
January 2009

Where's the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors

Megan Fuller
New York Law School Class of 2009

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

 Part of the [Entertainment, Arts, and Sports Law Commons](#), [Law and Society Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), and the [Legislation Commons](#)

Recommended Citation

Megan Fuller, *Where's the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 N.Y.L. SCH. L. REV. 495 (2009-2010).

This Note is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

MEGAN FULLER

Where's the Penalty Flag?
The Unauthorized Practice of Law,
the NCAA, and Athletic Compliance
Directors

ABOUT THE AUTHOR: Megan Fuller received her J.D. from New York Law School in June of 2009.

I. INTRODUCTION

An investigation by the National Collegiate Athletic Association (NCAA) for athletics rules violations at colleges and universities can set off a firestorm of negative attention from the media and alumni alike.¹ Scandals involving football or basketball programs cost coaches and administrators their jobs, athletes their amateur eligibility, and colleges millions of dollars.² The collegiate athletic compliance director plays an important role in preventing such nightmares because he is charged with ensuring that athletes, staff, and coaches are following NCAA rules.³ But meanwhile, who is regulating the compliance director?

This note will argue that non-attorney athletic compliance directors are violating state statutes that criminalize the unauthorized practice of law (“UPL”) because their jobs involve interpreting law and advising clients about the legal consequences of their actions. This note will further argue that state UPL statutes should be rewritten to include compliance directors’ activities as the practice of law. The legal profession maintains a monopoly over legal services by regulating who is allowed to practice law and by defining what activities “practicing law” includes.⁴ Lay-people who engage in such activities and attorneys who engage in prohibited activities are in violation of UPL statutes and are subject to prosecution.⁵ However, at the same time that the legal profession regulates and prosecutes violations of UPL statutes, it has ignored an entire industry that provides legal services and is virtually unregulated. Collegiate athletic compliance directors interpret statutes and contracts and give legal advice on a daily basis, yet they are often non-lawyers, and are allowed to operate entirely unregulated by the American Bar Association (“ABA”) or local bar associations.

Part II of this note will discuss the history of UPL, as well as the history of the NCAA and its emphasis on regulating conduct. Part III will discuss the lack of legislation and regulation of athletic compliance directors and illustrate why this is problematic. Part IV will propose a solution to the lack of regulation—specifically, that New York UPL statutes should be amended to prevent non-lawyers from giving legal advice while working as athletic compliance directors. Part V concludes this note.

-
1. Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 669 (2003).
 2. See Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 528–44 (1995).
 3. See generally Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295 (1996).
 4. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581–82 (1999).
 5. See, e.g., *People v. Alfani*, 227 N.Y. 334, 338–39 (1919); *In re Perez*, 327 B.R. 94, 96–97 (Bankr. E.D.N.Y. 2005).

II. HISTORY

A. Regulation to Promote Competency and Accountability

“In early America, attorneys did not dominate the legal system to the extent that they do today.”⁶ The development of an organized bar association was sporadic until the early twentieth century.⁷ In the past century, lawyers in America have worked hard to centralize and maintain control over the legal profession.⁸ Lawyers pride themselves not merely on working in a business or industry, but rather on being members of a profession. Several characteristics distinguish a profession from a business: a requirement of extensive formal training, admission to practice by licensure, a code of ethics imposing standards of conduct, a system of discipline for member violations, a duty to subordinate financial rewards to social responsibility, and an obligation by its members to conduct themselves honorably.⁹ Because law is a profession, non-lawyers are barred from performing legal services, including giving legal advice.¹⁰

Attorneys centralized and organized the legal profession in order to protect consumers of legal services.¹¹ This was accomplished by instituting strict educational requirements for admission to a bar association instead of traditional apprenticeships.¹² A non-lawyer who provides certain legal services is subject to punishment under UPL statutes. These legal services can include: (1) representing a person in a judicial or administrative capacity, (2) preparing legal instruments or documents, and (3) advising one of his legal rights and responsibilities.¹³ Lawyers assert that UPL statutes are necessary to ensure that clients receive competent and professional judgment from individuals with an ethical commitment to act properly.¹⁴ In contrast, non-lawyers performing those tasks are not necessarily trained or educated in the law, have not been licensed by a bar association, and are not governed by rules of conduct.¹⁵

6. Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 92 (2007).

7. *Id.*

8. Denckla, *supra* note 4, at 2582. “Although courts ultimately enforce the regulation of the practice of law, bar associations have largely set the agenda for its regulation.” *Id.*

9. Richard A. Glaser & Leslee M. Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. DET. MERCY L. REV. 563, 575 (1995).

10. Denckla, *supra* note 4, at 2581.

11. *See* Buhai, *supra* note 6, at 91–93.

12. *See* Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2023 (1990) (reviewing *LAWYERS IN SOCIETY* (Richard L. Abel & Philip S. C. Lewis eds., 1988–1989)).

13. *See* Buhai, *supra* note 6, at 94.

14. *See* Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 779 (2002).

15. Denckla, *supra* note 4, at 2593. Ethical Consideration 3-1 of the Model Code “explains that ‘the prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services.’” *Id.*

In recent years, non-lawyers have threatened the lawyer monopoly as they began performing in areas that had traditionally been considered legal areas, such as corporate compliance, information-technology consulting, employment-discrimination consulting, and environmental enforcement.¹⁶ In addition, today, real estate agents and brokers, title companies, sports agents, and accountants all provide assistance and advice on legal matters.¹⁷ From the legal profession's point of view, this is problematic because those individuals are arguably providing legal services but are not held to the same standard of care as licensed lawyers, who are required to act with a "degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in his jurisdiction."¹⁸ Furthermore, non-lawyers are not subject to regulation by the ABA or local bar associations.¹⁹

In addition to non-lawyers engaging in UPL, the legal profession is concerned about the emergence of multidisciplinary practices, in which lawyers work in partnership with non-lawyers.²⁰ Under ABA Model Rule 5.4, lawyers are not permitted to share legal fees or ownership and control of a firm with non-lawyers.²¹ This often occurs in the context of accounting firms that employ lawyers, accountants, and others in one firm.²² Although a multidisciplinary practice is often attractive to clients because it provides a convenient place to get all needed services, lawyers are concerned with regulating that conduct in order to ensure competency in the practice of law.²³

-
16. See generally Tanina Rostain, *The Emergence of "Law Consultants,"* 75 *FORDHAM L. REV.* 1397 (2006).
 17. Buhai, *supra* note 6, at 93–94. "In the interests of cost and efficiency, consumers are often willing to forego the additional costs of an attorney and allow the businesses that are already handling the non-legal aspects of their transactions to assist them with related legal questions." *Id.* at 94.
 18. *Id.* at 93 (quoting *Walker v. Bangs*, 601 P.2d 1279, 1282 (Wash. 1979)) (internal quotation marks omitted).
 19. See Denckla, *supra* note 4, at 2581.
 20. Galler, *supra* note 14, at 774–75.
 21. *Id.* at 775. This rule states, in relevant part, that "[a] lawyer or law firm shall not share legal fees with a nonlawyer," with a few exceptions, and "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." MODEL RULES OF PROF'L CONDUCT R. 5.4 (a), (b) (2004).
 22. Galler, *supra* note 14, at 777–78.
 23. *Id.* at 775. In some instances, courts have found that there is little threat to the public to have non-lawyers performing certain tasks, such as preparing real estate contracts or conducting real estate closings. *Id.* at 780. A multidisciplinary practice (MDP) is a firm that provides both legal and non-legal services, and where lawyers and non-lawyers share legal fees and clients. *Id.* at 773. It has been argued that lawyers are concerned that the growth of MDPs and the compliance profession threaten their monopoly on certain types of legal work. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 53 (1981). It has also been argued that lawyers are less concerned with protecting the public and more concerned with maintaining tight control over the profession for pecuniary reasons. See *id.* at 51–53.

Some states have considered redefining the practice of law in the state in order to both protect the public and allow non-lawyers to perform some arguably legal work.²⁴ Advocates for maintaining tight control of the profession argue that a broad definition of the practice of law is necessary to provide a useful regulatory framework, while non-lawyers who wish to engage in certain work want a narrow definition so that their work is excluded and they are not guilty of engaging in UPL.²⁵ Washington and Texas recently attempted to reconcile the interests of the bar association on the one hand, and non-legal professionals and clients not wishing to hire lawyers on the other.²⁶ The laws in those states define the practice of law broadly, and then specify those professionals, other than lawyers, that are permitted “to engage in specific conduct that falls within the practice of law and the circumstances under which they may do so.”²⁷ However, this model of redefinition has not been followed in the majority of states, so non-lawyers, including athletic compliance officers, regularly violate UPL statutes.

B. History of the National Collegiate Athletic Association

The National Collegiate Athletic Association (“NCAA”) is the organization through which the majority of United States colleges and universities compete in athletics.²⁸ “[I]t is a voluntary unincorporated association of members who have adopted a constitution and bylaws that specify the agreements among the members” and operating rules.²⁹ Universities formed what is now known as the NCAA in the early twentieth century because of the need to regulate football.³⁰ With no governing body or enforcement system, the sport was extremely violent and the unregulated style of play had frequently resulted in serious injuries and deaths.³¹ As a result, many schools were discontinuing their programs and wanted to abolish football.³² Then, in 1905, President Theodore Roosevelt held a conference with athletics leaders and formed the Intercollegiate Athletic Association with sixty-two members.³³ The members agreed to follow certain principles and regulations when conducting their individual athletic programs.³⁴ In 1910, the organization’s name was changed to the NCAA.³⁵

24. See Galler, *supra* note 14, at 782–84 (providing Washington and Texas as examples).

25. See *id.* at 782–84.

26. *Id.* at 783.

27. *Id.*

28. See Heller, *supra* note 3, at 299.

29. John Kitchin, *The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL’Y 71, 71 (1996).

30. Heller, *supra* note 3, at 298. The NCAA was founded in 1906 as the Intercollegiate Athletic Association of the United States. *Id.*

31. Kitchin, *supra* note 29.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

Currently, the NCAA has approximately 1000 active members, comprised of colleges and universities in each state.³⁶ Members can choose to compete in one of three divisions: Division I—which is the most competitive, Division II, or Division III.³⁷ The member schools are required to adopt the NCAA legislation, which governs the conduct of the athletic programs.³⁸ A forty-six-member council, elected by member schools at the annual convention, oversees NCAA policy in between conventions.³⁹ In addition, there are multiple committees established during the convention that develop policy by issuing reports to the council.⁴⁰ In order to serve on the council or a committee, an individual must be on the staff of a member college, university, or conference.⁴¹

The NCAA established several purposes of their organization, including improving intercollegiate athletic programs for student-athletes, upholding the principles of institutional control of all intercollegiate sports in conformity with the NCAA's constitution and bylaws, and supervising the conduct of, and establishing eligibility standards for, regional and national athletics events run by the Association.⁴² In addition, the NCAA constitution sets forth the NCAA's fundamental policy with regard to obligations of member institutions:

Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting. Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.⁴³

The enforcement procedures of NCAA rules differ from those of civil or criminal litigation because they do not, at least in theory, involve an adversarial system.⁴⁴

36. Heller, *supra* note 3, at 299. "In 1950, there were approximately 350 schools and 12 conferences active in the NCAA. Today, there are 1000 schools and 110 conferences active within the Association." *Id.*

37. See NCAA ELIGIBILITY CENTER, 2008–09 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 2–5, <http://www.ncaapublications.com/Uploads/PDF/2008-09%20CBSA9c29e699-00f6-48ba-98a9-6456c9b98957.pdf> (last visited Dec. 23, 2009).

38. Kitchin, *supra* note 29.

39. *Id.*

40. *Id.* at 71–72.

41. *Id.* at 72. "A member conference is a group of colleges and/or universities that conducts competition among its members and determines a conference champion in one or more sports . . ." NCAA CONST. art. 3.02.3.3, reprinted in NAT'L COLLEGIATE ATHLETIC ASS'N, 2008–09 NCAA MANUAL (2008) at 7 [hereinafter NCAA MANUAL]. Conference and NCAA membership is available to colleges and universities that are accredited and located in the United States. *Id.* art. 3.1.1, reprinted in NCAA MANUAL, at 8.

42. Heller, *supra* note 3, at 299–300.

43. Kitchin, *supra* note 29, at 72 (quoting NCAA CONST. art. 1.3, reprinted in NCAA MANUAL, *supra* note 41, at 1).

44. See Marsh & Robbins, *supra* note 1, at 703–04.

Instead, the goal is cooperation between the school and the NCAA to ensure that member institutions are abiding by the voluntarily agreed-upon rules.⁴⁵ The NCAA adopted rules regulating recruiting, eligibility, amateurism, and financial aid in 1948.⁴⁶ In 1950, policies to enforce the rules were developed because it became clear that rules without means of enforcement would be largely ineffective.⁴⁷ The Committee on Infractions (“COI”) acts as the judge and jury in a trial, and the enforcement staff investigates allegations and prosecutes the case when there is a hearing.⁴⁸ “The enforcement staff investigates and pursues alleged rule violations while the COI resolves issues of fact that pertain to alleged violations, determines when a violation has occurred, and imposes the penalties.”⁴⁹ The enforcement staff gives notice to member institutions of possible violations.⁵⁰ The enforcement staff and the member school then begin a cooperative effort to gather facts.⁵¹ Finally, the COI resolves issues of fact and institutes penalties as necessary.⁵²

The first step in the enforcement process is for an NCAA enforcement staff member to receive informational tips, from a variety of sources, that suggest a school has violated an NCAA or conference rule or regulation.⁵³ The staff member must then determine the reliability of the information.⁵⁴ Whether such information is reliable is within the discretion of the enforcement staff member.⁵⁵ If the information leads the staff member to reasonably believe that the school has committed a violation, the staff member either dismisses the matter or it is assigned to an enforcement representative for investigation.⁵⁶ If warranted, the COI issues a Notice of Inquiry to the chief executive officer of the school (often the president), stating that the enforcement staff will begin an investigation.⁵⁷ The Notice provides, *inter alia*, details of the sport involved, the time period under investigation, the identity of those

45. *Id.*

46. Kitchin, *supra* note 29, at 72. Amateurism promotes athletics in a nonprofessional (unpaid) setting where athletics is a part of the student-athlete’s education. James Hopkins, *NCAA Penalties: Corporate Accountability for Coaches and Presidents*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 179, 180 (2003).

47. Kitchin, *supra* note 29, at 72.

48. Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 753 (2007).

49. *Id.* at 754.

50. *Id.* at 764–65.

51. *Id.* at 758–60.

52. *Id.* at 754.

53. Heller, *supra* note 3, at 301.

54. *Id.* at 301–02.

55. *Id.* at 302.

56. *Id.* at 302–03.

57. Rogers & Ryan, *supra* note 48, at 764–65.

involved, and a statement that the school may obtain legal counsel to represent it throughout the process and is obliged to cooperate with the investigation.⁵⁸

At this point, the school may decide to let the COI enforcement staff investigate violations, hire its own independent investigator, or investigate internally.⁵⁹ During the investigation, and later at the hearing, those being interviewed have no right to remain silent, but in fact have an affirmative duty to cooperate and disclose any incriminating information.⁶⁰ This is clearly very different from a civil or criminal trial where lawyers advise their clients not to volunteer any incriminating information to the opposing party.⁶¹ However, the NCAA's duty to disclose ensures consideration of all relevant information by the enforcement staff, and later by the COI.

After the investigation, the COI determines whether to file formal charges in the form of a Notice of Allegations, or to drop unsubstantiated charges.⁶² After a Notice of Allegations is filed, there may or may not be a hearing to determine the existence of alleged violations and impose penalties, if warranted.⁶³ Individuals involved in the hearing have the right to an attorney.⁶⁴ However, the hearing differs from a civil or criminal trial in several respects. Most notably, there are almost no evidentiary rules at the hearing.⁶⁵ The guidelines state that "all credible, persuasive evidence of the kind that a reasonably prudent person relies on when conducting an investigation may be admitted."⁶⁶ After the hearing, the COI determines what penalties will be imposed on the organization.⁶⁷ Possible penalties include fines, sanctions that impose limits on recruiting and scholarships, forfeiture of wins, public censure, and prohibition on post-season competition.⁶⁸

The goal for NCAA member institutions during the course of an investigation is to show that they have maintained institutional control over employees, boosters, and staff.⁶⁹ One of the worst discoveries during an investigation is a lack of institutional control because this is indicative of an institution-wide failure, as

58. *Id.* at 765.

59. *Id.* at 778.

60. *Id.* at 757–58.

61. *Id.* at 758.

62. *Id.* at 766.

63. *Id.* at 771.

64. Kitchin, *supra* note 29, at 73.

65. Heller, *supra* note 3, at 308.

66. Rogers & Ryan, *supra* note 48, at 792–93 (quoting NCAA Bylaw 32.8.8.2, *reprinted in* NCAA MANUAL, *supra* note 41, at 403).

67. *Id.*

68. See NCAA Bylaw 19.5, *reprinted in* NCAA MANUAL, *supra* note 41, at 298. For a discussion on recent examples of NCAA enforcement decisions, see Heller, *supra* note 3, at 309–10.

69. See Marsh & Robbins, *supra* note 1, at 671. A booster is an individual or organization that represents the institution's athletic interests by promoting the organization or donating money. NCAA Bylaw 13.02.13, *reprinted in* NCAA MANUAL, *supra* note 41, at 80.

opposed to an act committed by one dishonest coach or booster.⁷⁰ A finding of such failure is particularly troubling because it suggests a “climate of noncompliance . . . [with] NCAA rules,”⁷¹ similar to a corporation that violates corporate law where there is “contempt for rules, negligent disregard of rules, or ignorance of rules.”⁷²

While the CEO of a school has ultimate responsibility for the conduct of employees and boosters, compliance directors must also demonstrate institutional control and compliance with the departmental rules.⁷³ The compliance director’s job is to keep the school in compliance with NCAA, conference, and internal school rules and regulations. Originally, athletic departments assigned NCAA-compliance matters and rules education to former coaches or to individuals who simultaneously held another job, such as sports marketing.⁷⁴ Today, the job is considered vital within an athletic department because the compliance director is the go-to person on rules and regulations.⁷⁵ While some schools employ attorneys in this role, there is no NCAA requirement that the compliance director be an attorney.

III. PROBLEM

A. *New York UPL Statutes in Action*

It is a crime in New York State for:

[A]ny natural person to practice or appear as an attorney-at-law . . . for a person other than himself in a court of record in [New York] [S]tate . . . to render legal services . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath.⁷⁶

Although courts have recognized that “legal services” are hard to define, since the early 1900s they have repeatedly emphasized that such services include drawing up agreements, preparing legal contracts, and generally giving advice to clients and taking action for them in matters connected with the law.⁷⁷ More recently, courts have reaffirmed that the practice of law includes not only appearing in court, but also preparing legal instruments of all kinds and giving legal advice.⁷⁸

Courts are generally even-handed in their punishment for engaging in unauthorized practices of law, finding laypeople, as well as lawyers practicing outside

70. *Id.* at 670–71.

71. *Id.* at 671.

72. *Id.*

73. *See id.* at 670–73.

74. *Id.* at 695.

75. Heller, *supra* note 3, at 317–18.

76. N.Y. JUD. CT. ACTS LAW § 478 (McKinney 2008).

77. *See, e.g., Alfani*, 227 N.Y. at 338–39.

78. *See Spivak v. Sachs*, 16 N.Y.2d 163 (1965); *In re Rosenberg*, 661 N.Y.S.2d 888 (3d Dep’t 1997); *In re Perez*, 327 B.R. 94.

their jurisdiction, to be guilty.⁷⁹ In *Spivak v. Sachs*, the New York Court of Appeals found the plaintiff, a licensed attorney in California, guilty of violating section 270 of the New York Penal Law⁸⁰ for the unauthorized practice of law.⁸¹ In that case, a California lawyer came to New York on a single occasion to advise a client about obtaining a divorce in New York and gave his opinion as to New York law concerning alimony and custody issues.⁸² The court held that although the attorney was licensed to practice in California and only gave advice as to New York law in one instance, he still violated section 270 because he was not licensed to practice in New York.⁸³ The *Spivak* court explained the policy concerns behind UPL that supported their decision, namely that we have UPL statutes in order to “protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.”⁸⁴

In addition to prosecuting attorneys who offer one-time legal advice on other states’ law, New York also punishes attorneys in the state who advise on and practice the law of other countries.⁸⁵ In *In re Roel*, the New York Court of Appeals enjoined Lorenzo Roel from practicing law in any manner whatsoever.⁸⁶ Roel was a Mexican citizen and an attorney admitted to practice in the courts of Mexico, but was not a United States citizen or a member of the New York bar association.⁸⁷ While in New York, Roel gave legal advice and services for issues that came under Mexican law, including Mexican divorce law.⁸⁸ He drafted documents that were necessary to commence divorce proceedings under Mexican law and sent the documents to a colleague in Mexico who represented his clients in the actual proceedings.⁸⁹ Although he had an office in New York, he did not give any advice on New York law.⁹⁰ Furthermore, in his retainer agreement used in divorce actions, his client agreed that Roel did not represent that divorce decrees would be legal or valid outside Mexico, and the client represented that he has consulted a United States attorney in his own state.⁹¹ The court ruled that Roel was practicing law in violation of section 270 of the Penal Law because of the nature of the activities performed, not the jurisdiction of the

79. See *Alfani*, 227 N.Y. at 335, 341; *Spivak*, 16 N.Y.2d at 165–68.

80. The relevant law is now § 478.

81. *Spivak*, 16 N.Y.2d at 165.

82. *Id.* at 166.

83. *Id.* at 167–68.

84. *Id.* at 168.

85. See *In re Roel*, 3 N.Y.2d 224, 227–29 (1957).

86. *Id.* at 227.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 228.

91. *Id.*

law that he practiced.⁹² In its decision, the *Roel* court reiterated the policy concerns behind UPL statutes:

While it is true that he renders only specialized services dealing with a field in which he claims to be particularly competent, the competence of [Roel] in the practice of his specialty is not dispositive of the case before us. In many fields of endeavor laymen acquire specialized knowledge which is relevant to the practice of law in that area. Thus accountants may know a great deal about tax law and labor relations consultants much about labor law. A specialized area of competence does not, however, entitle these laymen to engage in the business of giving legal advice based on their knowledge of the subjects.⁹³

B. Based on Case Law and Policy Concerns, Athletic Compliance Directors Are Routinely Practicing Law

Based on New York's definition of unauthorized practice of the law, athletic compliance directors in New York schools are violating section 478 of the Judiciary Law and should be prosecuted. It is curious that a system that strenuously prosecutes other cases violating UPL largely ignores UPL violations occurring at colleges and universities throughout the state and country. Non-lawyers negotiating deals, drafting contracts and regulations, and interpreting agreements when they have no minimum level of training or education requirement, are potentially detrimental to athletes and their organizations.⁹⁴

An important responsibility of the compliance director is to develop written guidelines for investigating and reporting NCAA infractions.⁹⁵ Accordingly, he is responsible for making sure that coaches and athletic directors observe the guidelines by analyzing the rules, and explaining legislation and rule changes as they occur.⁹⁶ Additionally, the compliance director assists coaches and staff with the day-to-day interpretation of NCAA, conference, and school rules.⁹⁷ Often, the coach will go to the compliance director with a question about a given course of action, and it is up to the director to investigate the issue, analyze the regulations, and inform the coach whether such action would violate a rule.⁹⁸ The compliance director must also set up a monitoring system in order to prevent recruiting, financial aid, and eligibility violations as well as academic fraud, and must educate student athletes about NCAA

92. *Id.* at 228–29.

93. *Id.* at 231.

94. This argument was originally used to push for stronger regulation of professional sports agents. See David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies, and the Dream Team Model*, 3 VA. SPORTS & ENT. L.J. 31, 37–39 (2003).

95. Marsh & Robbins, *supra* note 1, at 697.

96. *See id.*

97. *Id.*

98. *Id.*

rules.⁹⁹ If a compliance director suspects or uncovers a violation in the course of his work, it is his duty to report the violation to the NCAA.¹⁰⁰ The duties of compliance directors are comparable to the practices of the attorneys in *Spivak* and *Roel* that were found to be in violation of UPL statutes.¹⁰¹ Like those attorneys, compliance directors advise clients by interpreting regulations and advise coaches and staff how to obey NCAA guidelines.¹⁰² Like the attorneys in those UPL cases, the fact that non-lawyer compliance directors are knowledgeable of sports law or NCAA rules should not give them any right to provide legal services with respect to the same. Such a “specialized area of competence” does not entitle laymen to give legal advice to clients in divorce and other proceedings,¹⁰³ and this prohibition should extend to athletic compliance directors. Based on the courts’ reasoning in these cases, athletic compliance directors are practicing law.

Beyond case law suggesting that violations of UPL statutes are present, the nature of the regulations themselves suggests that compliance directors are violating UPL statutes. The NCAA Manual is over four hundred pages, containing the constitution and bylaws.¹⁰⁴ It also includes detailed rules, regulations, and punishments for a variety of infractions.¹⁰⁵ Guidelines include rules governing recruiting, sponsorship, academics, and gift-giving.¹⁰⁶ Articles one through six of the constitution consist of information relevant to the purposes of the NCAA, its structure, membership and legislative process information, and important principles for the conduct of intercollegiate athletics.¹⁰⁷ Articles ten through twenty-three are the operating bylaws, consisting of legislation adopted by members to promote the principles enunciated in the constitution and to achieve the Association’s purpose.¹⁰⁸ Articles thirty through thirty-three are administrative bylaws that set forth policies and procedures for the implementation of (a) general legislative actions of the Association; (b) the NCAA championships and business of the Association; (c) the Association’s enforcement program; and (d) the Association’s athletics certification program.¹⁰⁹ These administrative bylaws may be adopted or modified by the Division I Board of Directors or Legislative Council for the “efficient administration of the activities

99. *See id.* at 695, 698.

100. *Id.* at 697.

101. *See generally Spivak*, 16 N.Y.2d at 167–68; *In re Roel*, 3 N.Y.2d at 231.

102. Marsh & Robbins, *supra* note 1, at 697.

103. *In re Roel*, 3 N.Y.2d at 231.

104. *See NCAA MANUAL*, *supra* note 41.

105. *See generally id.* The NCAA Manual contains legislation adopted by the specific division. *Id.*

106. *See generally id.*

107. NCAA CONST., *reprinted in NCAA MANUAL*, *supra* note 41, at viii.

108. NCAA BYLAWS, *reprinted in NCAA MANUAL*, *supra* note 41, at viii.

109. NCAA ADMIN. BYLAWS, *reprinted in NCAA MANUAL*, *supra* note 41, at viii.

that they govern.”¹¹⁰ The member schools may also amend bylaws through the NCAA legislative process at the annual meeting.¹¹¹

The NCAA laws are complex. Indeed, experienced coaches and sports law scholars have lamented the difficulty of understanding these rules and called for reforms to the rules.¹¹² The NCAA debated an average of 140 new rules during its last three annual conventions.¹¹³ In 1952 the NCAA Manual was a twenty-five-page brochure; it now contains 412 pages.¹¹⁴ Legendary Penn State football coach Joe Paterno explained, “we change the rules so much, we don’t give people a chance to adjust. Maybe instead of those 30-second TV spots they do on each college during televised football and basketball games saying how great we are, they could have a spot on the rules.”¹¹⁵ A former University of Texas basketball coach concurred with this sentiment when he stated, “[y]ou’ve got to be a lawyer at the top of your class to understand the NCAA rules.”¹¹⁶

The victims of rule violation cases are the student-athletes who are deemed ineligible to compete in their sport. For many young people who earn athletic scholarships, the award money is the only way they can afford a college education.¹¹⁷ Student athletes who lose their eligibility are not only denied a chance to compete in high-level athletics, but are deprived of their only opportunity to attend college to improve their lives.¹¹⁸ Because students do not have due process rights in the NCAA enforcement process, it is all the more imperative that athletic compliance directors are competent in interpreting NCAA regulations so that students are not deemed ineligible due to actions beyond their control.¹¹⁹

Although there are no cases discussing whether a compliance director is engaged in the unauthorized practice of law, this type of rule interpretation and advising is considered unauthorized practice of law in other areas.¹²⁰ For example, informing clients about the benefits and disadvantages of contracts, and the consequences of

110. *Id.*

111. *See id.*

112. *See, e.g.,* Broyles, *supra* note 2, at 509 n.155–56; *see* Brent Shrotenbroer, *NCAA Rules Are Too Complex*, BEND WKLY., Feb. 29, 2008, <http://www.bendweekly.com/news/14171.html>.

113. *Id.* at 509 n.154.

114. *Id.* *See generally* NCAA MANUAL, *supra* note 41.

115. Broyles, *supra* note 2, at 509 n.154 (quoting DON YAEGER, *UNDUE PROCESS: THE NCAA’S INJUSTICE FOR ALL* 93 (1991)) (alteration omitted).

116. *Id.* at 509 (quoting YAEGER, *supra* note 116, at 93) (internal quotation marks and alterations omitted).

117. Broyles, *supra* note 2, at 527–28.

118. *Id.*

119. *See id.* at 534. It has been argued that the NCAA should revise its procedures to protect the due process rights of coaches and athletes. *See id.* at 546–48.

120. *See, e.g., In re Roel*, 3 N.Y.2d at 228–30; *Alfani*, 227 N.Y. at 335–36; *Spivak*, 16 N.Y.2d at 165.

taking certain action is deemed practicing law.¹²¹ Some jurisdictions have determined that reviewing, critiquing, and advising others of the legal consequences of documents is considered the practice of law.¹²² In fact, some courts have found that “simply filling in blank spaces on standardized forms drafted by attorneys can be considered practicing law if doing so requires legal judgment.”¹²³ Because these seemingly innocuous practices have been deemed violations of UPL statutes, it is troubling that New York has not seen the need to regulate the conduct of athletic compliance directors who do significantly more legal work. In *Roel* and *Spivak*, the court found that attorneys licensed to practice in other states or countries who gave legal advice in New York were engaging in the unauthorized practice of law.¹²⁴ The potential consequences in those cases were arguably far less serious than the potential consequences of athletic compliance directors practicing law. In both *Roel* and *Spivak*, the individuals at issue were licensed attorneys who would have been trained in legal analysis and reasoning.¹²⁵ In contrast, athletic compliance directors have no educational requirements or professional oversight, so their conduct in the legal realm is much more problematic. Although there is a lack of case law on this specific issue, athletic compliance directors are practicing law without any authorization.

IV. ANALYSIS/SOLUTION

Athletic compliance directors must be regulated so that the legal profession and the NCAA can be sure that individuals performing legally related duties are competent and trained. There are multiple ways to achieve this goal. Ideally, states would amend their UPL statutes to include this type of work in the definition of practicing law and would prosecute unlicensed practitioners. Another possible solution would be for states to apply an attorney’s standard of care to those who continue to work as compliance directors without a law degree. However, the most practical solution would be for the NCAA itself to revise its regulations and require compliance directors to be licensed attorneys. In addition, the NCAA and member conferences could take cues from the sports agent industry, discussed *infra*, which is generally regulated by individual sports leagues.

Examining each alternative in turn, state UPL statutes should be amended to include athletic compliance work. This would serve the dual interests of the NCAA, which wants rule compliance,¹²⁶ and the legal profession, which has a strong interest in regulating the profession and ensuring that only duly-licensed attorneys are

121. Caudill, *supra* note 94, at 39 (quoting *Francorp, Inc. v. Seibert*, 211 F. Supp. 2d 1051, 1057 (N.D. Ill. 2002)).

122. *Id.*

123. *Id.* (quoting *Francorp*, 211 F. Supp. 2d. at 1056).

124. See *In re Roel*, 3 N.Y.2d 224; *Spivak*, 16 N.Y.2d 163.

125. *In re Roel*, 3 N.Y.2d at 228; *Spivak*, 16 N.Y.2d at 165.

126. Kitchin, *supra* note 29, at 72.

practicing law.¹²⁷ For example, New York's law could include a provision that specifies that persons who interpret and advise others on the legal consequences of violating administrative regulations are in violation of UPL statutes. However, defining and regulating the practice of law is usually a power of a state's judiciary branch.¹²⁸ As a result, attempts by the legislature to enhance the regulatory scheme "are often resisted by the very courts they are intended to assist."¹²⁹

For example, Washington State attempted to limit its definition of practicing law by passing a statute that authorized non-lawyer escrow agents and officers to "select, prepare, and complete documents and instruments relating to . . . loan . . . or extension of credit, sale, or transfer of real or personal property."¹³⁰ In *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, the Supreme Court of Washington ruled that the statute was invalid because it "redefined the practice of law by exempting conduct previously reserved for attorneys."¹³¹ The court reiterated the policy behind UPL statutes when it held that "[i]t is the duty of the court to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar."¹³² The court also warned that "there is no such thing as a simple legal instrument in the hands of a layman."¹³³

Whereas the petitioner in *Bennion* requested that the court *restrict* the practice of law so that non-lawyers could perform legal services without fear of prosecution,¹³⁴ legislators who propose amending UPL statutes would be trying to *expand* the definition of the legal practice by including athletic compliance conduct, so that non-lawyers who interpret NCAA regulations and give advice on such regulations would fall within and violate the statute. This would further the legal profession's goal of protecting the public from unqualified individuals performing legal services.¹³⁵ It would also protect student-athletes from being victimized by the actions of compliance directors who are not bound by ethical or professional standards.

If legislators find it untenable to amend UPL statutes due to resistance from the courts, another way to regulate the conduct of compliance directors is to impose an

127. See Buhai, *supra* note 6.

128. *Id.* at 95.

129. *Id.*

130. *Id.* (citing *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730, 732 (Wash. 1981)). *Bennion* held that section 19.62 of the Washington Revised Code violated article 4, section 1 of the Washington Constitution, wherein the state supreme court was given the exclusive power to regulate the practice of law. *Bennion*, 635 P.2d at 731. The law limited escrow agents' authority to execute "deeds, promissory notes, deeds of trusts, mortgages, security agreements, assignments, releases, satisfactions, reconveyances, contracts for sale or purchase of real or personal property, and bills of sale." *Id.* at 732.

131. *Id.* at 735.

132. *Id.* at 733 (internal quotation marks omitted).

133. *Id.* (internal quotation marks omitted).

134. *Id.*

135. See Buhai, *supra* note 6, at 87–88.

attorney's standard of care on all compliance directors, regardless of whether they are attorneys.¹³⁶ A majority of courts have held, "if a layman undertakes to exercise discretion in the devising of the form of substance of a legal transaction, he properly should be held to the standards of a lawyer. . . . The violation . . . of this standard of care [is] . . . negligence for which [the layman] is liable."¹³⁷ It could be argued that this standard should apply to all sports agents who arguably are engaged in the practice of law in order to level the playing field between attorney-agents and non-attorney-agents.¹³⁸ Under this standard, both attorney-agents and non-attorney-agents "would be held to the standard of care of practicing attorneys, and would therefore be governed by applicable ethical rules."¹³⁹ Similarly, athletic compliance officers are often engaged in negotiations and interpretations of rules that affect the rights of the school as well as the athletes.¹⁴⁰ Indeed, the ramifications of such negotiations and interpretations on college athletes could be more profound than in the professional sports context, since athletes deemed ineligible due to NCAA rules violations face the end of their collegiate sports career, and often their college education because scholarships are revoked when member institutions violate rules.¹⁴¹

It is possible that states and bar associations have not seen fit to regulate this industry because they assume the NCAA is regulating it.¹⁴² However, although the NCAA is currently considered a private actor, it is possible that courts may revisit this conclusion and find that, like high school athletic associations, the NCAA is a state actor and is thus subject to state UPL statutes.¹⁴³

In *NCAA v. Tarkanian*, the Supreme Court overruled twenty years of precedent, finding the NCAA did not qualify as a state actor—a decision that has been criticized since it was decided in 1988.¹⁴⁴ Since the 1960s, courts had held that high school

136. *Cf. id.* at 128 (discussing sports agents, arguing that "[h]olding attorney-agents and layperson agents to the same standard of care would ensure that everyone competes on the same ethical grounds").

137. *Anderson v. Nw. Bonded Escrows, Inc.*, 484 P.2d 488, 491 (Wash. Ct. App. 1971).

138. *See Buhai supra* note 6, at 128.

139. *Id.* at 128.

140. *See generally* Heller, *supra* note 3.

141. Broyles, *supra* note 2, at 526–28.

142. *Cf. id.* at 558–59. In *NCAA v. Tarkanian*, the Supreme Court heard Tarkanian's argument that action by the NCAA was state action, "thus making schools liable for violations of Due Process under the Fourteenth Amendment." *Id.* at 559. The Court, "viewing the relevant 'action' as the adoption of the NCAA legislation by the full membership rather than the university's deferral to that legislation, found '[i]t would be more appropriate to conclude that [the University of Nevada, Las Vegas] has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.'" *Id.* (quoting *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988)).

143. *See generally* Kadence A. Otto & Kristal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS OF SPORT 243 (2008) (arguing that the NCAA is a state actor, like high school athletic associations, and subject to regulations).

144. *Id.* at 243–44.

athletic associations are state actors and, until *Tarkanian*, most courts found the NCAA was a state actor.¹⁴⁵ The courts in these cases reasoned that the state entity (the school) uses a private organization (the athletic association) to accomplish an essential part of its mission.¹⁴⁶ “A state could not avoid constitutional restrictions by giving a private association authority over athletics.”¹⁴⁷ Additionally, the Fifth Circuit found that public high schools were “deeply involved in fielding and promoting athletic teams with expenditures of tremendous time, energy, and resources including financing, training teams, and paying the coaches.”¹⁴⁸ The fact that private schools were part of the athletic association did not change the result. Instead, the schools that chose to join the association would also be subject to the restrictions of the Fourteenth Amendment.¹⁴⁹ This logic was extended to the NCAA, as one district court reasoned that “the high school athletic association’s activities, . . . control, and regulation of its members were ‘remarkably similar to’ the NCAA activities.”¹⁵⁰ The Fifth Circuit affirmed, emphasizing that “[o]rganized athletics play a large role in higher education, and . . . meaningful regulation of this aspect of education is now beyond the effective reach of any one state.”¹⁵¹

However, the courts began to reverse course and find that the NCAA was not a state actor, culminating with *Tarkanian*.¹⁵² There, the Supreme Court reasoned that although the State of Nevada helped in some small way to create the NCAA rules (through the University of Nevada, Las Vegas’s role), the state was not the “source of legislation adopted by the NCAA.”¹⁵³ The Court rejected *Tarkanian*’s argument that the University of Nevada, Las Vegas had “no practical alternative but to comply” with NCAA rules “since the NCAA’s power was so great,” because there were alternatives: The school could have refused to obey the rules and face possible

145. *Id.* at 250–54.

146. *Id.* at 249.

147. *Id.* at 251.

148. *Id.* at 250–51 (quoting *La. High Sch. Athletic Ass’n v. St. Augustine High Sch. Athletic Ass’n*, 396 F.2d 224, 228 (5th Cir. 1968)).

149. *Id.* at 251 (citing *La. High Sch. Athletic Ass’n*, 396 F.2d at 228). Under the Fourteenth Amendment, “[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, § 1. Section 1983 of the Civil Rights Act of 1871 establishes a cause of action when the government violates a citizen’s Constitutional rights under “color of state law.” 42 U.S.C. § 1983 (2008). “The ‘state action’ requirement provides that a private entity is subject to the Fourteenth Amendment under section 1983 only if its action is ‘fairly attributable’ to the state.” *Otto & Stippich supra* note 143, at 243 n.2.

150. *Otto & Stippich, supra* note 143, at 252 (citing *Parish v. NCAA*, 361 F. Supp. 1214 (W.D. La. 1973), *aff’d*, 506 F.2d 1028 (5th Cir. 1975)).

151. *Parish*, 506 F.2d at 1032.

152. *Otto & Stippich, supra* note 143, at 259–60. Beginning in 1984, lower federal courts began to hold that the NCAA was not a state actor on the theory that the Supreme Court in *Blum v. Yaretsky* “rejected the ‘indirect involvement of state governments’ theory” that had been previously relied upon. *Id.* at 259; see *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984); see also *Blum v. Yaretsky*, 457 U.S. 991 (1982).

153. *Otto & Stippich, supra* note 143, at 265 (quoting *Tarkanian*, 488 U.S. at 193).

disciplinary action, or alternatively, the school could discontinue its membership in the NCAA.¹⁵⁴

In contrast, in the high school athletics context, the Supreme Court has declined to apply *Tarkanian*. In *Brentwood Academy v. Tennessee Secondary Schools Athletic Association*, the Supreme Court held that a high school athletic association was a state actor when the association enforced its rules against a member school because there was “pervasive entwinement of public institutions and public officials” in the association’s composition.¹⁵⁵ The Court found that *Tarkanian* was not controlling because the schools that were members of the association at issue were located in the same state, while NCAA member schools are in various states.¹⁵⁶ The fact that the schools were located in the same state was dispositive for the Court in determining state action.¹⁵⁷ Notably, the Court declined to elaborate on this crucial factor, even though college and high school athletic associations are nearly indistinguishable in terms of purpose, structure, and organization.¹⁵⁸ Due to these similarities, it is clear that the logic used in *Brentwood* could and should be extended to the NCAA state action cases. Public schools predominately govern the NCAA, generate the most revenue for the organization, and carry out most of the enforcement of NCAA rules using state resources.¹⁵⁹ The issue of whether the NCAA is a state actor may come before the Supreme Court again.¹⁶⁰ In 2007, the Second Circuit held in *Cobane v. NCAA* that the NCAA “could be deemed a state actor if the allegations in a coach’s complaint were proven.”¹⁶¹ Although the Supreme Court denied certiorari,¹⁶² it is likely that this issue may resurface in the near future.¹⁶³

In other contexts, states have promulgated laws to regulate private industries. For example, Congress adopted the Federal Organizational Sentencing Guidelines, which regulate employee conduct, and issued a list of possible sentences and penalties for corporations found guilty of federal crimes.¹⁶⁴ Under these guidelines, “an effective program to prevent and detect violations of the law substantially mitigates the

154. *Id.* at 266.

155. *Id.* at 270 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001)).

156. *Id.*

157. *Id.*

158. *Id.* at 273 (“[T]he Court did not expound upon why the fact that all public schools were located in one state as opposed to many states should be determinative in light of all of the other similarities between high school and collegiate athletic associations.”).

159. *See id.* at 279–87.

160. *Id.* at 244.

161. *Id.* at 244–45. The coach’s complaint alleged that a “state university colluded with and effected the resignation of a coach in order to ‘placate the NCAA.’” *Id.* (citing *Cobane v. NCAA*, 215 F. App’x 13, 15 (2d Cir. 2007), *cert denied*, 128 S. Ct. 641 (2007)).

162. *Cobane*, 215 F. App’x 13.

163. Otto & Stippich, *supra* note 143, at 244.

164. Rostain, *supra* note 16, at 1402.

penalties imposed on companies convicted of a crime.”¹⁶⁵ A compliance program should set forth compliance protocols and benchmarks, designate compliance personnel, distribute resources as needed, and discipline rule-breakers.¹⁶⁶ Since the 1990s, compliance professionals have developed businesses that cater to various types of organizations and industries.¹⁶⁷ Many of the concerns that exist in regulating corporations also exist in regulating the NCAA and should prompt states to regulate athletic compliance directors.¹⁶⁸

Perhaps the most practical solution would be for the NCAA to amend its own rules and require athletic compliance directors to be licensed attorneys. While it is true that the NCAA has its own rules of conduct contained in the NCAA Manual, it does not indicate the type of training needed to perform the job of a compliance director.¹⁶⁹ The NCAA constitution makes clear that it is the responsibility of each member institution to control its intercollegiate athletic program in compliance with the rules and regulations of the Association.¹⁷⁰ While it specifies that the president or chancellor of the university is ultimately responsible for the administration of all aspects of the athletics program, by all accounts¹⁷¹ it is the athletic compliance director who is in charge of maintaining rule-compliance.¹⁷² In order to ensure that

165. *Id.* (internal quotation marks, alterations, and citations omitted).

166. *Id.*

167. *Id.* Traditionally, clients benefited from hiring a lawyer to conduct internal investigations because the corporation would be protected by the attorney-client privilege. *Id.* at 1412. Under this privilege, corporate clients’ communications with counsel “made for the purpose of obtaining or giving legal advice” were not discoverable. *Id.* Under the *Upjohn* rule, any communication between employees of a company and an attorney for the purpose of receiving legal advice is covered by the attorney-client privilege, not just those communications between attorneys and high-level management. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); see also Rostain, *supra* note 16, at 1413. Today, the attorney-client privilege is not considered as beneficial or essential to corporations in the midst of an investigation. Corporations are pressured to waive attorney-client privilege during an investigation because the corporation’s willingness to waive the privilege is a factor in determining charges and punishments. Rostain, *supra* note 16, at 1415. The Securities and Exchange Commission, Department of Justice, and the Environmental Protection Agency have all stated that they “would consider a company’s waiver of the attorney-client privilege . . . in connection with internal reviews” when deciding whether to enforce rule violations the company may have committed. *Id.* at 1416.

168. Like internal corporate investigations, an NCAA internal investigation conducted by a university that learns of a violation can mitigate its punishment at the penalty stage of an investigation. Rogers & Ryan, *supra* note 48, at 778. Schools and corporations have similar concerns when deciding whether they should use in-house staff to conduct an investigation or hire outside investigators. *Id.* Both organizations are concerned about public perception of an internal investigation. *Id.* The public and media are often skeptical of a completely internal investigation because of the belief that internal people cannot be completely objective. *Id.* at 779. In addition, there is always a chance that the investigation is a sham designed to placate the public, government, or NCAA, and is not a thorough investigation aimed at uncovering any real violations. *Id.*

169. See generally NCAA MANUAL, *supra* note 41, at 43–45.

170. NCAA CONST. art. 2, reprinted in NCAA MANUAL, *supra* note 41, at 3.

171. *Id.*

172. See Marsh & Robbins, *supra* note 1, at 695.

NCAA regulations are followed, the rules should be amended to include a provision specifying who is qualified to be a compliance director. The rules should stipulate that based on their daily tasks of interpreting rules and advising coaches and administrators, compliance directors are required to be attorneys. The regulation should explain that, given the educational requirements needed to become a lawyer, as well as the training in negotiating, drafting contracts, and interpreting statutes, attorneys are most qualified to perform this job.¹⁷³ Because attorneys are bound by a strict ethics code, there is an added incentive for the NCAA to adopt this amendment.¹⁷⁴ This would reassure the Association that the individuals hired as gatekeepers and enforcers of the rules will not treat rule violations with kid gloves, or turn a blind eye, because they are bound by duty both to the NCAA and to bar associations.

The NCAA should look to sports agency regulations for assistance in drafting its regulations. Recognizing that this profession has been described as “one of the most deceptive and unethical aspects of the sports industry,”¹⁷⁵ various states have implemented regulations to restrict some forms of agent conduct.¹⁷⁶ In addition to those regulations, various professional sports leagues have developed their own method of regulation.¹⁷⁷ The first professional sports association that created a program to certify and regulate sports agents was the National Football League Players Association (“NFLPA”), which was founded in 1983.¹⁷⁸ Under its guidelines, “any individual desiring to represent NFL players must be certified as an NFLPA Contract Advisor, and must comply with the NFLPA Regulations Governing Contract Advisors.”¹⁷⁹ In order to receive NFLPA certification, a potential sports agent is required to file an Application for Certification as an NFLPA Contract Advisor.¹⁸⁰

When completing the NFLPA Application, an applicant must state his educational background, his bar admissions or professional licenses, his employment history for the past five years and his experience representing professional athletes. Each applicant must provide names of professional and financial references and must state whether he is bonded if he intends to handle players’ funds. He must also disclose whether he has been disbarred,

173. Cf. Caudill, *supra* note 94, at 38–40.

174. See Denckla, *supra* note 4, at 2593.

175. Buhai, *supra* note 6, at 126 (quoting Ethan Lock, *The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire*, 35 AM. BUS. L.J. 319, 319 (1998)) (internal quotation marks omitted).

176. *Id.* at 126–27. “In addition, the American Bar Association has also recommended that an attorney engaging in a second occupation that involves some practice of law should be held to the standards of the bar for this occupation as well.” *Id.* at 127.

177. See Gary P. Konn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You’re Qualified*, 7 ENT. & SPORTS LAW. 1, 7 (1988).

178. *Id.*

179. *Id.*

180. *Id.*

suspended or otherwise disciplined as a member of a profession, convicted of criminal charges, suspended or expelled from an educational institution, or involved as a defendant in a civil action.¹⁸¹

The NFLPA regulations further require that a Contract Advisor must disclose all relevant qualifications, engage in continuous education on, inter alia, league structure and governance, negotiating techniques, new trends and changes in sports law, and “must attend an annual NFLPA briefing on contract negotiating.”¹⁸² Other professional organizations, such as the Major League Baseball Players Association, National Hockey League Players Associations, and National Basketball League Players Association have similar requirements.¹⁸³ Additionally, due to violations occurring after those regulations were adopted, states began subjecting agents to their own internal regulations.¹⁸⁴ Furthermore, Congress passed the Uniform Athlete Agents Act in 2000, a model law that may be adopted by states.¹⁸⁵ The Act standardizes agent requirements for reporting, registration and record keeping, and also allows offenders to be punished criminally.¹⁸⁶ It would be beneficial to institutions and bar associations to have the NCAA and individual conferences adopt similar requirements for compliance directors at universities, whereby they must detail their qualifications and certifications and become subject to penalties for violations.

From a policy perspective, leaving the industry unregulated is unwise. “A compliance director in a major program is an educator, arbitrator, mediator, advocate, enforcer, and often the fall-guy when the school violates NCAA rules.”¹⁸⁷ Because NCAA violations can result in devastating scandals for athletic departments in particular, and schools in general,¹⁸⁸ it is in the schools’ own self-interest to employ lawyers who are likely more skilled at interpreting NCAA regulations.

Furthermore, a lawyer’s training makes him especially suited for compliance work, even though the NCAA investigation process is designed to be cooperative, not adversarial.¹⁸⁹ Although lawyers are taught to be advocates for their client when working in the adversarial system in civil and criminal litigation, they also have the

181. *Id.*

182. *Id.* at 8.

183. *Id.* at 8–11.

184. Jeremy J. Geisel, *Disbarring Jerry Maguire: How Broadly Defining “Unauthorized Practice of Law” Could Take the “Lawyer” Out of “Lawyer-Agent” Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 233 (2007).

185. *Id.* at 234; see 15 U.S.C. § 7807; NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, UNIF. ATHLETES AGENTS ACT (2000).

186. *Id.*

187. Marsh & Robbins, *supra* note 1, at 695.

188. Heller, *supra* note 3, at 295.

189. See Rogers & Ryan, *supra* note 48, at 760.

opportunity to develop negotiating skills in settlements and arbitration.¹⁹⁰ Beyond this, employing an attorney as the compliance director is useful because NCAA investigations sometimes become adversarial when the investigation results in a disagreement about findings.¹⁹¹ When this occurs, the attorney's expertise would be valuable because he can go into "trial mode" at a hearing before the COI to dispute facts with the enforcement staff.¹⁹² Although a director with a sports management or other masters degree may understand the workings of the NCAA investigation process, an attorney will be more skilled at fact-finding and interpreting regulations and legislation.¹⁹³

V. CONCLUSION

Compliance directors play a vital role in a university's athletic department, guaranteeing that the school is complying with NCAA rules and regulations. As a member institution, the school has agreed to comply with these rules, and it is up to the compliance director to ensure that the school does so. Because compliance directors interpret legislation and give advice with legal consequences, they are engaged in the practice of law. Thus, those directors who are not attorneys are engaged in the unauthorized practice of law, and it is contrary to the interests of the legal profession to allow this to continue. In order to promote regulation, state legislatures and the NCAA should adopt laws and regulations that require these professionals to be attorneys in order to protect the schools and athletes they represent.

190. Opportunities to develop these skills start as early as law school. *See generally* New York Law School, Academics, Lawyering Skills Center Simulation Courses. http://www.nyls.edu/academics/jd_programs/lawyering_skills_externships/simulations (last visited Jan. 4, 2010).

191. Rogers & Ryan, *supra* note 48, at 760.

192. *Id.* When a school voluntarily agrees to become a member of the NCAA, it agrees to abide by all rules and regulations of the NCAA. *See id.* at 759. This includes a duty to assist in the investigation process, regardless of whether the investigation helps or hurts the institution. *Id.* at 757–58. “[A]n institution with an incriminating document must disclose it—even if it is not requested—as the Bylaws impose a continuing duty to self-police and report violations.” *Id.* at 758. The prosecution in the criminal justice system has a similar disclosure requirement. *Id.* at 758–59. *Brady v. Maryland* requires a prosecutor to disclose to the defendant “all evidence material to guilt or punishment.” *Id.* at 758. Because the state and a prosecutor should be motivated by a sense of justice and “not to obtain a conviction,” this requirement is both practical and justified. *Id.* at 758–59. Similarly, the institution’s ultimate interest should be in embracing and upholding NCAA policies, not wriggling out of a punishment. *See id.* at 759.

193. *See id.* at 757–60.