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## Panel III: Ethics and Sports: Agent Regulation

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## PANEL III: Ethics and Sports: Agent Regulation

Moderator: Patrick Connors\*

Panelists: John Genzale†  
Richard Hilliard‡  
Brian Mackler§  
Rachel Newman-Baker||

MR. TAXIN: Our final panel for today will examine the regulations currently in place and the legal and ethical issues sports agents face in an attempt to secure clients.

To moderate this panel today is Professor Patrick Connors. Professor Connors is an Assistant Professor of Law at Albany Law School, where he teaches legal ethics and professional responsibility. Prior to this, Professor Connors taught professional responsibility for nine years at Syracuse University's College of Law. Professor Connors is the author of the *McKinney's Practice Commentaries for the New York Lawyers Code of Professional Responsibility* and also a member of the New York State Bar Association's Committee on Professional Ethics.

Without further ado, we will begin our last panel. I give you Professor Connors.

PROFESSOR CONNORS: I thought I would start out with a story about the former coach of the Green Bay Packers, Vincent T. Lombardi,<sup>1</sup> who was affectionately called "St. Vincent" out in the Wisconsin area. The reason for that is he has two connections to

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<sup>1</sup> Vince Lombardi coached the Green Bay Packers from 1958 to 1967. See generally Official Site of Vince Lombardi, About Vince, *Biography*, at <http://www.vincelombardi.com/about/biography.html> (last visited Feb. 20, 2004).

this program. The first is his connection to Fordham University. The second is his connection with probably the most famous story regarding sports agents.

Number one, his connection with Fordham University. Back in the 1930s, there were actually three college football powerhouses here in the metropolitan area: New York University, Fordham University, and Columbia University. They would play games at the Polo Grounds and sell out the Polo Grounds on a regular basis.<sup>2</sup>

Vince Lombardi actually decided to take a scholarship with the Fordham Rams, and he attended the Rose Hill Campus.<sup>3</sup> It should be noted that he turned down a scholarship with Columbia to take that position. But he also has a connection with Fordham Law School, and this was a fact that Vince Lombardi tried to keep secret in his life. He attended Fordham Law School.<sup>4</sup> You will have to ask the former dean about this, but back when Fordham Law School had its campus on the twenty-third floor of the Woolworth Building, Vincent Lombardi attended his first semester of Law School in 1938.<sup>5</sup> He failed out after his first semester. You will see, though, that he tried to use whatever skills he gained during that short period of time later on as a coach for the Packers.

The second connection involves his involvement in a very famous sports agent story involving a player, Jim Ringo, who played for the Green Bay Packers.<sup>6</sup> Now, Jim Ringo was not your run-of-the-mill player. He was the center for the Green Bay Packers; he was an all-pro; he played in every game for the

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<sup>2</sup> See Vin Gurrieri, *The Glory Days of Fordham Football: A Look Back at Fordham's Illustrious History as a Football Superpower*, OBSERVER (FORDHAM COLLEGE AT LINCOLN CENTER), Jan. 10, 2002, available at <http://www.fclcobserver.com/observer/1-10-02/features-football.html>; see also Columbia Univ. Football, at <http://www.-gocolumbialions.com> (last visited Feb. 17, 2004); Fordham Univ. Football, at [http://www.fordhamsports.com/new\\_main.asp?TeamID=76&GO=GO](http://www.fordhamsports.com/new_main.asp?TeamID=76&GO=GO) (last visited Feb. 17, 2004).

<sup>3</sup> See Official Site of Vince Lombardi, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> Jim Ringo played for the Green Bay Packers from 1953 to 1963 and was inducted into the Professional Football Hall of Fame in 1981. See, e.g., Packers.com, Jim Ringo, at [http://www.packers.com/team/players/ringo\\_jim](http://www.packers.com/team/players/ringo_jim) (last visited Feb. 17, 2004).

Packers over a ten-year period going into the late 1960s; and he was really one of the key figures in the famous “Packer sweep.”<sup>7</sup>

Jim Ringo came up for renegotiation of his contract. The story goes—and, by the way, this is disputed in some circles—that Lombardi was involved very heavily, as the coach of the Packers, in player contracts and negotiations of those contracts. Ringo came in after the off-season—and, by the way, at the end of the prior season, he was the one who brought the ball to Vince Lombardi shortly before he was carried on “the lap,” on the shoulders of his players, and carried off the field—so, Ringo came back to Lombardi and he was anxious to renegotiate, and he wanted a \$25,000 raise. But he brought a gentleman with him, and this gentleman was dressed in a suit. He sat down. Lombardi was across the table.

Lombardi said, “Mr. Ringo, who is the gentleman to your left?”

Ringo said, “This gentleman is here to help me renegotiate my contract.”

At that, Lombardi excused himself and went out the door. As the story goes, he got on the phone. He came back and he said, “Mr. Ringo, you are negotiating with the wrong team. You have just been traded to the Philadelphia Eagles.”<sup>8</sup>

We have come a long way, as our panelists will tell us, in the area of sports agents, and I think it is really the sports agents themselves who have a tremendous amount of power today. Let me introduce my panelists who will tell us about how far we have come.

First, to my immediate left, is John Genzale. John is the Editor-in-Chief of the nation’s leading weekly newspaper dedicated to the sports industry, *Street & Smith’s SportsBusiness Journal*.<sup>9</sup> You can see their lead article for this current issue is

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<sup>7</sup> Rob Reischel, *Ringo Brings Truth to Old Lombardi Tale*, MILWAUKEE J. SENTINEL, Jan. 31, 2002, at 19Z.

<sup>8</sup> See *id.*

<sup>9</sup> *Street & Smith’s SportsBusiness Journal* is a national weekly trade magazine that provides news and information on the sports industry. It is available online at <http://www.sportsbusinessjournal.com> (last visited Feb. 17, 2004).

“NFLPA Sets Stage for Agent Feeding Frenzy.”<sup>10</sup> John is going to discuss some of the content of that story. John has taught editing and journalism at several universities throughout the country. He has written for several newspapers throughout the country. And he has a master’s degree in journalism from Columbia University.

To his left is Richard Hilliard, who is a partner at Ice Miller, the largest law firm in Indianapolis. He was the former Director of Enforcement for the National Collegiate Athletic Association (“NCAA”). He now provides representation to NCAA member institutions on all sorts of NCAA matters. He actually was a student-athlete at Boston College, where he played football. And he received his J.D. degree from John Marshall Law School.

To his left is Rachel Newman, who is currently the NCAA’s Assistant Director of Agent, Gambling, and Amateurism Activities. Prior to that time, she served as an intern in the Enforcement Services division of the NCAA. She received her undergraduate degree in sociology from Berea College and she has a master’s degree in sports administration from Ohio State.

To Rachel’s left is Brian Mackler, who is a Partner in SportStar, Inc. When we put together the program, SportStar, Inc. had approximately sixty current National Football League (“NFL”) clients. They are doing very well. They have approximately seventy-two current NFL clients as of today. He has been a sports agent for fourteen years. Prior to joining SportStar, Brian worked at Coopers & Lybrand as an accountant, and there he honed his craft for dealing with large sums of money. And I am sure that he has been able to use that talent in representing sports figures.

With that, I will turn you to our panel.

John, would you like to start with a ten-minute presentation?

MR. GENZALE: Sure. I don’t know if I can go ten minutes.

PROFESSOR CONNORS: That’s fine.

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<sup>10</sup> Liz Mullen, *NFLPA Sets Stage for Agent Feeding Frenzy*, STREET & SMITH’S SPORTSBUSINESS J., Mar. 3, 2003, at 1 [hereinafter Mullen, *Feeding Frenzy*]. NFLPA stands for the National Football League Players Association. See Nat’l Football League Players Ass’n [NFLPA], at <http://www.nflpa.org> (last visited Feb. 17, 2004).

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MR. GENZALE: The first thing I was worried about in coming here today is that you guys might expect some sort of academic presentation, complete with a lot of numbers, facts, and figures, and I don't have those for you. I honestly can be called the one true layperson in the business, with no affiliation to any sort of discipline or category in sports or any sport itself.

We cover things from sponsorship and gate, television, and all those things across the full array of sports, and the NCAA and amateur sports as well, because we fancy ourselves as the industry trade magazine. As that, and as the only Editor-in-Chief this publication has ever had, I guess someone could argue that I know something about the sports business, a little something, and probably know a heck of a lot, but probably not so deep in all the areas because we go across the board.

When I was thinking about this panel and coming here, though, one of the things that occurred to me was that if someone asked me on the street what is the biggest problem in all of sports, I would say without a doubt it is that agents run amuck. I am telling you that I think it is the single biggest problem.

Yeah, there are problems related to television and fractionalization and ratings; there are problems related to amateur and professional standings; there are problems related to gate throughout sports; there are problems related to how sports survives in a down economy, but I am telling you that the single biggest problem in sports revolves around agents.

Now, I wouldn't sit here for even a second and tell you there shouldn't be agents. I think the Vince Lombardi story is a great story. When I grew up watching sports there were no agents, but I think they are now absolutely necessary. I think a young athlete who has the potential to make a great deal of money is a fool if he goes out and tries to negotiate the contract by himself. He needs a professional. He needs someone, besides his parents, that he can trust. Therein lies the rub, because, frankly, pardon me, but it is hard to find people to trust out there.

As a matter of fact, I wrote a column once—and actually, it was a good column—about Major League Soccer (“MLS”).<sup>11</sup> People who refer to these columns forget that it started out kind of innocently. I was talking about some of the problems in sports, and I was saying MLS had done something that I thought was special, and we can put aside all of these problems. Of course, one of the problems I mentioned was a problem with sleazy agents. And, of course, all my friends got to me, including the MLS and everybody else.

One, in particular, the guy who runs Octagon,<sup>12</sup> which is one of the three big firms for athlete representation, a guy named Phil de Picciotto, who is a friend, wrote back to me and said, “Geeze, John, if agents are sleazy, we ought to hang around with editors, because editors are pretty sleazy themselves.” So I guess we have a society going.

So, I wrote a second column in which I started out by admitting that I had made a mistake. I admitted to all our readers that I had made a terrible mistake by calling all agents sleazy and that I had no intention of calling all agents sleazy, but that what I really meant to say was that most agents are sleazy. And that is very true. That is very true, and it is one of the things that concerned me.

I’ll give you another—I did a panel not too long ago with Ralph Cindrich, who is an NFL agent who works out of Pittsburgh.<sup>13</sup> He was also with the Houston Oilers for a lot of years. He knows what players are about, and he is an honest guy. During this panel, he had a hard time admitting to an audience that he was an agent. He said, “I know what you think of us.” I mean, I am not creating this, and I am not making this up, but let’s face it, we all have a pretty negative feeling about agents.

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<sup>11</sup> John Genzale, *Soccer Ambassadors Have a Ball*, STREET & SMITH’S SPORTSBUSINESS J., Aug. 12, 2002, at 28.

<sup>12</sup> Phil de Picciotto is President of Athlete Representation at Octagon, a sports and event marketing company. See [http://www.octagon.com/contact\\_details/office\\_details.php?office=Washington%20DC](http://www.octagon.com/contact_details/office_details.php?office=Washington%20DC) (last visited Feb. 25, 2004).

<sup>13</sup> Ralph Cindrich is a former linebacker at the University of Pittsburgh and currently an agent for NFL players. See Tony DeFazio, *Up Close With Pittsburgh Sports Report: NFL Agent Ralph Cindrich*, available at <http://www.pghsports.com/psr9812/98120103.html> (last visited Feb. 25, 2004).

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There is a friend of mine, Randy Hendricks,<sup>14</sup> who is one of the true icons in sports representation. He works out of Texas. He told me privately that he will not tell anybody he is an agent. Part of that is due to humility, but the other part is due to being embarrassed about his own profession. What's going on here, folks? I asked that question in print. We ask that question each week.

As Pat said, the lead story in our paper this very week—and believe me, we weren't thinking about this conference when this happened—is that one day last week, in fact it was Thursday last week, the National Football League Players Association (“NFLPA” or “NFL Players Association”) had its biggest or bloodiest day in terms of cracking down on agents.<sup>15</sup>

Like I said, agents have run amuck. The regulatory bodies that take care of these usually reside within the players associations of each of the leagues. They may or may not be in the right position to regulate agents. I have said time and time again in print, and I will stand behind it again on this panel, that we need more regulation for agents and that agents ought to regulate themselves before the courts do or Congress does. And in fact, there are some bills in front of Congress to regulate agents.<sup>16</sup>

Let me tell you one thing that we were talking about at the Super Bowl when I went to several parties and spoke with some agents. There were agents who went to these parties who, for some reason or other, decided to just share some of their life with me. One of the things that came up time and time again in social conversations was, “I want to be honest, but frankly the system in place right now forces me to at least think about cheating.” Now, keep in mind that no one will admit to cheating, but the system forces them to think about cheating. Now, they are cheating teams,

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<sup>14</sup> Randy Hendricks became Chief Executive Officer and President of SFX Baseball Group, Inc. when it was acquired by Clear Channel Communications. See Associated Press, *SFX Sports 'On Its Own' to Avoid Conflict of Interest*, available at <http://www.sportslawnews.com/archive/Articles%202001/SFXAgents.htm> (last visited Feb. 25, 2004).

<sup>15</sup> See Mullen, *Feeding Frenzy*, *supra* note 10.

<sup>16</sup> E.g., Sports Agent Responsibility and Trust Act, H.R. 361, 108th Cong. (2003).

and they are cheating their own athletes. It happens time and time again.

One of the biggest news stories that we covered all year was the story of David Dunn, who wound up cheating his own partner, Leigh Steinberg.<sup>17</sup> Leigh has one of the biggest names in all of sports. I remember the night not too long ago when Leigh was so proud of introducing me to David Dunn, his partner that he had absolute faith in. Jeff Moorad is also a partner, and both Leigh and Jeff introduced me to David. They were so happy.

David absconded with Leigh's clients. In a lawsuit that ended last year, the court awarded Leigh Steinberg \$44 million because Dunn ran away with his clients.<sup>18</sup> And frankly—I talked to Leigh at the Super Bowl—he is not going to see any of that money because Dunn is going to file for bankruptcy. This story that leads our paper this week is about, in part, Dunn, his partner, Joby Branion,<sup>19</sup> and the NFLPA cracking down on them after the court case.<sup>20</sup>

A final remark. The NFLPA does more than any of the other players associations, to regulate agents, and they do very, very, very little. The other leagues have to do something. But here is what I am suggesting. I would like to throw it out; I would like to kick it around; and I would like to get some agents behind it.

Good agents are losing the battle for reputation and credibility, and they will keep on losing unless they clean up their own act. I would love to be able to work with them to do that.

PROFESSOR CONNORS: Thanks so much, John.

Richard, would you like to give a short introduction, please?

MR. HILLIARD: Actually I was going to defer to Rachel first.

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<sup>17</sup> See Liz Mullen, *Sleaze Factor Off the Charts, Agents Allege*, STREET & SMITH'S SPORTSBUSINESS J., June 24, 2002, at 1, 30 [hereinafter Mullen, *Sleaze Factor*].

<sup>18</sup> See *id.*

<sup>19</sup> John Marshall "Joby" Branion III was an associate with Steinberg, Moorad & Dunn before leaving the firm with David Dunn. See Peter Keating, *Crash Landing*, ESPN THE MAGAZINE, Apr. 1, 2002, available at <http://espn.go.com/magazine/vol5no07-steinberg.html> (last visited Feb. 17, 2004).

<sup>20</sup> See Liz Mullen, *NFLPA: Ruling May Create Chaos*, STREET & SMITH'S SPORTSBUSINESS J., Mar. 31, 2003, at 4.

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PROFESSOR CONNORS: Sure. Rachel, if you could give a short introduction.

MS. NEWMAN-BAKER: Sure.

Obviously, I come from a little bit of a different perspective than my other panel members. The NCAA is quite a complex organization,<sup>21</sup> and I think that a lot of times it is very mysterious to a lot of people as far as how they work, how the rules operate, and what exactly the rules are, to be quite honest. So I thought I would start out and just give you a little bit of background about how that process works, and also what our rules governing agents are, and then we can get into more of the discussion-type issues.

Just to start off, the NCAA national office is located in Indianapolis, Indiana. There are approximately 320 people that work there in different areas.<sup>22</sup> The national office itself does not make the NCAA rules. We do not make the legislation. The rules are actually made by our membership, which would be all of the Division I, II, and III institutions. I think that is something that a lot of times many people do not understand, or might not even know.

Within the national office there is a division called the Enforcement Services division (“Enforcement”).<sup>23</sup> There are several subgroups within Enforcement. Agent, Gambling, and Amateurism Activities (“AGA”) is actually one of those subgroups.<sup>24</sup> We were formed fairly recently, about five or six years ago, as a result of the NCAA realizing that there needed to be an emphasis placed on all three of those areas—agents, gambling, and later, amateurism.

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<sup>21</sup> The National Collegiate Athletic Association (“NCAA”) is a voluntary association of about 1,200 colleges and universities, athletic conferences, and sports organizations devoted to the sound administration of intercollegiate athletics. See NCAA, *What Is the NCAA?*, at [http://www.ncaa.org/about/what\\_is\\_the\\_ncaa.html](http://www.ncaa.org/about/what_is_the_ncaa.html) (last visited Feb. 17, 2004).

<sup>22</sup> See *id.*

<sup>23</sup> See generally NCAA, *Enforcement/Infractions*, at <http://www.ncaa.org/enforcement> (last visited Feb. 25, 2004).

<sup>24</sup> See NCAA, *Frequently Asked Questions About the NCAA Enforcement Process*, at [http://www.ncaa.org/enforcement/faq\\_enforcement.html](http://www.ncaa.org/enforcement/faq_enforcement.html) (last visited Feb. 25, 2004).

About four people are employed in our AGA area. We have a director, two investigators, and a staff assistant. Our job is to investigate any and all NCAA violations that come in related to any one of those three areas. So, anything that has to do with agents, gambling, or amateurism we are going to get our hands on and dig in.

Our role is really as an investigator, but we also end up being educators as well. We do a lot of presentations and discussions about those three areas both on campuses and outside groups such as this. So, that just kind of gives you a little bit of background about where we are coming from.

We address the issue of agents using pretty much a three-prong analysis. One is to educate—educate our student-athletes, educate prospective student-athletes, and educate our institutions about our agent rules and about agents themselves. And then also, obviously, we have to take the enforcement role as well. We are housed in Enforcement, so we need to make sure that the rules governing agents with our student-athletes and our prospective student-athletes are enforced. And then, we also use a third prong, which is serving as a liaison between the professional leagues, the professional players' associations, coaches' associations, law enforcement, and our member institutions.

Often, we get criticized for being very complex as far as our rules, but the agent rule is really quite simple when you break it down. Basically, what the NCAA rules say is that you cannot have an agent and be a college athlete, and you cannot take anything from an agent and be a college athlete.<sup>25</sup>

Just real quick, I want to go over when we talk about agents who we are actually talking about, the group that we are addressing. Obviously, when we refer to an agent, we are referring to anybody that is marketing an individual's athletics ability and representing them. But also included in that general agent term are "runners." Have you ever heard the term "bird dog," "middle man," "street agent," or "runner"? Runners also would be

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<sup>25</sup> See NCAA, *Summary of NCAA Regulations Related to Agents and Other Amateurism Regulations*, pt. II, at [http://www.ncaa.org/agents/ncaa\\_summary.html](http://www.ncaa.org/agents/ncaa_summary.html) (last visited Feb. 25, 2004) [hereinafter *NCAA Agent Regulations*].

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included. Runners are individuals who recruit athletes, and they receive a finder's fee. Some are actually independent contractors that, for lack of a better term, try to sell an athlete to a particular agent.

And then, there are financial advisors. There is a very thin line right now with financial advisors. I am sure that this is something that we can discuss on this panel. Our rule does include financial advisors if financial advisors cross over that line of marketing an individual's athletic ability. So, I just want to make that point as well.

To get a little bit more specific about our rule, we specifically say an "individual," which means a prospective or an enrolled student-athlete, will jeopardize their college eligibility if they agree orally or in writing to be represented by an agent while they are in high school or college. And that is the case regardless of whether the agreement is for now or for in the future. So, for example, you cannot be a freshman in college and say, "Hey, I can't have an agent right now because I am just a freshman—I still have three years of eligibility left—but you are my guy when I get done." Our rule also incorporates that type of an arrangement.<sup>26</sup>

The second part of that rule states that you will jeopardize your college eligibility if you accept benefits—either you or your family members or close friends; there is actually a test that specifically addresses that that may apply—from an agent, a runner, financial advisor, or any other person associated with an agency business.<sup>27</sup>

The key piece is that the rule applies regardless of the value of the benefit or whether the benefit is actually used. So, if you get a plane ticket, but you don't ever actually get on that plane, that would be covered by our rule.

Two other important things I think that are caught up. A lot of times, some student-athletes do not realize that our rules actually do not prohibit meeting or having discussions with agents. You can talk to agents. Our rule also permits you to talk to professional

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<sup>26</sup> See *id.* pt. II.C.

<sup>27</sup> See *id.* pt. II.D.

teams, and you can request information from those teams about what your professional market value would be.<sup>28</sup>

One of the other points that I wanted to make is that we have just recently undergone a several-year period of trying to deregulate some of our amateurism legislation. That is quite complex, and to be honest, not a lot was really changed. But agent activity was one area within the amateurism rules that was not touched.

The other piece of this that we also have been working on is the Uniform Athlete Agents Act (“UAAA”),<sup>29</sup> which I am sure most of you are familiar with. And I am sure several of my panel members will probably touch on this as well. Several years ago, several universities in the NCAA national office actually went to the National Conference of Commissioners on Uniform State Laws (“NCCUSL”)<sup>30</sup> to draft a UAAA.<sup>31</sup> The purpose was actually to try to protect the interests of the athletes and their institutions regarding the uniform regulation of athlete agents.

To give you a couple quick numbers, as of February 20th of this year it has been passed in fifteen states and two territories; fifteen additional states had active UAAA legislation in their legislative chambers; eighteen states had existing non-UAAA law designed to regulate athlete agents; and eighteen states and one territory had no existing law regulating athlete agents, and New York is actually in that category as well.<sup>32</sup>

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<sup>28</sup> See *id.* pt. II.B.2.c.

<sup>29</sup> According to the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), the 2000 Uniform Athlete Agents Act (“UAAA”) “governs relations among student athletes, athlete agents, and educational institutions” and “protects the interests of student athletes and academic institutions by regulating the activities of athlete agents.” Unif. Law Comm’rs, at <http://www.nccusl.org/nccusl/-ActSearchResults.aspx> (last visited Oct. 3, 2003). The full text of the UAAA is available at <http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm> (last visited Feb. 25, 2004) [hereinafter UAAA].

<sup>30</sup> The NCCUSL is a non-profit association whose purpose is “to study and review the law of the states to determine which areas of law should be uniform.” See Unif. Law Comm’rs, at <http://www.nccusl.org> (last visited Feb. 25, 2004).

<sup>31</sup> See UAAA, *supra* note 29.

<sup>32</sup> As of October 3, 2003, eighteen states, including New York, have either enacted the UAAA or introduced legislation to adopt it. See Unif. Law Comm’rs, *supra* note 29.

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I think that is all that I am going to start off with in my discussion. I am sure we will get into a lot of other points during our conversations.

Thank you again.

PROFESSOR CONNORS: Rachel, just two points, because I just want to clarify this before we move on.

MS. NEWMAN-BAKER: Sure.

PROFESSOR CONNORS: Does the NCAA have jurisdiction to discipline an agent?

MS. NEWMAN-BAKER: We do not. We can discipline our coaches, and we can discipline our student-athletes, but we cannot discipline agents.<sup>33</sup>

PROFESSOR CONNORS: Can the NCAA directly discipline a student?

MS. NEWMAN-BAKER: A student-athlete?

PROFESSOR CONNORS: Yes.

MS. NEWMAN-BAKER: Well, if a student-athlete, let's say, entered into an agreement with an agent, he or she would then be ineligible as a result of that.<sup>34</sup> I guess that is one way. I guess that is discipline, by being ineligible and not being able to participate. But the institution would preserve the right to petition for reinstatement of that student-athlete's eligibility.

PROFESSOR CONNORS: Who is responsible to discipline the student, the institution or the NCAA?

MS. NEWMAN-BAKER: That is actually two parts—both of those, to answer your question. The institution assesses the situation, they determine if they have a violation.<sup>35</sup> If they decide that they do have a violation and they need to petition for

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<sup>33</sup> The NCAA may revoke a student-athlete's eligibility to participate in intercollegiate athletics for a violation of its regulations. *See generally NCAA Agent Regulations, supra* note 25.

<sup>34</sup> *See id.* pt. II.A. (stating the general rule with respect to representation of a student-athlete by an agent).

<sup>35</sup> *See* NCAA STUDENT ATHLETE REINSTATEMENT COMM., POLICIES & PROCEDURES, available at [http://www1.ncaa.org/membership/enforcement/s-a\\_reinstatement/SAR\\_policies.htm](http://www1.ncaa.org/membership/enforcement/s-a_reinstatement/SAR_policies.htm) (last visited Feb. 17, 2004).

reinstatement, they may do so and say, “Okay, we recognize that we have a violation, and as a result we are going to withhold this student-athlete for four contests and make him repay \$300.”

That case would go into another whole area within our Enforcement staff, called Student-Athlete Reinstatement.<sup>36</sup> They would look at the facts, look at case precedent, and decide if what the institution had done was appropriate or if they needed to do something additional. That would take care of the student-athlete.

In addition to that, the case would also be forwarded to another area within Enforcement, called Secondary or Major, and that area would look at whether there should have been any institutional responsibility. And there could be additional sanctions imposed on the institution.

PROFESSOR CONNORS: I don’t believe Rachel mentioned this, but the NCAA has a fantastic Web site that does go through a lot of this information.<sup>37</sup>

Richard or Brian? Okay, Richard.

MR. HILLIARD: From my perspective, I look at this topic of agent regulation by asking: can you regulate agents?

The historical perspective is the growth of this industry of agents. It used to be just a few agents—Bob Woolf out of Boston. It was high profile, it was glamour, etc. In working at the NCAA for a period of time, for about fourteen years, I saw the growth of agents because of the growth in popularity of the states, athletes getting better at younger ages, etc. But clearly, a growth in agents.

And it is a field where you do not have to be a lawyer to be an agent, therefore, those in law school or lawyers are automatically at a different set of parameters if you are going to follow ethical considerations as it relates fundamentally to being an agent.<sup>38</sup> Your competition is such that you don’t have to be a lawyer to be

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<sup>36</sup> “The student-athlete reinstatement staff processes violations and waivers that directly affect the eligibility of a prospective student-athlete or an enrolled student-athlete.” NCAA, NCAA-Student Athlete Reinstatement, at [http://www1.ncaa.org/membership/enforcement/s-a\\_reinstatement/index.html](http://www1.ncaa.org/membership/enforcement/s-a_reinstatement/index.html) (last visited Feb. 25, 2004).

<sup>37</sup> See NCAA, at <http://www.ncaa.org/homepage.html> (last visited Feb. 25, 2004).

<sup>38</sup> See MODEL RULES OF PROF’L CONDUCT (2003) [hereinafter MODEL RULES].

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an agent, therefore, certain individuals do not have to follow any ethical considerations, the Canon of Ethics.<sup>39</sup>

With the growth of agents, the number, the sheer number—I mean, there are clearly more agents. You go through the NFLPA book of agents, just registered agents,<sup>40</sup> and there are clearly a lot of agents just in the field of football.

When I was at the NCAA, our focus was not primarily on agents. If you dealt with agents, it was an amateurism issue. There has been a focus on the issues of amateurism within the last three year affecting student-athletes, prospective student-athletes, thus, affecting colleges and universities.

That is from my perspective. I represent colleges and universities that are involved primarily in NCAA-related matters. So when they have a student-athlete, a prospective student-athlete, something that affects an individual within their athletics department, it could relate to agents. So, I view this whole topic from that perspective.

I will be a naysayer and say you cannot regulate the industry. Rachel referenced several state laws and a uniform federal law. But that means it has to be enforced, and who is going to enforce that law? Probably the most aggressive law to date on the books is in California, where you have to post a bond.<sup>41</sup> Financially, it is probably the most restrictive. The genesis is probably through the Child Labor Act<sup>42</sup> and the entertainment industry.

From the NCAA perspective or from that of colleges and universities, as it relates to agents, probably the focus case was the Footlocker case at Florida State, where there were a lot of agents

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<sup>39</sup> The Canons of Ethics, along with Ethical Considerations and Disciplinary Rules, are set forth in the American Bar Association's ("ABA") Model Code of Professional Responsibility, last amended in 1980. *See* MODEL CODE OF PROF'L RESPONSIBILITY (1980). In 1983, the ABA promulgated and adopted the Model Rules of Professional Conduct. *See* MODEL RULES, *supra* note 38.

<sup>40</sup> *See* Nat'l Football League Players Ass'n, Agents, at <http://www.nflpa.org/agents/-main.asp> (last visited Feb. 25, 2004).

<sup>41</sup> CAL. LAB. CODE § 1546 (repealed 1998). The act required that agents must register and post a \$10,000.00 surety bond to satisfy any damages arising from misrepresentation or fraud.

<sup>42</sup> *Id.* at §§ 1285–1312 (2003).

interacting with student-athletes, because a lot of those football players were going to be high draft picks.<sup>43</sup> That, I think, brought amateurism to the focal point and raised the question: does a school have an obligation to prevent this interaction of agents with college athletes, not to mention prospective student-athletes? So, there clearly was a focus on student-athletes and the effect of agents providing benefits to student-athletes through that endeavor.

In the Walters-Bloom trial,<sup>44</sup> the “Tank” Black trial,<sup>45</sup> those were federal laws that were being violated and also involved agents absconding with funds.

I agree with John that it is an issue of trust. But if you are considering being an agent, it is a fiercely competitive field. So what distinguishes you from your competitor? It is client-driven. Being an agent means you have to get a client. Clients are not going to come to you. A seventeen-, eighteen-, nineteen-year-old individual is being wined and dined by wannabe agents, as well as by real agents.

And, in many ways, the field is dominated not only by the agents, but also by runners, as Rachel indicated. You go on any college campus—and again, from my perspective, it is not the veteran who already has been in the professional leagues for two, three, four, five years; it is the prospective student-athlete or the student-athlete—for the most part, if there is a potential pro

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<sup>43</sup> In 1993, numerous Florida State University (“FSU”) football players took part in several thousand-dollar shopping sprees at Footlocker, paid for by sports agent representatives. See Tony Barnhart, *FSU Investigating Gifts From Agent*, ATLANTA J.-CONST., May 8, 1994, at E11. FSU received a one-year probation from the NCAA in 1996 for its failure to monitor the involvement of sports agents with athletes and to take appropriate action in response to the Footlocker situation. See *Appeals Committee Upholds Florida State Penalties*, NCAA NEWS, Oct. 7, 1996, at <http://www.ncaa.org/news/1996/961007/active/3335n16.html>.

<sup>44</sup> Norby Walters and Lloyd Bloom were sports agents who were tried and convicted of federal fraud, racketeering, and conspiracy charges in 1989 for signing college athletes and hiding it from their universities. *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). Although the convictions were overturned on appeal, Walters and Bloom were ultimately convicted and sentenced to prison. See *id.*; see also Ron Lesko, *Cris Carter Catches On*, L.A. TIMES, Nov. 20, 1994, at C1.

<sup>45</sup> In 2002, former sports agent William “Tank” Black was convicted of defrauding his NFL clients of \$11 million. Mike Huguenin, *Former Agent Given 5-Year Prison Term*, ORLANDO SENTINEL (Fla.), May 8, 2002, at D6.

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prospect. And that varies. In the sport of football, you may not know a pro prospect until that individual's senior year. In basketball, it is completely different. By high school, by your freshman or sophomore year, if you are going to stay, you know who is going to be a professional athlete. It may not be in the National Basketball Association ("NBA"); it may be in Europe, etc., but football is vastly different.

There are runners out there, and they work for many different agents. Some are independent contractors. I don't see how a state law or a federal law being aggressively enforced will have a positive impact on that area. They are out, and they are trying to secure a relationship, because if you are going to have a client in this field, you have to establish a relationship—I mean, not only with the athlete, but it has to be with the relatives. Again, you are establishing some relationship. It may be based on trust, it may be based on what have you.

And there is an exchange; there is an advance of money; and there are favors being provided, etc. What is going to distinguish you from your competitor in order to negotiate a contract—because, in essence, that is what your services will be, contract negotiation—and what distinguishes you in that field in any sport? What can you provide to a client that someone else is not providing in a contract negotiation? Is it going to be structured differently?

Right now, with slotting in football,<sup>46</sup> when you are drafted, what round you are drafted, determines how much you are going to be offered during negotiation. You know, it is not that complicated. So, in that area, how are you going to benefit from one agent over another agent? And how is a uniform federal law going to positively affect that negotiation? It is a tough, competitive field, where every day you are faced with compromise in order to secure a client.

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<sup>46</sup> Slotting is a term used by many people in the industry to explain the descending salaries given to NFL rookies based on their draft position. See Len Pasquarelli, *CBA Inertia? It's a First-Rounder's Main Problem*, ESPN.com, at <http://espn.go.com/nfl/-trainingcamp01/s/2001/0720/1228997.html> (July 20, 2001).

I know several agents, but the one I respect is an individual that did it the hard way, because in order to do it the hard way it's a slow process. It is not the first client that is going to be the first-round draft pick, that is going to set your practice up. It is the individual. He focused his practice in football on the low draft picks, the guys who were marginal, that maybe won't make it, maybe will. But it is your efforts at that level—you contacting the player personnel, making the effort to get a tryout at least as a free agent, and taking aggressive steps to get that individual on the practice squad, etc.

So he did that. He had low draft picks, five or six clients, slowly built a practice, where right now he has one or two first-round draft picks per year. But if you ask him, it was not an overnight success; it was not an easy process.

Much like John, I didn't want to have an academic presentation of reciting rules and regulations, but rather offer a little bit of perspective from somebody who was at the NCAA, a regulatory body, and in private practice to discuss the regulation of agents.

With that, I will conclude.

PROFESSOR CONNORS: I am getting a little defensive here. I wonder if they are talking about me trying to steer this toward an academic perspective. Just kidding, Richard. I think this is fantastic, the practical insights, because we cannot get those from reading books for the most part.

Richard, there is something that you bring up that I want to stress to those of you going into this industry. It's extremely competitive. Brian and I were speaking about this at lunch, and, Brian, you may have some more to add on this. In the NFL there are approximately 1,900 players on the total rosters for all the teams.<sup>47</sup> There are 1,112 registered agents as of the end of last year.<sup>48</sup> Only thirty percent of those agents have clients currently in

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<sup>47</sup> There are thirty-two teams in the NFL, each with roughly sixty-two players. For a list of all teams and their player rosters, see NFL.com, *NFL Players*, at <http://www.nfl.com/players> (last visited Feb. 25, 2004).

<sup>48</sup> Mark Fainaru-Wada & Ron Kroichick, *Agents of Influence*, S.F. CHRON., Mar. 11, 2001, at C1.

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the league.<sup>49</sup> Now, Brian, the fact that he has seventy-two clients, I think that is substantial.

And that is typical of other sports. If you look at the NBA, we've got 350 total players in the league,<sup>50</sup> and there are 350 registered agents.<sup>51</sup> Fewer than 100 are estimated to have a client.<sup>52</sup>

So, Brian, I thought you might also want to comment on some of that in your introduction.

MR. MACKLER: I took a little bit of a beating here, so I am going to start by saying a couple things. This is my fourteenth year of doing this. I think we do it the right way. We are located here in Manhattan.

Just a number of quick stories for you. I'm sure somebody saw "Jerry Maguire,"<sup>53</sup> and somebody asked me my thoughts on that movie. I said, "I have two thoughts. One, I don't look like Tom Cruise." That's my first thought. "And two, there is nothing that is real about that movie."

What I am going to try to talk to you guys about is the reality of this. From some of the things that my fellow panelists said, I guess I'm the problem in the business, or a lot of the things that we do. A lot of what these guys and ladies have said, is true. The runners and a lot of sleazy agents are a big problem in the National Football League. So, you have to correct that. There are over 1,500 people that are registered agents in the National Football League.<sup>54</sup> A hundred of us represent over five players.<sup>55</sup> The top fifteen groups represent over thirty players, and we control seventy-five percent of the National Football League.<sup>56</sup> So, the competition is fierce.

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<sup>49</sup> *Id.*

<sup>50</sup> For a roster of all of the NBA players, see NBA, *Players*, at <http://www.nba.com/-players/> (last visited Feb. 25, 2004).

<sup>51</sup> Fainaru-Wada & Kroichick, *supra* note 48.

<sup>52</sup> *Id.*

<sup>53</sup> JERRY MAGUIRE (Columbia TriStar Pictures 1996).

<sup>54</sup> See Fainaru-Wada and Kroichick, *supra* note 48.

<sup>55</sup> See generally *id.*

<sup>56</sup> *Id.*

Unlike what John said, I can tell you with 100 percent confidence that—and one of my young partners is here—we never have cheated in obtaining a client ever, ever. I have never been sanctioned by the National Football League or any state.

Just so everybody understands this, when you become a registered agent with the National Football League, you need to send out an application and \$1,000, and then you need to register in every state where you want to talk to a prospect.<sup>57</sup> To do that, every state is different, but it usually runs between \$1,000 to register, and then you need to post a bond. So last year, I think we spent probably \$25,000 just to register in the states so that we can talk to players.

But I think what's more important is the recruiting of a player, and since I am down there and I know what it is about. I can give you an example of a young player that most of you guys should know, Bryan Thomas, who was the first-round pick for the New York Jets last year.<sup>58</sup> I was fortunate enough to get him as a client. But I just want everybody to understand what this business is about. I spoke to them, and I think that Mike said he wanted to hear some war stories. I started talking to Bryan back in September of the prior year. At that point in time, between Bryan and his father, they had spoken to over 100 agents, up to past September. When we started talking to him, by Christmas time, over 500 agents had called Bryan or his father. At that time, they eliminated to the top fifty agents, so we went from 500 to fifty. From the fifty, they narrowed it down to fifteen groups. Probably half of us were in that top fifteen group.

We each had a presentation. But the scariest part of the whole thing was when Bryan's father invited me down to Birmingham, Alabama, which I had never been to before. As I entered his apartment complex, I was about to call him because he lived in his big garden apartment off campus and there was a line of cars in

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<sup>57</sup> The certification procedure for agent registration with the NFLPA is available at NFLPA, Agents, *Certification*, <http://www.nflpa.org/Agents/main.asp?subPage=-Certification> (last visited Feb. 25, 2004).

<sup>58</sup> Bryan Thomas was drafted twenty-second overall by the New York Jets in the 2002 NFL draft. See Associated Press, *Jets Sign First-Round Pick Thomas*, NFL.com, available at <http://www.nfl.com/teams/story/NYJ/5445851> (June 19, 2002).

front of Bryan's father's house, a line. There must have been eight or nine cars, running, because it was a little bit cold that day.

I said, "Bryan, come out and get me because I can't find your apartment number." He said to me, "You've got to find this place, because if I walk out I'll never be able to walk back in." There were people lining up for when Bryan or his father when they came out. They were going to start talking to them. So, that is what this business is all about.

I spoke last year at the Rookies Symposium for the NFL Players Association,<sup>59</sup> where there were probably about 400 or 500 agents. The biggest problem in this business is runners; there's not a doubt in my mind. And the problem is that there are no governing bodies that can regulate them. What typically happens is that agents get a runner who is a young person that can go on campus and fit in. Obviously, if I'm on a college campus, they know I don't belong there. So, they usually get these young men or women, and they get on campus and they strike a relationship with these people.

Unlike what Richard said—he used the worst word in my business, slotting, and I will take him to task on this, rookie contracts are not slotted in the National Football League. After the second round they are, but the first two rounds they are not slotted. There is a big difference between those who know what they're doing and those who do not. I can tell him to go look at Bryan Thomas's contract versus Javon Walker's<sup>60</sup> contract and Napoleon Harris's<sup>61</sup> contract last year, and he will see what we do in terms of bargaining.

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<sup>59</sup> The NFL and NFLPA started the annual Rookie Symposium in 1997 to provide pre-career orientation for draftees. Joseph Sanchez, *When Elway Talks, Rookies Listen*, DENV. POST, July 2, 1998, at D3. Under article V, section 8, of the Collective Bargaining Agreement between the NFL Management Council and the NFLPA, attendance by rookies invited to the symposium is mandatory. See COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MGMT. COUNCIL AND THE NFL PLAYERS ASS'N (Jan. 8, 2002), available at <http://www.nflpa.org/members/main.asp?subPage=CBA+-Complete#art5> (last visited Feb. 17, 2004).

<sup>60</sup> Javon Walker plays in the NFL for the Green Bay Packers. See NFL.com, *Javon Walker*, at <http://www.nfl.com/players/playerpage/302233> (last visited Feb. 17, 2004).

<sup>61</sup> Napoleon Harris plays in the NFL for the Oakland Raiders. See NFL.com, *Napoleon Harris*, at <http://www.nfl.com/players/playerpage/302200> (last visited Feb. 17, 2004).

The bottom line is what you need to do to be a successful agent is to obtain somebody's trust, the ability to get them the best contract possible, and make sure that their financial future is taken care of. That's the most important thing.

The other issue that I wanted to talk about was what Mike asked me to talk about—the juniors. How do you go and talk to a junior or another underclassman who is not a senior? College eligibility for a senior player ends the day he comes off the football field for his last college game, whether it is his final season game as a college athlete or a bowl game.<sup>62</sup>

For a junior—and I am talking about the National Football League only—he is fortunate enough that he is not allowed to accept anything from anybody if he is considering coming out. But, in the National Football League we are fortunate enough to have a panel right here in New York,<sup>63</sup> an athlete sends in paperwork to the National Football League, and they will evaluate him. So, he usually sends that in in December. He sends a letter, “I, Brian Mackler, am a junior at Louisville, I’m considering coming out for the NFL draft. Please evaluate me.” What they do is they get about eight or nine general managers in the National Football League, and they will give him back a grade. They will come back and say, “You are a second or third round draft pick potential, fourth or fifth round, free agent,” and he you can make an intelligent decision.

The problem is with most juniors, they are listening to the agents that say, “Come on out, come on out,” and, unfortunately, it doesn't happen. The perfect example was three years ago, there was a young man from Clemson, called Keith Adams, who is, I believe, now with the Philadelphia Eagles.<sup>64</sup> He was told by probably thirty or forty agents that he was going to be a first round draft pick. In contrast, I told Keith that the sources were telling me

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<sup>62</sup> See NCAA, Rules and Eligibility, at <http://www.ncaa.org/legisfrontF.html> (last visited Feb. 25, 2004).

<sup>63</sup> See Antonya English, *6 Gators Checking Draft Prospects*, ST. PETERSBURG TIMES, Dec. 30, 2001 (noting that six players from the University of Florida football team had petitioned the NFL about their draft status).

<sup>64</sup> Keith Adams is currently a linebacker for the Philadelphia Eagles. NFL.com, *Keith Adams*, at <http://www.nfl.com/players/playerpage/235011> (last visited Feb. 17, 2004).

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that he was going to be a fifth or seventh round pick and that he should go through this process, which he never did. Unfortunately, he went in the bottom of the seventh round.

So, if anybody here is talking to any juniors in the NFL, there is a great service that the NFL offers that you need to take advantage of.

The NFL has a great Web site: nflpa.org.<sup>65</sup> You can find out all the things about all these agents that are getting decertified and all these other fun things. It's a great Web site.

PROFESSOR CONNORS: I know we have some questions in the audience, and we'll get to those, but I thought we would spend a few minutes just going back and forth with questions among ourselves.

Brian, I have a question for you. You touched on something everyone talked about. Are you at an advantage being a non-lawyer, considering the fact that you do not have to obey, number one, the Code of Professional Responsibility<sup>66</sup>? And that raises another question: what code do you have to obey if you are a lawyer? Do you have to obey New York's code and the code in Texas where you are maybe doing a solicitation? Are you at an advantage, number one?

And, number two, why does New York have no legislation governing agents?

MR. MACKLER: Well, I know everybody here is an attorney, but being a certified public accountant, we have some ethics.<sup>67</sup> I think I have a code I have to follow.

I don't know why New York doesn't have a regulation. To be candid with you, as John said, we need to regulate ourselves. Codes in New York, California—and I am probably going to get in trouble by saying this, but I wasted \$25,000 this year because of those state regulations—don't do a thing.

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<sup>65</sup> See Mullen, *Feeding Frenzy*, *supra* note 10.

<sup>66</sup> See *supra* notes 38–39.

<sup>67</sup> The American Institute of Certified Public Accountants governs the ethical code of certified public accountants. See AICPA, at <http://www.aicpa.org> (last visited Feb. 25, 2004).

I'll give you the best story—I told you it this morning—and I'll leave this with you. We represent a lot of players from one school, the name of which is irrelevant, in Texas. And they were uncomfortable with New Yorkers coming down and not being Texas people. So the school and the administration wasn't too appreciative of us being there. So, last year, one of my young associates was down there with one of our clients that went back to college. Like most players do, they go back and see their friends. He was with him, and he happened to run into two college seniors who were players. Actually, they weren't even prospects, but they were college players on the football team. Fine. Nothing said.

That season I caught wind that on "Agent Day," which is at the campus—every school has Agent Day, which means the school sets up rooms where agents can come in and meet players, and you can talk about the services you offer, and it's regulated by the school, an agent in the school brought a briefcase with \$50,000 and put it on the table, opened it up, and told his prospective client, "It's yours if you sign with me." On campus at Agent Day. Nobody knew that. I got a letter from that school questioning my interaction, or my associate's interaction, with a college senior, when right under their nose one of their boys that they use as an agent offered the kid \$50,000, which is documented. How's that?

MS. NEWMAN-BAKER: Can I follow up on that point just for a second?

I know I didn't give a lot of positions or our stances on these issues when we were first going through because I thought we were just giving background information. But I think from our perspective we would definitely say that we do have a problem. We are not turning blinders on this. We do realize this. We do believe that we have a significant number of elite athletes that are accepting benefits from agents.

Now, the Agent Day that Brian was talking about, not every school does it. Most of the Division I schools do. It's a way for that school to feel like they are somewhat regulating the process. A lot of schools provide educational sessions for the parents. I know that some schools actually sit in and provide questions that the athletes need to present to the agents, and actually drill them

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and ask them “Are you a member of the bar, have you ever been decertified, have you ever had a violation, etc.”

But in reference to the comment about it happening right there on campus, I would agree with John that agents need to self-regulate as well. We are only as good as the information that we can get. We get very few phone calls of agents talking about other agents. So, it’s a pretty interesting business. We hear a lot of complaints, we hear a lot of people getting upset about what is going on in the industry, but very few are willing to pick up the phone and say, “Hey, I saw this” or “I know this person is doing this to this person.”

MR. MACKLER: Here’s the problem. Let’s go back to the Texas case—and the school is irrelevant. First of all, he is an agent who has connections with the coaches—in fact, I think he represents the coach, which is a problem. You cannot represent the college coach and represent the players that are on his team.

MR. GENZALE: There is no rule anywhere against that.

MR. MACKLER: Right. There’s no doubt.

PROFESSOR CONORS: There would be a rule that would prohibit lawyers from doing that, if lawyers decide that they are bound by the Code of Professional Responsibility<sup>68</sup> when they act as agents.

MR. MACKLER: That might sound great in theory, but let’s talk reality. That doesn’t happen. I know you guys are lawyers, and I know you have this “holier than thou” code. We’re talking about the business of football that I’m in, okay, so let’s talk real.

Lawyers and non-lawyers represent coaches, and they represent the players that play for these coaches. So it’s a problem. But the problem is that if the student-athlete says something to a compliance officer or the coach, what is going to happen? What is a coach going to do? He’s going to sacrifice his season possibly for a violation? No. Is he going to suspend the player? The player didn’t do anything wrong. He sat there and listened. He did not take that money. I know that for a fact.

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<sup>68</sup> See MODEL RULES, *supra* note 38, Canon 5 (describing the conflict of interest rules).

MS. NEWMAN-BAKER: I think that you are jumping ahead, though, by saying that just by the agent bringing the briefcase of money in, that that's necessarily going to be a violation and that that player is going to be ineligible and is never going to be able to play again. If the player opened it up, looked at it, and said, "Oh, wait a second, what is this?" and then turned it back in, gave it to the compliance officer, and said, "This is what happened," I definitely would think that there would be some sort of mitigation through the reinstatement process.

So, I think you can't automatically assume that just because that happened, absent of the other facts, that the automatic penalty is going to be no reinstatement.

MR. MACKLER: You know what I find amazing? This is my fourteenth year. My partner has been doing this for twenty years. We are probably in the top ten agents in the country. You know how many Agent Days I've been invited to?

MS. NEWMAN-BAKER: How many?

MR. MACKLER: Less than I can fit on this hand.

MR. GENZALE: But there are two separate issues that you guys were talking about. I mean, one is the briefcase, and one is the coach. I can't help but think about agents representing coaches—and coaches need representation. There are many, many coaches that are now making over \$1 million a year.<sup>69</sup> They shouldn't be signing contracts without the proper help to guide them through that system. So, they have to have agents. I believe that.

The question is: can their players also be represented by the same agent that represents the coach? It happens today, and it has got to stop. To me, it's an easy fix. Pardon me, Richard, but I don't think you need laws.

When I was talking about regulation at the start, I wasn't talking about laws at all. What I'm talking about is how lawyers do it, through a bar association. Or how about an independent

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<sup>69</sup> See Darren Rovell, *Florida Didn't Break the Bank to Lure Zook*, ESPN.com, at <http://sports.espn.go.com/espn/print?id=1308453&type=story> (Jan. 9, 2002) (showing that several college coaches earned more than \$1 million in 2002).

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organization of reputable agents—and, believe me, there aren't that many. I won't go over the numbers again. Everyone has that 1,100 number right. The next number is that of those 1,100 in the NFL—there are 1,112 agents in the NFL as of today, or something—the key number is that 800 do not have any clients at all, and only seventy-seven agents have more than eleven clients.<sup>70</sup> That means that among those seventy-seven—those are highly competitive, highly successful agents—control this business.

If you can get them, those players in the NFL, the same people—the Scott Borases and Jeff Moorads of the world in Major League Baseball,<sup>71</sup> and on and on, or the Arn Tellemes and David Falks in the NBA<sup>72</sup>—to say, “Hey, our profession is being soiled by people who do cheat.”

And, Brian, I have to argue with you on two accounts on “Jerry Maguire.” One, I think you do look like him.

MR. MACKLER: Thank you. My wife will thank you.

MR. GENZALE: And, number two, tell me the character of that Bob Sugar guy, the guy who goes around stabbing someone in the back. Isn't that true? I think agents are telling me every day—I answer the phone and they're telling me—about how they're getting stabbed in the back, and they never get off the phone without stabbing someone else. That happens all the time in my life.

MR. MACKLER: John, how many times have I called you? This is the first time we ever met.

MR. GERZALE: Not everyone. But I mean it happens, Brian.

MR. MACKLER: You're talking about your finite group of people that you talk to. I'm talking about this business that I'm in every day.

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<sup>70</sup> See Fainaru-Wada & Kroichick, *supra* note 48; see also text accompanying *supra* note 49.

<sup>71</sup> See generally Bryan Curtis, *Scott Boras, Motherhood and Apple Pie*, Slate, at <http://slate.msn.com/id/105783> (May 9, 2001); *Rockies Win Bidding for Neagle*, S.F. CHRON., Dec. 5, 2000, at E2.

<sup>72</sup> See generally J.A. Adande, *Clippers to Match Brand Offer Sheet*, L.A. TIMES, July 18, 2003, § 4, at 1; Harvey Araton, *Sports of the Times*, N.Y. TIMES, Sept. 12, 2003, at D1.

MR. GENZALE: I'm talking about agents.

MR. MACKLER: That's what I do. And, by the way, John, when I'm at a party and people ask me what I do, the reason I tell them that I'm not an agent is so that I don't get their nephew's résumé—not because I'm embarrassed to be an agent.

MR. GENZALE: I understand that. But let's go back to that party, Brian. When I have honest-to-goodness people, people who have law degrees, people who have been out there practicing, people who care about their profession, people who care about their athletes, who look me in the eye and say, "What happens to me out there is when I try to do my job with the ethic of my experience and my profession, and someone comes in and doesn't have that same level of ethic or that same experience or that same sense of caring and trust, it forces me to have to consider to compete"—I'm talking about these seventy-seven in the NFL—"it forces me to have to think about things that I don't want to. It might be as simple as instead of taking 4 percent, taking 3.5 percent, 3 percent, 2.5 percent, which happens all the time; or taking less of a percent on athletes' endorsements, which is somewhere between 10 and 15 percent. Or it might be calling up the newspaper and telling us the other guy is bad." It happens.

MR. MACKLER: John, let me give you another point. I'm not disagreeing with what you're saying.

First of all, I don't negotiate my fee, so you understand that. You can check that with the NFL Players Association also.

I think your point is—and maybe I look at it differently than the other seventy-six people in that group you are talking about—over the last five years, and I think I'm correct on this, we've had more guys drafted than anybody in the country, including Octagon,<sup>73</sup> SFX,<sup>74</sup> and IMG.<sup>75</sup> They might have not

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<sup>73</sup> See Genzale, *supra* note 11.

<sup>74</sup> SFX Sports Group is a sports talent management and marketing agency. See SFX, About Us, *SFX Sports Group (USA)*, at <http://www.sfxsports.co.uk/content.php?categoryId=50> (last visited Feb. 25, 2004).

<sup>75</sup> International Management Group ("IMG") is the world's largest athlete representation firm with offices in thirty-three countries. See IMG, Areas of Business, at <http://www.imgworld.com/areasofbusiness/body.htm> (last visited Feb. 25, 2004).

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been as high rounders as those guys, but I think in terms of—is that correct? Mike is shaking his head.

I look at it a little different. I think there are enough players out there that want solid representation, that come from good families, that if you put what you do out there and show them how good you are, that there are enough guys there that we've been okay. I mean, we, SportStar, Inc., do okay.<sup>76</sup>

So, I'm not disputing that. If you want to get maybe the top ten guys in the NFL draft, then maybe you're correct. Maybe I don't look at it that way. I look at getting a good player like Shawn Barber, who just signed two days ago for \$30 million, who was a fourth-round pick.<sup>77</sup> That's okay for me. You know, if he is a fourth-round pick and turns out to be a \$30 million client, terrific, that's great.

QUESTIONER: I just want to comment on the situation you were talking about with the coaches and the college athletes. Taking it a step further into the NFL, what would you say about these conglomerates that represent not only the athletes but the coaches as well, and then possibly even the union heads?

MR. MACKLER: Right.

QUESTIONER: Is there an appearance of impropriety there?

MR. MACKLER: I think on the NFL Players Association contract that I gave, you have to note if you represent coaches. To me, to take it a step further, if you are dealing—let's take the New York Jets. I don't have a problem with the agent for Herm Edwards<sup>78</sup> representing a player, because Herm Edwards does not negotiate the contract with me; Terry Bradway and Mike Tannenbaum do.<sup>79</sup>

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<sup>76</sup> SportStar, Inc. represented fifteen clients drafted in 2003, more than any other agents or agency. See Len Pasquarelli, *Tip Sheet*, at <http://lists.rollanet.org/pipermail/-rampage/Week-of-Mon-20030505/044758.html> (May 9, 2003).

<sup>77</sup> Shawn Barber plays in the NFL for the Kansas City Chiefs. See NFL.com, *Shawn Barber*, at <http://www.nfl.com/players/playerpage/12201> (last visited Feb. 17, 2004).

<sup>78</sup> Herman Edwards is the head coach for the New York Jets. See ESPN.com, *Herman Edwards*, at <http://sports.espn.go.com/nfl/players/coach?id=9> (last visited Feb. 17, 2004).

<sup>79</sup> See Dave Hutchinson, *Jets: Brain Trust Has Tough Contract Decisions*, NEWARK STAR-LEDGER, Oct. 15, 2003, at 1A.

With the Denver Broncos, where I had their premier defensive player, John Mobley,<sup>80</sup> it would be a problem if I represented Mike Shanahan,<sup>81</sup> because he makes every decision, because he's the coach.

So, I think there is a fine line there where I would be comfortable or not comfortable. I don't represent any coaches. There is a guy out in California, Bob LaMont,<sup>82</sup> who does a great job, representing a lot of coaches—I don't know if it's half. And Bob used to represent players, and to my best knowledge he is no longer representing players. Based on what these coaches are making, he probably made a good decision, because they are making more than the players, and it's all guaranteed money.

MR. GENZALE: When I was talking about coaches, I was talking primarily about college coaches.

MR. MACKLER: Yes. The young lady was mentioning the NFL, so that's what I was addressing.

MR. GENZALE: But you were talking about big agencies and the conflicts that come up. You know, David Falk is a great example.<sup>83</sup> I don't know if he works in this business. He used to be a friend of mine and we used to talk often, and now we don't talk anymore. David Falk represented Michael Jordan, by anyone's standard the class relationship anywhere in the business. David sold Fame to SFX.<sup>84</sup> SFX wound up being consumed by

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<sup>80</sup> John Mobley is a linebacker with the Denver Broncos. See NFL.com, *John Mobley*, at <http://www.nfl.com/players/playerpage/3981> (last visited Feb. 17, 2004).

<sup>81</sup> Mike Shanahan is the Executive Vice-President of Football Operations and Head Coach of the Denver Broncos. See Denver Broncos, Team, *Football Operations*, at <http://www.denverbroncos.com/page.php?id=161> (last visited Feb. 17, 2004).

<sup>82</sup> Bob LaMont represents football coaches at the professional and collegiate level through his company Professional Sports Representation. See, e.g., Shelly Anderson, *Harris Extends His Stay at Pitt*, PITTSBURGH POST-GAZETTE, Mar. 15, 2000, at D-1 (mentioning LaMont as the agent for University of Pittsburgh Head Coach Walt Harris).

<sup>83</sup> See Cynthia Hobgood, *Floating on Air: David Falk*, WASH. BUS. J., Mar. 8, 2002 (discussing the agent-player relationship between David Falk and his most well-known client Michael Jordan).

<sup>84</sup> In June 1998, David Falk sold his company FAME to SFX for \$100 million. See Darren Rovell, *Cashing In on the Ultimate Cash Cow*, ESPN.com, at <http://espn.go.com/nba/s/2003/0414/1538744.html> (Apr. 15, 2003).

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Clear Channel.<sup>85</sup> Clear Channel has people on the board that own teams.<sup>86</sup> Now, there is a conflict that no one asked for, but David has backed out of the agency business, and it's getting tough for many of them.

QUESTIONER: We'll take that a step further. What would you say about the Hendricks brothers when they sold SFX to Clear Channel, and they were owned by Tom Hicks and the Rangers?<sup>87</sup>

MR. GENZALE: I told you I talked to Randy Hendricks often. In fact, he is going to meet me. He is going to be here in New York next week. And he recognizes it. The problem with Clear Channel is board membership in hockey more than any other sport. Randy does baseball, and he says he is careful to look at those ownership relationships.

MR. MACKLER: Just a side note, and I'm pretty confident on this statement, just so you know for your own edification. To my best knowledge, I also believe—and David is one of the premier guys in this business, but David also represented John Thompson,<sup>88</sup> getting back to our initial issue. John Thompson, who obviously got all the players from Georgetown. And I believe he also does work with "Coach K"<sup>89</sup> and some of the other head coaches.

PROFESSOR CONNORS: Just some other things in the conflicts—and, gentlemen and Rachel, you may be aware of this. I

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<sup>85</sup> See Maureen Dezell & Steve Morse, *Radio Giant Clear Channel Buys SFX*, BOSTON GLOBE, Mar. 1, 2000, at F2.

<sup>86</sup> See, e.g., Karen Kwiatkowski, *Clear Channeling*, LewRockwell.com, at <http://www.lewrockwell.com/kwiatkowski/kwiatkowski9.html> (Apr. 29, 2003). For a list of Clear Channel's current board of directors, see Clear Channel, Company Information, *Our Executives*, at [http://www.clearchannel.com/company\\_exec.php](http://www.clearchannel.com/company_exec.php) (last visited Feb. 25, 2004).

<sup>87</sup> See Scott R. Rosner, *Conflicts of Interest and Consolidation in the Sports Agent Industry*, Wharton Legal Studies, at <http://lgst.wharton.upenn.edu/srosner/Output-W0.htm> (last visited Feb. 25, 2004).

<sup>88</sup> John Thompson is a former Georgetown University men's basketball coach. For more information, see Basketball Hall of Fame, Hall of Famers, *John Thompson*, at <http://www.hoophall.com/halloffamers/ThompsonJohn.htm> (last visited Feb. 25, 2004).

<sup>89</sup> Mike "Coach K" Krzyzewski is head coach of the Duke University men's basketball team. See GoDuke.com, Men's Basketball, *Mike Krzyzewski*, at [http://goduke.ocsn.com/sports/m-baskbl/mtt/krzyzewski\\_mike00.html](http://goduke.ocsn.com/sports/m-baskbl/mtt/krzyzewski_mike00.html) (last visited Feb. 25, 2004).

believe that the same agent represents Art Howe<sup>90</sup> and Lou Pinella.<sup>91</sup> How does that agent deal with the conflict when both candidates are being interviewed by the Mets? Then you have a gentleman, Leigh Steinberg, who I think specializes in quarterbacks.<sup>92</sup> Well, how does he handle that problem, for instance, the Jets—well, now they have a quarterback, but basically before this year—when they needed a quarterback for at least a dozen years? How does he handle that when he has several clients possibly competing for the same job?

MR. MACKLER: People ask us that question all the time because obviously, when you have over seventy guys in a league, a prospective college prospect could say, “Well, what happens if I go to Kansas City now and I’m a linebacker, and Shawn Barber just signed for \$30 million? Is there a conflict?” We don’t make the decisions who plays and who doesn’t. We don’t make the decision who drafts prospects and who doesn’t draft them. Our job is to negotiate their contract.

So, if you become the backup quarterback for the New York Jets, there is no conflict if I represent Chad Pennington, who’s represented by IMG and Tom Condon.<sup>93</sup> There is not a problem because Tom Condon is not calling Coach Edwards and saying, “I want you to play the other guy.” They make their own decisions.

QUESTIONER: Brian, I think as far as football is concerned, what you said is not completely accurate, because there’s only a limited amount of money, because of the salary cap. If you’re representing two players on the same team, you can’t get them

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<sup>90</sup> Art Howe is a former baseball player and currently manages the New York Mets. For a profile of Howe’s career see Baseball Library.com, *Art Howe*, at [http://www.baseballlibrary.com/baseballlibrary/ballplayers/H/Howe\\_Art.stm](http://www.baseballlibrary.com/baseballlibrary/ballplayers/H/Howe_Art.stm) (last visited Feb. 25, 2004).

<sup>91</sup> Lou Pinella is a former baseball player and currently manages the Tampa Bay Devil Rays. For a profile of Pinella, see Baseball Library.com, *Lou Piniella*, at [http://www.-baseballlibrary.com/baseballlibrary/ballplayers/P/Piniella\\_Lou.stm](http://www.-baseballlibrary.com/baseballlibrary/ballplayers/P/Piniella_Lou.stm) (last visited Feb. 17, 2004).

<sup>92</sup> See Mark Hyman, *Superagent Leigh Steinberg: Pro Football’s Real Wild Man*, BUS.WEEK, Nov. 25, 2002.

<sup>93</sup> See IMG Football.com, *About*, at <http://www.imgfootball.com/about/default.asp> (listing Chad Pennington as a client) (last visited Feb. 25, 2004).

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both the maximum amount if there's a limit on how much a team can spend.

MR. MACKLER: In terms of the rookie population or the pro population?

QUESTIONER: The veteran population. If a team has, let's say, \$10 million available, you can't get them both \$10 million.

MR. MACKLER: Why not?

QUESTIONER: So, you're not maximizing their interests for both of them.

MR. MACKLER: Let's take the guy we just did, who's a perfect example, because my colleague and I just finished Shawn Barber. We have three other players on that team. I didn't go into Carl Peterson's<sup>94</sup> office and say, "Give me \$30 million instead of \$40 million so I can give \$10 million to my two other guys."

They make the decision on the position, and how much they're going to pay that position, not the players. You understand what I'm saying? So they have a number that they want to pay the starting linebacker for the Kansas City Chiefs. It has no bearing on the other players.

QUESTIONER: Well, it does if there's only a limited amount of money.

MR. MACKLER: But that's not your problem as an agent. Your problem is to maximize your client's potential.

QUESTIONER: You never tell the general manager, "I want you to give me more for this guy than what you've already allocated"?

MR. MACKLER: Oh, absolutely, all day.

QUESTIONER: But you're saying that you're accepting what they're telling you because that's—

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<sup>94</sup> Carl Peterson is the President and General Manager of the Kansas City Chiefs. *See, e.g.,* KC Chiefs, From the President's Pen, at [http://www.kcchiefs.com/-news\\_article\\_list.asp?category\\_name=From+the+President's+Pen](http://www.kcchiefs.com/-news_article_list.asp?category_name=From+the+President's+Pen) (last visited Feb. 25, 2004).

MR. MACKLER: But that's his decision to take it from somebody else. I'm not going to say, "Don't take it from my other guy, my second rounder Eddie Freeman,<sup>95</sup> last year."

QUESTIONER: You don't have to tell him that, but then inherently that is going to happen. There are only so many dollars. You can only divide it so many ways.

MR. MACKLER: It has never been a problem.

QUESTIONER: I'm not saying it's a problem, but that is a conflict.

PROFESSOR CONNORS: I think, and this is where the lawyers' Code of Professional Responsibility comes in, and, Brian, I will say—

MR. MACKLER: My wife works at the American Institute of Certified Public Accountants.<sup>96</sup> What you're saying is that we have no ethics.

PROFESSOR CONNORS: In all seriousness, Brian, I will say that I do. And I was actually involved in a panel in early January, and a lawyer who was on the panel and who was a sports agent said, "I do not follow the Code of Professional Responsibility because I'm not acting as a lawyer." Well, there are two cases and an ethics opinion that have said if you are a lawyer acting as a sports agent you are bound by the code.<sup>97</sup> Now, I think there are many lawyers doing it who don't follow the code.

MR. MACKLER: Just enlighten me. What is the code that we're talking about?

PROFESSOR CONNORS: The lawyers' Code of Professional Responsibility.

MR. MACKLER: And what responsibility is that?

PROFESSOR CONNORS: Well, there are conflict rules that would certainly apply to that situation.

QUESTIONER: He's not zealously representing his clients.

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<sup>95</sup> Eddie Freeman plays in the NFL for the Kansas City Chiefs. See NFL.com, *Eddie Freeman*, at <http://www.nfl.com/players/playerpage/302194> (last visited Feb. 17, 2004).

<sup>96</sup> See *supra* note 67.

<sup>97</sup> See MODEL RULES, *supra* note 38, Canon 5.

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MR. HILLIARD: The hypo you presented is a management decision.

MR. MACKLER: Right.

MR. HILLIARD: You have so many dollars. You can tell me I have a cap problem. Okay, that's fine, that's your problem. I go into negotiation, and I zealously represent both clients aggressively.

QUESTIONER: Who do you go to first? For which player—

MR. HILLIARD: It doesn't matter.

MR. MACKLER: What I think everybody is failing to understand, at 12:01 this past Thursday night, the first day of free agency, twelve teams called for Shawn Barber. You don't call them. They call you. So I don't understand. I'm not selling Shawn Barber to the National Football League. They're buying.

PROFESOR CONNORS: Another question?

QUESTIONER: My experience has been in baseball, both minor league and major league, both affiliated and independent. I think one of the things that really hasn't been talked about that much is how strong the tendency is for any athlete to go with word of mouth and reputation, and that's really all they can go on.

One of the things with the NCAA rulings, unfortunately, for basketball and football, is the minor leagues for those sports. And they don't have the benefit of spending a few years getting to know different people. When you have a situation where you have an Agent Day and you just get a line-up of people, they can't make a qualified decision. They have to throw the guys out that don't have contracts because there is nothing to base it on. So, you're almost forcing a situation on them that's counter to their best interest.

What probably would be better is to say to the agents who don't have clients, "You can't come to Agent Day. Go to hockey, go to baseball, get some clients, do your due diligence, get a reputation, and then you have the right to talk to us." So, I think that would eliminate some of the problems.

And the marketing representative is a whole other thing. I don't know what the exact NCAA ruling is on marketing

representatives, but there are situations in Major League Baseball where there are marketing representatives who have put their clients in jail and the clients still are represented by them for years and years later. So, there is that strong of a bond even when some of their teammates have been jailed.

MR. MACKLER: It's a great point. I'll give you two quick ones, if it's okay. Can I comment on that?

PROFESSOR CONNORS: Sure. And so can the other members of the panel, if they would like to comment after you, Brian.

MR. MACKLER: I think you came up with a great point. I think if you look at our client list, you'll see a lot of guys from the same school. This past year we were lucky enough to represent Chris Brown, who is from the University of Alabama-Birmingham.<sup>98</sup> His two best friends are Bryan Thomas, who went in the first round this past year to the Jets, and Eddie Freeman. Conversely, there is another player at another school who we weren't so fortunate to get. This player signed with a guy who had nobody in the business, not one player. I represented six guys from that school the last six years. He's driving around in a brand-new yellow Hummer, so you can put two and two together and get four.

MR. GENZALE: You know, one of the things I think you bring up is that athletes and parents have to make a decision that is going to affect their lives, their livelihood, and their financial future, and they do it without a whole lot of background. They do it on looking someone in the eye, not knowing them very long, who is saying, "Believe me, I'll take care of you." Now, you know, thirty years ago it might have been different, but in today's game millions and tens of millions rest on these decisions.

I think we look at the perspective of lawyers and agents, from players associations and teams, and rarely, or not enough, do we look at it from that of the parent. If I were a parent of a kid who could make millions of dollars or had a chance to be in

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<sup>98</sup> Chris Brown played football at the University of Alabama at Birmingham and was drafted by the Jacksonville Jaguars in 2003. See NFL.com, *Chris Brown, at* <http://www.nfl.com/players/playerpage/397877> (last visited Feb. 17, 2004).

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professional sports, I'd want to know what can I use—is there something out there that will help me make that decision? And, frankly, there isn't.

And again, I go back to that regulation. What if there were a body that turned out to be a clearinghouse, that listed online those agents in good standing, that haven't by their own peers been known to commit violations in the names of their clients? One would think that agents would want to belong to that organization. One would think that parents could rely on that information, that this is a bona fide, upstanding agent in good stead. I would love to see something like that happen.

MS. NEWMAN-BAKER: I agree. I think we might have one representative from the NFL, but I don't know if we have anybody from the NFLPA. I don't recognize anybody. But I think that the NFLPA is one organization that you can contact, as a parent or as a student-athlete, if you are interviewing an agent and want to find out whether or not that agent has ever had any violations of the NFLPA's rules or regulations. I don't know about any of the other players associations, but I do know that you can do that with the NFLPA.

MR. MACKLER: You're 100 percent right.

MR. GENZALE: The NFLPA is the most active. The NFLPA is the one players association that cracked down on these agents that led to this article. This doesn't happen routinely in other sports. Richard Berthelsen of the NFLPA says it is going to happen more and more, but I've got to tell you, he's responding to the fact that there are two bills in Congress. He's responding to the fact that these have hit the courts and that these cases are becoming high profile.<sup>99</sup>

Lastly, I ask you: is the NFL Players Association, who is interested in covering issues related to the whole body of athletes, the organization that should be regulating agents? I don't think so.

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<sup>99</sup> Richard Berthelsen is the General Counsel for the NFLPA. *See, e.g.*, Liz Mullen, *Tank Fires Back: Black Claims Players He Defrauded Owe Him Money*, STREET & SMITH'S SPORTSBUSINESS J., Feb. 11, 2002; *see also* NFLPA, *supra* note 10. For more information on the Sports Agent Responsibility and Trust Act, *see supra* note 16.

QUESTIONER: Okay. I actually would disagree with that. I think that they are the most powerful group. First of all, when you talk about self-regulation of agents, that was attempted. There was a group, ARPA, the Association of Representatives of Professional Athletes,<sup>100</sup> in the 1980s and 1990s. It was voluntary. It failed. If you didn't want to go along with the rules that they had set up, you didn't join.

In terms of the NCAA, you are too far downstream, it seems, with all due respect. Your efforts are noble, but you are too far downstream to address the problem.

I'm a college professor. I have dealt with prospective student-athletes at some pretty good institutions. Even the ones that are doing it the right way, so to speak. And you tell the student-athlete, "Well, you know you can't take any extra benefits or anything from an agent," and he says, "Well, only if you get caught are you ineligible."

MS. NEWMAN-BAKER: Exactly. And that was my point, too. I don't think that any of us are burying our heads in the sand thinking that we don't have a problem. We are very much aware that we have a problem.

QUESTIONER: Oh, I know that you're aware of it.

MS. NEWMAN-BAKER: We don't know how to address it.

QUESTIONER: Sure. And I think that from your perspective you're under-funded. I mean, you don't have the type of resources that you need to go after people.

MS. NEWMAN-BAKER: We don't have subpoena power, number one.

QUESTIONER: Sure. Your power is economic, not legal. And then, when you think about players associations, they are the ones—just with respect to contract advisors—that have the most power. The problem for them was finding out about it.

Well, you know, at the seminar a couple of years ago when one of the agents stood up and said, "He's cheating, he's cheating, and

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<sup>100</sup> See generally Bart Barnes, *Agent's Role Draws Fire*, WASH. POST, Aug. 10, 1980, at D1 (discussing the inability of Association of Representatives of Professional Athletes to enforce its code of ethics).

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he's cheating," suddenly they had something to go on. That is a form of self-regulation—to turn other people in. They have the economic power. They can say, "You can't earn your livelihood in the way that you choose if you are not doing it the right way according to our rules."

MR. MACKLER: The problem with what you just said—and we are in the process of having an arbitration on an agent that stole one of my guys—is that unless you get the player to come to the arbitration, it's one word against another. I understand what you are saying in theory.

I think John hit it right on the head. I think if you got the top eight—I'm talking about the NFL now—if you got the top seventy-seven, or whatever number he was using, or fifty guys, in a room, it is really easy to identify which guys are cheating and which aren't. Everybody knows. Anybody in the business will tell you who's giving money to college kids and who's not. It doesn't take a rocket scientist to figure this out. It's really simple.

QUESTIONER: Brian and Rachel, just two quick questions.

Brian, I was wondering, in looking at your background, if you got to be an agent through your accounting background or financial planning?

And, Rachel, following up on what that gentleman said, you said that they acknowledge a problem, but I was shocked when you told me that your staff is four people. I can't think the NCAA is really taking this seriously if they have only four people. I sympathize with you, but four people is not going to cut it in the United States.

MS. NEWMAN-BAKER: I agree. But I think you have to also remember that we are a fairly new department within Enforcement, as well. I mean, we're only five years old. So we're trying to grow and we're trying to get there, and we recognize that we need more staff. Rich might be better to speak on this because he spent several years there, as well.

I don't even know. Was it even started when you were there?

MR. HILLIARD: No, there was not a department. That's four more than there was four years ago. Correct me if I'm wrong, but

identify any state that commits manpower or resources to enforcement of an agents' law.

MR. MACKLER: Texas.

MR. HILLIARD: What's their staff?

MR. MACKLER: One or two.

MR. HILLIARD: It really is not an area. And furthermore, to touch on Professor Patrick Connor's question, the NCAA doesn't have jurisdiction over the agents. It's over the institution, student-athletes, and prospective student-athletes.

PROFESSOR CONNORS: Just a question to Richard and Rachel on a related topic. I saw a story about a case at the University of Southern California ("USC") brought against Robert Caron, who was an unregistered agent and an attorney.<sup>101</sup> The allegation against Mr. Caron was that by contacting the athletes at USC illegally, it caused damage to the university. I couldn't find the results on that, but that brings the question: can the courts be an enforcement mechanism?

Are you familiar with that case?

MS. NEWMAN-BAKER: I'm not familiar with that case. I have heard that idea tossed around, about the institution being able to bring forth a suit if as a result of another's actions an athlete is ineligible and cannot compete for the institution. But no, I am not familiar with that.

PROFESSOR CONNORS: Have you heard about that, Richard?

MR. HILLIARD: I have heard about it. I don't know how it was resolved. But I have dealt with NCAA member schools. One school, a Pac-10 school,<sup>102</sup> where an agent provided money to a

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<sup>101</sup> The University of Southern California ("USC") sued California-based sports agent Robert Troy Caron, after an investigation found he gave the three Trojan football players money and gifts. See Kristian Pope, *Agents Spoil NCAA's Amateur Status*, MINN. DAILY, Oct. 17, 1995. In October 1995, Caron settled out of court with the school and agreed to repay the university \$50,000. See *id.* He also promised not to lure any USC players into future illegal activities. See *id.*

<sup>102</sup> Since 1978, the Pacific-10 Conference has consisted of the following universities: University of California at Berkeley, Stanford University, University of Southern California, University of California at Los Angeles, University of Washington,

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basketball student-athlete, who was ruled ineligible and had to go through the process. But as a result of that, the athletic director reported the agent to whatever is the regulatory body for the state of California to be disciplined, and I know he was disciplined.

So, there are a lot of schools out there that take the initiative after the fallout, after a problem, to report that agent to the respective state agency.

MR. GENZALE: The courts are the ultimate arbiter anyway, if you think about it. When Dunn left Steinberg, it's going to wind up in court. And the court is going to make a decision. When "Tank" Black broke federal laws, he wound up in jail.<sup>103</sup> I mean, one way or another.

But what I am suggesting, though, is that should be probably the last resort, not the first resort, of trying to regulate things.

MR. MACKLER: I'm going to just step back for a second. I think that what the professor said makes a lot of sense. The real burden should be on the players associations. The NFLPA does a great job, a really good job. They are probably the best at what they do. But they need help.

I don't think the NCAA is going to be able to do this. The schools have compliance directors. But the ultimate has to be the NFL Players Association.

Does anybody remember the Curtis Enis story at Penn State?<sup>104</sup> Explain to me how that agent is still representing players. He should be one-and-out, and that's what I've proposed to the NFL Players Association.

MR. GENZALE: But see, Brian, that's where I would argue. I think the NFLPA does, like I said before, the best job of all the agencies, but I don't think they do the job. I don't think they have

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Washington State University, University of Oregon, Oregon State University, University of Arizona and Arizona State University. See CollegeSports.com, Pac-10 Conference, at <http://www.pac-10.org/school-bio/conf-of-champs-intro.html> (last visited Feb. 25, 2004).

<sup>103</sup> See *supra* note 45.

<sup>104</sup> In 1997, senior running back Curtis Enis was found to have accepted a \$500 suit as a gift from an agent. Enis became ineligible for Penn State's bowl game. CNNSI.com, *Penn State Strikes Back at Sports Agent*, at [http://sportsillustrated.cnn.com/football/college/news/1998/01/06/pennst\\_enis](http://sportsillustrated.cnn.com/football/college/news/1998/01/06/pennst_enis) (Jan. 6, 1998).

investigators, full-time investigators. I don't think they have full-time lawyers. I don't think they are looking for the trouble. I think the trouble winds up on their doorstep—and I applaud them. Richard Berthelsen will handle it, if it's on their doorstep.

MR. MACKLER: Right.

MR. GENZALE: But they're not out there taking care of the athletes, their families, the people, the schools, and the teams.

MR. MACKLER: John, I have two questions for you. First of all, you're 100 percent right. But you can't explain to me how Curtis Enis, the guy who was involved in that, is still representing players. That's the first point.

The second point is on your magazine that you're covering right there. The front story, one of those agents in which everybody knew what he was doing, and he is getting paid by the players association to manage players association funds.<sup>105</sup> Think about that.

MR. GENZALE: Are we talking about [inaudible] Jones?

MR. MACKLER: John, you can figure that out. But can you explain that to me?

PROFESSOR CONNORS: Another question in the back?

QUESTIONER: I have some information here, just from the players association view. First of all, the question of whether or not the players association is the right group of people to regulate or not. I mean, this is a sports law symposium, so it should be clarified that they are the only group to do it. They are by law the only group to do it.

The NFLPA is a players' union. By being a players' union, by the labor laws they are the exclusive bargaining agent for every single player, which is why all the sports agents must certify with them. And they are given the responsibility to do that by the NFLPA.

I mean, it could be that the NFLPA would never ever do it, but it could be that they can shut out all the agents and negotiate every single player's contract by themselves if they wanted to, which is

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<sup>105</sup> See Mullen, *Feeding Frenzy*, *supra* note 10.

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what gives them the authority to regulate the agents. That's the number one clarification.

Just as a side note on whether or not they have attorneys. You said that you don't think they have attorneys. Richard Berthelsen is an attorney obviously, and they do have another staff. But almost like the NCAA comment and some of the other comments, just generally speaking, it's a very hard industry to regulate. And I think that, obviously from the headlines of your paper, they are trying to crack down.

One other comment. As far as the courts coming in on Steinberg and Dunn, the courts can tell Dunn that he has to pay Steinberg \$44 million, but the courts cannot tell Dunn that he cannot have his own business in the sports agency field, whereas the NFLPA can. The NFLPA can tell David Dunn, "We're decertifying you. You can never represent another NFL player again." And that's where the bite is, and that's where their teeth are.

MR. GENZALE: Well, I don't argue that the NFLPA is the only players associations that has fallen to those guys. What I'm arguing is whether that's right.

I think you have to look at sports a little bit differently today than twenty years ago. I think when Marvin Miller<sup>106</sup> was around, it was about labor and management. I think it is a triangle now. That's where the difference is.

Now, management, labor, and agents are my triangle. And labor and agents are not necessarily doing the same thing. Number one, they are both taking care of players, but labor is taking care of players generally whereas agents are taking care of players exclusively.

So if you look at it in that fashion, then you have one element of this three-prong, or triangle, system trying to regulate the other. I'm suggesting that might not be the best body.

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<sup>106</sup> Marvin Miller was the Executive Director of the MLB Players' Association from 1966 to 1982. See Baseball Library.com, *Marvin Miller*, at [http://www.baseballlibrary.com/baseballlibrary/ballplayers/M/Miller\\_Marvin.stm](http://www.baseballlibrary.com/baseballlibrary/ballplayers/M/Miller_Marvin.stm) (last visited Feb. 25, 2004).

PROFESSOR CONNORS: Okay. I think we have time only for one more question. The woman in the back, please?

QUESTIONER: As a practical matter, since you are not a lawyer, are you working with lawyers, or does the player have a lawyer that is negotiating? You're negotiating the deal points, but is someone else memorializing it? And for the non-lawyer agents, who are obviously not subject to the same ethical guidelines that lawyers are, are they facing any issues? If they are actually preparing contracts, they are essentially practicing law without a license. It's the flip side of the issue.

MR. MACKLER: I don't want to disappoint any future lawyers that are sitting here, but in the NFL the contract that a player signs with a team is standard. I'm talking about an NFL contract. It's standard. You can add amendments, and there are some legal issues involved, but it is mostly financial. We do have attorneys on our staff. My associate is actually a Fordham Law graduate. But we have four attorneys on staff that help us with the preparation of that. Alan and myself handle most of the contracts.

MS. NEWMAN-BAKER: Just as a side note, we have a copy of the sample standard contract on our Web site<sup>107</sup> as well, in which we have institutions sit down with student-athletes and look at to try to explain. So if you want to see a copy of that, you can get it. And we worked with the NFL to do that.

QUESTIONER: Yes. But the amendments and addenda are also important issues.

MS. NEWMAN-BAKER: Exactly.

MR. MACKLER: When I'm talking about the standard contract, I'm talking about the language in terms of the length of time, what you can and cannot do—are usually signing language, workout money, roster bonus, and incentives. All those are designed afterward. Each one of those is independent of the one I'm talking about.

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<sup>107</sup> A sample player-agent contract is available on the NCAA's Web site at [http://www1.ncaa.org/membership/enforcement/amateurism/player\\_contacts/player\\_agent\\_contract.rtf](http://www1.ncaa.org/membership/enforcement/amateurism/player_contacts/player_agent_contract.rtf) (last visited Feb. 17, 2004).

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PROFESSOR CONNORS: I want to thank the members of the panel. I certainly learned a lot today. They came a long way, many of them, and certainly their preparation showed during the presentations. Thank you very much.