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WHEN A COLLEGE COACH'S AGENT RECRUITS THE COACH'S PLAYERS: POTENTIAL LEGAL AND NCAA RAMIFICATIONS

JOSHUA LENS

In a recent and seemingly natural trend, many agents who represent college football coaches recruit and attempt to sign the coach's student-athletes. While much has been written on the myriad conflicts of interest in the sports agent industry, this Article is the first to focus on the recruitment and signing of players coached by agents' current clients. The Article argues that the practice constitutes a conflict of interest when the player is a draft-eligible underclassman with remaining eligibility. This Article argues that practice should not be permitted.

College coaches and their agents also must recognize the fact that a coach's involvement in an agent's player recruiting can result in NCAA violations. The recent FBI investigation into corruption in men's college basketball, while unfortunate, provides a prime example. This Article explores possible NCAA rules implications that can result from a college coach's involvement in his or her agent's player recruiting. Finally, the Article suggests parameters that college coaches should put in place to mitigate the likelihood of NCAA rules violations when their agents seek to recruit their student-athletes.

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I. INTRODUCTION

In January 2016, University of Mississippi ("Ole Miss") junior offensive tackle Laremy Tunsil announced he would leave Ole Miss early and make himself available for the 2016 NFL draft.¹ A few months later, and just minutes before the draft, someone hacked

1. See Ole Miss Athletics, *Laremy Tunsil Declares for NFL Draft*, OLE MISS SPORTS (Jan. 4, 2016), www.olemisssports.com/sports/m-footbl/spec-rel/010416aah.html [<https://perma.cc/5UV4-8MQX>] (thanking Tunsil for, and listing his contributions to, Ole Miss).

Tunsil's Twitter account and posted a video of Tunsil wearing a gas mask and smoking marijuana through a bong.² At one point considered the likely number one overall pick, Tunsil slid in the draft until the Miami Dolphins drafted him with the thirteenth overall pick.³ While the bong and gas mask video deterred other teams from drafting Tunsil, the Dolphins felt comfortable selecting him in part because the Dolphins head coach at the time, Adam Gase, was able to talk about Tunsil with the agent they share, Jimmy Sexton, in a way Gase could completely trust.⁴

Things took another unexpected turn when in a news conference shortly after the Dolphins selected Tunsil, he admitted he accepted money from Ole Miss coaches in violation of NCAA rules.⁵ Before Tunsil could answer a question about whether he had spoken with NCAA investigators, a woman who worked for Sexton interrupted and ushered Tunsil off stage.⁶

At the time the Tunsil draft night hack and news conference occurred, the NCAA had just completed a three-year investigation of the Ole Miss football, women's basketball, and track and field programs.⁷ A few days later, with speculation swirling about Tunsil, the NCAA reopened its investigation of the Ole Miss football pro-

2. See Will Hobson, *Ole Miss Football Pinned its NCAA Scandal to a Rogue Assistant. He's Fighting Back.*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/sports/colleges/hugh-freeze-is-out-but-ole-miss-still-pins-ncaa-issues-on-this-career-assistant/2017/08/10/11fac660-7c99-11e7-9d08-b79f191668ed_story.html?noredirect=on&utm_term=.a19d19088f22 [<https://perma.cc/NBW2-UNMF>] (describing plight of former Ole Miss football staff member Barney Farrar as it relates to NCAA investigation into potential violations in Ole Miss football program).

3. See Kevin Seifert, *Laremy Tunsil Slides to Dolphins at No. 13 After Gas Mask Tweet*, ABC NEWS (Apr. 28, 2016, 9:54 PM), <https://abcnews.go.com/Sports/laremy-tunsil-slides-dolphins-13-gas-mask-tweet/story?id=38750252> [<https://perma.cc/V54A-P5JD>] (noting that Tunsil admits that video depicts him but was leaked by someone who hacked his social media).

4. See Mike Florio, *Sexton Connection Surely Helped Adam Gase Feel Better About Laremy Tunsil*, NBC SPORTS PRO FOOTBALL TALK (May 3, 2016, 12:25 PM), <https://profootballtalk.nbcsports.com/2016/05/03/sexton-connection-surely-helped-adam-gase-feel-better-about-laremy-tunsil/> [<https://perma.cc/U29A-EK8X>] (noting that agent who represents both coach and his player can be conflict of interest but this exact scenario helped Dolphins and their head coach feel more at ease in drafting Tunsil).

5. See Hobson, *supra* note 2 (describing former Ole Miss football staff member Barney Farrar's account of, and involvement in, Tunsil saga and suggesting any payments coaches made to Tunsil may have been permissible under NCAA rules by claiming they originated from "student-athlete opportunity fund" which permits certain expenditures for student-athletes based on need).

6. See *id.*

7. See *id.* (noting that NCAA re-opened investigation into Ole Miss football program).

gram.⁸ The investigation culminated with the NCAA charging Ole Miss with twenty-one violations of NCAA rules, leaving then-head coach Hugh Freeze facing potential penalties that could impact his ability to coach in the future and, as a result, impacting his career.⁹ Sexton also serves as Freeze's agent.¹⁰

Freeze eventually resigned when he became caught up in a defamation lawsuit filed by his predecessor, Houston Nutt, against Ole Miss.¹¹ Nutt's lawsuit alleged that Ole Miss broke its severance agreement with Nutt when Ole Miss and Freeze allegedly told media members and recruits that it was Nutt's staff members who committed the NCAA violations.¹² Nutt's agent at the time Ole Miss hired him was, of course, Sexton.¹³ During the course of the lawsuit, Nutt produced evidence of a phone call from Freeze to a number connected to an escort service, leading Freeze to resign.¹⁴

Ole Miss assistant coach Matt Luke replaced Freeze as the head coach on an interim basis, and subsequently on a permanent basis.¹⁵ Perhaps unsurprisingly, Sexton is also Luke's agent.¹⁶

Freeze had trouble finding new employment until recently. Fellow Sexton client and University of Alabama head football coach Nick Saban was among at least five Southeastern Conference ("SEC") head coaches who contacted Freeze about a position in the 2018 offseason.¹⁷ However, the SEC and its commissioner, Greg

8. *See id.* (noting that speculation swirled regarding text messages from Tunisie's hacked phone that incriminated Ole Miss football staff members).

9. *See id.* (explaining that alleged violations ranged in seriousness from egregious to minor).

10. *See id.* (noting that show-cause order was among possible penalties for Freeze).

11. *See id.*

12. *See* Gray Hardison, *Houston Nutt Wants You to Believe Hugh Freeze Cost Him a Coaching Job*, SB NATION (July 14, 2017, 8:00 AM), <https://www.redcuprebellion.com/2017/7/14/15967402/houston-nutt-ole-miss-lawsuit-hugh-freeze-someone-give-hootie-a-dollar> [<https://perma.cc/L82N-HMEG>] (analyzing Nutt's legal claims against Ole Miss).

13. *See id.* (referring to Sexton as "contract wizard").

14. *See* Hobson, *supra* note 2 (noting that Freeze admitted to "pattern of misconduct" at Ole Miss, including phone call to escort service).

15. *See* Zach Barnett, *Jimmy Sexton Represents 11 of the 14 SEC Head Coaches*, FOOTBALL SCOOP (Dec. 7, 2017), footballscoop.com/news/jimmy-sexton-represents-11-14-sec-head-coaches/ [<https://perma.cc/SC86-HLSW>] (listing Southeastern Conference head football coaches represented by Sexton).

16. *See id.*

17. *See* John Talty and Matt Zenitz, *What Really Happened Between Hugh Freeze, Alabama, and the SEC*, AL.COM (Apr. 16, 2018), https://www.al.com/alabamafootball/index.ssf/2018/04/what_really_happened_between_h.html?platform=hootsuite [<https://perma.cc/JCG4-FR7R>] (detailing Saban's flirtation with notion of hiring Freeze and reaction of SEC office).

Sankey, encouraged Alabama to refrain from hiring Freeze due to the personal shortcomings that led to his departure from Ole Miss.¹⁸ After a year and a half of unemployment, Liberty University hired Freeze in December 2018.¹⁹

In today's high-stakes, big-money college football industry, many coaches have agents who provide them with valuable services. Section II of this Article discusses the many roles that sports agents undertake for their clients. Given their importance and wide-ranging duties, conflicts of interest are prevalent in the sports agency trade. As illustrated by the above example, the college football industry can weave an exceedingly entangled web. Next, Section III examines authorities, considerations, and examples of conflicts of interest in the sports agency field.

For business reasons, many agents who represent college coaches recruit student-athletes who play for the coaches they represent. Section IV examines whether coaches and their agents should be more concerned with conflicts of interest and their ramifications or whether it is acceptable for agents like Sexton to represent the myriad individuals described in the situation above. Section V discusses potential NCAA rules implications for coaches in this scenario. Section V concludes by suggesting parameters for college coaches to adopt and implement in order to mitigate the likelihood of NCAA rules violations when their agents recruit players from their programs.

II. STATUS AND ROLES OF SPORTS AGENTS

Legendary professional football coach Vince Lombardi famously refused to deal with agents.²⁰ According to legend, when informed that an agent came to negotiate a player's contract with Lombardi in the early 1960s, he walked into his office and closed the door.²¹ Lombardi returned a few minutes later to inform the

18. *See id.*

19. *See* Tom Schad and Dan Wolken, *Liberty Hires Former Mississippi Coach Hugh Freeze*, USA TODAY (Dec. 7, 2018, 6:40 PM), <https://www.usatoday.com/story/sports/ncaaf/2018/12/07/hugh-freeze-liberty-football-coach/2236886002/> [<https://perma.cc/4JRG-C85W>] (describing Liberty University's hiring of Freeze).

20. *See* Simon Johnson, *Show Me the Money!!! Player Agents and Conflicts of Interest*, 1 ANZ SPORTS LAW J. 103, 125 (2006) (listing and describing numerous conflicts of interest in sports agency industry).

21. *See id.* (noting that Lombardi story is just one example of his crude but effective method of frustrating agents).

agent that he was negotiating with the wrong team—Lombardi had just traded the agent's client to another team.²²

The Restatement (Second) of Agency defines agency as “the fiduciary relationship that results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to act.”²³ Over the past several decades, athletes have become increasingly reliant on their agents.²⁴ Sports agents have a tremendous amount of power today.²⁵ They play a critical role in their clients' lives by managing business affairs off the field, enabling athletes to focus on their performance on the field.²⁶ An agent's main function is to negotiate the athlete's employment contract with his team.²⁷ Generally, the agent's goal is to maximize the athlete's salary for as long a period of time as possible.²⁸ To do so, the agent must understand a multitude of issues, including the league's collective bargaining agreement and salary cap, market value of the client, market value of similar athletes, and needs of the team.²⁹ Agents may also help clients obtain endorsement contracts and assist with investment, financial, estate planning and income tax counseling.³⁰ Some say that the modern agent even assumes additional roles, including psychologist, social planner, and babysitter.³¹

22. See *id.* (identifying player in question as Jim Ringo, who Lombardi dealt to Philadelphia).

23. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

24. See Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 194, 197 (2004) (noting myriad roles agents play for clients including psychologist, babysitter, social planner, counselor, finance manager, accountant, tax and estate planner, and attorney).

25. See Patrick Connors et al., *Panel III: Ethics and Sports: Agent Regulation*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 747, 749 (2004) (emphasizing role of agents in negotiating contracts between players and teams as well as players needing someone besides family members in whom to trust).

26. See James Masteralexis, Lisa Masteralexis, & Kevin Snyder, *Enough is Enough: The Case for Federal Regulation of Sport Agents*, 20 JEFFREY S. MOORAD SPORTS L. J. 69, 69 (2013) (describing “critical role” agents play in lives of clients).

27. See Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123, 125 (2007) (highlighting ethical considerations for agents who are attorneys).

28. See *id.* at 123.

29. See *id.* (explaining that agent should provide client with information necessary for client to make informed decision).

30. See *id.* (noting that only top players generally obtain endorsement deals).

31. See Rosner, *supra* note 24, at 194 (describing roles of modern sports agent in addition to negotiating contracts).

Agents who represent college coaches work with athletics directors to facilitate the hiring of coaches and staff.³² Agents must delicately balance the responsibilities they owe to clients with maintaining positive relationships with athletics department administrators.³³ Not only do head coaches have agents, but assistant coaches do, too.³⁴

Given an agent's wide range of responsibilities and the possibility of a large and diverse client list, it is important for agents and their actual and potential clients to understand conflicts of interest. The following section examines sports agents' conflict of interest authorities, considerations, and examples.

III. SPORTS AGENTS' CONFLICTS OF INTEREST AUTHORITIES, CONSIDERATIONS, AND EXAMPLES

In order to understand the potential existence of a conflict of interest resulting from a coach's agent recruiting an underclassman from the coach's program, it is imperative to fully understand conflicts of interest generally. While the regulation of professionals (*e.g.*, attorneys) is typically well-defined and accepted, the sports agency profession is not as old, and thus its code of conduct is not as well-defined.³⁵ Fortunately, academics have written extensively on conflicts of interest for sports agents. This section provides an overview of conflicts of interest authorities and considerations as well as examples of actual or potential conflicts of interest for sports agents. This analysis sets up Section IV, which returns to the unique potential conflict of interest scenario involving underclassmen.

32. See Richard Johnson, *How a *Normal* College Football Coaching Hire Goes Down, Explained by an Agent*, SB NATION (Nov. 16, 2017, 10:10 AM), <https://www.sbnation.com/college-football/2017/11/16/16648940/how-college-football-coach-hires-work> [<https://perma.cc/426T-GN9F>] (providing behind-the-scenes perspective on typical process by which universities hire head football coaches).

33. See *id.* (noting coach-agents may need to work with same athletic department administrators in future).

34. See Jeremy Fowler, *Inside Conflicted World of Agents Repping College Coaches, NFL Players*, CBS SPORTS (Jan. 17, 2014), <https://www.cbssports.com/college-football/news/inside-conflicted-world-of-agents-repping-college-coaches-nfl-players/> [<https://perma.cc/4UHK-M2R2?type=image>] (describing scenario in which coach's players sign with his agent).

35. See Paul T. Dee, *Ethical Aspects of Representing Professional Athletes*, 3 MARQ. SPORTS L. J. 111, 111 (1992) (utilizing comparison to physicians, attorneys, and engineers, who author believes have more well-defined and accepted professions).

Given the key roles an agent serves in an athlete's life, an athlete places great trust in his agent.³⁶ Trust is integral to the athlete-agent relationship.³⁷ The athlete is often young with little experience in the fields of business and negotiation and thus susceptible to exploitation by agents.³⁸ An athlete has one career, but an agent typically has many clients.³⁹ Thus, while difficult, it is imperative that an agent's clients—whether coaches or athletes—understand the potential for conflicts of interest and how they can affect representation.⁴⁰ A conflict of interest can result in an agent's inability to devote enough time to a client or keep individual clients' interests separate, leading to compromised service.⁴¹

Unfortunately, conflicts of interest are a predominant ethical dilemma in sports representation.⁴² In fact, they run rampant because numerous situations unique to sports representation can involve conflicts of interest.⁴³ The underlying source of sports agents' conflicts of interest is the fierce competition for clients.⁴⁴ The re-

36. See Masteralexis, *supra* note 26, at 69 (noting that violation of this trust can have substantial consequences including loss of eligibility, harm to college football program, and financial loss for athlete).

37. See Rosner, *supra* note 24, at 220 (describing athletes' dependence on agents).

38. See Masteralexis, *supra* note 26, at 80 (explaining that player is at risk of exploitation by agent who makes decisions without player's input).

39. See Dave Anderson, *Sports of the Times; Agents' Schemes and Harmful Effects*, N.Y. TIMES (Nov. 19, 2000), <https://www.nytimes.com/2000/11/19/sports/sports-of-the-times-agents-schemes-and-harmful-effects.html> [<https://perma.cc/V4K4-UVKX>] (describing agents who put their bottom lines ahead of their clients' careers).

40. See Bryan Blair, *Conflicts of Interest: What Coaches Should Know About Their Representation*, HOOPDIRT.COM (Apr. 6, 2016), <https://hoopdirt.com/conflicts-of-interest-what-coaches-should-know-about-their-representation/> [<https://perma.cc/L9EM-Y9TC>] (noting that conflict of interest can affect representation); see also Evan Brennan, *Conflicts of Interest in the Representation of Rookie NFL Players*, SPORTS AGENT BLOG (Nov. 20, 2013), <https://sportsagentblog.com/2013/11/20/conflicts-of-interest-in-the-representation-of-rookie-nfl-players/> [<https://perma.cc/8HL3-9MP4>] (noting that identification of conflict of interest is often not obvious for players, especially rookies).

41. See Rosner, *supra* note 24, at 210, 234 (noting that additional unique issues can arise at larger, consolidated agencies).

42. See Jamie E. Brown, *The Battle the Fans Never See: Conflicts of Interest for Sports Lawyers*, 7 GEO. J. LEGAL ETHICS 813, 816 (1994) (explaining there are situations unique to sports agency industry that cause conflicts of interest).

43. See Blair, *supra* note 40; see also Brown, *supra* note 42, at 816. The fact that conflicts of interest run rampant is likely due in large part to the fact that they are hard to prove and largely ignored by relevant stakeholders—large agencies, independent agents, players' associations, athletes, and professional sports leagues. See Rosner, *supra* note 24, at 195-96.

44. See Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 785 (2006) (noting factors including significant increase in overall number of agents).

cent trend of consolidation in the sports agency industry has increased this intense competition.⁴⁵ This competition can lead to agents acting in an overly aggressive manner to recruit and retain clients.⁴⁶ Complicating things even more is the fact that the extent of duties owed by a sports agent to his clients depends, to a degree, on whether the agent is also an attorney.

A. Conflict of Interest Authorities and Considerations for All Sports Agents, Including Non-Attorney Sports Agents

The relationship between an athlete and an agent is based on express contract.⁴⁷ In major professional sports leagues, these relationships arise from representation agreements that describe the nature of the services agents may perform on behalf of their principals (*i.e.*, the athletes).⁴⁸ They also articulate basic duties and obligations that the parties owe to each other.⁴⁹

The signing of an agency representation agreement results in a fiduciary relationship between a sports agent and his client.⁵⁰ The obligations agents owe to their clients are thus based upon the agency principle of agents aligning their incentives with the athletes'.⁵¹ An agent owes the duty to exercise the utmost good faith, loyalty, and honesty toward his principal.⁵² Further, agency law on conflicts of interest dictates that an agent has an obligation to avoid representing conflicting interests.⁵³ This obligation remains firmly intact unless the parties consent to the adverse representation and

45. See Johnson, *supra* note 20, at 103 (stating that increased consolidation among sports agencies makes conflicts of interest "inevitable").

46. See Masteralexis, *supra* note 26, at 69 (noting prevalence of agents offering inducements to potential clients).

47. See Davis, *supra* note 44, at 789.

48. See *id.*

49. See *id.*

50. See Darren Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, 7 DARTMOUTH L. J. 246, 246 (2009) (explaining that relationship results from athlete providing consent to agent to act on athlete's behalf yet be subject to athlete's control). Note the Author's references to an agent as "he," "his," and "him" throughout this Article is due to the overwhelming percentage of males in the industry. In 2017, women constituted just 41 of the 795 certified NFLPA agents. See Liz Mullen, *Women Make Gains in NFL Agent Business*, SPORTS BUS. J. (Oct. 2, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/10/02/Labor-and-Agents/Women-in-NFL.aspx> [<https://perma.cc/W684-9GFR>].

51. See Masteralexis, *supra* note 26, at 79 (likening agent-athlete relationship to that of worker employed by professional service firm).

52. See Brown, *supra* note 42, at 824.

53. See *id.*

it is obvious that the agent can adequately represent the interests of both clients.⁵⁴

While common law fiduciary principles and obligations apply to the agent-client relationship, they may not be the most appropriate method of seeking to maintain and enforce the integrity of the relationship.⁵⁵ Thus, it is important to note the existence of other authorities that regulate activities of agents and/or their prospective or current clients, including NCAA legislation, National Football League Players' Association ("NFLPA") regulations and the Uniform Athletes Agents Act ("UAAA").⁵⁶ Unfortunately, many see this array of regulation as ineffective in that it does not serve the needs of the athletes, leagues, universities, professional teams and fans.⁵⁷

By virtue of their status as a union, the NFLPA has broad authority over agents.⁵⁸ However, NFLPA rules only briefly and generally address the issue of conflicts of interest.⁵⁹ NFLPA regulations prohibit agents from engaging in activity that creates an actual or potential conflict of interest with the effective representation of players.⁶⁰ However, NFLPA regulations lack specifics. For example, the NFLPA does not prohibit an agent from representing more than one athlete on a team or from representing athletes and coaches or team management simultaneously.⁶¹ Many believe

54. *See id.*

55. *See* Johnson, *supra* note 20, at 103 (seeking to introduce and enforce effective regulations regarding agents' accreditation and activities); *see also* Jack Marshall, *The Unforgivable Conflict of Interest: Sports Agents, Robbing Their Ignorant Clients*, ETHICS ALARMS (Jan. 16, 2014, 11:11 PM), <https://ethicsalarms.com/2014/01/16/the-unforgivable-conflict-of-interest-sports-agents-robbing-their-ignorant-clients/> [<https://perma.cc/KW2Q-378P>] (describing conflict of interest that results from agent representing two players vying for same contract).

56. *See* Masteralexis, *supra* note 26, at 87–88 (listing relevant authorities).

57. *See id.* at 88 (noting, for example, that states rarely enforce adopted UAAA provisions).

58. *See* Davis, *supra* note 44, at 809 (denoting powers including determining who can represent athletes and criteria under which agents may represent athletes).

59. *See* Brown, *supra* note 422, at 833.

60. *See* NFL Players Association, *NFLPA Regulations Governing Contract Advisors*, NFLPA § 3B8 (2016), available at <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf> [<https://perma.cc/ZQ7D-SCDP>].

61. *See* Neiman, *supra* note 27, at 128. NFLPA regulations require agents to disclose the representation of any coaches or front office personnel to player-clients at the signing of the representation agreement but do not prohibit dual representation. *See* NFL Players Association, *supra* note 60, at § 3(A)(16).

NFLPA regulations are vague and unenforceable and have failed to curb conduct of unethical agents.⁶²

A number of states have adopted statutes governing the sports agency industry.⁶³ The UAAA, promulgated by the National Conference of Commissioners on Uniform State Law in 2000, forms the basis of many of these state statutes.⁶⁴ The UAAA's primary focus is to protect the interests of educational institutions and, to a lesser extent, protect student-athletes and provide uniformity among state laws.⁶⁵ Thus, it was not designed to combat all of the problems in the sports agency industry.⁶⁶ Many of these state statutes do not include prohibitions of conflicts of interest, and the ones that do only cover this issue cursorily.⁶⁷ Further, states that have adopted the UAAA or a version of it rarely enforce it.⁶⁸ Unfortunately, the state statutory schemes fail to provide a solution to the conflict of interest problems in sports representation.⁶⁹

B. Additional Conflict of Interest Authorities and Considerations for Attorney-Agents

Attorneys comprise more than half of all agents representing professional athletes.⁷⁰ An agent-client relationship differs in many ways from the traditional attorney-client relationship.⁷¹ Thus, many attorneys acting as sports agents incorrectly assume their agent activities are not governed by legal ethics rules.⁷² However, upon ad-

62. See Neiman, *supra* note 27, at 130 (arguing that regulatory language is weak and inadequately neither defines violations nor provides for investigation and enforcement); see also Masteralexis, *supra* note 26, at 94 (noting that players' association regulations tend to focus on agents' qualifications as opposed to regulating their actions).

63. See Neiman, *supra* note 27, at 128 (noting that state statutes are aimed primarily at protecting university student-athletes).

64. See Davis, *supra* note 44, at 802 (explaining that UAAA primarily protects university whose student-athlete loses eligibility due to actions of agent).

65. See *id.* (noting that registration is required of agents who recruit student-athlete to sign representation agreements).

66. See *id.* at 806 (explaining that legislation is reactive in that it provides apparatus to sanction agents).

67. See Neiman, *supra* note 27, at 128 (concluding that there is minimal state regulation of agents in dealings with professional athletes).

68. See Masteralexis, *supra* note 26, at 74 (citing review indicating lack of disciplinary action in most states).

69. See Davis, *supra* note 44, at 834 (suggesting that this could change should agents and athletes participate in enforcement process).

70. See Neiman, *supra* note 27, at 123 (noting that it is not requirement for agent to also be licensed attorney).

71. See Rosner, *supra* note 24, at 217 (explaining that agent-client relationship is not traditional personal representative relationship).

72. See Brown, *supra* note 42, at 814.

mission to a state bar, an attorney agrees to abide by its professional responsibility rules.⁷³ Further, many courts have held that ethical rules govern the attorney-agent.⁷⁴ While often ignored and unprovable, sports attorneys and their clients should closely scrutinize potential conflicts of interest, if for no other reason than sports attorneys' clients, who are typically young athletes, often do not possess the legal savvy or experience to make educated decisions concerning legal representation and strategy.⁷⁵

In addition to agency law discussed above, attorney-agents are bound by the *Model Code of Professional Responsibility* or *Model Rules of Professional Conduct* (hereinafter "*Model Rules*"), whichever is applicable in their state.⁷⁶ The vast majority of states have adopted the *Model Rules*, which further the overriding values of the legal profession.⁷⁷ One of the main policy considerations behind the conflict of interest rules, which is also a fundamental tenet of the attorney-client relationship, is unimpaired "zealous" loyalty to a client's interests.⁷⁸

It is impossible to completely eliminate conflicts of interest from the legal profession.⁷⁹ Rather than focus on whether a conflict exists, the modern view of conflicts of interest acknowledges that they are unavoidable, and instead centers on analysis of the risk of material, adverse harm to either the quality of the attorney's representation or the attorney-client relationship.⁸⁰

73. See Neiman, *supra* note 27, at 130 (explaining further that state bar authorities may sanction attorney whose business practices run afoul of these rules). Note, however, that state bars have not aggressively pursued the few claims athletes have made against their agents. See Davis, *supra* note 44, at 800.

74. See Neiman, *supra* note 27, at 131 (citing and summarizing state court cases from Arizona and Ohio).

75. See Brown, *supra* note 42, at 814.

76. See Davis, *supra* note 44, at 799 (explaining that violation of these standards may render attorney subject to discipline by state bar association). The Author acknowledges there are some who feel that legal ethics rules may not automatically apply to an attorney-agent, especially in situations where the agent does not provide legal advice to the client. See e.g., Jack Marshall, *The Truth About Scott Boras*, *HARDBALL TIMES* (Jan. 28, 2009), <https://www.fangraphs.com/tht/the-truth-about-scott-boras/> [<https://perma.cc/YQ5C-CW69>] (stating that it is unsettled whether agent's activities constitute practice of law). However, both case law and ethics opinion state that attorneys acting as sports agents are bound by the Model Code. See Connors, *supra* note 25, at 780 (noting that many agents who are attorneys fail to follow Model Rules).

77. See Rosner, *supra* note 24, at 217 (specifying that 42 states as well as District of Columbia adopted Model Rules).

78. See Brown, *supra* note 42, at 827.

79. See Rosner, *supra* note 24, at 218 (citing "practical realities" of serving more than one client).

80. See *id.* (explaining further that Model Rules require attorney to respond appropriately when risk of actual harm to either client is substantial).

Model Rule 1.7 is especially important in addressing conflicts of interest faced by attorney-agents.⁸¹ *Model Rule 1.7* establishes two general conflict of interest provisions.⁸² First, under *Model Rule 1.7(a)*, an attorney must decline representation of a client in a matter where the client's interests are "directly adverse" to another, existing client.⁸³ For example, a competition between two businesses for a limited resource places two clients' interests directly adverse to each other.⁸⁴ Thus, under *Model Rule 1.7(a)*, the same attorney may not represent both parties as one client would benefit only at the cost of the other.⁸⁵

Second, *Model Rule 1.7(b)* prohibits an attorney from representing a client in situations where the attorney's abilities are "materially limited" by the attorney's responsibilities to third parties or another client, or where the attorney's self-interest would conflict with the client's.⁸⁶ Thus, *Model Rule 1.7(b)* addresses the quality of the representation provided to each client and requires the likelihood of a material limitation on the representation before resulting in a prohibition.⁸⁷ Applied less rigidly than 1.7(a), *Model Rule 1.7(b)* stresses that attorneys should maintain independence of judgment unclouded by competing loyalties.⁸⁸ The Comment to *Model Rule 1.7* further provides that an attorney may not advocate against an individual who is represented by the attorney in another matter, even when the matters are "wholly unrelated."⁸⁹

Some situations exist, however, where an attorney may represent clients with potentially conflicting interests without running afoul of the *Model Rules* so long as both parties provide informed consent and the attorney reasonably concludes the conflicting representation will not be a detriment to either client.⁹⁰

81. *See id.* at 219 (explaining that rule first requires attorneys to identify competing interests that may impact judgment or capacity to be diligent and loyal to his client).

82. *See Brown, supra* note 42, at 827.

83. *See id.* at 827-28.

84. *See Rosner, supra* note 24, at 220 (stating that two competing businesses vying for same contract have interests that are directly adverse).

85. *See id.* at 220-21 (explaining that this type of relationship occurs often when agents represent multiple NFL or NBA players as both leagues utilize salary cap).

86. *See Brown, supra* note 42, at 828.

87. *See Rosner, supra* note 24, at 224 (describing *Model Rule 1.7(b)* language as broader than 1.7(a)).

88. *See id.* (noting that *Model Rule 1.7(b)* has higher threshold than 1.7(a) and thus is invoked less frequently).

89. *See Brown, supra* note 42, at 828.

90. *See id.*

This furthers the personal autonomy of an individual to acquire the best possible representation—a particularly acute need in the field of sports agency, where the number of competent and experienced attorneys and agents is limited.⁹¹ However, in situations where two parties' interests are fundamentally antagonistic to each other, representation is nonconsentable.⁹² Failure to adhere to the *Model Rules* can subject an attorney to state bar association discipline, court disqualification from continuing the representation, civil liability and/or forfeiture of fees.⁹³

C. Examples of Real or Potential Conflicts of Interest Involving Sports Agents

As noted above, academics have written extensively about potential conflicts of interest involving sports agents. Below is a list of commonly cited examples.

1. *An Agent Representing Multiple Athletes on the Same Team, Notably in Leagues with a Salary Cap*⁹⁴

In 1995, renowned agent Leigh Steinberg represented all three Pittsburgh Steelers quarterbacks—Neil O'Donnell, Kordell Stewart and Mike Tomczak.⁹⁵ More recently, agent Gary Uberstine represented two kickers—David Buehler and Nick Folk—competing for the Dallas Cowboys kicking job.⁹⁶ Some agents acknowledge that players represented by the same agent and competing for a job face the possibility that the agent throws one client under the bus to nudge the other into a better position.⁹⁷

91. *See id.*

92. *See* Rosner, *supra* note 24, at 224 (citing example of multiple parties in same negotiation).

93. *See id.* at 219 (noting existence of these possible ramifications while acknowledging that Rule 1.7 provides little practical guidance to attorneys facing conflicts of interest).

94. *See* Johnson, *supra* note 20, at 107–08 (stating that it is not difficult to envision situation whereby agent must compromise demands of one client in order to obtain more favorable outcome for another client); *see also* Neiman, *supra* note 27, at 123 (noting that some argue that representation of multiple athletes on same team is not conflict of interest because market determines value).

95. *See* Rosner, *supra* note 24, at 212 (referring to simultaneous representation of all three quarterbacks as “difficult task”).

96. *See* Paresch Dave, *Sports Agents Sometimes Have a Balancing Act with Clients*, L.A. TIMES (Dec. 25, 2013), [articles.latimes.com/2013/dec/25/sports/la-sp-1226-same-agent-20131226](https://perma.cc/5ZZA-EQEV) [https://perma.cc/5ZZA-EQEV] (noting that, ironically, these two kickers became friends while competing for same job).

97. *See id.* (identifying one agent who maintains that no general manager has ever called to ask agent's opinion on which athlete to choose; rather, general man-

Further, teams in salary cap leagues must pay players from a limited fund, yet each athlete expects his agent to negotiate a contract yielding the most money possible.⁹⁸ Thus, a high salary for one player may lead to a lower salary for another, especially if the two play the same position.⁹⁹ When an agent who represents multiple clients on the same team negotiates a lucrative contract for one client, it may lead to another client receiving an otherwise lower salary or, worse yet, being cut from the team for salary cap purposes.¹⁰⁰ This is a delicate situation that agents must handle carefully, and it can result in an egregious failure to represent a client with the client's best interest in mind.¹⁰¹ When multiple clients compete for the same job and/or try to obtain their maximum share of a limited budget, the conflict may not be eliminated.¹⁰² When this is the case, the representation of two clients on the same team in a salary cap league may not be undertaken regardless of informed consent.¹⁰³

2. *An Agent Representing Multiple Players Who Play the Same Position, Especially Those Who Have Similar Characteristics in Terms of Talent Level, Experience, Success, and Size*¹⁰⁴

When star NFL quarterback Peyton Manning was a free agent in the 2012 offseason, it was the “wildest free agent chase since the Reggie White sweepstakes of 1993.”¹⁰⁵ When the San Francisco 49ers emerged as contenders to sign Manning, things became very

ager asks agent to fill in blanks on injury history, a location preference, or target contract value).

98. See Rosner, *supra* note 24, at 221 (noting that this situation occurs often).

99. See *id.* (referring to this scenario as “dilemma” for sports agents).

100. See *id.* at 212 (noting that this issue becomes exacerbated when clients play same position).

101. See *id.* at 211 (suggesting that sports agents should only represent multiple players on same team if they can answer this following question affirmatively: “Can I the agent separate and carry out my functions as a sports agent as if the players were represented by different agents?”).

102. See Marshall, *supra* note 55 (explaining that in this scenario, attorney knows that performance of duties for one client will affect performance of duties owed to other client).

103. See Brown, *supra* note 42, at 817 (referring to scenario as win-lose, zero-sum situation in which one client wins at other client's expense).

104. See Joe Fortenbaugh, *Conflicting Interests for Agent of Manning, Smith*, NAT'L FOOTBALL POST (Mar. 17, 2012, 8:21 PM), <https://usatoday30.usatoday.com/sports/football/nfl/story/2013-03-17/conflict-of-interest-tom-condon/53594502/1> [<https://perma.cc/S4DV-9FN9>] (predicting that either Smith or Manning would “wind up getting the short end of the stick” while Condon collected three percent of both players' new contracts).

105. *Id.* (noting that Denver Broncos and Tennessee Titans believed it was two-team competition to sign Manning until 49ers became involved).

interesting for incumbent 49ers starting quarterback and former number one overall draft pick Alex Smith.¹⁰⁶ At the time, it was rumored that the 49ers and Smith were negotiating a lucrative contract extension.¹⁰⁷ When the 49ers became involved with Manning, however, the 49ers put negotiations with Smith on hold, causing many to believe that Smith became a 49ers afterthought.¹⁰⁸

In situations like these, Smith's agent bears responsibility for taking charge and creating leverage.¹⁰⁹ The problem, however, was that the individual responsible for doing everything in his power to protect Smith's best interests was the same man tasked with providing those services to Manning.¹¹⁰ Like Steinberg before him, agent Tom Condon represented a number of successful NFL quarterbacks at the time, including Smith and Manning.¹¹¹ It appeared at the time that there was no way for Condon to fulfill his obligations to either Smith or Manning without causing harm to the other.¹¹² In fact, longtime agent Jack Bechta noted at the time:

It's just human nature to play favorites. But when an agent represents two players vying for the same job, there is a moral obligation to do what's in the best interest of both players. However, what may be in the best interest of one client may not be in the best interest of the other.¹¹³

In reality, this situation is common despite the fact that it represents an un-waivable conflict of interest that technically could subject an attorney-agent to state bar discipline and perhaps constitute immoral and unethical behavior.¹¹⁴

106. *See id.* (noting that if 49ers would have signed Manning, Smith could have signed elsewhere, but Smith had led 49ers to 13-3 regular season record and spot in conference championship game in previous season and forged strong bonds with his 49ers teammates over previous six years).

107. *See id.* (explaining that remaining with 49ers was likely in Smith's best interests as opposed to starting over with new organization and offensive scheme).

108. *See id.*

109. *See id.* (noting that Smith paid Condon three percent of his contract in exchange for Condon's services).

110. *See id.* (describing Condon's simultaneous representation of Manning and Smith as "precarious position").

111. *See Connors, supra* note 25, at 778 (describing scenario where Steinberg represented all three Pittsburgh Steelers quarterbacks); *see also Fortenbaugh, supra* note 104 (noting that Condon is well-respected and successful, having represented numerous first-round draft picks and negotiated some of most lucrative free agent contracts in NFL history).

112. *See id.* (stating that Condon was bound to fail one client).

113. *See id.*

114. *See Marshall, supra* note 76 (using example of baseball agent Scott Boras and his simultaneous representation and negotiating on behalf of multiple players

3. *An Agent Representing Similarly Talented and Sized Draft-Eligible Players at the Same Position in a Draft Class*¹¹⁵

A recent example of two players at the same position jockeying for a draft selection slot occurred in the 2012 NFL draft when quarterbacks Andrew Luck and Robert Griffin III competed for the number one overall selection, owned by the Indianapolis Colts.¹¹⁶ If agency law and the existence of a fiduciary relationship impose duties including good faith and avoidance of conflicts of interest, it might seem clear that one agent could not ethically represent both quarterbacks and market one at the other's expense to the Colts.¹¹⁷ For example:

One of the most important roles that an agent can have on [rookies'] behalf is promotion to various scouts and other NFL personnel. Knowing that a rookie player's agent may also be doing the same for (or better) for said player's direct competition for a contract, roster spot, etc. at the same position and in the same draft class, is likely not a scenario that a rookie player wants to contemplate and undergo to their possible detriment.¹¹⁸

with New York Yankees). Manning eventually signed with the Denver Broncos, where he resurrected his elite Hall of Fame career. See Vinnie Iyer, *What If . . . Peyton Manning Had Picked 49ers Over Broncos?*, SPORTING NEWS (Oct. 16, 2014), www.sportingnews.com/us/nfl/news/peyton-manning-49ers-broncos-week-7-tim-tebow-jim-harbaugh-colin-kaepernick-alex-smith/15cnu4dywcnmu1mbw4263arokr [<https://perma.cc/D8AH-ZN8Y>]. Smith re-signed with the 49ers for three years and \$24 million. See *id.* The 49ers traded Smith the following offseason. See *id.*

115. See Brennan, *supra* note 40 (discussing agent recruiting generally and characterizing the subject scenario as "likely" conflict of interest due to importance of agent's promotion of his client to NFL personnel).

116. See Associated Press, *NFL Draft: Will Luck or Griffin Be Better NFL QB?* CBS NEWS (Apr. 23, 2012, 1:38 PM), <https://www.cbsnews.com/news/nfl-draft-will-luck-or-griffin-be-better-nfl-qb/> [<https://perma.cc/PDQ6-APBS>] (speculating that Indianapolis Colts would draft Luck first overall).

117. The two quarterbacks signed with different agents. Luck signed with his uncle. See Antonio Gonzalez, *Andrew Luck's Uncle to Serve as QB's Agent*, NFL.COM (Aug. 15, 2012, 8:37 PM), <http://www.nfl.com/news/story/09000d5d82617494/article/andrew-lucks-uncle-to-serve-as-qbs-agent> [<https://perma.cc/P7GS-N44P?type=image>]. Griffin signed with Ben Dogra, then of CAA. See Sports Agent Blog, *Robert Griffin III Hires Ben Dogra of Creative Artists Agency (CAA)*, BUS. INSIDER (Jan. 12, 2012, 6:22 AM), <https://www.businessinsider.com/robert-griffin-iii-hires-ben-dogra-of-creative-artists-agency-caa-2012-1> [<https://perma.cc/89RU-3HT9>]. The Colts ultimately selected Luck first overall and the Washington Redskins traded up in the draft to select Griffin. See Bill Barnwell, *The Rise and Fall of the 2012 NFL Draft*, GRANTLAND (Sept. 25, 2014), grantland.com/the-triangle/the-rise-and-fall-of-the-2012-nfl-draft/ [<https://perma.cc/3V7Q-4V3M>].

118. Brennan, *supra* note 40.

4. *Agents Placing Bets on Success—or Lack of—for their Client*¹¹⁹

In one publicized incident, an employee of the agency representing tennis star Roger Federer, although not the agent of record for Federer, allegedly placed large bets on Federer using inside information the employee obtained from Federer.¹²⁰ Agents are privy to inside information from clients and should use it to further the client's interests—not their own.¹²¹ In this case, the individual placing the bets worked for agency IMG Worldwide, a very large sports agency.¹²² IMG represented numerous other tennis athletes as well as athletes in other sports and actually owned a piece of several tennis tournaments.¹²³ “They are as much a part of sports as the leagues are, yet a league employee would never get away with gambling on a sport he or she has a financial interest in.”¹²⁴ Thus, the mere hint of a corrupting influence is enough to call the integrity of the sport into question.¹²⁵

5. *An Agent Employed as a High School Coach*¹²⁶

During the 2011 NFL lockout, Hamden Hall, a private high school in Connecticut, hired agent Joe Linta as its head football coach.¹²⁷ At the time, Linta represented approximately 40 professional football players, including Baltimore Ravens quarterback Joe Flacco.¹²⁸ A conflict of interest could arise should one of the student-athletes eventually become NFL-caliber and feel a sense of loy-

119. See Dashiell Bennett, *Sports Agents Should Not Be Gambling on Their Own Clients (But They Definitely Are)*, BUS. INSIDER (Oct. 20, 2010, 10:29 AM), <https://www.businessinsider.com/sports-agent-admits-to-betting-on-his-own-client-2010-10> [<https://perma.cc/92TL-66XS>] (acknowledging that agent regulations are lax and nearly impossible to enforce).

120. See *id.* (noting that, ironically, this agency employee actually lost \$40,000 betting on Federer to win the French Open final).

121. See *id.* (describing several previous examples where individuals involved with sports gambled on sports).

122. See *id.* (referring to IMG Worldwide as “the world’s biggest sports agency”).

123. See *id.*

124. *Id.*

125. See *id.*

126. See Bryan Toporek, *NFL Agent Moonlighting as High School Football Coach*, EDUC. WEEK (May 11, 2011, 1:39 PM), https://blogs.edweek.org/edweek/schooled_in_sports/2011/05/nfl_agent_moonlighting_as_high_school_football_coach.html [<https://perma.cc/3JV7-L74Q>] (noting that high school headmaster who employed agent as coach in subject example believed there was no conflict of interest because agent did not represent high school players).

127. See *id.* (noting that Linta’s sons played on team).

128. See *id.* (noting that Linta did not leave his roster of clients when he became coach and his clients remained his first priority).

alty to his former high school coach, making it more likely that the athlete will sign with Linta.¹²⁹

6. *An Agent Representing Athletes as well as Coaches or Management Personnel with Roster Decision-Making Authority*¹³⁰

Representing a coach and player for the same team “doesn’t pass our smell test,” according to agent Steve Kauffman, who exclusively represents basketball coaches and executives.¹³¹ Thus, the National Basketball Players Association (“NBPA”) has a rule banning simultaneous representation of coaches/management and players.¹³² This rule recognizes and prevents a conflict of interest for the agent should a player and coach dispute over a lack of playing time or role on the team as it precludes the agent from being placed in the middle of the dispute.¹³³

This rule also acknowledges that some coaches, like management personnel, play a role in roster decisions.¹³⁴ Individuals with authority to make roster decisions have interests adverse to players during negotiations.¹³⁵ Thus, it would be a conflict of interest for an agent to represent both an individual with authority to make roster decisions (*e.g.*, a coach or general manager) and a player on the team simultaneously.¹³⁶ The rule protects coaches because it

129. *See id.* (disclosing that Linta likely did not take coaching position with ill intentions; after all, he had previous coaching experience).

130. *See* Neiman, *supra* note 27, at 123 (explaining that this conflict is one that is likely non-consentable).

131. Dave, *supra* note 96 (providing example that player may feel he deserves more playing time while the coach seeks to bench the player).

132. *See* Ken Berger, *NBPA Mounting Crackdown Against Agents Over Conflicts of Interest*, CBS SPORTS (Feb. 19, 2016), <https://www.cbssports.com/nba/news/nbpa-mounting-crackdown-against-agents-over-conflicts-of-interest/> [<https://perma.cc/CM2B-US76?type=image>] (noting that rule has been in effect for long time but rarely enforced until recently when NBPA’s executive committee voted to mount enforcement campaign).

133. *See* Rosner, *supra* note 24, at 214 (citing NBPA REGULATIONS GOVERNING PLAYER AGENTS § 3B(f) (2018), *available at* http://3c90sm37lsaecdwtr32v9qof-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/OmittedPagesNBPA_AgentRegulations_050118.pdf [<https://perma.cc/L7XE-RWXQ>]).

134. *See* Connors, *supra* note 25, at 776 (using former Denver Broncos head coach Mike Shanahan as example).

135. *See* Johnson, *supra* note 20, at 108 (explaining that players demand highest salary possible while coaches align themselves with management and seek to pay lesser amount).

136. *See* Connors, *supra* note 25, at 776 (stating that agent Bob LaMont made good decision to no longer represent athletes and exclusively represent coaches, who typically have guaranteed contracts while professional football athletes do not).

eliminates any appearance of uneven treatment for a player who shares the same agent as the coach.¹³⁷

While the NFLPA requires an agent who signs an athlete to notify the athlete of NFL management personnel and coaches represented by the agent, the NFLPA does not prohibit this dual representation.¹³⁸ In failing to do so, the NFLPA is the only players association that fails to recognize that this dual representation constitutes a conflict of interest for agents that should not occur.¹³⁹ Many agents take advantage of the absence of such a rule to benefit their own bottom line.¹⁴⁰

The most prevalent conflict of interest in the coaching profession is an offshoot of agents concurrently representing coaches and players.¹⁴¹ When an agent represents both coaches and athletes, it is a conflict of interest for the agent to use the coach to try to access athletes for recruiting purposes.¹⁴²

7. *An Agent Representing Both Coaches and University Athletics Directors Responsible for Hiring Decisions*¹⁴³

In 2013, University of Memphis athletics director Tom Bowen renegotiated then-head men's basketball coach Josh Pastner's contract.¹⁴⁴ Both utilized the same agent at the time.¹⁴⁵ A state investigation and audit found no evidence of Bowen either receiving a

137. See Liz Mullen, *Coaches Union Likes NBPA's Decision to Enforce Agent Rule*, SPORTS BUS. J. (Feb. 29, 2016), <https://www.sportsbusinessdaily.com/Journal/Issues/2016/02/29/Labor-and-Agents/Labor-and-Agents.aspx> [<https://perma.cc/4SXH-QZQC>] (stating that National Basketball Coaches Association applauded NBPA's recent decision to enforce rule prohibiting simultaneous representation of coaches and players because NBA is "tight-knit family").

138. See NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS, *supra* note 60, at § 3(A)(16); see also Rosner, *supra* note 24, at 241.

139. See *id.* (noting that general counsel for NFLPA has made efforts to adopt similar rule as that in other professional league players associations).

140. See Jason Belzer & Darren Heitner, *An Offer They Should Refuse: Why Conflicts of Interest Raised by Dual Representation Among Player Agents is a Major Threat to the NCAA and Professional Leagues*, 2 ARIZ. ST. SPORTS & ENT. L. J. 1, 2 (2012) (explaining that, in doing so, agents take advantage of leagues, teams, and players).

141. See Blair, *supra* note 40 (using example of coach whose agent works at large agencies like CAA or IMG, predicting that agents from these agencies who represent players will try to access players through their coach).

142. See *id.* (describing this conflict of interest as "undeniable").

143. See *id.* (concluding that there is no way one person can ethically represent both sides of negotiation).

144. See Associated Press, *Audit: Memphis AD Had Conflict During Pastner Negotiation*, USA TODAY (July 10, 2017, 6:47 PM), <https://www.usatoday.com/story/sports/ncaab/2017/07/10/audit-memphis-ad-had-conflict-during-pastner-negotiation/103588028/> [<https://perma.cc/QQL8-XFLN>] (stating Pastner received raise from \$1.7 million annually to \$2.65 million).

145. See *id.*

benefit from the agent in exchange for Pastner's raise or inappropriately sharing information.¹⁴⁶ However, the university's Board of Regents described the situation as a conflict of interest, recognizing that one person cannot adequately represent both sides of a negotiation.¹⁴⁷

8. *An Agent Representing Multiple Coaches*¹⁴⁸

One can often map a list of an agent's clients like a family tree.¹⁴⁹ For example, the top branch of the aforementioned Uberstine's tree could include former University of Southern California and current Seattle Seahawks head football coach Pete Carroll.¹⁵⁰ Below the top branch are smaller branches of that head coach's current and former assistant coaches. In Carroll's case this could include current Florida Atlantic University head coach Lane Kiffin, current Louisiana State University head coach Ed Orgeron, and former Atlanta Falcons offensive coordinator Steve Sarkisian.¹⁵¹

In November 2013, two of Uberstine's clients vied for the same position.¹⁵² Both Orgeron and Sarkisian sought and were candidates for the University of Southern California head coaching position, begging the question of how Uberstine fulfilled his obligations to both clients.¹⁵³ Uberstine stated, "If a conflict develops at some point, you have a discussion about it. More often than not, they have a longstanding relationship and the client values that and believes the agent can represent them in an appropriate manner."¹⁵⁴

146. *See id.* (noting Pastner's updated contract was not submitted to Tennessee Board of Regents for approval as required for contracts exceeding \$100,000).

147. *See id.*; *see also* Blair, *supra* note 40 (advising that coach whose agent also represents athletics directors should find new agent who exclusively represents coaches).

148. *See id.* (explaining that situation is common).

149. *See* Dave, *supra* note 96 (noting that scenario happens several times annually when agent has multiple clients vying for single position).

150. *See id.* (explaining that Carroll and Uberstine have grown close, with Uberstine serving as advisor for Carroll's charity).

151. *See id.* (noting that Uberstine came recommended to Carroll's assistant coaches when some of them were being considered for head coaching positions).

152. *See id.* (noting this was not first time Uberstine dealt with scenario where two of his clients competed for same job; it happened in 2007 when Kiffin and Sarkisian competed for Raiders coaching job).

153. *See id.* (noting that these entanglements expose deep clientele of select few agents and their ability to leverage connections to steer some of their talent to particular teams).

154. *Id.*

Similar situations arise a few times every year.¹⁵⁵ Consider super-agent Sexton, for example.¹⁵⁶ He currently represents eleven of the fourteen SEC head football coaches alone.¹⁵⁷

9. *Advising the Amateur Athlete*

It is not uncommon for an underclass, draft-eligible football student-athlete to “test the waters” and consider leaving school early to enter the NFL draft and, in the course of his due diligence, meet with an agent to learn more about the business side of professional football. Although amateur football student-athletes with college eligibility remaining may not enter a representation agreement with an agent, they may consult with an agent on the prospects of foregoing eligibility and entering the draft without forfeiting eligibility.¹⁵⁸

However, an attorney-agent providing such counsel faces a potential conflict of interest when advising the student-athlete on his decision.¹⁵⁹ The Comment to *Model Rule* 1.7 states that an attorney’s own interests are not to have an adverse effect upon the representation of a client.¹⁶⁰ If the attorney-agent advises the student-athlete to turn professional, the agent may soon have a new client paying fees.¹⁶¹ However, it may be in the best interests of the student-athlete to return to his or her university and remain an amateur for another season.¹⁶² The signing of the new client would normally be in the interest of the attorney-agent, therefore the attorney-agent in the position of advising a college athlete regarding an early entry decision may face a conflict of interest.

Sports media and academics have covered the above scenarios in depth. Section IV examines a scenario yet to receive much attention—the recruitment of a coach’s players by the coach’s agent.

155. *See id.*

156. *See* Dennis Dodd, *Man Behind the Money*, CBS SPORTS (Jan. 16, 2015), <https://www.cbssports.com/collegefootball/feature/24963891/man-behind-the-money> [<https://perma.cc/DQV7-6ABY>] (describing Sexton as one of most powerful men in sports).

157. *See* Barnett, *supra* note 15. While his client list provides several examples in this Article, readers should not take this Article as an indictment on Sexton or his character. The Author’s interactions with Sexton have all been respectful, and many consider him not only a top coach-agent, but one of the top agents in the country. *See e.g.* Belzer, *supra* note 140, at 10. Sexton’s client list speaks for itself.

158. *See* Brown, *supra* note 42, at 822.

159. *See id.*

160. *See* MODEL RULES OF PROF’L CONDUCT, R.1 1.7 cmt. 10 (2018).

161. *See* Brown, *supra* note 42, at 822.

162. *See id.*

IV. THE CONFLICT OF INTEREST RESULTING FROM AGENTS
RECRUITING THEIR COACH-CLIENTS' DRAFT-ELIGIBLE
UNDERCLASSMEN

Most NCAA football coaches have agents.¹⁶³ This is logical and appropriate given the amount of money that college coaches earn today.¹⁶⁴ There are a number of conflicts of interest that could potentially arise as a result of college coaches having agents who recruit the coaches' athletes as clients.

First, when it comes time for the student-athlete to begin his agent selection process, either at the conclusion of his athletic eligibility or when considering leaving school to enter the draft early, it is natural for the athlete to seek counsel from a coach. The student-athlete and coach relationship could date as far back as high school when the coach began recruiting the student-athlete. The coach both successfully recruited the student-athlete and helped develop him over the course of at least four years to the point where the athlete is on the cusp of a professional football career. Further, the coach may be one of the few individuals who the student-athlete knows who utilizes an agent. Second, it can be natural for the coach to recommend the services of the coach's agent to his student-athlete. If the coach trusts his agent, it may be better than the alternative of the student-athlete signing with an untrustworthy agent.¹⁶⁵ Third, it can be natural for the coach's agent to recruit student-athletes who play or played for the coach. Finally, given the relationship between coaches and student-athletes, the student-athlete may choose the coach's agent based largely on the trust the coach seemingly places in his agent.

What, if anything, is wrong with the growing and seemingly natural trend whereby a football student-athlete signs with his coach's agent? The answer to this question depends on several factors, including who is asked (*e.g.*, the involved agent, competing agents, the NCAA, or the student-athlete) and the facts of each case (*e.g.*, whether the head coach presented the student-athlete with

163. See Justin VanFulpen, *Should College Football Coaches Have Agents?*, THE PODYUM (June 16, 2017), <https://recruit.thepodyum.com/articles/339-should-college-football-coaches-have-agents> [<https://perma.cc/5ZZN-JAGH>] (examining whether coaches should have agents).

164. See Connors, *supra* note 25, at 772 (differentiating between college coaches who tend to make guaranteed money and professional football athletes, whose contracts typically are not guaranteed).

165. See Fowler, *supra* note 34 (relaying feelings of anonymous BCS-level athletic director).

other recommendations or only endorsed his agent). Some are not bothered by student-athletes choosing their coaches' agents.

For example, Texas Tech athletics director Kirby Hocutt sought to ensure that the student-athletes at his university in these situations made their own decisions. Hocutt saw the scenario play out when former Texas Tech tight end Jace Amaro was drafted in the second round of the NFL draft in 2014, while represented by Erik Burkhardt of Select Sports Group, the same agent and agency that represented head coach Kliff Kingsbury, the head coach at the time.¹⁶⁶

Vann McElroy of Select Sports Group has stated that his agency is careful about the player-coach dynamic and does not use its connection to coaches to land players.¹⁶⁷ McElroy argues that representing a player's coach can put the agency at a disadvantage. He stated, "[t]hey'll say that a guy is trying to sway a player because that coach has a player, and that's not always a comfortable thing."¹⁶⁸ Regardless, Select Sports briefly represented former West Virginia University quarterback Geno Smith before Smith switched to Jay-Z's Roc Nation agency.¹⁶⁹ Select Sports represented West Virginia's head coach at the time, Dana Holgorsen, when Smith selected Select Sports to represent him.¹⁷⁰

Those uncomfortable with the scenario whereby a coach's agent recruits the coach's athletes include Big 12 commissioner Bob Bowlsby, Duke University head football coach David Cutcliffe and, generally, players-only agents. Referring to the situation, Bowlsby stated, "[i]t's an absolute conflict of interest. A rule or some sort of accepted practice to prohibit it would be appropriate Even under the best circumstances it doesn't pass the smell test."¹⁷¹ Coach Cutcliffe agreed and stated, "[t]hat's something that needs to be looked at."¹⁷² As a result, Cutcliffe never recommends an agent to a student-athlete in his program.¹⁷³ Not only do agents

166. *See id.* (noting Hocutt talks with parties involved to ensure they understand parameters with coach-player-agent overlap).

167. *See id.* (quoting McElroy as saying: "I think everybody knows the boundaries of that [relationship]").

168. *Id.*

169. *See id.*

170. *See id.* (noting McElroy's statement that his agency's representation of coaches adds credibility to company but company doesn't use connection to land clients).

171. *Id.*

172. *Id.*

173. *See id.* (noting that Cutcliffe's current home state taught college football harsh lesson through former University of North Carolina assistant football coach

who represent both coaches and their players receive a de facto endorsement of their services, they may receive exclusive access to players.¹⁷⁴ Further, players-only agents contend that agents who represent coaches may receive access to pro days and practices at schools that prohibit other agents from attending them.¹⁷⁵ A coach's agent may be placed on the same floor as the student-athletes in a team hotel for a bowl game.¹⁷⁶ Either of these scenarios provides the agent who has the coach as a client with the advantage of coveted access to potential player-clients.¹⁷⁷

In order to fully understand any potential ethical or NCAA ramifications resulting from this practice, it is important to first examine and understand the agent recruiting process generally.

A. The Process of Agents Recruiting College Student-Athletes

Well-known football agent Leigh Steinberg's definition of a successful sports agent is someone with great clients.¹⁷⁸ Thus, recruiting is the lifeblood of the sports agency business.¹⁷⁹ Former agent and NFL executive Andrew Brandt describes agent recruiting as attempting to convince a young man he should sign with him instead of the many others trying to sign him.¹⁸⁰ To football agent Pat Dye, Jr., recruiting is a job interview in which he must sell himself to the student-athlete, his potential client.¹⁸¹

John Blake when NCAA penalized university as part of wide-ranging investigation stemming from charges that Blake steered student-athletes to agent).

174. See Belzer, *supra* note 140, at 10 (explaining that agent's coaching clients may not outright recommend him to coach's student-athletes but coach in effect provides de facto endorsement by providing increased access to student-athletes).

175. See Fowler, *supra* note 34 (referring to such access as "inherent" advantage). A college pro day is where NFL teams put draft eligible players through workouts and testing in advance of the NFL draft. See Greg Gabriel, *Why College Pro Days are Important for NFL Draft Prospects*, BLEACHER REP. (Mar. 6, 2014), <https://bleacherreport.com/articles/1983716-why-college-pro-days-are-important-for-nfl-draft-prospects> [<https://perma.cc/3JR2-KAM9>].

176. See *id.*

177. See *id.*

178. See Leigh Steinberg, *How to be a Great Sports Agent—Signing Prospects Part I*, FORBES (Dec. 3, 2016, 11:39 AM), <https://www.forbes.com/sites/leighsteinberg/2016/12/03/how-to-be-a-great-sports-agent-signing-prospects-part-i/#7f5df1451d92> [<https://perma.cc/A3JS-AUJE>] (referring to successful recruiting as skill every agent must master).

179. See Andrew Brandt, *Football's Other Recruiting*, SPORTS ILLUSTRATED (Dec. 19, 2013), <https://www.si.com/2013/12/19/nfl-agents-recruit-draft-prospects> [<https://perma.cc/84LK-YCYA>].

180. See *id.* (explaining that time period between end of college football's regular season and bowl season is "go time" for agents in their pursuit of new clients).

181. See Kevin Scarbinsky, *Choosing an Agent: The Other Kind of Recruiting*, AL.COM (Mar. 11, 2012, 2:20 PM), <https://www.al.com/sports/index.ssf/2012/>

However, agent recruiting has been described by one football agent as “a shark tank without any lifeguards.”¹⁸² This is due in large part to the fact that there are many NFLPA certified agents vying to represent the few draftees and players who will be undrafted to the NFL.¹⁸³ Thus, agents look for and often need angles into a player’s life during the recruiting process.¹⁸⁴ For Dye, Jr., the business is all about relationships.¹⁸⁵ The usual ways into a student-athlete’s agent selection process include relationships with (or representation of) a school’s coach or coaches, representation of players that the student-athlete knows and/or trusts, representation of players from the student-athlete’s school, representation of players from the student-athlete’s hometown, or being a well-known name in the industry.¹⁸⁶ Make no mistake—agents use the fact that they represent a student-athlete’s coach as a recruiting tool when trying to convince the student-athlete to become a client.¹⁸⁷ Perhaps that is why an agent like Uberstine, agent for former University of Southern California head coach Pete Carroll, enjoyed success recruiting and signing players from the school, including wide receiver Curtis Conway and tight end Jordan Cameron.¹⁸⁸

The agent selection process is extremely important for student-athletes. Most agents are honest and professional, but many do

03/post_345.html [<https://perma.cc/Y4DJ-EUP8>] (describing Dye’s background, which includes being son of Auburn University’s former head football coach and obtaining his law degree).

182. *Id.* (explaining that not all agents follow relevant authorities, and consequence for agents who follow rules is that they get later start on developing relationships with potential clients).

183. *See* Steinberg, *supra* note 178 (noting that in 2017, there were nearly 1,000 NFLPA certified agents vying for representation of many less draftees and players who would go undrafted).

184. *See* Brandt, *supra* note 179 (explaining that cold calls do not work due to competitiveness of business).

185. *See* Scarbinsky, *supra* note 181 (providing example of Dye, Jr., who is example of “Auburn grad” signing former University of Alabama football student-athlete through leveraging relationships with people associated with University of Alabama).

186. *See* Brandt, *supra* note 179.

187. *See* Zach Lowe, *Double Dribble: The Conflict of Interest Concern with Agents Representing Players and Coaches*, GRANTLAND (July 13, 2015), grantland.com/the-triangle/double-dribble-the-conflict-of-interest-concern-with-agents-representing-players-and-coaches [<https://perma.cc/TV2A-G8B8?type=image>] (citing examples of NBA team rosters on which multiple players and head coach utilize same agent).

188. *See* Dave, *supra* note 96 (providing example of secret contract between former NBA player Joe Smith and Minnesota Timberwolves that resulted in sanctions for Timberwolves and NBA declaring Smith to be free agent).

more harm than good.¹⁸⁹ For any athlete, there is nothing better than an honest agent—and nothing worse than a dishonest agent.¹⁹⁰ The selection process can be grueling and complicated, with former University of Alabama running back and third overall pick in the 2012 NFL draft Trent Richardson saying it was “probably the hardest thing ever.”¹⁹¹ The process can overwhelm student-athletes, who often receive fifty text messages and twenty-five calls a day from agents seeking to represent them.¹⁹²

Further, the relevant players in the agent recruiting game—student-athletes, agents, family members of student-athletes and coaches—must learn and follow NFLPA regulations, NCAA rules, university guidelines, and state laws that regulate the agent recruitment process.¹⁹³ However, the NCAA does not have power over agents—that is the NFLPA’s purview.¹⁹⁴ And the NFLPA does not regulate student-athletes—that’s the NCAA’s job.¹⁹⁵ To complicate things further, while the NCAA does not prohibit contact between agents and student-athletes, universities may have policies restricting contact.¹⁹⁶ For example, the University of Alabama allows contact between agents and juniors after December 1 (or the SEC Championship Game if Alabama is involved) “with the head coach’s permission, depending on final exams and the bowl practice schedule.”¹⁹⁷

Perhaps unsurprisingly, the aforementioned Richardson played at the University of Alabama for head coach Nick Saban and then signed with Saban’s agent, Jimmy Sexton, upon leaving school

189. See Anderson, *supra* note 39 (explaining that agent’s harm can be blatantly wrong or subtle scheme, and providing examples of each).

190. See *id.* (providing examples of agents’ dishonest acts).

191. See Scarbinsky, *supra* note 181 (explaining that agent selection is hard because agents tend to tell “you what you want to hear”).

192. See *id.* (likening agent recruiting to college coaches recruiting high school athletes).

193. See *id.* Note the Sports Agent Responsibility and Trust Act of 2004 is a federal statute, the goal of which is intended to regulate sports agent conduct during the student-athlete recruitment period. Heitner, *supra* note 50, at 246–47. However, it is widely considered weak and thus the author does not include it in the Article. *Id.*

194. See Scarbinsky, *supra* note 181. NCAA regulations can carry little weight with agents since they are not employed by an NCAA member university. See Mastalaxis, *supra* note 26, at 89.

195. See Scarbinsky, *supra* note 181.

196. See *id.* (noting that universities may have more restrictive rules governing contact between agents and student-athletes).

197. *Id.*

early and declaring for the draft.¹⁹⁸ The following section examines whether this scenario constitutes a conflict of interest for the coach's agent.

B. It is a Conflict of Interest When Agents Recruit and Sign their Coach-Clients' Draft-Eligible Underclassmen

When agents recruit draft-eligible underclassmen, the agents' overall message tends to be that the player should leave school and enter the draft early.¹⁹⁹ For example, former Clemson University and NFL linebacker Keith Adams heard from forty different agents that a team would draft him in the first round of the 2001 NFL draft.²⁰⁰ On draft day, however, an NFL team did not select Adams until the draft's seventh round.²⁰¹ Under NCAA rules, once a football student-athlete goes through the NFL draft, perhaps due in large part to the urging of an agent (or agents), the student-athlete may not return to his university and compete in football, regardless of whether or where an NFL team selected him.²⁰² The loss of a student-athlete in this situation also deprives the coaching staff of the student-athlete's contributions to the team in upcoming seasons.²⁰³

198. *See id.* (noting that, under University of Alabama's rules, agents must receive head coach's permission to contact student-athletes during certain times).

199. *See Connors, supra* note 25, at 768–69 (explaining that student-athletes tend to listen only to those agents who urge them to leave school early and enter draft).

200. *See id.* at 769 (describing Adams as “perfect example” of junior who listens only to agents who encourage student-athlete to leave school early for draft).

201. *See id.* (noting that Adams failed to take advantage of NFL process whereby it provides juniors with projected draft round in advance of draft to assist them in making informed decision whether to leave school early).

202. *See* Richard Johnson, *Should Players Who Aren't Drafted or Signed be Allowed to Return to School? Why Not?*, SB NATION (May 1, 2018, 8:02 AM), <https://www.sbnation.com/college-football/2018/4/28/17280426/undrafted-players-ncaa-basketball-commission-reports-agents> [<https://perma.cc/9HVV-JTPZ>] (arguing that student-athletes who go through NFL draft and are not drafted or signed should be permitted to return to school with collegiate eligibility). Note the NCAA recently implemented changes that will permit some men's basketball student-athletes to return to school after entering and going through the NBA draft. *See* Jason Belzer, *NCAA Unveils New Rules for College Basketball, But They May Wind Up Deepening Old Problems*, FORBES (Aug. 8, 2018, 4:18 PM), <https://www.forbes.com/sites/jasonbelzer/2018/08/08/ncaa-college-basketball-rules/#26fce0fc6115> [<https://perma.cc/U4UE-G53S>].

203. The reader should note that this Article does not argue that it is a conflict of interest for a coach-agent to recruit a coach-client's former player, even one who just recently exhausted his eligibility to compete under NCAA rules. If a coach-agent recruits and signs such a former player from a coach-client's program, the fact that the player has no remaining competition eligibility means he may not compete for the coach again. Thus, the interests of the coach and player are not adverse and the agent may take on simultaneous representation of the coach and

By signing a representation agreement with his coach's agent, the underclassman forfeits his remaining college athletics eligibility under NCAA rules and can no longer compete for the coach.²⁰⁴ Thus, the agent adds to his client list but weakens the coach's team. In doing so, the agent fails to align his incentives with those of his client (*i.e.*, the coach), fails to fulfill his duty to exercise the utmost good faith and loyalty to the coach, and fails to avoid representing conflicting interests. Therefore, the agent's recruitment and signing of a draft-eligible underclassman from a client's team results in a conflict of interest under agency law. This is true regardless of whether the agent is an attorney.

There are additional implications for attorney-agents who engage in this practice. Recall that one of the main considerations of conflict of interest rules is unimpaired "zealous" loyalty to a client's interests.²⁰⁵ Under *Model Rule 1.7(a)*, an attorney must decline representation of a client in a matter where the client's interests are "directly adverse" to another existing client.²⁰⁶ It is hard to see how a coach's agent who recruits and signs a client's underclassman can maintain that he was zealously loyal to the coach when, due to the agent's actions (signing a representation agreement with the player), the underclassman may no longer play for the coach.

Further, as stated above, *Model Rule 1.7(b)* prohibits an attorney from representing a client in situations where the attorney's abilities are "materially limited" by the attorney's responsibilities to another client or where the attorney's own self-interest would conflict with the client's.²⁰⁷ Again, *Model Rule 1.7(b)* addresses the quality of the representation provided to each client, stressing that attorneys should maintain independence of judgment unclouded by competing loyalties.²⁰⁸ By signing away a client's player, the attorney-agent's self-interests in adding to his client list conflicts with

former player free from implication of legal conflict of interest law and guidelines (although some such as Commissioner Bowsby and Coach Cutcliffe express moral concerns referenced in Section IV above). There is, however, still a potential for NCAA rules implications when coach-agents recruit their coach's players. For further discussion of these issues, see *infra* notes 214–241 and accompanying text.

204. See NCAA, 2017-18 Division I Manual § 12.3.1 (2017), available at <http://www.ncaapublications.com/productdownloads/D118.pdf> [<https://perma.cc/4J7G-US8R>] [hereinafter NCAA Manual 2017-2018].

205. See Brown, *supra* note 42, at 827.

206. See *id.* at 827–28.

207. See *id.* at 828 (providing example that attorney may not advocate against individual who attorney represents in another matter, even if the matters are "wholly unrelated").

208. See Rosner, *supra* note 24, at 224 (explaining that there must be material limitation on representation before Rule 1.7(b) can be invoked).

the coach's interest in fielding the best possible team. Further, by fielding a weakened team, the coach may lose more games, making it more difficult for the agent to help the coach keep his job and/or find a new job. Thus, when an agent recruits a client's underclassmen, the agent engages in a practice that Model Rule 1.7(b) seeks to prohibit.

Further, agents may not circumvent this conflict of interest via waiver. As stated above, an attorney may represent clients with potentially conflicting interests without running afoul of the *Model Rules* so long as both parties provide informed consent and the attorney reasonably concludes the conflicting representation will not be a detriment to either client.²⁰⁹ A part of the analysis includes an objective examination in that a reasonably prudent and competent attorney must agree with the attorney-agent that the attorney-agent's relationship with the coach would not be affected.²¹⁰ A reasonably prudent and competent attorney would agree that the signing of one of the coach's players is fundamentally antagonistic to the coach's interests in retaining his most talented players and fielding the most competitive team, and thus the attorney-agent may not proceed with signing the player.

Consent may not even be a consideration, however. A situation is non-consentable where the concern for the protection of the integrity of the attorney-client relationship outweighs the desire for client autonomy.²¹¹ This occurs most often in situations involving a client who is unsophisticated in retaining attorneys or inadequately informed about or incapable of understanding the risks of the conflict of interest.²¹² That is often the case in these situations. The athlete is young with little experience in the fields of business and negotiation and susceptible to exploitation by agents.²¹³ Thus, consent may not even be an option, and if it is, it is a poor one.

209. *See id.*

210. *See id.* at 222.

211. *See id.* at 223 (noting that representation is non-consentable when it is not reasonably likely lawyer can provide adequate representation to at least one of two or more clients).

212. *See id.*

213. *See* Masteralexis, *supra* note 26, at 80 (explaining that agents can take advantage of circumstances to control process and final outcomes, with minimal input from clients).

V. POTENTIAL NCAA RULES IMPLICATIONS FOR COLLEGE COACHES
WHEN THEIR AGENTS RECRUIT CURRENT AND FORMER
STUDENT-ATHLETES FROM THEIR PROGRAMS

As stated above, the relevant stakeholders largely ignore conflicts of interest in the sports agency industry.²¹⁴ Thus, agents are likely to continue to recruit both their client's underclassmen—despite the practice resulting in a conflict of interest—and former players. But what, if any, NCAA rules implications exist for college coaches whose agents recruit their current and former student-athletes?

On its face, a student-athlete choosing his coach's agent is permissible under NCAA regulations so long as the agreement takes place after the student-athlete's final college game.²¹⁵ However, one does not have to look hard to see how NCAA legislation could come into play during an agent's recruitment of a student-athlete. When an agent's recruitment of a student-athlete results in an NCAA violation, penalties can adversely affect the student-athlete (if he retains eligibility), the coach, and the university.

This section focuses on one potential way an agent's player recruitment can lead to an NCAA violation—when the player's coach receives something of value from an agent in exchange for steering the player to the agent. This scenario should be top of mind given the recent and well-publicized FBI investigation into men's college basketball. In this analysis, it is important to understand relevant NCAA legislation. After an examination of the legislation, this section discusses the application of this legislation in both a case involving former University of North Carolina assistant football coach John Blake and the allegations stemming from the FBI investigation into corruption in men's college basketball. Finally, this section examines the recent Commission on College Basketball report's recommendations regarding agents, which acknowledge the existence of at least the temptation of coaches to accept payment for steering players to an agent.

A. Relevant NCAA Legislation

NCAA legislation with respect to student-athletes is fairly straightforward. Student-athletes jeopardize their eligibility by entering an agreement with an agent or accepting a benefit from an

214. See Rosner, *supra* note 24, at 195–96 (noting that conflicts of interest are also widespread and difficult to prove).

215. See Masteralexis, *supra* note 26, at 69 (explaining NCAA legislation applicable to student-athlete interactions and relationships with agents).

agent.²¹⁶ Things get more complicated when considering the NCAA's broad definition of an agent. In relevant part, an agent is an individual who: (1) represents or attempts to represent an individual for the purpose of marketing his athletics ability or reputation for financial gain or (2) seeks to obtain any type of financial gain or benefit from a student-athlete's potential earnings as a professional athlete.²¹⁷

This broad definition of an agent comes into play when considering the scenario in which a coach accepts payment or a benefit from an agent for steering a player to the agent. NCAA rules prohibit athletic department staff members from representing an individual in the marketing of athletics ability or reputation to an agent and for receiving compensation or gratuities for such services.²¹⁸ An exception to this rule permits a head coach to contact agents on behalf of a player provided the coach does not receive compensation for such services.²¹⁹ As illustrated by the NCAA case involving now-former University of North Carolina ("UNC") assistant football coach John Blake described below, a coach who accepts payment or a benefit for steering a player to an agent violates NCAA rules. NCAA rules further prohibit coaches from receiving benefits in exchange for facilitating or arranging meetings between a student-athlete and an agent.²²⁰

B. The John Blake Case

Until the recent FBI investigation into men's college basketball, a 2012 case involving now-former UNC assistant football coach John Blake and his ties to sports agent Gary Wichard was perhaps the most notorious case involving a college coach involved in agent player recruiting.²²¹ Blake was associated with his friend Wichard's agency.²²² The agency issued Blake a company credit card and

216. See NCAA Manual 2017-2018, *supra* note 204, at §§ 12.3.1, 12.3.1.3.

217. See *id.* at § 12.02.1.

218. See *id.* at § 11.1.3.

219. See *id.* at § 11.1.3.1.

220. See *id.* at § 10.1(d).

221. See Andy Staples, *An Inside Look at the Case Against Former UNC Assistant John Blake*, SPORTS ILLUSTRATED (Oct. 26, 2011), <https://www.si.com/more-sports/2011/10/26/john-blake> [<https://perma.cc/BW6T-RYTN>] (outlining information obtained by Sports Illustrated in advance of Committee on Infractions hearing).

222. See NAT'L COLLEGIATE ATHLETIC ASS'N, University of North Carolina Public Infractions Decision, 2 (Mar. 12, 2012), *available at* <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102358> [<https://perma.cc/WBK7-PT25>] (explaining that relationship between Blake and Wichard was discovered during course of investigation into receipt of extra benefits by student-athletes).

published a brochure describing Blake as a company vice president.²²³ Blake also touted the agency and his work with it in news articles.²²⁴ There was also evidence of a \$45,000 deposit into Blake's bank account that originated at a bank in New York through which Wichard conducted business.²²⁵

The NCAA Enforcement Staff had reason to believe that, while an assistant coach at UNC, Blake helped recruit UNC student-athletes to the agency and was compensated for doing so.²²⁶ In its report adjudicating the matter, the NCAA Committee on Infractions ("COI") affirmed this belief.²²⁷ As part of the penalties it issued in this case, the COI imposed a three-year show-cause order on Blake, who by then had lost his job at UNC.²²⁸ While an extreme example, the John Blake case should caution coaches from becoming overly involved in the agent recruiting game.

C. FBI Investigation Into Men's College Basketball

Recent events in men's college basketball serve as a more contemporary deterrent to coaches from involvement in agent player recruiting. An FBI investigation into corruption in men's college basketball indicates that more than twenty of the nation's top men's basketball programs possibly broke NCAA rules.²²⁹ Examples include now-former University of Arizona assistant coach Emanuel "Book" Richardson and now-former University of Southern California assistant men's basketball coach Tony Bland both allegedly accepting payments from an agent to steer student-athletes to the

223. *See id.* (describing "extensive evidence" that established connection between Blake and Wichard's agency).

224. *See id.*

225. *See id.* at 13.

226. *See id.* at 15, 21 (explaining that Enforcement Staff was "particularly interested" in details regarding a \$45,000 deposit made into Blake's bank account originating from New York bank through which Wichard conducted business).

227. *See id.* at 18 (concluding that Blake continued recruiting clients for Wichard's agency even after returning to coaching).

228. *See id.* at 24. A show-cause order essentially means that NCAA penalties stick with the individual on whom imposed for a designated period of time and could be transferred to another school that hires the coach before the order expires. *See* Nicole Auerbach, *The Perception and Reality of NCAA Show-Cause Penalties*, USA TODAY (May 27, 2014, 7:15 PM), <https://www.usatoday.com/story/sports/college/2014/05/27/ncaa-show-cause-penalty-bruce-pearl-kelvin-sampson/9632273/> [<https://perma.cc/7NBV-KVWW>].

229. *See* Mitch Sherman, *Everything You Need to Know About the College Basketball Scandal*, ESPN (Feb. 23, 2018), www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents [<https://perma.cc/2ZG5-6TY6>] (setting forth information on relevant individuals and universities as well as timeline of FBI investigation).

agent.²³⁰ Both assistant coaches have since lost their jobs and face not only federal indictments but a likelihood of allegations of NCAA rules violations when the NCAA Enforcement staff completes its investigation.²³¹

D. Commission on College Basketball Recommendations

In response to the FBI investigation, the NCAA Board of Governors, Division I Board of Directors, and NCAA President established the Commission on College Basketball in October 2017.²³² Composed of individuals such as former U.S. Secretary of State Dr. Condoleezza Rice (chair of the Commission), Ohio State University athletics director Gene Smith, former players David Robinson and Grant Hill, and former head coaches Mike Montgomery and John Thompson, III, the Commission's charges included the gathering of information to make transformative recommendations to protect the integrity of men's college basketball.²³³

In the Commission's April 2018 *Report and Recommendations to Address the Issues Facing Collegiate Basketball*, the Commission recognized that agents, seeking to enter into relationships with potential professionals when they are in high school and college, violate NCAA rules by paying players and those with influence over players, including coaches.²³⁴ Thus, the Commission recognizes and acknowledges the present-day temptation of college coaches accepting payment to steer players to an agent in violation of NCAA rules.

230. *See id.*

231. *See id.* (explaining that FBI charges included involvement in fraud and corruption schemes).

232. *See* Commission on College Basketball, *Commission on College Basketball Charter*, NCAA, § 1 (Apr. 2018), available at www.ncaa.org/governance/commission-college-basketball-charter [<https://perma.cc/SQ4H-DR8R>] (including information on group including its charges, makeup, and responsibilities).

233. *See id.* at § 2.

234. *See* Commission on College Basketball, *Report and Recommendations to Address the Issues Facing Collegiate Basketball*, COMM'N ON COLLEGE BASKETBALL Recommendation § 1A (Apr. 2018), available at www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf [<https://perma.cc/HT78-FLX8>] (issuing report and recommendations to NCAA Board of Governors, Division I Board of Directors, and NCAA President Mark Emmert).

E. Recommended Parameters a Coach Should Put in Place
Should His Agent Wish to Recruit the Coach's Players so as to
Mitigate the Likelihood of NCAA Violations

Previous sections of this Article show that it is a conflict of interest for agents who represent coaches to recruit and sign their clients' underclassmen and that coaches are at risk of NCAA rules violations when their agents recruit their players. While agents should not recruit their clients' underclassmen, they may still be tempted to do so. Further, no matter how much they trust their agents, coaches are still at risk when their agents recruit the coaches' student-athletes—both current and former. This section details parameters that coaches should put in place. Some of these parameters can be memorialized in the representation agreement between the coach and his agent to mitigate risks of NCAA rules violations associated with agents recruiting their clients' players.²³⁵

1. *A Coach and His Agent Should Agree that the Agent Will Not Recruit Underclassmen from the Coach's Program*

Section III shows the existence of a conflict of interest when agents recruit and sign their clients' underclassmen. Thus, agents should not engage in the practice for legal reasons. Further, when an agent's recruitment of a student-athlete with remaining eligibility violates NCAA rules, the potential consequences for the student-athlete, coach and university—loss of competition eligibility—are significant (see Section V.A. above). A student-athlete without eligibility is of little to no help to his coach's win-loss record. An example is an agent who recruited one of his client's underclassman at a university in Texas and, while doing so, offered the student-athlete \$50,000 to commit to eventually signing with the agent.²³⁶ As covered in Section V.A. above, had the student-athlete accepted the payment and been caught by the NCAA, it would have rendered him ineligible, likely weakening the team and perhaps costing the coach victories. Coaches should eliminate this risk by contractually prohibiting their agents from recruiting their underclassmen.

235. The Author does not suggest that agents who represent coaches are more unscrupulous than players-only agents; rather, coaches likely have more control over the agents who they hire and with whom they have a contract.

236. See Connors, *supra* note 25, at 770 (noting that student-athlete remained in compliance with NCAA legislation by refusing offer).

2. *A Coach and His Agent Should Agree that the Agent Will Not Provide Anything of Value to the Coach if the Agent Signs One of the Coach's Players*²³⁷

A coach and his agent should stipulate that the agent will not provide any type of benefit (*e.g.*, payment or fee discount) if the agent meets with or signs one of the coach's former players.²³⁸ Doing so would protect not only the coach under relevant NCAA legislation (see Section IV.A. above), but also the agent if the provision of such a benefit triggers relevant players' association rules or state laws. For example, NFLPA rules prohibit agents from providing or offering money or something of value to someone for the purpose of inducing or encouraging that person to recommend the services of the agent.²³⁹ The State of Texas codified a similar provision, which prohibits agents from furnishing something of value to someone to induce an athlete to enter an agreement with that agent.²⁴⁰

3. *To Avoid Even the Appearance of Impropriety, Coaches Should be Leery of Involvement in a Player's Agent Selection Process*

The conclusions reached elsewhere in this Article warrant Coach Cutcliffe's hesitation toward recommending an agent to a player. A coach's involvement in a player's agent selection process can put the coach at risk of potential NCAA violations in his or her program. Coaches would be wise to follow the trend of involving athletics department compliance staff members in the player's agent selection process.²⁴¹ If the coach feels compelled to recom-

237. A head coach would be wise to stipulate in writing to both his agent and each of his staff members that the agent may not provide, and the staff member may not accept, something of value should a player from the program sign with the agent. This is due to emphasis on head coach responsibility for violations within his program memorialized in NCAA Bylaw 11.1.1.1. See generally Josh Lens, *NCAA Head Coach Responsibilities Legislation*, 14 DEPAUL J. SPORTS L. 33 (2018) (detailing NCAA head coach responsibilities legislation and its application and providing recommendations for head coaches to consider implementing to mitigate likelihood of allegation or finding).

238. The Author had the privilege and honor of assisting many Baylor University student-athletes and their family members in the agent selection process. Toward the end of every calendar year, an agency who represents several high-profile NFL players would send the Author a popcorn tin—even when the agency had not signed any Baylor student-athletes. In an abundance of caution to avoid ever being accused of providing favoritism to the agency, the Author would never accept the popcorn tin. The Author maintains that the gift was innocent and does not even like popcorn that much anyway.

239. See NFL Players Association, *supra* note 60, at §3(B)(3).

240. See TEXAS OCC. CODE § 2051.351(9) (2011), available at <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.2051.htm> [<https://perma.cc/CPT2-PJFT>].

241. See Liz Mullen, *Agent Searches Increasingly Move to Campus*, SPORTS BUS. J. (Jan. 9, 2012), <https://www.sportsbusinessdaily.com/Journal/Issues/2012/01/09/>

mend that his or her student-athlete consider the coach's agent, the coach should recommend that the player interview multiple agents.

VI. CONCLUSION

Agents provide a wide range of valuable services to both their coach and player clients. However, a college coach should be circumspect of his or her agent recruiting players from his or her program. When an agent recruits and signs a client's underclassmen, the agent does so at the expense of the coach's welfare and thus engages in a conflict of interest. Further, agent recruiting can result in significant NCAA violations that can adversely impact the coach and university. For example, there are recent high-profile cases where college coaches allegedly accepted payment for steering players to particular agents. As a result of these allegations, coaches lost their jobs and their universities face the likelihood of NCAA investigations and penalties. While coaches do not need to adopt the "avoid agents at all costs" attitude of Vince Lombardi, they would be wise to adopt and implement parameters mitigating the likelihood of NCAA violations.

Lagor-and-Agents.aspx [<https://perma.cc/D44D-TUSL>]. The Author was heavily involved in Heisman winner Robert Griffin III's agent selection process referenced in Mullen's article.

