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The Role of Athlete-Agents and the Law: A Conflict of Interest?

Justin Park

In 1983, running back Billy Sims was entering the last year in a three-year contract with the Detroit Lions. The managers of the Lions offered Sims a $3.5 million contract extension to keep him in Detroit; however, knowledge of the contract extension never reached him.2 Sims’ agent, Jerry Argovitz, having a significant financial interest in the USFL expansion team, the Houston Gamblers, wanted Sims to sign with the Gamblers and did not relay to him the news of the contract extension.3 Instead, Argovitz negotiated a contract for Sims with the Houston Gamblers for $3.5 million. Argovitz did not represent his client’s best interest; in contrast, he used his client’s exorbitant earning potential to create financial gain for himself. Argovitz’s actions warranted a lawsuit in Detroit Lions, Inc. v. Argovitz,4 although numerous laws and regulations have since been enacted concerning athlete-agents, they still do not effectively prevent similar problems from occurring. Rather, the laws rely on legal ideas whose definitions are disputed. This is a major issue, considering the

1 Justin Park is a junior at Brigham Young University. He is studying German with a minor in management. The author would like to give special thanks to Adam Edwards for his many insightful contributions to this paper.


3 Id.

immense opportunity to exploit professional athletes’ substantial earnings.

Large annual salaries are seen in other sports leagues such as the NBA, NHL and recently, the MLS. In 2013, the average salary for a major league baseball player was $3,386,212, while the minimum salary for 2014 was set at $500,000.\(^5\) Although athletes and executives benefit monetarily from the success of the multi-billion dollar sports industry in the U.S.,\(^6\) they are not the only parties taking advantage of the financial success of professional sports. Representatives of professional athletes, known as athlete-agents or “sports agents” can earn millions of dollars by representing professional athletes in contract negotiations and other services. Current regulations allow athlete-agents to earn up to 3\(^\%\),\(^7\) 4\(^\%\),\(^8\) 4\(^\%\),\(^9\) and 5\(^\%\)\(^10\) in the NFL, NHL, NBA and MLB respectively. Due to the high earning potential of athlete-agents and the relatively low number of potential clients, the athlete-agent industry is a highly competitive field in which agents compete fiercely for clients in order to cash-in on potentially lucrative professional-sports-services contracts.

For many athlete-agents, revenue from contract negotiations is only the tip of the iceberg as far as moneymaking is concerned. Providing financial services from the money earned from contracts can be turned into large amounts of cash through investments and other

business opportunities initiated by the athlete-agent. However, legal issues are prone to arise from what happens to the money after the contract has been negotiated. These issues particularly concern conflicts of interests and violations of the fiduciary duty that the athlete-agent has towards his/her clients.

While this review does not consider all aspects of the athlete-agent industry, it will focus on the fiduciary relationship between athlete-agents and athletes. This review will examine how the relationship is defined by current laws and regulations and how it is threatened by deficiencies within them, which allow athlete-agents to engage in practices that take advantage of their clients. Reform, such as a separation of duties in the form of a law or regulation, is needed in order for the laws and regulations to more appropriately govern athlete-agents considering they are engaged in a fiduciary relationship with their clients.

Section I of this paper will specify the problem and introduce the various responsibilities of an athlete-agent as well as the fiduciary duty. Section II will examine legislation and regulations placed upon athlete-agents, including the UAAA, SPARTA and the players associations’ regulations. Section III will discuss the fiduciary relationship between athlete-agents and athletes in the context of current laws and regulations. Finally, section IV will explore possible remedies and their counterarguments for the issue at hand.

I. ROLES OF AN ATHLETE-AGENT AND THE FIDUCIARY DUTY

It is safe to say that athlete-agents play an important role in managing many aspects of athletes’ lives. For example, they assume significant responsibilities through representing their clients in a wide range of matters, including:

Contract negotiations, tax planning, financial planning, money management, investments, estate planning, income tax preparation, incorporating the client, endorsements, sports medicine consultation, physical health consultation,
post-career development, career and personal development and counseling, legal consultation and insurance matters.\textsuperscript{11}

Due to the complex and important nature of the services that an athlete-agent may provide, laws and regulations have been established in order to attempt to protect athletes from unscrupulous activities perpetrated by athlete-agents. However, the current laws and regulations do not effectively define the role of the agent-athlete. A clear, defined role for the athlete-agent as well as stipulations to limit his/her power will reduce conflict of interest, namely a separation of duties between contract negotiation and financial advisement.

This clearer and more defined role within the laws and regulations concerning athlete-agents is necessary because athlete-agents’ owe their clients a fiduciary duty,\textsuperscript{12} which is the “legal duty to act solely in another party’s interests.”\textsuperscript{13} The opportunity for significant monetary gain as well as the wide range of services that are offered by athlete-agents often leads to problematic actions by the athlete-agent due to an overreliance on the somewhat vague definition of fiduciary duty.\textsuperscript{14} Often, these problems come in the form of mismanagement of the client’s money, improper incentives, and other activities that violate those fiduciary duties. These all-too-common improprieties create the perception that the athlete representation business is “composed of individuals too willing to compromise ethics and competent representation for financial gain.”\textsuperscript{15}

While the current laws and regulations limit athlete-agents’ power in order to prevent legal issues, athlete-agents still retain the ability to act in behalf of athletes in a wide range of services that could possibly lead to a conflict of interest, which is a “situation that

\begin{itemize}
\item \textsuperscript{12} \textit{NFLPA}, supra note 7 § 2.C.
\item \textsuperscript{13} Definition of Fiduciary Duty, Cornell Univ. Sch. of Law, http://www.law.cornell.edu/wex/fiduciary_duty [hereinafter Fiduciary Duty].
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} Kenneth L. Shropshire & Timothy Davis, \textit{Business of Sports Agents} I (University of Pennsylvania Press, 2nd ed. 2008).
\end{itemize}
can undermine a person due to self interest,”\textsuperscript{16} thus violating the fiduciary duties owed to the client. Therefore, the relationship between the agent and the athlete is very complex and at times problematic.

II. UAAA, SPARTA AND THE PLAYERS ASSOCIATIONS

In 2013, former NFL player Terrell Owens sued his former agent Drew Rosenhaus for breach of fiduciary duty, fraud and negligence.\textsuperscript{17} Rosenhaus allegedly advised Owens and dozens of other clients to invest their money with Jeff Rubin. Rubin, a close business associate of Drew Rosenhaus, invested the athlete’s money in a now bankrupt casino, costing the athletes as much as $43.6 million.\textsuperscript{18} The point of conflict is not necessarily that Jeff Rubin was an inexperienced and unskilled financial manager; it is that Rosenhaus potentially violated his fiduciary duty by advising his clients to invest their money in his business associate’s failed casino project. Rosenhaus denies any relationship to the casino,\textsuperscript{19} and his allegations of a breach of fiduciary relationship remain contested due to the inadequate existing laws and regulations.

Unfortunately, the example of Drew Rosenhaus is just the most recent in a long line of athlete-agents who have been accused of taking advantage of their clients for personal gain. Because athlete-agents have such a responsibility-assuming relationship with their clients, they have the opportunity to use their clients’ high earnings for their own leverage and personal gain. This violation of trust between athletes and athlete-agents is nothing new, as lawmakers took


\textsuperscript{19} \textit{Id.}
action at the beginning of this century to further prevent these types of injustices. Two different pieces of legislation were created, which have attempted to more clearly define the relationship between athlete-agent and athlete: the Uniform Athlete Agents Act (2000) and the Sports Agent Responsibility and Trust Act (2004).

The Uniform Athlete Agents Act (2000), also known as UAAA, was drafted by the National Conference of Commissioners on Uniform State Laws\(^{20}\) and has been implemented by 40 states.\(^{21}\) The UAAA was meant to provide uniformity among the states by offering a centralized law that would counteract the many conflicting laws concerning athlete-agents, which varied from state to state.\(^{22}\)

The UAAA (2000) concerns itself mostly with student-athletes and their relationship with athlete-agents. The act defines a student-athlete as: “an individual who engages in, is eligible to engage in, or may be eligible in the future to engage in, any intercollegiate sport.”\(^{23}\) Student-athletes are protected by the UAAA from athlete-agents’ recruitment practices while they remain student-athletes. Under the act, athlete-agents may not “give any materially false or misleading information,”\(^{24}\) “furnish anything of value to a student-athlete before the student-athlete enters into the agency contract,”\(^{25}\) or “furnish anything of value to any individual other than the student-athlete or another registered athlete agent.”\(^{26}\) These restrictions, along with others, are, if broken, punishable by law in the states that


\(^{22}\) Shropshire & Davis, supra note 15 at 162.


have adopted the UAAA.\textsuperscript{27} These measures are necessary to protect the amateur status of collegiate athletes.

Although the primary purpose of the UAAA is focused on protecting student-athletes up until they become professional-athletes, portions of the act specify qualification requirements for athlete-agents. The act states that individuals may not act as athlete-agents unless they are registered with each state that has adopted the UAAA.\textsuperscript{28} Under the UAAA athlete-agents are also required to provide pertinent information found in the agency contract with the athlete. One function of the agency contract, under UAAA specifications, is to warn the student-athlete that his/her collegiate eligibility will be lost if they request the services of an agent.\textsuperscript{29} It also instructs athlete-agents to inform the student-athlete’s athletic director within 72 hours of signing the agency contract, thereby, protecting the educational institution from damaging NCAA penalties.\textsuperscript{30} Therefore the UAAA, first and foremost, protects educational institutions from NCAA sanctions; secondly, it protects student-athletes from being considered ineligible to compete at the collegiate level. While the UAAA achieves its purpose in regulating athlete-agents’ activities with student-athletes, it fails to appropriately define and structure the agent-athlete relationship in legal terms. The act is void of any restrictions that effect athletes after they have finished their collegiate careers. The relationship between athlete-agent and the post-collegiate athlete is left untouched.

Like the UAAA, the Sports Agent Responsibility and Trust Act (2004), also known as SPARTA, primarily protects educational institutions as well as student-athletes. However, SPARTA is federal law that was enacted by Congress in 2004. Although it is intended to

\begin{flushleft}
\textsuperscript{27} \textit{Unif. Athlete Agent Act}, \textit{supra} note 23 § 15.
\textsuperscript{28} \textit{Unif. Athlete Agent Act}, \textit{supra} note 23 § 4.A.
\textsuperscript{29} \textit{Id}.
\end{flushleft}
work congruently with the UAAA, it repeats many points found in the UAAA. Similar to the UAAA, SPARTA inadequately addresses the post-collegiate relationship between athlete and athlete-agent. In essence, SPARTA is a simplified and more direct version of the UAAA. Although both SPARTA and the UAAA provide a foundation for more laws and regulations to be added, the two acts leave much to be interpreted by the sports leagues themselves. In particular, the regulation of athlete-agents and the defining of the agent-athlete relationship are left primarily to the players associations.

The players associations (labor unions) of the major sports in the United States hold most of the responsibility to regulate athlete-agents. Players associations derive their authority from the National Labor Relations Act, which states they have the power to regulate athlete-agents. Each players association has set forth regulations that are supposed to work with state and federal laws that concern athlete-agents. These regulations set by the players associations are more restrictive and defining than the federal laws and many state laws.

The players associations’ regulations encompass all services provided by the athlete-agent. For example, the NFLPA’s regulations cover the providing of counsel with respect to negotiating their individual contracts with Clubs, as well as “any other activity or conduct which directly bears upon the Contract Advisor’s integrity, competence or ability to properly represent individual NFL players and the NFLPA in contract negotiations.” The other players associations have established similar regulations regarding the scope of their regulation. For the purpose of simplicity, in this paper I will use the NFLPA’s regulations as a representative of the players associations’ regulations from the other leagues. The seemingly comprehensive coverage could explain the lack of protection provided by state and

33 NFLPA, supra note NFLPA 7 § 1.B.
34 See generally NFLPA Regulations Governing Contract Advisors, N.F.L.P.A. (2012) (it is generally accepted that the NFLPA has the most restrictive regulations).
federal laws for post-collegiate professional athletes. In the players associations’ regulations, the relationship between an athlete-agent and an athlete is defined as a fiduciary relationship. More specifically, the regulations state that an agent should “act at all times in a fiduciary capacity on behalf of players.” However, the regulations do not prohibit athlete-agents from providing financial services to clients, which can lead to conflict and lawsuits, as is seen in the Rosenhaus example. Although the players associations are more effective in defining many aspects of the relationship between athletes and athlete-agents than the UAAA and SPARTA, they still fail to address the fiduciary conflict that exists concerning the athlete-agents’ ability to perform so many services, specifically financial services. The failure of the players associations as well as the UAAA and SPARTA allow athlete-agents to engage in practices that violate their fiduciary duty. Section III will discuss threats to the fiduciary relationship between agent and athlete despite laws and regulations, which ineffectively control the behavior of athlete-agents towards their clients.

III. THE AGENT-ATHLETE RELATIONSHIP

Federal and state laws, as well as the regulations set forth by the players associations, explicitly, and implicitly, define the relationship between an athlete-agent and an athlete as a fiduciary relationship. A fiduciary relationship between athlete-agent and athlete requires the athlete-agent to act in the best interest of the athlete in all services entrusted to the athlete-agent. The regulations established by the players associations do not restrict the range of services that the athlete-agent can perform on behalf of the athlete. The services that an athlete-agent can perform range from contract negotiation to money management, and even to estate planning. This is the deficiency in the laws and regulations that most often leads to fraud and

35 NFLPA, supra note 7 § 3.A(17).
36 Id.
mismanagement on the side of the athlete-agent. Fraud and mismanagement occur among many other high-income professions, however, athletes are particularly vulnerable due to the breadth of services that one individual or firm is allowed to provide to athletes, as well as the nature of professional sports, which requires the athlete to focus solely on their performance on the field.\textsuperscript{38}

In addition to giving counsel in contract negotiations, athlete-agents often offer a wide range of financial services to their clients, permitted under the current laws and regulations. Some agents work for agency firms that employ several people in order to handle the athlete’s finances. On the other hand, some agents operate individually, separate from any firm, and act as an agent, financial advisor, and asset manager. Regardless of whether the athlete-agent works as an individual or a part of a larger firm, the separation of services is necessary to avoid a conflict of interest, which disrupts the fiduciary relationship that is expressed in the laws and regulations concerning athlete-agents.

The conflict of interest occurs when an athlete-agent negotiates a contract for the athlete, and then uses the athlete’s money that was made from the contract to invest in the agent’s private endeavors. Many times the athlete-agents are neither financial advisors nor financial managers, but rather have connections to them. This often leads to poor investments that were the result of pure self-interest on the side of the athlete-agent. The law should obligate the athlete-agent to have the athlete’s best interest in mind while acting on his/her behalf, thus complying with their fiduciary role. However, the law fails to fulfill this purpose, thus, leading to the agent violating the fiduciary duty.

One prominent example is of former financial advisor and founder of the sports agency \textit{Global Sports and Entertainment}, Donald Lukens. Lukens convinced several professional athletes to allow his firm to represent them in contract negotiations and accept their investment management services. Lukens and his firm used the money made from the successfully negotiated contracts to invest

\textsuperscript{38} \textit{Shropshire & Davis}, \textit{supra} note 15, at 74.
in supposedly “safe” and “secure” investment vehicles.\textsuperscript{39} These vehicles were in reality quite risky and the SEC filed a complaint alleging that Lukens “duped” hundreds of clients, including several NBA and NFL athletes.\textsuperscript{40} Although Donald Lukens’ firm defrauded hundreds of high-income individuals, who were not professional athletes, the fact that Lukens and his firm were allowed to represent professional athletes in contract negotiations and then invest the money earned by the athlete in high-risk investments constitutes a conflict of interest. This destroys the fiduciary relationship defined by the current laws and regulations. The fact that current laws and regulations do not separate services that are allowed to be carried out by one individual or firm has led to such unlawful incidents, and will continue to do so unless something is changed.

The need to separate an athlete-agent’s duties in order to preserve the fiduciary relationship is seen in the example of John W. Gillette Jr. Throughout the 1990’s Gillette built up his business with high profile clients such as all-pro linebacker Junior Seau.\textsuperscript{41} However in 1998, Gillette was sentenced to 10 years in prison, after he had defrauded his clients out of more than $11 million.\textsuperscript{42} According to the SEC, Gillette “made materially false and misleading statements” and “converted clients’ funds to his own use.”\textsuperscript{43} The lack of a separation of an agent’s responsibilities allows the athlete-agent control over the production of funds, the distribution, as well as investment. The fact that Gillette converted clients’ funds to his own use clearly illustrates that the athletes’ best interests were not in mind when Gillette negotiated the athletes’ contracts. When the athlete-agent negotiates contracts and represents the athlete in order to gain funds for his/her investment purposes, it breaks the structure of a fiduciary

\textsuperscript{39} Shropshire & Davis, supra note 15, at 75.
\textsuperscript{40} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
relationship, in which the agent must act only according to the best interests of the principal (the athlete).\textsuperscript{44}

The NFLPA regulations concerning contract advisors as is found in section 3(B) prohibits:

Holding or seeking to hold, either directly or indirectly, a financial interest in any professional NFL club or in any other business entity when such investment could create an actual conflict of interest or the appearance of a conflict of interest in the representation of NFL players.\textsuperscript{45}

Since players associations’ regulations apply to all of the agent’s activities that affect their clients, this particular regulation should resolve the problem that this article discusses. However, the fact remains, that the athlete-agent is not prohibited from benefitting from investments and other financial advice based upon the money that is earned by the athlete through successfully negotiated contracts, which sets up a situation that automatically creates an inherent conflict of interest. It is possible that the athlete-agent’s intention is to negotiate a contract in order to coerce the athlete give that money back so that the athlete-agent can use that money to make even more money through other services. This does not comply with the concept of a fiduciary relationship as is outlined in current laws\textsuperscript{46} and regulations.\textsuperscript{47}

The enforcement of the above-mentioned subsection found in section 3(B) has been played out in court. The ruling, however, provides an interpretation of a breach of fiduciary duty that brings the current non-separation of duties of athlete-agents into question. In Detroit Lions, Inc. v. Argovitz,\textsuperscript{48} the defendant, Jerry A. Argovitz, was found to have committed a breach of fiduciary duty towards

\begin{itemize}
  \item \textsuperscript{44} Fiduciary Duty, supra note 13.
  \item \textsuperscript{45} NFLPA, supra note 7 § 3.B(7).
  \item \textsuperscript{46} SPARTA, supra note 31.
  \item \textsuperscript{48} Detroit Lions, Inc. v. Argovitz, supra note 4.
\end{itemize}
his client, Billy Sims. Argovitz had a financial interest in both, the Detroit Lions and the now defunct Houston Gamblers, and he inappropriately exercised his influence by withholding information from his client for personal gain. According to the ruling, he “manipulated Sims’ contract negotiations with the Lions in light of his own interest in the Gamblers,” thus breaching his fiduciary duty to his client. This ruling shows that once the athlete-agent compromises the athlete’s best interest, it is a breach of the fiduciary duty that an athlete-agent has towards his/her client.

This ruling could also apply to an athlete-agent, who negotiates his/her client’s contract and then acts as an investment manager and/or advisor, taking the money to invest it. It is highly likely that the athlete-agent will be influenced by the opportunity to make money off of the money from the contract, so a law must be made to create more roadblocks to prevent agents from doing so. This is a volatile situation in which the athlete-agent is prone to earn even more money by acting as a money manager. Therefore, the athlete-agent is hindered in his/her ability to fulfill his/her fiduciary duty towards the client, because the contract negotiations are tainted by the opportunity to use the money earned through the contract to make even more money for the athlete-agent. A separation of an athlete-agent’s duties will help get rid of the all-too-common fraud, mismanagement and violations of the fiduciary relationship. The firm and/or individual that represent an athlete should only be involved in either contract negotiations or fund management, not both.

IV. THE SEPARATION OF DUTIES—A SOLUTION

The multiplicity of clashing responsibilities claimed by athlete-agents causes a conflict that violates the agents’ fiduciary duty. Therefore, a clear distinction between responsibilities must be made that disallows athlete-agents to engage in both contract negotiations and other activities that involve the investment and/or advisement of the money made from the contract. In short, a separation of duties

49 Id.
50 Id.
must be implemented in either a national law, or within the players association’s regulations.

While this proposed solution would not eliminate all violations of fiduciary duties among athlete-agents, it would reduce the number of lawsuits and threats of lawsuits from professional athletes. The proposed solution would also be effective in preventing inherent violations of fiduciary duties found in the way the laws and regulations are currently structured. In order to more clearly show how this would be possible it is helpful to apply the separation of duties retroactively to the previously mentioned incident of Donald Lukens.

After Lukens would negotiate his clients’ contracts, he would invest their money in financially unstable companies, telling his clients that they were “safe” investments. The issue of providing poor advisement on false information was exacerbated by the fact that he was previously acting as his clients’ contract negotiator. If a law or regulation was enacted that would prevent Lukens from offering financial advisement after he negotiated their contracts, his clients would not have been subject to Lukens’ shortcomings as a financial advisor; his clients would be forced to seek financial advisement elsewhere. Lukens’ role as a contract negotiator became ambiguous with his role as a financial advisor.

Although many athlete agents are also registered financial advisors, the problem is that the line between roles of contract negotiator and financial advisor has become ambiguous. This creates an environment for plausible deniability by the athlete agent. An athlete agent could argue that his poor advisement was given to his client as a friend from the relationship they developed through the contract negotiations, which would relieve him of violations to the fiduciary duty. A law or regulation to more clearly define the fiduciary duty would remove plausible deniability of fiduciary duty from financial advisement. Financial advisors are held to their own standards, which differ from athlete agents.

It could also be argued that a separation of duties would reduce the efficiency of the individual athlete-agents as well as sports agencies. Instead of performing all services for an athlete, the athlete

51 Champion, supra note 11.
must search out multiple individuals or firms for contract negotiations and financial management. Although this is a valid argument, the inconvenience does not outweigh the breaches of fiduciary responsibility that are currently allowed. In addition, a law would actually make the industry more easily regulated because it would separate the legal standards and duties of athlete agents from financial advisors, thus reducing the ambiguity and in turn, the legal issues surrounding the profession. Enacting a law or regulation will result in fewer corruptions of athlete agents in financial advisement.

IV. Conclusion

The athlete-agent industry is as competitive as ever considering the record size contracts that are under negotiation in every major sports league in the country. Wherever there is an opportunity to earn large amounts of money in a relative short amount of time, there will be opportunities to commit fraud and to violate certain duties. Strict regulation is needed in these circumstances. Although the current laws and regulations concerning athlete-agents are fairly comprehensive, they fail to protect athletes by allowing athlete-agents to engage in a wide range of services that result in a conflict of interest, and thus, a breach of the fiduciary relationship. A separation of duties would prevent fraud, instead of catching it after it has already happened. Hopefully, as sports becomes more commercialized and athletes become more valuable, the laws and regulations will conform appropriately by applying stricter definitions of an athlete-agents’ responsibilities.