

April 2012

Football v. Football: A Comparison of Agent Regulation in France's Ligue 1 and the National Football League

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Recommended Citation

Thomas A. Baker III, Darren A. Heitner, Jean F. Brocard & Kevin K. Byon, *Football v. Football: A Comparison of Agent Regulation in France's Ligue 1 and the National Football League*, 2 *Pace. Intell. Prop. Sports & Ent. L.F.* 1 (2012).

Available at: <https://digitalcommons.pace.edu/pipself/vol2/iss1/1>

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Football v. Football: A Comparison of Agent Regulation in France's Ligue 1 and the National Football League

Abstract

Baker, Heitner, Broçard and Byon, in their article *Football v. Football*, analyze agent regulation in the NFL and compare it to how agents are regulated in France for Ligue 1. The article begins with a brief discussion on the concept of a sports agency that includes analysis of governmental regulation of agency in both the United States and in France. The article continues by exploring how agents are regulated in their representation of the NFL and Ligue 1 football players. Subsequently the article concludes with a discussion that includes suggestions concerning future agent regulation for both the NFL and Ligue 1.

Keywords

sports agents, football

Cover Page Footnote

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Football v. Football: A Comparison of Agent Regulation in France's Ligue 1 and the National Football League

Thomas A. Baker III¹, Darren A. Heitner², Jean Francois Brocard³, and Kevin K. Byon⁴

I. Introduction

French football and American football are two very different sports that share a common name. Although, when it comes to the degree of fan interest, any variance between the sports is as subtle as the distinction between pommes frites and french fries.⁵ The mania in Marseille for those who play the “beautiful game” is just as strong as the passion in Pittsburgh for their warriors of the gridiron. This high level of fan interest has transformed both forms of football into billion-dollar industries. Ligue 1 (“L1”), the premier professional football league in France,

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⁵ French fries are an American derivative of pommes frites. The only distinction between the two fried potato products is that pommes frites are fried twice while french fries are typically fried only once; although some establishments do fry french fries twice.

earned €478 million in 2009-10 from television revenues alone.⁶ The National Football League (NFL), the premier professional football league in the United States, will earn \$4 billion in television revenues in 2011.⁷ However, players for both L1 and the NFL demand their fair share of revenues earned by their respective leagues. The total player wage bill of L1 for 2009-10 was €481 million⁸, while NFL player costs topped \$4.5 billion.⁹ With that much money on the line for the services of professional athletes in both countries, there exists a need for quality player representation at the negotiation table in the form of sports agents. In turn, there exists a resulting need for sports agent regulation to protect the interests of the athletes and the two leagues.

This need has been proven through the existence of agent abuses in both L1 and the NFL. A classic example from the NFL includes that of agent/financial advisor Don Luken who allegedly defrauded seventy-eight NFL players out of \$42 million between 1992-2002. There are many more examples of agent malfeasance ranging from income mismanagement and embezzlement to self-serving conduct conflicting with the athlete's best interests. Problems associated with sports agency in the United States have resulted in sports agents earning the reputation of sleazy, money hungry "serpents...poised to strike at the wealth professional athletes earn in such plenty."¹⁰ Intentional abuses in representation are not the only problems plaguing the athlete-agent relationship in the United States; examples of outright incompetence also permeate the profession.

⁶ Direction Nationale du Contrôle de Gestion, Rapport d'Activité de la Ligue de Football Professionnel - Saison 2009/2010 (2010) [hereinafter DNCG report], available at <http://www.lfp.fr/corporate/dnccg>.

⁷ Jim Trotter, *Ruling in TV revenues hearing may hold key to NFL labor dispute*, SPORTS ILLUSTRATED (Feb. 24, 2011), http://sportsillustrated.cnn.com/2011/writers/jim_trotter/02/24/labor.hearing/index.html.

⁸ DNCG report, *supra* note 4.

⁹ Kurt Badenhausen, Michael K. Ozanian and Christina Settimi, *The Most Valuable NFL Teams*, FORBES (Aug. 25, 2010), <http://www.forbes.com/2010/08/25/most-valuable-nfl-teams-business-sports-football-valuations-10-intro.html>.

¹⁰ Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT L.J. 91 (2010), quoting Craig Neff, *Den of Vipers, a Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED (Oct. 19, 1987), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1066585/5/index.htm>.

An infamous example of agent incompetence in the NFL involves the misrepresentation of NFL running back Ricky Williams. In 1999, Williams was the top pick for the New Orleans Saints in the NFL player draft. Williams signed with an agency firm owned by rapper and founder of the label No Limit Records, Percy Robert Miller, who is better known as Master P. The firm negotiated for Williams what many hold as one of the worst contracts in the history of organized sports.¹¹ The contract included incentives that were almost impossible to reach and was so horrendous that “it should be studied by MBA programs today as a template for how not to do an NFL deal.”¹² Not long after signing his rookie contract, Williams terminated his agreement to be represented by Master P’s firm, but the contractual damage was done and it cost Williams millions of dollars. More recently, another NFL player sought contractual relief from an inadvisable agreement. This situation involved wide receiver Andre Johnson who wanted to save the 3% he would have spent in an agency fee by using his uncle Andre Melton to negotiate his contract.¹³ The result was an eight-year agreement, the term of which was problematic in-and-of itself, with only 25% of the agreed upon amount guaranteed by the Houston Texans.

In France, the situation is not much better. The *Bosman*¹⁴ judgment, rendered by the Court of Justice of the European Communities, has led to an exponential increase¹⁵ in the salaries and transfer fees paid for professional football players.¹⁶ With financial flows increasing in Europe, sports agents have taken a much more important role in the negotiation of contracts and

¹¹ Mike Freeman, *Johnson Crying Uncle on Contract Becomes Lesson for Players*, CBS SPORTS.COM (May 19, 2010), <http://www.cbssports.com/columns/story/13411941/johnson-crying-uncle-%09on-%09contract-becomes-lesson-for-players>.

¹² *Id.*

¹³ *Id.*

¹⁴ Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman, C-415/93 (1995) E.C.R. I-4921 (European Court of Justice).

¹⁵ From 1997 to 2007, the salaries of professional football players increased by 235% in the ‘big five’ European leagues (England, Spain, Italy, Germany and France).

¹⁶ See generally, JEAN-JACQUES GOUGUET, *LE SPORTS PROFESSIONNEL APRES L’ARRET BOSMAN: UNE ANALYSE ECONOMIQUE INTERNATIONALE* (3rd ed. 2009).

management of the affairs of professional football players, which has resulted in a substantial increase in agent misconduct. The rise of agent misconduct in Europe led to the sentiment that sports agents “are often, in practice, at the centre of reprehensible practices [but] are not essentially responsible for them. Rather they crystallise the shortcomings of the system as a whole.”¹⁷ The main misconduct observed involves secret fees or “bungs” hidden dual agency and activities carried out by unlicensed agents. One of the first famous agent abuse cases in France involved Rolland Courbis, former coach of several L1 teams (Girondins de Bordeaux, Olympique de Marseille...) who was convicted in 2006 by the Correctional Court of Marseille for “misuse of company assets, complicity in misuse of company assets, forgery and use of forged documents.”¹⁸ Courbis was found guilty of receiving obscure commissions alongside trades involving players he was coaching. In fact, he was acting as a sports agent without the right to do so.

Another famous case involved two former presidents of the Paris Saint Germain, a Nike representative, and several sports agents. The aforementioned parties were convicted of “forgery, use of forged documents and covert employment” by a judgment from the Correctional Court of Paris in 2010. The matter concerned fake conventions and more than twenty trade contracts that included unlawful remunerations (an estimation of €9 million) to players and their agents resulting from illegal tax savings.¹⁹ These are just some of many instances in both the United

¹⁷ Didier Primault, *Rapport d'information N° 3741 de M. Dominique Juillot déposé en application de l'article 145 du Règlement par la Commission des affaires culturelles, familiales et sociales sur les conditions de transfert des joueurs professionnels de football et le rôle des agents sportifs*, Assemblée Nationale française (2007).

¹⁸ Rolland Courbis écroué aux Baumettes, LIBERMARSEILLE.FR, <http://www.libemarseille.fr/henry/2009/09/rolland-courbis-arr%C3%AAt%C3%A9-%C3%A0-la-sortie-du-v%C3%A9lodrome-samedi.html> (last visited Mar. 17, 2012).

¹⁹ *Le PSG et Nike Renvoyés en Correctionnelle dans l'affaire des Transferts Frauduleux*, LEMONDAE.COM, http://www.lemonde.fr/sports/article/2009/11/02/le-psg-et-nike-renvoyes-en-proces-dans-l-affaire-des-transferts-frauduleux_1261434_3242.html (last visited Mar. 17, 2012).

States and France involving the misconduct of sports agents. These select cases demonstrate the need for agent regulation for both the United States and French forms of professional football.

This article will analyze agent regulation in the NFL and compare it to how agents are regulated in France for L1. A review of relevant literature revealed that no similar study exists. In fact, the review could not locate a study that directly compared agent regulation in the United States with agent regulation in any other country. Thus, this study will attempt to fill a substantial hole in existing research. Sports leagues and governing bodies for sports can benefit from comparative studies, especially studies aimed at addressing common problems. This article will begin with a brief discussion on the concept of a sports agency that includes analysis of governmental regulation of agency in both the United States and in France. The article explores how agents are regulated in their representation of NFL and L1 football players. Subsequently the article concludes with a discussion that includes suggestions concerning future agent regulation for both the NFL and Ligue 1.

II. Sports Agency and Governmental Regulation

A Google search of the term “sports agent” revealed 23,200,000 results in .26 seconds.²⁰ There is no shortage of sources willing to define or describe the profession. There is also no shortage of sources willing to highlight the unscrupulous activities of sports agents. These problems have prompted both the United States and French governments to promulgate legislative regulation of sports agents.

²⁰ The search was performed on Sept. 19, 2011.

United States Governmental Regulation

The United States federal government decided that it was going to involve itself in the regulation of agents in 2004 when it passed the *Sports Agent Responsibility and Trust Act* (“SPARTA”).²¹ SPARTA requires sports agents to be truthful to their clients, disclose warnings to potential clients about their risk of losing their NCAA eligibility to compete in collegiate sports as student-athletes, and abstain from providing anything of value to student-athletes who have remaining NCAA eligibility.²² SPARTA and many sports agent regulations implemented by various states have been criticized for their failure to actually deter the unscrupulous conduct of many sports agents. In fact, since its formation, up to the date of this paper’s completion, SPARTA has not once been used to punish a sports agent with a civil or criminal penalty for violating the Act.

While the federal government has done little to regulate the sports agent profession in the United States, the professional sports players’ associations have become involved in the regulation of those who wish to represent professional athletes (the union members). The National Football League Players Association (NFLPA), in particular, has acted as a strong check to deter sports agents from freely taking advantage of their clients. Sports agents must go through an extensive background check prior to even being allowed to represent NFL players. The background checks include researching past criminal convictions, bankruptcy filings, and fraud or embezzlement charges.²³ The NFLPA is also distinct from the other United States players’ associations for three additional reasons. First, it requires applicants to register to become an NFLPA Contract Advisor in the month of January. Second, they must purchase

²¹15 U.S.C.A §§7801-7807 (2006).

²² See Darren A. Heitner, *Duties of Sports Agents to Athletes and Statutory Regulations Thereof*, 7 DARTMOUTH L. J. 246, 249-51 (2009).

²³See Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 809 (2006).

expensive professional liability insurance. Third, before permitted to represent NFL players in contractual negotiation with an NFL team, NFLPA requires its members to sit for a test on the current collective bargaining agreement.

III. French Government Regulation

The business of sports agency grew tremendously during the 1980's in France, but it was not until 1992 that the French government recognized the need for specific regulation of the industry. Before 1992, general agency law provisions were the only regulations for French sports agents. However, problems specific to sports agency prompted French public authorities to recognize sports agency as a separate and distinct activity that required specific recognition in French law.²⁴ While a 1992 act recognized sports agency law as distinct from general agency law, it stopped short of effectively controlling the actions of French sports agents. It was not until 2000 that the French government passed a more detailed sports agency law that superseded the 1992 act²⁵ and this new law introduced the *Code du Sport*²⁶ and its articles that regulate sports agency.²⁷ While more thorough than SPARTA, the Federation Francaise de Football (FFF) recognized that the *Code du Sport* did not meet all of its needs in regulating agents who represent French football players. Accordingly, the FFF has developed its own restrictions for sports agents for matters not covered by the *Code du Sport*. Thus, the provisions of the *Code du Sport* concerning agency, in conjunction with the FFF regulations, serve as the primary authority for sports agents representing L1 players in France, whereas sports agents who represent NFL players in the United States are regulated primarily by the NFLPA. The remainder of this article

²⁴ Law N°92-652, July 13, 1992, relative to the organization and the promotion of sports and physical activities.

²⁵ Law N°2000-627, July, 6 2000, relative to the organization and the promotion of sports and physical activities.

²⁶ The Code du Sport (first published by the ruling N°2006-596 on May, 23rd 2006) is the document which contains all the applicable laws and decrees in the field of sports. The last alteration of the *Code du Sport* with regards to sports agents' regulation happened with the decree N° 2011-686 of June 16, 2011.²⁶

²⁷ Code du Sport (C. SPOR.) art. L.222-5 to L.222-11, art. R.222-1 to R.222-22, Art. A.222-1 to A.222-14 (Fr.).

will describe how agents are regulated by the NFLPA and how that differs from agent regulation in France under the *Code du Sport*. In doing so, the article analyzes regulations by answering four research questions: (1) what qualifications are required in order to become a sports agent; (2) what are the rules that govern agents and subject agents to sanction; (3) how are agents supervised and who performs this supervision; and (4) what possible sanctions exist for sports agents who violate rules.

IV. Question 1: Agent Qualification Requirements

Agent qualification is a pressing issue in both the United States and in France. The reason for this is that general agency law in both countries fails to provide any minimum qualifications on who can serve as an agent for a principal. “Sports agent” is typically a term reserved for those who negotiate contracts for professional athletes.²⁸ This type of representation has increased in importance over the past several decades due to the rise of athlete salaries and the advent of a less-restricted labor marketplace.²⁹ These factors have created a climate in which professional athletes have the potential to maximize their wealth through skillful negotiation. Competent sports agents are able to assist professional athletes by providing a degree of parity in the negotiation process.³⁰ And to their credit, sports agents have delivered in this regard as player salaries in major professional sports have increased substantially over the past several decades.³¹ When players earn more money, so do their agents, via a percentage fee attached to all successfully negotiated contracts.

²⁸ Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123, 125 (2007).

²⁹ Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193, 195-97 (2004).

³⁰ William Rothstein, *The Business of Sports Representation: Agent Evolution in the “Industry”*, 9 VA. SPORTS ENT. L. J. 19, 24 (2007).

³¹ Neiman, *supra* note 26 at 127.

However, the modern sports agent is much more than just a negotiator of contracts.³² Clients now demand more from their agents, and many agents have responded by extending their required services to also include tasks such as financial management, public relations, investment management, tax and estate planning, athletic training, and legal counseling.³³ Competent agents at large, full-service agencies like Creative Artists Agency (CAA), Wasserman Media Group (WMG), and Lagardère Unlimited have the resources to meet all of their clients' needs. For small firms and sole practitioners, providing all requested services in-house is much more challenging.

Note that the expansion of the sports agent's responsibilities includes tasks that are of high importance to clients and could drastically impact their estate if not handled properly. This is problematic because not all agents are capable of completing these tasks. Thus, the NFLPA, the FFF and the French Government have recognized a need to place minimum qualifications necessary to represent football players for the NFL and L1.

A. NFLPA Qualification Requirements

To represent any NFL player, an agent must be duly certified by the NFLPA and included in the current list of NFLPA certified agents (the NFLPA refers to certified agents as "Contract Advisors").³⁴ According to Article 48 of the 2011 NFL Collective Bargaining Agreement (CBA), entitled NFLPA Agent Certification, the NFLPA Rules Governing Contract Advisors (RGCA) provides the exclusive certification system for NFLPA agents.³⁵ The current NFLPA RGCA was

³² *Id.*

³³ Damon Moore, *Proposals for Reform to Agent Regulations*, 59 DRAKE L. REV. 517, 522 (2011).

³⁴ *National Football League & National Football League Players Association, COLLECTIVE BARGAINING AGREEMENT 210* (Aug. 4, 2011), available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf.

³⁵ *Id.*

published in 2007 and amended in 2009 and 2011. The amendments provided minor rule changes and outlined certification guidelines and timetables after the union re-certified in 2011.

Under the combined rules contained in these documents, players may represent themselves if they so choose.³⁶ However, any contract negotiated on behalf of an NFL player by a representative not certified and listed among current NFLPA certified agents will be disapproved by the NFL Commissioner.³⁷ NFL member Clubs who knowingly negotiate with an uncertified agent will be fined \$30,000 (increasing by 5% annually) for their second offense under Article 48.³⁸ Beyond these enforcement measures, all regulation and certification procedures are designated to the authority of the NFLPA.

B. NFLPA Regulations Governing Contract Advisors

Section 2 of the NFLPA RGCA states that “[a] person must file a verified Application for Certification as a Contract Advisor and a completed and signed Authority and Consent to Release Information with the NFLPA, and pay the required application fee as established by the NFLPA Board of Player Representatives.”³⁹ Only individuals, not firms, corporations, partnerships, or other business entities, are eligible for certification.⁴⁰ All applicants are required to have an undergraduate degree from an accredited four year school as well as a post-graduate degree from an accredited program.⁴¹ Exceptions to the education requirement can be made by the NFLPA when the applicant can demonstrate “sufficient negotiating experience.”⁴² New

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 210-11.

³⁹ National Football League Players Association, *Regulations Governing Contract Advisors*, 3 (amended through Mar. 2007),

http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

applicants must attend the NFLPA seminar (held annually in July) for new Contract Advisors and pass a written examination prior to receiving certification.⁴³ If an applicant fails the exam twice, he is barred from retaking the test again for 5 years.⁴⁴ Certification applications are only accepted during specified times set by the Board of Player Representatives.

On September 9, 2011, the NFLPA published a memorandum announcing that Contract Advisors in good standing as of March 11, 2011, automatically received interim certification.⁴⁵ Those agents with interim certification were required to submit a complete application for certification, including 2011-12 membership fees and a fee for the background check cost by October 1, 2011.⁴⁶ The 2011 Amendment outlines dates and requirements for applying to be an NFLPA Contract Advisor during 2012, following the procedures provided in the 2007 NFLPA RGCA and discussed above.

The procedures outlined in the 2011 Amendment include an application review by the NFLPA, during which they may request further materials from the applicant and may conduct any further investigation deemed necessary.⁴⁷ Section 2(C) of the NFLPA RGCA lists grounds for denial of certification which include, but are not limited to, the following conditions.⁴⁸ Making false or misleading statements in the application will disqualify an applicant. Anyone who has misappropriated funds, been found guilty of embezzlement, theft, fraud, or other crimes that would lead to distrust as a fiduciary agent will be denied certification.⁴⁹ The NFLPA may

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Memorandum from National Football League Players Association Legal Department to agents 1 (Sept. 9, 2011) (on file with author), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/2011_Agent_Regulations_Amendment.pdf.

⁴⁶ *Id.*

⁴⁷ National Football League Players Association, *Regulations Governing Contract Advisors*, 4 (amended through Mar. 2007), http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf.

⁴⁸ *Id.*

⁴⁹ *Id.*

deny an application based on any information which adversely impacts the applicant's "credibility, integrity or competence to serve in a fiduciary capacity on behalf of players."⁵⁰ If an applicant has been denied certification by another professional sports players' association, then he cannot be certified by the NFLPA.⁵¹ Any applicant found to have solicited a player for representation after the filing of an application and prior to certification will not be certified by the NFLPA.⁵² To be eligible for certification, all applicants must complete the application and any other requested materials completely, accurately, and honestly in addition to having met all requirements and paying the application fee. The certification process is rigorous, and maintaining certification requires vigilance in serving players represented as well as abiding by a strict code of conduct.

C. FFF and Code du Sport Qualification Requirements

To represent football players in France, one needs to hold a license granted by the FFF by first passing the exam. The Federation organizes an exam at least every year.⁵³ Only natural persons can be granted a license. No official education or training is required to apply, but the difficulty of the exam tends to require a certain degree of knowledge, especially in law.

The exam is written and comprises two different parts: (1) a general part (including a case study and general questions) testing the law skills of the candidates (mainly in social, tax, contracts, and insurance laws); and (2) a specific exam (a multiple choice questionnaire) testing the knowledge and skills of the candidates in issues proper to soccer (regulations, rules, statistics at national and international levels).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ C. SPOR. art. R.222-14 to art. R.222-17 (Fr.).

Every year, the FFF makes the previous exam, along with the correct answers and sample questions from the exam, open to the public. A few example questions can be found in Appendix (A). In order to pass the exam, a candidate needs to earn a minimum grade of 10 out of 20 on the general part and a minimum grade that changes each year, on the specific part. The exam is regarded as being very difficult, because so few candidates pass every year. Only 14 out of 189 passed the exam in 2003 (a 7.4% passage rate). Between 2007 and 2010, the passage rate averaged roughly 17.2%. There are two leading reasons for the substantial increase in the passage rate from 2003 to that for the 2007-10 period: (1) the content of the exam is now largely common knowledge, which deters unlikely candidates; and (2) some private schools now offer preparation courses specifically for the exam.

In addition to passing the exam, the candidate needs to comply with the list of requirements called incompatibilities that are set by the Code du Sport. According to the Code du Sport, no one can be granted a license if:⁵⁴

- The person exercises, directly or indirectly, legally or in fact, as a volunteer or an employee, any duties in the direction or the training staff of an association or a company that compensates athletes or organizes sports events, or in a sports federation, or if one has had those activities in the previous year.
- The person is, or was during the previous year, a shareholder or associate in a company that compensates athletes or organizes sports events.
- The person was the target of disciplinary sanctions (at least a suspension) for ethical reasons.

⁵⁴ C. SPOR. art. L.222-9, art. L.222-11 (Fr.).

- The person is an official of an association or of a company that compensates athletes or organizes sports events.
- The person is an official of a sports federation.⁵⁵

Furthermore, the Code du Sport prohibits currently licensed agents from engaging in any activity prohibited by the list of incompatibilities and the individuals must give back their licenses and wait one year before engaging in any such activities.

In addition to those restrictions, the Code du Sport prohibits a person from ever being a licensed agent if the person is convicted of crimes that call into question the person's honor, integrity, or morals or has filed for personal bankruptcy or been sanctioned for mismanagement of business assets.⁵⁶ The Code du Sport qualification requirements were developed to avoid conflicts of interest and to make sure the agent candidates have no criminal record.

In addition to those qualifications, the Code also requires that candidates have and maintain professional liability insurance provided by a French insurance company (which costs around 800€ per year) and sign the code of professional conduct created by FIFA and implemented by the FFF.⁵⁷ If a license is granted to a candidate, that candidate is added to the list of authorized agents by the FFF. The license exists for an indefinite period of time and can only be suspended or removed through a disciplinary process or by the agent's request.

The Code du Sport also covers foreign agents within the European Union (EU) who want to represent athletes in France. In the past, the Code du Sport only provided temporary permission for an agent licensed in another EU or European Economic Area (EEA) country if the agent complied with the list of incompatibilities provided by the Code.⁵⁸ Current regulations now

⁵⁵ *Id.*

⁵⁶ Such sanctions are provided by the Code of Commerce.

⁵⁷ *See* C. SPOR. Appendix (Fr.).

⁵⁸ C. SPOR. art. L.222-15 (Fr.).

force agents licensed in EU or EEA countries to officially ask the Commission of Sports Agents of the FFF for a right to practice in France. This procedure requires the would-be agent to provide the FFF with information that proves the legitimacy of the agent. Would-be agents who are not from EU or EEA countries must sign what is called a “convention” with a legitimate licensed agent in France.⁵⁹ The convention is a contractual agreement between the foreign agent and the French agent to co-represent athletes in France.

V. Question 2: Rules Governing Agent Conduct

While gate-keeping regulations are necessary to restrict who can and cannot serve as agents for professional football athletes, they are not effective in restricting undesired conduct of licensed agents. Thus, there needs to be some standard of conduct required of practicing agents.

Conduct Required by the NFLPA

An agent certified by the NFLPA as a Contract Advisor must adhere to the requirements in Section 3(A) of the NFLPA RGCA to maintain his certification.⁶⁰ Upon request by the NFLPA, an agent must provide all relevant information regarding his qualifications to serve as a Contract Advisor.⁶¹ Expected qualifications include negotiating experience, special training, prior representation experience in professional sports, and membership in appropriate business associations.⁶² Additionally, Contract Advisors are required to attend the annual NFLPA seminar on individual contract negotiations.⁶³ So long as agents meet these requirements (along with

⁵⁹ *Id.*

⁶⁰ National Football League Players Association, *Regulations Governing Contract Advisors*, 3 (amended through Mar. 2007), http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

passing a test and paying the requisite fees to the NFLPA), they are eligible to represent NFL players.

When a Contract Advisor agrees to represent a player, he must execute a Standard Representation Agreement (SRA), file a copy with the NFLPA and abide by the agreement. The Contract Advisor must also provide to the NFLPA any other agreement(s) for services “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.”⁶⁴ Copies of any further agreement(s) entered into between an agent and a player have to be provided to the NFLPA within ten days of execution. Contract advisors are considered fiduciary agents for each of their player-clients at all times, and as such, are obligated to notify the player and report any NFL Club’s violations of his contract or CBA rights to the NFLPA.⁶⁵

Contract Advisors are required to provide annual itemized fee and expense reports for all services rendered to each player represented and file a copy with the NFLPA for every client.⁶⁶ These reports should include SRA Disclosure Forms disclosing all payments of money or any other valuables to anyone in relation to the recruitment of player-clients. The SRA Disclosure Forms should be signed by each player represented, as they must be provided to the player for review prior to executing an SRA.⁶⁷ Agents are also obligated to open their books, in regards to services provided, for review by any current or former client and authorized representatives thereof.⁶⁸ Additionally, agents have to cooperate completely with the NFLPA, including providing any materials deemed relevant for any investigation conducted under the NFLPA RGCA.

⁶⁴ *Id.*

⁶⁵ *Id.* at 6.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 7.

NFLPA agents are obligated to educate their clients about benefits, rights and obligations provided in the CBA. It is the agent's duty to "advise and assist those player-clients in taking maximum advantage of those benefits and rights, including, without limitation, Termination Pay, Severance Pay, Bert Bell/Pete Rozelle disability benefits, workers compensation benefits, second medical opinions, and right to chose their own surgeon."⁶⁹ To ensure that NFLPA agents stay familiar with all applicable regulations, player rights, obligations, and current negotiating tactics, they are subject to an NFLPA Contract Advisor examination at any time. If an agent fails the examination, he will be suspended for a minimum of one year and must re-take and pass the examination prior to re-certification.⁷⁰ In addition to complying with all the required agent conduct, Contract Advisors must be careful not to engage in any prohibited activities.

A. Prohibited Conduct

Section 3(B) of the NFLPA RGCA lists thirty-one items of conduct prohibited for NFLPA Contract Advisors.⁷¹ This section summarizes the most pertinent aspects of those prohibitions. No one shall represent an NFL player in contract negotiations with member clubs until he has met all the requirements for certification discussed above, is listed among current certified agents by the NFLPA, and has properly executed and filed an SRA with that player.⁷² All actions counter to the intent of the CBA, NFLPA RGCA, or amounting to a breach of fiduciary duty are specifically prohibited.

⁶⁹ *Id.* at 8.

⁷⁰ *Id.* at 7.

⁷¹ *Id.*

⁷² *Id.*

Contract Advisors in the NFL are not allowed to pay players, prospective players, their families, or other affiliates to recruit them for representation.⁷³ NFLPA agents are also prohibited from misleading or deceiving anyone during the recruitment or representation of clients. This prohibition includes agents indicating in any way that certification by the NFLPA constitutes an endorsement of the agent by the NFLPA.⁷⁴

NFLPA Contract Advisors are responsible for preventing conflicts of interest or even the appearance of conflicts of interest within the scope of their player representation practices. Agents cannot accept payments of any kind, borrow money from, or secure a loan with collateral provided by any NFL player or member club.⁷⁵ Preventing possible conflicts of interest also requires that agents do not hold or attempt to hold a financial interest in the NFL, member clubs, or any other business that might create such an appearance.⁷⁶ Furthermore, an agent may not allow an NFL Player Contract to contain any incentive clauses that would help an NFL Club reach the guaranteed Minimum Team Salary; unless, the clause is of substantial benefit to the player.⁷⁷ When a player believes that such a clause is in his best interest, the agent bears the burden of proving that the player was informed as to the possibility of undermining the Minimum Team Salary protections contained in the CBA.⁷⁸ The agent is at all times charged with representing the players' best interests. However, NFLPA Contract Advisors must also preserve a personal reputation of honesty and integrity.

NFLPA agents shall not engage "in unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other activity which reflects adversely on his/her

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 9.

⁷⁶ *Id.*

⁷⁷ *Id.* at 11.

⁷⁸ *Id.*

fitness as a Contract Advisor or jeopardizes his/her effective representation of NFL players.”⁷⁹

Filing a lawsuit against a player relating to anything controlled by arbitration under section 5 of the NFLPA RGCA is not permitted for NFLPA agents.⁸⁰

NFLPA agents may not contact any player currently subject to a SRA with another Contract Advisor for any reason related to representation until the last 60 days of the players’ existing SRA.⁸¹ However, if a player initiates contact with the agent regarding such matters, the Contract Advisor may respond. Written materials constituting reasonable advertising for players, and not directed specifically to a particular player, are permissible.⁸² However, for rookie players (players entering the NFL for the first time), agents may not solicit for representation directly or indirectly “if that player has signed a Standard Representation Agreement prior to a date which is thirty (30) days before the NFL Draft and if thirty (30) days have not elapsed since the Agreement was signed and filed with the NFLPA.”⁸³

In 2009 the NFLPA Board of Player Representatives amended Section 3(B) of the NFLPA RGCA as follows:

Contract Advisors are prohibited from: (30) (a) Communicating either directly or indirectly with (including but not limited to in person, telephonic or electronic communication) a prospective player who is ineligible for the NFL Draft pursuant to Article XVI of the CBA or communicating with (including but not limited to in person, telephonic or electronic communication) any person in a position to influence a prospective player who is ineligible to be drafted pursuant to Article XVI of the CBA until ~~the prospective player becomes eligible for the NFL Draft~~ **after a prospective player’s last regular season college or conference championship game (excluding any post-season bowl game) or December 1, whichever is later, of the college football season immediately prior to the year in which such prospective player would be eligible to apply for the NFL Draft.**

⁷⁹ *Id.* at 9.

⁸⁰ *Id.*

⁸¹ *Id.* at 10.

⁸² *Id.*

⁸³ *Id.* at 11.

(b) speaking or presenting to groups of prospective players in a setting where prospective players who are ineligible for the NFL Draft pursuant to Article XVI of the CBA, **other than those prospective players specified in Section 3(B)(30)(a)**, are present at such presentation.⁸⁴

The 2009 amendment above allows NFLPA agents to contact underclassmen six weeks earlier than permitted under the 2007 NFLPA RGCA “Junior Rule.” The 2011 Amendment to the NFLPA RGCA notes that requiring certification of all runners and recruiters under these rules will be a topic of discussion at the March 2012 board meeting.⁸⁵ The proposed increased regulation indicates a desire to restrict all forms of agent contact with players not yet eligible for the NFL Draft.

Once a player is ready to declare for the NFL Draft and hire representation, an agent must use an SRA and abide by the standard fee schedule. It is prohibited for NFLPA agents to circumvent the standard fee schedule contained in Section 4 of the NFLPA RGCA or to condition signing an SRA upon contracts for other services to be provided by the agent or any affiliate thereof.⁸⁶ Agents may not even recommend a workers compensation attorney or financial advisor’s services unless they are listed among the NFLPA Panel of Workers Compensation Attorneys or NFLPA Registered Player Financial Advisors respectively.⁸⁷

All violations of the required or prohibited conduct contained in Section 3 of the NFLPA RGCA will result in disciplinary action under the procedures outlined in Section 6 of the NFLPA RGCA.

⁸⁴ Memorandum from Tom DePaso, associate general counsel of the National Football League Players Association to all National Football League Players Association Contract Advisors 1 (Mar. 27, 2009) (on file with author), available at

http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/2009_amendment_to%20Regs_Junior_rule.pdf.

⁸⁵ Memorandum from National Football League Players Association Legal Department to agents (Sept. 9, 2011) (on file with author).

⁸⁶ National Football League Players Association, *Regulations Governing Contract Advisors*, 10 (amended through Mar. 2007),

http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf.

⁸⁷ *Id.*

B. Conduct Required by FFF and Code du Sport

On June 16, 2011, the Prime Minister of France issued decree N° 2011-686, stating that the FFF would develop the Sports Agents Regulation, regulations that will govern sports agent conduct in French football. However, the decree noted that the agents would still be regulated the Code du Sport and the FIFA Players Agent Regulation (FIFAPAR), the regulations that govern agent conduct within FIFA. A review of these existing regulations revealed a need for the Sports Agents Regulation because there is little agent conduct in France that is currently regulated. The majority of French regulation is found in the list of incompatibilities located in the Code du Sport's gate-keeping requirements. These restrictions were provided in the previous section and focus primarily on preventing conflicts of interest. There is also regulation provided by Code du Sport that generally bars someone from receiving a license if they have been convicted of crimes related to honor or moral turpitude or they have filed for bankruptcy. But other than those gate-keeping restrictions, there is very little agent conduct regulated by the French. However, there are a few restrictions that require attention.

First, all representations must be reduced to written contracts.⁸⁸ These contracts for representation can involve an agency relationship between the agent and a club or an agent and players and coaches. While the FFF list of incompatibilities prohibits double mandates (representation of both clubs and players), it does allow agents to represent both players and coaches.⁸⁹ Second, agent fees are capped at 10% of the gross salary of the player or coach, in addition to signing fees.⁹⁰ A new decree issued by the FFF in June of 2011⁹¹ now allows

⁸⁸ C. SPOR. art. L.222-17 (Fr.).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See Decree N° 2011-686, op. cit.*

contracting parties to specify in the contract to have either the constituent (player or coach) or the co-contractor (club) pay the agent's fee.⁹² In most cases, the constituent will pay the agent's fee. Previous FFF rules required the constituent to pay the fees. Further fortifying the list of incompatibilities, the Code du Sport has a regulation that prohibits double representation, representing both a club and a player or coach in a negotiation.⁹³ Third, agents are prohibited from entering into contracts where they would receive fees through the representation of minors (persons under 18 years of age).⁹⁴

VI. Question 3: Supervision of Agents

Setting a standard of conduct required for agent behavior is pointless if there is no supervisory board or commission to ensure that agents are doing what is required of them. Thus, there exists a need for regulators to monitor agent behavior and hear complaints concerning agent misconduct. Yet the following questions remain: how should this be structured, how should charges be brought against an agent and what manner of due process should be afforded once charges of misconduct are brought against an agent before regulators?

A. Agent Supervision in the NFL

The NFLPA may propose the suspension or revocation of certification pursuant to Section 6(B) of the NFLPA RGCA for any reason that would have justified denial of an application under Section 2(C).⁹⁵ Section 3 of the NFLPA RGCA documents the required and

⁹² C. SPOR. art. L.222-17 (Fr.).

⁹³ *Id.*

⁹⁴ C. SPOR. art. L.222-5 (Fr.).

⁹⁵ National Football League Players Association, *Regulations Governing Contract Advisors*, 16 (amended through Mar. 2007), http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf.

prohibited conduct necessary for an agent to maintain certification as discussed above.⁹⁶ Section 3(A)(11) requires Contract Advisors to file an updated Application for Certification annually, which must include disclosure of the names of any financial advisors recommended to any client within that year. Failure to comply with Section 3 “shall result in immediate suspension of the Contract Advisor’s Certification.”⁹⁷ Proposed suspensions or revocations “must be sent by confirmed facsimile or overnight delivery to the Contract Advisor’s office or residence.”⁹⁸ The Committee on Agent Regulation and Discipline (“CARD”) makes all disciplinary action decisions.

B. Disciplinary Committee

The CARD is appointed by the President of the NFLPA and consists of three or five active or retired NFL players.⁹⁹ The CARD is responsible for prosecution of any violations by NFLPA agents. CARD decisions are made by majority vote, which explains the 3 or 5 member requirement. The NFLPA General Counsel may advise the CARD and provide counsel during disciplinary proceedings but is not allowed to vote. The 2011 Amendment addressed the forthcoming announcement of a CARD but the NFLPA has yet to publish current CARD members as of December 21, 2011.

C. Agent Supervision in FFF

⁹⁶ *Id.* at 6.

⁹⁷ *Id.*

⁹⁸ *Id.* at 16.

⁹⁹ *Id.* at 15.

Pursuant to the *Code du Sport*, the Commission of Sports Agents for the FFF supervises all agent activity for French football.¹⁰⁰ The Commission requires agents to provide it with all information concerning the agent's financial status on a yearly basis.¹⁰¹ Agents must also provide, with a maximum one-month delay, copies of all contracts involving the agent within that year.¹⁰² This includes contracts evidencing agency relationships between the agent and clients and contracts negotiated by the agent on behalf of clients with third parties.¹⁰³ The *Code du Sport* also allows the Commission to request information from third parties in privity of contract with the agent or with whom the agent has contracted on behalf of another, in order to verify the accuracy of the information provided by the agent.¹⁰⁴ Currently, the *Code du Sport* requires that the Commission consist of 10 active members with a replacement for each of the members.¹⁰⁵ The president of the Commission is an ex-member of the Executive Committee of the FFF. The other members are:

- A jurist of the Law Department of the FFF.
- The manager of the Law Department of the LFP.
- The General Director of the professional football clubs union.
- The Manager of the Law department of a club of Ligue 1 (currently Olympique Lyonnais).
- An agent owner of a license delivered by the FFF.
- A professional football coach.
- An ex-professional football player.

¹⁰⁰ C. SPOR. art. R.222-31 (Fr.).

¹⁰¹ *Id.*

¹⁰² C. SPOR. art. R.222-32 (Fr.).

¹⁰³ *Id.*

¹⁰⁴ C. SPOR. art. R.222-34 (Fr.).

¹⁰⁵ C. SPOR. art. R.222-2 (Fr.).

- A member of the French National Olympic Committee.
- A FFF representative to the agents' issue, who is the current director of the FFF Law department.

The Commission is the institution that delivers,¹⁰⁶ suspends¹⁰⁷ and pronounces disciplinary sanctions¹⁰⁸ in cases of non-respect of obligations. The composition of the Commission is heterogeneous, but members have traditionally held some degree of legal expertise.

VII. Question 4: Possible Punitive Measures for Agent Misconduct

It is necessary to examine the possible sanctions available for situations involving agent misconduct. While rules are necessary to regulate agent behavior and regulators are necessary to oversee the enforcement of the rules, it is also important that the rules have teeth by way of sanction to dissuade agents from committing wrongful acts.

A. Punitive Measures for Agents in the NFL

Pursuant to NFLPA RGCA, the CARD may impose one or more of the six disciplinary actions listed in Section 6(D).¹⁰⁹ These options include informal reprimand by way of an order kept in the agent's file at the NFLPA's office or formal, publicized reprimand.¹¹⁰ The CARD may also suspend an agent's Certification. During a suspension, the contract advisor is prohibited from any form of participation in negotiations between any NFL player and an NFL

¹⁰⁶ C. SPOR. art. R.222-10 (Fr.).

¹⁰⁷ C. SPOR. art. R.222-12 (Fr.).

¹⁰⁸ C. SPOR. art. R.222-38 (Fr.).

¹⁰⁹ National Football League Players Association, *Regulations Governing Contract Advisors*, 17 (amended through Mar. 2007),

http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf.

¹¹⁰ *Id.*

club regarding the player's individual contract.¹¹¹ The agent is also not allowed to participate in recruiting clients during a suspension. In December 2010, the CARD suspended the late NFLPA agent Gary Wichard of Pro Tect Management for nine months based on having impermissible contact with a University of North Carolina college football player who was not eligible for the NFL Draft at the time of contact.¹¹² Wichard had a very impressive client list including defensive ends Jason Taylor and Dwight Freeney, linebackers Terrell Suggs and Elvis Dumervil, and running back C.J. Spiller. That same month, CARD revoked the NFLPA Contract Advisor certification of agent Teague Egan, because he provided a ride on his company's golf cart to a University of Southern California football player.¹¹³ The free ride was deemed to be an impermissible benefit under NCAA rules.¹¹⁴

The CARD may also decide to restrict the Contract Advisor's right to collect any fees otherwise due under any Standard Representation Agreement.¹¹⁵ A suspension may also prevent an agent from representing or soliciting additional clients during a specified time.¹¹⁶ However, it is possible for the Contract Advisor to continue representation of clients previously signed to Standard Representation Agreements during a suspension.¹¹⁷

Another punitive measure available to the CARD allows them to impose a fine. Fines have to be paid within thirty days of their issuance and one-half of the fines go to the Players Assistance Trust and the other half to NFL Players Charities. The most severe grievances can

¹¹¹ *Id.*

¹¹² NFL Players Association, *Card Committee Issues Discipline on Two Contract Advisors*, NFL PLAYERS (Dec. 3, 2010), <https://www.nflplayers.com/Articles/Press-Releases/CARD-Committee-Issues-Discipline-on-Two-Contract-Advisors/>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

cause the CARD to revoke a Contract Advisor's Certification indefinitely.¹¹⁸ All disciplinary measures are subject to appeal through outside arbitration as outlined in NFPLA RGCA Section 6(E).

There are far too many cases to discuss in this single paper. Therefore, the authors have subjectively selected three noteworthy disciplinary actions and highlighted them in this section.

1. NFLPA and CARD v. Josh Luchs

After former NFL agent Josh Luchs was provided a worldwide audience in George Dohrmann's Sports Illustrated piece that highlighted his numerous illegal payments to student-athletes,¹¹⁹ Luchs was given the opportunity to speak at many institutions of higher education, in front of the NCAA and state legislatures, and signed a deal to author a book titled, *Illegal Procedure: A Sports Agent Comes Clean on the Dirty Business of College Football*.¹²⁰ What many do not know is that Luchs was disciplined by CARD long before he came clean about his payments to student-athletes.

On July 12, 2007, CARD suspended Luchs from acting as an NFL agent and fined him \$25,000 for engaging in conduct prohibited by the Regulations.¹²¹ Luchs had been working for deceased agent Gary Wichard at Pro Tect Management from May 2000 to some point in 2004 under an agreement that paid Luchs twenty-five percent of any commissions received by the company from "any new business generated from players who attend college in the Pacific and

¹¹⁸ NFL Players Association, *Card Committee Issues Discipline on Two Contract Advisors*, NFL PLAYERS (Dec. 3, 2010), <https://www.nflplayers.com/Articles/Press-Releases/CARD-Committee-Issues-Discipline-on-Two-Contract-Advisors/>.

¹¹⁹ George Dohrmann, *Confessions of an Agent*, SPORTS ILLUSTRATED, Oct. 18, 2010, available at <http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html>.

¹²⁰ JOSH LUCHS & JAMES DALE, *ILLEGAL PROCEDURE: A SPORTS AGENT COMES CLEAN ON THE DIRTY BUSINESS OF COLLEGE FOOTBALL* (Bloomsbury USA., 1st ed. 2012).

¹²¹ Nat'l Football League Players Ass'n v. Luchs, No. NFLPA 07-D5 at 4 (Jan. 23, 2008) (Kaplan, Roger P. Arbs.), available at [http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPA%20v.%20Luchs,%20Joshua\(1\).pdf](http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPA%20v.%20Luchs,%20Joshua(1).pdf).

Mountain time zones.”¹²² Luchs successfully recruited and signed former University of Oregon and Minnesota Vikings wide receiver Keenan Howry while Luchs was employed by Pro Tect Management. Pursuant to the terms of Luchs’ contract with Pro Tect Management, the players Luchs signed while at Pro Tect Management would remain Pro Tect Management clients in the event that the contract was terminated by either party. However, Luchs did not immediately inform Howry that Luchs was no longer a Pro Tect Management employee and actually helped Howry draft the letter that terminated Howry’s Standard Representation Agreement with Gary Wichard.

Pro Tect Management eventually sent an invoice to Howry and Howry wrote a check for \$5,320.59, made out to Pro Tect Management, but given to Luchs at Luchs’ suggestion. Luchs instructed his attorney to deposit the check into his attorney’s trust account, which his attorney did after he wrote “Pro Tect Management” on the back of it and signed it. Wichard was not informed of the existence of the check or that it was deposited in Luchs’ attorney’s trust account. Upon receiving the aforementioned information, CARD issued a decision to suspend Luchs from practicing as an NFL agent and slap him with a \$25,000 fine.

Luchs filed a timely appeal soon thereafter. The arbitrator, Roger P. Kaplan, upheld CARD’s decision, and made note of the fact that Luchs had repeatedly testified under oath that he had forwarded Howry’s check to Pro Tect Management, which was an erroneous statement. Kaplan was also concerned by the fact that Luchs’ was not adequately suited to serve in a fiduciary capacity on behalf of NFL players based on his misrepresentations, which brought Howry into legal proceedings. Kaplan determined that the penalty imposed by CARD was reasonable based on the number and type of regulations violated.

¹²² *Id.*

2. NFLPA and CARD v. Joel Segal

While Josh Luchs' payments to student-athletes was not the focus of CARD's Investigation and subsequent remedial action against the former NFL agent, the activity of paying student-athletes was precisely what CARD was concerned about when the body suspended NFL agent Joel Segal and fined him \$5,000 in 1996. Today, Joel Segal is an agent with sports talent management firm Lagardère Unlimited, where he represents Reggie Bush, Michael Vick, Percy Harvin, amongst others. Over an eight-day period in 2011, Segal negotiated roughly \$150 million in contracts for about 20 players.¹²³ When Segal was disciplined by CARD, he represented around a total of 15 players.

On June 14, 1996, CARD filed a Disciplinary Complaint against Segal based on his relationship with Corey Sawyer and violations of the State of Florida's athlete agent law stemming from Segal not being properly registered as an agent in Florida and providing money to Sawyer while he was a student-athlete at Florida State University.¹²⁴ Specifically, CARD claimed that Segal wired \$1,350 to Sawyer under an alias (the name John Miller).

Segal appealed CARD's punishment on October 14, 1996.¹²⁵ His strongest claim was that CARD's Complaint was untimely because the Committee knew, or reasonably should have known, about his payments to Sawyer at least 1 year prior to the date that the Complaint was filed. CARD is limited to filing a Complaint within 1 year "from the date on which the information became known or reasonably should have become known to the Disciplinary Committee, whichever is later."¹²⁶ On appeal, the arbitrator found that any information CARD

¹²³ Dashiell Bennett, *How Football Agent Joel Segal Made His NFL Clients \$150 Million In Eight Days*, BUSINESS INSIDER (Aug. 9, 2011), <http://www.businessinsider.com/football-agent-joel-segal-interview-2011-08>.

¹²⁴ See Nat'l Football League Players Ass'n v. Segal, No. NFLPA 96-D3 at 4 (May 1, 1997) (Kaplan, Roger P. Arbs.), available at [http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPA%20v.%20Segal%2096-D3\(1\).pdf](http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPA%20v.%20Segal%2096-D3(1).pdf).

¹²⁵ *Id.*

¹²⁶ *Id.*

had more than a year prior to filing the Complaint was not “verified information, with specificity, to prosecute a Complaint against a Contract Advisor,” and thus, it was held that the Complaint was timely filed. CARD’s discipline was upheld as reasonable, and as dicta, arbitrator Roger P. Kaplan added the following:

The NFLPA is correct in arguing that Segal’s conduct not only jeopardized Sawyer’s eligibility to play for a championship team, but gave credence to those who label the representation of athletes as a dirty and unethical business.¹²⁷

3. NFLPA and CARD v. Sean Jones

Unlike Josh Luchs and Joel Segal, who were suspended from acting as NFL Agents, Sean Jones had his certification completely revoked. After Jones’ appeal of the revocation, his punishment was amended and became a two-year suspension.

Jones was a NFL player for roughly 13 years. After retiring from the NFL, Jones started a company that advised NFL players on their finances. Jones had managed the finances for NFL players Ebenezer Ekuban and Cris Dishman, amongst others.

Cris Dishman was a teammate of Jones on the Houston Oilers (currently the Tennessee Titans). Dishman invested in Jones’ hedge fund, which Jones created in 1996. In 1999, Dishman and his wife filed an arbitration action before the National Association of Securities Dealers (NASD) based on claims of suitability, unauthorized trading, churning, breach of fiduciary duty, breach of contract, negligence, misrepresentation, and failure to supervise. The panel awarded Dishman and his wife \$396,500 plus interest and fees. Jones petitioned to vacate the award and eventually told the NFLPA that he and Dishman had agreed to resolve their dispute through a written settlement. Dishman disputed that such settlement had been made. The

¹²⁷ *Id.*

NFLPA determined that based on the evidence presented by Jones, along with Dishman's unwillingness to testify, that there was insufficient basis in the record for concluding that Jones failed to pay Dishman the award. Thus, no violation of the NFLPA Regulations was sustained.

In a separate case, Jones had misrepresented transactions to Ekuban. He characterized sureties or options as "loans." The NFLPA also found that Jones structured investment transactions to benefit himself or entities he controlled. Amongst those "loans" was a \$300,000 certificate of deposit as collateral for a loan by a bank to Sean Jones' entity; Jones Legacy Family LTD. Ekuban understood that Jones would pay off the loan in 12 months. Jones paid it off, but obtained a second loan using Ekuban's \$300,000 certificate of deposit as collateral. In appeal, the arbitration found that all of Jones' actions "constituted violations of the obligations imposed on Jones by the NFLPA Regulations to act as a fiduciary in his dealings with Ekuban and not to engage in activities which created actual or potential conflicts of interest with Ekuban." Based on Jones' actions with regards to Ekuban, he was suspended from serving as an NFLPA Contract Advisor for 2 years.

B. Punitive Measures for Agents in FFF

Agents who represent professional football players in France face the possibility of punishment by disciplinary sanction by the Commission or civil or criminal sanction based on provisions set by the *Code du Sport*.

C. Discipline by the Commission

Failure to provide annual reports or other documents required by the Commission could subject the agent to the following possible sanctions:

- An official warning;

- A financial penalty which amount cannot exceed 1500€ or 3000€ in case of second offense;
- The temporary suspension of the license;
- The withdrawal of the license, with a possible maximum 5-years impossibility to apply for a new license in any sports; or
- The Commission could decide to cumulate any of the aforementioned sanctions.¹²⁸

Appendix (B) Table 1 contains a chart of disputes filed by the FFF between the seasons of 2007-08 to seasons 2010-11. An analysis of the disputes filed during that time period reveals a decrease in charges against agents filed by FFF over the four-year period (from twenty-eight to eight). The biggest decreases concerned disputes based on failure to transmit contracts and annual information to the Commission and disputes based on absence of professional liability insurance. It is expected that the trend of fewer disputes for these areas will continue and the trend may also extend to cases involving double mandates (conflicts of interest based on dual representation). The reason for this expectation is based on the issuance of decree N° 2011-686, which allows agents to be paid by the clubs even when they represent players.

The remaining disputes listed on the table involve issues related to the representation of minors and contractual interference with existing agency agreements through multiple agent representation. Problems associated with the representation of minors mainly stem from the competition for a limited number of clients among agents. Some agents try to mine for clients by recruiting minors. In France, the academy system establishes a program where most professional football players are trained from early ages by professional clubs. From these academies, agents attempt to find the next big French football star and this sometimes results in agents recruiting

¹²⁸ C. SPOR. art. R.222-38 (Fr.).

and contracting with minors (persons under 18), which is prohibited by the *Code due Sports*. Similarly, agents have even started to contract, wrongfully, with minors from Africa with the goal of bringing them to French football stardom.

Competition is also at the core of the contractual interference caused by multiple agent representation. Some players already contractually involved with an agent are not willing to take into account the contents of the contract they signed and instead agree to follow any agent able to have them sign the contract they want. This leads to a situation where clubs sign a player represented during the negotiation by an agent and realize that the player had signed a representative contract with another agent who also requests the payment of a commission.

Appendix (B) Table 2 details the degree or extent of sanctions imposed by the Commission. A review of the penalties issued reveals that from the last 4 seasons, only 45 sanctions were issued out of 61 disputes. And among those 45 sanctions, 60% were suspended sanctions of different lengths. Only one agent during that period received a ban from practicing as a sports agent for French football.

Additionally, the *Code du Sport* goes beyond what is allowed by the NFLPA through the CBA by means of the inclusion of criminal sanctions issued by a French Correctional Court. Thus, the *Code du Sport* actually sets the possible penalties available for the French criminal justice system. The maximum sentence is a two year imprisonment and a €30,000 fine in case of practicing as a sports agent without an up-to-date license or not fitting the moral conditions set by the law.¹²⁹ Finally, the Code du Sport states that in the case of double representation, non-respect of the remuneration limits or any other violation of the general contract law, a Civil Court can render contracts void.¹³⁰

¹²⁹ C. SPOR. art. L.222-20 (Fr.).

¹³⁰ C. SPOR. art. R.222-17 (Fr.).

In addition to those sanctions, when a legal dispute arises in the field of sports, the Court of Arbitration for Sports (CAS), based in Lausanne in Switzerland, can resolve it by pronouncing arbitral awards that have the same enforceability as judgments of ordinary French courts. In fact, when signing an intermediation contract, the agent and his client can add an optional arbitration clause and agree in advance to submit any future dispute to arbitration by the CAS. However, in the absence of an existing arbitration clause, the parties can voluntarily agree to have their disputes decided by the CAS.¹³¹ Because the CAS provides faster decisions than ordinary courts and provides the parties with access to arbitrators with industry experience, almost all important civil disputes involving L1 players and agents eventually end up in Lausanne.

The most significant dispute regarding agents' issues in France occurred in 2008 and set the French soccer player Franck Ribery against the agent Bruno Heiderscheid of Luxembourg. In that dispute, the player questioned the legitimacy of the representation contract signed and the agent demanded the payment of fees. The agency agreement between Ribery and Heiderscheid was entered into when Ribery was under contract with the Turkish club Galatasary Istanbul. The agreement included an arbitration clause for resolution by the CAS. The contract also included a clause providing that French law would govern the relationship between the parties.

The dispute at issue in the case arose when Ribery was transferred from Istanbul to the Olympique de Marseille in France in June 2005, which was negotiated by Heiderscheid. The problem was that Heiderscheid was practicing under a license issued by the Football Association of Luxembourg that was no longer valid based on numerous offenses committed by Heiderscheid, including forgery and the use of forged documents. Thus, Heiderscheid's agency did not comply with the list of incompatibilities required by the *Code due Sports* and, therefore,

¹³¹ See *General Information*, TAS/CAS TRIBUNAL ARBITRAL DU SPORT COURT OF ARBITRATION FOR SPORT (Mar. 23, 2012), <http://www.tas-cas.org/news> (general information regarding the CAS).

his representation of Ribery in the negotiation with Olympique de Marseille was unauthorized by the FFF. As a result, the CAS rendered this contract void and all the fees received by the putative agent were to be returned.

There is another significant case, also involving Heiderscheid. In this second case, Heiderscheid appeared in a labor contract signed between Ribery and Olympique de Marseille as the proxy of the club whereas he was, at this time, also representing Ribery in other contracts in Turkey. Since double mandates are forbidden by the *Code du Sport*, the representation contract signed with Ribery was also rendered void.

VIII. Summary and Suggestions

As the organization that has the power of certifying, suspending, and revoking the license of football agents to represent NFL players, the NFLPA wields a great deal of power. Its decision to require applicants to have a post-graduate degree prior to applying for NFLPA Contract Advisor certification is a step in the right direction of ensuring the professionalism of those who become licensed. However, violations of the NFLPA RGCA, state, and federal sports agent laws continue despite the NFLPA's efforts. One problem in the NFLPA's qualification requirements is found in the fact that there are various types of post-graduate degrees. Would-be agents do not need any legal or sports-specific training to apply for NFLPA Contract Advisor licensure. Perhaps the NFLPA should instead require a diploma from an ABA accredited law school, or a degree in Sports Management. Law schools provide students with training in contract law, which is very necessary for any agent representing athletes in contract negotiations. Law schools also offer courses that focus on agency and sports law. Furthermore, law school programs provide a degree of rigor in both the admissions process and in completing the degree program that should

serve as an extra gate-keeping measure to prevent those who are incapable of attaining a law degree from representing athletes. While not as difficult to enter or complete, graduate programs in Sports Management at least offer some sports-specific training and most, if not all, require a course in sports law that includes exposure to contract law and sports agency.

Or perhaps the NFLPA can look to the French and assist in the development of programs aimed at training would-be agents for its exam. This type of program would not only help agents pass the NFLPA's exam, it would also train candidates in the subjects covered by the exam and therefore provide some minimum degree of contract-specific and/or sports-specific training for agents who might not otherwise possess such training. In this sense, the exam-prep course would serve as a quasi-agent training program. While it could be argued that any form of exam preparatory course would be inadequate to train a potential agent in what is needed to represent clients, it can also be argued that any form of contract-specific and sports-specific training is better than none at all. The fact that this type of program currently does not exist in the United States begs the question, is the NFLPA's exam too easy to pass? After all, exam preparatory programs popped up in France out of necessity and not through FFF direction. However, research did reveal that exam passage rates have dramatically risen since the inception of the preparatory courses and this makes the authors question whether it is too easy to coach applicants for the French exam. Accordingly, both the NFLPA and FFF should critically examine their entrance exams to determine whether each exam needs to be made more difficult. After all, these admissions exams are the best and only methods for both the NFLPA and the FFF to test the competency of candidates who desire to represent professional football players.

The research also revealed that French regulations do a much better job than their NFLPA counterparts in controlling for potential issues that may arise concerning conflicts of

interest. The French have recognized that conflicts of interest, or duel mandates as they call them, create problems and both the FFF and the *Code du Sport* have gone to great lengths to prohibit them. The *Code du Sport* has a mandate that expressly prevents duel mandates, representing both parties in the same negotiation, and also has a very detailed list of incompatibilities, many of which target potential conflicts of interest. The NFLPA does not address conflicts of interest with the same degree of attention and this should change. The National Basketball Players Association prohibits basketball agents who represent NBA players from also representing any NBA coaches and/or NBA team executives and it is the suggestion of the authors that the NFLPA should adopt a similar regulation. And while the *Code du Sport* does a good job of addressing conflicts of interest, it needs to go further in its regulation of other types of undesired conduct. The research revealed that NFLPA regulations go into much more detail than the *Code du Sport* in terms of the types of offences that will subject an agent to sanction. The *Code du Sport* identifies conflicts of interest caused by duel mandates and also singles out representation of minors specifically, but it is more general in terms of the criminal or civil offences that will subject an agent to sanction. The French are currently in the process of developing the *Sports Agents Regulation*, a code for regulating agent conduct. It is recommended that this new code go into more detail than that which currently is found in the *Code du Sport* and in the *FIFAPAR*. Not only will increased detail better assist in the regulation of agent conduct, it will also provide agents with a clear warning as to the type of acts that will result in punishment. Further, it is recommended by the authors that both the NFLPA and FFF look into better addressing the fiduciary duty owed to clients by agents. While law in both France and in the United States mandates this duty, better description of the fiduciary duty in regulations and increased coverage of the duty on exams would reinforce the importance of the duty and

compliment existing civil remedies. The fiduciary obligations owed by agents cannot be overemphasised.

There are also worthy measures that may assist regulators in the enforcement of their rules and the levying of discipline of violators. FIFA wants to improve the transparency of the transfer market and the labour market in football, which is supposed to reduce the opportunities for one to misbehave in the sports agency profession. The Transfer Matching System¹³² (TMS), launched in October, 1st 2010 by FIFA, is an electronic system meant to regulate the international football transfers and protect minors. In a nutshell, both clubs involved in an international transfer have to enter the exact same information regarding all the details of the transfer (names of clubs, players and agents, bank accounts, amounts paid, dates, etc.) before being granted the International Transfer Certificate. Adding transparency in the markets will directly reduce agents' power. The French law followed up in the transparency quest by forcing agents to communicate information to the supervisors. In a memorandum from the NFLPA Legal Department on September 9, 2011, the department stated that the NFLPA will consider another amendment to the NFLPA RGCA in March 2012 regarding the possibility of requiring "anyone recruiting players on behalf of any Contract Advisor to also be certified as a Contract Advisor under the Regulations."¹³³ These recruiters are often called "runners." This will likely be a step in the right direction for the NFLPA to more effectively regulate its Contract Advisors.

IX. Conclusion

¹³² See generally *Football Governance - The TMS explained*, FIFA.com (Sept. 30, 2010), <http://www.fifa.com/aboutfifa/organisation/footballgovernance/news/newsid=1310345/index.html>; Letter from Jerome Valcke, Secretary General, Federation Internationale De Football Association, to FIFA Members (Sept. 23, 2009) (available at <http://www.fifa.com/mm/document/affederation/administration/01/10/77/60/circularno.1205-fifatmstransitionphase.pdf>) [hereinafter Letter from Jerome].

¹³³ Letter from Jerome at 2.

This study is the first of its kind. A review of relevant literature revealed that there are no existing studies that compare French and United States sports agency regulation. In fact, the review could not locate a single study that compared sports agency regulation in the United States for any sports with agency regulation for any sports in any other country. It was not the intent of this article to solve all problems associated with the representation of football players by agents in both France and in the United States. Instead, it is hoped that this is the first of many comparative studies concerning how agents are regulated and should be regulated.

This article highlights the fact that sports agency in both the United States and in France face the same problems. The article also discussed similarities and differences in how agents who represent football players are regulated in both countries. Suggestions were made based on these comparisons. It is our belief and contention that those who regulate sports agents in the United States can learn from how their counterparts in other countries combat the ills of an industry that receives far too much negative attention. We hope that scholars answer our call and that this is only the first of many comparative regulation studies aimed at making sports agency a more reputable and less problematic profession.

Appendix A

Table 1. Example of questions of the general part of the exam organized by the FFF in September 2010:

- | |
|---|
| <p>- What is a contract concluded “intuitu personae”</p> <ul style="list-style-type: none">a) A contract concluded in consideration of the co-contractorb) A contract which will be interpreted by the judge according to his intuitionc) A contract concluded with several personsd) All the previous answers are righte) None of the above answers is right <p>- A public company is ruled by a Board of Directors:</p> <ul style="list-style-type: none">a) Of 5 members at mostb) Of 5 members at leastc) Of 7 members at mostd) Of 7 members at leaste) None of the above answers is right |
|---|

Table 2. Example of questions of the specific part of the exam organized by the FFF in September 2010:

<p>- According to the Disciplinary Code of FIFA, which ones of those sanctions cannot be pronounced to a players' agent for non-respect of the regulation:</p> <p>a) A 10000 Swiss Francs fine</p> <p>b) A suspension of the licence for a period of time that cannot exceed 18 months</p> <p>c) The interdiction of exercise any activity in relation with football</p> <p>- As for the number of non EU, and non European Economic Area (EEA) players that clubs of first and second professional divisions (Ligue 1 and Ligue 2) can have under contract, it is limited to:</p> <p>a) Four in Ligue 1 and three in Ligue 2</p> <p>b) Four in Ligue 1 and two in Ligue 2</p> <p>c) Three in Ligue 1 and two in Ligue 2</p> <p>d) None of the above answers is right</p>

Appendix B

Table 1. Types of agent offenses in France 2007/08-2010/11

Offences	Season 2007/08	Season 2008/09	Season 2009/10	Season 2010/11
Double mandate	11	3	2	4
Contracts with minors	14	5	1	5
Contracts not transmitted to the Federation	3	0	0	0
Absence of professional liability insurance	0	1	6	0
Multiple agent representation	0	4	3	3
Total	28	13	12	8

Table 2. Type of sanctions ordered for agent misconduct in France 2007/08-2010/11

Sanctions	Season 2007/08	Season 2008/09	Season 2009/10	Season 2010/11
Official warning	1			
Suspended suspension - 1 month	3			1
Suspended suspension - 2 months	1			1
Suspended suspension - 3 months	11	3	2	4
Suspension - 1 month	3			
Suspension - 3 months	1	1		
Suspension - 2 months of which 1 suspended		1		
Suspension - 3 months of which 2 suspended	1			
Suspension - 6 months of which 1 suspended		1		
Suspension - 5 months of which 3 suspended	1			
Suspension - 6 months			1	
Suspension - until regularization of the situation			6	
Withdrawal of a passed exam		1		
Ban from candidacy to the sports agent licence examination		1		
Total	22	8	9	6