ETHICS AND THE SPORTS LAWYER: A COMPREHENSIVE APPROACH

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I. SPORTS REPRESENTATION AND ITS MOVEMENT TO THE LEGAL PROFESSION

The role of the sports lawyer[1] has greatly expanded in past years. This expansion has been both in the capacity of individual client representation, and in the many other areas falling in the category of "sports law."[2] One factor impacting the growth in the personal representation area is the escalating salaries of professional athletes.[3] Whether be-

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1. A sports lawyer is essentially an attorney who is working on a legal matter that has found its way into the sports domain. This Article's primary focus is on the representation of sports figures, such as professional athletes. While the three major sports leagues (football, baseball, and basketball) are most often discussed, virtually all sports apply to the Article. The general area is referred to at times as the "sports representation industry," which includes both lawyers and agents.

2. The various areas of sports law are wide-ranging, and could include labor law issues, rules and regulations of amateur sports, constitutional issues (perhaps the drug testing of athletes), personal injury litigation, and even copyright law. *See* Hochberg, *Sports Law, Anyone?*, SPORTS INC., Aug. 15, 1988, at 44 (discussing the difficulty in defining sports law, as the area is really an amalgam of various legal disciplines).

3. In 1987, The top 100 income earners in sports averaged over $1.4 million, a dramatic increase from the previous four years. *The 100 Highest-Paid Athletes*, SPORT, June, 1987, at 23, 23-27. In six years (1982-88) the number of millionaire sports personalities grew from 23 to 118. *Who Makes What in Sports*, SPORT, June, 1988, at 23. More incredibly, 21 baseball players, when considering salary, attributable deferred pay-

cause of this financial incentive, or merely the supposed glamour of the professional contracting process, there has been a movement to represent sports clients. This combination of factors has resulted in intense competition to enter the sports representation industry. The competition, as could be expected, has brought with it abuse.

The most prominent target of this abuse is the sports agent, a non-lawyer that serves the same role as agents in other areas generally.[4] The sports agent is a figure known for such unethical behavior as overly aggressive recruitment practices and "early signings,"[5] unreasonable fees, and financial mismanagement. Documented cases of agent abuse extend beyond mere unethical behavior;[6] agents throughout

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ments, and pro-rated share of any signing bonus, were to earn over $2 million for the 1989 season. Bodley, *Salary Record Goes to Hershiser*, USA Today, Feb. 17, 1989, at C1, col. 2.

The financial impact of salaries is further seen through the "everyday" athlete in the various major professional sports leagues. The average salaries for the 1987 season were as follows: baseball, $412,454; football, $250,000; and basketball, $510,000. Information provided by the Major League Baseball Players Association ("MLBPA"), National Football League Players Association ("NFLPA"), and the National Basketball Players Association ("NBPA") (July 1, 1988).

4. Such persons "ac[t] for or in the place of another by authority from him" or "represen[t] another in contractual negotiations." RESTATEMENT (SECOND) OF AGENCY § 1 (1958). As used in this Article, sports agents are not only those that represent professional athletes in any sport, but those that attempt to do so. This use obviously encompasses persons who are not also members of the legal profession; more and more lawyers, though, are serving the role of sports agents. This may include an attempt to "segregate" the two roles, disaffirming the lawyer status. *See infra* subpart III(B)(4).

Players utilizing agents (primarily for contract negotiations) is a recent phenomenon, with the practice becoming customary as recently as the early 1970s. For a thorough study of sports agents, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS §§ 3.17-.19 (1979 & Supp. 1985) [hereinafter WEISTART & LOWELL]; Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701 (1987); Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815 (1981); Special Report, *Agents: What's the Deal?*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 74; Cover Story, *Athletes & Agents: Is Something Wrong?*, THE SPORTING NEWS, Nov. 16, 1987, at 10; Cover Story, *Agents Under Fire*, USA Today, June 22, 1987, at C1, col. 3.

5. *See infra* note 97. Reasonable fees in the sports representation setting are discussed *infra* subpart VI(A); for an example of an agent mismanaging a client's finances, see *infra* subpart IV(C).

6. Sports agents have, however, made an effort to improve their ethical standards in the representation industry. The Association of Representatives of Professional Athletes ("ARPA"), which was founded in 1978, has a code of ethics and an organized continuing education program. The ARPA Code addresses many of the same issues (*e.g.*, conflict of interest, competence, and reasonable fees) as the various ethical codes

1987-89 were prosecuted under various criminal laws, ranging from tampering with a sports contest,[7] to racketeering.[8] A combination of this type of behavior has led to a barrage of legislation directed toward

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of the legal profession. The ARPA Code is reprinted in the Appendix to this Article. The primary criticism of these efforts centers on the problems of enforceability. *See* Sobel, *supra* note 4, at 723 (noting that with membership not being legally required, the ARPA Code of Ethics is not effective in remedying inadequacies of the law in dealing with the abuses of the sports agent); *see also* G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 128-29 (1986).

7. *See* Mortensen, *Walters Will go on Trial Today, Alabama Prosecutor: 'We're Going to Show These Agents'*, The Atlanta Constitution, May 9, 1988, at D1, col. 5; Mortensen, *Walters, Alabama Negotiate: Agent Agrees to Repay $200,000*, The Atlanta Constitution, May 10, 1988, at E1, col. 2 (both describing the indictment, and subsequent settlement, of New York agent Norby Walters on charges brought by the state of Alabama for commercial bribery, deceptive trade practices, and tampering with a sports contest, resulting from his and partner Lloyd Bloom's dealings with University of Alabama basketball players Derrick McKey and Terry Coner). The settlement followed the Alabama conviction (which was later overturned) of agent Jim Abernethy for tampering with a sports contest, and the plea bargain of Bloom for the misdemeanor charge of deceptive trade practices. Scorecard, *Soft Time*, SPORTS ILLUSTRATED, May 23, 1988, at 13. Commentators have stated that although the state's attempts to keep unscrupulous agents away from college athletics is to be commended, the sentence chosen for Bloom—washing state trooper cars for one week—was "laugh[able]." *Id.* The sentence chosen should have been more closely associated with the charge, such as being punished by performing community services. *Id.*

8. *See* Grand Jury Indictment, United States v. Walters & Bloom, No. 88-CR-709 (N.D. Ill. filed Aug. 24, 1988); Bannon, *U.S. Indicts Three Agents; 'First Step?'*, USA Today, Aug. 25, 1988, at C1, col. 5 (federal indictments following a 17-month FBI investigation of agents Walters and Bloom on charges of racketeering, conspiracy, extortion, and mail and wire fraud, for their dealings with 44 college athletes, primarily in the sport of football). The same agents were reputed to have utilized organized crime connections to not only fund the "early signings" of professional prospects, but also to threaten wayward signees. *Id.* (describing the "standard sales pitch" of the agents, that of an offer of between $2,500 and $5,000 cash up front, followed by monthly payments of $250, in return for the exclusive rights to represent the players when they turned professional; several players that threatened to leave the agents supposedly were told that the agents would arrange someone to "break their legs"). For commentary on these indictments, see Selcraig, *The Deal Went Sour: Sports Agents Norby Walters and Lloyd Bloom Were Indicted for Racketeering and Extortion*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 32. The two agents were eventually acquitted on two counts of mail fraud, but were found guilty of five counts of racketeering and fraud. Fiffer, *Two Sports Agents Convicted of Fraud and Racketeering*, The New York Times, April 14, 1989, at 1, col. 1.

Quite logically, these abuses have inspired numerous commentaries aimed at assisting the athlete in retaining a competent representative. For a sample listing of such sources, see *infra* note 99.

agents.[9]

Recent years have shown that sports clients are increasingly turning to the legal profession for services formerly provided by agents.[10] This undoubtedly is due, at least in part, to agent abuses, which have been both flagrant and highly publicized. Fifty percent of those actively involved as representatives in the three major professional sports leagues are lawyers, and an even higher percentage represent the major clients.[11]

With this shift to the legal profession, the competition among at-

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9. Up until several years ago, the sports agent was largely unregulated. *See* Comment, *supra* note 4, at 828-30. Spurred by the aggravated conduct of several agents, in particular Norby Walters, Lloyd Bloom, and Jim Abernethy, some 15 states have passed acts that require agents (and anyone serving in that role) to be certified. *See generally* Sobel, *supra* note 4, at 724-30; Kohn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified*, 6 ENT. & SPORTS LAW. 1 (1988). Those states most recently passing laws in this area (as of 1988) include Florida, Georgia, Indiana, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Ohio, and Tennessee. Generally, these states, while vigorously pursuing and passing the laws, have not followed up in terms of compliance and enforceability.

Lawyers, with the exception of the California and Louisiana schemes, likewise must register under these state laws. The ethical issues raised in this Article do not directly address this legislation. Nevertheless, a very basic ethical concern is raised when lawyers fail to comply with these laws, and continue to enter into these states for the purpose of meeting with prospective sports clients. It is commonplace for lawyers or agents to enter states without proper licensing.

10. For lawyers in the sports representation area, such services typically begin with the client's contract (*e.g.*, negotiation and drafting), and follow with other traditional legal services, including estate planning, insurance protection, investment overseeing, and general counseling.

11. Lawyers are more often serving as contract negotiators and player representatives generally. A survey of the three major professional leagues shows that well over 50 percent of the current representatives are in fact lawyers.

***National Football League ("NFL")**—The top 10 draft choices from 1985-88 selected lawyers 78 percent of the time (31/40). In addition, the top six draft picks in 1983 retained lawyers.

***Major League Baseball ("MLB")**—"There has been an increasing move over the past five years for players to be represented by attorneys. Out of the 150 people that are currently representing [baseball] players, between 50 and 60 percent actually are attorneys. Out of the 25 people that represent the majority of the players, even a larger percentage are attorneys." Telephone interview with Arthur Shack, Counsel to the MLBPA (July 21, 1988).

***National Basketball Association ("NBA")**—Of the 227 representatives registered with the NBPA and the Committee on Agent Registration and Regulation, 134 (or 59 percent) indicate that they are members of the legal profession. Information provided by Lori Weisman, Administrative Assistant to the NBPA (Aug. 1, 1988).

torneys has grown fierce, just as with agents. Established sports lawyers seek to expand their client base, while other lawyers aspire to enter the representation industry. This scenario necessarily requires lawyers to pay special attention to the ethical mandates of the legal profession.

This Article discusses the sports lawyer and these ethical rules. While one work would be hard-pressed to thoroughly examine every potential legal ethics problem arising in the sports representation context, these materials attempt to survey the most debated and relevant of these issues. The Article furnishes the sports lawyer with one source for a discussion of the policy and purpose of the ethical rules, as well as the modern state of the law. Practical guidelines as to the application of these rules in the sports representation industry distinguish this ethical work from general ethical studies. These guidelines, and additional commentary, are hoped to form a useful starting source for lawyers addressing the numerous factual scenarios in this area.[12]

This Part begins this Article with one major premise: there exists an unquestioned movement of sports clients to members of the legal profession, over the much-maligned sports agent. Multiple sources are provided to document this premise, as well as to provide a starting point for a thorough ethical survey.

Part II discusses the many threshold ethical issues facing the sports lawyer, such as avoiding confusion and lawyer solicitation. These issues arise as a result of sports lawyers often engaging in secondary, law

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12. Analysis will focus primarily on the 1969 American Bar Association's Model Code of Professional Responsibility ("ABA Code") and the 1983 Model Rules of Professional Conduct ("Model Rules"), as applied to the sports representation industry. Reference will also be made to the ARPA Code of Ethics, which is reprinted in the Appendix.

For general guideline purposes, the various ABA Code provisions and their significance should be mentioned. Nine canons make up the ABA Code, with each canon expressing the standards of professional behavior required of attorneys. Ethical considerations and disciplinary rules are derived from each canon. An ethical consideration represents the ethical goals toward which all lawyers should strive, while the disciplinary rules are mandatory in nature and indicate a minimum level of ethical conduct which an attorney must maintain to avoid disciplinary sanctions. *See generally* Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804 (1982); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

The Model Rules are the ABA's official, "model" statement on lawyer conduct. As of November 1, 1988, the following states had adopted the Model Rules either in their entirety or with some modification: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia, and Wyoming.

related occupations, simultaneously with a law practice. The goal of this Part overall is to provide a framework for discussion of all of the major issues facing sports lawyers. The Part concludes with one major finding, important throughout the work, namely that the ethical rules apply to sports lawyers in their related occupations.

Part III examines one of the more debated topics in the field of ethics and the sports lawyer: solicitation. The Part begins by tracing the policy and purpose of rules regarding "information about legal services," and follows with modern statements in the area. These more recent court holdings allow truthful, direct mail contact with prospective clients. This confirms the belief that the true concern in this area is in-person client contact. Four persuasive arguments—urging a specialized solicitation exception for sports law—are formulated by the Part. These arguments state that the solicitation rules should not apply, for example, because of the nature of the sports representation industry. Finally, common fact situations in the sports representation industry are applied to these solicitation rules. These scenarios should have personal applicability to those seeking to begin a sports representation practice.

Part IV discusses lawyer competence. Initial discussion centers on general practitioners entering the sports law field. These practitioners are not precluded from embarking on such a practice; upon client consent, they may associate competent counsel. The Part also examines a troublesome segment of competence: client neglect. Sports lawyers must confront these issues due to the likely mixture of both lucrative and lower-salaried clients. Finally, the fact that lawyers have higher standards than sports agents generally is discussed.

Part V focuses on the lawyer's duty to avoid "conflicting" or "differing" interests. The ethical rules provide a starting point discussion, with emphasis on the lawyer's obligation of loyalty and confidentiality. Subparts III(B)(1)-(7) demonstrate through examples just how rampant potential conflicts of interest are in the sports representation industry. These examples include: (1) competing client interests; (2) endorsements; (3) fee arrangements; (4) advising the amateur athlete; (5) players association lawyers; (6) event management; and (7) coach-player representation. Finally, this Part concludes that members of the legal profession, with discretion under the "disinterested lawyer" standard, may, depending on the circumstances, avoid improprieties in this area. Much of this conflict avoidance will be determined by the scope of the lawyer's representation, a matter that lawyers in general are obligated to fully explain to all interested clients.

Part VI examines two additional ethical concerns for sports law-

yers. First, lawyers are required to charge a reasonable fee. Second, sports lawyers face ethical issues due to their unique role when dealing with the media. The issue of ethical fees does not solely relate to the particular method chosen to arrive at those fees; the overall issue is one of "reasonableness." In dealing with the media, sports lawyers are urged to limit their personal motives, and only seek advancement of a specific client need when addressing the press. Compliance with this "rule of self-promotion" is recommended, even though it is not directly set out by the rules of ethics.

Part VII concludes that the ethical standards of the legal profession are of increasing importance. This simple fact requires that lawyers guide their conduct by the high standards of the legal profession, and not those of the sports representation industry. For the standards of sports agents and the representation industry, from an overall standpoint, have fallen below the standards of the legal profession.

While established sports lawyers, or those general practitioners with an interest in this area, will be an obvious target of this work, it is hoped that other factions of the sports industry will benefit as well. For example, an athlete already represented must understand the obligations of his representative, whether that individual is an attorney or an agent.[13] As previously stated, a goal of this work is to place the ethical rules of the legal profession at the forefront of an area of law that not only is growing rapidly, but also is intensely competitive. It is also hoped that the Article will aid additional research in this field, such as the adoption of a code of ethics for sports lawyers.

II. PRELIMINARY ISSUES

A. The Sports Lawyer's Practice: Nonlegal Services

Sports law, as previously mentioned,[14] can take a lawyer into a wide range of practice areas. Serving as a sports lawyer can additionally take members of the legal profession *outside* the confines of rendering legal advice. That is, in addition to typical services provided by a sports lawyer,[15] these lawyers may serve the same roles as sports agents or

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13. This Article will benefit those athletes making such a selection, as to the boundaries of lawyer conduct generally. Additionally, it is hoped that the sports management industry, which overlaps considerably with the many duties of a sports client's legal counsel, will find these ethical guidelines of use—particularly as a starting point survey to the many issues present when representing sports personalities.

14. *See supra* note 2.

15. *See supra* note 10.

other nonlawyers. Such services might include procuring and negotiating endorsement contracts for clients,[16] working for a sports management or marketing firm,[17] or placing clients into investment opportunities.[18] This overall transition from providing purely legal services to performing other representative tasks propels the sports lawyer into "dual or multiple occupations,"[19] raising numerous threshold ethical issues.

The purely representational aspect of sports law, the primary focus of this Article, may or may not apply to this dual occupation scenario. Many lawyers in this field work in conjunction with experts in other areas, such as accountants, financial planners, and insurance agents. By appointing these nonlawyer experts, these issues are less likely to arise. Nevertheless, some sports lawyers—due, perhaps, to the competition to maintain work in this area[20]—quite frequently expand their practice into service areas not necessarily requiring a law degree. The sports lawyer's role expansion is similar to the entertainment lawyer's gravitation to the various areas of personal representation available in that industry. Those services range from counselors to talent agents and business managers.[21] Even though this expansion may ultimately benefit the lawyer's clients, once the transition in services has occurred, the lawyer is no longer acting exclusively as legal counsel.

Even sports lawyers that actively delegate many of these nonlegal services to outside experts must pay attention to these initial issues.[22] For, as mentioned below, the sports representation industry by its very nature is not necessarily comparable to a traditional area of legal repre-

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16. *See infra* subpart V(B)(2).

17. *See infra* subpart V(B)(6).

18. *See infra* subpart IV(C).

19. Cole-Wallen, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations*, 8 HASTINGS COMM/ENT L.J. 481, 495 (1985); *see also* Comment, *The Dual Practitioner—DR 2-102(E)*, 5 J. LEGAL PROF. 191 (1980).

20. The competition is intense between both lawyers and agents. *See supra* Part I.

21. Cole-Wallen, *supra* note 19, at 493-94; *see id.* (suggesting that the "balance of representation" is upset when the lawyer expands his role, usurping such roles as the talent agent and personal manager; this dual role may work to the detriment of the client, once the lawyer is an "active participant and no longer an impartial advisor 'policing' the deal"). However, if the "team approach" (*i.e.*, hiring managers, accountants, etc.) is abandoned by a lawyer, it is said that a lawyer is best suited to perform these multiple roles. *See id.* at 494 (citing Panel Discussion, *Legal Aspects of Personal Representation*, COMM/ENT ENTERTAINMENT LAW SYMPOSIUM (Jan. 26, 1985)).

22. The overriding issue when discussing these multiple service areas, and the delegation of those services not within the lawyer's expertise, is lawyer competence. *See infra* Part IV.

sentation; lawyers are in direct competition with nonlawyers for the same clients.[23] More importantly, sports lawyers offer the same services as agents, at least initially.[24]

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23. *See infra* subpart III(B)(1). Some sports lawyers argue, based on the nature of the representation industry, that if they enter the industry and hold out themselves as a sports agent, they avoid application of the ethical rules of the legal profession. *See infra* subpart III(B)(4). This argument, as brought out by the discussion below, is rendered faulty. *See infra* notes 54-62 and accompanying text.

24. The primary service provided by sports lawyers (as well as agents) is the negotiation of the client's professional sports contract. There can be little doubt that the general service of negotiation is an area of traditional legal representation. *See, e.g.*, G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 2 (1983) (American lawyers spend a major portion of their time negotiating – *i.e.*, the formation and execution of contractual transactions and relationships – in dispute and nondispute settings); *see also* C. WOLFRAM, MODERN LEGAL ETHICS § 13.5 (1986).

Negotiators in many arenas must be familiar with the law and legal institutions in order to function effectively. A negotiating lawyer's role as legal consultant might even be secondary in some of these settings, such as negotiating a business transaction. "A lawyer's chief value as negotiator might be in a capacity to deal creatively with the challenge of ordering a future course of interactions between the negotiating parties that maximizes the protections and benefits for each." C. WOLFRAM, *supra*, § 13.5, at 712. Once serving this role, and "holding himself out" as an attorney, negotiating a professional sports contract is unquestionably "practicing law," and not necessarily a law related, secondary occupation under the meaning of this Part. One state ethics opinion, specifically applicable to contract negotiations on behalf of an athlete, has so held. *See* Ill. Comm. on Professional Ethics, Formal Op. 700 (1980) (Dual Practice; Solicitation) [hereinafter Ill. Op. 700], *reprinted in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 801:3005 (1980-85) [hereinafter LAWYER'S MANUAL]. The portion of that opinion dealing with the issue of practicing law is as follows:

> The . . . question presented deals with whether an attorney may handle "player representation" from the same office in which he engages in the general practice of law. It would appear, therefore, that the attorney making this inquiry questions whether the representation of athletes is actually the practice of law in that it may include a wide range of business counseling, as well as contract negotiation. This doubt could be prompted by the fact that non lawyers frequently engage in these activities.
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> The committee is of the opinion that, when an attorney engaged in the private practice of law represents a client in contract negotiations and general business counseling, these activities constitute the practice of law and it would be professionally proper to handle them from the same office in which he engages in the general practice of law.

Ill. Op. 700, *supra*. As this opinion indicates, the fact that a lawyer's role as negotiator may be secondary at times to his role as legal consultant, in addition to the fact that many nonlawyers perform the same services, does not alter the conclusion that negotiating sports contracts is practicing law. *Compare* Cole-Wallen, *supra* note 19, at 492-93 (stating that the complexity of contract negotiations in the entertainment area may necessitate an entertainment lawyer undertaking the representation, to the exclusion of a

B. Ethical Rules Applied to a Lawyer's "Secondary Occupation"

The ethical constraints placed on those sports lawyers choosing to expand into secondary occupations are similar to other ethical areas generally. This engagement will be allowed, if conforming to various standards set out by the ethics rules.[25] The overriding standard is that lawyers—if the secondary occupation is "law related"—must still conform to the applicable state ethical code, whether it be the Model Code of Professional Responsibility ("ABA Code"), the Model Rules of Professional Conduct ("Model Rules"), or some variation of the above. As one formal opinion stated, a lawyer may conduct his law practice with this secondary occupation in the same office, "if he complies . . . with all provisions of the [ABA] Code."[26]

The stringency of the ethical standards concerning dual occupations reflect the overall disfavor of this practice. While a dual practice may provide services of a higher quality, and the possibility of lower client costs, it raises basic questions of lawyer competence. Sports lawyers engaging in dual occupations may find it increasingly difficult to devote sufficient time to both occupations, in keeping abreast of current developments.[27] Despite these reservations, lawyers may even conduct completely unrelated activities concurrently with a law practice, both in the same office. Serving dual roles unrelated to law formerly required full compliance with DR 2-102(E). Lawyers engaged in a dual practice were not permitted to indicate this on firm notices to the

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talent agent or personal manager).

25. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972) [hereinafter Formal Op. 328]; *see* Cole-Wallen, *supra* note 19, at 500 n.88 (citing *Continuing Professional Constraints, Current Legal Trends and Developments in the Entertainment and Sports Industries*, ABA FORUM COMM. OF ENTERTAINMENT AND SPORTS INDUSTRIES (D. Lange ed. 1979)); *id.* at 504 n.107; C. WOLFRAM, *supra* note 24, § 16.4.

26. Formal Op. 328, *supra* note 25, cited *infra* note 30. An occupation not related to the law is one in which the products or services provided by the lawyer to the client do not involve services which would be essentially legal in nature. Cole-Wallen, *supra* note 19, at 503; *see id.* (stating examples such as a lawyer operating a shopping center, retail enterprise, or manufacturing enterprise). Law related occupations would include such areas as an accountant, business consultant, manager, or mortgage broker. *Id.*

27. *See* Cole-Wallen, *supra* note 19, at 502 (discussing the lawyer-CPA dual roles, and stating that each are full-time jobs, and "the public cannot be expected to understand or evaluate competence and is likely to be misled and confused by dual titles"). Dual occupations are also disfavored because of another ethical concern: solicitation. It is said that a second occupation may serve as a "feeder" to the attorney's law practice, raising "indirect solicitation" issues. *Id.* at 502; C. WOLFRAM, *supra* note 24, § 16.4, at 897.

public,[28] such as on law firm letterhead or on an office sign. Along with those reservations discussed above, it was felt that listing the lawyer's dual occupation with his law practice would misleadingly recognize him as a specialist. This was repealed in 1980, deferring to the overall ethical standards for notice.[29] The situation of a lawyer conducting an occupation unrelated to law generally does not apply to the sports lawyer.

The more likely scenario for the sports lawyer is that of engaging in a separate, law related occupation. Examples of such a secondary occupation for general practitioners, as provided by the ethics rules, are a marriage counselor, accountant, or mortgage broker.[30] These occupations would clearly be analogous to the sports lawyer's work in other areas. Expanding areas typically include procuring and negotiating endorsement contracts, post-career counseling, and financial planning.[31] Sports lawyers with such an expanding role are obligated to comply with the ethical provisions that apply to all members of the legal profession, both within their law practice, and law related occupation.[32]

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28. Disciplinary Rule 2-102 governs professional notices, such as firm letterheads, telephone directory listings, and the like. Public listings are only allowed if in "dignified form." *See* AMERICAN BAR ASSOCIATION MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102 (1969) [hereinafter ABA CODE].

29. Comment, *supra* note 19, at 206-07; *see id.* (stating that separate identification under DR 2-102(E) of a law practice and other occupation "is no longer a viable part of the ABA Code"); C. WOLFRAM, *supra* note 24, § 16.4, at 897 ("A lawyer continues to remain fully subject to the lawyer codes, even if the lawyer holds another certificate and even if the lawyer's work with clients involves fields and professions other than law.").

30. Formal Opinion 328, *supra* note 25, provides general guidelines for law related occupations. The opinion (emphasis added) states as follows:

> [A] lawyer may conduct . . . his law practice and a second occupation, not law-related from one office; and he may practice from the same office both as a lawyer and as a member of a law-related profession or occupation, such as a marriage counselor, accountant, labor relations consultant, real estate broker, or mortgage broker, *if he complies . . . with all provisions of the Code of Professional Responsibility* while conducting his second, law-related occupation.

31. For the sports lawyer's services that are legal in nature, see *supra* note 10.

32. Formal Op. 328, *supra* note 25, cited *supra* note 30; C. WOLFRAM, *supra* note 24, § 16.4, at 897-98 ("[t]he issue under the Model Rules . . . will be handled under the relevant rules on advertising and lawyer publicity and under other rules for particular issues"); Comment, *supra* note 19, at 207 ("[a]ll the provisions of the Code . . . will apply to an attorney's conduct while he is engaged in another business or profession"). It is said that a sports or entertainment lawyer may find it extremely difficult to engage in a secondary occupation, due to this requirement of conforming to the overall stan-

Threshold issues that arise in terms of sports lawyers engaging in dual occupations include many of the same ethical matters in this Article overall; a list of such issues, as in any analysis of professionalism, would not be exclusive. The following discussion develops several of these potential ethical concerns.

1. Confidentiality. — Conflicting obligations of loyalty, confidentiality, and disclosure may be placed on the lawyer by each of his occupations.[33] Lawyers are required to preserve the "secrets" or information acquired in the law related occupation, just as in the law occupation.[34] Further, just as with law offices generally, a sports lawyer in a dual occupation will likely delegate duties to nonlawyers. This is, of course, essential to an efficient office. Nevertheless, the sports lawyer must be concerned with client confidentiality in this situation.[35]

2. Avoiding confusion. — Lawyers are required to avoid confusion among the various functions of the dual occupations. State bar associations have in the past typically required the separation of the activities of the two occupations.[36] This would include maintaining a clear distinction between the two occupations, by avoiding the commingling of expenses, receipts, files, and records.[37]

3. Conflict of interest. — Potential conflicts of interest[38] could arise between the various clients utilizing the lawyer's legal or secondary oc-

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dards of the ethics rules. Cole-Wallen, *supra* note 19, at 501.

33. This would be the case, even though confidentiality generally takes on a new meaning in the sports law area. *See infra* subpart V(A)(2).

34. *See, e.g.*, LAWYER'S MANUAL, *supra* note 24, at 801:1701 (California) (duty to preserve confidences will bind lawyers, even though others engaged in the law related occupation — such as a sports agent in this Article — do not have similar duty).

35. *See* C. WOLFRAM, *supra* note 24, § 16.3, at 894 (discussing problems of nonlawyer employees, and stating that lawyers should take care to select employees suitable to being trusted with confidential client information, and to assure that employees understand their responsibilities to stand by them); *see also* ABA CODE, *supra* note 28, Ethical Consideration (EC) 4-2.

36. *See, e.g.*, LAWYER'S MANUAL, *supra* note 24, at 801:3006 (Illinois) (a lawyer-physician "may also practice medicine . . . if separate offices are kept and other efforts are made to isolate the two practices"); *id.* at 801:7902 (South Carolina) ("collateral business [of serving as] stockholder, officer, or director of a corporation primarily engaged in a real estate purchase and loan closing business [along with the practice of law] . . . should be kept separate and apart from the practice of law").

37. Cole-Wallen, *supra* note 19, at 505.

38. *See infra* Part V (full treatment of conflict of interest in sports law).

cupational services. For example, the lawyer's nonlegal interests of his secondary occupation could present a personal conflict with the interests of his client.[39] Because of the lawyer's desire for his secondary occupation to be both lucrative and successful, commentators have stated that the potential for conflict of interest is amplified in the secondary occupation scenario.

Depending on the nature of the occupation, the lawyer's personal interest in this secondary occupation may take on numerous forms. These interests range from a proprietary or possessory interest, to a security or pecuniary interest. This personal financial interest of the lawyer is potentially pitted against the interests of his client, in violation of the "vigorous" representation requirements.[40]

4. Advertising and publicity. — Ethical advertising is not a serious practical concern in the field of sports law;[41] nevertheless, a lawyer engaging in a secondary occupation may misleadingly imply that he is a specialist in the area of law connected with that secondary occupation. This would be contrary to the bar's traditional reluctance to permit this type of recognition.[42]

One concern that will more likely face the sports lawyer is his unique role when dealing with the media.[43] The lawyer's duties in his secondary occupation (just as when conducting a law practice) restrict

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39. Two general types of conflicts of interest are delineated by the ethics rules; a lawyer may face a conflict (1) due to the lawyer's personal interests, or (2) due to the lawyer's clients, whether present or former. *See infra* subpart V(A)(3).

40. *See* Cole-Wallen, *supra* note 19, at 506 (citing ABA CODE, *supra* note 28, DR 5-104(A), which prohibits a lawyer from "enter[ing] into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure").

This conflict generated by the lawyer's law related occupation is exemplified in a variety of situations in the sports representation industry. *See infra* subpart V(B)(2) (lawyer providing service of procuring and negotiating endorsement contracts for sports clients); *infra* subpart V(B)(6) (lawyers, in addition to personal representation of athletes, managing the events the athletes participate in).

41. *See infra* note 84 and accompanying text. The more noteworthy issues in this general area are in-person and direct mail solicitation. *See infra* subpart III(A)(3).

42. C. WOLFRAM, *supra* note 24, § 16.4, at 897. For example, one jurisdiction stated that a real estate lawyer may not identify himself as such in any publication regarding his loan closing business. *See* LAWYER'S MANUAL, *supra* note 24, at 801:5403 (Montana) (attorney "may not hold himself out as a specialist in the subject matter area of the other business").

43. *See infra* subpart VI(B).

his statements to the press, unless those statements serve specific client needs.[44]

5. Solicitation. – A legitimate area of concern for sports lawyers conducting a secondary occupation is lawyer solicitation.[45] Lawyers are precluded from using a secondary occupation to solicit clients for their law practice. The traditional concern of the bar was said to be that the secondary occupation would be used as a "feeder" for the lawyer's law office.[46] These solicitation mandates also include prohibitions for accepting legal clients where the lawyer has given unsolicited advice, or where the matter originated from the lawyer's secondary occupation.[47]

6. Reasonable fees. – A lawyer's secondary occupation may not be conducive to an hourly rate or other fee arrangement.[48] This might be the case, for example, when a sports lawyer's services include the procuring and negotiation of endorsement contracts for clients. Lawyers in the endorsement situation, as well as other areas, may be tempted to pattern their fee methods after agents and other nonlawyers performing virtually identical services. Whatever decision is made as to the fee calculation method, lawyers will continue to be bound by ethical standards of reasonableness – both when conducting their law practice, and secondary, law related occupation.[49]

7. Competency. – Arguably the most significant concern of a

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44. This is true in light of the "rule of self-promotion," formulated *infra* subpart VI(B)(1), which states that sports lawyers, while often serving important and necessary functions when communicating with the media, often have personal goals of client expansion in mind, and thus must restrict their comments unless they serve specific client needs.

45. *See infra* Part III (full treatment of solicitation in sports law).

46. C. WOLFRAM, *supra* note 24, § 16.4, at 897; *see, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1497 (1983), *reprinted in* LAWYER'S MANUAL, *supra* note 24, at 801:5504 (lawyer-psychiatrist). *Compare infra* note 133 and accompanying text (lawyer, attempting to avoid the mandates of solicitation, impermissibly sets up corporation for the very purpose of soliciting sports clients).

47. Cole-Wallen, *supra* note 19, at 508 (citing New York State Bar Association Comm. on Ethics and Professional Responsibility, Formal Op. 206 (1971), *reprinted in* 44 N.Y.S.B.J. 120 (1972)).

48. One common argument in the sports law area is the proper method for calculating fees, both when negotiating player contracts and otherwise. *See infra* subpart VI(A)(1) (percentage-of-the-contract method debated with the more traditional hourly rate form).

49. *See supra* notes 25-32 and accompanying text.

sports lawyer engaging in a secondary occupation, the lawyer must provide all clients with competent representation. This standard applies both when performing legal services and otherwise. A lawyer engaging in a secondary occupation is required to maintain a certain level of knowledge and skill, as with lawyers entering new areas.[50]

As previously discussed, when a sports lawyer utilizes the "team approach" to a particular representation, such as working with accountants and investors, the likelihood of incompetency due to expanding into a dual occupation is decreased. The sports lawyer in such a scenario retains the independent professional judgment and impartiality of lawyers generally, by not acquiring an interest in the client's affairs; additionally, he avoids the potentially confusing or misleading status of maintaining multiple titles.[51]

8. Unauthorized practice of law.—By carrying on dual occupations, sports lawyers likely will direct and supervise nonlawyers in their law office. Necessity for delegation, as previously mentioned, is essential for office efficiency; however, it raises the potential problem of aiding the unauthorized practice of law by a nonlawyer.[52] The nonlawyer must be directly supervised by the lawyer and may not engage in acts that constitute the practice of law. Furthermore, the nonlawyer may not be given an ownership or managerial role in the enterprise if any part of his or her work involves the practice of law.[53]

C. Threshold Issues as Applied to "Ethics and the Sports Lawyer"

Once establishing that the ethical rules are binding throughout the sports lawyer's various roles, the ethical issues discussed in this Article are placed more in focus. This realization should be compared with each Part below.

For example, the argument that the rules of solicitation would not apply, due to a full segregation of the roles of lawyer and agent, is

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50. For a full discussion of lawyer competence, see *infra* Part IV. If not at this requisite level of competency, the lawyer would be forced to turn down the employment. He could, though, accept the employment by conducting an independent study, as well as associating competent lawyers in the particular area. *See infra* subpart IV(A)(1).

51. *See supra* notes 21 & 27 and accompanying text.

52. *See* ABA CODE, *supra* note 28, DR 3-101.

53. C. WOLFRAM, *supra* note 24, § 16.4; *see id.* at 898 (lawyer and accountant scenario includes forbidding ownership in enterprise, or law practice).

rendered faulty.[54] Serving in the representational capacity of a "sports agent" clearly would be, at a minimum,[55] a law related occupation.[56] These individuals are forbidden from soliciting prospective clients, as are all members of the legal profession.

Additionally, fees charged by sports lawyers for services rendered must be "reasonable" under the "clearly excessive" standard.[57] Lawyers that charge fees for managing a sports client's investments, for example, will see their fee structure scrutinized under Model Rule 1.5.[58] Fees for financial management services, as well as sports management generally, will not necessarily be judged under the customs of the particular industry. The industry may very well be dominated by nonlawyer agents, who utilize unconventional billing methods.[59]

Of course, just what constitutes an occupation related to law may remain at issue. One text writer has listed a wide range of occupations that qualify as law related (*i.e.*, essentially legal in nature). Law related occupations include an accountant, collection agent, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax specialist, or loan or mortgage broker.[60] As discussed earlier, negotiating a professional sports contract is argued to actually constitute "practicing law."[61] This may be disputable; few would argue, though, that sports lawyers are not engaged in a

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54. Lawyers in the representation industry often attempt to segregate the roles of lawyer and agent, thus justifying their open recruitment and face-to-face contact with clients, along with other questionable ethical conduct. *See infra* subpart III(B)(4).

55. The initial service provided by an agent (and undoubtedly the most crucial) is the negotiation of the client's contract. It is argued (and has been held by a state ethics opinion) that the negotiation of a professional sports contract by a lawyer is actually practicing law, and not a secondary, law related occupation at all. *See supra* note 24.

56. *See* Formal Op. 328, *supra* note 25, cited *supra* note 30.

57. *See infra* subpart VI(A)(2).

58. AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983) [hereinafter MODEL RULES].

59. In the area of sports management, it is common for management firms to collect 20 to 25 percent of all income from a sports client, both from off-the-field endorsement contracts, to actual winnings from participating in that sport. These sports management firms are discussed elsewhere in terms of a potential conflict of interest: managing events simultaneously while representing participants at those events. *See infra* subpart V(B)(6).

60. Cole-Wallen, *supra* note 19, at 503; *see also supra* note 26 (providing examples of those occupations not essentially legal in nature); Annotation, *Nature of Legal Services or Law-related Services Which may be Performed for Others by Disbarred or Suspended Attorneys*, 87 A.L.R. 3d 279 (1978).

61. *See supra* note 24.

law related occupation throughout a typical sports client's representation.[62]

III. SOLICITATION

The modern rule of solicitation states that a lawyer, with several exceptions, may not contact a specific, prospective client concerning professional employment. This conduct is forbidden when the lawyer (1) has no family or prior professional relationship with that prospective client, and (2) when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.[63] This rule and its predecessors[64] have stirred

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62. The examples provided in Formal Op. 328, *supra* note 25, make clear that roles to be considered essentially legal are in the nature of rendering advice generally—such as a counselor or advisor. This general guideline would seem to apply to many of the overlapping areas of the sports lawyer, such as an advisor on endorsements or post-career opportunities. *See, e.g.*, Ill. Op. 700, *supra* note 24 (lawyer counseling athlete on business matters constitutes practicing law); ABA CODE, *supra* note 28, EC 7-8 ("Advice of a lawyer to his client need not be confined to purely legal considerations.").

This still, however, leaves open questions. For example, an "investment advisor," a possible area of sports lawyer expansion, would seem to certainly be in such a related role. However, those lawyers who abruptly enter such areas as the real estate or banking industry, are, as a practical matter, not bound by an ethical rule such as solicitation. The issue will likely hinge on whether (and to what extent) the individual retains any incidents of a law practice.

63. MODEL RULES, *supra* note 58, Rule 7.3. The rule continues with a broad definition of "solicit." Solicitation includes "contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient." *Id.* The rule also broadly labels certain conduct as falling outside solicitation. Solicitation does not include "letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." *Id.*

The rationale of Model Rule 7.3 of allowing direct mail only to those not known to be in need of legal services is to keep such contact from persons whose emotional or physical condition makes them susceptible to overreaching. C. WOLFRAM, *supra* note 24, § 14.2, at 784. The United States Supreme Court, however, has recently held that this type of direct mail contact—including contact with those known to be in need of legal services—is constitutionally protected commercial speech. *See infra* notes 86-94 and accompanying text.

64. *See* ABA CODE, *supra* note 28, DR 2-103(A). Attorneys under DR 2-103(A) are forbidden from "recommend[ing] employment, as a private practitioner . . . to a nonlawyer who has not sought his advice." The draconian 1908 Canons of Ethics went so far as to require members of the legal profession to "immediately" inform the authorities of this type behavior, "to the end that the offender may be disbarred." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 28 (1908).

up more debate regarding lawyers in the sports representation industry than any other rule of professional conduct.[65] Indeed, the "evils" of seeking prospective clients through in-person solicitation are at the forefront of any discussion of ethics and the sports lawyer.[66]

The policy and purpose of the rules prohibiting lawyer solicitation are summarized in this Part, as well as the express exceptions to the rule. Modern trends in the area of permissible client contact provide further discussion, along with the importance of these trends to the sports lawyer. Various viewpoints in favor of and in opposition to the rules as they apply to the sports lawyer are furnished in subparts III(B)(1)-(4). Finally, the Part formulates hypothetical situations that illustrate the numerous ethical issues in this area.

A. Policy and Purpose

1. The prevention of unscrupulous tactics and overreaching; maintaining the "profession".—From a definitional approach, solicitation is merely an unrequested communication to a nonlawyer that implies, or is for the purpose of, obtaining professional legal employment. The legal profession has traditionally frowned on this type of behavior for a number of reasons.

First, these particular ethics rules deal with similar problems which sports agents have caused: overzealous contact with potential clients.[67]

Evidence of breaking from the strict traditional approach to solicitation (primarily constitutional considerations) is seen by examining an early draft of the 1983 Model Rules. The early draft would have lifted the blanket prohibition on in-person solicitation in favor of a rule permitting solicitation absent physical, emotional, or mental conditions diminishing the client's judgment about the selection of a lawyer. However, this rule was not enacted. *See* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 146-47 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 9.3 (Discussion Draft 1980)); *see also* Figa, *Lawyer Solicitation Today and Under the Proposed Model Rules of Professional Conduct*, 52 U. COLO. L. REV. 393, 394 (1981).

65. *See generally* 1 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 213-14 (1986); G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 145-47; Sobel, *supra* note 4, at 714-16; Comment, *supra* note 4, at 830-33.

66. While solicitation and advertising are often lumped under one heading, solicitation—or to be more accurate, "recruiting" or "business development"—is, at least from a practical standpoint, the only real ethical concern of these two areas for lawyers entering the sports representation area. Advertising will generally be mentioned, but is not a focus of this Part.

67. The general heading for this type of agent abuse is "overly aggressive client recruitment practices." For more information on client recruitment, including the increasing number of "early signings" of eligible student-athletes of the NCAA, see *infra* note 97. While such actions are seldom by members of the legal profession, more and

Solicitation provisions reinforce the concern of the bar to protect the public from high-pressure sales pitches of lawyers. This concern, as stated in the landmark case of *Ohralik v. Ohio State Bar Association*,[68] was prompted by in-person solicitation dangers of deception, overreaching, undue influence, intimidation, and other forms of "vexatious conduct."[69]

Second, solicitation guards against lowering the status of the "profession." By being members of the legal profession, lawyers perform a public service—a service that does not coexist with the commercialization of ordinary businesses.[70]

This idea of a public service, along with these self-imposed rules against solicitation, are traceable to the early English bar, when lawyers were predominantly members of the upper class. Lawyers at this time practiced as a public service instead of a business. Solicitation (as with advertising) was considered undignified; lawyer compensation was a secondary concern.[71]

Similar to the status of the legal profession, solicitation is prohibited in order to preserve the profession's standards and dignity. Since lawyers are said to be officers of the court, any undignified conduct reflects badly on the entire system of justice.[72] Lastly, solicitation is banned to promote unity among members of the legal profession by preventing "client stealing."[73]

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more lawyers are serving roles of contract negotiators and player representatives generally. A survey of the three major professional leagues reveals that well over 50 percent of the current representatives are in fact lawyers. *See supra* note 11.

68. 436 U.S. 447 (1978).

69. *Id.* at 462. Other "substantive evils" of solicitation, as stated by the United States Supreme Court, include stirring up litigation, assertion of fraudulent claims, debasing the legal profession, underrepresentation, and overcharging. *Id.* at 461.

70. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935) (solicitation is improper because it commercializes the bar; "[t]he practice of law is a profession and not a trade"); *see also* Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677, 684 (1954).

71. H. DRINKER, LEGAL ETHICS 210 (1953); *see id.* ("early members of the bar regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident").

72. *Id.* at 212; *see also* Note, *Soliciting Sophisticates: A Modest Proposal for Attorney Solicitation*, 16 J.L. REFORM 585, 591 (1983) (in addition to lowering professional standards, comes a diminishing of the overall quality of legal services, to society's detriment).

73. H. DRINKER, *supra* note 71, at 190-91; *id.* at 211 n.6; Note, *supra* note 72, at 592; *see* ABA CODE, *supra* note 28, EC 2-30 (if lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other

Each justification for lawyer solicitation has an equally compelling argument for abandoning the rules. This provides more evidence of the level of debate when these rules are applied to the sports lawyer. As stated above, the standards of the legal profession are maintained by protecting consumers from unscrupulous attorneys. Nevertheless, these rules may have the effect of restricting the flow of information to potential clients regarding legal services.[74]

Solicitation also is banned to preserve the dignity of the profession. While this is an important interest, the ban on in-person solicitation does not clearly protect it. Those favoring the rule assert that there is a connection between solicitation and the erosion of professionalism; however, such an argument is "severely strained,"[75] in assuming that lawyers would conceal from themselves and their clients the real-life fact that they earn their livelihood at the bar.[76]

However persuasive the counter-arguments, the mandates against solicitation are consistently upheld. States have "important" interests to protect, and can constitutionally "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the state has a right to prevent."[77]

2. Permissible solicitation: friends, relatives, clients, and lawyers. — The policy behind the solicitation rules make clear that certain portions of the consumer public are potentially vulnerable to overreaching lawyers. The very facts of *Ohralik* exemplify one such sector of society, the personal injury client. In *Ohralik*, the in-person solicita-

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counsel approves or withdraws, or the client terminates the prior employment).

74. The noted case of Bates v. State Bar of Arizona, 433 U.S. 350 (1977), addressed these issues, in holding that states may not prohibit truthful newspaper advertising regarding the availability of routine legal services. Per se bans on advertising and solicitation don't clearly address consumer concerns, because they restrict the flow of information to potential clients regarding legal services. *Bates*, 433 U.S. at 374 n.30.

The court stated that while a referral system for attorneys seeking future business "may have worked when the typical lawyer practiced in a small, homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy." *Id.* These outright bans on advertising and solicitation represent a misconception of how reputational information is disseminated in a complex urban setting. *Id; see* Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 401, 414-15 (1980).

75. *Bates*, 433 U.S. at 368 ("the postulated connection between advertising and the erosion of true professionalism [is] severely strained").

76. *Id.*

77. *Ohralik*, 436 U.S. at 449.

tion occurred when the lawyer, following an accident, approached a person who was hospitalized, and possibly susceptible to overreaching.[78]

This problem of overreaching, along with concerns of invasion of privacy and harrassment, are obviously not present in all settings. Professional rules of conduct recognize this, and allow a lawyer to recommend his or her services to a "close friend, relative, [or] former client."[79] By knowing the lawyer, these persons presumably would be less likely to be subject to unethical practices or pressures. Additionally, they are said to be better able to "evaluate the propriety of employing him than can laymen who are not within those categories."[80]

The solicitation rules also permit lawyers to solicit business from other members of the bar.[81] Once again, there is said to be an absence of significant risks of overreaching, misrepresentation, or invasion of privacy.[82] An earlier version of the ethical rules did not provide for this exception, barring any solicitation that "stirred up litigation."[83]

3. Form of client contact: direct mail solicitation. — Direct mail solicitation and advertising relate to the sports lawyer generally, although in-person solicitation is the primary area of discussion.[84] This distinction

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78. *Id.* at 449-51. This lawyer solicited a second client as well, approaching her shortly after she was released from the hospital. The lawyer also engaged in other misconduct, including secretly taping a conversation with one of the women. The Court said the lawyer in *Ohralik* was clearly "ambulance chasing." *Id.* at 469 (Marshall, J., concurring).

79. ABA CODE, *supra* note 28, DR 2-104(A)(1). The Model Rules, under Rule 7.3, do not include the exception for friendships, and therefore may be read more narrowly. *See supra* text accompanying note 63; *see, e.g.*, Goldhwaite v. Disciplinary Board, 408 So. 2d 504 (Ala. 1982) (allowing attorney to recommend his employment to chairman of bank, friend and former client, to represent estate of dying cousin). *See generally* C. WOLFRAM, *supra* note 24, § 14.2, at 788-89.

80. *Goldhwaite*, 408 So. 2d at 507.

81. Under the ABA Code, DR 2-103(A) only prohibits contacting "nonlawyers." *See supra* note 64. Similarly, Model Rule 7.3 disallows soliciting "a prospective client." *See supra* text accompanying note 63. The ABA Code also allows lawyers to solicit clients when they are employed by a qualified legal services organization. *See* ABA CODE, *supra* note 28, DR 2-103(D).

82. C. WOLFRAM, *supra* note 24, § 14.2, at 789.

83. *Id.* (citing *In re* Hubbard, 267 S.W.2d 743 (Ky. 1954)).

84. It is common for expected professional draft picks, for example, to be contacted through the mail. Of course, the most widespread debates concerning solicitation are over the in-person "recruiting" of potential clients. Nevertheless, the permissibility of direct, targeted letters to potential sports clients known to be in need of legal services remains relevant to any discussion of this area.

relating to the form of client contact results from the policy of these rules, as mentioned below, of preventing overreaching, intimidation, and the like.[85] A letter, or other similar mode of communication, clearly does not pose the same risks as does in-person contact. The client is not required to immediately provide a yes-or-no answer; after all, the recipient can simply "avert his eyes."[86] As the 1988 case of *Shapero v. Kentucky Bar Association*[87] stated:

> [A] truthful and nondeceptive letter, no matter how big its type and how much it speculates can never shout at the recipient or grasp him by the lapels, as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching.[88]

Modern decisions distinguishing in-person and direct mail solicitation, in effect, have opened the door for a certain type of specific client contact.[89] This, of course, is in addition to the more liberal allowances for attorney advertising allowed under *Bates v. State Bar of Arizona*.[90]

Although targeted letters and other direct mailings seeking legal business may be frowned on by members of the legal profession, this type of contact nevertheless has been approved by the courts. One state bar even allowed a rather questionable scheme to gain legal business. The lawyers under this plan would obtain accident victims' names from police accident reports and then contact the victims by means of direct mail advertisements.[91] Thus, lawyers with an interest in sports

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85. *See supra* notes 67-77 and accompanying text.

86. Fraley & Harwell, *Sports Law and the "Evils" of Solicitation*, 9 LOY. L.A. ENT. L.J. 21, 29 (1988) (citing Cohen v. California, 403 U.S., 15, 21 (1971)). *See generally* Whitman & Stoltenberg, *Essay: Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381, 399-407 (1984).

87. 108 S. Ct. 1916 (1988), *rev'g* 726 S.W.2d 299 (Ky. 1987).

88. *Id.* at 1924 (citations omitted). For an analysis of this case, and the area generally, see Becker, *Shapero—Direct Mail Clarified*, 22 AKRON L. REV. 199 (1988); Recent Development, *Shapero v. Kentucky Bar Association: Regulating Lawyers' Targeted Direct-Mail Advertising—A Constitutional Standard for an Ethical Dilemma*, 63 TUL. L. REV. 724 (1989); Fraley & Harwell, *supra* note 86, at 27-30.

89. Prior to the *Shapero* case at the Supreme Court level, various state opinions similarly held that direct mail contact was permissible. *See, e.g.*, Fla. Advisory Op. 87-7 (1987), *reprinted in* THE FLORIDA BAR NEWS, July 1, 1987, at 2 (allowing lawyers, through direct mail solicitation, to contact accident victims, provided that certain requirements are met).

90. *See supra* note 74.

91. While such targeted direct mail contact was prohibited under the ABA Code,

representation, like all practitioners, retain written solicitation as an authorized course of action when attempting to enter the area.

An accident list or foreclosure list[92] is no different from a draft list of expected professional athletes. Lawyers may aggressively contact these potential clients known to be in need of legal services. Just as the lawyer in *Shapero* offered a free telephone call to direct mail recipients,[93] a sports lawyer may suggest that the athlete contact him about a meeting. Contacting prospective clients in this manner will not qualify as solicitation, assuming the various conditions the Supreme Court outlined are met. The paramount conditions are that the correspondence must be truthful and nondeceptive.[94]

As a practical matter, however, this permissible form of client contact, while surely affecting practitioners generally, will have little impact on the sports representation industry. Athletes known to be in need of legal services have been deluged with mail long before the Supreme Court placed its stamp of approval on this type of conduct.[95] The actual volume of direct mail received by prospective clients dictates that it has little impact on the selection process of a representative. The nature of the industry is such that these prospective clients have even come to expect *in-person* contact with agents and lawyers.[96] This face-to-face contact is in addition to any communication received through the mail. Such in-person meetings are clearly outside the scope of these recent direct mail solicitation holdings; in-person contact, of course, will more likely influence the athlete's decision when hiring a representative.

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it was approved under Rule 4-7.3(b) of the Florida Bar. *See* THE FLORIDA BAR NEWS, July 1, 1987, at 2. The Florida Bar has stated that this contact is allowed, if certain conditions are met. The conditions attached to such an allowance include: the mail must not be false or misleading, the top of each page must be marked "advertisement," a copy must be sent to staff counsel at the bar headquarters, and retained by the attorney for three years, and, if a form letter, all the names and addresses of its recipients must be sent as well. *Id.* (citing Fla. Rule 4-7.3(b)).

92. In the recent *Shapero* case, the lawyer sent a letter to specific homeowners known to be in the process of a foreclosure. The letter featured raised, bold letters, offering a free telephone call. *See Shapero*, 108 S. Ct. at 1919.

93. *See supra* note 92.

94. *See supra* note 88 and accompanying text.

95. Much of this contact, as could be expected, comes from sports agents. *See, e.g.*, Ruxin, *Unsportsmanlike Conduct: The Student-Athlete, the NCAA, and Agents*, 8 J.C. & U.L. 347, 356 (1981-82) (noting that quarterback Neil Lomax had over 100 sports agents contact him in anticipation of the 1981 NFL draft).

96. *See infra* notes 106-09 and accompanying text.

B. Solicitation Exception for Sports Law?

The unscrupulous actions of sports agents have given rise to considerable discussion. One of the most flagrant abuses is relevant to lawyer solicitation; the overly aggressive recruitment practices of agents have left a trail of destruction throughout the country, particularly in the realm of amateur athletics at academic institutions.[97] As a result of so many well-documented cases of abuse,[98] sports clients may now consult numerous sources for advice on retaining competent representation.[99]

While the most blatant abuses have come from agents, there is no hard and fast rule that members of the legal profession are more com-

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97. *See* Sobel, *supra* note 4, at 714-16 (summarizing the overall scenario of this particular agent abuse, including the various types of illegal inducements). *See generally* WEISTART & LOWELL, *supra* note 4, § 3.17, at 320. While the majority of this type of recruiting is conducted by nonlawyer agents, more members of the legal profession are serving similar roles. *See supra* note 11.

The most well known examples in this area are the recruiting of NCAA student-athletes. Incidents of "early signings" of these athletes—primarily from major college football institutions—to representation agreements are too numerous to list. It has been estimated that over one-half of the top NFL prospects every year sign such an agreement before expiration of their college eligibility, whether with an agent or lawyer. *See* Bannon, *Ex-agent: 80% Sign in School*, USA Today, Dec. 17, 1987, at C1, col. 4 (quoting various sports agents in their estimates—ranging from 50 to 80 percent—of how many of the top 330 senior college football players usually have accepted money from agents or signed with them prior to ending their eligibility); *see also* M. TROPE, NECESSARY ROUGHNESS 77 (1987) (former sports agent Mike Trope claiming that during his time as an agent, some 60 percent of the players drafted by the NFL in the first three rounds had "made a commitment, in one form or another, to an agent before their senior season ended"); R. RUXIN, AN ATHLETE'S GUIDE TO AGENTS 35-36 (1982) (reporting that 60 to 75 percent of NFL draftees had made agent commitments prior to NCAA eligibility expiration).

One could only imagine the degree of contact with amateur athletes that does not result in an actual signed representation agreement. *See, e.g.*, Powers, *Coaches, Athletes Are Artful Hustlers, Too*, THE SPORTING NEWS, Nov. 16, 1987, at 12 (sports agents Norby Walters and Lloyd Bloom "crisscrossed the country for the last two years, making pitches to virtually every football player they thought might go in the first three rounds of the NFL draft").

98. Other flagrant abuses known to be caused by sports agents are the misappropriation of funds, and fraudulent investments. *See infra* subpart IV(C).

99. *See, e.g.*, R. RUXIN, *supra* note 97; E. GARVEY, THE AGENT GAME: SELLING PLAYERS SHORT (1984); G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 127-30; NCAA Booklet, *A Career in Professional Sports: Guidelines That Make Dollars and Sense* (1984); Neff, *A Clean Sweep: How to Deal with the Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987 at 102, 104.

petent in this area than agents. Indeed, a sports client that retains an experienced agent will likely be more adequately represented than with a lawyer outside of sports, at least within the scope of the first major service area: the negotiation of the client's contract.[100] It has, however, been stated that athletes in general are better represented when they retain a lawyer.[101] Accepting that argument to be true, members of the legal profession are at a competitive disadvantage when attempting to acquire sports clients.[102] The solicitation rules are fair throughout the legal profession—they apply to all lawyers equally. Yet, in an industry where lawyers must compete with sports agents for clients, lawyers are prevented from taking part in the open recruiting practices of agents. Assuming that a lawyer feels bound by professional ethical restraints,[103] the sports agent is left with an "unfair advantage,"[104] even though the particular sports client might be better off hiring a lawyer, and the full services of a law firm.

One possible solution, then, would be to relax the solicitation prohibitions that currently bind attorneys in the sports law area.[105] The

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100. For a discussion of the competency standards for sports lawyers generally, as well as text relating to the higher competency standards of lawyers as compared to agents, see *infra* Part IV.

101. *See* Neff, *supra* note 99, at 104 (quoting Barry Rona, Executive Director of the Major League Baseball Players Relations Committee, "I would hire a lawyer from a quality firm, and I'd pay him by the hour"); *see also* Kohn, *supra* note 9, at 15 (athletes at an advantage when hiring lawyers over agents, due to several factors, including the formal law education and actual practice—involving the negotiation and drafting of contracts—of lawyers, as well as the fact that lawyers are bound by codes of ethics that curb dishonest and incompetent representation).

102. Comment, *supra* note 4, at 832-33 (lawyers in a "Catch-22" situation when competing with sports agents).

103. Some lawyers won't follow ethical codes, as they are "largely irrelevant" because of the legal profession's historical failure to enforce the provisions of whatever code is in effect. Aronson, *Reforms Are Needed to Correct Malaise in Enforcement of Canons of Ethics*, 2 NAT'L L.J. 27 (Nov. 26, 1979); *see* Mark & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 1974 U. ILL. L.F. 193.

104. Comment, *supra* note 4, at 832.

105. *See id.* at 842-44; *see also* Winter, *Is the Sports Lawyer Getting Dunked?*, 66 A.B.A.J. 701 (1980) (suggesting a loosening of the ethics rules against solicitation to help lawyers compete in the market, following a quote from former NFLPA Executive Director Ed Garvey that nonlawyer agents "solicit clients with gusto").

As a practical matter, many established sports lawyers gained their clients through solicitation. Indeed, both agents and lawyers have been known to spend the majority of a given year's time recruiting future clients. These lawyers typically attempt to "segregate" their practice, and "hold themselves out" as a sports agent, thus fully taking part in in-person recruitment like their rival agents. Alternatively, they abandon the so-

following discussion develops several arguments for such a specialized exception.

1. The nature of the representation industry is such that sports figures expect this contact. — The nature of the sports representation industry is such that the solicitation rules should not apply. First, due to the national scope of potential sports clients, a referral system for sports clients is unrealistic. Second, the competition in the industry is such that clients have become accustomed — and indeed expect — in-person solicitation.

One argument for abandoning the solicitation rules in the sports law area results from comparing the realities of the representation industry to lawyer advertising generally. The ideal scenario for the legal profession is to gain business purely through referral. A referral system, however, is not realistic in the urban settings of most lawyers. This competitive reality leaves open one type of truthful and non-deceptive client contact: advertising.[106] A state would be acting unconstitutionally if it tried to ban advertising. Similarly, such a referral system for sports lawyers is arguably unrealistic, in light of the nationwide scope of potential clients. Clients in this industry are anything but local; sports lawyers are not working in a "small, homogeneous community."[107]

In addition to the broad geographical client base, solicitation rules should not apply due to the competition in the industry. Nonlawyer agents — and indeed, even some lawyers — openly recruit throughout the country.[108] Because of this floodgate of contact with the client base, it cannot be legitimately argued that sports clients are not accustomed to being approached about a possible representation. More realistically, they have come to *expect* it. Therefore, denying lawyers the right to recommend that they be employed to such clients only punishes both lawyer and client. The lawyer's business development is frustrated, and the client is denied valuable information concerning legal

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licitation mandates altogether. For a discussion of lawyers serving the roles of "agents," and not following the ethical mandates of the legal profession, see *infra* notes 128-33 and accompanying text. This reasoning is rendered faulty when examining the ethical rules for law related dual occupations. *See supra* subpart II(C).

106. *Bates*, 433 U.S. at 374. *See supra* note 74.

107. *Bates*, 433 U.S. at 374 n.30.

108. For statistics on the prevalence of this type of activity, which commonly leads to "early signings" of eligible student-athletes, see *supra* note 97. *See also supra* note 105 (agents, or lawyers attempting to segregate their role when serving as a sports agent, take part in year-round "recruiting" of sports clients).

services. These services could include more competent representation and the possibility of lower client fees.[109]

2. Sports clients are "sophisticated" persons.—The traditional purposes for banning lawyer solicitation are unquestionably valid, as they serve important state interests.[110] Those state interests, however, do not justify prohibiting the solicitation of sports clients. It could hardly be argued that a college all-star, for example, is "overwhelmed" by his legal troubles. He is far from suffering from an "impaired capacity for good judgment,"[111] creating a serious potential for undue influence.

Sports personalities experience more high-powered, face-to-face contact than typical members of the general public. Many athletes are subject to media scrutiny during their college careers and earlier.[112] Additionally, due to the likelihood that such an athlete was initially recruited heavily from his high school, impressive, in-person sales pitches become routine.[113] The process of selecting a lawyer or agent, and the subsequent signing of a representation agreement, is no different than signing a National Letter of Intent[114] with an academic institution.

Further, while a student-athlete is an "amateur"[115] in his relation-

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109. It is often asserted by lawyers that they will charge more reasonable fees, through an hourly rate arrangement, than a sports agent. The classic argument in the sports law area concerning fees pits a method based on a percentage of the total dollar value of the contract negotiated, against this more traditional hourly method. *See infra* subpart VI(A)(1).

110. Such reasons include the desire to curb unscrupulous lawyers and to maintain the "profession" and its standards. *See supra* notes 67-77 and accompanying text.

111. *Shapero*, 108 S. Ct. at 1918.

112. *See* Horn, *Intercollegiate Athletics: Waning Amateurism and Rising Professionalism*, 5 J.C. & U.L. 97, 97 (1977-79) (noting that the student-athlete is subject to a massive sports press, organized to satisfy a national audience).

113. *See, e.g.*, Wolff, *The Fall Roundup: Persuasive Hostesses Help Colleges Lasso Top Prospects*, SPORTS ILLUSTRATED, Aug. 31, 1987, at 48, 48-56 (describing the recruiting process of major college football programs, and their techniques utilized to achieve success in luring the top high school athletes).

114. The National Letter of Intent program was devised by the NCAA as a compulsory program whereby the student certifies his intention to attend a particular institution. *See* Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 114 (1985); *see also infra* note 232 (basic definition of the NCAA).

115. Amateurism as defined by the NCAA has been under much scrutiny from commentators; the controversy seems to be that the NCAA has failed in making a "clear demarcation" between college athletics and professional sports. *See, e.g.*, Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 176 (1983-84). Student-athletes are amateurs in an intercollegiate sport if "their participation . . . [is] motivated

ship with his institution, the more realistic position of the athlete is that he is an integral part of a lucrative business relationship with the institution.[116] Athletes are compensated by their scholarships and other benefits, and more properly are "professionals."[117]

Sports personalities thus do not require ordinary consumer safeguards against overreaching, undue influence, and intimidation.[118] Their past experiences give them the necessary expertise to evaluate the sales pitches and appeals of a lawyer offering his legal services.[119] The typical sports personality, in short, is well-equipped to face the "evils" of in-person contact with a lawyer regarding a possible professional relationship.[120]

3. The governing bodies are unconcerned.—League players associations, and more recently state legislatures, regulate in various ways

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primarily by education and by the physical, mental and social benefits to be derived." NCAA CONST. art. 3, § 2.6, *reprinted in* PROPOSED 1989-90 NCAA MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 4 (1989) [hereinafter NCAA MANUAL].

At its 1989 winter meetings, the NCAA proposed, and subsequently adopted, an "extensive reorganization" of its rules manual. While not substantively altering any provisions, the new "user friendly" version incorporates information from cases and official interpretations into the legislation. The only departure from the 1988 definition of amateurism is the following statement: "Student participation in intercollegiate athletics is an avocation, and *student-athletes should be protected from exploitation by professional and commercial enterprises.*" *Id.* (emphasis added).

116. *See* Koch, *The Economics of "Big-Time" Intercollegiate Athletics*, 52 SOC. SCI. Q. 248, 258 (1971) (providing a microeconomic model of the business conducted by major college athletic programs, and reporting that revenues actually exceed costs at such institutions); *see also* Barile v. Univ. of Virginia, 2 Ohio App. 3d 233, ____, 441 N.E.2d 608, 616 (1981).

117. Comment, *Compensation for Collegiate Athletes: A Run for More than the Roses*, 22 SAN DIEGO L. REV. 701, 702 (1985).

118. *But see* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 147 ("Given the disparity in sophistication between lawyer-agents and many athletes, some limitation on in-person solicitation of athletes seems desirable.").

119. *See, e.g.*, Note, *supra* note 72, at 585 (advocating an amendment to the ethical standards to permit in-person solicitation of prospective clients who qualify as "sophisticated," defined as those persons having general knowledge of their legal needs and the expertise to assess adequately the information and presentation of an attorney).

120. A further interest in banning solicitation is to guard against deception. The ethical rules adequately address deception generally, in provisions outside of the solicitation rules. *See* ABA CODE, *supra* note 28, DR 2-101(A); MODEL RULES, *supra* note 58, Rule 7.1. Not only do the state bar associations govern against such deception, but the various league certification programs do as well. *See, e.g., infra* note 123.

those individuals who earn their livelihood representing sports figures.[121] These governing bodies have shown little concern about face-to-face contact between athletes and representatives. This alone is a strong argument for allowing in-person solicitation in the sports representation area.

"Solicitation" in the eyes of the sports representation industry never concerns the typical *Ohralik* "evils."[122] While contract advisors under players association schemes do have stated prohibitions when dealing with prospective clients, all of these rules relate to more substantial concerns than the dignity of the profession or problems of overreaching lawyers. The evils addressed by the governing bodies are the ones more prevalent in the industry: player bribes, providing materially false information to a player, misleading business titles, and the like.[123] In fact, it is openly assumed that attorneys solicit prospective clients, both in-person and otherwise.[124]

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121. Agent regulation plans have been frequently adopted since the early 1980s. The individual number of states to include such a regulatory scheme has increased rapidly in 1987-88. *See supra* note 9. The three players association schemes (MLBPA, NFLPA, and NBPA) are binding on those representing athletes as well. Additionally, the NCAA adopted its own agent registration program in 1984. *See* Memorandum to Individuals Acting in the Capacity of Player Agents (cited in Sobel, *supra* note 4, at 724). All of these schemes are summarized in Sobel, *supra* note 4, at 724-25.

122. *See supra* notes 67-69 and accompanying text.

123. The NFLPA Regulations are exemplary of the efforts of major sports unions. The "solicitation" section is as follows:

> C. Solicitation
>
> An NFLPA Contract Advisor is also prohibited from:
>
> (1) Providing or offering to provide anything of significant value to a player in order to become the Contract Advisor for such player;
>
> (2) Providing or offering to provide anything of significant value to any other person in return for a personal recommendation of the Contract Advisor's selection by a player;
>
> (3) Providing materially false or misleading information to any person in the context of solicitation for selection as the Contract Advisor for any player;
>
> (4) Using titles or business names which imply the existence of professional credentials which he or she does not actually possess; and
>
> (5) Soliciting or accepting anything of value from any club or other NFL management personnel for his or her personal use or benefit.

NFLPA Regulations Governing Contract Advisors (NFLPA Regulations) § 5(C) (1983) (Requirements Concerning Contract Advisor's Conduct).

124. "Our regulations do not mention attorneys. We don't differentiate between agents and attorneys; our interpretation is that when an attorney is acting as an agent, he is an agent. All attorneys are in the process of recruiting players. I doubt very seri-

Other governing bodies also voice different concerns from the solicitation policies. The National Collegiate Athletic Association ("NCAA"), with its interest in maintaining amateurism, only forbids an athlete from signing a representation agreement with an agent or lawyer during the athlete's eligibility. Moreover, the NCAA Constitution even contemplates face-to-face contact between student-athletes and representatives prior to the expiration of this eligibility.[125]

The various regulatory schemes of state legislatures, to a certain extent, mirror the concerns of the NCAA. These state statutes likewise attempt to protect the particular institutions by preserving the student-athlete's eligibility.[126] The only feared contact with the athlete, whether in-person or otherwise, is during this eligibility term. This interest in retaining amateurism obviously is an attempt to protect the institutions. For example, as a result of playing an ineligible athlete, the institution may be forced to forfeit team victories or money winnings. These state lawmakers, like other regulators, are generally not concerned (unlike the solicitation policies) with a lawyer approaching a prospective client and offering his services.[127]

4. Alternative: "holding out" as an agent; not "practicing

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ously that any [sports] attorney sits back and waits for the telephone to ring and players to call them. It just comes down to how the particular attorney goes about soliciting." Telephone Interview with Mike Duberstein, Director of Research, NFLPA (July 21, 1988).

125. NCAA Bylaw 12.3.2, *reprinted in* NCAA MANUAL, *supra* note 115, at 61 ("Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent . . . ."); *see also infra* notes 232-35 and accompanying text (NCAA definition and extended discussion of NCAA provisions).

126. All states adopting these schemes generally have attempted to curtail "early signings," see *supra* note 97, with agents or lawyers. Should a student-athlete with eligibility remaining agree (even orally) to be represented in the negotiations of a professional sports contract, he or she is ineligible. *See infra* note 233 and accompanying text. The various states attempt, in varying degrees, to incorporate these NCAA rules into the legislation. *See, e.g.*, Tennessee Sports Agent Act, Pub. Ch. No. 853, § 2 (1988) ("[f]or purposes of determining violations under this act, the rules of the governing national collegiate athletic association in effect at time of passage of this act . . . shall apply").

127. One factor indirectly applying to in-person solictation by lawyers is the recent implementation by institutions of a screening process to help student-athletes in their selection of a proper representative. Institutions with this procedure in place are clearly assisting athletes in dealing with face-to-face meetings with agents and lawyers. For those lawyers choosing to abide by the rules of ethics, such a screening process raises interesting solicitation issues. *See infra* notes 139-40 and accompanying text.

law". — An option for a lawyer attempting to avoid the solicitation rules is to "hold himself out" as solely a sports agent. The lawyer in this situation would claim that the ethical mandates facing other members of the legal profession are inapplicable, as the standards defer to general fiduciary principles under agency law. Agency law obviously does not include the legal profession's mandates of in-person lawyer solicitation.[128]

Lawyers choosing this route must make sacrifices. For one, they must completely disavow their bar membership. It is common for lawyer-agents to claim that they avoid violation of solicitation rules by "segregating" the two positions. While this may appear at first glance to be acceptable, the "agent" more likely openly discusses with prospective clients the general advantages of hiring someone with the experience and skills of a lawyer. More importantly, by retaining the status of lawyer, the individual is, at a minimum, engaged in a "law related" occupation when acting as an agent. Lawyers are bound by all rules of ethics (including solicitation), both in their law practice and law related occupation.[129]

Disavowing ties to the legal profession to avoid solicitation rules

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128. The only "solicitation" rules applicable to sports agents are those dealing with, for example, player bribes. *See supra* notes 122-24 and accompanying text. This deferring to general agency principles is contrasted with conflict of interest for nonlawyer agents. In the area of conflict of interest, unlike solicitation, agents are still held accountable. *See infra* subpart V(A)(5) (nonlawyer sports agents violate conflict of interest standards, when, for example, they negotiate on behalf of a player with a team in which they are part-owner).

129. *See supra* Part II. This issue is specifically discussed *supra* notes 54-56 and accompanying text. Many members of the legal profession actively recruit sports clients; in fact, it is not uncommon for some sports lawyers to spend the majority of a given year's time recruiting clients. These lawyers often claim to be only "agents" when they are in the recruitment process, and later "lawyers" when handling other matters. *See* Note, *Agents of Professional Athletes,* 15 NEW ENG. L. REV 545, 560 (1980) (responding to questions from the United States House Select Committee on Professional Sports in 1976, sports lawyers stated that the rules of solicitation were avoided as they no longer practiced law, or alternatively, set up corporations made up of nonlawyers, to solicit clients).

As a practical matter, lawyers in the role of agent can be viewed as a separate industry. "Of course, I would prefer all athletes to be represented by attorneys. When that is the case, there is a standard of accountability. In reality, though, members of the industry are not all lawyers. What you are left with really is a situation of treating this industry as a profession apart from the law, such as the real estate industry." Telephone interview with Dick Berthelsen, General Counsel of the NFLPA (Aug. 1, 1988). *But see* Ill. Op. 700, *supra* note 24 (negotiating professional sports contracts and counseling athletes on business matters constitutes practicing law).

can be taken a step further. Assume, for example, that a holder of a law degree chooses to not become a licensed member of a state bar, but still claims to be a "lawyer" in his role as sports agent.[130] Or similarly, the lawyer simply withdraws his license. This type of a representation subjects the individual to unauthorized practice of law statutes.[131] For such an individual, by stating that he is a lawyer, or claiming such on firm listings, "act[s] or hold[s] himself out to the public as a person qualified to practice or carry on the calling of a lawyer."[132] This would clearly be an impermissible means of circumventing the solicitation rules.

An equally impermissible means of avoiding the edicts of solicitation would be to form a corporation—made up of nonlawyers—to solicit sports clients. For example, this arrangement might include a law firm funding such an operation, in hopes of representing those clients recruited by the corporation. Courts will likely disapprove of such a scheme. One broad-sweeping state opinion held that an attorney could not serve as a "shareholder, director, or officer . . . or legal counsel" of a corporation organized to represent professional athletes in contract negotiations.[133]

C. Solicitation Applications

Despite the persuasive arguments in favor of a specialized excep-

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130. Such individuals state that their reason for not obtaining a law license is that attorney solicitation is unethical, yet in order to obtain sports clients, they must solicit. *See, e.g.*, Ala. State Bar Disciplinary Comm., Op. 85-73 (1985) (Unauthorized Practice: Prohibitions on Practice of Nonlawyers—Athletes' Agents), *reprinted in* LAWYER'S MANUAL, *supra* note 24, at 801:1104 [hereinafter Ala. Op. 85-73].

131. It could be argued, alternatively, that sports agents are engaged in the unauthorized practice of law when they represent clients in contract negotiations, and perform other services. *See* Comment, *supra* note 4, at 844-45 ("court[s] should exercise [their] inherent power to confine . . . the preparation of contracts for other for those that are licensed to practice law in this state") (citing Washington State Bar Ass'n v. Washington Ass'n of Realtors, 251 P.2d 619, 622 (Wash. 1952)). *See generally* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 149.

132. Ala. Op. 85-73, *supra* note 130.

133. Ky. Bar Op. E-89 (cited in Ala. Op. 85-73, *supra* note 130) (allowing an attorney to advise such a corporation when employment is confined to general corporate matters, *i.e.*, his services as legal counsel must not relate to the negotiations undertaken on behalf of an athlete, or provide legal services for an athlete). Additionally, forming such a corporation may present problems with DR 5-107 of the ABA Code, which requires attorneys to avoid influence by outside interests other than the client. *See id; see also* ABA CODE, *supra* note 28, DR 1-102(2) (generally finding attorney misconduct when "[c]ircumventing a Disciplinary Rule through actions of another").

tion for the solicitation rules in the sports representation area,[134] the rules are nevertheless binding on sports lawyers. This is the case, even with the recent holdings in this area, which can clearly be seen as significant movement to relax the solicitation policies generally.[135]

Just what rises to the level of "solicitation" can at times be murky. This is especially true for the sports lawyer, due to the nature of the industry.[136] Various applications of the rules of ethics will necessarily result in differing opinions: from a strict, technical approach as to the wording and purpose of a particular rule, to a liberal or "modern" viewpoint of the same provision.

The following hypothetical situations outline some standard applications of the rules of solicitation in the sports law area. The situations focus primarily on two parties. First, an attorney in the sports representation industry, or one attempting to enter the field ("Lawyer"). Second, a well-known college sports star, or other prospective sports client ("Athlete"). Each fact situation follows with a brief analysis and holding ("*Determination*").

1. Typical scenarios.—Lawyer is called on the telephone by Athlete. Athlete, a rising senior with one year of college eligibility remaining, wants to discuss his future professional sports career with Lawyer, including weighing the benefits of entering the professional draft prior to his final year of eligibility. Additionally, Athlete inquires about the purchasing of a disability insurance policy. *Determination*: No reading of the ethical rules would find lawyer solicitation, based on these facts. This would obviously be a referral contact, even if Athlete has eligibility remaining. Lawyers are allowed to render "advice" to similarly situated persons as Athlete, so long as they do not also agree to represent them for contract negotiations.[137]

A college football coach contacts Lawyer and states that he wants

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134. *See supra* notes 106-27 and accompanying text.

135. One recent Supreme Court case held that targeted, direct mail contact with prospective clients known to need legal services (such as an emerging sports figure) is protected under the first amendment. *See supra* notes 84-88 and accompanying text.

136. When lawyers look to expand their client list in the sports law area, such a search is nationwide in scope. Additionally, the clients, due to the competition from agents that aggressively recruit, are accustomed to (and expect) to be approached in-person. *See supra* notes 106-09 and accompanying text.

137. NCAA Bylaw 12.3.1, *reprinted in* NCAA MANUAL, *supra* note 115, at 61. Also, as a sidenote, acquiring insurance against a career-threatening injury is acceptable conduct under the NCAA. It follows that lawyers may counsel eligible student-athletes on the benefits of such a policy.

to set up a meeting with him and several athletes on his team. The meeting is specifically about the athletes retaining Lawyer as their representative. *Determination*: Once again, this would be an acceptable referral contact, the very type meeting that the legal profession envisions.[138]

2. Types of contact that approach solicitation.—Lawyer sends a personalized letter to an institution's pro-player agent committee.[139] The letter specifically targets Athlete, and not the various other student-athletes at that particular institution generally. It is for the purpose of setting up a face-to-face meeting in hopes of entering into a representation agreement with Athlete. *Determination*: Based on the direct mail holding of *Shapero*, discussed above, the form of communication is permissible, even though the contact targets a specific client known to be in the process of selecting a representative. The eventual client contact in this case, though, remains in question. Should the agent committee merely approve the letter and physically pass it on to Athlete, this could hardly constitute solicitation. However, a meeting between the committee and Athlete about Lawyer raises third-party solicitation issues,[140] particularly if Lawyer has made contact with the committee other than through the mail, such as with in-person meetings. Considering the purpose of such committees, it could be argued that chances of overreaching and undue influence are clearly minimal, regardless of what means Lawyer uses to approach such a committee.

Lawyer sends a personalized, targeted letter directly to Athlete's residence. The letter discusses Athlete's particular legal needs, such as the need for an effective negotiator for the coming year of his rookie contract. It also lists many other needs of Athlete: estate planning, tax planning, insurance protection, investment overseeing, endorsements,

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138. The ideal setting for lawyers to gain legal business is through referral; courts in the past, however, have scrutinized the overall ability to gain clients by this method. *See supra* note 74.

139. Several schools, such as the University of Alabama, Duke University, the University of Florida, and the University of Miami, acting on the recent blatant abuses of "early signings" of eligible student-athletes to representation agreements, have implemented committees to assist athletes in screening and selecting potential agents or lawyers. *See New Miami Policy to Take Tough Stand Against Sports Agents*, Orlando Sentinel, Dec. 20, 1987, at C12, col. 1; *see also* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 137 (screening committees help the athlete acquire helpful information about possible representatives; such a committee "may be very productive in eliminating excesses that have been all too common in the player-agent relationship").

140. *See infra* notes 142-44 and accompanying text.

post-career counseling, and the like. Lawyer claims that he, along with his firm, can provide such services. *Determination*: Should the letter meet the tests of *Shapero* (*i.e.*, the writing is deemed truthful and nondeceptive), it will apparently be fully within the confines of permissible client contact. This is the case, even though Athlete is known to be in need of legal services. Also, the particular state may require other formalities, such as a filing of the letter with the appropriate bar association committee.[141]

3. Violating ethical mandates.—Lawyer has a handful of sports clients and looks to expand that list. He contacts one such existing client, who is a close personal friend of Athlete. Lawyer conveys his intent of meeting with Athlete to his client, and asks the client to make the necessary arrangements for such a meeting.[142] As an alternative to actually arranging the meeting, Lawyer requests his client to persuade Athlete to contact him (perhaps with a telephone call), or merely asks for a recommendation. *Determination*: This scenario is similar (albeit on a much smaller scale) to sports agents and their "runners," individuals who recruit around the country for agents. Lawyer's purpose is obviously for an in-person meeting, in hopes of gaining a new client. Such client contact is forbidden if he recommends himself for employment. Furthermore, this is the classic type of third-party solicitation conduct addressed by Model Rule 7.2(c). That rule forbids this type of cultivation if it includes the transfer of money or other items of "value" to third parties.[143] Any transfer of value would obviously be a violation of

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141. *See, e.g.*, Fla. Bar Rule 4-7.3(b), discussed *supra* notes 89 & 91 and accompanying text.

142. This is similar to Lawyer contacting the institution's coach or athletic director, as to communicate that he is "available" to represent Athlete, or that he is engaged in a sports law practice. One state ethics opinion has ruled that such a recommendation is improper. *See* Ill. Op. 700, *supra* note 24 ("The committee is of the opinion, therefore, that the initiation of communications by an attorney to coaches and athletic directors to inform them of the attorney's availability to represent athletes would be professionally improper."). That opinion cited Rule 2-103(a) of the Illinois Code of Professional Responsibility, which states that "[a] lawyer shall not by private communication . . . directly or through a representative, recommend or solicit employment of himself, his partner or his associate for pecuniary gain or other benefit and shall not for that purpose initiate contact with a prospective client." *Id.* (stating that laypersons selecting a lawyer are best served if the recommendation is disinterested, and that "a lawyer should not seek to influence another to recommend his employment").

143. MODEL RULES, *supra* note 58, Rule 7.2(c). The provision reads: "A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication

this provision, and constitute solicitation.[144] Of course, in this particular scenario, the third party utilized had a prior relationship with Athlete, presumably mitigating the impact of this in-person contact.

Athlete appoints his brother to screen and interview various potential agents and lawyers. Lawyer "cold calls" Athlete's brother, for the purpose of arranging a face-to-face meeting with Athlete. *Determination*: Initially, it could be argued under agency law that contacting Athlete's brother would be the same as directly calling Athlete himself—which would constitute solicitation. Aside from that issue, it is apparent that such a telephone call would not be considered permissible under the Supreme Court's recent holdings. In future years, telephone contact may be categorized with mail contact,[145] but this is not the current state of the law. If the facts were such that Athlete's brother "sent out" a message (perhaps through the media) that he was to interview qualified candidates in the representation industry, there could be an argument that all established agents and lawyers had been asked to set up a meeting. Absent these facts, such an attempt to gain employment through face-to-face contact is plainly solicitation.

Lawyer attends several post-season college all-star games. He makes himself "visible" by watching the week's practices, and spending time in the hotel where numerous athletes are staying. Lawyer hopes to personally meet several of these potential clients. He "happens" to run into Athlete and immediately recommends himself for employment. *Determination*: Lawyer has, in essence, personally arranged a meeting for the sole purpose of recommending himself to be Athlete's lawyer. This type of conduct is a clear solicitation violation. Such conduct would surely be a step below the unscrupulous "recruitment" practices of sports agents, as Athlete is no longer eligible under the NCAA. Nev-

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permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization." *See* ABA CODE, *supra* note 28, DR 2-103(B). The ARPA Code of Ethics also contains provisions for the lawyer or agent recommending himself for hire. *See* ARPA CODE OF ETHICS, Rule 2-103 (Appendix).

144. One obvious "value" to an existing client would be lower legal fees. If Lawyer hints to his client that, for example, should Lawyer sign and represent Athlete, the client would personally benefit in terms of his fees for various services, this would constitute third-party solicitation. Numerous other examples of value can be applied in this situation, whether or not an actual money payment is involved. Outside of actually giving a third party "value" under this rule, even obtaining a recommendation for being hired has been held as improper. *See supra* note 142.

145. For example, just as the mail receiver can avert his eyes, and drop a letter in the trash, a telephone recipient arguably can simply hang up. *See supra* notes 86-88 and accompanying text.

ertheless, Lawyer's actions fall below the standards of the legal profession.

Lawyer obtains the telephone number of Athlete. He "cold calls" Athlete and recommends himself for legal employment. He also attempts to set up a meeting in the near future to further discuss Lawyer's services. *Determination*: This conduct would not differ from in-person contact, and would fit squarely as solicitation. Athlete may not merely "avert his eyes,"[146] as he could with any similar contact through the mail. The mode of communication distinguishes this type of contact, even though both situations may provide virtually the same information regarding Lawyer's services.

Lawyer obtains the address of Athlete and personally travels to his residence unannounced. He recommends himself as the legal representative for Athlete's upcoming professional career. *Determination*: This particular conduct unquestionably rises to solicitation. In-person solicitation presents a multitude of possibilities for overreaching, undue influence, and intimidation; states have important interests in curtailing this type of conduct.[147]

IV. COMPETENCE

A. General Practitioner Entering Sports Law

Lawyers are bound to represent all clients "competently." While competence may be largely undefinable, this threshold ethical concern can have profound significance for lawyers in the sports representation industry. Even though many sports clients are represented by nonlawyers,[148] this does not translate into a rule that lawyers are any more able to undertake a representation in this area than a sports agent. Indeed, an athlete that retains an experienced agent will likely be more adequately represented than a lawyer outside of sports, at least for the service of negotiating the athlete's playing contract.

From a perception point of view, it is felt by many members of the legal profession that if a lawyer serves the role of a negotiator in various areas outside of sports (such as in a loan transaction or personal injury settlement), that this experience is immediately transferable to the negotiation of a professional sports contract. The representation industry, however, includes a wide range of issues that are outside the main-

146. *See supra* notes 86-88.

147. *See supra* note 77 and accompanying text.

148. For statistics on just how many athletes from the three major professional leagues have selected lawyers over agents in the past five years, see *supra* note 11.

stream of a general law practice. Practitioners outside of sports are arguably not competent to accept such a representation. This scenario would be no different than a lawyer referring a matter outside his adopted area of specialization. Sports lawyers are required to be proficient in such issues as the collective bargaining agreements of the various leagues, the bonus and incentive clauses available for player contracts, the rules and regulations governing the particular sport, and the overall market of that sport.[149]

The actual level of this knowledge and skill required is generally outlined by the ethics rules. Competent representation means that a lawyer must have "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[150] Overall, a lawyer should not accept employment that he "knows or should know that he is not competent to handle."[151]

1. The association of competent counsel.—Despite this rule of general practitioners not accepting representation of a sports client, these lawyers may obtain the requisite competence at a later time. That is, the competency level envisioned by the ethics rules is not necessarily judged at the time a lawyer undertakes a particular representation. Lawyers who "in good faith . . . expec[t] to become qualified through study and investigation" may undertake a representation in an otherwise new area of law.[152] This has been interpreted by one commentator to allow lawyers, with such an ambition for self-improvement, "no matter how junior or illprepared for practice, to accept any matter."[153]

The rules of ethics arguably contemplate more than merely a "good faith" effort at independent study. Lawyers lacking a sports

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149. *See, e.g.*, ARPA CODE OF ETHICS, Rule 1-104(C) (Appendix).

150. MODEL RULES, *supra* note 58, Rule 1.1. California's definition of lawyer competence is more specific. To meet this competence standard, lawyers must possess "the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances." CAL. RULES OF PROF. CONDUCT, Rule 6-101(1) (1975). The lawyer may not continue under this state scheme "unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill." *Id.*

151. ABA CODE, *supra* note 28, DR 6-101(A)(1). *See generally* C. WOLFRAM, *supra* note 24, § 5.1.

152. ABA CODE, *supra* note 28, EC 6-3. This will be the case, so long as such an independent study would not cause unreasonable delay or expense to the client. *Id*; *see also* ARPA CODE OF ETHICS, Rule 5-101(A) (Appendix).

153. C. WOLFRAM, *supra* note 24, § 5.1, at 188.

background should implement a procedure that will provide the client with this required level of competence. In addition to the previously mentioned study and investigation, the lawyer should consider associating an experienced sports lawyer.[154] This association will provide the general practitioner with the necessary link to areas unique to the sports representation industry.

2. Full disclosure and consent.—One crucial element in this procedure of associating competent counsel remains: full disclosure and client consent. The client must first be informed that the lawyer he retained was not competent at that point in time to adequately represent his interests. He must also understand that, to continue the representation, the lawyer must retain *and compensate* a lawyer accustomed to sports representation industry matters. This all-important aspect of associating experienced counsel is dealt with only in cursory fashion by the ethics rules.[155]

This disclosure and consent requirement when retaining a competent lawyer is clearly the proper course of action, when viewing the purpose of such an association. First, an unqualified lawyer may simply, for all practical purposes, be referring the matter to this lawyer. Second, a lawyer may utilize the association to educate himself. Regardless of which one of these two alternative reasons applies for a particular representation, the client should be fully informed. The athlete, as with any client, is paying for the time and effort of his legal representative. However, without knowing, from the outset of the relationship,[156] of

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154. *See* MODEL RULES, *supra* note 58, Rule 1.1 comment (Legal Knowledge and Skill).

155. Generally, EC 6-3 of the ABA Code calls for one of two procedures. First, the previously discussed independent study. Second, the inexperienced lawyer may associate a competent lawyer. When the lawyer is offered employment in a matter that he does not expect to become qualified in, he should "either decline the employment or, with the *consent of his client*, accept the employment and associate a lawyer who is competent in the matter." ABA CODE, *supra* note 28, EC 6-3 (emphasis added).

The Model Rules do not mandate client consent before accepting a representation, when that representation includes the association of a competent lawyer. Such a clear omission in the rules may deny an unknowing client important information that, as mentioned below, may have severe financial consequences.

156. In the sports representation area, unlike lawyer-client relationships generally, the outset of the relationship for a client typically consists of a signed representation agreement, whether with an agent or lawyer. In fact, such an agreement has become mandatory under several professional league players associations' certification schemes. *See infra* note 317 and accompanying text.

the need to associate a second lawyer, the client may be subject to excessive fees. Not only would the client be unaware of having to compensate another lawyer altogether, but also would not contemplate serving as the source for funding the initially retained lawyer's training.

B. The Sports Lawyer's Duty to Avoid "Neglect"

Another problem in the general area of competence is unrelated to a lawyer's training in a particular area, such as sports law. Lawyers owe their clients a duty to avoid neglect.[157] The mere fact that a particular client involves a larger fee, for example, does not allow a lawyer to short change the interests of other clients. The more lucrative clients, while surely taking more of the lawyer's time and resources, should not preclude providing competent representation to other clients. These other clients would even include those paying no fee at all. The obvious solution for such an overcommitted lawyer is to refer the matter elsewhere.[158]

It is relatively common for lawyers to combine other practice areas with the representation of sports clients. Of course, the perceived importance of one matter must not lead to the neglect of another. A sole practitioner (often the case for a sports lawyer) is held to the same standard as firms with unlimited resources. One court stated the general rule as follows:

> Every attorney, whether he is a sole practitioner, a member of a large law firm or a member of a small firm, and regardless of the extent of his legal experience, owes an obligation—not only to his client but also to the courts and the justice system—*not* to undertake legal representation in matters unless he has adequate time to pursue the matter with reasonable diligence.[159]

A lawyer's lack of work experience in the particular area generally does not affect this standard.[160] This requires lawyers to be conscious

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157. C. WOLFRAM, *supra* note 24, § 5.1, at 186-88; *see* ARPA CODE OF ETHICS, Rule 5-101(B) (Appendix).

158. C. WOLFRAM, *supra* note 24, § 5.1, at 187 (citing Comm. on Professional Ethics v. Bitter, 279 N.W.2d 521, 524 (Iowa 1979)).

159. Cortlett v. Gordon, 106 Cal. App. 3d 1005, 1015, 165 Cal. Rptr. 524, 528 (Cal. Ct. App. 1980) (emphasis in original).

160. *See id.* at 1015-16, 165 Cal. Rptr. at 528 (court not unmindful of fact that circumstances may exist in the case of sole practitioner that constitute a justification for neglect, such as an unexpected illness, but not finding such justification in this case).

of fluctuations in their commitments of time, based on the demands of various clients.

C. *Lawyer Standards Higher than the Sports Agent*

Whether applying to an experienced sports lawyer, or a lawyer undertaking representation of his first sports law client,[161] one general aspect of competence is clear: Lawyers are held to a higher standard than sports agents. Agents as an industry are not effectively held accountable to a code of ethics, as are lawyers through the various bar associations.[162]

As mentioned below, the duty of providing competent representation clearly requires lawyers to refrain from undertaking matters outside of their jurisdiction of knowledge, skill, and training.[163] Agents and lawyers are distinguished in terms of this obligation of providing only certain types of services. A vivid illustration is in the area of "investment advice," a service commonly provided by sports agents.[164] Along with this service has come drastic cases in the sports representation industry of income mismanagement and financial loss.[165]

National Basketball Association star Kareem Abdul-Jabbar's financial troubles provide one such example.[166] The agent in question, Tom Collins, signed Abdul-Jabbar and other clients to extremely broad representation agreements. Under this contract, Collins could "do anything he pleased with [his clients'] money" – from signing checks, to taking out loans, to making investments.[167] Holding this power, Collins was only obligated to provide monthly financial statements to his clients. Limited partnerships and other investments were organized by the agent. Under the terms of these partnerships, Abdul-Jabbar and the other cli-

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161. *See supra* notes 148-56 and accompanying text.

162. Sports agents, though, have made an effort to improve the ethical standards of their industry. *See supra* note 6.

163. *See supra* notes 148-51 and accompanying text.

164. Sobel, *supra* note 4, at 708.

165. *See, e.g.*, WEISTART & LOWELL, *supra* note 4, § 3.17, at 320 n.705; Comment, *supra* note 4, at 820-21 (reporting cases of agents losing their client's money through investments, with the agents being subject to grand larceny). *See generally* Rosenblatt, *'Have I Got a Deal for You, Kid. . .'*, SPORTS INC., Feb. 20, 1989, at 20 (describing the explosion of financial planning for athletes, listing players involved in money-losing deals, and providing a sample financial profile).

166. *See* Papanek, *A Lot of Hurt: Inaction got Kareem Creamed*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 89.

167. *Id.* at 92.

ents were all liable as general partners.[168] Sums of money moved from one client account to another with no notice to the clients; Abdul-Jabbar even unknowingly lent fellow NBA player Ralph Sampson $575,000.[169]

Once again, this is but one example of many in the overall area of competence, in illustrating the distinguishing characteristics of lawyers and agents. It is relevant to the legal profession in several ways. Expertise as a lawyer generally, as well as in a specialized area such as sports law, necessarily *narrows* the scope of the lawyer's competence. The lawyer must be cognizant of this ambit of expertise, and properly delegate to outside sources. This would include assisting the client in hiring (or directly hiring, upon informed client consent[170]) certified public accountants, financial planners, and competent investors generally.[171]

V. CONFLICT OF INTEREST

Conflict of interest problems have been described as the most pervasively felt of the professional responsibility dilemmas facing members of the legal profession.[172] Although other ethical issues, such as solicitation, are arguably more prevalent in the sports representation context,[173] representing conflicting interests is nevertheless at the fore-

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168. *Id.* at 94.

169. *Id.* Abdul-Jabbar sued Collins for $59 million, alleging misuse of funds. Rosenblatt, *supra* note 165, at 24.

170. This is analogous to general practitioners associating competent sports lawyers. With such an association comes a duty to disclose and receive client consent of such a need. *See supra* notes 155-56 and accompanying text.

171. Barring lawyers from providing investment services would obviously be unconstitutional. Sports lawyers, in fact, regularly expand into dual occupations. *See supra* Part II; *see also* ARPA CODE OF ETHICS, Rule 2-102(B)-(C) (Appendix) (requiring separate qualifications when providing investment services, along with disclosure of fees). The primary purpose of this discussion, then, would be to emphasize the importance of competence in whatever area the lawyer engages in.

172. C. WOLFRAM, *supra* note 24, § 7.1, at 313; *see Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1247 (1981) (stating that "[f]rom 1908 to the present, the lawyer with conflicting interests has provided bench and bar with one of the toughest problems in legal ethics"); *see also* Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982); O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 643 (1980).

173. By no means would one ethical concern be more or less important than another. Solicitation issues, however, are more widely discussed, due to the intense competition to gain access to sports clients. *See, e.g., supra* note 11 (227 registered repre-

front of the sports law area, just as with the legal profession generally. Under the Model Rules, lawyers are forced to decline representation of a client if (1) that representation will be directly adverse to another, or (2) the lawyer's personal interests "materially limit" his responsibilities to a client.

The discussion in this Part examines the conflict of interest mandates facing the sports lawyer—both from a historical and modern perspective. A large portion of the Part focuses on examples of conflicts in the sports representation industry. Throughout the discussion, various viewpoints of conflict of interest are provided generally. Subpart V(C) offers a set of guidelines, with emphasis on the disclosure and consent provisions under the ethics rules and the lawyer's scope of representation, for practicing sports lawyers to utilize to avoid situations which may present conflict of interest problems.

A. The Lawyer's Duty to Avoid Conflict of Interest

1. Loyalty and confidentiality: underlying policy considerations.—The thrust of the conflict of interest rules is that a lawyer must provide his client with unimpaired loyalty throughout the representation.[174] This "zealous"[175] loyalty is an essential element in the attorney's relationship with his client.[176] As will be seen below, various interests in the sports representation area—ranging from personal interests of the lawyer to those of another client—may potentially impair such a vigorous representation.

The principle of confidentiality is an equally important underpinning of the conflict of interest rules.[177] The lawyer holds an obligation to

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sentatives with the NBPA, yet only 275 player-clients). Likewise, the NFLPA, which has 1,600 player-members, was reported to have registered 1,266 agents or lawyers as of 1986. Bulkely, *Sports Agents Help Athletes Win—and Keep—Those Super Salaries*, Wall St. J., Mar. 25, 1985, at 31, col. 4.

174. Canon five of the ABA Code requires lawyers to maintain undivided loyalty, while advising clients of their best course of action; EC 5-1 reads as follows:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

175. ABA CODE, *supra* note 28, EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .").

176. MODEL RULES, *supra* note 58, Rule 1.7 comment (Loyalty to a Client).

177. *See* C. WOLFRAM, *supra* note 24, § 7.1, at 317; L. PATTERSON & E. CHEATHAM, THE

protect these confidences, defined by the ABA Code as information protected by the attorney-client privilege. The obligation also includes protecting "secrets," defined as "other information gained in the professional relationship."[178] Confidentiality of information encourages individuals to seek legal services. Representation of adverse interests, though, may threaten this openness, as confidential information received from one client may be used to the disadvantage of that client when the attorney is representing a third party.[179]

Although other issues have been raised as to what constitutes a conflict,[180] breaches of loyalty and confidentiality are the two primary concerns for lawyers to consider. Either of these two aspects of conflicts of interest can arise at any point throughout the client's representation, and can take on numerous forms.

2. • Confidentiality in sports law: varying policies. — While confidentiality is a chief consideration in the area of conflict of interest generally, it is far less important in the sports representation industry. Indeed, the confidentiality standards of the legal profession are at times largely a nullity in the area of sports law.

This is the result of the very nature of the practice. Lawyers in the sports representation industry often serve the same roles as agents, such as negotiating contracts or engaging in other law related occupa-

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PROFESSION OF LAW 229 (1971).

178. ABA CODE, *supra* note 28, DR 4-101(A); *see* MODEL RULES, *supra* note 58, Rule 1.6; ARPA CODE OF ETHICS, Rules 4-101, 4-102 (Appendix).

179. *See* Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996, 997-98 (1979) (stating that in the course of representing interests adverse to a client, an attorney may, despite conscientious attempts to resist, subconsciously or inadvertently use his client's confidences against him).

180. For example, the broad-sweeping language of Canon Nine of the ABA Code to avoid "even the appearance of impropriety" is often asserted in these situations to claim lawyer disqualification because of a conflict. The 1983 Model Rules, however, omitted this statement as a means of lawyer disqualification. Additionally, such a standard has been widely criticized. *See* C. WOLFRAM, *supra* note 24, § 7.1, at 320 (questioning not only who are the observers to whom the relevant appearances present themselves, but whether it is even possible to gain an accurate perception of public reaction to a particular representation); *see also* Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264-65 (1981) (a "dangerous and vague standard," disqualifying counsel based on appearances alone often turns on how different judges suppose that the public might view a given ethical issue, and that public perception is often in contrast to legitimate concerns of the bar). *But see* ARPA CODE OF ETHICS, Rule 5-103 (Appendix).

tions.[181] The mere fact that lawyers serve the same roles as agents would by no means be a sufficient reason for altering the confidentiality rules. Sports agents, in fact, are obligated to preserve information gained in the course of the professional relationship with an athlete, if "the athlete has requested [it] to be held confidential or . . . the [agent] knows or should know would be embarrassing or detrimental to the athlete if released."[182] A great deal of information that a lawyer or agent gains in a professional relationship with an athlete, however, will not in fact be held strictly confidential. This is the result, whether or not the client requests it to be confidential. For example, a player's salary and performance incentives are often publicly disseminated through the news media.[183] Additionally, the governing bodies of lawyers and agents customarily require representation agreements with the lawyer and other information to be disclosed.[184] This information is *beyond the control* of the lawyer, and more accurately characterized as in the "public domain."

Disclosing this publicly available information does not violate accepted standards of confidentiality. The more akin the sports lawyer's services are to those traditional services provided by attorneys,[185] though, the more likely that confidentiality rules remain intact. There is little doubt that a substantial portion of information gained by the lawyer during the servicing of a sports client remains subject to confidentiality.[186] This, of course, is the case, so long as the attorney-client privilege is applicable. The sports client would not only have to be seeking

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181. *See supra* Part II.

182. ARPA CODE OF ETHICS, Rule 4-102 (Appendix).

183. *See, e.g., Gridiron Green: What NFL Players Earn*, USA Today, Feb. 23, 1988, at C9; *From Millionaires to the Minimum*, USA Today, Oct. 13, 1988, at C4 (MLB salary survey "based on documents filed with the . . . Major League Baseball Players Association"). "Our position is that when an attorney claims, for example, that he has confidentiality to protect a player's salary information, that this is not allowed. Our stance is that his claim on confidentiality grounds is not a legal matter—it is simply part of the agent rules that such information must be divulged." Telephone Interview with Mike Duberstein, Director of Research, NFLPA (July 21, 1988).

184. *See, e.g.*, Alabama Athlete Agents Regulatory Act, ALA. CODE § 8-26-22 (1987) (requiring representation agreements to be approved by the regulating Commission); MLBPA Regulations § 4(B) (1988) (representation agreement to be filed with players association within 30 days of execution).

185. For types of services typically provided by sports lawyers, see *supra* note 10.

186. For example, an area such as estate planning for a sports client obviously requires lawyers to adhere to confidentiality standards. Unlike confidentiality, the principle of loyalty as related to conflict of interest is not subject to the alterations due to the nature of the sports representation industry.

legal advice, but also would have to be in an expectation of confidence.

3. 1969 ABA Code: lawyers must avoid representing "conflicting" or "differing" interests. – From the outset, the basic duty of an attorney is to exercise independent professional judgment on behalf of a client. Canon Six of the 1908 Canons of Ethics initially set the standard by stating that it was "unprofessional to represent conflicting interests."[187] The 1969 ABA Code similarly forbids representing clients who would adversely affect the lawyer's independent judgment; the actual wording employed, though, has been changed to "differing interests." A differing interest is defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[188]

A conflict of interest may arise in several situations. First, the client may stand as a conflicting or differing interest under DR 5-105. Second, a lawyer's personal interests may clash with those interests of a client. In this latter situation, the ABA Code formulates the following conflict of interest test: A lawyer encounters a conflict if his professional judgment on behalf of a client "will be or reasonably may be affected by his own financial, business, property, or personal interests."[189]

A conflict violation under the ABA Code generally will preclude a law firm or single practitioner from accepting (or later resigning from) a representation. Aside from the issues of full disclosure and client consent,[190] lawyer disqualification arguably is not required in every case.[191] Once disqualification becomes inevitable, case law varies as to which of the clients the lawyer will be allowed to continue to represent. The

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187. ABA CANNONS OF PROFESSIONAL ETHICS, Canon Six (1908).

188. ABA CODE, *supra* note 28, DR 5-105(A) (definitions); *see also* ABA CODE, *supra* note 28, EC 5-14 (emphasis added) (clarifying the distinction between the two policy concepts of loyalty and independent professional judgment, by stating that a lawyer's required level of "independent professional judgment . . . precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of *or* dilute his loyalty to a client").

189. ABA CODE, *supra* note 28, DR 5-101(A).

190. *See infra* notes 271-78 and accompanying text.

191. *See, e.g.*, Miller & Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 THE BUS. LAW. 631, 658 (1985) (disqualification is a matter of discretion and equity, with the relevant considerations including whether a party waived its right to such relief by delaying and permitting the attorney to represent other clients well into the course of a matter).

lawyer may, in fact, not be able to choose among his clients.[192]

4. 1983 Model Rules: clarification with "directly adverse" standard.—Recognizing several "deficiencies"[193] in the 1969 ABA Code, the Model Rules omit the ambiguous "appearance of impropriety" rubric.[194] The impropriety standard has been criticized for various reasons, one being the impossibilities of gaining an accurate perception of public reaction to a particular representation.[195] That vague touchstone was often asserted to disqualify a lawyer for conflict of interest.

The Model Rules also more completely state the requirements for client consultation when seeking consent to a conflict.[196] Lawyers must "reasonably believe" that a representation will not be adversely affected, due to other clients represented, or other potentially conflicting situations. The Model Rules further allow the representation to continue if the client or clients "consent after consultation."[197]

The primary conflict of interest proviso is Model Rule 1.7. It measures the concurrent representation issues with a "directly adverse" standard. The rule provides as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and

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192. *See, e.g.*, Estates Theatres v. Columbia Pictures Industries, 345 F. Supp. at 93, 100 (S.D.N.Y. 1972) (attorney facing conflict not entitled to choose which of the two parties he will represent, but required to withdraw); *see also* IBM v. Levin, 579 F.2d 271 (3d Cir. 1978) (if the second client is dissatisfied with and unwilling to consent to the joint representation, the attorney must cease representing the first client).

193. C. WOLFRAM, *supra* note 24, § 7.1, at 315. *See generally id.*, § 7.1, at 315-16 (outlining the Model Rule departures from the ABA Code).

194. *See* MODEL RULES, *supra* note 58, Rules 1.7, 1.8-1.13.

195. *See supra* note 180.

196. C. WOLFRAM, *supra* note 24, § 7.2, at 340-41.

197. MODEL RULES, *supra* note 58, Rule 1.7. For a discussion of disclosure and consent issues, and the sports lawyer's obligation to avoid an actual conflict, see *infra* notes 271-303 and accompanying text

> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[198]

In regard to this "directly adverse" standard, the comments to Model Rule 1.7 discuss the degree of adversity of a representation that will rise to a conflict of interest. A Lawyer typically may not act as advocate against an individual the lawyer represents in some other matter, even if it is "wholly unrelated."[199] The comments then further qualify this standard: "On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."[200]

The Model Rules additionally provide general guidelines for a lawyer considering a potential conflict. The Model Rules maintain that the critical question is the likelihood that a conflict will actually result. If a conflict does result, the lawyer must determine whether it will "materially interfere" with his independent professional judgment in terms of the various courses of action to pursue on behalf of the client.[201]

As to whether a multiple representation would impair a lawyer's ability to exercise independent professional judgment, the Model Rules require the attorney to "reasonably believe" that the representation will not adversely affect the client. It has been argued that this test, really one of the client's "best interest," does little to assist the lawyer in better identifying such situations, and determining when disqualification is the proper course.[202]

5. Conflicts for the "sports agent": a fiduciary duty. — The ethics rules of the legal profession are obviously not binding on sports agents; nevertheless, agents are subject to conflict of interest standards generally. Agents are held accountable and owe duties of loyalty under agency law to their principal-clients;[203] an agent must not "place himself

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198. MODEL RULES, *supra* note 58, Rule 1.7; *see also* ARPA CODE OF ETHICS, Rule 1-103(2) (Appendix).

199. MODEL RULES, *supra* note 58, Rule 1.7 comment (Loyalty to a Client).

200. *Id.*

201. *Id.*

202. *See* Moore, supra note 172, at 286 (test based on client's "best interest" does little to resolve the present "controversy and confusion over the resolution of typical conflicts dilemmas").

203. *See e.g.*, Naviera Despina, Inc. v. Cooper Shipping Co., 676 F. Supp. 1134,

or voluntarily permit himself to be placed in a position where his own interests or those of any other person whom he has undertaken to represent may conflict with the interests of his principal."[204]

Therefore, even those sports lawyers whose representational capacity encompasses exclusively "contract advising"[205] are bound to avoid conflicts of interest. Any arguments that the role of "agent" is separable from that of an attorney—such that when lawyers enter the sports representation industry, they are not bound to the ethical constraints of the legal profession—are rendered faulty.[206]

Unlike an ethical area peculiar to the legal profession, such as solicitation,[207] the issues that lawyers face in the conflicts area are equally applicable to agents, at least generally. It follows that failure of an agent to disclose a potential conflict and obtain client consent will likely result in an actual conflict and agent disqualification. Even the most noted judicial statements of conflict of interest in the sports representation industry involve nonlawyer agents,[208] as well as lawyers serving the role

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1141 (S.D. Ala. 1987) ("agent must not, except where the principal has full knowledge and gives consent, assume any duties or enter into any transaction concerning the subject matter of the agency in which he has an individual interest or represents interests adverse to those of his principal"); Ramsey v. Gordon, 567 S.W.2d 868, 870 (Tex. Ct. of Civ. App. 1978) (contract void at option of principal due to agent's personal interest in transaction); United States v. Drisko, 303 F. Supp. 858, 860 (E.D. Va. 1969) (agent, by secretly advancing interests of third party, "placed himself in a position of serving conflicting interests and loyalties").

204. F. MECHEM, OUTLINES OF THE LAW OF AGENCY 345 (1952); *see* H. REUSCHLEIN & W. GREGORY, AGENCY & PARTNERSHIP 123 (1979) (duty of agent loyalty includes acting solely and completely for the benefit of principal); WEISTART & LOWELL, *supra* note 4, § 3.19, at 329 ("There can be little dispute that the agent has a legal duty to avoid conflicts of interest in his representation of his athlete-clients."); RESTATEMENT (SECOND) OF AGENCY § 394 (1958).

205. A "contract advisor" is the general term often employed by various bodies that govern persons serving as sports agents or lawyers. *See, e.g.*, NFLPA Regulations Governing Contract Advisors, a section of which is cited *supra* note 123. Sports representation characteristically expands into other areas than the negotiation of an athlete's playing contract; it frequently takes the lawyer beyond providing traditional legal services. *See supra* Part II. For a specific discussion of these law related areas, see *supra* text accompanying note 31.

206. Lawyers in this area commonly attempt to segregate the roles of lawyer and agent. This separation—as a practical matter—is not always such a complete one. *See supra* subpart III(B)(4).

207. *See supra* Part III.

208. *See* Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542 (E.D. Mich. 1984) (agent Jerry Argovitz violating conflict of interest principles when representing his client, Billy Sims of the NFL, by negotiating with a team in which he was part-owner). For an analy-

of an agent.[209]

B. Conflict of Interest in the Sports Representation Industry

Abuse and unethical activity dominate the sports representation industry.[210] One significant aspect of this abuse—both directly and potentially—is lawyer or agent conflict of interest.[211] The following discussion outlines examples in the representation industry of these potential conflicts, and how they may run afoul of ethical concerns.

1. Sports clients with competing interests.—Lawyers may face potential differing interest situations when clients are in competition in one form or another. This is particularly true for a sports lawyer with a broad clientele. The nature of the clients involved, of course, will largely determine what type of competition is at issue.

Arguably, the one competing interest situation with the most profound consequence is in the area of player representation.[212] This type of conflict may arise when a lawyer's client list includes several different athletes in the same sport. Should the rights to both players be held by the same team, it is possible that the lawyer may sacrifice or compromise one player's demands in order to negotiate a more favorable contract for the other. Negotiating such a "package deal" may force the lawyer to independently (and perhaps arbitrarily) rank the relative worth of both athletes.[213] Even under the most liberal read-

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sis of this case, see Fraley & Harwell, *The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 HASTINGS COMM/ENT L.J. 165, 180-82 (1989).

209. *See, e.g.*, Brown v. Woolf, 554 F. Supp. 1206 (S.D. Ind. 1983) (denying sports agent-attorney Bob Woolf's motion for summary judgment in suit brought by former client claiming breach of fiduciary duty by virtue of Woolf's alleged failure to investigate the financial stability of team, as well as certain deferred compensation issues, guarantees, and agent fees).

210. *See supra* notes 4-9 and accompanying text.

211. *See generally* WEISTART & LOWELL, *supra* note 4, § 3.19, at 328-31; R. RUXIN, *supra* note 97, at 63-74; G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 147-48.

212. *See* Fraley & Harwell, *supra* note 208, at 183-85. Due to player mobility practices varying from league to league, the issues of competing player interests in sports vary according to which league is involved. *Id.* at 183.

213. *See, e.g.*, Special Report, *supra* note 4, at 84. The Kansas City Royals' Hal McRae and Frank White were represented in 1981 contract negotiations by Tony Pace, apparently not a lawyer. The representative was reported to have refused to come to terms on White's contract until the Royals agreed to extend McRae's, which had two years to run. *Id.* Kansas City management claimed that White, who had only one year left on his contract, could have signed a new contract a month earlier if Pace had tried

ing of the ethics rules, a lawyer in this position could hardly claim undivided loyalty to both athletes.

Other scenarios of competing player interests also raise loyalty questions. A sports lawyer might represent multiple players at the same position, such as two quarterbacks vying for one available roster spot.[214] In this scenario, it is possible that one client could question the allegiance of his lawyer. A more subtle conflict arises if the lawyer is forced to negotiate salaries for two players, when both salaries originate from the same limited fund.[215] Many of these same competing player interest issues exist for coaches, whether head coaches or assistants.[216]

2. Endorsements. — The sports lawyer, depending on the marketability of his clients, may be in a position to increase his client's income by procuring and negotiating endorsement contracts. It is conceivable that this service could present a lawyer with a potential conflict of interest.

One possible endorsement conflict, if the lawyer's clientele includes two players in the same sport, could arise in terms of the lawyer's duty of confidentiality. Players in the same sport are likely to be attentive of what other similarly situated players receive from this off-the-field source of income. Disclosing this information to an inquiring player, though, may betray the first palyer's confidence as to his income. Such a breach of confidence could arise, for example, when sharing the terms of one baseball player's glove or shoe contract with

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to negotiate. R. RUXIN, *supra* note 97, at 68.

214. *See* Fraley & Harwell, *supra* note 208, at 185; *see also* R. RUXIN, *supra* note 97, at 69; G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 135; Special Report, *supra* note 4, at 84.

215. Fraley & Harwell, *supra* note 208, at 185 (potential conflict exists when two NBA players are represented by the same lawyer; teams in that league must maintain "salary caps"); *see also* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 135. *But see* NBPA Regulations Governing Player Agents (NBPA Regulations) § 3(B)(g) (1986) (general rule of conflict of interest prohibits agents from "[e]ngaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NBA players," but specifically providing that "representation of two or more players on any one club shall not itself be deemed to be prohibited by this provision").

216. Fraley & Harwell, *supra* note 208, at 186. When representing several coaches interviewing for the same job, for example, the lawyer's role is not typically that of influencing the selection process. This limits the lawyer's role, and decreases the potential for a conflict. *Id.* at 213. Once the lawyer serves as an employment agency, however, lawyer resignation is the proper course. *Id.*

another player.[217] Conversely, not conveying such an amount to another client may be withholding relevant information about the endorsement market; this client would argue that he has a right to hear this type of information from his lawyer.[218]

It could also be argued that lawyers who bill their clients according to a percentage of all endorsements[219] encounter an inherent conflict of interest. This potential conflict is based on the lawyer's personal interest in the outcome of the transaction. For example, an endorsement contract or commercial may not be advisable, due to the possibility of diluting the client's future marketability; nevertheless, the lawyer may consciously or subconsciously disregard this important consideration, and advise his client to accept the endorsement. Once the contract is secured, the lawyer personally collects his fee. Such a financial stake may influence the lawyer's "independent professional judgment."[220]

Another conceivable endorsement conflict would be when a lawyer is confronted with one advertising or endorsement offer for two clients. Such an infrequent situation would arise, for example, if an advertising budget only allowed for one endorsement, and that company approached a lawyer who represented multiple clients, all of whom would be interested in the endorsement. This scenario is rare, due to the regional appeal generally of clients that endorse products. Nevertheless, there is the possibility that, had the clients retained independent counsel, their interests could have been more vigorously represented.[221]

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217. *See* Special Report, *supra* note 4, at 85 (questions raised about lawyer Tom Reich's endorsement negotiations for baseball clients Dave Parker and Tim Raines).

218. In this particular situation, as a practical matter, the glove or shoe contract market generally would not be the subject of confidentiality principles. An individual endorsement, though, would be protected information. Confidentiality, an important conflict of interest policy consideration, generally takes on a different meaning in the area of sports law. *See supra* notes 181-86 and accompanying text.

219. The more typical fee arrangement for sports management firms is the representative or firm gaining 20 percent of the client's income; this income includes, for example, a tennis player's endorsement income, as well as actual tournament winnings. These management firms, such as International Management Group, are discussed elsewhere in this Article in terms of another potential conflict: event management simultaneously with player representation. *See infra* notes 241-50 and accompanying text.

220. Due to the lawyer's personal financial interest in completing the transaction, his loyalty to his client could be compromised. *See, e.g.*, ABA CODE, *supra* note 28, DR 5-103, 5-104 (requiring lawyers to avoid an acquisition of a personal interest in the client's matters, as well as limiting business relations with clients); MODEL RULES, *supra* note 58, Rule 1.8(a).

221. *See* WEISTART & LOWELL, *supra* note 4, § 3.19, at 328 (posing hypothetical of a

The procurement and negotiation of endorsement contracts will often be a service provided to sports clients by nonlawyers, such as agents and sports management or marketing firms. The argument follows that when lawyers provide these services, they are not "practicing law."[222] These lawyers, however, will still be subject to conflict of interest rules under agency law,[223] as well as the mandates of the legal profession generally, as they are engaged in a separate, law related occupation.[224]

3. Inherent conflict with fee arrangements.—Historically, fee arrangements in the sports representation industry have not been noted for basic notions of fairness.[225] One segment of this general area of fees for services rendered[226] relates to conflict of interest. A lawyer could conduct a certain negotiation in a manner that would place his own fee above the interests of his client—clearly falling out of the vigorous representation category. Two separate and distinct fee arrangement scenarios are prevalent in the representation industry.

The first potential conflict of interest relates to the overall negotiation practices of the lawyer. In this situation, a lawyer may come to terms with a team earlier than that point in the negotiations merit (or that player's market value demands). The reason for this premature contractual agreement is simple: lawyers billing according to a percentage of the contract basis[227] are paid when the athlete is paid. Therefore, the earlier negotiations are concluded, the sooner the lawyer can

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manufacturer seeking endorsements from athletes that are all represented by the same individual, thus leaving the lawyer "in a position of having to choose between several equally well-suited candidates").

222. *But see supra* note 24 (discussing the traditional legal service of negotiating, and concluding that lawyers in the sports representation industry *are* "practicing law," both when negotiating sports contracts and counseling on business matters); *supra* subpart III(B)(4) (segregating roles of lawyer and agent).

223. *See supra* notes 203-09 and accompanying text.

224. *See supra* subparts II(B)(3) & II(C) (if qualifying as "law related," all provisions of the ABA Code and Model Rules are binding on the lawyer).

225. It was reported that one sports agent charged an amount equal to one full contract year of a three-year contract. R. RUXIN, *supra* note 97, at 4. *See generally* WEISTART & LOWELL, *supra* note 4, § 3.17.

226. For a discussion of fees generally, and the sports lawyer's duty of "reasonableness," see *infra* subpart VI(A).

227. One custom in the sports representation industry that enjoys widespread popularity is to bill according to a percentage of the total dollar value of a negotiated contract. Alternatively, agents or lawyers bill under an hourly rate arrangement. *See infra* subpart VI(A)(1).

collect his fee. If the lawyer is in fact motivated, based on the *time* he collects his fee, to come to an early settlement, the player is left with nonvigorous representation at a point when the lawyer's role is most crucial.

While these instances are not necessarily widespread, the time of year a player signs with a club is often determined (and easily predicted) by who represents him. The most notable examples of this scenario in the representation industry come from sports agents. These agents rely in terms of their livelihood on the continued representation of recent college players.[228]

The second overall fee conflict scenario, once again, relates to lawyers that bill according to a percentage of the total dollar value of a negotiated contract.[229] A player's contract with a club has two values: the "face value" and the present value. The face value, often that figure disseminated to the general public, includes any of the contract's deferred payments. The present or actual worth of the contract, of course, will be a smaller number.[230] Despite the real value of the negotiated contract, some lawyers compute their percentage according to the face value—the inflated figure—of the contract. In effect, the client has been misled as to his agent or lawyer's percentage rate. The lawyer's claimed percentage charged, such as five percent, is a deceptive number in this situation.

This issue of the *value* of the player's negotiated salary must be

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228. These firms are typically undercapitalized, needing to come to terms with teams early to meet expenses, such as those outlays of illegal gifts and cash loans made throughout the undergraduate years of these athletes. *See supra* note 97. Benefits of this kind conferred on the athlete are in violation of NCAA rules, an ethical concern itself. *See* NCAA Bylaw 12.3.1.2, cited *infra* note 233. Once the athlete signs with a team, the "advances" are recovered by the agent. While such actions are not often by members of the legal profession, more and more lawyers are serving the roles of contract negotiators and player representatives generally. *See supra* note 11.

229. It could also be argued, on the other hand, that even sports lawyers billing under an hourly rate method have a conflict—such as a desire to extend negotiations with the club, increasing their fee. The sports law area overall involves the representation of highly compensated individuals in an extremely competitive setting. This combination arguably requires particular concerns in this area, regardless of the fee arrangement chosen.

230. The present value, the amount that must be currently invested to produce the known future value, is "always a smaller amount than the known future amount because interest will be earned and accumulated on the present value to the future date." D. KIESO & J. WEYGANDT, INTERMEDIATE ACCOUNTING 236 (4th ed. 1983). The only actual up-front payment from the team is generally the player's signing bonus, if any. All yearly salaries, unless otherwise provided, are paid weekly during the actual season.

compared to the first conflict of interest possibility in this area: sacrificing a client's interest by settling early with the team. Lawyers in both scenarios quite obviously are pursuing personal gains. The latter of these two situations could be discussed just as accurately in the area of the lawyer's duty to charge a reasonable fee.[231]

4. Advising the amateur athlete.—National Collegiate Athletic Association ("NCAA")[232] rules forbid any student-athlete with remaining eligibility from entering into an agreement (whether orally or in writing) to be represented in the negotiation of a professional sports contract.[233] These amateur rules do not, however, prevent a student-athlete from "securing advice" from a lawyer "concerning a proposed professional sports contract."[234] Therefore, a lawyer is free to discuss an eligible student-athlete's professional career generally, "unless the

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231. *See infra* subpart VI(A).

232. The NCAA is a voluntary association whose approximately 900 members, by joining the organization, agree to abide by certain terms and conditions of membership. Member institutions include almost all of the major four-year colleges and universities in America. Membership obligates the individual athletic departments to operate consistently with NCAA legislation. Wong & Ensor, *The NCAA's Enforcement Procedure—Erosion of Confidentiality*, 4 ENT. & SPORTS LAW., Summer 1985, at 1, 13.

233. NCAA Bylaw 12.3.1, *reprinted in* NCAA MANUAL, *supra* note 115, at 61. Bylaw 12.3.1 (citations omitted) provides as follows:

> 12.3.1 General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports and the individual shall be ineligible to participate in any sport.
>
> 12.3.1.1 Representation for Future Negotiations. An individual shall be ineligible per 12.3.1 if he or she enters into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed his or her eligibility in that sport.
>
> 12.3.1.2 Benefits From Prospective Agents. An individual shall be ineligible per 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from any person who wishes to represent the individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general.

234. *Id.* Bylaw 12.3.2 ("Legal Counsel. Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the student-athlete in negotiations for such a contract.").

lawyer also represents the student-athlete in negotiations for such a contract."[235]

Lawyers face a potential conflict of interest when advising such a student-athlete. This would be the case if the lawyer had such a relationship with the athlete as to expect to represent him once he embarked on his professional career. Of course, if the client is advised to turn professional, the lawyer gains a new client. The lawyer's advice, to say the least, could be clouded in this situation.[236]

The sports lawyer must always keep in mind his own motive when advising a student-athlete. He is obligated to make a due diligence search among coaches, scouts, and experts in the sport concerning the player's draft status, both in that particular year and other possible years. The actual market of the particular sport is equally crucial in determining the player's immediate and future salary potential. Other considerations include the player's maturity as a person and as an athlete, and the ever-present possibility of an injury. Assuming that the best interests of the player are to remain an amateur for another season, the lawyer must obviously advise him as such.

5. Players association lawyers.—It has been asserted that lawyers who are employed by a players association[237] face a conflict when they also represent player-members of the association.[238] The interests, for example, of the National Basketball Players Association, may differ from those of an individual player.

A typical professional sports league collective bargaining agree-

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235. *Id.*

236. *See, e.g.*, MODEL RULES, *supra* note 58, Rule 7.3 comment (emphasis added) ("Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may *color the advice and representation* offered the vulnerable prospect.").

237. For a discussion of collective bargaining in sports and the advent of players associations as viable collective bargaining unions, see WEISTART & LOWELL, *supra* note 4, § 6.01. *See also* L. SOBEL, PROFESSIONAL SPORTS AND THE LAW 267-99 (1977).

238. *See* Sobel, *supra* note 4, at 713-14; G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 6, at 135-46; *see also* Special Report, *supra* note 4, at 83-85. Attorney Larry Fleisher has concurrently served as General Counsel for the NBPA and lawyer for players in that league. Lawyer Gary Holthus lists the Pro Bowlers Tour and several individual bowlers as clients. Fleisher, along with Alan Eagelson, who represents hockey players and is employed by the National Hockey League Players Association, "may be privy to information not available to other [attorneys] . . . [a]nd there surely are times when [they] must act officially in a way that's at odds with the specific interests of one or more of their individual clients. Are Eagelson and Fleisher [attorneys] or union bosses first?" *Id.* at 83-84.

ment will outline a player's "terms or conditions of employment" generally.[239] Common topics at the negotiating table include player mobility, disciplinary systems for players who violate league rules, compensation issues (perhaps an entry-level wage scale), and injury provisions. With a broad spectrum of salaries in the various leagues, and the inherent instability of employment in sports, individual parties have widespread interests.

Such varying interests may result in a single player—such as a superstar—finding his attorney, who also represents the players association, at collective bargaining meetings arguing for positions adverse to his. For example, player employment benefits may be sacrificed to reach an agreement with management. This type of agreement may have the effect of aiding lower-level employees—at the expense of the superstar athlete-client. The attorney's differing interest here is clear, and disqualification should be considered.[240]

6. Event management.—Some lawyers or agents may be in a position to not only represent many athletes, but to control the sporting events the athletes participate in—a scenario that leaves such persons "actually running those sports."[241] The example cited most often of this alleged conflict of interest is directed at the world's largest sports management firm, International Management Group ("IMG").[242] Many other firms similar to IMG have been formed in the past ten years, and thus this discussion would not be solely directed to any one group.[243]

Firms of this type offer a wide variety of services to the sports

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239. WEISTART & LOWELL, *supra* note 4, § 6.08, at 813 (discussing the National Labor Relation Board's definition of the term collective bargaining, which meaning includes "wages, hours, and other terms and conditions of employment").

240. *See, e.g. Inquiry Into Professional Sports: Final Report of the Select Committee on Professional Sports, House of Representatives*, H.R. REP. NO. 94, 94th Cong., 2d Sess. 17 (1977) (reporting that a National Labor Relations Board director ruled that, based on conflict of interest grounds, two agents who represented players in the Major Indoor Soccer League could not be officials of the MISL Players Association).

241. Special Report, *supra* note 4, at 83.

242. *See* Cooney, *The Real Army Behind Arnie and Greg*, GOLF DIGEST, Oct. 1987, at 66-76. The firm has 21 offices in 14 countries and some 450 employees worldwide. The IMG client list includes 350 athletes in many sports, the most notable being golf and tennis. *Id.* at 72.

243. *See* Cover Story, *Sports Marketing*, BUSINESS WEEK, Aug. 31, 1987, at 48, 52 (noting that the "Big Three" sports management firms—IMG, ProServ, and Advantage International—dominate the market, but "there are more than 500 such companies in the U.S. today, up from fewer than a dozen five years ago").

industry: legal representation of individual athletes, procuring and negotiating endorsement and promotional opportunities for athletes, and managing and packaging events in which the athletes compete.[244] Additionally, some firms may even control subsidiaries that televise the events.[245]

The arguments that this grip on the sports industry amounts to a conflict of interest[246] have gone so far as to result in formal charges against the firms. The primary cause for concern is when these firms simultaneously represent individual athletes, and the events they participate in. One charge has been brought by the Men's International Professional Tennis Council.[247] The Council, like others, has asserted that

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244. Firms such as IMG and ProServ are most commonly known for the management of golf and tennis events. *See, e.g.*, Cooney, *supra* note 242, at 71 (explaining how IMG organized the World Match Play Championships and the European Tournament Players Championships, both golf tournaments in England).

245. An IMG subsidiary, Trans World International, is the world's largest independent source and distributor of televised sports programming. It produces and develops many sporting events, such as Wimbledon, NFL Football, and the U.S. Open. *Id.* at 73; *see* Fraley & Harwell, *supra* note 208, at 196. Another power of these sports management firms includes owning the actual camps that help develop professional prospects. The final "frightening" move might be holding back several clients from an event to undermine a rival tournament. *Id.*

246. Proponents of IMG claim that this pervasive control does not amount to a conflict of interest, in that they deserve such authority after taking significant business risks. Fraley & Harwell, *supra* note 208, at 195.

In addition to conflict of interest, sports management firms that represent players and control forums are equally susceptible to attack on antitrust grounds. *See* Comment, *Matchpoint: Agents, Antitrust, and Tennis*, 64 U. DET. L. REV. 481 (1987). This article analyzes the control and influence of the firms IMG and ProServ, who in 1985 represented 16 of the world's top 20 men's tennis players. Despite the fact that the two firms may have achieved a monopoly in the representation of professional players, this alone is not necessarily illegal, as it may be a natural result of the firms' business ingenuity. *Id.* at 497 (citing United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 297 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), for the proposition that Section Two of the Sherman Act does not apply if it results from "superior skill, superior products, natural advantages . . . or the like"). Expanding to event management, through controlling the top players, however, "does not naturally flow from their skills in representing professional players." *Id.* A firm like IMG could then be found to violate the antitrust laws by (1) monopolizing one field, and securing dominant market power in another field, in violation of the Sherman Act, or (2) if not reaching a monopoly in running tournaments, but exercising their monopoly of player representation to control "players in a manner that maintains their position and excludes competition." *Id.* at 498.

247. The Men's Tennis Council, the governing body of men's professional tennis in the United States, is made up of three factions: (1) the Association of Tennis Professionals ("ATP"), (2) the various tournament directors, and (3) the International Tennis

such a broad influence threatens various interests in that sport. One asserted interest is the continued viability of independent entities that manage sports events.

Tennis star Ivan Lendl also sued a sports management company: his former representative, ProServ. The suit had multiple allegations, including conflict of interest and breach of fiduciary duties.[248] One claim by Lendl would seem to be a clear conflict. ProServ is said to have actively "packaged" the services of Lendl with other tennis clients that were obligated to pay a higher percentage of their income to the company than was Lendl. Thus, Lendl would not receive his full market value when collecting appearance fees.[249] The company, often acting as event manager and player representative, was alleged to have had "frequent opportunities . . . to abuse its position and to exploit the trust . . . held by its clients."[250]

7. Dual representation of coaches and players.—Representing players and coaches in the same league,[251] particularly of the same

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Federation. The ATP, failing to agree on such issues as the control of the Grand Prix Circuit and increased prize money for players, has attempted to launch its own tour, which may alter the current structure of the Council. *See* Comte, *Men's Council May Disband: Last-Ditch Proposal Doesn't Stop ATP Tour*, SPORTS INC., Oct. 31, 1988, at 3.

The formal charges brought by the Council, like others, allege conflict of interest. *See* Cook, *Mark McCormack Does Everything but Play the Game*, BUSINESS WEEK, Aug. 31, 1987, at 52 (federal court case involving MPTC based on conflict of interest and restraint of trade); Comte, *Trouble is, No One is in Charge: Mega-agents Control Tourneys, but the Sport is Facing a Volley of Power Plays*, SPORTS INC., Aug. 29, 1988, at 16-17.

248. *See* Fraley & Harwell, *supra* note 208, at 198 (other theories included in Lendl's original complaint were fraud, breach of contract, diversion of funds and business opportunities, misappropriation, and conversion).

249. *See* Muniz, *Lendl's Counterpunch*, SPORTS INC., May 9, 1988, at 3 (describing "packaging," where a management company, in an attempt to generate more profits, lowers one player's fees in order to include other players, also represented by the firm). It is commonplace for golf and tennis players to receive appearance fees for specialized tournaments and non-PGA or Grand Slam events. Such fees guarantee players an amount of money, regardless of their final finish in the event. *See* Special Report, *supra* note 4, at 83 (claiming that appearance money may eliminate an important incentive to win, reducing some tournaments to mere exhibitions).

250. Fraley & Harwell, *supra* note 208, at 199 (citing Lendl and Taconic Enterprises v. ProServ, Inc., No. B-88-254, at 10 (D. Conn. filed May 5, 1988)). The Lendl suit, as well as the MTC suit discussed above, settled out of court. *Id.*

251. The discussion of this potential conflict is referred to as a "coach," but could mean other non-player employees. For conflict issues when a dual representation includes management employees that actively take part in the negotiation of player con-

team, is also said to present a potential conflict of interest.[252] The Commissioner of the National Football League has even spoken on this matter. He has claimed that such common representation can "cause significant problems" and that clubs should "seriously consider adopting policies directed at avoiding these troublesome situations."[253]

Such simultaneous representation presents the appearance of a conflict in several situations. One example would be the wide disagreement between a lawyer and the team in contract negotiations for a player's salary. This situation may necessitate an extended holdout from participation with the team. If a lawyer's client list includes that team's coach, the coach may be without a major contributor to the win-loss record and overall success of that particular season—subjecting the lawyer to a potential conflict of interest. The coach obviously has a strong interest in the player participating in training camp and all regular season games. Such a scenario must be compared to the case of independent lawyers representing both the player and coach, wherein questions of a lawyer's unfettered loyalty do not arise.[254]

This potential conflict arising from the dual representation of coaches and players may become an actual conflict if that particular coach, as part of his job, actually takes an active role in contract negotiations. When a coach initiates decisions for management concerning the compensation level of individual players, the lawyer's interest of his player-client and coach-client become adverse. One client interest

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tracts, see *infra* notes 255-56 and accompanying text.

252. *See* Special Report, *supra* note 4, at 84 (serving management and labor on the same team can cause problems, and raising the question of attorney Robert Fraley's representation of Philadelphia's Buddy Ryan, the coach, and a Philadelphia player, Jerome Brown); Rosenblatt, *Robert Fraley: If You Coach, Play or Run a Team, He Will Represent You*, SPORTS INC., Feb. 22, 1988, at 24 (each time an attorney surfaces as a representative for both NFL coaches and players, the question of conflict of interest is raised).

253. Fraley & Harwell, *supra* note 208, at 200 (including Memorandum from Commissioner Pete Rozelle to NFL Club Presidents regarding multiple representation of player and non-player employees (Sept. 4, 1987)). Rozelle's claims, like the majority of conflict of interest accusations, are grounded in loyalty and confidentiality. He also makes the distinction between agents and lawyers, and states that applicable bar associations "only partially meet the problem." Although stating that the representation is "suspicious," Rozelle does acknowledge that any ethical problems "can usually be avoided altogether by full disclosure to all interested parties." *Id.*

254. Other potential conflict situations include a lawyer's assisting in player relocation, when such relocation is to the detriment of a coach. *Id.* at 201. Additionally, disputes and player grievances generally could present a potential conflict of interest. *Id.*

would clearly "materially interfere"[255] with the lawyer's independent professional judgment, to the point of requiring disqualification. However, this scenario, at least in the three major professional leagues, occurs rather infrequently. The role of negotiator is customarily not the function of a member of the team's on-the-field staff.[256]

(a) Reaction from governing bodies: the NFLPA, MLBPA, and NBPA.—League players associations[257] expressly prohibit the concurrent representation of players and certain management personnel. The most obvious prohibition—which would amount to an unquestioned conflict of interest—would be for a lawyer to actually hold a financial interest in a team in which he negotiates against.[258] A lawyer that represents players concurrently with a team owner in the same league would clearly fall under this general prohibition.

The dual representation of coaches and players scenario is addressed in various ways by the players associations. The NFLPA[259] and the MLBPA do not expressly prohibit such a representation.[260] The baseball players association views such a dual representation on a case-by-case basis, considering such factors as the nature of the negotiations to be conducted, who the individual coach is, and what authority he has.[261] Although the initial presumption is to disallow such a representa-

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255. *See supra* notes 198-201 and accompanying text.

256. Negotiations of this type are typically handled by the general manager or persons with titles such as chief negotiator or financial officer. Some teams even retain outside counsel for the sole purpose of contract negotiations.

257. Player unions regulate agents and lawyers by certification programs. These regulatory schemes generally make no distinction between agents and lawyers. *See generally* Sobel, *supra* note 4, at 724-25.

258. *See* NBPA Regulations § 3(B)(e) (1986); NFLPA Regulations § 5(B)(1) (1983); MLBPA Regulations Governing Player Agents (MLBPA Regulations) § 3(B)(5) (1988); *see, e.g., Detroit Lions*, 580 F. Supp. at 542 (agent disqualified for conflict of interest in representing player with team in which he was part-owner).

259. The NFLPA allows the simultaneous representation of players and coaches, so long as the dual representation is fully disclosed and consented to. *See infra* notes 291-93 and accompanying text.

260. Under the MLBPA scheme, player agents may be subject to disciplinary action for "[b]eing employed by, serving as an officer of, or representing, either directly or indirectly, Major League Baseball, the American or National Leagues, any Club or affiliated entity, or representing, either directly or indirectly, any management or supervisory level employee or official of them, *without the prior written authorization of the MLBPA*." MLBPA Regulations § 3(B)(6) (1988) (emphasis added).

261. Comments by Gene Orza, Associate General Counsel of the MLBPA, at Certification Seminar in New York (July 8, 1988). "Long-standing relationships will be recog-

tion, the lawyer will have an opportunity to convince the MLBPA that the representation will not be damaging to all client interests, particularly the player.[262]

The NBPA, on the other hand, prohibits the dual representation of players and coaches or general managers.[263] A committee of players[264] made this determination, based on several perceived problems with player and coach representation.[265] For example, when a coach recommends disciplinary measures against a player, the agent or lawyer is said to be unable to devote full attention to the player's interests.[266] The NBPA's concerns reflect the ethical rules in this area generally – *i.e.*, agents and lawyers, obligated to act in a client's best interest, must provide undivided loyalty for every client.[267]

While this express prohibition is significant, it is not so broad to preclude the representation of an NBA coach for other matters outside of contract negotiations or team matters. Other matters, such as endorsement opportunities or general legal work, would be permissible. The NBPA rules expressly state that the forbidden dual representation concerns matters "pertaining to [the coach's] employment by or association with any NBA team."[268]

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nized and respected. Simple logic tells you that you can't burn all bridges; dual representation will be allowed under certain circumstances." *Id.*

262. *Id.*

263. The NBPA prohibits player agents from "[r]epresenting the General Manager or coach of any NBA team (or any other management representative who participates in the team's deliberations or decision concerning what compensation is to be offered individual players) in matters pertaining to his employment by or association with any NBA team." NBPA Regulations § 3(B)(f) (1986).

264. The Committee on Agent Registration and Regulation was made up of league players Alex English, Rolando Blackman, Junior Bridgeman, Quinn Buckner, Norm Nixon, Jim Paxson, and Isiah Thomas.

265. Telephone Interview with George Cohen, Legal Counsel to the NBPA Committee on Agent Registration and Regulation (Aug. 3, 1988) [hereinafter Cohen Interview].

266. *Id.* The distinction of potential and actual conflict of interest was not a determining factor under the NBPA prohibition. "The Committee [on agent Registration and Regulation] was not concerned with the issues of consent or waiver, or whether or not it is more than an 'appearance' of a conflict or an 'actual' conflict." *Id.* The NFLPA did reach such a compromise, and allows the dual representation of players and coaches. *See infra* notes 291-93 and accompanying text.

267. "The solution to disallow representation of coaches was really decided on by the players because they wanted all agents that represent their interests to provide complete loyalty." Cohen Interview, *supra* note 265.

268. *See supra* note 263. "Other areas outside of this scope, such as an endorsement agreement for a coach, or other similar areas, would likely be held to be outside

(b) Regulations vs. ethical codes.—The conflict of interest provisions of the players associations discussed in this subpart, as well as the various disclosure and consent procedures,[269] raise separate, yet relevant, issues in the area of ethics and the sports lawyer. It is apparent that both the standards of the legal profession and the appropriate players association regulation scheme bind sports lawyers. Initially, though, lawyers face the issue of reliance on the certification requirements of a particular players association. The standards provided by the players associations are arguably not enough in the area of consent to a conflict. A more in-depth disclosure and consent would be required to fully address a potential conflict. Similarly, a provision stating that a form of representation does not constitute a conflict of interest would not be the final determination for lawyers.

This overlap of two standards that bind sports lawyers, and the conclusion in the area of conflicts that a players association regulation may not be sufficient to fully address a situation, does not translate into a per se rule that ethics provisions have more force than regulations. In fact, the ethics rules will at times be, to a certain extent, overruled. For example, a similar overlap is in the area of agent or lawyer fees for sports clients. Unlike the area of consent and disclosure to a conflict, a specific provision regarding an acceptable fee—such as a maximum fee of $1,000 for a player earning a salary near the league minimum—would prevail over any determination of just what is "reasonable."[270]

C. Avoiding the Improprieties of a Conflict of Interest

1. Client consent after full disclosure.—The ethics rules reflect that any potential conflict of interest does not automatically preclude a lawyer from undertaking a representation. This attitude is based on several assumptions, one being freedom of contract.[271] Another is per-

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the employment agreement area, and permissible. We have not had a ruling on that point as of now." Cohen Interview, *supra* note 265.

269. *See infra* notes 289-93 (disclosure and consent procedures under various governing bodies, such as the NFLPA).

270. *Compare* NFLPA Regulations § 4(C)(5) (1983) ("In the event that the Contract Advisor fails to negotiate compensation for the player in excess of the applicable minimum salary for any year covered by the contract(s) in question, the maximum fee which may be charged by the Contract Advisor shall be the lessor of: (a) $125.00 for each hour spent by the Contract Advisor in negotiation of the contract; or (b) The sum of $1,000.00.") *with* subpart VI(A), *infra*.

271. C. WOLFRAM, *supra* note 24, § 7.2, at 339.

sonal autonomy—the basic right of a client to select which lawyer he believes is the most qualified to pursue his various legal entitlements. From the perspective of an attorney, this autonomy refers to a client's interest in having certain subjective, nonlegal goals recognized as both valid and important.[272]

The 1969 ABA Code, under DR 5-105(C), sets the standard for allowing lawyers with a potential conflict between multiple clients to obtain client consent to such a situation. First, the lawyer must "obvious[ly]" be able to adequately represent both clients' interests.[273] Second, the lawyer must secure consent from each client who is likely to be adversely affected, "after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment."[274]

The Model Rules also require the lawyer to initially determine if he can adequately represent both clients. This determination, reworded from the "obvious" standard of the ABA Code, requires that the lawyer "reasonably believe" that the simultaneous representation will not adversely affect either client. The dual representation can then continue only if "each client consents after consultation."[275]

Both rules require the lawyer to make a good faith determination that representing both clients is proper.[276] The question nevertheless remains: When can the lawyer "obviously" or "reasonably believe" that he can adequately represent the interests of both clients? The

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272. Moore, *supra* note 172, at 233-34. The lawyer, recognizing this autonomy, must then determine if multiple representation will be "adequate" under the Model Rules. *See* MODEL RULES, *supra* note 58, Rule 1.7, cited *supra* text accompanying note 198. Autonomy also involves a client's freedom to make his own choices, including the freedom to choose unwisely. Considering this meaning, a lawyer violates the clients' autonomy not only if he unilaterally determines that multiple representation would be improper, but also if he permits the clients to consent after first determining that it is in their best interests to do so. Moore, *supra* note 172, at 234.

273. ABA CODE, *supra* note 28, DR 5-105(C).

274. *Id.*

275. MODEL RULES, *supra* note 58, Rule 1.7. The rule is reprinted in full, *supra* text accompanying note 198.

276. There will obviously be certain circumstances when a conflict is "nonconsentable," never requiring a lawyer to make this initial good faith determination. Commentators have stated that both the ABA Code and the Model Rules are inadequate in their treatment of the specific situations when a conflict is nonconsentable. *See* Moore, *supra* note 172, at 240. Unlike the current version of the conflicts rules, the proper focus is arguably not on what the reasonable lawyer believes. Appropriate debate should center on the issue of the conditions under which a client would probably have agreed to relinquish his freedom to decide the question for himself. *Id.*

comments to Model Rule 1.7 suggest that the final decision for such a dual representation is to be made by a "disinterested lawyer." This detached decision maker may conclude that "the client should not agree to the representation under the circumstances."[277] Should this be the case, it would be improper for the attorney involved to ask for the clients' consent. This hypothetical disinterested adviser does not have to actually be consulted, however, leaving the standard once again to the lawyer's good faith.[278]

2. Guidelines for the sports lawyer. — Lawyers in the sports representation industry, like all general practitioners, must be adept at identifying any potentially conflicting representation, and must take steps in advance to avoid any improprieties.[279] As a practical matter, some conflicts may be resolved by informally disclosing all relevant factors to the lawyer's multiple clients. This would be the case, for instance, if the lawyer's client list included athletes or coaches in the same sport. Other conflicts must be handled on a more formal basis.

A threshold issue for large law firms is often who actually are the firm's clients.[280] All "new matters" must be compared with any existing clients, through an internally structured office procedure. Sports lawyers, which undoubtedly have fewer clients to consider, should also implement such a procedure.

If a potential conflict exists, a determination must be made as to whether the lawyer can adequately represent both clients; this determination must be made under the "disinterested lawyer" standard[281] prior to officially being retained as the attorney of record. This initial matter obviously will depend on the particular situation, with many fac-

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277. MODEL RULES, *supra* note 58, Rule 1.7 comment (Consultation and Consent).

278. C. WOLFRAM, *supra* note 24, § 7.2, at 341. The lawyer "burdened with the conflict is to assess in a dispassionate way whether to undertake the representation." *Id.* Although this standard is "rather transparen[t]," and "not much of a test at all," lawyers under the Model Rules approach are provided with some type of objective standard, whatever the lawyer's subjective standard. *Id.*

279. *See generally* R. RUXIN, *supra* note 97, at 71-74. This author, from the perspective of client protection, suggests that an athlete obtain an opinion from an uninvolved person, such as an attorney outside of sports law. Assuming the lawyer does not disqualify himself, the final determination as to the potential conflict rests with the athlete at the time of selecting his representative. The test for an athlete to utilize is whether the lawyer can carry out his various functions, just as if all of his clients were represented by separate lawyers. *Id.* at 74.

280. *See* Miller & Warren, *supra* note 191, at 661.

281. *See supra* notes 276-78 and accompanying text.

tors being considered in the decision.[282] Naturally, if the lawyer concludes that such a dual representation can be maintained, the consent of both clients must be obtained.

(a) Degree of knowledge required. – The actual request for consent is crucial. In *Detroit Lions v. Argovitz*,[283] the court fully stated (in a sports representation setting) the degree of knowledge and understanding that a client or clients must possess to be fully informed of the representative's potential conflict. The conflict in *Detroit Lions* was of a personal nature and did not involve two clients with differing interests. It also involved a sports agent's conflict of interest, and the corresponding general fiduciary principles of agency law.[284] These principles are not as rigid as the ethical rules facing members of the legal profession, and the case must be interpreted in that light.

Merely informing the client of a general conflicting interest will be inadequate to effectively obtain client consent and continue with the representation. This is exemplified by the facts of *Detroit Lions*. The client in that case, Billy Sims of the NFL, was actually aware of his agent's conflict – that of being a part-owner of the football team in which he was negotiating with. Sims had in fact been present at a press conference when the agent announced that his application for a franchise had been approved.[285] Rather than providing general information, the lawyer must "inform the [client] of all facts that come to his knowledge that are or may be material or which might affect his [client's] rights or interests or influence the action he takes."[286]

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282. One commentator has urged a "capacity for informed and voluntary consent" standard for determining the permissibility of multiple representation in conflict of interest situations. Under this standard, the relevant questions are whether the clients have a clear understanding of both the advantages and disadvantages of the requested multiple representation, and whether those decisions ultimately made were in fact based on psychological or economic stress, such that the client would probably later regret being coerced into an unwise decision. Moore, *supra* note 172, at 240. Of course, in the sports law area, the nature of the parties must be considered, along with the custom within that sport and the industry overall.

283. 580 F. Supp. 542 (E.D. Mich. 1984). For a more complete discussion of the facts and holding of this case, see Fraley & Harwell, *supra* note 208, at 180-82.

284. For a discussion of these principles for nonlawyers in the sports representation industry, see *supra* notes 203-09 and accompanying text.

285. *Detroit Lions*, 580 F. Supp. at 544 (but stating that Sims "did not know the extent of [the agent's] interest in the [team]").

286. *Id.* at 548 (quoting Anderson v. Griffith, 501 S.W.2d 695, 700 (Tex. Civ. App. 1973)).

Few would question the rigorousness of the required level of client knowledge articulated in *Detroit Lions*. One commentator described the resulting standard as follows: "The impression is left that the court requires a level of disclosure so exacting that it is difficult to imagine a reasonable person continuing to be represented by the agent with the conflict."[287] Despite this stern standard of disclosure, the court did not rule out the possibility of the agent continuing with the representation, assuming he could prove that adequate information was relayed to (and within the knowledge of) the client.[288]

(*b*) *Form of consent.*—Many of the conflict of interest examples provided below, such as competing client interests,[289] will fall under the "catch all" provision in the applicable players association regulation scheme. These certification schemes do not exempt members of the legal profession, as they (like agents) must be properly certified. The NFLPA's provision is typical, and forbids lawyers and agents from "[e]ngaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL players."[290]

While these regulations call for lawyers to vigorously represent their clients, the provisions typically do not include corresponding guidance as to the form of client consent. As with other potential conflicts guided by the ABA Code and Model Rules, such as event management and representing a players association, the form of consent will depend on the circumstances. As a general guiding rule, it is advisable for the consent to be in writing. This precautionary measure may appear as unnecessary for some conflict possibilities. In terms of protection, though, lawyers should err on the side of safety.

One situation previously discussed, that of a lawyer serving as

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287. WEISTART & LOWELL, *supra* note 4, § 3.19, at Supp. 53 (1985).

288. The agent was required to fully disclose all facts that would have influenced Sims' decision to sign with the team. Several material facts noted by the court included the relative values of the contracts with both teams he was negotiating with, the significant financial differences between the two competing leagues (both that the NFL was more financially stable than the USFL, and offered more fringe benefits), the actual ownership interest of the sports agent (including his salary with the team), and the fact that Sims currently enjoyed "great leverage," which was not being taken advantage of by the agent. *Detroit Lions*, 580 F. Supp. at 549.

289. *See supra* notes 212-16 and accompanying text. One competing client scenario mentioned—that of representing two NBA players on the same team—is specifically provided for outside of the NBPA's "catch all" provision. *See supra* note 215.

290. NFLPA Regulations § 5(B)(3) (1983). *See generally* R. BERRY & G. WONG, *supra* note 65, at 213-23 (including NFLPA Regulations Governing Contract Advisors).

counsel for NFL management positions—such as a coach—and a player in that league, must be expressly consented to in writing.[291] In practice, this particular potential conflict is provided for by the lawyer furnishing a form that lists any coaches represented, both past and present. It is attached to the representation agreement between the lawyer and client, with both signing that page. The NFLPA's disclosure and consent provision was adopted as a compromise position[292] between the various contending factions.[293]

(c) *Lawyer discretion governs conflicts.*—It could be argued that, based on the *Detroit Lions*[294] case, the majority of apparent conflicts of interest in the sports representation area could still be undertaken by lawyers. This is assuming, of course, that proper disclosure and client consent has been obtained. *Detroit Lions* was as clear a conflict of interest as is imaginable: a team owner negotiated on behalf of an athlete against that team.[295] The court, though, held that this concurrent representation would still have been permissible had proper disclosure been made.[296] Under this reasoning, other potential conflicts—such as competing player interests, or representing coaches and players—would be likewise allowable under certain circumstances.

Additionally, in a broad sense, conflicts of interest in the sports representation industry do not involve actual courtroom confronta-

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291. *See* NFLPA Regulations § 5(B)(2) (1983) (contract advisor prohibited from "[f]ailing to disclose in writing to a player, prior to accepting representation of such player, the names and current positions of any NFL management personnel whom he or she has represented or is representing in matters pertaining to their employment by or association with any NFL team").

The Canadian Football League Players Association has remarkably similar provisions regarding conflict of interest, including a requirement for written disclosure prior to accepting representation of players and management personnel. *See* CFLPA Regulations Governing Contract Advisors, Art. IV (8)-(10) (Code of Conduct) (1985).

292. Telephone Interview with Dick Berthelsen, General Counsel to the NFLPA (Aug. 1, 1988). "When we dealt with the conflict problem of representing coaches and players, we felt that we could not single out someone in that role. What we ended up with was the current disclosure provision. As a result of this settlement type provision, the player, by signing the disclosure statement, waives any right to later complain that he is subject to a conflict." *Id.*

293. For quotes from various NFL coaches and management personnel concerning the arguments on both sides of the dual representation of players and coaches in the NFL, see Rosenblatt, *supra* note 252, at 24-26.

294. *See supra* notes 283-88 and accompanying text.

295. *See supra* note 285 and accompanying text.

296. *See supra* notes 283-88 and accompanying text.

tions. At a minimum, this can be interpreted as presenting more ambiguity in the rules of ethics, and more discretion for the lawyer representing multiple clients.[297] This general conclusion would apply to sports clients such as players and coaches, as often their representation is exclusively of a nonlitigious nature.

(d) Overriding issue: scope of representation.—The overriding or transcending issue throughout conflict of interest in the sports law area is the lawyer's *scope of representation.*[298] In the previously discussed dual representation of coaches and players scenario,[299] as well as in other situations outlined in this Part, a lawyer must fully define this scope of representation. While a player holdout over a given year's salary may appear to present a conflict with the coach, in reality, a lawyer's services typically do not include the supplying of talent. Once the lawyer's representational capacity is defined—and fully disclosed and consented to by any multiple clients—the obligations that arise become more apparent, such that a potential conflict does not result in an actual disqualification situation.

In the competing player scenario,[300] for example, the role defining requirement becomes a necessity. A lawyer may be in a position to bolster a particular player's status with management such that he receives more playing time or salary incentives than other players in competition. Obviously, the realities of this situation must be discussed with both players. By disclosing this possibility to both clients, the lawyer's scope of representation is narrowed. Both clients are thus fully aware of whom he is retaining; a client at this juncture could hardly argue that he is the victim of a conflict of interest.[301]

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297. *See* Note, *Outside the Courtroom: Conflicts of Interests in Nonlitigious Situations*, 37 WASH. & LEE L. REV. 161, 163 ("The [ethics rules] and present case law, however, do not adequately distinguish between litigious and nonlitigious representation and, therefore, fail to address the problems peculiar to conflicts of interests arising in nonlitigious circumstances."); *see also* ABA CODE, *supra* note 28, EC 5-15 (stating that there are few instances in which a lawyer representing multiple clients in litigation would be justified to continue, yet in matter not involving litigation, a lawyer—if the interests at issue vary only slightly—will be able to continue).

298. *Compare* WEISTART & LOWELL, *supra* note 4, § 3.19, at 330 ("Thus, the parties may undertake, by formal contract, tacit agreement, or trade custom, to define the agent's obligation in particular circumstances.").

299. *See supra* notes 251-56 and accompanying text.

300. *See supra* notes 212-16 and accompanying text.

301. As a practical matter, few in the representation industry will take the essential steps necessary to fully disclose any adverse interests. The industry's ethical and moral

Similarly, in the area of competing coaches represented by the same lawyer,[302] a lawyer's duties are limited. An example of this limited role is when the lawyer's coaching clients are interviewing for the same job. Normally, the duty of the lawyer is not to actually *secure* employment, but to negotiate for benefits once the coach is at that particular position. Of course, the lawyer must scrutinize his role. First, it must be fully understood and consented to by all coaches. Second, the lawyer[303] must determine when, despite having received full consent to the multiple representation, his clients can in fact be adequately represented and, for example, more beneficially represented by separate counsel.

Once again, the issue of conflict of interest is one of role defining and narrowing. Both lawyer and client must be in complete mutual understanding as to just what purpose the lawyer is hired to fulfill. This process is crucial in avoiding a conflict of interest.

VI. Other Ethical Duties of the Sports Lawyer: Reasonable Fee; The Media*

A. The Sports Lawyer's Obligation to Charge a Reasonable Fee

The debate over the proper method of calculating fees for sports law work generally, and contract negotiation services in particular, has raged in the past.[304] This discussion largely centers on whether fees should be determined based on a percentage (or contingent) basis, or on an hourly rate arrangement.

1. Percentage vs. hourly rate. – The percentage fee arrangement provides the representative with a stated portion of the total dollar value of a negotiated contract.[305] This method is said to provide a fi-

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standards have generally fallen below the standards of the legal profession. *See infra* Part VII.

302. *See supra* note 216 and accompanying text.

303. *See supra* notes 294-97 and accompanying text (lawyer discretion governs the propriety of multiple representation).

* A modified version of this Part appeared in *The Sports Lawyer*, the official quarterly journal of the Sports Lawyers Association. *See* Fraley & Harwell, *Ethics and the Sports Lawyer: The Duty to Charge Fees that are "Reasonable;" The Media and the Rule of Self-Promotion*, 6 The Sports Law., Fall 1988, at 3.

304. *See, e.g.*, R. Ruxin, *supra* note 97, at 55-57; E. Garvey, *supra* note 99, at 32-39; Special Report, *supra* note 4, at 83.

305. Typical fees in the sports representation industry range from 3.5 to 10 percent. A separate ethical concern for lawyers charging by this percentage fee is Model

nancial rather than a moral incentive for the representative to negotiate for a higher salary. Hourly rate proponents claim that the overall fee will be more closely associated with the services rendered. This latter argument has merit, considering the troubling practices of many current agents and lawyers utilizing the percentage-of-the-contract formula. Indeed, the percentage method has been the subject of documented cases of abuse. The most common complaint stems from a fee that is initially reasonable (such as four percent); however, because the agent or lawyer collects his fee based on the contract's face value (including deferred money), and not the present value, an injustice results.[306]

Billing according to time, though, may erode the development of a personal relationship with a client, as he may worry about when the "meter is turned on and off."[307] The percentage method has undeniably been the brunt of more criticism; overall, however, those studying the various types of fee calculations were "unable to discern . . . that contingent fee arrangements were totally devoid of ethical value or that hourly . . . fees were preemptively superior."[308]

2. Prevailing issues: reasonableness and the "clearly excessive" standard. — The percentage-hourly rate argument will continue as long as the sports marketplace is in need of player representation. The debate, however, is really of little significance in the area of ethics and the

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Rule 1.5(c). This provision requires a percentage or contingent fee arrangement to be in writing, with specific reference to the methods for determining such a fee. As a practical matter, agreements between players and representatives include such information, and have become mandatory by various players associations. *See, e.g.*, NBPA Regulations § 4(A) (1986) (to be certified as a player agent, persons must have a signed written agreement with the player in the form provided by the association, which allows a maximum four percent fee). Obviously, other sports clients not in the three major professional leagues must be fully informed of this type of fee method through a written contract consistent with Model Rule 1.5(c).

306. *See supra* notes 229-31 and accompanying text; *see also* R. RUXIN, *supra* note 97, at 58 (considering the present value of money, and the fact that the player could get cut early in his career, agent's up-front commission in year one of a ten-year contract is a manifest injustice); Sobel, *supra* note 4, at 711 (providing examples of the abuses of percentage arrangements). As a result of such obvious cases of abuse, many regulations govern when and how representatives are paid, including the deferred compensation situation. *See, e.g.*, NBPA Regulations § 4(B) (1986) ("It is the intent of these Regulations that the player agent shall not be entitled to receive any fee for his services until the player receives the compensation upon which the fee is based.").

307. Special Report, *supra* note 4, at 83.

308. R. RUXIN, *supra* note 97, at 56 (quoting a study by the United States House of Representatives Select Committee on Professional Sports).

sports lawyer. For whatever method is utilized, lawyers are bound to charge fees that are "reasonable."[309] Both methods will be tested under the ABA Code's "clearly excessive" test. A particular fee will be disallowed when, "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[310]

Various players associations and individual states have recently been active in addressing the issue of fees charged to sports clients.[311] For example, a certified agent with the NBPA may charge (as a maximum amount) four percent of the player's total compensation.[312] This cap on the representative's fee would apply to both the percentage and hourly rate method.

These governing bodies also specifically address percentage fees. The regulations only allow a percentage to be calculated for that amount of the player's compensation that *exceeds* the minimum salary of the particular league. The MLBPA, for example, states that when negotiations by the lawyer or agent fail to produce more than the league minimum, the representative shall not charge a fee.[313] Regulations of this type quite obviously provide sports lawyers with another standard, in addition to those set by the legal profession. In fact, a players association provision in the area of fees for services rendered would be controlling when overlapping an ethical rule.[314]

While a percentage fee basis may be more apt to flunk this test of reasonableness under the ethical rules, an hourly basis may nevertheless do the same. A lawyer may drag a particular negotiation on endlessly, with little client benefit. The eventual hourly basis fee could be substantially more than a percentage basis, particularly for a lower-salaried player. Similarly, a lawyer utilizing a lower percentage number to

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309. MODEL RULES, *supra* note 58, Rule 1.5(a); *see* ARPA CODE OF ETHICS, Rule 2-104 (Appendix).

310. ABA CODE, *supra* note 28, DR 2-106(B); *see also* ARPA CODE OF ETHICS, Rule 2-104(C) (Appendix) (test includes prudent lawyer or agent in sports representation area).

311. *See generally* Sobel, *supra* note 34, at 755-62.

312. NBPA Regulations § 4(B) (1986).

313. MLBPA Regulations § 4(F) (1988). Where the salary negotiated does exceed the applicable minimum salary (as negotiated under the collective bargaining agreement between the MLBPA and the baseball clubs), any fee charged may not, when subtracted from the salary negotiated, produce a net salary to the player below or equal to the minimum salary. *Id.*

314. For further discussion of the overlap of the legal profession's ethical codes and the various league players association regulations, see *supra* notes 269-70 and accompanying text.

calculate the overall fee (*e.g.*, three percent) could provide the more appropriate fee, considering the time and effort included in the lawyer's services.

(a) Criteria. – Both the Model Rules and the ABA Code contain criteria to employ when assessing the permissible size of a fee.[315] This nonexhaustive list should be consulted regardless of the particular billing method chosen.[316]

It is customary in the sports industry for clients to sign representation agreements from the outset of the relationship with a lawyer, prior to any services rendered. In fact, it is now becoming mandatory for such an agreement.[317] This agreement must state the method of the attorney's compensation, whether by percentage, hourly rate, or otherwise.[318] Determining factors under the ethical rules for reasonable

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315. *See* MODEL RULES, *supra* note 58, Rule 1.5(a); ABA CODE, *supra* note 28, DR 2-106(B); C. WOLFRAM, *supra* note 24, § 9.3; *see also* ARPA CODE OF ETHICS, Rule 2-104(D) (Appendix).

316. These stated factors are as follows:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

MODEL RULES, *supra* note 58, Rule 1.5(a)(1)-(8) (Fees).

Other general factors for this amount, particularly as applied to the sports representation industry, are the specialized knowledge of the lawyer, the cost incurred, and the benefit to the client. Additionally, considerations include the impact of the services to be performed on the workload of the representative, and (when the negotiation of a contract is involved) the relationship between the fee and the length of the contract. ARPA CODE OF ETHICS, Rule 2-104(D)(4)-(5) (Appendix).

317. *See, e.g.*, MLBPA Regulations § 4(B) (1988) (requiring all player agents to have written agreements with athletes in "plain, understandable language which contract shall specify the services to be provided to the Player by the Player Agent and the fees to be charged therefor").

318. Although it is fairly rare, sports agents or lawyers may set their fees by predetermined or fixed rate, disregarding the time spent or the contract amount. *See* R. RUXIN, *supra* note 97, at 55; ARPA CODE OF ETHICS, Rule 2-104(F) (Appendix).

fees, such as the "time and labor required" or the "nature and length of the professional relationship,"[319] are unpredictable at such an early stage in the negotiation process.

The lawyer must necessarily make the determination based on similar negotiations in the past, and the customary practice in the industry. Even if that determination may be made accurately, an element of flexibility must be added as well. For example, a player's market value may be obtained through an efficient negotiation, requiring far less of the lawyer's time than was originally contemplated.

(b) Guidelines for the sports lawyer.—Sports lawyers may find that this "reasonable" amount may best be determined by utilizing a combination of the percentage and hourly rate methods, to build in this element of flexibility. This combination method is essentially a "lesser of" determination, as the eventual client fee could be determined under an hourly or percentage rate.[320] The time feature of the hourly rate format tracks the overall effort expended by the lawyer and his firm, yet still allows the eventual fee to be well below the typical percentage rate. The percentage ceiling limits the overall billing of services, and provides a measuring stick customary to others in the representation industry.

B. The Sports Lawyer and the Media

An established sports lawyer is in a unique role. His clients are consistently in the public spotlight, commanding public attention. The lawyer will thus likely have the opportunity to serve the role of media liaison or spokesman. While this role is potentially an important one,[321] it can also be abused. One abuse would be when the lawyer speaks to

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319. MODEL RULES, *supra* note 58, Rule 1.5(a), cited *supra* note 316.

320. A typical clause for such a combination fee for an NFL client would be as follows:

> CONTRACT ADVISOR'S COMPENSATION. If the Player executes a player contract with a club in the NFL during the term hereof, the Player shall pay to the Contract Advisor a fee in an amount equal to the lesser of (i) three percent (3%) of the gross compensation received by the player, or (ii) the Contract Advisor's hourly rate (which varies from [list terms] per hour depending upon the level of experience of the individual performing the work) multiplied by the number of hours actually expended on Player's behalf for the negotiation of a player contract with a club in the NFL.

321. For example, the lawyer may have to rebut false accusations of the player's salary or other contractual terms, as well as coordinate press conferences for contract signings or other major announcements.

the press for the primary purpose of furthering himself professionally—with little or no real concern for the client's needs. One court found that a sports agent, by using the media to promote himself, was actually as much in the public eye as his client.[322] It is fairly common for sports agents or lawyers to seek out the press with goals of expanding their client list. Media coverage of any kind is generally seen as assisting in terms of exposure and visibility.

1. The rule of self-promotion.—The legal profession's rules of ethics have traditionally been wary of self-promotion. In fact, the original Canons of Ethics flatly condemned comments by lawyers concerning a client's pending or anticipated litigation.[323] Subsequent rules continue with this hesitation, with primary emphasis on criminal trials and publicity that may prejudice them.[324] The ABA Code forbids lawyer elaboration during a trial unless the comments fall in one of five categories. Comments are permissible when the information is contained in a public record, an investigation is in progress, and when providing a warning to the public of any dangers.[325]

The test under the Model Rules is that statements should not be made when the "lawyer knows or reasonably should know that [an extrajudicial statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[326] Once again, the rules only forbid lawyer comments when they involve pending litigation. Sports

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322. Woy v. Turner, 573 F. Supp. 35 (N.D. Ga. 1983). Agent Bucky Woy was representing Bob Horner of the Atlanta Braves in contract negotiations, and subsequently brought a libel and slander action for statements made by Braves owner Ted Turner. The court found Woy a "public figure," as he "voluntarily thrust himself into the forefront of a public controversy—[Horner's] contractual dispute." *Id.* at 38. Woy had "constantly promote[d] himself" and his views on sports by "soliciting" the press, television stations, and sports magazines. *Id.*

323. ABA CANONS OF PROFESSIONAL ETHICS, Canon 20 (1908), *reprinted in* H. DRINKER, *supra* note 71, at 309 app. c; *see, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (criminal trial disrupted by the media, partly caused by participating lawyers). *See generally* Comment, *The Prosecutor and Pre-Trial Publicity: The Need for a Rule*, J. LEGAL PROF. 169, 169-70 (historical evolution of the adoption of Canon 20 included the recognition that prosecuting attorneys are officers of the court, along with the prosecuting attorney being deemed to do harm with his out of court statements).

324. *See* ABA CODE, *supra* note 28, DR 7-107 (1969 ABA Code calling for a "no comment" from attorneys, and forbidding "extrajudicial comment[s] that a reasonable person would expect to be disseminated by means of public communication").

325. *Id.* (other allowable comments include the general scope of the investigation, and a request for assistance in apprehending a suspect).

326. MODEL RULES, *supra* note 58, Rule 3.6(a).

lawyers, of course, typically are engaged solely in nonlitigious matters.

A strict prohibition of media contact would be both unwarranted and in violation of the first amendment rights of lawyers. The modern rules of ethics reflect this, with exclusive emphasis on trial publicity. Also, as previously mentioned, sports lawyers can potentially serve important roles in regards to the media. Nevertheless, those lawyers that seek out the press for personal gain are essentially ethically unregulated.[327]

2. Guidelines for the sports lawyer—While seeking out the press for self-promotion, at best, is only objectionable on grounds of character,[328] sports lawyers are advised to guide their contact with the media by set standards.[329] Lawyers should remain accessible to the press only when directly advancing a specific situation or need of a client.[330] Any

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327. The ARPA Code of Ethics also is silent on this matter. Canon One, though, does call for representatives to maintain integrity throughout a representation. This includes "act[ing] in the best interests of the professional athlete, bearing in mind the high degree of trust and responsibility reposed in him as fiduciary." ARPA CODE OF ETHICS, Rule 1-104(B) (Appendix).

328. C. WOLFRAM, *supra* note 24, § 14.2, at 781 (citation omitted) ("[f]awning on the media is objectionable on character grounds perhaps, but the First Amendment rights of the lawyer, the lawyer's derivative claim of a need to publicize a client's version of publicly debated events by commenting on pending cases, and the right of the media to gather and broadcast information clearly overrides any such merely plausible state interest").

329. *Compare* Hoover, *What a Lawyer May Say to the Media*, 42 BENCH & BAR OF MINNESOTA 31, 31-32 (1985) (emphasis added) (analyzing Canon 7 and stating that "[t]he duty to represent a client zealously should be kept in mind as an *implicit prohibition* of attorney comments to the media which may have the purpose of enhancing the attorney's reputation or supporting the attorney's aims on behalf of another client"). For a discussion of publicity generally, including how it relates to solicitation, as well as the lawyer's need for expanding the potential client base, see R. PATTERSON & E. CHEATHAM, *supra* note 177, at 356-63.

330. This unwritten rule incorporates several existing ethical provisions. First, the "zealous" representation requirement of Canon 7. Second, the prohibitions of "self-laudatory" statements made in attorney advertising under DR 2-101 (A)-(B) of the ABA Code. DR 2-101(B) reads in part as follows:

> A lawyer shall not publicize himself, his partner, or associate, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

While speaking to the press would not squarely fit as a paid advertisement, it could nevertheless be a form of "commercial publicity." Such self-promotion (at the client's expense) would not conform with a zealous representation.

other contact not advancing the client's cause should not be dealt with publicly; zealous representation does not include publicizing oneself. Such inspiring media comments concerning the lawyer's conduct and importance of his position, are a form of indirect advertising, are self-laudatory and "defy the traditions and lower the tone of our high calling, and are intolerable."[331]

VII. CONCLUSION

Threshold ethical issues facing sports lawyers include professional competence and solicitation. The loyal representation of existing clients commands lawyers to avoid situations presenting actual conflict of interest. Additionally, sports lawyers are obligated to charge their clients reasonable fees, as well as to refrain from making self-serving comments to the press. Along with these specific ethical concerns, sports lawyers more generally are bound to all rules of professional conduct, both when directly serving as legal counsel for a sports client, as well as when engaging in a law related occupation.

This Article emphasizes the importance of legal ethics in the sports law area. While ethical lawyering is largely based on "rules" of professional conduct, the existence of a set of standards does not preclude one from exercising moral judgment when fulfilling this obligation of professionalism. Indeed, a person's internal controls are an integral part of legal ethics.

After all, it is said that lawyers are members of a profession, distinguishable (based on society, economy, and education) from craft and trade associations.[332] Some will no doubt contend that this distinction is archaic in today's modern society; nevertheless, lawyers must be mindful of the status. They must strive to act within the perimeters of the legal profession. For sports lawyers, this is particularly significant, as nonlawyers have historically dominated the sports representation industry. More importantly, the ethical standards of the representation industry are below those of the legal profession.

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331. H. DRINKER, *supra* note 71, at 215-16 (quoting ABA Code, Canon 27, "[i]ndirect advertising for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable").

332. For a discussion of the distinction between professions and other occupational groups, see Cohen, *Professionalism*, 13 J. LEGAL PROF. 1, 3-5 (1988).

APPENDIX

The Code of Ethics of the Association of Representatives of Professional Athletes

CANON ONE

A Representative shall maintain the highest degree of integrity and competence in representing the professional athlete.

Rule 1-101 Representing Clients with Competence & Integrity

(A) A Representative shall not:

(1) Violate a rule of conduct of this Code,

(2) Use another to circumvent a rule of this Code,

(3) Engage in illegal conduct involving a felony or conduct involving moral turpitude,

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation,

(5) Engage in conduct prejudicial to the reasonable conduct of professional athletics,

(6) Engage in conduct which adversely reflects on his fitness.

Rule 1-102 Information Regarding a Violation of this Code

(A) A Representative possessing information which is unprivileged as a matter of law and not protected by Rule 4-101 of this Code concerning a violation of Rule 1-101 shall report such information to the Committee on Discipline of the Association of Representatives of Professional Athletes immediately.

(B) A Representative shall be available to testify or produce a statement under oath as to the nature, source and details of the information described in Rule 1-102(A).

Rule 1-103 Refusing to Accept a Client

(A) A Representative shall refrain from accepting the representation of a professional athlete when

(1) The Representative does not possess the competence through training by education or experience in a particular area,

(2) The Representative's representation of the athlete will create differing or unresolvable conflict of interest with an existing client or with an existing financial enterprise,

(3) The Representative has differing interests with those of his prospective client.

(B) A Representative must disclose in writing in advance of his representation of a professional athlete the nature and degree of his involvement in any matter in which he is recommending, suggesting, or advising that the athlete invest.

Rule 1-104 General

(A) A Representative shall not knowingly give aide to or cooperate in any way with another in conduct which would violate this Code.

(B) A Representative shall act in the best interests of the professional athlete, bearing in mind the high degree of trust and responsibility reposed in him as fiduciary.

(C) A Representative shall become familiar with the Collective Bargaining Agreement, Standard of Uniform Players Contract, Constitution, Bylaws and League Rules or the League and such other relevant documents affecting wages, hours and working conditions of the players in the sport or sports in which he represents professional athletes.

CANON TWO

A Representative shall be dignified in the conduct of his profession.

Rule 2-101 Representative's Letterhead, Stationery, etc.

(A) A Representative shall not compensate or give anything of value to representatives of the print, video or audio media or other communication media in return for professional publicity.

(B) The professional letterhead, business or calling card, stationery, announcements, office signs of a representative and his firm or organization shall be dignified and may;

(1) list the representative's name, firm or organization name, firm members and their position,

(2) list the address of the firm's office or offices, phone number, telex and other such information as may aid the professional athlete in locating the representative,

(3) indicate his membership in ARPA.

(C) A Representative in the operation of his firm may practice under a trade name, partnership corporation or professional association.

(D) The letterhead of the representative shall indicate the name or names of representatives associated with the firm. If the degree of participation by a representative in the firm is less than that of a partner or manager, the nature of such association shall be indicated on the firm's stationery.

Rule 2-102 A Representative engaged in more than one profession or business

(A) A Representative who is engaged both in representation of professional athletes and simultaneously in another profession or business shall clearly distinguish those businesses or professions on his letterhead, office sign, professional card and other public communication.

(B) A Representative, who in addition to his traditional role as a representative, offers to provide services as an investment and/or financial advisor, counselor or director to a professional athlete or in any way assert or maintain control and/or management of the financial affairs of a professional athlete, whether for compensation or not, must be qualified to do so based upon training or experience.

(C) A Representative who assumes the role outlined in Section B of this Rule, shall fully disclose that role in his contract with the professional athlete he represents. Such contract shall provide at least a statement of the services to be provided in connection with investment counseling, the limitations of such services, if any, and the fees to be charged for such services.

(D) A Representative may use or permit the use of, in connection with his name, any earned degree or title.

Rule 2-103 Recommending Employment of the Representative

(A) A Representative shall not compensate in any way or give anything of value or promise to compensate a professional or amateur athlete to recommend or secure the representative's employment in any capacity.

(B) A Representative shall not compensate or give anything of value to any individual as a reward for recommending the representative's employment or for referring an athlete to the representative; except that a representative may pay the customary costs and charges in connection with a Professional Association and with ARPA.

(C) A Representative may receive without the payment of compensation, other than dues, referrals from appropriate referring agencies.

(D) A Representative may employ for compensation, with the consent of his client another representative or other professional to assist him in fulfilling his duties and obligations to a professional athlete he represents.

Rule 2-104 Fees for Service

(A) A Representative shall disclose, in advance of any representation agreement and in writing, the nature of his fees and the services to be performed for the fee.

(B) A Representative shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(C) A fee is clearly excessive when, after a review of the facts, an individual within the industry of reasonable prudence would be left with the firm conviction that the fee is in excess of a reasonable fee for the work performed.

(D) Among the factors relevant in determining whether a fee is reasonable are:

(1) The time, labor, expenses involved;

(2) The degree of expertise required and the level of expertise of the representative;

(3) The usual and customary charge in the industry for the services performed;

(4) The impact of the services to be performed on the workload of the representative;

(5) The relationship between the fee and the length of the athlete's contract.

(E) In determining his fee, the Representative shall consider the relationship between the fee and foreseeable length of the athlete's employment with the athletic team and shall make every reasonable effort not to inflict serious hardship on the athlete.

(F) A Representative may employ one of the following methods in establishing his fee:

(1) Fixed fee

(2) Percentage fee

(3) Contingent fee

(G) A Representative shall never solicit nor accept any compensation for services rendered in connection with the negotiation of a player contract or in connection with any other services to a professional athlete from a professional athletic team, club or club representative either directly or indirectly.

(1) Prior disclosure of such compensation shall not result in a waiver of the prohibition set forth in 2-104(G).

(2) The prohibition set forth in 2-104(G) may not be waived by prior agreement or by subsequent contract.

Rule 2-105 Financial Payments

(A) A Representative shall not offer, promise or provide financial payments, support or consideration of any kind to an amateur athlete, his family members, athletic coach, director, school official or school with the intent to influence those persons or organizations into recommending that representative for employment by a professional athlete.

(B) The provisions contained in 2-105(A) may not be waived in advance or by subsequent conduct.

CANON THREE

A Representative shall maintain management responsibility for his firm.

Rule 3-101 A Representative working with a non-Representative

(A) A Representative shall not share fees with a non-Representative except:

(1) A Representative may, with the prior consent of the professional athlete he represents, retain the services of another professional or business entity on behalf of the athlete.

(2) All charges in connection with such work shall be billed to the athlete directly or, at least, must be separately listed on the representative's bill for services.

Rule 3-102 A Representative and the Player Contract

(A) A Representative shall not negotiate or agree to, on behalf of an athlete, any provision in a player contract which directly or indirectly violates or circumvents an operative collective bargaining agreement.

(B) All Representatives shall have a written contract with their clients which fully discloses all fees, duties and responsibilities. Such contract shall fully disclose all matters in which the representative will receive a financial benefit.

(C) Any dispute arising out of a matter other than a dispute over fee shall be resolved by binding arbitration before an impartial arbitration panel set up for the particular sport in accordance with the rules of the American Arbitration Association.

(D) The supervision and administration of the binding arbitration shall be conducted by ARPA.

CANON FOUR

A Representative shall preserve the confidence of his client.

Rule 4-101 Maintaining the confidences of the client

(A) A Representative shall not knowingly reveal information of any sort given to him by a client in the course of their professional relationship and which the client reasonably expects to be kept confidential.

(B) A Representative shall not use such confidential information to the direct or indirect disadvantage, harm, or damage of the client.

(C) A Representative shall not use such confidential information for his own advantage unless the client consents in advance after full disclosure by the representative.

Rule 4-102 Confidential information defined

(A) Confidential information refers to information gained in the course of the professional relationship between a representative and a professional athlete which the athlete has requested to be held confidential or which the representative knows or should know would be embarrassing or detrimental to the athlete if released.

Rule 4-103 Representative's Employees

(A) A Representative may reveal:

(1) Confidential information with the written consent of the client after full disclosure by the representative.

(2) Confidential information when required by law or directed by a tribunal.

(3) Confidential information concerning illegal conduct past, present or future on the part of the athlete, except where such information is protected by the attorney/client privilege.

CANON FIVE

A Representative shall handle a Client matter competently.

Rule 5-101 A Representative shall not fail to act competently

(A) A Representative shall not handle a matter in the representation of a professional athlete if he knows or should know that he is not competent to handle such a matter.

(B) A Representative shall not handle a matter concerning a professional athlete without proper preparation and shall not neglect a matter entrusted to him by such a client.

Rule 5-102 A Representative shall actively represent the interests of his client

(A) A Representative shall actively represent the interests of the professional athlete he represents.

(B) A Representative shall not knowingly make a public comment containing a false statement to his client's detriment.

(C) A Representative shall not knowingly make false statements concerning professional athletics or a professional athletic team or club.

Rule 5-103 A Representative shall avoid the appearance of impropriety

(A) A Representative shall preserve the identity of all client funds and of property which are given to him by or on behalf of a client.

(1) A Representative shall maintain a separate bank account to retain client funds.

(2) A Representative shall pay any interest earned on such an account to his client wherever practical.

(B) A Representative shall maintain complete records of client funds and property entrusted to the representative's care and shall render a record of such accounts to the client on a regular basis and upon request.

(C) A Representative shall conduct himself in his representation of professional athletes in such a manner as to avoid even the appearance of impropriety.