

BRIEFING AND POLICY PAPER

EXPLOITING KIDS: THE SCANDAL IN AGENT RECRUITING OF ATHLETICALLY-GIFTED TEENS

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Rules governing the recruitment and treatment of skilled athletes by major collegiate athletic programs have been controversial for over a century. There appears to be a general consensus, however, that teenage athletes should be protected from exploitation by professional and commercial enterprises. A continuing scandal follows published reports that over a four-year period a leading and well-respected basketball agent paid over \$300,000 to intermediaries in a successful effort to sign star phenom O.J. Mayo, with approximately \$30,000 filtering down to Mayo himself in cash and gifts, while the rest was apparently retained by the intermediaries. This raises difficult legal questions concerning current federal, state, and private liability of those involved, as well as whether the current set of rules meaningfully act to protect athletes from exploitation.

In this Paper, we briefly summarize the news reports, analyze the potential liability of various parties under existing law, and provide some suggestions for meaningful reform. We conclude that if these allegations are true:

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- Under NCAA rules, the Pac-10 Conference may be required to refund or forego a substantial sum of money that received because of USC's success in the Men's Basketball Tournament this year
- O.J. Mayo is not liable under federal or California sports agent regulatory statutes and is probably not liable under applicable West Virginia or Ohio law either; however, he is potentially liable for criminal and civil damages for mail fraud in falsely certifying his eligibility for intercollegiate athletics if he had been receiving gifts and cash from agents' representatives
- Agent Billy Duffy and his BDA agency are potentially liable to USC under federal sports regulatory law and California law if USC suffers any financial damage as a result of the scandal; he is also potentially liable as Mayo's co-conspirator for mail fraud; BDA employees such as Rodney Guillory (BDA's direct contact with Mayo) are also subject to criminal prosecution under the California agent regulatory law
- Although Duffy is also potentially liable to Mayo under several legal theories, recovery is unlikely because it is not clear how Mayo has been damaged
- The Mayo scandal reveals two distinct ways in which athletes are exploited:
 - the process of illicit payments can lead some athletes to make poor choices concerning the college they attend and the agent they select for professional representation
 - agents and others, such as AAU officials, unfairly earn considerable sums of money because of the athletic skills of a teenager
- An NCAA initiative to closely audit the top 50 recruits each year, and their families, would be a more effective way of inhibiting illicit payments to athletes

• **Rather than accept under-the-table payments to college athletes as legitimate “guerilla warfare” on unfair NCAA rules, critics of those rules should insist that athletes not be drawn into prohibited conduct but have rules strictly enforced, which may bring about greater scrutiny and enhance the opportunities for reform**

Summary of News Reports About the Scandal

Last year, news organizations reported that A. J. Mayo, then a freshman basketball star at the University of Southern California (USC), received gifts and benefits of up to \$30,000 from Rodney Guillory, an employee of the prominent basketball agency Bill Duffy Associates (BDA). This story first received national attention via ESPN’s ‘Outside The Lines’ television show. According to a person inside Mayo’s circle of friends, Guillory, a Los Angeles resident and sports entrepreneur, was responsible for building a relationship with Mayo in order to secure him as a client for BDA. The relationship was built on Guillory providing Mayo with cash and gifts while he was an amateur, to gain his friendship and to influence Mayo to hire BDA as his representative when he became an NBA player.¹

Mayo, who since ninth grade had been recognized as one of the most promising professional prospects for his age group, played high school basketball in West Virginia and Ohio. Although recruited by virtually every top university in the nation to play basketball, Mayo was actually not heavily recruited by USC. In fact, Guillory – with roots in Los Angeles, working for a firm based in Northern California and with a marketing office in LA -- put USC in touch with Mayo after building a strong relationship with the then-high school star.² USC

¹ Kelly Naqi, *OTL probe: Mayo Received Money, Perks from Agent Reps*, ESPN.com, May 13, 2008, <http://sports.espn.go.com/ncb/news/story?id=3389049>.

² Larry Dorman, *Pressure On U.S.C., Spotlight On Mayo*, NEW YORK TIMES, March 22, 2007, at D4.

jumped on this opportunity and signed Mayo to play for the Trojans. Before Mayo began his collegiate career, rumors and allegations led the Pac-10 Conference as well as the NCAA to investigate any improprieties, but those inquiries cleared Mayo to participate in intercollegiate sports.³

During the 2007-2008 basketball season, freshman Mayo led the Trojans to a spot in the NCAA Tournament. Shortly after the USC lost in the first round of the tournament to Kansas State, Mayo declared for the NBA – entering his name in the draft and hiring BDA as his representative. BDA has built quite a client list, including Steve Nash, Yao Ming, Carmello Anthony and Greg Oden, so Mayo’s addition to BDA’s star-studded client list came as no surprise. However, the ESPN story with detailed facts and receipts of transactions suggested that Mayo’s choice of agent was not simply based on BDA’s experience with other top athletes.⁴ O.J. Mayo denies ever receiving any cash/gifts. BDA also denies ever giving any cash/gifts. BDA and Mayo severed ties at the end of May, 2008.⁵ In early June, Leon Rose (another sports attorney with a number of prominent NBA clients) became Mayo’s principal agent. Mayo was drafted third overall in the first round of the NBA draft by the Minnesota Timberwolves. However, his rights were traded later that day in a multi-player deal that sent him to the Memphis Grizzlies, the team for which he currently plays.

USC representatives denied any knowledge of Mayo’s dealings with BDA, but had previously banned Guillory from campus after he was involved in illegal dealings with former USC basketball player Jeff Trepagnier a couple of years earlier.⁶

³ See Naqi, *supra* note 1.

⁴ *Id.*

⁵ Ben Bolch, *Mayo's Agent Off Job to Avoid 'Distraction,'* LOS ANGELES TIMES, May 23, 2008, at D14.

⁶ ESPN.com, Report: USC to tell NCAA it Banned Guillory From Getting Tickets,

The following legal analysis assumes that the illicit behavior described in these press reports are accurate. Obviously, no liability attaches if these reports are untrue.

Potential Liability of the University of Southern California

The USC Trojans basketball program profited handsomely from O.J. Mayo's performance during the 2007-2008 season. Not only did sales at the new Galen Center grow from an average game attendance of 5,907 over 17 games in 2006-2007 season to an average attendance of 8,467 over a 15-game home schedule in 2007-08, an increase of 59 percent per game, but all the members of the Pac-10 Conference shared in USC's participation in March Madness. The NCAA tournament rewards teams that make the tournament by providing a share of the television revenues, distributed over six years, to the conference for any team that makes the tournament. Like the majority of conferences in NCAA Division 1, the Pac-10 shares revenue equally from the NCAA Basketball Fund. The payout for USC is roughly \$191,000, increasing by around 8 percent over the next six years, meaning that each share is worth more than 1.4 million dollars to the conference over 6 years. If the NCAA were to seek to recover this money, Pac-10 Conference members would have to refund nearly \$160,000 each.

The NCAA places upon the university the responsibility of determining and certifying the amateur status of a prospective student athlete.⁷ It is the university's responsibility to know whether Mayo received any sort of prohibited compensation (defined by 12.1.2.1.1 of the NCAA Division 1 manual as any direct or indirect salary, gratuity, or comparable compensation not expressly authorized by NCAA rules) when he was in high school. The NCAA and the Pac-10

<http://sports.espn.go.com/ncb/news/story?id=3406324> (last visited May 26th, 2009).

⁷ NCAA, 2008-2009 DIVISION I MANUAL, art. 12.1.1.1.2.1 (2009), available at http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf. [herein after referred to as DIV. I MANUAL]

Conference apparently conducted investigations prior to OJ Mayo's enrollment at USC and found no violations of its amateurism guidelines.⁸ It is also the school's responsibility to know of prohibited conduct from the time he enrolled at USC.⁹ ESPN.com reported on allegations that Mayo received a flat screen television, in addition to clothes from Guillory, purchased with the money given to him by BDA.¹⁰ The television in Mayo's dorm was visible to anyone (including coaches) who might enter the room, and Mayo apparently did not attempt to hide its existence from anyone associated with USC.¹¹ Any coach walking in to check on a player in the course of day-to-day activities should reasonably have suspected potential rules violation when any college student without wealthy parents and who is not working obtains such an expensive item. Its presence should have given USC "cause to believe" that Mayo's status was jeopardized, therefore making it USC's responsibility to notify the NCAA eligibility center of the information.¹²

More recently, newspapers reported that Louis Johnson, a former member of Mayo's inner circle during his time at USC, allegedly told both federal and NCAA investigators that while he was an associate of Guillory and Mayo, he witnessed USC coach Tim Floyd giving money directly from Guillory, presumably as payment to deliver Mayo to USC, or using Guillory as an intermediary to funnel money directly to Mayo.¹³ If indeed Floyd was paying Guillory regarding Mayo's recruitment, it would be a clear violation of NCAA rules and could

⁸ ESPN.com, *Mayo Denies Ex-Confidant's Claims of Gifts, Including TV, Cash*, <http://sports.espn.go.com/ncb/news/story?id=3390695> (last visited May 26th, 2009)

⁹ DIV. I MANUAL, art. 12.1.1.1.2.2

¹⁰ ESPN.com, *supra* note 8.

¹¹ Pat Forde, *USC, Tim Floyd have No Excuse for turning a Blind Eye*, ESPN.com, May 11, 2008, http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=3390757&sportCat=ncb.

¹² See DIV. I MANUAL, art. 13.3.3

¹³ Lance Pugmire, *Did Floyd Pay for Mayo?*, LOS ANGELES TIMES, May 13, 2009, at C1.

also allow the NCAA to build a case for a lack of institutional control.¹⁴ Additionally, this information would aid in developing a civil case around the claim that USC basketball staff members not only knew and encouraged actions that violated the bylaws of the NCAA, but that they also directly participated in the violations as well.

At the current time, the entire USC athletic department is under investigation by the NCAA for alleged violations committed, not in connection with Mayo, but also former USC football standout Reggie Bush.¹⁵ These cases have been consolidated in order to assess the possibility of systemic problems within the USC athletic program. Should the NCAA decide to sanction USC for a lack of institutional control at the conclusion of the investigation, it could look to spread the sanctions across the football and basketball programs, in addition the support staff and compliance department through orders which would limit these individuals' ability to gain employment with another NCAA institution.¹⁶

Potential Liability of O.J. Mayo

The legal regimes designed to prevent agents from providing payments to athletes to recruit them for representation include (1) the federal Sports Agents Responsibility and Trust Act (SPARTA); (2) California's Miller-Ayala Athlete/Agent Act; (3) the Uniform Athlete Agent Act (UAAA); (4) state regulation of lawyer-agents; and (5) NCAA rules. With the exception of the latter, most regimes primarily target the agent rather than the player. The principal deterrent for player acceptance of improper gratuities has traditionally been disqualification for further participation in intercollegiate athletics. However, star players with no intention of maintaining

¹⁴ NCAA COMMITTEE ON INFRACTIONS, PRINCIPLES OF INSTITUTIONAL CONTROL, section C (8), *available at* <http://compliance.pac-10.org/thetools/instctl.pdf>, (last visited May 26, 2009).

¹⁵ Lance Pugmire, *NCAA Probes USC Program*, LOS ANGELES TIMES, April 9, 2009, at C7.

¹⁶ *See* DIV. I MANUAL, art. 19.02.01

a college career, who participate for one year in order to become eligible for the NBA draft under new rules barring drafting of high school seniors, have a reduced incentive to avoid improper payments and gifts (the only risk would be that gifts discovered during the season might result in immediate ineligibility).

The federal law regulating agent/ amateur-athlete relations, the Sports Agent Responsibility and Trust Act (hereafter referred to as SPARTA),¹⁷ focuses primarily on proscribing conduct of agents and those who act as "runners" for these agents, meaning that BDA (and Guillory) would bear the brunt of potential liability for any damage incurred by Mayo and USC. Likewise, California law on agent conduct as it relates to a student athlete emphasizes liability imposed on the agent, rather than the student athlete. The Miller-Ayala Act's language, like that of SPARTA, appears to presume that the athlete is the victim, rather than an accessory to the illicit conduct. Under the Miller-Ayala Act, if the NCAA were to find O.J. Mayo became ineligible as a student athlete, he is presumed to be injured by the actions of the athlete agent.¹⁸ USC additionally is presumed to be injured if the NCAA finds that Mayo was made ineligible while at USC. However, that statute provides for recovery of damages only against the wrongdoing agent. The only reference made directly to athlete conduct in Miller-Ayala is a provision that requires the athlete to notify the institution's athletic department 72 hours after entering into a contract with an agent.¹⁹ However, there is no indication that Mayo entered into a contract with BDA Sports Management before declaring for the NBA draft. While he may have received money from the agent, that in itself is not enough to establish a contract, meaning that USC cannot recover from Mayo on the 72 hour provision.

Because Mayo allegedly received payments while a standout at Huntington High School

¹⁷ 15 U.S.C. 104

in West Virginia²⁰, and West Virginia has adopted the UAAA, Mayo is potentially liable if USC is penalized by the NCAA as a result of his conduct. WV Code § 30-39-16 makes Mayo jointly and severally liable (*i.e.* liable for the whole amount of damages, along with the other wrongdoers) for any financial damage suffered by USC. It is unclear whether others damaged, such as the Pacific-10 Conference and its members, could sue Mayo directly. The UAAA allows “educational institutions” to recover against athletes, but it is not clear if the Conference qualifies. The member schools fit this definition, but it is not clear whether Stanford, for example, could invoke WV Code §30-39-16(b), allowing recovery against a “former student athlete,” since Mayo was not an athlete at Stanford. However, “former” could refer to the fact that Mayo was once a student-athlete and is no longer, making the school that he actually played for immaterial and allowing for any affected school to file suit under the statute. Because there has been no litigation under this statute with regard to third party institutions, it remains unclear whether liability extends to institutions.

ESPN has also reported allegations that Mayo received money from DBA Management while playing for North College Hill High School in Ohio²¹; this conduct would be governed by a specific statute passed by that state in lieu of the UAAA. Ohio law imposes liability on the agent for actions of the athlete or agent, Chapter 4771 of the Ohio State Code, and only allows recovery for institutes for higher education within the state of Ohio.²²

Because BDA Sports Management withdrew as his representative following the allegations of scandal, Mayo may be potentially liable to the agent, at least for recovery of the

¹⁸ Cal. Business and Professions Code §18897.8(a)

¹⁹ Cal. Bus. & Prof. Code § 18897.7

²⁰ Pete Thamel, *High School Ranks Have Been Infiltrated by Agents*, NEW YORK TIMES, May 18, 2008, at SP6.

²¹ Kelly Naqi, *Mayo Investigations Going Strong*, ESPN.com, May 14, 2009, <http://sports.espn.go.com/nba/news/story?id=4165378>.

\$30,000 he actually received. However, in contrast to the Connecticut litigation (reported in the news but without an official decision) between Marcus Camby and his former agent, under California law agents are expressly prohibited from recovering for money paid in violation of the Miller-Ayala Act.²³

Mayo is also potentially liable under the federal statute making it illegal to use the United States mail as part of a “scheme or artifice to defraud.” (If, as reported, Mayo received cash and gifts from agents prior to enrolling at USC, then Mayo falsely signed documents provided by USC to all scholarship athletes, claiming that he had complied with NCAA rules that bar the receipt of cash and gifts from would-be agents. Even if he signed these documents on campus, these documents are necessarily mailed to the NCAA as part of athletic compliance.) A similar attempt to convict a corrupt agent was reversed by the Court of Appeals in Chicago in the *Norby Walters* case, because the loss of money by the universities from Walters’ conduct was incidental to the scheme of Walters’ profit-motive from representing the athletes in their professional careers. Judge Easterbrook made a point to differentiate a mere cheater from a criminal. However, Mayo’s deception of USC was an integral part of his scheme to get himself exposure during the time he was required to play non-NBA basketball (i.e., during his one-and-done year). He intended directly to defraud USC in order to be cleared to play basketball and receive their scholarship money, suggesting that the *Walters*’ reasoning would not foreclose prosecution (as well as civil liability under RICO) against him.

As of May, 2009, several federal investigatory agencies including the Federal Bureau of Investigation, the United States Attorney’s Office, and the Internal Revenue Service are interviewing individuals regarding the nature of the relationship between Mayo and Guillory,

²² See Ohio Code § 4771.20

though there is no hint of whether charges may be subsequently filed.²⁴

Potential Liability of BDA Sports Management

Billy Duffy Associates Sports Management (BDA) is the firm at the center of the O.J. Mayo controversy, allegedly providing Mayo and his family with approximately \$30,000 in cash and gifts through "runner" Rodney Guillory, in order to induce him sign BDA as his professional agent.²⁵ Perhaps because BDA had the most to gain through the relationship, recent statutory trends have shown that state and federal laws aimed at reducing this type of behavior have targeted athlete agents far more than anyone else.

The **federal SPARTA** grants an affected educational institution (in this case, USC) a cause of action against those responsible at BDA for damages.²⁶ Thus, BDA is potentially liable to USC and indeed arguably the entire Pac-10 conference for any losses suffered because of the scandal.

BDA is also potentially liable under **federal racketeering and mail fraud statutes**. In *United States v. Walters*,²⁷ the court of appeals reversed a conviction of an agent for providing money to student-athletes, reasoning that the agent had no intent to injure the affected universities and that the financial losses suffered by the athletic programs were a by-product, rather than the aim of the fraudulent scheme. That case, however, was a criminal prosecution where the student-athlete was not charged. Despite this decision, BDA remains potentially liable as a co-conspirator to Mayo's fraud upon USC to obtain a scholarship and play his freshman

²³ See Cal. Bus. & Prof. Code §18997.8(b).

²⁴ Charles Robinson and Jason Cole, *Source: Floyd Gave Cash to Mayo Handler*, Yahoo! Sports, May 12, 2009, <http://sports.yahoo.com/top/news?slug=ys-floyd051209>.

²⁵ Naqi, note 1 above.

²⁶ 15 USC §7805 (b)1

²⁷ 997 F.2d 1219 (7th C.A. 1993) at 1225-1226.

year for the Trojans (see prior discussion of Mayo's liability).

Reports suggest that BDA gave gifts or money to Mayo while he was playing basketball in three states (California, West Virginia, and Ohio).²⁸ BDA, as a California company, probably faces the greatest risk from **California's Miller-Ayala Act**. When Rodney Guillory initially contacted Mayo while working on BDA's behalf, Miller-Ayala requires various written disclosures be made to Mayo. The Act further prohibits agents from directly or indirectly providing funds to Mayo and his family. Finally, assuming that BDA's representatives, including Guillory, initiated contact with Mayo rather than the other way around, this would be an additional violation of the section.²⁹

If USC has to forfeit games from the 2007-2008 season, go on probation, or forfeit the share that it earned by making the 2007-2008 NCAA Basketball Tournament (which comes to nearly \$1.4 million over 6 years),³⁰ it would be presumed to be damaged under Article 4 of the statute.³¹ Under California law, BDA could face civil actions by Mayo and USC, in addition other members of the Pac-10 conference. As the definition of a damaged educational institution includes any school financially damaged by the actions of the agent, each member of the Pac-10 could bring an action against BDA because of the revenue sharing agreement for NCAA basketball tournament money, if the NCAA should demand the return of the basketball tournament share.³² Should BDA be found liable, the firm would have to pay actual damages or \$50,000, whichever is greater, in addition to punitive damages, court costs, and attorney's fees.³³

²⁸ ESPN.com, *supra* note 8.

²⁹ Cal. Bus. & Prof. Code §18897.6-18897-77

³⁰ 2007-2008 NCAA Revenue Distribution Plan, *available at* <http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/about+the+ncaa/budget+and+finances/revenue+distribution/current+revenue+distribution+plan>.

³¹ Cal. Bus. & Prof. Code § 18897.8-18897.97

³² Pac-10 Handbook, Administrative Rule 1-5 (b), *available at* <http://compliance.pac-10.org/thetools/0809hbv1.pdf>

³³ Cal. Bus. & Prof. Code § 18897.8-18897.97

If USC were put on NCAA probation and forced to give back their NCAA tournament share and forfeit games, there is a strong chance they would go ahead and file a suit against BDA. USC was a driving force to get the Miller-Ayala Athlete Agent Act passed in 1996. In 1995, USC filed suit against agent Robert Caron (which was later settled for \$50,000³⁴) for tampering with USC football players, including running back Shawn Walters. In the following session (1995-1996) of the California Legislature, Senator Ruban Ayala, a USC season ticket holder,³⁵ introduced Assembly Bill 1987, the final result of which was the Miller-Ayala Act.

Employees of BDA involved in the Mayo scandal could be subject to criminal prosecution. Individuals convicted of violating Miller-Ayala are guilty of a misdemeanor, punishable by a fine of up to \$50,000, imprisonment up to a year, or both.³⁶ As there are both civil and criminal charges that could be filed against members affiliated with BDA, it is possible that the attorneys representing the state could use the criminal charges as leverage to force BDA to pay restitution without trial as part of a plea agreement. An agreement of this nature was made in Alabama as part of the Norby Walters scandal.³⁷

DBA may also be liable under the **UAAA, adopted in West Virginia**, based on any contact or gifts given to Mayo during his time as a player at Huntington High School. While it appears no charges have been filed, under the West Virginia Code, individuals responsible could face felony charges that could result in a fine of up to \$50,000 dollars, jail time of between one to three years, or both. If BDA only made indirect contact with him during that time, it is a misdemeanor, with a fine up to \$500, up to a year in jail, or both.³⁸

³⁴ Elliot Almond, *USC Suit is Settled By Agent*, LOS ANGELES TIMES, October 14, 1995, at C1.

³⁵ Robert Baker, *Its Time to Revise the Miller Ayala Act*, LOS ANGELES LAWYER, June 2005, at 52, available at <http://www.lacba.org/Files/LAL/Vol28No4/2160.pdf>.

³⁶ Cal. Bus. & Prof. Code § 18897.8-18897.97

³⁷ Associated Press, *Walters Settlement*, NEW YORK TIMES, June 1, 1988, at D28.

³⁸ West Virginia Code §30-39-15

Civil remedies under the West Virginia Code are also available for any educational institution damaged by the acts of an agent against that agent or a former student athlete. This could mean that should Huntington High ever be sanctioned by the West Virginia High School Athletic Association in relation to agent activity, the high school could seek restitution for any penalty incurred. Additionally, the West Virginia Secretary of State may assess a civil penalty of up to \$25,000. BDA would be potentially liable on these claims as well.

Any BDA gifts given to Mayo while he was in high school in **Ohio** would also subject them to liability under that state's **special agent law**. Like the other two states, Ohio prohibits an athlete agent from attempting to induce a student athlete into a contract. Assuming that BDA did not initially contact Mayo's high school athletic department, Ohio law prohibits their initiating unilateral contact with Mayo. If BDA illegally made contract with Mayo, those within the firm who are responsible would be subject to losing their license to be agents in Ohio (provided they are registered in Ohio in the first place). More significantly, anyone convicted of making illegal contact with a student-athlete in violation of the statute or making payments to an athlete in an attempt to induce the athlete into an agency contract are guilty of a first degree misdemeanor.

Theoretically, Mayo could sue BDA in Ohio, but this is extremely unlikely, due to the difficulty that Mayo would have in proving that he was actually injured. Unlike the California law, Mayo is not presumed injured due to a mere loss of eligibility as a result of agent conduct. While Mayo's eligibility was most likely terminated upon his receipt of the first gifts from Guillory and BDA, he still passed a background check by both USC and the Pac-10 prior to playing in college and was allowed to play. His NBA draft potential did not seem to fall due to his agent relationship, meaning that his salary upon being drafted will not suffer. Additionally,

given the high probability that Mayo would have left after one year of college anyway, due to the NBA's "one and done" rule, damages related to equity are minimal. USC or other members of the Pac-10 would not be permitted to sue under the Ohio law, due to the statute's definition of "institution of higher education," which is defined as a college or university within the state.

The Ohio High School Athletic Association said that it would launch an inquiry into potential improprieties regarding Mayo's time at North College Hills High School in Cincinnati.³⁹ However, only 2 days later, it was reported that the school would be allowed to keep its state titles, citing the lack of any apparent involvement by the school in illicit agent activities.⁴⁰ This lessens the likelihood of any Ohio-based victims who could seek recovery under Ohio law.

As a successful agency representing leading NBA basketball players, BDA must be certified by the National Basketball Players' Association (NBPA), because the collective bargaining agreement between the union and the league permits clubs to negotiate only with union-certified agents. Pursuant to that authority, the **NBPA has promulgated a Regulation Governing Player Agents**, which prohibit a player agent from providing or offering "a monetary inducement to any player (including a rookie) or college athlete to induce or encourage that person to utilize his services." Violation of this provision could result in suspending or revoking the agent's certification with the NBPA, preventing him from being a player agent in the NBA. The Disciplinary Committee is charged with making the case against the agent before an arbiter.⁴¹ Following the conclusion of their investigation in August 2008, the NBAPA

³⁹ Tom Groeschel, *OHSAA wants more on Mayo*, DAYTON DAILY NEWS ONLINE, May 13, 2008, available at <http://www.daytondailynews.com/s/content/oh/story/sports/high-schools/reds/2008/05/13/ddn051308spmayo.html>; See also Greg Billing, *NCH Likely Will Keep Titles, but Situation Sad*, DAYTON DAILY NEWS, May 13, 2008, at B2.

⁴⁰ ESPN.com, *Report: Ohio Prep Association Says Mayo's High School Will Keep Titles*, May 15th, 2008, <http://sports.espn.go.com/ncb/news/story?id=3396878>.

⁴¹ NBPA Regulations Governing Player Agents, Sections 3 B (b), 2 (e), and 6(a).

Disciplinary Committee suspended agent Calvin Andrews, former agent of Mayo at BDA, for a year in connection with improprieties in funneling money to Mayo through a third party.⁴²

BDA is also potentially subject to civil liability under several **common law principles**. USC could sue BDA agents for **tortious interference with contractual relations**. In order for USC to recover on this theory, it must show that it had a contract with Mayo, that the defendant knew the existence of the contract, that the defendant still induced the third party to break that contract, and that damages resulted from that interference. When Mayo signed his national letter of intent and subsequently enrolled at USC, he made a one-year contract with the school (college scholarships are normally renewed every year). BDA and Guillory were certainly aware that Mayo had a contract with the school, and they would know that under-the-table payments to Mayo would violate the contract that Mayo had with USC.⁴³

USC's ability to recover, however, would be compromised by any relationship between USC officials and Guillory, the principal intermediary between BDA and Mayo. Guillory was a well-known figure to USC already, having been identified by the NCAA as an agent runner under a similar set of circumstances in 2000, involving former USC basketball player Jeff Trepagnier and Fresno State player Tito Mattox. If USC knew that Guillory's relationship with Mayo was a violation of NCAA rules and they allowed it to go on, or they had serious reason to suspect and did not investigate further, it would be difficult for the school to recover on a claim of tortious interference of a contract. The recent accusations with regard to head coach Tim Floyd paying money directly from Guillory,⁴⁴ if proven, may be used to prove USC's direct knowledge.

⁴² Ben Bolch, *OJ Mayo's Former Agent Suspended*, LOS ANGELES TIMES, August 30, 2008, at D3.

⁴³ Mike Lancaster, *College Sport Financial Aid – What Colleges offer Scholarships and How do I Get Recruited*, <http://www.athleticscholarships.net/sports-scholarship.htm>; See also Naqi, *supra* note 1.

⁴⁴ Pugmire, *supra* note 13.

BDA is also potentially liable to Mayo himself for **breach of fiduciary duty**. Even though there was no official agent/ player contract, Mayo could establish a fiduciary relation “between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.”⁴⁵ Mayo has called Rodney Guillory a "trusted advisor" and if Guillory was, in fact, working closely with BDA to deliver Mayo to the agency, a court might find that a quasi contract existed, depending on Mayo’s knowledge about the firm Guillory was working for and whether there was an agreement that Mayo would take money in exchange for signing with BDA after he left USC. If there was such an agreement, BDA would owe a fiduciary duty to Mayo, and providing Mayo with gifts and money during his high school and college career, BDA and their agent (Guillory), were breaching the agent's fiduciary duty of care. In theory, providing funds to Mayo could be a conflict of interest as well, forcing Mayo out of the amateur ranks and into a professional league with an 18 year old age limit, such as the NBA Development League, therefore providing an opportunity for BDA to negotiate a contract and collect commission.

Given the circumstances, however, Mayo faces two problems in gaining any sort of reasonable recovery from an action of breach of fiduciary duty. The first is the lack of damages. While the California statute presumes Mayo damaged if he is declared ineligible as a result of BDA's actions, it would be difficult to assess a common law remedy for the damages. Mayo was selected as a lottery pick in the NBA draft, despite his problems with Guillory and BDA, making the impact upon his career minimal. Secondly, Mayo may be forced to deal with assertions by BDA he was a contributor (and willing participant) in the violations. BDA will surely bring up that Mayo was exceedingly aware of the consequences of taking money and gifts from boosters

⁴⁵ RESTATEMENT (SECOND) OF TORTS § 874.

or agents. At elite camps, such as the NBPA Top 100 Camp, which Mayo attended in 2005, seminars were conducted on agent regulations. Furthermore, USC has all the NCAA and California regulations readily available on its website for all student-athletes to read. The warnings, along with availability of on-site compliance officials to guide Mayo, erodes the idea that he was ignorant of NCAA and state laws and contributes to the contention that he knew what he was doing when he accepted the money and gifts from Guillory and willfully did so, intentionally flouting the NCAA Bylaws.⁴⁶ However, the lack of any measurable damages would appear to give Mayo little incentive to create litigation.

Policy Issues Raised By Agents Paying Teenagers

For some, the issues raised by the Mayo scandal, and what appears to be widespread non-compliance with NCAA rules barring any receipt of cash, goods or services value by student-athletes other than those specifically authorized those same rules, all come back to the controversy over the NCAA's policy that student-athletes shall be amateurs, motivated "primarily by education and by the physical, mental, and social benefits to be derived." There is a very wide spectrum of views on this issue. At one end are purists willing to radically alter intercollegiate athletics by limiting even big-time college football and basketball to students who fall into this category, directing all those primarily interested in developing and showcasing their talents for a professional career to professional minor leagues. At the other end, many advocate turning big-time college sports into explicitly professional operations to end any economic exploitation of young athletes.

The issues raised by the scandal, in our view, can be resolved on narrower grounds upon

⁴⁶ DIV. I MANUAL, art. 12.1.2

which most Americans are likely to agree: *athletes should be protected from unfair exploitation from professional and commercial enterprises*. Although, in the event, it would appear that young Mr. Mayo has done fine by himself, to the extent that this is an archetypical case, rather than an extraordinary one, the alleged facts suggests exploitation at a number of levels. Putting aside the amateurism issues involved in BDA's payment over 5 years of over \$300,000 to secure Mayo's signature on a representation agreement at a future time when he became a professional athlete, reports suggest Mayo received only 1/10th of this sum. That intermediaries, whose skills seemed limited to befriending and influencing teenagers, skimmed over \$250,000 is itself exploitation of Mayo, whose athletic talent is what led BDA to offer these illegal inducements. That Mayo selected USC, a leading football power with a nascent basketball program that had not actively recruited him, raises serious questions as to whether his decision was influenced by factors other than athletics and academics. Finally, we agree with underlying purpose of the union's rules against certified agents providing compensation to secure a representation agreement: under-the-table payments preclude a young and often unsophisticated athlete from making the best decision as to who should guide his business and professional future.

We acknowledge little harm was apparently done in this particular case. Bill Duffy is a well-respected agent and we have no particular reason to believe that Mayo would have ill-served had the representation gone forward. Mayo left USC after one year, so it is hard to imagine that he made a bad choice from an academic perspective, and he was the third overall pick in the NBA draft, so professionally he was not harmed either. Indeed, his cross-town rivalry with freshman UCLA star Kevin Lowe might well have raised his profile even further.

But Mayo is archetypical, not the usual case. A more usual situation is that experienced

by Randolph Morris. A former Kentucky Wildcat, Morris played one season under coach Tubby Smith at Kentucky before deciding to test his professional stock in the NBA Draft. On June 21, 2005, the deadline to withdraw from the NBA Draft, Morris issued a press release through SFX Agency. The press release spoke of Kentucky in past terms and stated that Morris planned to set his sight on the NBA.⁴⁷ However, Morris went undrafted on draft day and sought to return to Kentucky. Although SFX is generally known as a reputable agency, it failed to do its homework on Morris. An agent that plans to represent a potential draft pick in the NBA must contact teams regarding possible workouts, team interest and draft possibility of that team. The Agent must also equip the underclass players with the rules of working with an agent and how to assess their draft stock.

Fortunately for Morris, he was allowed to return to school by the NCAA because of a rarely used NCAA rule that provides “that a player may return to school so long as he reimbursed all the expenses of any NBA workouts in which he participated and had not entered into an agreement, oral or written, with an agent”. His ability to restore his eligibility with only a 14-game suspension was particularly fortunate because it could easily have been concluded that he had entered into an agreement with SFX to be his agent, since SFX issued a press release for him and was listed as the contact for Morris on a list completed to help NBA teams arrange pre-draft workouts.

Randolph Morris shouldered much more risk in leaving school than SFX bore in taking steps to represent him. Agents know there is no guarantee that players will make it professionally, but they give the appearance to the athlete that professional success is guaranteed or an easy transition. Agents accomplish this by treating young players to

⁴⁷ Kevin McNeil, *Randolph Morris: Welcome back or stay out?*, Dec. 4, 2005,

professional games of current clients, constantly talking about turning professional to the athlete, and giving petty cash/gifts.

Another case that is more typical than Mayo's is that of Marcus Taylor of Michigan State. Taylor was Michigan's 2000 Mr. Basketball as a high school senior, and heralded as the best player to come out of Lansing since Ervin "Magic" Johnson. Taylor played two good years at Michigan State, leading the Big Ten in scoring and assists his second season. Commencing with the NCAA-championship team led by the so-called 'Flintstones', the Spartan program has been a hotbed for agents seeking to attract potential professional clients. However, the conventional wisdom was Taylor he needed to stay in school in order for his basketball game to grow, because he was only 6'3" and his game still had several weaknesses likely to be exposed at the NBA level.

Nonetheless, Taylor signed with an agent after his sophomore season. He was drafted 52nd in the NBA Draft by Minnesota. This is a bottom second round pick in a draft that only has two rounds! Taylor was waived by Minnesota in training camp. A recent Michigan State University student blog jokingly asked the current whereabouts of Marcus Taylor,⁴⁸ but in reality it is a big tragedy. Unfortunately, Taylor's story is not unique.⁴⁹ Taylor now has no college degree, no chance at a free education from a major research institution, and no professional basketball career. He has bounced around in the CBA and ABA, playing most recently for TBB Trier of the German Basketball Bundesliga first division. Although there have been no reports that Taylor's decision was influenced by illegal conduct by his agent, it illustrates the way in which student-athletes can be victimized by a poor choice of his legal

<http://www.collegehoopsnet.com/columns/kevinmcneill/051204.htm>.

⁴⁸ Spartan Tailgate, www.spartantailgate.com/forums/msu-red-cedar-message-board/259854-what-marcus-taylor-doing-since-he-left-msu.html.

⁴⁹ Dan Wiederer, *Entering NBA Draft Early not Always a Good Idea*, Fayetteville Observer, May 24, 2008,

representative, whether that choice is due to illegality or simply bad judgment. A bad agent can be defined in many ways, but one way is an agent that does not properly advise clients of the risks and work associated with becoming a professional.

In choosing a college or an agent, high profile athletes are often exploited. To be clear, exploitation is not limited to manipulating an impressionable athlete to make an ill-suited decision for his life and career. A player is also exploited when adults around them use his talents to benefit/advance their own needs, often at the expense of the needs of the athlete. For example, consider competition in the Amateur Athletic Union (AAU), one of the most popular ways to be seen by college coaches and agents. AAU Basketball has significantly expanded since the late 1980s; previously it was only played by a select few, while the majority of athletes played for their high school team during the summer and also attended a basketball camp or two.⁵⁰ This new dynamic has opened the door for more exploitation of these athletes because they have more exposure nationally. The first thing that college coaches or agents want to know about a high profile athlete is “who is handling them?” Parents do not have the money to pay for AAU and travel to the games, so they trust the AAU coach with the care of the athlete. This has led to plenty of exploitation. Major college programs increasingly feature former AAU/high school coaches on staff. Likewise, family friends are hired primarily to persuade an athlete to choose a particular college program.

Consider the events at Indiana University which occurred prior to the 2007-2008

available at <http://www.fayobserver.com/article?id=294882>.

⁵⁰ The best players from the high school teams generally played AAU for a period of time that did not significantly conflict with summer high school basketball. For example, in 1987 a Detroit AAU team featured Steve Smith (Michigan State/NBA), Doug Smith (University of Missouri/NBA), Anderson Hunt (UNLV/CBA), Victor Alexander (Iowa State/NBA), Lyman DePriest (UCONN) and Anthony Buford (University of Cincinnati). Today, teams like this are uncommon. Instead, AAU basketball is geared to include players unable even to make their own high school's varsity. Anyone can have an AAU team as long as they have money to travel and pay for the AAU tournament. The number of AAU tournaments has also increased as a result.

basketball season.⁵¹ Eric Gordon verbally committed to attend the University of Illinois. However, Gordon de-committed from Illinois and instead enrolled at Indiana University for one season after Kelvin Sampson was hired as the Hoosiers' new head coach. Among Sampson's early administrative decisions was the hiring of two family friends of Eric Gordon. Gordon, who was a lottery pick in the NBA draft, did not necessarily suffer from this decision, but it is clear that a lot of other adults profited from his choice: this too is exploitation.

As the summary above demonstrates, most of the focus of the legislation passed to address this scandal is the potential harm to colleges from the lost eligibility of a player and for returning proceeds from games won with an ineligible player. We believe this focus is misguided, for individual schools and the NCAA can and should do a better job of policing rules to make it more difficult for boosters, agents, and their associates to make under-the-table payments that result in the substantial distortion of important decisions by teenage athletes.

We think it most unlikely that teenagers and their families would be willing to risk eligibility to accept under-the-table payments that did not provide immediate value and improve often severely under-privileged situations. We note little suggestion that Grant Hill, the Duke superstar who was the son of NFL star Calvin Hill, was on the receiving end of any substantial side payments. Nor are we familiar with cases of athletes being offered under-the-table life insurance annuities that will provide them with a nice income at age 40. If, as we assume, virtually all under-the-table offers are in the form of goods, services, or cash that will be immediately used, the NCAA and its member schools should be able to identify them.

In Mayo's case, for example, it has been publicly reported that his dorm room featured an expensive flat-screen TV, and that he enjoyed the vibrant lifestyle for young people in Los

Angeles. While this may be par for the course among wealthy undergrads at USC, this would not be possible in Mayo's individual circumstances absent under-the-table financial support. Indeed, USC's failure to identify this obvious breach of rules should bar it from any discretionary relief to which it might otherwise be entitled under the common law or agent-specific statutes.

Another critical difference between NCAA rule enforcement and other related enforcement (for example, tax compliance by the IRS) is that targeting the stars will effectively preclude corruption of everyone. If the NCAA were to identify the top 50 basketball stars each year, and thoroughly audit their finances and lifestyle, as well as the finance and lifestyle of parents, family members, and close friends, it would make it extremely difficult for under-the-table payments to continue. (An elite team of auditors, subject to review by an expert panel of retired judges or other experts who are genuinely independent from the NCAA and its schools and who have broad discretionary powers in difficult cases of non-cooperation, can balance the privacy interests of those most likely to receive benefits on an athlete's behalf and the legitimate concerns about rule enforcement.)

Perhaps forcing schools to take notice of all irregularities in a star athlete's personal and family life may result in schools withdrawing scholarship offers or disciplining athletes without gaining substantial information. The recent controversy surrounding the recruitment of blue-chip recruit Renardo Sidney by several schools, including USC, shows that schools are increasingly cognizant of risks that recruits might be taking money from boosters. Sidney had received scholarship offers from both USC and UCLA and had informally committed to USC. However, both LA schools withdrew their offers after widespread speculation that his parents

⁵¹ See Seth Davis, *Hoop Thoughts, Walking a Fine Line*, Nov. 21, 2006,

were suddenly living a lifestyle that was well above their means.⁵² The family moved from Mississippi to California to aid Sidney's basketball career, living in "upscale homes" while he finished up his high school basketball career. According to Pat Forde of ESPN.com, these moves were bankrolled, at least in part, by former Reebok shoe representative Sonny Vaccaro,⁵³ a claim that a Sidney family representative denies.

Red flags again went up when the family threw a lavish party for Sidney when he announced his college decision which reportedly cost upwards of \$2000.⁵⁴ Sports websites also reported that Ricardo's father, the director of a basketball camp that also controlled Sidney's Reebok-bankrolled AAU team, had suggested that he was expecting a kickback for delivering Sidney to USC. While all of the specifics are not yet fully known, and both USC and UCLA have refused to comment on the situation, there is no doubt a palpable concern that all of these lifestyle inconsistencies, in aggregate, were enough to make schools fearful enough of increased NCAA scrutiny to steer away from him. Sydney is now committed to play for Mississippi State University.

We recognize that for many Americans, under-the-table payments to student-athletes is a legitimate form of "guerilla warfare" on a system of NCAA rules that are themselves highly exploitive. While this critique of the NCAA rules is not wholly without merit, we believe that the costs of fighting this guerilla war outweigh the benefits, and that if NCAA rules were strictly enforced, there would be greater focus and concern about the equity of the current situation.

Stricter and uniform enforcement stopping under-the-table payments also has the benefit of "leveling the playing field" for major college programs seeking to attract teenagers for the

http://sportsillustrated.cnn.com/2006/writers/seth_davis/11/21/hoop.thoughts/1.html.

⁵²Lance Pugmire, *Taking a Pass on a Basketball Star*, LOS ANGELES TIMES, May 4, 2009, at A1.

⁵³ Pat Forde, *Bulldogs take a Ride on Sydney Tour*, ESPN.com, May 6, 2009, http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=4141859&sportCat=ncb.

athletic and academic programs they offer and for agent/representatives as well.

⁵⁴ Pugmire, *supra* note 52.