

# Ethical Aspects of Representing Professional Athletes

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# ETHICAL ASPECTS OF REPRESENTING PROFESSIONAL ATHLETES

PAUL T. DEE\*

## I. ETHICAL CONDUCT AND THE SPORTS AGENT

The regulation of conduct of persons practicing a profession is now relatively well defined and accepted. This can generally be said for physicians, lawyers, engineers, and other defined professions. The evaluation of the regulation of conduct in the professions has followed various paths. For example, in American law the concept of lawyer discipline was originally regulated by the courts. As the concept of the profession grew, attempts were made to define and regulate lawyer conduct. Professors Geoffrey Hazard and Deborah Rhode in *The Legal Profession: Responsibility and Regulation*,<sup>1</sup> point to several seminal works and efforts in the evolution of lawyer regulation. In 1836, David Hoffman, a law professor, published "Fifty Resolutions in Regard to Professional Department."<sup>2</sup> In 1854, George Sharwood, a judge, published an "Essay on Professional Ethics."<sup>3</sup> Hazard and Rhode indicate that this essay "heavily influenced the first state bar association's "Canon of Ethics" (1908).<sup>4</sup> Thereafter, two major revisions by the American Bar Association (ABA) have occurred. In 1970, the ABA proposed the "Model Code of Professional Responsibility."<sup>5</sup> In 1983, the ABA again revised its ethical code in the "Model Rules of Professional Conduct."<sup>6</sup>

The profession of sports agency is not as old, nor is its code of conduct as well defined. At first, one might suggest that at present there is no ethical code or system which governs agent conduct. However, it is submitted that agent conduct is regulated, even though there is not an organized profession or specialized code of conduct.

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1. GEOFFREY C. HAZARD, JR. & DEBORAH RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 92 (1988).

2. *Id.*

3. *Id.* at 93.

4. *Id.*

5. *Id.* at 100.

6. *Id.*

## II. THE REGULATION OF PROFESSIONAL CONDUCT

In undertaking the responsibility to provide service for clients, professionals assume certain responsibilities and duties for their acts. These responsibilities, duties, and obligations are expressed in differing forms. Some sports agents may be subject to more than one source of regulation, but the conduct of all sports agents is subject to some regulation under state and federal law.

The regulation of ethical conduct takes several forms. First, agents may be regulated by their membership in a profession, the ethical code of which would apply to the representation of athletes. Second, agents are governed by codes of conduct of the players associations to which their clients belong. Third, agent conduct is regulated by law. This legal regulation may be statutory, regulatory, or arise under various causes of action recognized by the courts. The fourth form of regulation is the agent's own moral code and sense of duty generally owed to others, particularly clients. An examination of each of the foregoing follows.

### *A. A Code of Professional Conduct*

Many sports agents are professionals licensed to practice in their particular jurisdiction. While the profession that most immediately comes to mind is the legal profession, many agents are certified public accountants, certified financial planners, or members of other licensed professions. The professional conduct of members of these professions is generally regulated. The question here is whether the ethical code of that profession applies when the regulated person is practicing another profession.

With respect to the legal profession, this query has been answered in the affirmative. In a discipline case in Arizona, an attorney had acted as a financial advisor in a transaction for a client. Subsequently, the client alleged that the financial planner had acted improperly in the matter and sought redress by filing a complaint with the Arizona Bar. The attorney defended the action in part on the basis that he was not practicing law when he was acting in his capacity as a financial advisor, arguing that the ABA "Model Code of Professional Responsibility" did not apply. The Supreme Court of Arizona expressed its disagreement with this position:

As long as a lawyer is engaged in the practice of law, he is bound by ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of

professional activity. For only in this way can full protection be afforded to the public.<sup>7</sup>

This ruling is both good law and good policy. The fact that a person is believed to be a member of a profession is certainly a reason for the selection of the agent by the client. The client's interests are thus best protected by continuing the obligation of the profession beyond the scope of the practice. It may also be argued that the activities of a sports agent or an attorney may be indistinguishable, for which reason it is appropriate to adopt a policy which supports the application of the ethical code regardless of form.

From the foregoing, it appears the better rule is that the ethical codes of any regulated profession should apply to the activities of that professional while acting in the capacity of a sports agent.

### *B. Sports Industry Regulation*

The players in all major professional sports have organized themselves and have formed players associations. One of the areas of concern of the professional athlete is the quality and competence of representation. This concern is so universal that the players associations have developed codes of conduct which attempt to protect the athletes from inappropriate conduct by agents. These codes of conduct provide, in part, provisions regulating the activities of agents with respect to issues of ethics.

A review of the National Football League Players Association's "Code of Conduct for NFLPA Member Contract Advisors"<sup>8</sup> demonstrates the concerns of the players about the activities of agents and describes the conduct that is regulated. Section 3 of the Code is specifically the Code of Conduct.<sup>9</sup>

Section 3(A) directs its attention to the basic contract of representation between the player and agent and to management conflicts of interest.<sup>10</sup> Section 3(B) is specifically directed to improper contract advisor conduct.<sup>11</sup> This section addresses three principal concerns. First, the players require their agents to be competent and to act with integrity. Second, the agent must avoid improper conduct in his/her representation of the player. Third, the players regulate the activities of agents in the solicitation of members for representation.<sup>12</sup> The elements of each of these three catego-

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7. *In re Dwight*, 117 Ariz. 407, 410, 573 P.2d 481, 484 (1978).

8. CODE OF CONDUCT FOR NFLPA MEMBER CONTRACT ADVISORS (National Football League Player Ass'n 1990).

9. *Id.* § 3.

10. *Id.* § 3(A).

11. *Id.* § 3(B).

12. *Id.*

ries further define the conduct either expected or prohibited. A review of this section demonstrates the application of an ethical code to sports agents otherwise not covered.

### *C. State Law Regulating Conduct*

Over the past decade, nineteen states have enacted legislation which regulates the conduct of athlete contract advisors.<sup>13</sup> The particular class protected by these laws is the professional athlete and the student-athlete possessing professional potential. These statutes for the most part only agree on the basic policy of protecting athletes. They are otherwise inconsistent in coverage and enforcement. All of the states provide for civil enforcement remedies, while some states additionally provide criminal penalties. The conduct addressed in these statutes is the protection of student-athletes from improper solicitation by agents.

On a broader base, the conduct of agents is regulated by the general law of the states. Conduct which violates a code of conduct is often conduct which gives rise to recognized causes of action such as fraud, breach of contract, and professional negligence. Using law as a base, it is clear that a code of conduct based on the principles of ethics exists and applies to sports agents.

### *D. Personal Moral Code*

Everyone has a conscience. Every person has developed some set of principles and values by which they act. While these principles and values vary widely from person to person, they do exist. Over time, the course of a person's conduct can be observed. The reporting system is called "reputation." This form of ethical conduct is the most critical. Codes of conduct are meaningless to persons lacking values and courage to do right. Therefore, personal integrity would be one of the most important attributes sought by the player in obtaining representation.

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13. ALA. CODE § 8-26-1 to -41 (1987); ARK. CODE ANN. § 17-48-101 to -203 (1992); CAL. LAB. CODE § 1500 (West 1993); FLA. STAT. ANN. § 468.451-457 (West 1992); GA. CODE ANN. § 43-4A-1 to -19 (1992); IND. CODE ANN. § 35-46-4-1 to -4 (Burns 1992); IOWA CODE ANN. § 9A.1-12 (West 1992); KY. REV. STAT. ANN. § 518.080 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 4:421-426 (West 1992); MD. CODE ANN., BUS. REG. § 4-401 to -426 (1992); MICH. STAT. ANN. § 750.411e (1993) (Callaghan 1993); MINN. STAT. ANN. § 325E.33 (West 1993); MISS. CODE ANN. § 73-41-1 to -23 (1992); NEV. REV. STAT. §§ 398.065, 398.085, 398.095, 598.065 (1992); OHIO REV. CODE ANN. § 4771.01-.99 (Page 1992); OKLA. STAT. ANN. tit. 70, § 821.61-.71 (West 1993); PA. STAT. ANN. tit. 18, § 7107 (1992); TENN. CODE ANN. § 49-7-2101 to -09 (1992); TEX. REV. CIV. STAT. ANN. art. 8871 (West 1993).

### III. BASIC ELEMENTS OF REGULATED CONDUCT

Using the ABA "Model Rules of Professional Conduct" for lawyers as an example of a professional code; the NFLPA's "Code of Conduct for NFLPA Member Contract Advisors" as an example of sports industry regulation of conduct; and, the laws of the State of Florida as an example of legal regulation of conduct, a basic code of ethical conduct can be said to exist for all sports agents. A review and comparison of the issues addressed in each "code" discloses three consistent areas of behavior which govern the actions of sports agents. These areas address: (1) minimal standards of competence, integrity, and diligence; (2) improper conduct; and, (3) the parameters of solicitation. The following is an analysis of the provisions of each of the codes with respect to the common areas of behavior.

#### A. *Competence/Integrity/Diligence*

##### 1. ABA "Model Rules of Professional Conduct"

###### (a) *Competence*

The first rule set forth in the ABA "Model Rules of Professional Conduct" is related to lawyer competence. Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."<sup>14</sup>

The rule sets forth the affirmative obligations of a lawyer to possess the appropriate knowledge and skill to undertake the representation of a client. In the case of an attorney acting as a sports agent, it would be assumed that the attorney is familiar with the negotiation process, the rules of any agreements between the league and its players, be capable of carefully and thoroughly negotiating the agreement, and be prepared to meet the needs and goals of the client and the client's career in the negotiation process. To the extent the representation includes other areas of responsibility, such as financial management, the lawyer should possess the requisite competencies to undertake the representation.

###### (b) *Integrity*

The hallmark of integrity is truthfulness. The responsibilities of an attorney in dealing with the client, third parties, and the public are contained in Section 4 of the Rules.<sup>15</sup> Each of these four rules address the responsibility of the attorney to be honest and to avoid interference with the rights of

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14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

15. *Id.* Rules 4.1-4.4.

third parties and unrepresented persons. The principal theme of this section is basic integrity.

*(c) Diligence*

Rule 1.3 on diligence provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>16</sup>

By this rule, the lawyer is required to pursue the interest of the client with commitment and dedication.<sup>17</sup> As well, the lawyer must act in a timely fashion. Procrastination is unacceptable.<sup>18</sup>

2. NFLPA Code of Conduct

*(a) Competence and Integrity*

The NFLPA Code of Conduct addresses the conduct of contract advisors in the process of negotiation. The code does not apply or seek compliance by the advisors in representation beyond negotiation. However, despite this shortcoming, the code does focus on the protection of the rights of the client. Section 3(B)(1)(b) requires that advisors "maintain the highest degree of integrity and competence in individual negotiations with NFL clubs."<sup>19</sup> Subsection 3(B)(1)(c) requires the advisor to be competent with respect to the structure and economics of the league, and to know and understand the NFL Constitution and Bylaws, negotiating techniques, and developments in sports law.<sup>20</sup> While the list is specific, its breadth indicates the general scope of conduct expected by contract advisors.

The code is clear on these points. The NFLPA membership seeks protection from conduct which does not meet these standards.

*(b) Diligence*

The NFLPA Code of Conduct addresses the issue of diligence in several respects. Section 3(B)(1)(c) requires that advisors learn and keep current with all topics related to their representation of members.<sup>21</sup> Section 3(B)(2)(d) requires the prompt notification of the association as to the pro-

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16. *Id.* Rule 1.3.

17. *Id.* Rule 1.3 cmt.

18. *Id.*

19. CODE OF CONDUCT FOR NFLPA MEMBER CONTRACT ADVISORS, *supra* note 8, § 3(B)(1)(b).

20. *Id.* § 3(B)(1)(c).

21. *Id.*

gress of negotiations.<sup>22</sup> Section 3(B)(2)(f) requires the advisor to avoid conduct which adversely reflects on his or her fitness to act as an advisor.<sup>23</sup>

From these three sections, the NFLPA seeks the prompt handling of matters on behalf of the members. While the reporting requirements might appear to be for the benefit of members other than the represented player, the intent is apparently otherwise. The rule provides the Association with the ability to monitor the manner in which the members' interests are being met. It provides the Association with the ability to monitor progress and to inquire as to delays. Stated differently, it is a test of advisor diligence.

### 3. Other Law—Competence, Integrity, Diligence

The third area in which agents might find rules regulating their conduct in their representation of clients is in state or federal law. Focusing on the issues of competence, integrity, and diligence, there are two principal sources of jurisdiction. The first is in an action in contract. The second is in an action on negligence.

The law of agency imposes duties on the agent to act for and on behalf of the principal in a manner in which the principal would act.<sup>24</sup> Among the expectations of the principal would be the competent, prudent, and diligent representation of the principal's interest.<sup>25</sup> The failure of the agent to meet these obligations gives rise to a cause of action for breach of contract.<sup>26</sup>

In tort, the negligent representation of the client causing harm would give rise to a cause of action.<sup>27</sup> While the mechanisms for enforcing the client's rights become more burdensome with the application of the principles of contract and tort, they, nonetheless, provide a standard of conduct for the agent which has the effect of providing for ethical considerations.

#### *B. Improper Conduct*

The second common element which gives rise to ethical concerns for agents is improper conduct. Improper conduct includes acts of dishonesty, fraud and misrepresentation, and conflicts of interest. These ethical issues subject the agent's conduct to close scrutiny.

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22. *Id.* § 3(B)(2)(d).

23. *Id.* § 3(B)(2)(f).

24. RESTATEMENT (SECOND) OF AGENCY §§ 1(1), 377, 383 (1957).

25. *Id.* § 379.

26. *Id.* § 400.

27. *Id.* § 401.

## 1. ABA "Model Rules of Professional Conduct" on Improper Conduct

As stated above, the key elements of improper conduct are dishonest and illegal conduct and conflicts of interest. The ABA "Model Rules of Professional Conduct" address these issues at Rule 8.4, which states that it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.<sup>28</sup>

These rules apply to the general conduct of the lawyer both within and outside the practice of law. Of particular importance is the fact that the remedies for acts which are violations of this Rule are multiple. Clearly, if the rules apply to all acts of the attorney, their breach in the representation of a client, albeit outside the practice of law, would be covered by the rule.

On the issue of conflict of interest, the ABA "Model Rules of Professional Conduct" are again specific. Rule 1.7 generally defines the principle of conflict of interest. Rule 1.8 prohibits certain transactions with clients or adverse to clients. Rule 1.9 prohibits conduct giving rise to a conflict with a former client.

With respect to agents, special attention should be paid to the provisions of Rule 1.8, particularly subsection (a), on business transactions with a client or acquiring an interest in a transaction adverse to the client.<sup>29</sup>

## 2. NFLPA Rules of Conduct—Improper Conduct

Rule 3(B)(2) of the "NFLPA Rules of Conduct for Member Contract Advisors" proscribes conduct of the agent with regard to six issues.<sup>30</sup> The agent (a) cannot have a financial interest in a team; (b) cannot undertake

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28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1983).

29. *Id.* Rule 1.8.

30. CODE OF CONDUCT FOR NFLPA MEMBER CONTRACT ADVISORS, *supra* note 8, § 3(B)(2).

representation of a player unless he/she has disclosed to the player the names of management personnel the agent has previously represented; (c) cannot engage in activities which create a conflict of interest; (d) cannot fail to disclose the status of negotiations on behalf of his/her client; (e) cannot agree to allow a client to sign a contract with a team which prohibits disclosure of contract terms to the NFLPA; and (f) cannot engage in unlawful or dishonest activities including fraud and deceit.<sup>31</sup>

Rules 3(B)(2)(a-e), like Rule 3(B)(1), are limited to the negotiation process. However, Rule 3(B)(2)(f) does not contain such a limitation and must be construed to apply to all conduct of the agent.<sup>32</sup> This is a particularly far reaching, yet prudent, policy. It regulates the overall behavior of the agent, and protects the players from persons who act dishonestly.

Rule 3(B)(2)(c) is a general statement in the representation of the client. The agent is required to avoid any actual or potential conflicts of interest. This general rule leaves open to broad interpretation the circumstances which could be viewed as a conflict of interest. For example, can an agent represent two players on the same team? What if there is a team salary cap? Can an agent represent two players on the same team at the same position? There are more. The important point is to recognize the problem and to seek relief through disclosure or through an opinion from the players association.

### 3. Other Law—Improper Conduct

As a general statement, the law abhors improper conduct. Any dishonest behavior in fraud, deceit, misrepresentation or otherwise is actionable. In some cases the activity will also be criminal. No professional code of ethics is needed to mandate appropriate conduct. Any player-client would have several causes of action against an agent for engaging in dishonest conduct. These causes of action arise in contract, tort, fraud and in criminal prosecutions. It should be clear to any agent this is not an area of debate when it comes to this conduct.

#### C. Solicitation

##### 1. ABA "Model Rules of Professional Conduct"

The rules regulating advertising and the solicitation of prospective clients are found in Rule 7 of the ABA "Model Rules of Professional Con-

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31. *Id.* § 3(B)(2)(a-f).

32. *Id.* § 3(B)(2)(f).

duct.”<sup>33</sup> Since the Supreme Court’s decision in *Bates v. State Bar of Arizona*,<sup>34</sup> lawyer advertising has been regulated consistent with the concepts of commercial speech. Thus, when the bar sought to control this aspect of lawyer conduct it accepted the Court’s invitation to engage in rules of restraint.

One year after *Bates*, the Supreme Court addressed another solicitation issue. There, the question was whether the bar could restrict direct personal contact with prospective clients for the purpose of solicitation. In *Ohrlick v. Ohio State Bar Association*,<sup>35</sup> the Court found that in controlling lawyer conduct, the state’s interest in regulating professional conduct outweighed the attorney’s interest in commercial speech. Given these two cases, the ABA drafting committee elected to continue restrictions on this type of conduct.

Rule 7.1 acknowledges the attorney’s commercial speech rights, but prohibits a “false and misleading communication about the lawyer or the lawyer’s services.”<sup>36</sup> Rule 7.2 regulates lawyer “advertising.”<sup>37</sup> Rule 7.3 addresses “direct contact with prospective clients.”<sup>38</sup> Rule 7.3(a) states: “A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”<sup>39</sup>

Rule 7.3 is clear. Direct personal solicitation of a prospective client who is neither a family member nor a person with whom the lawyer has had a prior professional relationship is prohibited. The rule does not prohibit the lawyer from answering inquiries from persons who would be prospective clients even though there is personal contact.<sup>40</sup>

## 2. NFLPA Rules of Conduct

The NFLPA Rules of Conduct applicable to Contract Advisors is found at Section 3(B)(3)(a-e).<sup>41</sup> The Association, in protecting the players and the integrity of the system, has prohibited the following conduct: (a) the provi-

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33. MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1-7.3 (1983).

34. 433 U.S. 350 (1977).

35. 436 U.S. 447 (1978).

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983).

37. *Id.* Rule 7.2.

38. *Id.* Rule 7.3.

39. *Id.* Rule 7.3(a).

40. *Id.* Rule 7.3 cmt.

41. CODE OF CONDUCT FOR NFLPA MEMBER CONTRACT ADVISORS, *supra* note 8, at § 3(B)(3)(a-e).

sion or offer to provide anything of value to a player in order to become a contract advisor; (b) the provision or offer to provide anything of value to a third party for a recommendation of the agent to serve a player as an advisor; (c) the provision of false or misleading information to any person related to solicitation; (d) the use of titles which imply the existence of credentials not held; and (e) the provision or acceptance of anything of value from a club or NFL personnel for his or her personal use and benefit.<sup>42</sup>

While the direct solicitation of clients is an accepted practice, inducements to players or others is absolutely forbidden.<sup>43</sup> Provisions (a) through (d) appear limited to the solicitation of players for purposes of representation.<sup>44</sup> However, subsection (e) is broader and general when applying to overall relations with management.<sup>45</sup> Special attention should be paid to the interpretations of this rule.

### 3. Other Law

While one might consider the solicitation of business to be the heart of sales and marketing, there are some constraints on this behavior found in state law. Two statutes come to mind on this issue. One relates to lawyers and is, therefore, limited in scope. The other relates to the process of signing collegiate athletes to agent contracts. In Florida, a violation of the Rule of Professional Conduct provision on direct solicitation by a lawyer is a first degree misdemeanor.<sup>46</sup> The attorney would be well advised to check the laws of the states in which he/she practices to determine whether such conduct is statutorily proscribed.

The second area relating to state laws regulating agent conduct addresses the solicitation and signing of student-athletes to representation contracts. The law in this area is far from uniform. There are nineteen states which attempt to regulate this conduct by statute.<sup>47</sup> In Florida, there are two statutes.<sup>48</sup> Under these statutes, it is illegal for an agent to sign a contract with a student-athlete who has eligibility remaining without disclosing that contract to the college or university before competition or within seventy-two hours of signing.<sup>49</sup> The penalties for a violation are

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42. *Id.*

43. *Id.*

44. *Id.* § 3(B)(3)(a-d).

45. *Id.* § 3(B)(3)(e).

46. FLA. STAT. § 877.02 (1992).

47. *See supra* note 13.

48. FLA. STAT. § 468.451 -457 (1992); FLA. STAT. § 240.5337 -.5339 (1992).

49. *Id.*

both civil and criminal.<sup>50</sup> A violation by an agent gives rise to a cause of action by the institution for treble damages for the value of the scholarship furnished by the institution during the period of the athlete's eligibility.<sup>51</sup> A scholarship at a private university is currently valued at approximately \$25,000. If a student was in his fourth year of eligibility the treble damages would approach \$300,000.

Moreover, a violation of this statute by the agent carries a criminal penalty upon conviction of imprisonment of up to five years and a fine not exceeding \$5,000.<sup>52</sup>

In many states, there is a growing recognition of a cause of action for tortious interference with a contract which can be brought by the institution against the agent.<sup>53</sup>

#### IV. CONCLUSION

Agent conduct is regulated. The purpose of this overview is to direct attention to the volume of law and regulation that affects the conduct of sports agents in the performance of their professional activities. Although not centrally codified and distributed as a professional code of ethics, there can be little doubt that much is expected of persons acting for and on behalf of athletes.

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50. *Id.*

51. *Id.*

52. *Id.*

53. See Charles Ehrhardt & Mark Rodgers, *Tightening the Defense Against Offensive Sports Agents*, 16 FLA. ST. U. L. REV. 633 (1988); Richard Woods & Michael Mills, *Tortious Interference with an Athletic Scholarship: A University's Remedy for the Unscrupulous Sports Agent*, 40 ALA. L. REV. 141 (1989).