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Journal

UCLA Entertainment Law Review, 12(2)

ISSN

1073-2896

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Publication Date

2005

DOI

10.5070/LR8122027075

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The Unintended Consequence of the Miller-Ayala Athlete Agents Act: Depriving Student Athletes of Effective Legal Representation

By Robert P. Baker*

I. INTRODUCTION

The Miller-Ayala Athlete Agents Act (“Act”) became effective January 1, 1997.¹ It resulted from the blending of two bills that were introduced to regulate athlete agents. The first was Assembly Bill 1987, which was introduced by Assembly Member Gary Miller (R-Diamond Bar). The second was Senate Bill 1401, which was introduced by State Senator Ruben Ayala (D-Chino).² Both bills were efforts to stem a perceived increase in incidents of unethical conduct by agents purportedly resulting in damage to student athletes and their schools.³ In his arguments in support of his bill, Assembly Member Miller compared sports agents to drug dealers who prey on kids.⁴ Senator Ayala, now retired, viewed agents as the cause of both the loss of amateur eligibility by some student athletes and the imposition of NCAA sanctions

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¹ CAL. BUS. & PROF. CODE §§ 18895-18897.97 (2005).

² Enrolled Bill Report on AB 1987 (Sept. 9, 1996).

³ See *id.*

⁴ Assembly Committee on Governmental Organization, Hearing on AB 1987 (Apr. 8, 1996).

upon educational institutions.⁵ Senator Ayala is a USC graduate and USC football season ticket holder as well as a self-proclaimed sports enthusiast.⁶ In his public statements regarding SB 1401 in the spring of 1996, Senator Ayala expressed his exasperation with sports agents thusly:

I've had enough of these unscrupulous agents who offer kids money to sign with them. Under current law, they can get a university on probation or make a kid ineligible to play and nothing happens to the agent. They just move on to the next kid. The culprit goes free.⁷

However, Senator Ayala's frustration may have been misplaced. The NCAA maintains an online database that collects information regarding all major infractions of its by-laws since 1953.⁸ Since then, there have been 558 cases in which sanctions have been assessed by the NCAA for major infractions of NCAA By-Laws by Division I athletic programs.⁹ Not one of these cases appear to have involved misconduct by agents.¹⁰ Of the 558 cases, 47 involved California schools.¹¹

In the past 10 years, the NCAA has punished only two major infractions by California Division I football and mens' basketball programs of NCAA By-law 12.3 dealing with amateurism and benefits to athletes.¹² Neither of these two major infractions involved agents.¹³ In

⁵ Kristie Ackert, *Ayala's Bill Would Demand Agents Be Held Accountable*, MODESTO BEE, Mar. 22, 1996, at D4; R.E. Graswich, *Bill Would Help Control Agents*, SACRAMENTO BEE, Apr. 17, 1996, at E1.

⁶ Ackert, *supra* note 5, at D4; Graswich, *supra* note 5, at E1.

⁷ Graswich, *supra* note 5, at E1. This newspaper article reported that during the legislative hearings on the Act, testimony was taken regarding four incidents involving agents in 1995. Three incidents involved USC football players; the fourth involved Cal basketball player Tremaine Fowlkes. *Id.* A review of the legislative history of the Act discloses a letter from USC's lobbyist in Sacramento, which states, "Last Fall at USC, an athlete agent surreptitiously provided benefits, including airline tickets, beepers, rent and other payments, in order to gain future representation for three football players . . . through 'runners.'" Letter from Kristen F. Soares, Associate Director for Government Relations, University of Southern California, to Bill Hoge, Chairman, Assembly Committee on Governmental Organization (Apr. 1, 1996) (available in Material from the legislative bill file of the Assembly Committee on Governmental Organization on Assembly Bill 1987). The letter did not state how the violations came to light, did not state what precautions USC takes to avoid such situations, did not state what penalties were assessed, if any, or what other harm USC suffered, and did not state whether the agent was an attorney. *See id.* This is hardly "fact finding" and constitutes a slim basis for a legislative agenda.

⁸ The NCAA's database is maintained by Legislative Services Database for the internet at https://goomer.ncaa.org/wdbctx/lsdbi/LSDBI.lsdbi_menu.homepage ("Major Infractions") (last visited May 12, 2005).

⁹ *Id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

2001, USC was sanctioned for having its employees assist in completing academic programs for three student athletes.¹⁴ USC was penalized two football scholarships for the 2002-2003 academic year.¹⁵ In 2000, Cal State Northridge was sanctioned for widespread institutional violations including hiring an excessive number of football coaches, giving an excessive number of football scholarships, providing improper meals, allowing ineligible students to compete, and using improper recruiting methods.¹⁶ Cal State Northridge was made ineligible for post season play for one year, was placed on probation, and suffered other related penalties.¹⁷

In a statement provided in support of SB 1401, David Price, then Associate Commissioner of the Pacific 10 Conference and now a compliance officer for the NCAA, alleged that nine student athletes at four institutions in the Pacific-10 Conference had been suspended for at least one athletic contest as the result of receiving benefits directly or indirectly from an agent in the prior two years.¹⁸ The benefits allegedly included both minor perks such as the use of pagers and telephone debit cards as well as more substantial benefits such as the purchase of airline tickets for family members.¹⁹ Mr. Price asserted that the suspect agents typically used “runners” or go-betweens such as friends or roommates of the players to provide the benefits.²⁰ Apparently, these By-law violations were not punished as major infractions.²¹

Thus, it appears that although there has been some agent misconduct, the educational institutions themselves are also quite capable of self-inflicting the type of harms that concerned Senator Ayala. Yet, there is no provision in the Act for imposing any civil or criminal liability upon an employee or representative of an educational institution for conduct that jeopardizes the eligibility of the educational institution or its athletes.²² Compared to what the schools themselves are doing, the conduct of the agents seems innocuous, and the results are *de minimus* to the schools by comparison.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Undated statement of David Price, Associate Commissioner of the Pacific-10 Conference (available in Material from the legislative bill file of the Senate Committee on Business and Professions on Senate Bill 1401).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *supra* notes 12, 13 and accompanying text.

²² See CAL. BUS. & PROF. CODE §§ 18895-18897.97 (2005).

Submitting letters in favor of SB 1401 during the legislative process were USC, the NCAA, the Pacific 10 Conference, the California Interscholastic Federation, the University of California, and the Association of Independent California Colleges and Universities.²³ Opposition came from members of the California State Bar and the Governor's Department of Consumer Affairs.²⁴ Of particular note was a letter from the Executive Director of the NCAA to Senator Ayala.²⁵ In that letter, the NCAA proposed sixteen changes in SB 1401 and offered up four witnesses to testify on behalf of the bill.²⁶ Correspondence in favor of AB 1987 was likewise received from the California Interscholastic Federation, USC, the NCAA, and the Association of Independent California Colleges and Universities.²⁷

The Act changed prior law significantly and repealed several sections of the Labor Code.²⁸ Under prior law, the Department of Industrial Relations had oversight responsibility for athlete agents who were required to register with the Labor Commissioner.²⁹ The Act established a registration system under the aegis of the Secretary of State,³⁰ and instituted an enhanced system of civil and criminal liability.³¹ As discussed below, the Act also placed important new burdens upon athlete agents and further restrictions on their conduct. One of the major changes in the new law was to subject attorneys to regulation.³² As of 1996, as many as 98% or approximately 980 of the 1,000 sports agents operating in California were also attorneys³³ and although they were subject to the rules of the California State Bar, they were not covered

²³ See Material from the legislative bill file of the Senate Committee on Business and Professions on Senate Bill 1401.

²⁴ See *id.*

²⁵ Letter from Cedric W. Dempsey, Executive Director of the NCAA, to Senator Ruben Ayala (Feb. 20, 1996) (available in Material from the legislative bill file of the Senate Committee on Business and Professions on Senate Bill 1401).

²⁶ *Id.*

²⁷ See Material from the legislative bill file of the Senate Committee on Business and Professions on Assembly Bill 1987.

²⁸ The Act repealed Sections 1500-1518, 1521, 1523-1528, 1530, 1530.5, 1531, 1531.5, 1532, 1533, 1535, 1535.5, 1535.7, 1536-1540, 1543, and 1546 of the Labor Code. Amended Stats., ch. 857, §§ 3-12, 14-37 (1996). Certain other Labor Code provisions were repealed effective January 1, 1998 by operation of CAL. LAB. CODE § 1550.

²⁹ CAL. LAB. CODE § 1510 (repealed 1996).

³⁰ CAL. BUS. & PROF. CODE § 18896 (2005).

³¹ See *id.* § 18897.8 (civil liability) and § 18897.93 (criminal liability).

³² See *infra* notes 41-43 and accompanying text.

³³ See Senate Committee on Business and Professions, Subcommittee on Sports, Hearing on SB 1401 (Mar. 22, 1996); Senate Third Reading of SB 1401, as amended Aug. 22, 1996 (analysis prepared by Jean Huston).

by the registration provisions of the Labor Code regulating athlete agents.³⁴

The Act is not *sui generis*. Rather, in 1997 the NCAA and several of its largest member institutions lobbied the National Conference of Commissioners of Uniform State Laws (NCCUSL) to draft a model law regulating athlete agents.³⁵ The NCCUSL undertook the project and convened an 11 person drafting committee that developed model legislation called the Uniform Athlete Agents Act (UAAA).³⁶ As of May 3, 2005, the UAAA had been enacted in 32 states.³⁷ California and five other states had enacted non-UAAA laws designed to regulate athlete agents.³⁸ The UAAA differs in many important respects from the Act. As discussed below, if California wished to enact legislation dealing solely with athlete agents, it would have been wiser to adopt the UAAA.

This article argues that, on balance, the Act does more harm than good and that the Act should be replaced with more productive legislation. The Act addresses an over-exaggerated problem (misconduct by athlete agents) through the enactment of a poorly thought out regulatory scheme that attempts to control persons who were already subject to more appropriate regulation. The Act hurts student athletes by depriving them of effective legal advice both because it imposes conflicting ethical duties upon attorneys who represent student athletes and because the Act, over time, will drive many ethical attorneys entirely out of the practice of representing student athletes.

The Act also fails to control the true “culprits” in amateur athletics such as schools themselves, their affiliates and their representatives who are responsible for virtually all of the major infractions of NCAA regulations, and it completely ignores the major challenges facing college athletics today: poor academic performance, a financial arms race, and rampant commercialization.

³⁴ See Senate Third Reading of SB 1401, *supra* note 33.

³⁵ See NCAA website, “Uniform Athlete Agents Act (UAAA) History and Status,” at <http://www1.ncaa.org/membership/enforcement/agents/uaaa/history.html> (last visited May 12, 2005).

³⁶ Uniform Athlete Agents Act (2000) available at <http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm> (last visited May 12, 2005).

³⁷ NCAA website, *supra* note 35.

³⁸ *Id.*

II. SUMMARY OF THE ACT

A. *Who Is An Athlete Agent?*

The Act applies to any “athlete agent” (doing business in California), defined as:

any person who, directly or indirectly, recruits or solicits an athlete to enter into any agency contract, endorsement contract, financial services contract, or professional sports services contract, or for compensation procures, offers, promises, attempts or negotiates to obtain employment for any person with a professional sports team or organization or as a professional athlete.³⁹

The Act goes on to make clear just how broad the definition of “acting as an athlete agent” is intended to be. “Negotiate” is defined as (1) having *any* contact on behalf of a student athlete with any sports organization, or (2) being present during any discussion of an endorsement contract or professional sports services contract with any representative of any sports team, organization, or potential employer.⁴⁰

The inclusion of attorneys and other professionals is expressly addressed in Section 18895.2(b)(2)(A) of the Act:

“Athlete agent” does not include a person licensed as an attorney, dealer in securities, financial planner, insurance agent, real estate broker or sales agent, or tax consultant, or other professional person, when the professional person offers or provides the type of services customarily provided by that profession, except and solely to the extent that the professional person also recruits or solicits an athlete to enter into any agent contract, endorsement contract, or professional sports services contract, or for compensation procures, offers, promises, attempts, or negotiates to obtain employment for any person with a professional sports team or organization or as a professional athlete.⁴¹

According to the Act, attorneys are covered as athlete agents if they either (1) recruit or solicit an athlete to enter into an agency contract, endorsement contract, or professional sports services contract or (2) negotiate for, offer, provide or procure for a person employment as a professional athlete or any employment with a professional sports organization.⁴² This definition would seem to cover an attorney who advised a client to turn pro early in order to accept a pending offer. It

³⁹ CAL. BUS. & PROF. CODE § 18895.2(b)(1) (2005). It is unclear precisely who is covered by the Act. For instance, an agent residing out of state might solicit (by telephone or email) a student athlete attending college in California, but living outside California, for employment outside California. Is that agent covered even though he never set foot in California because a California university could be penalized for his conduct?

⁴⁰ *Id.* § 18895.2(f).

⁴¹ *Id.* § 18895.2(b)(2)(A).

⁴² *Id.*

would certainly apply to any attorney who had any involvement in negotiating the offer or the resulting contract.

Under prior law (Labor Code § 1500, *et seq.*), an agent was defined as any person who, as an independent contractor, directly or indirectly recruited or solicited any person to enter into an agent contract or professional sport services contract; or—for a fee—procured, offered, promised or attempted to obtain employment for any person with a professional sport team or as a professional athlete.⁴³ Thus, the Act clearly widens the definition of what it means to function as an athlete agent in two respects. First, by including “negotiating” within the range of services that will bring an attorney or other professional within the scope of the Act and by defining “negotiating” to include having any contact with or even being in the presence of any representative of a professional sports organization, the Act sweeps within its ambit a large group of persons not covered by the prior law. Second, by including attorneys and other professionals who advise or represent student athletes on financial and legal matters, the Act covers another large group of professionals under its umbrella.

B. *What Must a Person Do To Become An Athlete Agent?*

Before acting as an athlete agent in California, any person, even a practicing member of the California State Bar, must register with the Secretary of State and provide all of the information required in Business and Professions Code § 18896.⁴⁴ In addition to name, address, driver’s license and social security numbers, pertinent background information is requested regarding education, training, experience, and criminal or disciplinary record.⁴⁵ A “schedule of fees to be charged and collected” must also be filed.⁴⁶ The Secretary of State must be advised if any of the information provided by the agent changes.⁴⁷ An athlete agent must also disclose the identification of the insurance policy or the location of the security used to satisfy Business and Professions Code § 18897.87,⁴⁸ which requires that every athlete agent either (a) secure a \$100,000 per -claim -made errors and omissions insurance policy or (b) post \$100,000 in cash or cash equivalents as security for his or her potential errors and omissions.⁴⁹ Under prior law, athlete agents were

⁴³ Senate Committee on Business and Professions, Hearing on SB 1401 (Apr. 22, 1996).

⁴⁴ CAL. BUS. & PROF. CODE § 18896 (2005).

⁴⁵ *Id.* § 18896(a),(d),(e),(g),(h),(i),(j),(l).

⁴⁶ *Id.* § 18896(n).

⁴⁷ *Id.* § 18896.2.

⁴⁸ *Id.* § 18896(f).

⁴⁹ *Id.* § 18897.87.

required to deposit a \$25,000 surety bond with the Labor Commissioner.⁵⁰ However, attorneys were excused from the requirement of posting security because they did not register as athlete agents. When first contacting a student athlete or his representative, an athlete agent now must provide written notification of the availability of the foregoing information.⁵¹

All of this information is required from the agent to assist the Secretary of State in enforcing the Act.⁵² Accordingly, although the Act does not expressly grant such authority, the Secretary of State likely has the authority under § 18897.97 to deny a registration application or to suspend or revoke an agent's license if the Secretary disapproves of any of the submitted information.⁵³ Interestingly, the regulatory scheme proposed by AB 1987 would have eliminated any registration requirement.⁵⁴ The assembly staff believed that the cost of the registration system would outweigh its benefit. The registration requirement of SB 1401 prevailed when the two bills were merged.⁵⁵

C. *How Does The Act Regulate Dealings Between Athletes and Agents?*

Every contract between agent and athlete must be in writing, describe the services to be performed, and provide a schedule of fees to be charged.⁵⁶ This provision is far less stringent than the rules currently governing fee agreements between lawyers and clients.⁵⁷ Every agent contract must also disclose that there is information about the agent that may be obtained from the Secretary of State.⁵⁸ In this day of Google, Martindale.com, and the State Bar on-line, this provision is wholly unnecessary as applied to attorney agents.

While the Act provides that a trust fund must be set up when an agent receives an athlete's salary,⁵⁹ the State Bar has enacted more stringent requirements and imposes tougher penalties in cases of violations of its trust fund requirements and rules.⁶⁰ In addition, the Act

⁵⁰ CAL. LAB. CODE § 1519 (repealed 1998).

⁵¹ CAL. BUS. & PROF. CODE § 18896.6 (2005).

⁵² *Id.*

⁵³ *See id.* § 18897.97.

⁵⁴ Senate Committee on Business and Professions, Hearing on AB 1987 (June 10, 1996).

⁵⁵ Enrolled Bill Report on AB 1987 (Sept. 9, 1996).

⁵⁶ CAL. BUS. & PROF. CODE § 18897 (2005).

⁵⁷ *See id.* §§ 6147-6148 (2005); *see also* Rule 4-200 Rules of Professional Conduct of the State Bar of California (2005).

⁵⁸ CAL. BUS. & PROF. CODE § 18897.1 (2005).

⁵⁹ *Id.* § 18897.2.

⁶⁰ Not only do the State Bar Act and the Rules of Professional Conduct require that every attorney maintain a trust fund into which *all* client's funds must be deposited, *any* irregular-

states that no agent may have an ownership or other financial interest in the same sport in which the athlete is a participant.⁶¹ This provision is unnecessary as applied to attorneys acting as athlete agents who were already covered by the State Bar rules and judicial decisions dealing with conflicts of interest.⁶²

An agent giving financial advice must now disclose to a client any relevant business interests or commissions.⁶³ For California attorneys, however, this is “Fiduciary Duty Law 101,” and any lawyer is bound to disclose potential conflicts to a client and to abjure from secret profits. The Act also prohibits false statements, promises and advertising.⁶⁴ However, this provision is duplicative of Civil Code § 1770, Business and Professions Code § 17200, as well as the common law of fraud.⁶⁵

Finally, the Act prohibits an athlete agent from giving a student athlete money or anything of value.⁶⁶ Again, however, State Bar rules currently prohibit advising a client to breach a rule, including an NCAA rule.⁶⁷ Providing funds to a student athlete would violate NCAA By-law 12.3.1.2⁶⁸ and would therefore constitute *per se* advice to violate that rule. Moreover, conduct by an attorney causing a student athlete to lose his or her eligibility would likely violate the attorney’s fiduciary duty to his client.

As illustrated above, the portions of the Act that attempt to protect athletes in their dealings with agents seem unnecessary when the

ity in the handling of client’s funds is grounds for discipline, including possible disbarment in the case of habitual disregard of clients’ interests. Also, any attorney mishandling client funds in violation of the State Bar Act and the Rules of Professional Conduct would be liable for compensation and punitive damages for breaching fiduciary duty. Rule 4-100 Rules of Professional Conduct of the State Bar of California (2005); CAL. BUS. & PROF. CODE § 6103; *Hamilton v. State Bar of California*, 591 P.2d 1254, 1259 (Cal. 1990) (disbarment); *Stanley v. Richmond*, 41 Cal. Rptr. 2d 768, 776 (Cal. Ct. App. 1995) (breach of rule is breach of fiduciary duty).

⁶¹ CAL. BUS. & PROF. CODE § 18897.27 (2005).

⁶² See, e.g., Rule 3-300 Rules of Professional Conduct of the State Bar of California (2005).

⁶³ CAL. BUS. & PROF. CODE § 18897.3 (2005).

⁶⁴ *Id.* § 18897.37.

⁶⁵ See CAL. CIV. CODE § 1770 (2005) (It is unlawful if a person is “[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another . . . [or] [d]isparaging the goods, services, or business of another by false or misleading representation of fact . . . [or] [a]dvertising goods or services with intent not to sell them as advertised.”); see also CAL. BUS. & PROF. CODE § 17200 (2005) (“As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.”).

⁶⁶ CAL. BUS. & PROF. CODE § 18897.6 (2005).

⁶⁷ Rule 3-210 Rules of Professional Conduct of the State Bar of California (2005).

⁶⁸ See *infra* note 138 and accompanying text.

agent is an attorney. In short, 98% of the agents to whom the Act applies are already covered by regulations that are more detailed, exacting and appropriate.

D. *How Does The Act Regulate Dealings Among Student Athletes, Agents And Educational Institutions?*

Section 18897.63 of the Act provides that no agent may make or continue any contact with any student athlete, any relative or roommate of any student athlete, or any “representative” of any of these persons *unless* the communication is *written* and a copy is sent to the student athlete’s educational institution.⁶⁹ If a student athlete or a representative of a student athlete initiates any contact with an athlete agent, the athlete agent must notify the president or chief administrator of the student athlete’s educational institution—no later than the next business day—that the contact has occurred.⁷⁰ The Act also forbids any contact, written or oral, between agents and student athletes that is not made known to and strictly monitored by the educational institution of the student athlete.⁷¹

If a large law firm employs an attorney who has registered as an athlete agent, that firm could not hire for the summer as a mail clerk or messenger a child of any partner who was a student athlete. Any communication between the student and the agent, and most likely any communication between the student and any employee of the firm (a “runner”) would have to be reported to the student athlete’s school. No doubt the matter would then be reported to the NCAA and at the very least the student athlete would lose his or her job. There would likely also be an investigation as to whether any agent’s services were rendered or whether the job was provided to the student as an inducement for an agency contract.

The Act also requires that any agent who enters into an agent contract with a student athlete or who represents a student athlete in entering into an agent contract, endorsement contract, or professional sports contract give notice thereof to the student athlete’s educational institution within 48 hours.⁷² The student athlete must give the same notice within 72 hours or before participating in any practice or game, whichever occurs first.⁷³ Every agent contract, endorsement contract or professional sports services contract entered into by a student athlete must

⁶⁹ CAL. BUS. & PROF. CODE § 18897.63(a),(b) (2005).

⁷⁰ *Id.* § 18897.63(c).

⁷¹ *See id.* § 18897.63.

⁷² *Id.* § 18897.7.

⁷³ *Id.*

bear a warning concerning the attendant loss of amateur eligibility and advise the student athlete of his or her right to rescind that contract within 15 days,⁷⁴ a rescission right established by the Act itself.⁷⁵

Thus, an athlete agent must notify an educational institution of either of two things: (a) any contact with or initiated by a student athlete; or (b) the signing of an agency contract, endorsement contract, or professional sports contract.⁷⁶

E. *What Are The Penalties For Violating The Act?*

The Act establishes both civil and criminal penalties. Any violation of the Act by an athlete agent carries a minimum \$50,000 civil penalty; but higher actual damages may be recovered.⁷⁷ An athlete or educational institution may sue any athlete agent for actual damages caused by a violation of the Act.⁷⁸ For instance, if a university loses a bowl invitation with a \$750,000 appearance fee due to ineligibility issues caused by an agent's actions in violation of the Act, the university can seek to recover those damages from the agent.

The Act's legislative history demonstrates a specific intent to make these types of alleged losses recoverable by educational institutions. The University of California wrote a letter to Senator Ayala in which it mentioned the need to establish a civil cause of action by universities against agents to recover damages caused by eligibility problems resulting from agent misconduct.⁷⁹ This theme was picked up in the several iterations of the legislative analysis of SB 1401 prepared by the Subcommittee on Sports of the Senate Committee on Business and Professions. In the analyses, it was pointed out that educational institutions could lose millions of dollars in appearance fees and broadcast rights from a ban on postseason bowl games such as the Rose Bowl.⁸⁰ The summary of the Bill's provisions in the legislative analysis then made it clear that the bill would permit a school to file a civil suit against an agent to recover such losses that might arise from his or her violation of the Act.⁸¹

⁷⁴ *Id.* § 18897.73.

⁷⁵ *Id.* § 18897.77.

⁷⁶ *Id.* §§ 18897.63, 18897.7.

⁷⁷ *Id.* § 18897.8.

⁷⁸ *Id.*

⁷⁹ Letter from Stephen Arditti, Director for State Governmental Relations, University of California, to Senator Ruben Ayala (Apr. 5, 1996) (available in Material from the legislative bill file of the Senate Committee on Business and Professions on Senate Bill 1401).

⁸⁰ See legislative analyses of consultant Michael V. Abbott for Hearings on SB 1401 (Apr. 8, 1996; Apr. 22, 1996; June 10, 1996).

⁸¹ See *id.*

An agent may also be liable to repay any consideration he received under the contract and may forfeit the right to repayment of any advances given to the student athlete.⁸² Any violation of the Act is also punishable as a misdemeanor carrying up to a year in County jail and/or a fine of not more than \$50,000.⁸³

The Act further establishes a presumption of damage if an athlete is suspended or disqualified, or if an educational institution is suspended or disqualified by the NCAA due to acts of an athlete agent in violation of the Act.⁸⁴ It is unstated whether this presumption is rebuttable or conclusive.⁸⁵ There is no legislative history explaining why educational institutions have been given a presumption of damage in addition to an automatic civil penalty in suits against agents when such an advantage is shared by virtually no other litigant in California.

Under the Act, a plaintiff may recover punitive damages against an agent, and court costs and reasonable attorneys' fees are both recoverable by the prevailing party.⁸⁶ The Act does not state what precisely needs to be shown in order to recover punitive damages.⁸⁷ Nor does the Act state whether all court costs are recoverable or only those enumerated in § 1033.5 of California's Civil Procedure Code.⁸⁸ No specific definition of "prevailing party" is given either for the recovery of costs or attorneys' fees.⁸⁹

III. CRITIQUE OF THE ACT

No doubt in passing the Act, Senator Ayala and the rest of the Legislature acted in good faith to protect student athletes and educational institutions. However, the Act unfairly hinders the ability of student athletes to obtain the legal advice they need to deal with educational institutions and the NCAA by over-regulating the conduct of attorneys and by adopting draconian penalties for even inadvertent violations of the Act by counsel. Moreover, the Act creates a statutory duty of disclosure to educational institutions that runs counter to the duty of confidentiality that attorneys have to their clients. This may tend to discourage ethical attorneys from becoming athlete agents in the first place, creating the additional unintended consequence of en-

⁸² CAL. BUS. & PROF. CODE § 18897.8(b) (2005).

⁸³ *Id.* § 18897.93.

⁸⁴ *Id.* § 18897.8(a).

⁸⁵ *See id.*

⁸⁶ *Id.* § 18897.8(b).

⁸⁷ *See id.*

⁸⁸ *See id.* *See also* CAL. CIV. PROC. CODE § 1033.5 (2005).

⁸⁹ *See* CAL. BUS. & PROF. CODE § 18897.8(b) (2005).

trusting the field to less scrupulous, unlicensed persons. The burdensome security requirement of the Act also establishes an absurdly high barrier to entry that good attorneys must face when they wish to handle only one or two negotiations for student athletes rather than to make sports law a staple of their practice. Many of these issues are illustrated below through the use of hypotheticals.

Finally, although the Act reflects a sensitivity to the problems of educational institutions in dealing with their student athlete labor force, it gives them no remedy against their other employees or representatives, such as coaches, athletic directors, boosters and other potential “culprits” who commit most of the major infractions that result in the imposition of sanctions by the NCAA or collegiate conferences such as probation or loss of bowl eligibility.⁹⁰

A. *Hypotheticals No. 1 (Son) and No. 2 (Daughter).*

An attorney in a large, well-established law firm has represented a surgeon and his family for 20 years. The attorney has the trust and confidence of the surgeon’s entire family. The surgeon’s son is a junior quarterback at USC and his daughter is a freshman tennis star at UCLA. Other than assisting these two student athletes at the request of the surgeon as discussed below, the attorney has no plans to practice sports law.

The surgeon advises attorney that several NFL scouts and general managers have contacted him and asked if his son will be returning to USC, or declaring for the NFL draft. They want to discuss the pros and cons of turning pro and where his son is likely to be drafted if he decides to declare for the NFL draft. The surgeon has also discussed his son’s draft status with the USC coach and petitioned the NFL for an opinion as to where his son is likely to be drafted. Various self-proclaimed agents have also contacted surgeon and attempted to convince him to have his son declare for the draft and sign an agent’s contract. The surgeon wishes to find out from the attorney how far his son can go in speaking with each of these people without compromising his eligibility.

The surgeon also tells attorney that his son has been approached to endorse several products if he declares for the draft and that he would like the attorney to learn what the real financial potential of these offers may be. One NFL team wants to fly the son out to its training facility where all of its draft data and projections are kept, which data the team has offered to share. The surgeon is concerned that this might

⁹⁰ See NCAA website, *supra* note 35.

compromise his son's amateur eligibility. One NFL team has recently offered to give the surgeon's nephew an entry level position in its front office with "no strings attached." Another team is actively recruiting USC's quarterback coach who is pressuring the son to turn pro.

The surgeon has just learned that the SUV that he purchased for his son from a dealership owned by a USC booster was purchased at \$2,500 under invoice. He has also learned of a cooperative venture at USC between the athletic department and the debating team in which top USC debaters, hired by the athletic department to hand out towels and clean lockers, have been taking exams for football players. When the debaters traveled to nationwide tournaments, they were paid by the athletic department even in their absence. The surgeon's son received an A in geology as a result of this program. During the time the surgeon's son needed to be studying for the geology exam, he was practicing, attending team meetings, lifting weights, rehabilitating two injuries, and spending late nights mastering new plays being introduced into the game plan. An assistant coach told him that the geology exam had been taken care of and that he did not need to take it. Later, the son learned from a debater what had really happened.

In short, the surgeon wants the attorney to look into all of this and determine whether the projected improvement in his son's draft position and endorsement potential from playing another year at USC would be worth taking the risk that a scandal might erupt while he is still at USC. The surgeon hands the attorney a retainer check for \$10,000 and says to bill him by the hour.

In addition to asking attorney to research issues concerning his son, the surgeon would like attorney to do some work involving his daughter. The surgeon's daughter has been suspended by UCLA pending an investigation for recreational and performance enhancing drug use. The only evidence against the daughter is a statement by a teammate who wishes to supplant her. A new tennis league is being formed. Its representatives want to speak with the daughter about turning pro. The surgeon wants: (1) a full investigation of the ownership and finances of the new league, (2) a legal analysis of the daughter's situation at UCLA, including the prospects that she will be suspended or disqualified, and (3) a determination of the best offer available from the new league if it is found to be a respectable and viable entity. UCLA has also requested a urine sample from the daughter for a drug test and the surgeon wants advice as to how to respond. The surgeon hands attorney a second retainer check for \$10,000 and says to bill him by the hour.

1. Analysis of Hypothetical No. 1 (Son).

Attorney is concerned that he has violated the Act simply by speaking with the surgeon as those communications constitute substantive contacts with a relative of a student athlete that must be reported to USC. Moreover, attorney is certain that once he accepts the retainer check and is engaged to represent the surgeon's son, he is required by the literal terms of the Act to advise USC. If attorney fails to do so, he may be committing a misdemeanor. If someone finds out about the engagement and USC is penalized as a result, attorney could be sued for millions. Yet, attorney knows that under the applicable State Bar rules of ethics he absolutely may not divulge his clients' confidences to USC or anyone else irrespective of the risk to himself. Attorney does not know if USC is aware of the booster's activity, the deal between the athletic department and the debate team, or the conduct of its quarterback coach. Either way, USC and the surgeon's son are potential adversaries.

Attorney realizes that he may not represent the surgeon and his son without registering as an athlete agent. He might be performing further activities covered by the Act such as negotiation for endorsement or professional services contracts, at least to the point of determining their financial potential. The act of determining where the son will be drafted and rendering advice to the son will put attorney in contact with and in the presence of many NFL representatives, which constitutes negotiation under the Act and is therefore conduct that attorney must disclose to USC. Any statement or suggestion by attorney that might be deemed to encourage a draft day commitment would also clearly violate the Act. Attorney is not going to bet his net worth, his license to practice law, and his freedom on the argument that none of his planned activities are covered by the Act.

After considering the consequences of not complying with the Act, attorney registers as an athlete agent and posts \$100,000 security by drawing down his home equity line of credit. (His firm cashes the \$20,000 in retainer checks and does not reimburse him.) Then attorney has the surgeon, the son, and the daughter all sign contracts complying with the Act. The surgeon demurs at first, arguing that all he wanted was legal advice and would sign attorney's usual engagement letter. However, trusting his long-time attorney, the surgeon relents, and he, his son and daughter all sign the athlete agent contract without reading it. They do not realize that those contracts might have to be turned over to USC and UCLA, or that the attorney will have to notify USC and UCLA that they were executed.

Next, attorney must decide what to tell USC. Although attorney's activities are almost certainly covered by the Act and attorney could not gamble that he was not so covered, if attorney advises USC that he is the agent for the surgeon's son, the son will be suspended immediately. He stops to think: If I do not tell USC anything it is in the client's interest, but I may violate the Act and be sued or go to jail. If I send the contract to USC, or advise USC of its existence, my client will be suspended but I will be safe.

Attorney also cannot ignore the fact that USC is a potentially adverse party, and that he should not be communicating with USC at all concerning his client's affairs. Attorney thus faces a dilemma: Either remain silent and run the risk of incurring civil and criminal penalties under the Act, or breach his fiduciary duty of confidentiality to his client by advising USC of the engagement and risk disbarment as well as civil liability to his client.

2. Analysis of Hypothetical No. 2 (Daughter).

While pondering those issues, attorney has dinner with the surgeon, his daughter and the representatives of the new tennis league. He acquires background and financial information regarding ownership, and listens to the surgeon's contract negotiations. In the restroom, attorney advises the surgeon as to several negotiating points. By the end of the dinner, a firm offer is on the table from the tennis league.

The surgeon then asks attorney to interview his daughter regarding the drug issues, to hire a private investigator to collect evidence, and to attempt to determine the status of UCLA's internal proceedings. Attorney does so. After a few days of investigation, a report is made to the surgeon that exonerates his daughter. The surgeon and his daughter ask attorney to draft a demand letter to UCLA demanding that the school clear the daughter of all drug charges, drop all ongoing investigations, terminate her suspension immediately, and reaffirm her amateur eligibility. The surgeon wishes to advise UCLA that his daughter has received a firm offer to turn pro and that she will accept unless her eligibility is promptly restored.

Attorney realizes that if he sends the letter, UCLA will suspect that he signed an athlete's agent contract with daughter and was involved in the pro negotiations and failed to advise UCLA, in violation of the Act. If attorney does not write the letter, someone else will, and a few questions will turn up the fact that attorney violated the Act. Yet, the surgeon and his daughter could not have taken such a firm legal posture against UCLA before attorney had concluded his work on behalf of the daughter, work which was adverse to the interests of UCLA

and would have been thwarted by advising UCLA of his engagement at the outset. Simply put, because UCLA was adverse to the daughter, advising UCLA of his employment in compliance with the Act would have breached attorney's duty of confidentiality. Attorney promises to start working on the demand letter, and makes a mental note to call his former ethics professor in the morning.

B. *Hypothetical No. 3.*

Anthony Baker grew up in South Central Los Angeles. He played basketball for Compton Centennial and won a basketball scholarship to Oregon. Anthony is the oldest of five children raised by his mother, a domestic worker. He red-shirted his freshman year to get used to college life and get a head start on his progress toward a degree, but he is struggling. Anthony does not believe he will graduate from Oregon. He needs either to move on to the NBA, or at least Europe or the CBA, or find another job in basketball such as coaching a high school team.

Anthony's scholarship covers room, board, books, tuition and fees. He is also covered on the school medical plan. To maintain his scholarship, Anthony must make satisfactory progress towards a degree and play basketball for Oregon. Anthony's mother needs assistance with his four siblings; however, Anthony cannot afford to travel back and forth to L.A., nor does he have any money to send to his mother. Anthony would like to stop attending class and get a job because his family needs the money and Anthony sees no prospect of graduating. NCAA rules forbid this. Thus, if Anthony gets a job and ceases to attend classes he would lose his eligibility and that would cost him his scholarship. Anthony's play begins to suffer. He now contemplates quitting school and joining the CBA. Anthony is approached with several offers: (1) \$10,000 to shave points; (2) a car to visit his mother and \$100 a week if he will sign a post-dated agent contract; and (3) an opportunity to transfer to a Los Angeles area university.

This all becomes too much for Anthony. Anthony calls attorney's son, against whom Anthony played in high school, and the two of them visit attorney. Anthony tells attorney that he may have to drop out of school and join the CBA. Attorney hears Anthony's story and gives him legal advice as to all points. Attorney tells Anthony that shaving points is a crime and grounds to forfeit his eligibility; that he may not accept gifts from an agent or post date a contract without forfeiting his eligibility; and that if he transfers, he must sit out a full year. This would delay the date by which Anthony could take responsibility for

his family. Attorney charges Anthony nothing because Anthony has no money.

There are no good alternatives for Anthony. He likely will not get a degree. He will not be able to help his family while he is in school. He must make himself a career in basketball. Attorney counsels Anthony not to give up on school just yet but to investigate all available mentoring and tutoring resources at Oregon and to seek advice from older players who have graduated if he can find any. Attorney tells Anthony to visit again if he cannot make progress and meanwhile Attorney will try to find someone conversant with the CBA and European teams to counsel Anthony.

As the students leave, Attorney gets a sinking feeling. He pulls the Act up on his computer screen and reads section 18897.6:

No athlete agent or athlete agent's representative or employee shall, directly or indirectly, offer or provide money or any other thing of value to a student athlete.⁹¹

Attorney is an athlete agent, having registered as such in connection with dealing with the issues of the surgeon's children. By rendering legal advice to Anthony without payment, has Attorney just violated the Act? Consulting with Anthony could be viewed as a "loss leader" or an inducement for an agency contract. Attorney notes that section 18895.2(b)(2)(A) seems to exclude him as long as he is rendering only the type of services customarily rendered by lawyers.⁹² He is puzzled. Negotiating contracts is certainly among the services attorneys customarily render. If Anthony had asked attorney to negotiate an agreement with the CBA, why would that be covered at all? In fact, is that not one of the reasons Anthony came to see attorney, to determine whether to drop out of school and play for the CBA or Europe? Attorney shuts off his computer and hopes Anthony never calls him again.

IV. CONFLICTING DUTIES CREATED BY THE ACT

In creating a duty of disclosure and care by attorneys to third party non-clients, the Act is at odds with prevailing California law. Generally, attorneys have duties only to their own clients. The duty of care owed to clients is not extended to third-party non-clients if doing so

⁹¹ CAL. BUS. & PROF. CODE § 18897.6 (2005).

⁹² *See id.* § 18895.2(b)(2)(A).

would place an undue burden on the legal profession or prevent zealous representation of clients.⁹³

The three hypotheticals demonstrate that the burden placed on the legal profession and the interference with the attorney-client relationship by the Act are quite extreme. The Act could posit a number of perplexing ethical conundrums that would make it virtually impossible for an attorney to act properly on behalf of a student athlete. Moreover, many of the possible issues involve questions of divided loyalties; conflicts between the interests of the client and the obligations of the attorney under the Act. Under prevailing law, an athlete's agent would quite likely *not* be liable for negligence to a student athlete's educational institution.⁹⁴

Attorneys have been held not liable for negligence to non-client third parties in the following contexts: attorney giving negligent advice on stock registration exemption to client was not liable to purchaser,⁹⁵ attorney for close corporation owed no duty of care to minority owner,⁹⁶ attorney not liable to second wife for husband's sloppy divorce from his first wife,⁹⁷ attorney for junior lienholder not liable to senior lienholder,⁹⁸ attorney for psychologist not liable to client's patient,⁹⁹ attorney for purchaser not liable to escrow agent,¹⁰⁰ litigation attorney not liable to adversary for malicious prosecution,¹⁰¹ attorney calling witness not responsible for resulting self-incrimination,¹⁰² and attorney securing attachment not liable to bonding company for diligent prosecution of case.¹⁰³

⁹³ *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (burden on profession); *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 135 Cal. Rptr. 2d 888, 893 (Cal. Ct. App. 2003) (impinging on ethical duties to client); *Goodman v. Kennedy*, 556 P.2d 737, 743 (Cal. 1976) (burden on profession; undue affect on quality of representation to client).

⁹⁴ This discussion assumes, *arguendo*, that the balancing of factors outlined in *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) and *Lucas*, 364 P.2d at 688, for the imposition of liability for negligence upon a professional to a third party lacking privity, favored imposing liability. If such a balance could not be struck, no liability should be imposed. Whether these factors would balance out in favor of attorney or the educational institution in any given case is beyond the scope of this article.

⁹⁵ *Goodman v. Kennedy*, 556 P.2d at 739.

⁹⁶ *Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627, 636-37 (Cal. Ct. App. 1991).

⁹⁷ *Burger v. Pond*, 273 Cal. Rptr. 709, 716 (Cal. Ct. App. 1990).

⁹⁸ *Sooy v. Peter*, 270 Cal. Rptr. 151, 156-57 (Cal. Ct. App. 1990).

⁹⁹ *Schick v. Lerner*, 238 Cal. Rptr. 902, 909 (Cal. Ct. App. 1987).

¹⁰⁰ *St. Paul Title Co. v. Meier*, 226 Cal. Rptr. 538, 540 (Cal. Ct. App. 1986).

¹⁰¹ *Norton v. Hines*, 123 Cal. Rptr. 237, 240 (Cal. Ct. App. 1975).

¹⁰² *DeLuca v. Whatley*, 117 Cal. Rptr. 63, 64 (Cal. Ct. App. 1974).

¹⁰³ *Nat'l Auto & Casualty Co. v. Atkins*, 119 Cal. Rptr. 618, 619 (Cal. Ct. App. 1975).

On the other hand, attorneys *are* liable to non-client third parties for their acts of fraud.¹⁰⁴ Accordingly, if an athlete agent deliberately gave something of value to a student athlete as part of a scheme to forfeit the eligibility of that student athlete, the athlete agent, though an attorney, would be liable to *both* the student athlete and his educational institution, even in the absence of the Act.

One wonders what great public policy is being served by the Act that could justify reversing the flow of the foregoing judicial authority in order to allow educational institutions not only to sue attorneys for even inadvertent errors that result in speculative damage to them but also to presume such damage, to allow the recovery of both civil penalties *and* punitive damages, and to permit the fining and incarceration of attorneys. In fact, as discussed below, the public policy being served is the enforcement of NCAA regulations that forbid the employment of agents. Those regulations in turn assure the NCAA, a cartel consisting of its member schools, a consistent flow of labor at below market prices to go along with their ability to restrict the supply of their product.¹⁰⁵ The ability of student athletes to procure competent legal advice, and the right of lawyers to render it, should not be held hostage in this fashion.

The NCAA claims to be concerned that agents are giving student athletes things of value, sometimes in return for post dated agency contracts, a situation that destroys "amateurism."¹⁰⁶ However, the Act goes further than merely proscribing illicit compensation. It undermines what student athletes need as much as anything in deciding what to do with their professional lives: sound legal advice. The Act makes it very difficult for student athletes to get help by virtue of the double whammy of substantial penalties for violations together with provisions that seem to outlaw the practice of sports law on behalf of amateur clients. Why is the provision of legal advice and other professional guidance to student athletes anathema to the NCAA and its members? It is not to preserve the Olympic ideal of amateurism. Greek Olympic athletes were compensated handsomely.¹⁰⁷ Presently, professional ath-

¹⁰⁴ Shafer v. Berger, Kohn, Shafon, Moss, Figler, Simon & Gladstone, 131 Cal. Rptr. 2d 777, 781-82 (Cal. Ct. App. 2003); Ciccone v. URC Corp., 227 Cal. Rptr. 887, 891 (Cal. Ct. App. 1986).

¹⁰⁵ See NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 96 (1984).

¹⁰⁶ See Letter from Cedric W. Dempsey, Executive Director of the NCAA, to Senator Ruben Ayala (Mar. 21, 1996) (available in Material from the legislative bill file of the Senate Committee on Business and Professions on Senate Bill 1401).

¹⁰⁷ Greek city-states sponsored their citizens to represent them at the games. They contributed to their training expenses, and if the athlete were victorious, he generally ate all of his meals at public expense, and enjoyed front row seats at the theater and other public

letes are allowed to compete in certain Olympic events.¹⁰⁸ Rather, the NCAA and its members disfavor allowing athletes to obtain sound legal advice because such advice could be inimical to the maintenance of the NCAA's below cost labor force. College football and basketball are big business. The educational institutions, their athletic departments, their communities, television, sponsors, merchandisers and the NCAA reap billions of dollars in revenue. The NCAA apparently prefers that the only amateurs involved in amateur sports be the athletes.

The greatest potential harm both to student athletes and their educational institutions is not from the acceptance of modest amounts of cash by the student athletes from agents, but from the punitive response to that practice by the NCAA. The NCAA abhors the practice because it wants to keep student athletes away from the agents, and their money. Accordingly, the Act uses the full weight of the criminal justice system and a "rigged" civil liability scheme to enforce that separation on behalf of the NCAA and the educational institutions. The NCAA is concerned that if students retain agents and get advice then they will turn pro or perhaps mount various legal challenges to the NCAA. If student athletes begin to turn pro earlier, then the NCAA's below cost labor pool will be jeopardized.

If student athletes are being underpaid – and here we are specifically talking about athletes in the minority-dominated, income-producing sports of basketball and football – then basic economic theory dictates that universities are reaping excess profits on this labor. Where is that excess profit going? The universities claim that it goes to support non-revenue producing sports.¹⁰⁹ In other words, the minority-dominated revenue producing sports are being used to fund the Caucasian-dominated non-revenue producing sports such as tennis, golf, fencing, swimming, volleyball, water polo, etc.¹¹⁰ It is a worthwhile goal to offer a panoply of sports to students, but it is distasteful to think about

festivals. One city, Aegium, built a gymnasium at the public expense in which its champion wrestler and pancration champion, Straton, could train. Poets were commissioned to compose songs to the honor of these athletes. One famous verse was composed by Pinder regarding the feats of Hiero. Vases depicted the victories of Olympic athletes and sculpture was also created in their honor. An Olympic athlete thrice victorious had a statue in his likeness erected in the sanctuary of the Temple of Zeus on Mt. Olympus. See PAUSANIAS, DESCRIPTION OF GREECE, Book VII, ch. 23, p.5 (circa 160 C.E.); University of Pennsylvania Museum of Archaeology and Anthropology, *The Real Story of the Ancient Olympic Games*, at <http://www.museum.upenn.edu/olympics> (last visited May 12, 2005).

¹⁰⁸ For instance, professional athletes have been allowed to compete in Olympic basketball, hockey, baseball and tennis matches, among others.

¹⁰⁹ Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 47 (1996).

¹¹⁰ *Id.*

how this is actually being accomplished in social terms. It is simply unfair to the minority athletes who are generating all the cash.

There is also another, often unmentioned, distribution of the excess profits. Each university pays millions of dollars to its athletic directors and staff, its football coach and staff, and its basketball coach and staff. These positions are held predominantly by Caucasian men. In 2001, only 2.0 percent of all head football coaches at large colleges and 12.7 percent of all head basketball coaches were African-American.¹¹¹ The Act protects this redistribution of income with the full force of the law.

For example, in 2002, the University of Alabama considered hiring African-American Sylvester Croom as its head football coach. Croom was an All-American at Alabama and was an assistant coach there for ten years before leaving to become an assistant coach for the Green Bay Packers of the NFL.¹¹² Instead of hiring Croom, Alabama hired Mike Shula, a 37 year old Caucasian and a former Crimson Tide quarterback who had never coached previously on the college level. The job paid \$900,000 per year.¹¹³

At the end of his eligibility, what does a scholarship basketball or football player typically have? Approximately 60 players are drafted yearly by the NBA, and many of those spots are taken by foreign players or high school students.¹¹⁴ Approximately 255 players are drafted into the NFL every year and even fewer have a professional career of significance.¹¹⁵ On the other hand, half of all Division I schools represented at the NCAA men's basketball tournament last year failed to graduate 40% of their basketball and football players.¹¹⁶ Forty four of the sixty five schools represented failed to graduate more than 50% of

¹¹¹ News and Views, *Black Teams and White Coaches: African Americans Continue to Make Limited Progress in College Coaching Positions*, J. BLACKS IN HIGHER EDUC., July 31, 2003, at 43. African Americans made up 52% of all athletes on football scholarships and 59.8% of all men on basketball scholarships in 2001 and both percentages have increased significantly since. African Americans are only 6% of all athletes on baseball scholarships. *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See <http://www.nba.com/draft2004/board.html> (last visited May 12, 2005). There are two rounds in the NBA draft. Players are drafted from outside the United States and from secondary schools as well as from colleges and universities. In 2004, fifty-nine players were drafted by the NBA. Of those, seven were drafted out of United States high schools, four from Russia, two from Slovenia, and one each from eight other countries. Only thirty-eight players were drafted from United States colleges and universities. *Id.*

¹¹⁵ Jack Bogaczyk, *Wilson's long NFL Draft rewarded, King, Wallace, Wiley sign free agent deals*, CHARLESTON DAILY MAIL, April 26, 2004, at P1B.

¹¹⁶ NCAA Report, *Graduation Rates Cause Alarm*, L.A. TIMES, Mar. 20, 2004, at D13.

their players.¹¹⁷ Is this a social policy worth defending with the legislative deference shown by the Act?

The overall graduation rates within six years for scholarship athletes entering college in 1996-1997 was 51% for football players and 42% for basketball players.¹¹⁸ Among all student athletes the rate was 60%.¹¹⁹ However, of the 328 Division I colleges that play men's basketball, 58 that had African-American players did not graduate even one of them within a 6 year period.¹²⁰ Of the "sweet 16" qualifiers in 2003, 5 had African-American player graduation rates between a third and a half lower than the university's overall graduation rate; 6 of the 16 had an African-American player graduation rate a third to three-quarters lower than the rate for all male athletes.¹²¹

For the recruiting years between 1990-1994 *none* of the African-American players from the University of Arkansas' basketball team graduated and neither did any of the African-American players at thirty-four other Division I schools.¹²² During that same time period, Ohio State graduated 18% of its basketball players and 28% of its football players.¹²³ "Progress" resulted in 34% of African-American basketball players and 50% of Caucasian basketball players graduating in 1999.¹²⁴ It should be noted that graduation figures collected by the NCAA in 2004 show that the following institutions all graduate over 80% of their student athletes (in descending order of success): Duke, Xavier, Georgetown, Davidson, Notre Dame, Bucknell, Colgate, Holy Cross, Marquette, Stanford, William and Mary, Boston College, Penn State, Virginia, Rice and Purdue.¹²⁵

V. SECURITY AS A BARRIER TO ENTRY

The requirement of the Act that an agent post either an insurance policy or \$100,000 in collateral seeks to secure judgments obtained by student athletes or educational institutions.¹²⁶ This evinces a degree of

¹¹⁷ *Id.*

¹¹⁸ John O'Connor, *A New School of Thought: Now, NCAA Members Must Make the Grade or Face the Music*, RICHMOND TIMES DISPATCH, June 13, 2004, at C1.

¹¹⁹ *Id.*

¹²⁰ Frank Litsky, *2003 NCAA Tournament: Academics; Study Finds Top Teens Failing in the Classroom*, N.Y. TIMES, Mar. 25, 2003, at S4.

¹²¹ *Id.*

¹²² *Where The Outrage Isn't: Those abysmal graduation rates*, ARK. DEMOCRAT-GAZETTE, Mar. 6, 2002, at B8.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ David Barron, *State Schools Drop Academic Ball*, HOUSTON CHRON., Oct. 27, 2004, at Sports 9.

¹²⁶ CAL. BUS. & PROF. CODE § 18897.87 (2005).

protectiveness virtually unparalleled in California statutes. An attorney may represent thousands of clients in his career, owing fiduciary duties of care and confidentiality to all of them. These clients may include seniors, the infirm, and the unsophisticated. The attorney may hold millions in their settlement funds. Yet, attorneys need not post any collateral at all to practice law. However, if an attorney offers to give advice to the labor force of the NCAA, the entry fee is essentially \$100,000 of liquid net worth. This seems to be an unnecessary requirement lobbied for by a special interest.

The result of this security requirement may be to exclude experienced attorneys who wish to represent a few athletes and to consolidate more power in the hands of the "super" agents. For example, the legislative history included a letter by a partner in a venerable California firm who represented a few local athletes every year, generating less than \$15,000 in fees annually.¹²⁷ He denied ever having offered any inducement to student athletes but stated that the proposed security requirements of the Act would compel him to give up his fledgling practice.¹²⁸ A typical seventh round NFL draft pick might make \$150,000 in his first year, and his agent would be paid at most 4% of that pursuant to the NFLPA regulations which limit a contract advisor's fee to 4% of the amount negotiated; payment to be received when and only when the client is first paid under his contract.¹²⁹ Moreover, competition often drives the fee down to 3%.¹³⁰ For one \$4,000 client, a professional may be unlikely to choose to post \$100,000 security. It is doubtful that more than 10 players graduating from California universities in any given year will end up on NFL rosters.¹³¹ Only a very small number of agents representing the elite athletes make substantial sums.¹³² The rest will be squeezed out of the practice by this security provision and the stiff competition for a limited number of clients. For this reason, AB 1987 originally had no provision for a surety bond; this requirement appeared in SB 1401.¹³³ To make matters worse, with so many states now adopting a similar security requirement, the practice

¹²⁷ Letter from Robert G. Campbell, Esq. of Thelen, Marrin, Johnson & Bridges, to Larry Doyle, Office of Governmental Affairs, State Bar of California (June 27, 1996) (available in Material from the legislative bill file of the Assembly Committee on Governmental Organization on Senate Bill 1401).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.*

¹³³ Senate Committee on Business and Professions, Hearing on AB 1987 (June 10, 1996).

of sports agency law across state lines has become prohibitive for all except the “super agents.”¹³⁴

Finally, the Act does not make clear who must post the security.¹³⁵ When a client engages an attorney, that client generally retains the attorney’s law firm and any one or more of the firm’s attorneys may act on his behalf. So, who posts the security: the firm, the attorney who brought the client into the firm, the attorney in charge of the matter, every attorney working for the client, or every attorney in the firm? Make a mistake and it could be a misdemeanor.

VI. NCAA BY-LAWS REGARDING AGENTS

The NCAA Constitution and By-Laws consume 504 pages. They are available online to all student athletes, coaches, agents, professional sports organizations and anyone else who wishes to view them.¹³⁶ What does the NCAA itself say about agents? The NCAA forbids any student athlete from competing in its sanctioned events if he or she is represented by an agent or has ever accepted anything of value from an agent. The General Rule is set forth in By-Law 12.3.1:

An individual shall be ineligible for participation in an intercollegiate sport, if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.¹³⁷

The receipt of compensation from agents not representing the student-athlete is also destructive of eligibility.

12.3.1.2 Benefits from Prospective Agents

(a) An individual shall be ineligible per Bylaw 12.3.1, if he or she (or his or her relatives or friends) accepts transportation or other benefits from:

(b) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general; or

¹³⁴ See Letter from Robert G. Campbell, *supra* note 127.

¹³⁵ See CAL. BUS. & PROF. CODE § 18897.87 (2005).

¹³⁶ 2004-05 NCAA Division I Manual: Constitution, Operating Bylaws, Administrative Bylaws (2004) available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (last visited May 12, 2005).

¹³⁷ *Id.* § 12.3.1.

An agent, even if the agent has indicated that he or she has no interest in representing the student athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student athlete's sport.¹³⁸

In 2000, the NCAA suspended a baseball player for nine games for accepting less than \$100 in cab fare from a "runner" for an agent.¹³⁹ In 1995, the NCAA suspended a hockey player who retained an agent to advise him regarding his desire to compete professionally in Switzerland.¹⁴⁰

The statements of the NCAA regarding the role of counsel are somewhat confusing:

Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the student athlete *in negotiations* for such contract.¹⁴¹

According to a summary of NCAA rules and regulations prepared by the NCAA itself, this is how the NCAA views the effect of legal counsel in By Law 12.3.2:

In 1974, NCAA members recognized that student athletes might need legal advice to assist them in understanding and evaluating professional sports contract offers made to them while they had eligibility remaining. Accordingly, member institutions adopted the current clause of 12.3.2 that permits a student athlete to seek advice from a lawyer, provided the lawyer does not represent the student athlete in negotiations for a professional sports contract.

It was noted on the NCAA convention floor during consideration of the proposal that a student athlete may seek the advice of a lawyer relative to future negotiations or discussion of the individual's professional aspirations, so long as the lawyer does not become actively involved in negotiations with the professional team or organization. This legislation was intended to provide an opportunity for a student athlete to receive advice so that he or she could understand a contract offer, but it was not intended to involve the lawyer in direct contact with a professional organization.

Since the adoption of this legislation, more and more agent-attorneys have used the language to become involved actively in actual contract discussions with professional sports organizations. Some lawyers

¹³⁸ *Id.* § 12.3.1.2.

¹³⁹ NCAA Athletic Agent Information Packet available at http://www1.ncaa.org/membership/enforcement/agents/sa_info/agentPacket.html (last visited May 12, 2005).

¹⁴⁰ *Id.*

¹⁴¹ 2004-05 NCAA Division I Manual, *supra* note 136, § 12.3.2 (emphasis added).

have asked professional sports organizations to communicate all contract offers to a particular student athlete through them while at the same time insisting that they are not representing the student in contract negotiations.

The legislation does not deny an individual the opportunity to seek competent legal counsel to review the terms of a proposed professional contract and to assist the individual in understanding those terms, nor does it deny an individual the opportunity to be represented by legal counsel if he or she chooses to negotiate a professional contract and forgo his or her remaining eligibility. It does indicate that *once the student decides to have legal counsel contact the professional club concerning the contract offer, the individual has agreed to be represented by an agent in the marketing of his or her athletics talent, and no longer is eligible per 12.3.2.*

. . . A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (i.e., in person, by telephone or by mail) with a professional sports organization on behalf of the student athlete. A lawyer's presence during such discussions is considered representation by an agent. [12.3.2.1]

For example, if an individual was drafted by a Major League Baseball team and offered a contract, his advisor would not be permitted to negotiate with the professional team. In this regard, however, the advisor could provide advice to the individual in private regarding the merits of the contract. If the individual, in turn, elected not to accept the terms of the contract, he could negotiate the terms of the contract with the professional team by himself or with the assistance of his parents or the institution's professional sports counseling panel.¹⁴²

In sum, a student athlete can negotiate with a sports team for a contract, but he cannot hire a lawyer or sports agent to do so for him without losing his eligibility. An attorney can listen to the athlete's secondhand version of the sports organization's offer, but he cannot hear it directly from the organization or participate in the negotiations. A lawyer can render advice on an offer, but not if he heard the offer himself from a sports organization or negotiated for its terms.

It is difficult to see what legitimate interest of the NCAA or its members these limitations can possibly serve. If a college student decides to negotiate with the NFL or the NBA and stand up to badgering from a college wishing to retain his services, he is entitled to the best

¹⁴² Summary of NCAA Regulations Related to Agents and Other Amateurism Provisions (1998) available at http://www.ncaa.org/agents/ncaa_summary.html (last visited May 12, 2005) (emphasis added).

lawyer he can find to assist him in any way he wants to be helped. A law or rule depriving the student athlete of counsel in matters that could impact the rest of his professional life seems calculated to serve the NCAA and educational institutions at the expense of the student athlete. The only purpose of sending the student athlete out alone to bargain with wolves as an underclassman is to convince him to abandon the effort and to use all of his amateur eligibility.

VII. HOW DOES THE UAAA DIFFER FROM THE ACT AND DOES IT SHARE THE SAME DEFECTS?

Although the NCAA and its members lobbied the NCCUSL to draft an NCAA friendly model act, it was somewhat less successful with these legal experts than it was with USC graduate and sports enthusiast Senator Ayala. The UAAA, the end product of deliberations by the NCCUSL, differs from the Act in the following significant respects:

1. An "athlete agent" is defined as an individual who enters into an agency contract with a student-athlete or solicits a student athlete to enter into an agency contract.¹⁴³ It does not include persons who merely have contact with professional sports organizations or who are present at any negotiations by professional sports organizations.¹⁴⁴ Thus, the concerns articulated at the NCAA convention in 1974 were not taken into account in drafting the UAAA.

2. The UAAA enumerates the grounds to deny, revoke, or suspend registration or renewal of registration while the Act does not.¹⁴⁵

3. The only notification that an educational institution is entitled to receive from the athlete agent is notice that an agency contract has been signed.¹⁴⁶ This relieves attorneys from most of the conflicting burdens created by the Act.

4. The only types of contact with a student athlete prohibited by the UAAA are false and misleading statements or contacts absent proper registration by the agent.¹⁴⁷ This places a substantially lower burden on the legal profession than that imposed by the Act.

5. No athlete agent may give anything of value to a student athlete prior to the signing of an agency contract.¹⁴⁸ The Act missed the

¹⁴³ Uniform Athletes Agents Act, § 2(2) (2000) available at <http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm> (last visited May 12, 2005).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* §§ 6-7.

¹⁴⁶ See *id.* § 11.

¹⁴⁷ See *id.* § 14.

¹⁴⁸ See *id.*

obvious point that after an agency contract is signed, the agent is obligated to provide something of value.

6. The penalties prescribed by the UAAA are less severe than those imposed by the Act. The civil penalty is \$25,000 and there is no private right of action by the student athlete against the agent, because he or she has existing contractual and tort remedies. An educational institution may sue an athlete agent for damages, but there is no presumption of damages as under the Act. Punitive damages are not expressly made recoverable, and criminal penalties are left to the states to determine.¹⁴⁹

In short, the UAAA offers a more reasonable approach than the Act to the problem of regulating athlete agents. It does not slavishly enforce NCAA By-laws but represents a balanced approach designed by legal experts. For instance, where NCAA By-laws clearly provide that legal counsel may not contact a professional sports organization on behalf of a student athlete, the UAAA does not proscribe such contact. In fact, the UAAA seems similar to the law that existed in California prior to the Act's passage.

VIII. COUNTER-PROPOSALS

Senator Ayala was correct in concluding that there is some sort of problem that needs to be addressed. However, he was incorrect in concluding that the solution was to adopt draconian penalties regulating the conduct of agents and to include attorneys in the system of regulation. Here are several alternative approaches:

1. Replace the Act with the UAAA

The superiority of the UAAA has already been demonstrated. Adopting the UAAA would relieve most of the undue burden placed upon the legal profession by the Act.

2. End the Insanity

The NCAA By-Laws state that a college athletics program is designed to be an integral part of the educational program and that the student athlete is considered an integral part of the student body.¹⁵⁰ An amateur athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for which participation in that sport is an avocation.¹⁵¹ However, it is

¹⁴⁹ See *id.* §§ 15-17.

¹⁵⁰ 2004-05 NCAA Division I Manual, *supra* note 136, art. 12.01.2.

¹⁵¹ *Id.* art. 2.9.

impossible to reconcile that statement with the reality of any top 25 football or basketball program.

Accordingly, each educational institution should be given a choice. It should decide whether to field a true amateur team or a semi-professional team in each sport. If an institution chooses to field an amateur team, then there must be no athletic scholarships awarded and no form of compensation whatsoever to any student athlete on the team. If the educational institution chooses to field a semi-professional team, it can pay the student athletes whatever the market can bear. Students or semi-professional teams may hire agents, lawyers, accountants, allergists and tree surgeons if they wish. There will be one year contracts and free movement between school years without any mandatory "sitting out" period.

However, any educational institution selecting a semi-professional program must submit a plan outlining a long-term effort to bring graduate rates among student athletes in basketball and football up to the graduation rate of the entire student body. If satisfactory graduation rates are not obtained, then that school will receive a graduated series of penalties up to and including the death penalty. Once the death penalty is imposed, the institution would have to move into the amateur classification.

Only the monetary portion of the student athlete's income will be taxed. There will be a mandatory health, disability and life insurance program.

This plan invites competition from semi-professional teams not affiliated with educational institutions. Athletes who cannot realistically satisfy the educational requirements of academia should not be required to struggle to "maintain satisfactory progress toward a degree" that they will never obtain. Accordingly, other semi-professional teams should be allowed to compete with say, USC, Oklahoma, Miami, Michigan, LSU, Auburn, Texas, Florida, Florida State, and other collegiate powerhouses on terms that are fair and just.

This, of course, would threaten the NCAA's virtual monopoly on football in the United States in the 18-22 year age bracket, or, more precisely, in the slot between high school and the NFL. Such a plan would likely be opposed by the NCAA and its members. The NCAA would no doubt sanction its members for competing against non-member teams and refuse to admit the new clubs because they are not affiliated with educational institutions.

Assuming that these restrictions passed legal muster, the new semi-professional teams would have to form their own league and play among themselves. However, the competitive landscape would be al-

tered by the fact that educational institutions would also have to pay players and provide an education as well. This might make it possible for a semi-pro league to survive.

3. Repeal the Act and Focus on Reforming InterCollegiate Athletics

On balance, the Act seems to do more harm than good. It would be preferable to declare the work of the sports agent to be the practice of law. This would exclude the 2% of agents who are not attorneys. Then the Act could be repealed and much better enforcement effort could be made under the aegis of the State Bar. Among the things the State Bar might consider creating are: (1) a specialization in sports agency law, (2) MCLE classes on point, (3) a hotline for student athletes, their parents and their coaches, and (4) a separate committee for education and enforcement.

In 2001, the Knight Commission, a blue ribbon committee established by the John S. and James K. Knight Foundation, issued its report on the state of college athletics.¹⁵² This report was published after a decade had elapsed since the Knight Commission published the first of three similar reports in the nineties.¹⁵³ The Knight Commission had earlier proposed a “‘one-plus-three’ model for intercollegiate athletics – presidential control directed toward academic integrity, financial integrity, and independent certification of athletic programs.”¹⁵⁴ At the ten year mark, however, the Knight Commission concluded that “the problems in big-time college sports have grown rather than diminished.”¹⁵⁵

The Knight Commission saw the three major issues facing college sports to be academic transgressions, a financial arms race, and commercialization, which was deemed “a widening chasm between higher education’s ideals and big time college sports.”¹⁵⁶ Instead of more NCAA rules, the Knight Commission sought a coalition of presidents to seek academic reform, de-escalation of the athletic arms race, and a de-emphasis on commercialization.¹⁵⁷ The specific recommendations were as follows:

¹⁵² A Call to Action: Reconnecting College Sports and Higher Education, Report of the Knight Foundation Commission on Intercollegiate Athletics, June 2001, available at http://www.ncaa.org/databases/knight_commission/2001_report/2001_knight_report.html (last visited May 12, 2005).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

A. *Academics*

1. Mainstream athletes: hold them to the same academic requirements as other students.
2. Achieve a 50% graduation rate: Improve graduation rates upon threat of loss of post-season eligibility.
3. Scholarships should be for 4-5 years, not one year.
4. Reduce the length of the competitive seasons.
5. Encourage the NBA and NFL to develop their own minor leagues.

B. *Arms Race*

1. Reduce total expenditures and number of scholarships.
2. Reduce coaches' salaries.
3. Require that coaches' outside income be negotiated with the institution.
4. Change the method of distributing CBS broadcasting fee for NCAA mens' basketball tournament so that no revenue is distributed based upon winning.

C. *Commercialization*

1. Institutions should control when games are played, how they are broadcast, and who sponsors them.
2. Consider commercial contracts in the context of academic values.
3. Minimize commercial intrusions into arenas and stadia.
4. Prohibit exploitation of athletes – no corporate logos.
5. Support federal legislation to end gambling on college sporting events.¹⁵⁸

The analysis of the Knight Commission is clearly grounded in the belief that the primary goal of an academic education is to educate and that universities should not be controlled by alumni boosters, corporate sponsors, millionaire coaches on the way to the NFL, or agents. It can also be argued that student athletes who have no intention of ever attempting to graduate have no business attending school. However, they are getting an education in one sense—the job training applicable to a specific career. Perhaps the admissions requirements are too quaint in failing to recognize this.

4. Further Study

Further study is necessary as to the exact role of all the actors: agents, students, parents, coaches, professional sports' organizations,

¹⁵⁸ *Id.*

educational institutions and the NCAA. Each party has legitimate concerns that need to be articulated and considered before a successor to the Act is settled upon. Because the Governor's Department of Consumer Affairs initially opposed the Act,¹⁵⁹ perhaps Governor Schwarzenegger would call for several sessions of hearings on this issue throughout the state or appoint a commission to make recommendations before we adopt a knee-jerk solution based on our love of sports or what we think we know from media reports.

IX. CONCLUSION

In the Miller-Ayala Athlete Agents Act, California has a law governing athlete agents that is more severe than the model act (UAAA) adopted by 32 states. The Act imposes a draconian system of regulating and penalizing athlete agents even though there is no adequate statistical basis for concluding that athlete agents are the root cause of any of the major problems facing college sports. According to the Knight Commission, the three major problems are academic transgressions, a financial arms race and rampant commercialism. Perhaps it would be more productive for the California legislature to direct its attention to those problems and to ease the over-regulation of athlete agents that threatens to deprive student athletes of effective counsel.

¹⁵⁹ See *supra* note 24 and accompanying text.

