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Loans and Marketing Guarantees in Athlete Agent Recruiting: Why They Are Ill-Advised Under Agency Law and Attorney Ethics Regulations Principles

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LOANS AND MARKETING GUARANTEES IN ATHLETE AGENT RECRUITING: WHY THEY ARE ILL-ADVISED UNDER AGENCY LAW AND ATTORNEY ETHICS REGULATIONS PRINCIPLES

*By: Joshua Lens**

Athlete agents use various means to recruit prospective clients. Controversial yet common methods include offering loans and marketing guarantees to prospective clients. In each transaction, the agent provides his client with money, in some cases amounting to millions of dollars. The agent typically expects repayment of the loan whereas the marketing guarantee is an advance on future marketing income that the agent will arrange for the athlete. While both National Football League Players Association ("NFLPA") agent regulations and state athlete agent laws prohibit agents from offering inducements to prospective clients, neither authority considers loans or marketing guarantees illicit or prohibits them.

This Article details the use of loans and marketing guarantees in the football agent recruiting process. The Article also explores both NFLPA and state athlete agent law, which is based on the Uniform Athlete Agents Act or its revised version's prohibitions on athlete agents providing inducements to prospective clients. It describes the fiduciary relationship between athlete agents and their clients and the duties that result under agency law. Next, the Article applies agency law to the provision of loans and marketing guarantees by athlete agents to their clients, determining that agency law seeks to prohibit such transactions. The Article then discusses the application of attorney ethics regulations to attorneys who serve as athlete agents and provide loans and marketing guarantees, finding that attorney-agents who engage in this activity violate ethics regulations. The Article concludes by explaining why both athlete agents and athletes should be leery of these dealings and by urging the NFLPA and individual states to expressly prohibit them.

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I. Introduction[1]

At the conclusion of his junior season of collegiate eligibility, a draft-eligible defensive lineman considers leaving his university early and entering the upcoming NFL draft. The lineman and his family begin gathering material that will aid in the decision, the university's head coach solicits information on the lineman's strengths and weaknesses and projected draft position from NFL contacts, the lineman and his family monitor the number of other defensive linemen eligible for the draft, and the lineman obtains a projection from the NFL College Advisory Committee.[2] As the lineman and his family collect this information, they decide to meet with and interview athlete agents to

1. While a college athletics administrator, I helped dozens of student-athletes at multiple universities with their agent selection process. This scenario closely resembles actual events of one such selection process.

2. Draft-eligible underclassmen may request a pre-draft projection from the NFL College Advisory Committee, which is made up of professional and team scouts. *See NFLPA Pipeline to the Pros*, https://www.nflpa.com/pipeline (last visited Mar. 1, 2020) [https://perma.cc/LH9S-G8FP] (outlining resources available to student-athletes considering leaving school early for the NFL draft). For information on how a draft-eligible underclass student-athlete should successfully transition from a collegiate to professional football career while maintaining compliance with NCAA rules, see Mike Rogers, *Paving the Road Between NCAA Stardom and an NFL Career: A University Advisory Panel Perspective*, 19 U. Denv. Sports & Ent. L.J. 187, 212–13 (2016) (reviewing "stay" and "go" factors for former top early-entry NFL draft selections such as Jason Smith and Robert Griffin, III).

both learn more about the business side of professional football and select and sign with an agent should the lineman decide to enter the draft.[3]

The lineman and his parents, coaches, and athletics department administrators collaborate and discuss characteristics they would like a potential athlete agent to possess. The lineman researches various athlete agents, talks to acquaintances who play in the NFL about their agent representation, and ultimately invites five successful and reputable athlete agents to campus for interviews. The first four meetings go as anticipated—the agents pitch their services to the lineman and his family, boast about the number of first-round draft picks among their clientele, show statistics regarding the millions of dollars in contracts they negotiated on behalf of clients, explain the pre-draft process, and discuss the draft itself. Each agent expresses gratitude to the family for the organized and fair selection process and tells tales of being disadvantaged when recruiting some other athletes who signed with the athlete agent willing to pay the most.

The final meeting ends with a twist, however. After giving a recruiting pitch similar to the other agents, this athlete agent dramatically states, "I have such confidence that we would be a great fit together and you'll be drafted highly that I'm willing to put my money where my mouth is and offer you a marketing guarantee of $250,000." The lineman and his family exchange confused looks and express incomprehension. The athlete agent explains that if the lineman decides to leave school early and retain the athlete agent for both contract negotiation and marketing representation, the athlete agent will pay the lineman $250,000 up front as an advance against future marketing income.

The lineman's middle-class parents express agitation that this athlete agent believes their son could be bought with what seems like a loan. The athlete agent explains that the lineman will never have to repay him any of the money, that it is an advance on future marketing income and if the athlete agent arranges marketing income for the lineman amounting to less than $250,000, the agency will be on the hook for the difference. The lineman's folks remain concerned with and confused about this offer, now considering it more akin to a cash payment or bribe. The athlete agent counters that if the lineman's parents feel more comfortable with their son repaying the $250,000, the parties can treat the payment as a loan—the athlete agent was simply

3. In this example, the lineman wishes to preserve his NCAA competition eligibility in case he decides to return to his university for his senior season. Thus, while he will meet with athlete agents, he will not sign with one until he concludes he will leave school early and enter the draft because, under NCAA regulations, football student-athletes who sign with athlete agents forfeit their competition eligibility. *See* NCAA, 2018–19 Division I Manual § 12.3.1 (Aug. 2018), http://www.ncaapublications.com/productdownloads/D118D119.pdf [https://perma.cc/MA57-NMN5].

trying to get some money in the lineman's pocket as it will be several months before the lineman receives a paycheck from his future NFL organization. The lineman's parents want to research the permissibility of athlete agents providing marketing guarantees and loans and, perhaps just as importantly, engage in some soul-searching to determine how they feel about the ethics of the offers. The lineman and his family thank the athlete agent for the meeting, agree to consider the athlete agent's pitch and offers, and promise to remain in contact.

Part II of this Article explores marketing guarantees and loans and how athlete agents use them in the recruiting process. Part III provides answers to the lineman's parents' concerns about whether loans and marketing guarantees violate the National Football League Players Association ("NFLPA") regulations and state athlete agent laws. Additionally, Part III analyzes considerations the lineman's parents did not contemplate: the application of agency law and attorney ethics regulations to these transactions. This Part concludes that agency law and ethics regulations seek to prohibit athlete agents and attorneys who serve as athlete agents from offering loans and marketing guarantees. This Article concludes in Part IV by cautioning athletes and athlete agents to refrain from entering into these transactions and, based on the rationale of agency law and attorney ethics regulations, urging the NFLPA and individual states to expressly prohibit them.

II. Use and Role of Loans and Marketing Guarantees in Athlete Agent Recruiting[4]

The athlete agent selection process is extremely important for student-athletes. Although most athlete agents behave honestly and professionally, there are those who do more harm than good.[5] Hiring an honest agent can be of extreme benefit to an athlete, while hiring a dishonest agent can cause great harm to an athlete's career.[6] Athlete agents are a leading cause of problems relating to student-athletes' transitions into professional careers.[7] The selection process can be grueling and complicated, with Trent Richardson, former University of Alabama running back and third overall pick in the 2012 NFL draft

4. While athlete agents offer loans and marketing guarantees to athletes who participate in many sports, this Article focuses on athlete agents who represent and offer loans and marketing guarantees to football players.

5. *See* Dave Anderson, *Sports of the Times; Agents' Schemes and Harmful Effects*, N.Y. Times (Nov. 19, 2000), https://www.nytimes.com/2000/11/19/sports/sports-of-the-times-agents-schemes-and-harmful-effects.html [https://perma.cc/Z4WT-CAG7] (explaining that an athlete agent's harm can be blatantly wrong or a subtle scheme and providing examples of each).

6. *See id.* (providing examples of agents' dishonest acts).

7. *See* Glenn Wong, Warren Zola & Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 Cardozo Arts & Ent. L.J. 553, 557 (2010) (noting agents are still a necessary component of this process).

saying it was "probably the hardest thing ever."[8] The process can overwhelm student-athletes, who often receive fifty text messages and twenty-five calls a day from athlete agents seeking to represent them.[9]

For athlete agents, player recruiting "is the lifeblood of the agent business."[10] Thus, if they are not careful, athlete agents can spend more time recruiting potential clients than actually representing current clients.[11] Former athlete agent and NFL executive Andrew Brandt describes agent recruiting as attempting to persuade a young man he should sign with him instead of the many other agents attempting to sign him.[12] To football agent Pat Dye, Jr., recruiting is a "job interview" in which he must sell himself to the student-athlete, his potential client.[13] For Dye, Jr., the "business is all about relationships."[14]

However, one football agent described player recruiting as "a shark tank without any lifeguards."[15] David Ware, a longtime agent who represented former NFL star Barry Sanders, characterized player recruiting as "the wild, wild West."[16] This is due in large part to the

8. *See* Kevin Scarbinsky, *Choosing an Agent: The Other Kind of Recruiting*, AL.COM (Mar. 11, 2012), https://www.al.com/sports/index.ssf/2012/03/post_345.html [https://perma.cc/7KNS-GYED] (explaining that agent selection is hard because agents tend to "tell[ ] you what you want to hear").

9. *Id.* (likening agent recruiting to college coaches recruiting high school athletes).

10. Andrew Brandt, *Football's Other Recruiting*, SPORTS ILLUSTRATED (Dec. 19, 2013), https://www.si.com/2013/12/19/nfl-agents-recruit-draft-prospects [https://perma.cc/33F3-33TL] (describing agent recruiting).

11. Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should be the "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 742 (2006) (proposing that players associations be more proactive in their role as the "exclusive" representative of players).

12. *See* Brandt, *supra* note 10 (referring to the time period between the end of college football's regular season and bowl season as "go time" for agent recruiting). Brandt's background includes serving as the contract advisor for NFL stars Matt Hasselbeck, Adam Vinatieri, and Ricky Williams, prior to serving as the Green Bay Packers' Vice President. *See Andrew Brandt Biography*, VILLANOVA U., https://www.1villanovawww1.villanova.edu/villanova/law/academics/faculty/Facultyprofiles/AndrewBrandt.html. (last visited Jan. 6, 2020) [https://perma.cc/TM5N-WYEN].

13. *See* Scarbinsky, *supra* note 8 (describing Pat Dye, Jr.'s background, which includes being the son of Auburn University's former head football coach and obtaining his law degree). Dye, Jr. has more than thirty years of experience as an athlete agent. *See Pat Dye, Jr.*, SPORTSTRUST ADVISORS, https://www.sportstrust.com/team/pat-dye-jr/ (last visited Jan. 6, 2020) [https://perma.cc/9R2R-JGAE].

14. *See* Scarbinsky, *supra* note 8 (providing example of Dye, Jr., an "Auburn grad" who signed former University of Alabama football student-athletes through leveraging relationships with people associated with the University).

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

16. *See* Liz Mullen, *Dirty Dealings Spark Debate*, SPORTS BUS. J. (Apr. 19, 2004), https://www.sportsbusinessdaily.com/Journal/Issues/2004/04/19/Labor-Agents/Dirty-Dealings-Spark-Debate.aspx [https://perma.cc/K49E-UPFY] (describing the state of the agent industry and the possibility of new, tighter authorities).

fact that there are many NFLPA-certified agents vying to represent the few draftees and undrafted free agents.[17] As many as thirty agents may contend for the right to represent one prospect.[18]

The simple supply and demand of the industry can cause athlete agents to act unduly aggressive to recruit and retain clients.[19] Thus, today's climate "often includes bidding wars where athlete-agents spend large sums of money to land a top player."[20] In other words, player recruiting often comes down to an agent's capital.[21] Consequently, recruiting tactics may include illicit behaviors such as providing materially false information or cash payments to a prospective client and his family members.[22] For example, one industry insider estimated that one-third of the players drafted in the first three rounds

17. *See* Leigh Steinberg, *How to be a Great Sports Agent—Signing Prospects Part I*, FORBES (Dec. 3, 2016, 11:39 AM), https://www.forbes.com/sites/leighsteinberg/2016/12/03/how-to-be-a-great-sports-agent-signing-prospects-part-i?#7f5df1451d92 [https://perma.cc/45Q4-6QLR] (noting that in 2017 there were nearly 1,000 NFLPA-certified agents vying for representation of many fewer draftees and players who would go undrafted); *see also* Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 786 (2006) (advocating for need of effective means of regulating agents due to harms on athletes as result of agent misconduct).

18. *See* Eddie Matz, *Agent of Change*, ESPN (May 2, 2014), https://www.espn.co.uk/nfl/draft2014/story/_/id/10872670/nfl-agent-kyle-strongin-made-remarkable-strides-just-two-years-espn-magazine [https://perma.cc/AR2N-NPV3] (profiling agent Kyle Strongin).

19. *See* James Masteralexis, Lisa Masteralexis & Kevin Snyder, *Enough is Enough: The Case for Federal Regulation of Sport Agents*, 20 JEFFREY S. MOORAD SPORTS L.J. 69, 70 (2013) (describing the agent field as being full of risk and fraught with ethical challenges). For years, competition in the industry has been so fierce that some agents and union officials are concerned that agents are more focused on getting and keeping clients than on doing well with their clients' contracts. *See* Mullen, *supra* note 16 (noting that agents are now "recruiting clients at younger ages, routinely stealing each other's clients and filing lawsuits against one another at . . . a record rate").

20. Jason La Canfora, *Time to Overhaul (Install?) System of NFL Player-Agent Money Dealings*, CBS SPORTS (June 11, 2014, 7:16 AM ET), https://www.cbssports.com/nfl/news/time-to-overhaul-install-system-of-nfl-player-agent-money-dealings/ [https://perma.cc/9MWM-NDRH] (advocating reform of authorities governing agents); *see also* Masteralexis et al., *supra* note 19, at 70 (noting it appears inducements are routine in the agent business).

21. *See* Steve Koesterman, *The Money Behind the Pre-Draft Process*, SPORTS AGENT BLOG (Apr. 25, 2019), sportsagentblog.com/2019/04/25/the-money-behind-the-pre-draft-process/ [https://perma.cc/X69W-LA5V] (describing common pre-draft expenses). Now-deceased, longtime agent Eugene Parker lamented that athletes often sign with the best recruiter as opposed to the best contract negotiator. *See* Mullen, *supra* note 16. Agent Steve Persia agrees, stating his frustration with the current climate where athletes sign with the agent or agency offering the largest guarantee. *See* Josh Corriveau, *Interview with the Agent: Steve Persia*, SPORTS AGENT BLOG (Mar. 11, 2014), http://sportsagentblog.com/2014/03/11/interview-with-the-agent/-steve-persia/ [https://perma.cc/66CZ-JQJB] (wherein Persia states that competing against an agent offering a marketing guarantee or other incentives is the most difficult and challenging aspect of recruiting).

22. *See generally* Joshua Lens, *Application of the UAAA, RUAAA, and State Athlete-Agent Laws to Corruption in Men's College Basketball and Revisions Necessitated*

of the 2015 NFL draft received some type of illegal inducement from their agents.[23]

Some top agencies will not engage in such dishonest behavior but may offer something more innocuous but equally as powerful.[24] Common agent recruiting tactics include offering a loan or a marketing guarantee to a prospective client.[25]

Peers place a tremendous amount of pressure on athletes to "spend lavishly and show off their wealth."[26] Perhaps taking advantage of this pressure, agents who offer loans in the recruiting process make the line of credit available to the athlete immediately upon signing.[27] One agent described the average loan for a potentially high draft pick as being between $100,000 and $200,000 but had heard of a line of credit as high as $500,000.[28] Another estimate puts the range of loans between $25,000 and $300,000 upon execution of a representation agreement between the agent and athlete.[29] A different agent identified a seventh-round draft pick who received a line of credit of $50,000.[30]

Marketing guarantees have recently emerged in the agent recruiting industry.[31] And they have already developed a negative reputation.[32] In 2004, agents characterized marketing guarantees as "out of con-

by NCAA Rule Changes, 30 MARQ. SPORTS L. REV. 47 (2019) (describing application of state athlete agent laws to corruption in men's college basketball).

23. *See* Neil Stratton, *Paying Players*, SUCCEED IN FOOTBALL – THE DAILY BLOG WRITTEN BY INSIDE THE LEAGUE'S NEIL STRATTON (Dec. 30, 2015), https://succeedinfootball.com/2152015/12/30/paying-players/ [https://perma.cc/E6U3-CZNV].

24. Brandt, *supra* note 10.

25. *See* Jack Bechta, *Sports Agents: Myths & Tactics*, NAT'L FOOTBALL POST, https://nationalfootballpost.com/sports-agents-myths-tactics/ (last visited Dec. 27, 2019) [https://perma.cc/79BY-BE9N] (admonishing agents for providing loans to clients and prospective clients, as they encourage spending money not yet earned).

26. Karcher, *supra* note 11, at 753 (noting such purchases can include too many cars, plane tickets, hotels, flying friends to games, and homes in multiple cities).

27. *See* Bechta, *supra* note 25.

28. *See id.* (noting that agent Bechta loaned $25,000 to one client).

29. *See* La Canfora, *supra* note 20 (noting that some such loans are forgivable). This Article pertains to loans provided by agents to the athlete directly but agent Greg Linton describes multiple occasions where an agency provided a loan to an athlete's family member with an expectation that the athlete would repay the loan amount. *See* Greg Linton, *"Que Sera, Sera" Just Another Day in Gotham...*, BLOGSPOT: AGENT LINTON: THE INFORMATIVE AND ENTERTAINING VIEWS ON FOOTBALL, BUSINESS, AND LIFE OF AGENT GREG LINTON (May 19, 2014), http://agentlinton.blogspot.com/ [https://perma.cc/7JTL-TWB4] (noting that one such $50,000 loan was interest-free and another was a five-figure "nice gesture" by an agency).

30. Davis, *supra* note 17, at 786 (stating that the draftee also spent $80,000 on a car).

31. *See* Andrew Brandt, *Football's Accounting Tricks*, SPORTS ILLUSTRATED (Dec. 15, 2016), https://www.si.com/mmqb/2016/12/15/themmqb-business-football-andrew-brandt-contract-extensions-salary-cap-agents-recruiting-college [https://perma.cc/R2WL-94ED] (describing various aspects of the business of professional football).

32. *See* Anthony R. Caruso, *NFL Agent: Real Talk About Agents and Amateurism*, SCARINCI HOLLENBECK (Dec. 1, 2014), https://scarincihollenbeck.com/law-firm-in-

trol."[33] However, the prevalence of marketing guarantees has increased as the NFL has enjoyed "an explosion in the marketability of its athletes."[34] Marketing income can potentially "subsidize or even supersede a rookie's base salary," particularly for players at the skills positions (quarterback, running back, and wide receiver).[35] A marketing guarantee is a creative method for an athlete agent to get money to an athlete.[36]

Mechanically, an athlete agent provides a marketing guarantee to a client by advancing a sum of money to the client that will be offset against future marketing revenue the client earns.[37] In this scenario, the athlete not only hires an agent to negotiate contracts with professional organizations, but also to manage the athlete's marketing opportunities, which is an increasingly common service for agents to offer.[38] In other words, "a marketing guarantee is an advance against future marketing income on the player's brand."[39] If an athlete agent advances $100,000 to a client, the agent then keeps the initial $100,000 in marketing income the client generates.[40] Subsequently, the athlete and agent would enter a more traditional commission-based relationship, wherein the agent, if handling the athlete's marketing, typically earns up to 20% of any paid, off-field opportunities.[41] If the agent cannot produce the guaranteed amount of marketing income, the athlete still keeps the guaranteed amount.[42] Thus, in the above example,

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sights/entertainment-and-sports/nfl-agent-talks-amateurism [https://perma.cc/AZ5N-CX6B] (providing recommendations on agent screening process).

33. Mullen, *supra* note 16 (noting that many agents believed marketing guarantees constitute inducements that the NFLPA should prohibit).

34. *See* Neil Stratton, *Real Talk on Pre-Draft Marketing*, SUCCEED IN FOOTBALL – THE DAILY BLOG WRITTEN BY INSIDE THE LEAGUE'S NEIL STRATTON (Dec. 17, 2015), https://succeedinfootball.com/2015/12/17/real-talk-on-pre-draft-marketing/ [https://perma.cc/KN3E-DUAX].

35. *Id.*

36. Jeremy Fowler, *For NFL Prospects, Cost of Getting Drafted Can Surpass $100K*, ESPN (Apr. 18, 2019), https://www.espn.com/blog/pittsburgh-steelers/post/_/id/30615/for-nfl-prospects-cost-of-getting-drafted-can-surpass-100k [https://perma.cc/V954-PDRR] (describing common pre-draft expenses).

37. *See* Andrew Brandt, *An Agent's Life Isn't All Glamour*, ESPN (Nov. 27, 2012), https://www.espn.com/nfl/story/_/id/8681968/nfl-agent-life-all-glamour [https://perma.cc/TX3W-3BLB]; *see also* Bechta, *supra* note 25.

38. *See* Wong et al., *supra* note 7, at 572 (noting agents also offer services including financial planning, tax advice, and estate planning).

39. *See* Caruso, *supra* note 32 (noting marketing guarantees allow profitable agencies to gain edge).

40. Bechta, *supra* note 25.

41. Darren Heitner, *Report: Brett Hundley to Sign with Roc Nation Sports*, FORBES (Oct. 14, 2014, 10:39 AM), https://www.forbes.com/sites/darrenheitner/2014/10/14/report-brett-hundley-to-sign-with-roc-nation-sports/#695fbf8969ac [https://perma.cc/2KML-CQZW] (describing anticipated relationship between football player Brett Hundley and agency Roc Nation Sports). The NFLPA caps an agent's salary commissions at 3% and permits agents "to charge up to 20 percent on endorsement earnings . . . . " *See* Matz, *supra* note 18.

42. *See* Brandt, *supra* note 31.

if the agency only secures $25,000 of future marketing income for the athlete, the agency assumes the $75,000 difference as a "cost of doing business."[43] Due to the great dollar amount exchanging hands, larger agencies with plentiful resources are more likely to offer and utilize marketing guarantees.[44]

The guarantee amounts typically vary between $25,000 and $250,000 but have reached $2 million.[45] Most potential first-round draft picks receive marketing guarantees.[46] Further, second- and third-round draft picks routinely receive six-figure guarantee offers.[47] In fact, during the 2014 college football season, rumors swirled that Brett Hundley, the then UCLA quarterback and projected second-round draft pick, would sign with rapper and entertainer Jay Z's Roc Nation Sports for marketing representation in large part because Roc Nation offered a $1 million marketing guarantee.[48] The Green Bay Packers ultimately drafted Hundley in the fifth round.[49]

Given their prevalence, one may (correctly) assume that NFLPA regulations and state athlete agent laws do not expressly forbid agents from offering loans and marketing guarantees to prospective clients. However, athlete agents and athletes should familiarize themselves with these laws and consider them as well as other, perhaps less obvious, authorities prior to entering such transactions.

III. Application of Relevant Authorities to Scenario Whereby an Athlete Agent Provides a Loan or Marketing Guarantee

Myriad authorities apply to agents' player recruiting.[50] Many athlete agents who offer loans and marketing guarantees are likely to

43. *See* Brandt, *supra* note 10.

44. *See id.* (noting that larger agencies use marketing guarantees to separate themselves from smaller firms).

45. *See* Brandt, *supra* note 37; *see also* Bechta, *supra* note 25. A more recent estimated range is between $10,000 and $50,000 with the disclaimer that it depends on the caliber of athlete recruited. *See* Koesterman, *supra* note 21 (estimating possible pre-draft expenses for a draft prospect to total between $56,000 to $218,000).

46. *See* Greg Linton, *So You Wanna Be a Sports Agent...*, Blogspot: Agent Linton: The Informative and Entertaining Views on Football, Business, and Life of Agent Greg Linton (Oct. 2011), agentlinton.blogspot.com/2011/10/so-you-wanna-be-sports-agent-part-1-so.html [https://perma.cc/PY7X-LETS].

47. *See* Mullen, *supra* note 16.

48. *See* Heitner, *supra* note 41 (noting some Roc Nation clients sign with Roc Nation for marketing and another agency for their contract advising).

49. *See* Mark Sessler, *Packers Draft UCLA Quarterback Brett Hundley*, NFL.com (May 2, 2015, 2:29 PM), www.nfl.com/news/story/0ap3000000490444/article/packers-draft-ucla-quarterback-brett-hundley [https://perma.cc/9GDB-X8VL].

50. *See* Masteralexis et al., *supra* note 19, at 87–88. Enforcement of these regulations, however, is lacking. *See* Chris Deubert, *What's a "Clean" Agent to Do? The Case for a Cause of Action Against a Player's Association*, 18 Vill. Sports & Ent. L.J. 1, 4 (2011) (pointing out that "clean" agents face a disadvantage competing against agents who fail to follow regulations).

concern themselves most with NFLPA regulations and state athlete agent laws based on the Uniform Athlete Agents Act ("UAAA") and its revised version.[51] However, athlete agents who engage in these transactions must also consider agency law and, if they are attorneys, ethics regulations.

A. *Application of NFLPA Regulations to Loans and Marketing Guarantees*

The National Labor Relations Act ("NLRA") effectively gives players associations the discretion to negotiate on behalf of their colleagues and, specifically "the authority to certify agents to negotiate" players' salaries.[52] Thus, due to its status as a union, the NFLPA has broad authority over athlete agents.[53] In fact, most players associations, including the NFLPA, have rules for agent certification and regulation.[54] More generally, "players association regulations tend to define the athlete/agent relationship as fiduciary in nature."[55]

NFLPA agent regulations include provisions intended to "level[ ] the playing field in agents' competition for clients."[56] Notably, NFLPA agent regulations include a prohibition against agents "[p]roviding or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services."[57] An agent violating this prohibition, or engaging in any other prohibited conduct, is subject to disciplinary procedures.[58] NFLPA regulations further stipulate that an agent who provides an improper inducement must reimburse any fee the agent charged and received from the inducement recipient.[59] However, the NFLPA regulation prohibiting agents from providing inducements to clients is perhaps the most commonly violated NFLPA regulation.[60] The NFLPA does

51. *See generally* NFL PLAYERS ASS'N, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS 8, § 3B(2) (2011) (amended 2016), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf [https://perma.cc/YW5G-76TR]; UNIFORM ATHLETE AGENTS ACT (UNIF. LAW COMM'N 2000) (amended 2019).

52. Masteralexis et al., *supra* note 19, at 93.

53. *See* Jamie E. Brown, *The Battle the Fans Never See: Conflicts of Interest for Sports Lawyers*, 7 GEO. J. LEGAL ETHICS 813, 832–33 (1994) (examining situations unique to the sports agency industry that cause conflicts of interest).

54. Masteralexis et al., *supra* note 19, at 93.

55. Davis, *supra* note 17, at 819 (citing example of MLBPA regulations stating that only individuals who can "reasonably be expected to carry out faithfully their important fiduciary responsibilities will be entitled to certification").

56. *Id.* (citing prohibition on improper inducements as example). However, the ability of agents to permissibly provide benefits including marketing guarantees and loans inherently favors larger agencies. *See* Brandt *supra* note 10.

57. NFL PLAYERS ASS'N, *supra* note 51, at 8, § 3B(2).

58. *Id.* at 8–11, § 3B.

59. *Id.* at 13, § 4B(5).

60. Deubert, *supra* note 50, at 21 (noting that agents customarily provide athletes with money after signing them).

not define "inducement" or "any other thing of value" in its regulations.[61]

NFLPA regulations explicitly permit agents to provide loans to clients. Section 3(A)(6) requires agents to "file with the NFLPA . . . any other agreement(s) for additional services that the Contract Advisor has executed with the player, including, without limitation, agreements or other relevant documents relating to loans, lines of credit, or pre-combine or pre-draft services or benefits being provided to rookie clients."[62] Regardless, at least one prominent athlete agent believes agents should not provide loans to clients because of the message it sends. Agent Jack Bechta, who admits that the most he has loaned a client is $25,000, has publicly stated he is against agents loaning clients money prior to the draft because it indicates to clients that it is acceptable to have debt and borrow money before his clients earn it.[63]

Likewise, the NFLPA does not consider marketing guarantees to constitute impermissible inducements and permits agents to offer them to clients.[64] Such offers, while seen by some as "nebulous terrain, fraught with potential peril, complicated language and substantial loopholes," are nevertheless exempt from the NFLPA's prohibition on inducements.[65] One academic characterizes offering guaranteed marketing income as unethical and an abuse of the rule against inducements, noting "the end result is the same," regardless of how the parties classify the transaction.[66] At least one agent, attorney Steve Persia, agrees, having stated publicly that he would characterize a marketing agreement as an inducement (and "a joke") and thus does not see why the NFLPA allows them.[67] More generally, Persia is against marketing guarantees because they are "not the way to start a player-agent relationship."[68] Other agents have expressed similar con-

61. While many commentators agree that the NFLPA's agent regulations should serve as a model for others because they are comprehensive and responsive to ongoing problems, they are inadequate against unethical solicitation of collegiate student-athletes. Jeffrey C. Meehan, *Harvard or Hardball? An Examination of Ethical Issues Faced by Lawyer-Agents*, 21 SPORTS L.J. 45, 60 (2014) (stating that the NFLPA has little incentive to penalize agents for unethical solicitation of collegiate student-athletes).

62. NFL PLAYERS ASS'N, *supra* note 51, at 6, § 3A(6).

63. Bechta, *supra* note 25.

64. *See* Davis, *supra* note 17, at 790; *see also* Liz Mullen, *NFLPA to Use Combine to Update Agents on Regs Overhaul*, SPORTS BUS. J. (Feb. 16, 2015), https://www.sportsbusinessdaily.com/Journal/Issues/2015/02/16/Labor-and-Agents/Labor-and-Agents.aspx [https://perma.cc/CC6E-D9AU] (describing NFLPA plans to overhaul agent regulations in 2015).

65. La Canfora, *supra* note 20 (arguing there is too much leeway for money to exchange hands).

66. Deubert, *supra* note 50, at 21 (referring to agent signing bonuses as unethical and an abuse of the rule against inducements).

67. Corriveau, *supra* note 21.

68. *Id.*

cerns privately to the NFLPA.[69] Now-deceased, longtime NFL agent Eugene Parker characterized marketing guarantees as "gimmicks" that "sound sexy" but whose importance pales in comparison to the contract with the team.[70]

Interestingly, many agents have privately argued for years that offering marketing guarantees to players who play certain positions such as offensive guard constitutes an inducement that the NFLPA should prohibit because offensive guards rarely "generate much interest from potential sponsors."[71] Further, second- and third-round draft picks who play positions other than quarterback or running back, despite routinely receiving six-figure marketing guarantees, are unlikely to earn commensurate endorsement income.[72] Thus, marketing guarantees are "fertile ground for shady business."[73]

In fact, in February 2014, several agents submitted a proposal to the NFLPA that "no more than $25,000 should be allowed to exchange hands between an agent and his client."[74] Thus, the proposal would have banned loans, marketing guarantees, stipends, signing bonuses, and similar arrangements in excess of $25,000.[75] After those agents made the proposal, the NFLPA distributed a general questionnaire to agents regarding marketing guarantees.[76] However, the NFLPA did not adopt the proposal.

The agent industry revisited the idea of limiting inducements in August of 2018 when 300 agents discussed, among other topics, the possibility of adding an addendum designed to curb inducements from

69. *See* Mullen, *supra* note 64 (noting that agents with concern over marketing guarantees believe them to be, "for practical purposes, an inducement").

70. Mullen, *supra* note 16 (noting Parker's list of "gimmicks" also included promises to give perks, jewelry, special trips, involvement in an entertainment project, and access to rappers). A former San Antonio Spur, Parker went on to represent several NFL megastars, including Deion Sanders, Emmitt Smith, and Larry Fitzgerald. #*40 Eugene Parker*, FORBES (Sept. 23, 2015), https://www.forbes.com/profile/eugene-parker/#4b6876f97bb8 [https://perma.cc/3S8D-VE9K]. He helped negotiate more than a billion dollars in contracts. *Id.*

71. Mullen, *supra* note 64 (pointing out that some players enjoy receiving guaranteed money from agents, and that players, not agents, run the NFLPA); *see also* Fowler, *supra* note 36 (explaining that "only the fantasy football positions such as quarterback, running back and wide receiver earn enough marketing dollars to make [guarantees] worthwhile").

72. *See* Mullen, *supra* note 16. Agents maintain that athletes often ask for marketing guarantees. *See id.* For example, agent Greg Linton describes an occasion where the father of a likely third-round draftee called Linton a year before the next draft and described a series of anticipated expectations of the draftee's agent-to-be including a $50,000 marketing guarantee and a $25,000 line of credit. Linton, *supra* note 29.

73. La Canfora, *supra* note 20 (arguing agents should handle contract relations and not complicated financial dealings with clients). The same would likely hold true for the lineman in the hypothetical at the outset of this Article.

74. *Id.* (noting NFLPA executive DeMaurice Smith encouraged such a proposal from agents at the NFL Combine after hearing of numerous financial inducements).

75. *Id.* (describing the proposal as "a pretty good common sense place to start").

76. *See* Mullen, *supra* note 64.

agents to athletes to the Standard Representation Agreement.[77] Agent Peter Schaffer, who led the call, circulated a proposed addendum prior to the conference call.[78] The addendum would prohibit agents from providing marketing guarantees, preclude agents from providing a player with a signing bonus of any amount, limit loans in excess of $50,000 to rookie players, and require payback of such loans within nine months.[79] The NFLPA has yet to adopt or require the addendum.

Dialogue regarding curbing inducements continued, however. At the March 2019 annual players' meeting, roughly 200 active NFL players unanimously passed a resolution dubbed the "inducement resolution."[80] Under the resolution, the NFLPA would, among other things, implement a "cap on the amount of money that agents can recover from any amount advanced to players" and require disclosure of any money paid by an agent to a player.[81] The resolution is not currently effective, however, because the NFLPA has not set the cap amount.[82] Thus, agents may continue to spend freely, including paying for predraft training expenses, providing loans, and offering marketing guarantees.[83] At best, this resolution would cap the amount agents could eventually recover from a player.[84] Thus, the resolution *may* deter agents from offering *large* loans to potential clients because the resolution would limit the amount the agent could eventually recover. However, the resolution would not prevent or deter offering large marketing guarantees because agents have no intention of recovering marketing guarantee money.

77. *See* Darren Heitner, *NFL Agents Discuss Creation of Agent Association and Changes to NFLPA Rules*, SPORTS AGENT BLOG (Aug. 22, 2018), sportsagentblog.com/2018/08/22/nfl-agents-discuss-creation-of-agent-association-and-changes-to-nflpa-rules/ [https://perma.cc/A2YV-BXAX] (summarizing conference call among agents). The NFLPA requires agents and players to use a pre-printed Standard Representation Agreement provided by the NFLPA. NFL PLAYERS ASS'N, *supra* note 51, at 12, § 4A.

78. *See* Heitner, *supra* note 77 (noting that, while agents would like to limit inducements, having a seat at NFLPA Executive Committee and Players Rep meetings was top priority).

79. *Id.* For the proposed addendum, see Addendum to Standard Representation Agreement for All NFL Players from Peter Schaffer to NFL Agents (Aug. 22, 2018) (on file at https://www.scribd.com/document/386844336/SRA-Addendum-Proposed-to-NFLPA-7-2018).

80. Darren Heitner, *Inside the Heated Back-And-Forth Between A Group of Agents and the NFLPA*, SPORTS AGENT BLOG (Mar. 16, 2019), sportsagentblog.com/2019/03/16/inside-the-heated-back-and-forth-between-a-group-of-agents-and-the-nflpa/ [https://perma.cc/S97R-6W7X] (noting that receiver Doug Baldwin moved for passage of the resolution, and quarterback Andrew Luck seconded the motion).

81. *Id.*

82. *Id.*

83. *See id.*

84. *Id.*

B. *Application of State Athlete Agent Laws to Loans and Marketing Guarantees*

"The Uniform Law Commission ("ULC"), also known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which is now in its 124th year, provides non-partisan legislation to states in order to bring clarity and stability to essential areas of state statutory law."[85] In 2000, the ULC drafted the Uniform Athlete Agents Act ("UAAA") to govern relations among student-athletes, athlete agents, and universities.[86] The UAAA is not binding legislation, and states have discretion to adopt it in whole or in part.[87] Forty-two states have enacted the UAAA.[88]

In July 2015, the ULC drafted the Revised Uniform Athlete Agents Act ("RUAAA") to address various issues and modernize the UAAA in an "ever-evolving sports commercial marketplace."[89] Fourteen states have enacted the RUAAA, and ten other states introduced it in 2019.[90]

The UAAA, RUAAA, and state athlete agent laws prohibit an agent, "with the intent of inducing a student athlete to enter into an agency contract," from "furnishing anything of value to a student athlete or another person before that athlete enters into an agency contract . . . ."[91] Thus, the UAAA and RUAAA's bans on athlete agents offering inducements to student-athletes mirror NFLPA regulations. However, given the prevalence of loans and marketing guarantees in player recruiting, the entities enforcing state athlete agent laws either do not adequately enforce these laws or, like the NFLPA, do not consider loans and marketing guarantees to constitute illicit inducements.[92] Just as with NFLPA regulations, it is difficult to see how

85. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, REVISED UNIFORM ATHLETE AGENTS ACT (2015), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6a97db74-446e-e102-f517-0bd54fbb7ff4&forceDialog=0 [https://perma.cc/N4GS-VXYE] (describing the ULC and its functions) [hereinafter RUAAA].

86. *Id.* at 1 (providing reasons for drafting the UAAA).

87. Meehan, *supra* note 61, at 56–57 (pointing out that some believe UAAA is a barrier advantaging large agencies).

88. *Athletes Agent Act, Revised*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?Communitykey=4d46906c-2d24-4ede-84ab-a57b40fa5c37&tab-groupdetails [https://perma.cc/KB34-VFSJ] (last visited Jan. 7, 2020) (providing interactive map detailing individual states' adoptions of athlete agent laws) [hereinafter RUAAA Map].

89. *Why Your State Should Adopt the Revised Uniform Athlete Agents Act* (2015), UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a59a2fe8-009d-fdab-dcb1-402b39176bb3&forceDialog=0 (last visited Jan. 7, 2020) [https://perma.cc/X3TW-8GUH] (detailing benefits of RUAAA).

90. RUAAA Map, *supra* note 88.

91. RUAAA, *supra* note 85, at 2.

92. Entities not enforcing laws is certainly a possibility as many feel as though states do not adequately enforce agent laws. *See, e.g.*, COMM'N ON COLLEGE BASKET-

offering to furnish a sum of money to a prospective client, regardless of whether it is a loan or an advance on future marketing income, is not an "item of value" that the UAAA and RUAAA—and state laws based on them—should prohibit.

C. *Application of Agency Law to Loans and Marketing Guarantees*

The fact that neither the NFLPA nor state athlete agent laws expressly forbid athlete agents from providing loans and marketing guarantees is not surprising since, according to at least one expert, most athlete agent regulations "subordinate the interests of both athletes and their agents" to those of the NCAA.[93] However, the athlete agent industry is shortsighted if it stops its analysis of relevant authorities on loans and marketing guarantees after looking only at NFLPA regulations and state laws. Athlete agent behavior does not have to violate an express authority to cause harm to an athlete.[94] Agency law provides some protection for athletes when they are part of an agent–client relationship.

The *Restatement (Third) of Agency* defines "agency" as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[95] Over the past several decades, athletes have become increasingly reliant on their agents.[96] Athlete agents "have a tremendous amount of power today."[97] Given the key roles an agent serves in an athlete's life, an ath-

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BALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL § 1C (2018), www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf [https://perma.cc/B9RX-7U8D] (issuing a report and recommendations to NCAA Board of Governors, Division I Board of Directors, and NCAA President Mark Emmert); *see also* Associated Press, *AP Study: Laws for Sports Agents Rarely Enforced*, DENVER POST (Aug. 17, 2010, 3:04 AM), https://www.denverpost.com/2010/08/17/ap-study-laws-for-sports-agents-rarely-enforced/ (last updated May 5, 2016, 5:12 PM) [https://perma.cc/TV97-VT6A] (detailing survey finding that more than half of the then forty-two states with agent laws had yet to revoke or suspend a single license or invoke penalties of any sort).

93. Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. SPORTS & ENT. L.J. 145, 148 (2013) (arguing for change to athlete agent laws to better protect athletes).

94. Karcher, *supra* note 11, at 739.

95. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

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

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

lete places great trust in his agent.[98] Trust is fundamental to the athlete–agent relationship.[99] A professional football executive highlighted the importance of this trust, noting that a player has one career, but an agent likely represents multiple athletes.[100]

The relationship between an athlete and an agent is based on express contract.[101] In major professional sports leagues, this relationship stems from representation agreements that describe the nature of the services agents may perform on behalf of their principals (i.e., the athletes).[102] These contracts also express "basic duties and obligations the parties owe each other."[103]

Signing an agency representation agreement results in a fiduciary relationship between a sports agent and his client.[104] The obligations agents owe to their clients are based upon the agency principle of athlete agents aligning their incentives with the athletes they represent.[105] An agent owes the duty to "exercise the utmost good faith, loyalty, and honesty toward [the] principal."[106] Further, "[t]he duty of loyalty obliges the agent to avoid conflicts of interest."[107] Law imposes the fiduciary relationship "upon the agent because the very nature of the agency relationship involves the principal entrusting his fortune, reputation, and legal rights and responsibilities to his agent whose actions . . . affect the economic well-being and reputation of the principal."[108]

Further, "an agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."[109] More specifically, "[a]n agent is deemed to act as or for an adverse party in a transaction when the agent has a substantial economic interest in the party with whom the principal deals."[110] This duty is formulated broadly.[111] The duty is so broad that "[s]o long as

98. Masteralexis et al., *supra* note 19, at 69 (noting that violation of this trust can have substantial consequences including loss of eligibility, harm to college football programs, and financial loss for the athlete).

99. Rosner, *supra* note 96, at 220 (describing athletes' dependence on agents).

100. Anderson, *supra* note 5 (describing agents who put their bottom lines ahead of their clients' careers).

101. Davis, *supra* note 17, at 792.

102. *Id.*

103. *Id.*

104. *See* Darren A. Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, 7 DARTMOUTH L.J. 246, 247 (2009) (explaining that the relationship results from the athlete providing consent to the agent to act on the athlete's behalf yet be subject to athlete's control).

105. *See* Masteralexis, et al., *supra* note 19, at 79 (likening agent–athlete relationship to that of worker employed by professional service firm).

106. Brown, *supra* note 53, at 824.

107. Rosner, *supra* note 96, at 229 (noting that agents must avoid actual and apparent conflicts).

108. Davis, *supra* note 17, at 793.

109. RESTATEMENT (THIRD) OF AGENCY § 8.03 (AM. LAW INST. 2006).

110. *Id.* § 8.03 cmt. c.

111. *Id.* § 8.03 cmt. b.

the transaction in which an agent acts as or on behalf of an adverse party is connected with the agency relationship, the agent is subject to the duty although the agent does not have direct or indirect responsibility for conducting the transaction on behalf of the principal."[112] The rationale behind this obligation stems from the agent's "duty to the principal to act loyally in the principal's interest in all matters in connection with the agency relationship."[113] This is because "an agent's self-interest in a transaction recommended to a client may systematically bias the quality of the recommendation."[114] Thus, agents may not put themselves "in a situation in which there is an actual, or even apparent, conflict between [their] interests and the interests of [their clients]."[115] This is due to the fact that "[w]hen an agent deals with the principal on the agent's own account, the agent's own interests are irreconcilably in tension with the principal's interests because the interest of each is furthered by action . . . that is incompatible with the interests of the other."[116] Further, "[e]ven if the agent's divided loyalty does not result in demonstrable harm to the principal, the agent has breached the agent's duty of undivided loyalty."[117]

Jurisdictions analyze the propriety of transactions between agents and principals in various ways. Courts in Texas have held that all transactions between a fiduciary and his principal are presumptively "void; therefore, the burden lies on the fiduciary to establish the validity" of any transaction involving him.[118] Indiana courts also hold that "transactions entered into during the existence of a fiduciary relationship are presumptively invalid," adding that they are the "product of undue influence."[119] In Indiana, courts look at whether the evidence establishes "(1) the existence of a fiduciary relationship, and (2) [that] the questioned transaction between the two parties resulted in an advantage to the dominant party in whom the subordinate party had reposed both their trust and confidence."[120] If the situation satisfies both prongs, Indiana law imposes a presumption that the dominant party's undue and fraudulent influence resulted in the transaction and, thus, the transaction is void.[121] Further, Indiana law "presumes fraud when a person with a fiduciary duty benefits from a questioned transaction."[122] Once the plaintiff establishes these facts, "the burden shifts

112. *Id.*
113. *Id.*
114. *Id.* § 8.01 Reporter's Notes b.
115. Karcher, *supra* note 11, at 758.
116. RESTATEMENT (THIRD) OF AGENCY § 8.03 cmt. b (2006).
117. *Id.*
118. *In re* Douglass, 2015 WL 6446305, at *27 (Bankr. E.D. Tex. 2015).
119. *In re* Estate of Wade, 768 N.E.2d 957, 963 (Ind. Ct. App. 2002).
120. *Id.* at 961–62.
121. *Id.* at 962.
122. *Id.* at 963.

to the dominant party in the relationship to rebut the presumption by clear and unequivocal proof."[123]

The breadth of the undivided loyalty duty "requires that an agent disclose adverse interests to the principal so that the principal may evaluate, as only the principal is situated to do, how best to protect [his] interests in light of the agent's interests."[124] There exist occasions in which "[a] principal may consent to conduct by an agent that would otherwise constitute a breach of the agent's duty."[125] However, the consent must meet several conditions for it to be valid. In obtaining the principal's consent for a specific act or transaction, the agent must: (1) act in good faith; (2) with limited exceptions, disclose all material facts the agent knows, has reason to know, or should know would reasonably affect the principal's judgment; and (3) otherwise deal fairly with the principal.[126]

Given the foregoing analysis, it is hard to fathom a court upholding the terms of a loan that an athlete agent provided to a client that the client later challenged. Keeping in mind that a court applying agency-law principles would closely scrutinize any transaction between an athlete agent and his client, a loan between them would put the two in adverse positions. Generally, a loan—assuming the athlete repays it—is a win for the agency, not the athlete.[127] For example, consider the scenario where an athlete agent provides a loan to one of his clients who is an undrafted, rookie free agent. The transaction may compromise the athlete agent's guidance when evaluating contract offers from teams. So the client is better able to repay the loan, the agent may advise his client to accept a short-term contract with a high average annual value as opposed to a longer-term, more lucrative offer from another team. In doing so, the agent fails to act loyally in the client's interests even if there is no actual harm to the client. While the agent may attempt to obtain the client's informed consent to the loan, the requirements for validity of the consent are steep, especially given the unequal positions of the two parties.

Further, agency law would not look favorably on athlete agents providing marketing guarantees to their clients. In the first place, legal scholars have noted that if an agent's "compensation is a percentage of the client's endorsement income, there may be a conflict, because the lawyer has a personal interest in the endorsement contract's out-

123. *Id.* at 962.

124. RESTATEMENT (THIRD) OF AGENCY § 8.03 cmt. b (AM. LAW INST. 2006).

125. *Id.*

126. *Id.* § 8.06. Additional requirements apply for client consent to conduct by an attorney that would otherwise breach the attorney's duties of loyalty to the client. *See id.* § 8.06 cmt. a; *see also infra* Section III.D.

127. Fowler, *supra* note 36 (noting that athletes often must repay the loan after receiving a signing bonus from the team).

come."[128] Agents who handle an athlete's marketing are fiduciaries under agency law and are thus "held to conflict of interest standards."[129] An endorsement opportunity may be inadvisable for several reasons. However, "an agent's self-interest in a transaction recommended to a client may systematically bias the quality of the recommendation."[130] For example, too many simultaneous endorsement endeavors may weaken an athlete's on-field career or future marketability.[131] Nevertheless, the agent "may advise the client to accept the endorsement so that the [agent] can collect his percentage fee."[132] Providing a marketing guarantee only increases the likelihood of an athlete agent acting—or being tempted to act—upon his own interest to make up the guarantee amount by advising his client to participate in too many marketing endeavors. Thus, the athlete agent likely fails to uphold his duty of loyalty and to avoid conflicts of interest.

When an agent breaches a fiduciary duty of loyalty, agency law provides distinctive remedies to the principal.[133] Potential remedies in a successful breach of fiduciary duty tort claim include punitive damages.[134] Further, courts allocate burdens of proof "differently in cases alleging breach of fiduciary obligation than in civil litigation generally."[135] Also, "a different limitation period may apply, and it may not begin to run until the principal discovers the breach of duty."[136]

The application of agency law should give great pause to athlete agents who consider providing loans or marketing guarantees to clients, as courts are unlikely to uphold challenges to them, which greatly exposes athlete agents' pocketbooks and reputations. As the following Section shows, ethics regulations should serve as an additional deterrent for attorneys who serve as athlete agents and contemplate engaging in such transactions.

128. Robert E. Fraley & F. Russell Harwell, *The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 HASTINGS COMM. & ENT. L.J. 165, 187 (1989) (listing potential conflicts of interest for attorney-agents who handle a client's marketing).

129. *Id.* at 189.

130. RESTATEMENT (THIRD) OF AGENCY § 8.01 Reporter's Notes b (AM. LAW INST. 2006).

131. *See* Fraley & Harwell, *supra* note 128, at 187.

132. *Id.*

133. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. LAW INST. 2006).

134. *See* Edelman, *supra* note 93, at 161 (noting difficulty of success of such claims).

135. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. e (AM. LAW INST. 2006).

136. *Id.*

D. *Application of Attorney Ethics Regulations to Attorney-Agents Who Offer Loans and Marketing Guarantees to Prospective Clients*[137]

When selecting their agents, athletes increasingly turn to attorneys.[138] Attorneys comprise more than half of all agents representing professional athletes.[139] The percentage of professional football athletes who select attorneys to serve as their agents is even higher.[140]

An agent–client relationship differs in many ways from the traditional attorney–client relationship.[141] Consequently, many attorneys acting as sports agents incorrectly assume their agent activities are not governed by legal ethics rules.[142] However, when admitted to a state bar, an attorney is subject to that state bar's professional responsibility rules.[143] Further, many courts have held that ethical rules do in fact govern the attorney-agent.[144] Ethics regulations likewise

137. Some have pointed out that the *Model Rules* prohibit attorney-agents from soliciting any clients, which includes athletes. *See* Karcher, *supra* note 11, at 748–49 (citing rationale that the potential for abuse inherent in direct in-person or telephone contact by fiduciary with a prospective client known to need services). This Section focuses, however, on the offering of loans and marketing guarantees by attorney-agents and the application of ethics regulations to such transactions.

138. Fraley & Harwell, *supra* note 128, at 170–71 (explaining competition in athlete representation by legal professionals will likely mirror existing competition among non-attorney agents).

139. *See* Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123, 123 (2007) (noting that it is not a requirement for the agent to also be a licensed attorney).

140. *See* Fraley & Harwell, *supra* note 128, at 170.

141. Rosner, *supra* note 96, at 217 (explaining that the agent–client relationship is not a "traditional personal representative relationship").

142. *See* Brown, *supra* note 53, at 814. Because attorney-agents often ignore the possibility of conflicting representation, and it is often difficult, if not impossible to prove, the issue of conflicts of interest for attorney-agents should be closely scrutinized. *Id.*

143. Neiman, *supra* note 139, at 129 (explaining further that state bar authorities may sanction attorneys whose business practices run afoul of these rules). Note, however, that state bars have not aggressively pursued the few claims athletes have made against their agents. Davis, *supra* note 17, at 806.

144. Neiman, *supra* note 139, at 129 (citing and summarizing state court cases from Arizona and Ohio). Bar association rules are inapplicable to non-attorneys, thus creating a regulatory disparity between attorney-agents and non-attorney-agents. Deubert, *supra* note 50, at 17 (suggesting a possible remedy of considering athlete agent business as practicing law, thus meaning all agents must be attorneys); *see also* Jeremy J. Geisel, *Disbarring Jerry Maguire: How Broadly Defining "Unauthorized Practice of Law" Could Take the "Lawyer" Out of "Lawyer-Agent" Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 245 (2007) (providing suggestions for "bridging the competitive gap" between attorney and non-attorney agents); *see also* Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 TEX. REV. ENT. & SPORTS L. 37, 38–39 (2003) (arguing that *Model Rules* should be amended such that they do not apply to athlete representation). For a comprehensive discussion on attorneys as distinctive agents, meaning they are officers of the court and members of a self-regulating profession and thus subject to duties distinct from other agents, see Deborah A. DeMott, *The Lawyer As Agent*, 67 FORDHAM L. REV.

bind attorneys who provide endorsement negotiation services for clients.[145]

Thus, in addition to agency law discussed above, attorney-agents must follow the *Model Code of Professional Responsibility* or *Model Rules of Professional Conduct* ("*Model Rules*"), whichever is applicable in their state.[146] The vast majority of states have adopted the *Model Rules*, which "further the overriding values of the legal profession."[147] The *Model Rules* "represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by, for example, constitutional, corporate, tort, fiduciary and agency law."[148] For clients who have sought an attorney's counsel, "application of these rules adds a further measure of protection and enforcement."[149]

One of the main policy considerations behind the conflict of interest rules, which is also a fundamental tenet of the attorney–client relationship, is "unimpaired 'zealous' loyalty to the client's interests."[150] Note however that, "various interests in the sports context may impair the requisite vigorous representation."[151] Additional standards contemplated by attorney-ethics regulations that seem particularly applicable to attorney-agents, and their highly competitive industry, include "rules governing the provision of competent representation, diligent representation, solicitation, and conflicts of interest."[152] The conflict of interest problems facing attorney-agents are especially unique.[153]

301, 301–02 (1998) (illustrating the significance of agency and its limitations in the legal profession).

145. Fraley & Harwell, *supra* note 128, at 188–89 (describing negotiation of endorsement contracts as a law-related occupation).

146. Davis, *supra* note 17, at 805 (explaining that violation of these standards may render attorney subject to discipline by state bar association). I acknowledge there are some who feel that legal ethics rules may not automatically apply to an attorney-agent, especially in situations where the agent does not provide legal advice to the client. *See, e.g.*, Jack Marshall, *The Truth About Scott Boras*, HARDBALL TIMES (Jan. 28, 2009), https://www.fangraphs.com/tht/the-truth-about-scott-boras/ [https://perma.cc/N6KJ-KM2C] (stating that it is unsettled whether agent's activities constitute practice of law). However, both case law and ethics opinions state that attorneys acting as sports agents are bound by ethics regulations. *See* Connors et al., *supra* note 97, at 780 (noting that many agents who are attorneys fail to follow the *Model Rules*).

147. Rosner, *supra* note 96, at 218 (specifying that forty-two states as well as the District of Columbia have adopted the *Model Rules*). Due to their prevalence, this Article focuses on the application of the *Model Rules* as opposed to the *Model Code of Professional Responsibility.*

148. Tamara L. Barner, *Show Me the...Ethics?: The Implications of the Model Rules of Ethics on Attorneys in the Sports Industry*, 16 GEO. J. LEGAL ETHICS 519, 519 (2003) (analyzing application of *Model Rules* to attorney-agents).

149. *Id.*

150. Brown, *supra* note 53, at 827.

151. Fraley & Hartwell, *supra* note 128, at 173.

152. Davis, *supra* note 17, at 805–06 (noting that state bars have not been aggressive in pursuing complaints by athletes against agents).

153. Brown, *supra* note 53, at 814.

When considering the provision of an inducement by an athlete agent to a prospective client through the lens of legal ethics regulations, one media member said:

> There isn't a bar association in the country that would allow a lawyer to land a client with the aid of gifts or monies (signing bonus, marketing guarantee or otherwise), much less set up scenarios where upward of a million dollars changes hands legally. In fact, it is strictly prohibited in all 50 states as it would naturally lead to conflicts of interest, impropriety and unprofessionalism. So why not have the same apply to these player/agent relationships?[154]

More specifically, by providing a loan or marketing guarantee to a client, an attorney-agent implicates two *Model Rules* prohibitions: (1) attorneys may not enter business transactions with clients absent certain conditions and (2) except in limited circumstances, attorneys may "not provide financial assistance to a client in connection with pending or contemplated litigation."[155]

1. The *Model Rules* Prohibit Attorneys from Entering Business Transactions with Clients Absent Certain Conditions[156]

An attorney's "legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business . . . transaction with a client."[157] Model Rule 1.8 pertains to conflicts of interest and creates several requirements for situations where an attorney seeks to enter a transaction with a client, "even when the transaction is not closely related to the subject matter of the representation."[158] The Comment to Model Rule 1.8 specifies that a loan is an example of a transaction between an attorney and client to which Model Rule 1.8 applies.[159] Subsection (a) prohibits attorneys from entering business transactions with clients unless:

> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[160]

154. La Canfora, *supra* note 20.
155. *See* MODEL RULES OF PROF'L CONDUCT, r. 1.8(a), (e) (AM. BAR ASS'N 2018).
156. *Id.*
157. *Id.* r. 1.8(a) cmt. 1.
158. *Id.*
159. *Id.*
160. *Id.* r. 1.8.

The aforementioned, longtime agent Eugene Parker believed that "[m]ost rookies don't have any idea how to make a good, quality business decision."[161] An attorney-agent's client is often young and does not possess the "legal savvy and experience to make educated decisions concerning legal representation and legal strategy."[162] He either recently graduated college or left college prior to graduation to pursue a professional athletic career.[163] Despite his youth, every rookie athlete is "thrust at a young age into an industry where his talents and marketability are often earning him millions of dollars a year."[164] Athletes are often inexperienced in the fields of business and negotiation and are thus susceptible to exploitation by agents.[165] Further, loan and marketing guarantee transactions between athlete agents and clients are complicated.[166] Many athlete agents use the "naivety of [athletes] to their advantage by giving players financial inducements in order to win over their business."[167]

Given this dynamic, attorney-agents who provide loans or marketing guarantees will likely have a tough time satisfying the Model Rule 1.8(a)(1) requirement that they disclose the loan or marketing guarantee transaction in a manner that the athlete could have reasonably understood. Recent transactions between two of the biggest names in the professional football industry serve as an example. A few years ago, "complicated" financial dealings between star wide receiver DeSean Jackson and his now-former agent Drew Rosenhaus became a mainstream conversation in the industry.[168] Through a series of documented loans, Jackson could have owed Rosenhaus as much as $736,415, according to an NFLPA arbitration ruling on the grievance between the two.[169] Of this amount, $361,415 constituted remaining unpaid loans that Jackson "questioned whether . . . [the loans] might be gifts from Drew Rosenhaus to Jackson that were intended to bolster their deteriorating business relationship."[170] Thus, Jackson claimed the loans constituted a financial inducement to stay with

161. Mullen, *supra* note 16.

162. Brown, *supra* note 53, at 814.

163. *Id.* at 837.

164. *Id.* (noting this athlete is often bombarded with decisions to make). Thus, it is important for athletes to understand that agent misconduct can lead to financially disastrous consequences for their clients. Davis, *supra* note 17, at 783–84 (citing example of football agent Sean Jones and his "financial misdealings" involving two clients).

165. Masteralexis et al., *supra* note 19, at 80 (explaining that a player is at risk of exploitation by an agent who makes decisions without player's input).

166. *See* La Canfora, *supra* note 20 (describing dealings between wide receiver DeSean Jackson and agent Drew Rosenhaus).

167. Karcher, *supra* note 11, at 753 (citing statistics on likelihood that a high school athlete will play a game in the big leagues).

168. La Canfora, *supra* note 20 (noting the NFLPA contemporaneously issued a memo to agents "vowing increased discipline for those [failing] to uphold [the] rules governing the signing of players").

169. *Id.*

170. *Id.*

Rosenhaus as Jackson pursued a new contract."[171] Given the large amount of money at stake, Jackson had significant incentive to understand the transaction, but he did not (or could not). Should a transaction with a client come into dispute, the Rosenhaus–Jackson transactions serve as a prime example of the difficulty that an attorney-agent will have in satisfying the requirement that he disclosed it in a manner that his client could reasonably understand. One may argue that a marketing guarantee transaction would be even more difficult for a client to understand than the loan (or inducement) at issue in the Rosenhaus–Jackson dispute.

Attorney-agents who engage in business transactions with clients, such as loans and marketing guarantees, must also satisfy Model Rule 1.8(a) documentation requirements. These requirements include: (1) full disclosure and transmission of the transaction in writing in a manner that the client can reasonably understand; (2) advising the client of the desirability of seeking the advice of independent legal counsel on the transaction; and (3) the client's "informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction."[172] An attorney-agent who provides a loan or marketing guarantee faces a tall task in attempting to satisfy these requirements. Given the likely youth and inexperience of his client, attorney-agents will likely struggle to show they disclosed the transaction in a manner his client could reasonably understand or that his client gave informed consent.

Further, the Comment to Model Rule 1.8 requires the attorney-agent, when necessary, to discuss: (1) the "material risks of the proposed transaction, including any risk presented by the lawyer's involvement," (2) "the existence of reasonably available alternatives," and (3) "why the advice of independent legal counsel is desirable."[173] Thus, attorney-agents who provide loans to clients must discuss with them the existence of alternative loan sources, for example. Similarly, attorney-agents who offer marketing guarantees must discuss the availability of other marketing representation options with clients. When an attorney fails to satisfy Model Rule 1.8(a) requirements regarding transactions with clients, the result is a rebuttable presumption that the transaction is void as against public policy.[174]

The Comment to Model Rule 1.8 explains that the risk is greatest when the client expects the attorney to "represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client

171. *Id.* (noting the remaining amount of $155,000 was unpaid agent fees).

172. MODEL RULES OF PROF'L CONDUCT, r. 1.8(a) (AM. BAR ASS'N 2018).

173. *Id.* r. 1.8 cmt. 2.

174. ELLEN J. BENNETT & HELEN W. GUNNARSSON, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 169 (9th ed. 2019) (citing Calvert v. Mayberry, No. 16SC413, 2019 WL 1510451 (Colo. Apr. 8, 2019)).

will be materially limited by the lawyer's financial interest in the transaction."[175] This risk of an attorney's financial self-interest exists when attorney-agents provide marketing guarantees to clients. For example, an attorney-agent's provision of a large sum of money as an advance on future marketing income may incentivize the attorney-agent to arrange for marketing opportunities for the client that are too numerous—or less than desirable—so as to bring in marketing revenue to make up the attorney-agent's guarantee advance amount. Such a situation results in an additional requirement for attorney-agents, as they must comply not only with the requirements of Model Rule 1.8(a), but also with Model Rule 1.7. Under Model Rule 1.7, the attorney-agent must disclose the risks associated with the attorney's dual role, such as the risk that the attorney-agent "will structure the transaction or give legal advice in a way" that favors the attorney-agent's "interests at the expense of the client."[176]

Moreover, the attorney-agent must secure the client's informed consent.[177] In some cases, the attorney-agent's interests "may be such that Rule 1.7 will preclude the [attorney-agent] from seeking the client's consent to the transaction."[178] In that case, even informed client consent may not cure the conflict of interest that would exist as a result of the transaction.[179] Thus, the attorney must either avoid the transaction or comply with conditions designed to protect the client.[180]

If the *Model Rules*' provisions on business transactions between attorneys and clients do not deter attorney-agents from providing loans and marketing guarantees to clients, then the rationale behind the *Model Rules*' stance on attorneys providing financial assistance to clients should definitely dissuade such transactions.

2. With Limited Exceptions, the *Model Rules* Prohibit Attorneys from Providing Financial Assistance to Clients in Connection with Pending or Contemplated Litigation[181]

An attorney-agent providing a loan or marketing guarantee to a client requires analysis of another Model Rule 1.8 provision. Generally, attorneys "may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to clients for living expenses."[182] If one of these scenarios were to occur, it "would encourage clients to pursue lawsuits that might not

175. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 3 (AM. BAR ASS'N 2018).
176. *Id.*
177. *Id.*
178. *See id.*
179. *See id.*
180. *See id.* r. 1.8(a).
181. *Id.* r. 1.8(e).
182. *Id.* r. 1.8(e) cmt. 10.

otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation."[183] To safeguard against these dangers, Model Rule 1.8(e) prohibits attorneys from providing "financial assistance to a client in connection with pending or contemplated litigation"[184] except in two (very limited) circumstances.[185] Attorneys "may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."[186] Also, attorneys representing "indigent client[s] may pay court costs and expenses of litigation on behalf of the client[s]."[187]

A trilogy of state court cases involving state bar association rules based on Model Rule 1.8(e) illustrates the application of and rationale behind the *Model Rule* prohibition on attorneys providing financial assistance to clients. In 1995, the Supreme Court of Mississippi held that an "attorney's loans to [an] indigent client for personal maintenance pending resolution of [his] personal injury claim violated prohibition against providing financial assistance other than court costs and expenses of litigation."[188] Like Model Rule 1.8(e), the relevant Mississippi Rules of Professional Conduct prohibited an attorney from advancing "necessary and essential living and medical expenses" to a client "during the course of litigation in order to maintain the viability of the client's claim."[189] In its opinion, the Mississippi Supreme Court examined how other jurisdictions decided the issue, noting that the majority of states facing the issue held that the advancement of funds beyond court costs violates ethical regulations.[190] The rationale behind its ruling, according to the Court, included avoiding the potential dangers of an attorney "hav[ing] his own pocketbook in mind as he handles the litigation" of a client who owes him money.[191] For example, the attorney may "settle for an amount sufficient to cover the loan to his client, while foregoing the risk of a trial where his client could recover a larger amount or lose everything."[192] Thus, the attorney "should not face this risk to independent judgment."[193] The Court went on to state its concern that "unregulated lending to clients would generate unseemly bidding wars for cases and inevitably lead to further denigration of our civil justice system."[194] Thus, the Court privately reprimanded the attorney who made the loan.[195]

183. *Id.*
184. *Id.* r. 1.8(e)
185. *Id.* r. 1.8(e)(1)–(2).
186. *Id.* r. 1.8(e)(1).
187. *Id.* r. 1.8(e)(2).
188. Miss. Bar v. Attorney HH, 671 So.2d 1293, 1293 (Miss. 1995).
189. *Id.* at 1294.
190. *Id.* at 1296.
191. *Id.* at 1296–97.
192. *Id.* at 1297.
193. *Id.*
194. *Id.* at 1298.
195. *Id.*

A similar Oklahoma Rules of Professional Conduct ("ORPC") provision was at issue in a 2000 case decided by the Supreme Court of Oklahoma. The Oklahoma Bar Association "alleged one count of misconduct warranting discipline against respondent attorney, Donald E. Smolen."[196] The Association alleged that Smolen violated the prohibition against providing financial assistance to a client in connection with pending or contemplated litigation pursuant to ORPC 1.8(e).[197] During his representation of the client, Smolen loaned the client $1,200 for living expenses.[198] In its opinion, the Supreme Court of Oklahoma stated that ORPC 1.8(e) "unambiguously prohibit[s] a lawyer from advancing living expenses to clients."[199] The Court noted that the purposes of the prohibition against attorneys providing financial assistance to clients for living expenses include preventing "evils" such as:

> (1) clients selecting a lawyer based on improper factors, and (2) conflicts of interest, including compromising a lawyer's independent judgment in the case and creating the potentially conflicting roles of the lawyer as both lawyer and creditor with divergent interests.[200]

Smolen received a sixty-day suspension from practicing law.[201]

A 2003 Connecticut state court considered the application of Connecticut's version of Model Rule 1.8(e) to a situation where attorneys provided financial assistance to clients in connection with pending litigation "by providing bus tokens to clients for transportation to medical appointments and by advancing medical costs to clients and to providers for physicians' treatment, prescriptions, and medical supplies."[202] The Court noted that "[i]t [was] not a defense to an ethical violation that the attorney did not act in bad faith or intend to violate the code."[203] The Court disagreed with the attorneys' argument that medical-related costs constitute "court costs and expenses of litigation," which Connecticut's version of Model Rule 1.8(e)(1) permits attorneys to advance to clients.[204] The Court, in concluding that attorneys may not advance medical expenses to clients, based its decision on rationale including: (1) ethics rules preclude attorneys "from enticing clients with the promise of monetary advances"; (2) ethics rules afford attorneys protection from client assistance requests; (3) ethics rules shelter attorneys from the competition of other attorneys agree-

196. State *ex rel.* Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 457 (Okla. 2000).
197. *Id.*
198. *Id.*
199. *Id.* at 458.
200. *Id.* at 462. The Supreme Court of Oklahoma cited Miss. Bar v. Attorney HH, discussed *supra* notes 188–95.
201. *Smolen*, 17 P.3d at 464.
202. Rubenstein v. Statewide Grievance Comm., No. CV020516965S, 2003 WL 21499265, at *2 (Conn. Super. Ct. June 10, 2003) (internal citation omitted).
203. *Id.*
204. *Id.* at *4, *6.

able to giving monetary assistance to clients; and (4) client loans could place the attorney in the conflicted roles of counselor and creditor, thus encouraging the attorney to steer the litigation to protect the attorney's welfare.[205]

While the language of Model Rule 1.8(e) expressly forbids attorneys from providing financial assistance to clients in connection with pending or contemplated litigation, the rationales behind the prohibition are appropriate for the scenario whereby an attorney who serves as an athlete agent provides financial assistance to clients via loans and marketing guarantees. First, the increasingly common scenario in which an athlete chooses representation based on the size of the loan or marketing guarantee, as opposed to contract negotiating acumen, is undesirable.[206] Further, an attorney-agent who provides a loan or marketing guarantee to a client possesses too great a financial stake in the representation of the athlete. For example, an attorney-agent who provides a loan to a free-agent client may drive the client to the biggest immediate payday via a contract with a large signing bonus as opposed to a potentially more lucrative long-term, incentive-laden contract offer from another organization that would provide the athlete with more long-term security. In helping the client decide which offer to accept, the attorney-agent's interest in assisting the client determine which offer is best for the client conflicts with the agent's own interest in the client's ability to repay the loan.

Likewise, an attorney-agent who provides a client a marketing guarantee suddenly possesses too great of a financial stake in the client's career. The guarantee transaction may incentivize the attorney-agent, who can earn up to 20% of a client's marketing income compared to up to 3% of a client's salary, to arrange for too many or undesirable marketing appearances in an attempt to make up the amount of the advance.[207] In what is (hopefully) an extreme example, an attorney-agent who provides a large marketing guarantee to a defensive lineman may encourage the lineman to accept a marketing opportunity from a car dealership in the lineman's hometown that requires the athlete to sign autographs for $10.00 apiece at the dealership on a Saturday morning in the summer. The lineman's time may be better spent training or resting; however, the attorney-agent may be more concerned with making up the guarantee amount he advanced to his client, who is not otherwise very marketable.[208]

205. *Id.* at *5.

206. *See* Mullen, *supra* note 16, for agents voicing frustration with the current recruiting climate in which athletes choose representation based on inducements, see also Corriveau, *supra* note 21 and accompanying text.

207. *See* Matz, *supra* note 18 (discussing NFLPA maximum percentages permitted).

208. *See* Fowler, *supra* note 36, for reference to marketability of individuals who play certain positions. In some instances, agents are more interested in how their clients can benefit the agents financially instead of their best possible playing scenarios. Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversa-*

Unfortunately, "many athletes blindly accept their agents' advice," assuming that agents only look out for their clients' best interests.[209] Model Rule 1.8(e) seeks to prevent such scenarios and protect clients from attorneys with conflicted interests. The rationales behind Model Rule 1.8(e) are transferable to the scenario in which an attorney-agent provides loans or marketing guarantees to clients.

IV. Conclusion: Based on Agency Law and Attorney Ethics Regulations Rationales, Athletes and Agents Should be Leery of Engaging in Loan and Marketing Guarantee Transactions, and the NFLPA and Individual States Should Expressly Prohibit Them

Regarding conflicts of interest, super-agent Jimmy Sexton has stated, "I can see where someone in academic law might see [conflicts of interest] as a problem, but they don't work in the business, so they don't know the rules of the business. . . . We know the rules. . . . I don't think it's a problem."[210] The rules to which Sexton likely refers are NFLPA regulations and state athlete agent laws, both of which prohibit athlete agents from providing inducements but neither of which forbids loans and marketing guarantees. However, to conclude analysis on these common transactions at considering only these two authorities is shortsighted. Complete analysis must include application of agency law and attorney ethics regulations.

Agency law seeks to protect the interests of principals, applies to all athlete agents who negotiate their clients' marketing endeavors, and, stated generally, seeks to prevent transactions between agents and their clients in which their interests conflict and jeopardize agents' loyalty. Thus, agency law disapproves of athlete agents providing loans and marketing guarantees.

Likewise, attorney ethics regulations apply to attorneys who represent athletes, including for marketing endeavors. With limited exceptions, the *Model Rules* prohibit attorneys from engaging in business transactions with clients and would prohibit attorney-agents from providing loans and marketing guarantees to clients. Further, the rationales behind the *Model Rules*' prohibition on attorneys providing financial assistance to clients in connection with contemplated or

ries?, 17 Vill. Sports & Ent. L.J. 91, 101 (2010) (advocating that athletes pay closer attention to agents' educational backgrounds and highlighting benefits of legal education).

209. Evans, *supra* note 208, at 125 (pointing out that agents may possess self-concerns including pride, image, and money).

210. Anthony L. Salvador, *The Regulation of Dual Representation in the NFL*, 13 Tex. Rev. Ent. & Sports L. 63, 79 (2011) (foootnote omitted) (proposing solution to practice of dual representation of NFL coaches and players). For background on Sexton and his intimate involvement in the tangled web of football representation, see Joshua Lens, *When a College Coach's Agent Recruits the Coach's Players: Potential Legal and NCAA Ramifications*, 26 Jeffrey S. Moorad Sports L.J. 1, 3–5 (2019).

pending litigation apply seamlessly to the scenario whereby an athlete agent provides loans and marketing guarantees.

Thus, the NFLPA and individual states should expressly prohibit athlete agents from providing loans and marketing guarantees to clients. Doing so would have positive effects including elimination of confusion and helping put attorney-agents and non-attorney agents on a level playing field. It would also further the goals of NFLPA agent regulations by promoting competition among agencies, protecting athletes from agents with conflicted interests, protecting agents from client requests for funds, stopping the practice of athletes receiving money that they have yet to earn, and eliminating the increasingly common tendency of athletes signing with the highest agent bidder as opposed to the best contract negotiator. Besides, there is a large segment of agents who desire this prohibition.[211] Further, since bar associations do not have jurisdiction over non-attorneys, it would be unfair to attorney-agents to count on them to police agents who provide loans and marketing guarantees to clients.[212] Rather, the NFLPA and individual states should adopt express prohibitions on such transactions between all agents and their clients.

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211. *See, e.g.*, Mullen, *supra* note 16, for discussion of segment of agent industry that desires such change.

212. Bar associations may not possess the time or resources to conduct inquiries into allegations of agents violating these rules. Rosner, *supra* note 96, at 238. Further, bar associations typically only investigate cases in which facts are clear, a situation often untrue of allegations involving agents. *Id.* Additionally, bar associations usually focus investigations on violations involving less privileged clients who require protection from unscrupulous attorneys, and thus may not have incentive to pursue allegations involving more privileged athletes. *Id.* However, attorney-agents and their athlete clients currently experience a low level of accountability for attorney-agents concerning conflicts of interests, while the ramifications for athletes can be extraordinarily high. Brown, *supra* note 53, at 814. Regardless, some individuals who were attorneys have left the practice of law to become full-time athlete agents and avoid more restrictive regulations applicable only to attorney-agents. Jamie P.A. Shulman, *The NHL Joins In: An Update on Sports Agent Regulation in Professional Team Sports*, 4 SPORTS L.J. 181, 202 (1997) (citing Michael A. Weiss, *The Regulation of Sports Agents: Fact or Fiction?*, 1 SPORTS L.J. 329, 349 (1994) (noting inequity between attorney-agents with responsibilities for following legal ethics regulations and non-attorney agents)). Conversely, at least one now-former attorney-agent, Mark Rodgers, stopped serving as an agent due to his unwillingness to compete against agents willing to engage in illegal behavior that may incentivize him to engage in actions that could result in disbarment. *See* Meehan, *supra* note 61, at 46 (examining whether a legal education hinders an attorney-agent's progress in athlete representation).