

**SPORTS AND ENTERTAINMENT AGENTS AND AGENT-
ATTORNEYS: DISCOURSES AND CONVENTIONS
CONCERNING CROSSING JURISDICTIONAL AND
PROFESSIONAL BORDERS**

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“Sometimes the law can’t be foller’d no way,” said Pa. “Not in decency, anyways. They’s lots of time you can’t Sometimes a fella got to sift the law”

The preacher rose high on his elbow. “Law changes,” he said, “but ‘got to’s” go on. You got the right to do what you got to do.”¹

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I. INTRODUCTION

Questions regarding the ethical obligations, pitfalls, and dilemmas facing attorneys who become sports or entertainment agents are not new. However, despite a substantial discourse on the topic, the sense persists that being both a lawyer and an agent is problematic. The applicable laws, including ethical regulations, seem to be clear, but are subject not only to law’s usual jurisdictional variations and interpretive instability, but also to the mediation of conventions or tacit understandings that pervade the sports and entertainment industries. Problems, therefore, remain that appear to require a solution.

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1. JOHN STEINBECK, *THE GRAPES OF WRATH* 140 (Penguin Classics 2006) (1939).

The identifiable problems arise, in part, from the competition between (i) non-attorney agents, impliedly members of a profession governed by regulations (i.e., existing state laws and league or union rules regulating sports or entertainment agents) and agency law, and (ii) attorney-agents, who appear to cross back and forth between two professions.² As attorneys, attorney-agents are governed by ethical rules of conduct, which constitute a competitive disadvantage insofar as non-attorney agents may impliedly solicit clients, worry less about conflicts of interest, and cross state boundaries without worrying about the unauthorized practice of law.³ Attorney-agents can try to regain their competitive edge by taking the position that they “wear two hats”—at times they are practicing law under the ethical rules for lawyers, and at other times they are acting as agents.⁴ That strategy has been condemned, in numerous legal ethics opinions, judicial opinions, and legal commentary as a misunderstanding of the scope of the rules of professional conduct—“all of [an attorney’s legal and non-legal] services are considered to be legal services for purposes of determining whether a lawyer must comply with the rules.”⁵ Even if an attorney-agent decides to resign from the bar (or a law school graduate decides not to be licensed as a lawyer), holding oneself out as a lawyer without being licensed constitutes the unauthorized practice of law.⁶

A solution, analogous to the alleviation of restrictions on multi-jurisdictional practice in Model Rule 5.5,⁷ is the proposal that attorney-agents should not be burdened by attorney ethics:

Modifying the policy surrounding the law governing lawyers likely does not require much, if any, restructuring of the [Model Rules of

2. See KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 98, 100 (University of Pennsylvania Press 2d ed.) (2008).

3. See ABA MODEL RULES OF PROF’L CONDUCT (2009), R. 1.7 (prohibiting concurrent conflicts of interest unless clients give informed consent), R. 5.5 (prohibiting practice in another jurisdiction except in narrow circumstances), and R. 7.3 (prohibiting in-person or live telephone solicitation if significantly motivated by pecuniary gain).

4. See generally SHROPSHIRE & DAVIS, *supra* note 2, at 100-03.

5. State Bar of Calif., Formal Op. No. 1999-154 (1999).

6. See Ala. State Bar Disciplinary Comm., Op. No. 85-73 (1985) (holding that if a law school graduate who is not bar member lists himself as an “attorney” on membership roster of organization or in any publication, he would be holding himself out as an attorney in violation of statute prohibiting the unauthorized practice of law).

7. See ABA MODEL RULES, *supra* note 3, R. 5.5 (amending the previous prohibition against practice in another jurisdiction by establishing safe harbors for (i) associating with co-counsel in that jurisdiction, (ii) matters relating to pending litigation if the out-of-state lawyer is or will be authorized to appear, (iii) arbitration or mediation relating to the lawyer’s in-state practice, and (iv) matters arising out of or related to the lawyer’s in-state practice).

Professional Conduct] or the restatements. The solution may be as simple as . . . an addendum letter or . . . some other written amendment sent . . . to each state bar association The goal would be to have all states, as well as state and federal courts, begin to modify their existing policies to the extent that lawyers engaged in other professions . . . should be able to engage in conduct that is reasonably expected of practitioners in those professions without the fear of reprimand.⁸

That argument is especially compelling because the author raises the specter of attorneys being driven out of the field of athlete and celebrity representation, much to the disadvantage of those clients.⁹ On the other hand, the author underestimates the magnitude of the recommended amendment of the rules, and downplays the negative aspects of the conventional “conduct that is reasonably expected” of agents.¹⁰ Moreover, the concern that agents are regularly engaged in the unauthorized practice of law, a concern that is not directly related to the problem of the competitive disadvantage of attorney-agents in the field of sports and entertainment representation (except regarding unauthorized practice of law by an *attorney* in multi-jurisdictional practice) should be part of any proposal to solve the problem.

II. DISCOURSES

A. *Pedagogical Dimensions*

The fields of sports and entertainment law are now well-established in the curriculum at most law schools, and some law schools offer specialized programs in the fields.¹¹ Sports law courses, societies, and

8. Jeremy Geisel, *Disbarring Jerry Maguire: How Broadly Defining “Unauthorized Practice of Law” Could Take the “Lawyer” Out of “Lawyer-Agent” Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 245-46 (2007).

9. *See id.*

10. *See id.* at 246. The proposal to lower attorney ethical standards would unwittingly eliminate the protection offered to a lawyer’s client in ABA Model Rules, R. 1.8(a) (requiring advice concerning the desirability of seeking the advice of independent counsel when the lawyer enters a business transaction with a client), which comes into play whenever a lawyer drafts a contract from which the lawyer will receive a percentage of the client’s income, as long as agents typically do not recommend a lawyer to clients signing such contracts. Likewise, the representation of multiple athletes with adverse interests, *see infra* note 40 and accompanying text, is a convention that would radically alter attorney conflict of interest rules.

11. For example, Duke, Florida Coastal, Georgia State, Marquette, and Tulane law schools offer sports law programs. *See* Sports Law School Programs, SportsAgentBlog.com, <http://www.sportsagentblog.com/links/sports-law-school-programs> (last visited Apr. 8, 2010). Many other schools offer numerous courses related to the fields. *See* Best Entertainment Law

specialized student-edited journals reflect high law student interest in the possibility of representing professional athletes some day.¹² Numerous casebooks and supplementary materials are available to the law professors teaching, for example, sports law; many such professors are active in the Section on Law and Sports of the AALS and in other sports law associations and blogs.

Introductions to law students of the ethical problems of sports law representation, and the tension between non-attorney agents and attorney-agents, vary. One approach is reflected in Peter Carfagna's *Representing the Professional Athlete* (2009), which is impliedly a law school casebook (written by a sports attorney who teaches at Harvard Law School, and published in West's "American Casebook Series").¹³ Although it would be a superb guide for agents generally, it refers in the teacher's manual to "students," not merely "law students," and is therefore, perhaps, intended for a broader audience.¹⁴ In any event, the ethical problems and tensions between non-attorney agents and agent-attorneys are basically ignored.¹⁵ Indeed, the focus is on the agent profession, which is very important in the training of attorney-agents, and not on attorneys per se.¹⁶ The legal relationship between the athlete-agent and the client is defined in terms of agency and contract law, not in terms of attorney regulation.¹⁷ In the casebook's lengthy discussion of the contract between an agent and her athlete client, there is a sudden reference to the "agent's attorney" as the drafter of such contracts, which implies that the agent is not drafting contracts (which, as I will later argue, is a good idea); strangely, there is no reference to the *athlete's* attorney, perhaps an attorney-agent, the implied subject of the casebook.¹⁸ Then, following a comprehensive chapter on NCAA regulations, Carfagna devotes a long chapter to negotiation, "what agents spend the majority of their time doing once they have obtained

Schools and Sports Law Schools, Top-Law-Schools.com, <http://www.top-law-schools.com/entertainment-law-schools.html> (last visited Apr. 8, 2010).

12. See, e.g., Sports Law, SportsLinkCentral.com, http://www.sportslinkscentral.com/Sports_Business/sports_law.htm (last visited Apr. 8, 2010) (listing publications and societies).

13. See e.g. PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE (Thomson West 2009).

14. See PETER A. CARFAGNA, TEACHER'S MANUAL TO REPRESENTING THE PROFESSIONAL ATHLETE 1 (Thomson West 2009).

15. See CARFAGNA, *supra* note 13.

16. See *id.*

17. See *id.* at 1-7. The author also mentions regulation of agents by state legislatures, the NCAA, and player associations. See *id.* at 7-9.

18. See *id.* at 13-14.

athlete-clients.”¹⁹ After then discussing negotiation techniques and strategies, Carfagna turns to drafting. While he does not mention the issue of non-attorney agents who might conventionally draft contracts, he does refer in his conclusion to “the attorney representing the . . . athlete” and “[the athlete’s] personal . . . attorney,” which suggests that the casebook is targeted at law students, and even that attorneys draft negotiated contracts and non-attorney agents do not (again, a good suggestion).²⁰ The concluding section on drafting litigation documents is obviously meant for future attorney-agents, and the next chapter on publicity rights refers to “attorneys for celebrity athletes” as drafters of license agreements.²¹ The following chapter on managing the mature athlete includes a hypothetical, beginning, “You are the attorney/agent for . . . ,”²² which confirms that Carfagna is addressing law students, but then (in a later chapter) when discussing employment agreements between agents and sports agencies, Carfagna mentions that “[the] agent who also operates as an attorney will be constrained by the professional rules of responsibility governing lawyers . . . [which] may limit contracts and business relationships.”²³ This is the clearest reference to the competitive tension between non-attorney agents and attorney-agents, and the only mention made of the alleged competitive disadvantage to lawyers in the field of sports representation. No mention is made of the “two-hat theory” to avoid the problem, or of the question of whether non-attorney agents (engaged in negotiation and concomitant client counseling) are engaged in the unauthorized practice of law.²⁴ Without criticizing the substance of Carfagna’s book, if it was the only book law students read, they would not be introduced to a major discourse (concerning ethics) in the field of sports law.

Most sports law casebooks, on the other hand, include a more comprehensive treatment of the ethical aspects and dilemmas of attorney-agents. For example, a leading casebook by Mitten, Davis, Smith, and Berry²⁵ offers a section on ethical issues (including restrictions on lawyer solicitation and the resulting competitive disadvantage vis-à-vis non-attorney agents) that ends with a three-part problem that summarizes the controversies concerning non-attorney

19. *See id.* at 36.

20. *See* CARFAGNA, *supra* note 13, at 53.

21. *See id.* at 69.

22. *Id.* at 109.

23. *Id.* at 133-34.

24. *See id.*

25. MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH, & ROBERT C. BERRY, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* (Aspen Publishers 2d ed.) (2009).

agents and attorney-agents. The first question is whether a licensed attorney who holds himself out as an attorney can, in a disciplinary action for commingling funds, disavow that he is practicing law when he is acting as a sports agent; the answer is no.²⁶ The second question is whether it would help the sports agent-attorney's argument if he only represented athletes and did not identify himself as an attorney on business cards or solicitation letters.²⁷ This presents for the students a harder case, because (i) an Alabama disciplinary opinion (in the casebook) confirmed that a sports agent who is a law school graduate, but not a licensed attorney, would be engaged in the unauthorized practice of law if he listed himself as an attorney on the membership roster of a sports representative organization²⁸ (the attorney in the second question did not hold himself out as an attorney), and (ii) an Illinois State Bar Association advisory opinion (in the casebook) confirmed that an attorney who handled player representation and practiced law from the same office is also practicing law in his role as a player representative²⁹ (and impliedly is governed by the ethical rules for attorneys; but the second question involves an attorney who is *only* a sports agent with no other clients). The fact that the attorney is licensed and does not hold himself out as an attorney distinguishes his case from the Alabama ethics opinion, which concerns the unauthorized practice of law by an unlicensed attorney who holds himself out as an attorney—the attorney in the second question is claiming *not* to be engaged in the practice of law, even though he is licensed.³⁰ The fact that the attorney in the second question has no law practice apart from his player representation distinguishes his case from the Illinois ethics opinion, but some courts have assumed “that lawyers who acted as sports agents were subject to the rules of their respective bar associations.”³¹ (As an aside, the second question is therefore a superb, or at least typical, law school exam question.) Because most cases of this type (and the materials in the casebook) involve “dual representation”—both legal and non-legal services provided by an attorney—the second question highlights whether being a sports agent necessarily involves the practice of law. A

26. See *id.* at 764. The facts of the hypothetical are based on *In Matter of Horak*, 224 A.D.2d 47, 647 N.Y.S. 20 (1996).

27. See MITTEN ET AL., *supra* note 25, at 764.

28. See Alabama opinion, *supra* note 6.

29. See SHROPSHIRE & DAVIS, *supra* note 2, at 101 (citing Illinois State Bar Assoc., Op. No. 700 (Nov. 4, 1980)).

30. MITTEN ET AL., *supra* note 25, at 764.

31. *Id.* at 763 (citing *In the Matter of Frederick J. Henley*, 478 S.E.2d 134 (Ga. 1996) and *Cuyahoga County Bar Assoc. v. Glenn*, 649 N.E.2d 1213 (Ohio 1995)).

certified public accountant who is also practicing law is governed by the rules of professional conduct,³² as is the practicing attorney who provides financial advice.³³ But there is a gap, because an agent (who happens to be an attorney without a law practice or law office) is seemingly only wearing one hat and avoiding the “dual representation” in the case law and legal ethics opinions.

The third question in the casebook, for the law students reeling at this point, is whether a non-attorney, who “negotiated player-team contracts [and] endorsement deals,” is engaged in the unauthorized practice of law,³⁴ and the casebook authors suggest that courts would likely not find the non-attorney in violation of unauthorized practice statutes.³⁵ That answer may be right, but I doubt that it should be the law. The Illinois ethics opinion, in response to an attorney’s question whether he may handle player representation “from the same office in which he engages in the general practice of law,” remarked:

It would appear . . . 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 nonlawyers frequently engage in these activities.³⁶

However, the Illinois State Bar did not answer that question, but rather the easier question of whether an *attorney-agent* is practicing law, which he is.³⁷

Another book, Kenneth Shropshire and Timothy Davis’s *The Business of Sports Agents*,³⁸ is not a casebook but is a likely candidate for supplementary materials in a sports law course. The chapter entitled “Ethics: Attorney Versus Nonattorney Agents,” faces squarely the problems of dual representation, the competitive disadvantage suffered by attorney-agents bound by the ethical rules for attorneys, and the

32. See *id.* (citing *In re Clinton A. Jackson*, 650 A.2d 675, 677 (D.C. App. 1996) (“A lawyer is held to a high standard of honesty, no matter what role the lawyer is filling . . .”).

33. See *id.* (citing *In Matter of Dwight*, 573 P.2d 481, 484 (Ariz. 1977) (“As long as a lawyer is engaged in the practice of law, he is bound by the ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity.”).

34. See *id.* at 764.

35. MITTEN ET AL., *TEACHER’S MANUAL [FOR] SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 125 (2009).

36. Illinois State Bar Assoc., Op. No. 700 (Nov. 4, 1980); See also SHROPSHIRE & DAVIS, *supra* note 2.

37. See Illinois Opinion, *supra* note 36.

38. *Supra* note 2.

question of whether non-attorney agents are regularly engaged in the unauthorized practice of law.³⁹ The authors first raise the issue of conflicts of interest, because it has been argued that the ethical rules governing conflicts for attorney-agents give an advantage to non-attorney agents who (if successful) frequently represent multiple athletes with adverse interests (for example, competing for the same endorsement opportunities or, if the athletes are on the same team, the same salary pool (under a league-imposed salary cap)).⁴⁰ Shropshire and Davis argue that the standards binding attorney-agents and non-attorney agents, including agency law and league/union regulations, are not so different.⁴¹

Turning to the two-hat theory, whereby attorney-agents might try to “disavow their attorney status” in their role as sports agents, Shropshire and Davis do not “draw any definitive conclusions”—negotiation of contracts *is* a traditional legal service, but agents offer non-legal services, including accounting and business planning.⁴² Nevertheless,

39. See SHROPSHIRE & DAVIS, *supra* note 2, at 97-106.

40. *Id.* at 97-100; see also Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 TEX. REV. ENT. & SPORTS L. 37, 51-55 (2003). Doman also considers agent conflicts of interest due to concurrently representing a player and (i) management, (ii) corporate clients, (iii) the agent’s parent company, and (iv) his own interests. See *id.* at 55-65; see also Jamie E. Brown, *The Battle the Fans Never See: Conflicts of Interest for Sports Lawyers*, 7 GEO. J. LEGAL ETHICS 813, 816-22 (discussing conflicts of interest arising from multiple client-athletes, including competition between players in the same draft class and limitations on endorsement opportunities, as well as conflicts arising from representing both players and coaches or both players and their union).

This phenomenon also recurs in the representation of entertainers:

Some experts in the entertainment business believe that conflicts of interest are beneficial. For example, if an entertainment lawyer represents a successful producer and a famous actor and unites them, as some agents do, in a package deal, that combination can produce a box office hit. Everyone wins. The risk, however, is that lawyers may protect their special relationship with the studio and others via package deals that promote more prominent clients at the expense of the less famous (and less profitable) clients.

Kenneth J. Aldo & Jack P. Sahl, *A Professional Responsibility Primer for Today’s Entertainment Lawyer*, 18 ENT. & SPORTS LAW. 3, 4 (2000).

41. See SHROPSHIRE & DAVIS, *supra* note 2, at 97-98. Doman, *supra* note 40, at 51-65, also concedes the restriction on conflicts of interest in league/union regulations, but argues that they are weakly enforced. See also Brown, *supra* note 40, at 824-31 (discussing agency law regarding conflicts of interest and comparing it with ethical rules for lawyers); 831-34 (stating that regulatory schemes for sports agents are more vague, with respect to conflicts of interest, than the ethical rules for lawyers, and often fail to protect athlete clients).

42. SHROPSHIRE & DAVIS, *supra* note 2, at 100-01.

[In the entertainment industry, some] attorneys argue that when acting as an agent or manager, they are not subject to the codes of professional conduct. This approach carries some risk, because lawyers’ professional liability policies may not cover all of their services. Other attorneys formally establish separate businesses that render

numerous legal authorities suggest that attorneys offering services that are related to the practice of law will be judged under the rules of professional conduct.⁴³ But the inquiry continues—what about attorneys who do not hold themselves out as attorneys, or do not practice law apart from their sports representation, or do not get licensed after law school, particularly if they “[provide] services that involve those traditionally considered to involve the practice of law (for example, contract review and negotiation) . . . ?”⁴⁴ Can such individuals avoid attorney ethics, or (if unlicensed or outside their bar’s jurisdiction) avoid the unauthorized practice of law? Such questions “defy easy resolution,” because “the practice of law” is difficult to define.⁴⁵ Shropshire and Davis cite cases involving licensed attorneys outside their jurisdiction, wherein the practice of law is defined as engaging in activities requiring “legal knowledge, training, skill, and ability”⁴⁶ and “legal advice and legal instrument . . . preparation.”⁴⁷ But these cases involving attorneys seem to deflect the bigger question raised by the authors but left unanswered, namely whether non-attorney agents are practicing law. That question, seemingly unrelated to the problems attorney-agents face in their competition with non-attorney agents, points to a realistic solution for those problems.

B. *Proposed Solutions*

I have not discussed some of the other problems attributed to athlete and celebrity representation by non-attorneys (which have been identified by others and provide the backdrop for the various proposed solutions to the dilemmas of attorney-agents), including a history of

financial or career advice or solicit employment [for entertainment industry clients]. They may incorporate the businesses and employ full-time personnel, but these businesses must not provide legal services.

Lawyers must be very careful when creating separate businesses to ensure that these are not used to circumvent the lawyer’s ethical obligations. As long as attorneys are licensed to practice law, they are subject to state codes of professional conduct for even their nonprofessional activities.

Abdo & Sahl, *supra* note 40, at 6.

43. See SHROPSHIRE & DAVIS, *supra* note 2, at 101-03.

44. See *id.* at 104.

45. *Id.* at 104.

46. See *id.* at 104 (citing *In re: Application of Jackman*, 761 A.2d 1103, 1106 (N.J. 2000) (citing *State v. Rogers*, 705 A.2d 397 (N.J. Super. 1998))).

47. See SHROPSHIRE & DAVIS, *supra* note 2, at 104-05 (citing *Birbrower, Montelbano, Condon, & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1, 5 (Cal. 1998) (citing *People ex rel. Lawyers’ Institute of San Diego v. Merchants Protective Corp.*, 209 P. 363 (Cal. 1922))).

unscrupulous behavior by many sports and entertainment agents, the seeming ineffectiveness of existing state and league or union regulations to curtail such behavior, and the fact that anyone can apparently become an athlete or celebrity agent without regard to qualifications because the profession is so ill-defined.⁴⁸ Proposed solutions include (i) more and better regulation, especially ethical regulation, of non-attorney agents,⁴⁹ (ii) lower ethical standards for attorney-agents,⁵⁰ and (iii) requiring all sports agents to be law school graduates.⁵¹ All have merit—the first, by keeping attorney ethics strong and transferring those principles to the profession of non-attorney agents, addresses most of the ethical problems identified in the discourse of sports representation; the second at least solves the problem of the competitive disadvantage of attorney-agents; and the third seems to solve the problem of unqualified and abusive agents by eliminating the competition problem. All have weaknesses—the first is complex and unwieldy, insofar as it could go in many directions and face opposition on many fronts, *and* it does not address the problems of unauthorized practice of law or the qualifications of agents; the second solves the competition problem at great cost to attorney ethics and assumes that the competitive disadvantage is the major problem; and the third is unrealistic given that there are many services offered by agents that do not involve the practice of law—in my experience, agents often have marketing skills and financial planning skills that many attorneys do not possess. But borrowing from the intent of the first and second solutions (to ensure quality representation of athletes and celebrities), and honoring the principle behind the third solution that only attorneys should be practicing law, I believe the focus of any solution should be on the unauthorized practice of law by non-attorney agents, which is a far more conventional *legal* idea that will only be rendered unrealistic by conventional understandings and practices in the field of sports and entertainment law.

48. See generally Geisel, *supra* note 8; Doman, *supra* note 40.

49. See, e.g., Doman, *supra* note 40.

50. See, e.g., Geisel, *supra* note 8.

51. See, e.g., Brian Charles Lea, *Sports are Big Business, So Stop Playing Games: Why Federal Regulation Should Require Every Sports Agent to Possess a J.D.* 49 (unpublished manuscript available at http://works.bepress.com/brian_lea/1/).

III. CONVENTIONS

The definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice [of law]

Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers . . . [or] insurance agents, . . . [and] providing guidance on forms for property transactions by real-estate agents Several jurisdictions recognize that many such services can be provided by nonlawyers without significant risk of incompetent service⁵²

According to the *Restatement of Law Governing Lawyers*, “unauthorized practice restrictions have lessened . . . in most jurisdictions,” and while a few still enforce “traditional restraints . . . through active programs,” others have “effectively ceased” enforcement.⁵³ A major argument in favor of allowing non-lawyers to perform traditional legal services is that:

persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of the transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically high cost of lawyer services.⁵⁴

Moreover, “traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.”⁵⁵

To the extent that non-attorney sports and entertainment agents provide traditional legal services alongside non-legal services, an argument can be made that agency law, state regulatory schemes for athlete agents, and league or union regulations offer significant protection to clients.⁵⁶ On the other hand, while the lessening of

52. RESTATEMENT OF LAW GOVERNING LAWYERS § 4 cmt. c. (2000).

53. *Id.* at § 4 cmt. b.

54. *Id.* at § 4 cmt. c.

55. *Id.*

56. See SHROPSHIRE & DAVIS, *supra* note 2, at 97-98:

General agency law principles, as well as those that govern the practice of law, impose duties on both attorney agents and nonattorney agents. Examples of such duties include requirements that services be rendered competently and that clients be represented with the utmost loyalty and good faith.

unauthorized practice restrictions is justified by the “actual experience in several states with extensive nonlawyer provision of traditional legal services indicat[ing] no significant risk of harm to consumers of such services,”⁵⁷ the history of sports and entertainment representation offers many examples of agent misconduct and abuse.⁵⁸ And although many athletes struggle to break into the ranks of professional sports, those who manage to break in are typically not considered needy. Therefore, the field of sports representation seems to be especially well-suited as an area for enforcement of unauthorized practice restrictions.

A strange formal ethics opinion from Arizona in 1999 provides insight into the debate over unauthorized practice of law by non-attorney agents.⁵⁹ The questions presented included whether an attorney representing an insurer may negotiate with a non-attorney “public adjuster” who negotiates settlement of claims on behalf of insureds.⁶⁰

Arizona ethical rules clearly prohibit communication with a party represented by a lawyer, clearly allow contact with a party not represented by a lawyer, and clearly prohibit assisting “a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”⁶¹ Since the practice of law has been defined in Arizona as including negotiation of a contract, and law practice requires bar membership, the committee concluded that negotiating with a non-attorney “public adjuster” would be aiding in the unauthorized practice of law.⁶² However, an Arizona statute permits non-lawyer adjusters to negotiate settlement of insurance claims, apparently permitting “nonlawyers to engage in what would otherwise be the practice of law.”⁶³ Struggling with the impact of that statute “in the ongoing debate about what constitutes the unauthorized practice of law,” the committee was forced to recognize the category of “authorized” practice of law by non-lawyers.⁶⁴ Nevertheless, lawyers

Id. See also CARFAGNA, *supra* note 13, at 1-9 (discussing fiduciary duty under agency law, civil and criminal liability for mismanagement of funds, and state regulation of athlete-agents).

57. RESTATEMENT OF LAW GOVERNING LAWYERS § 4 cmt. c. (2000).

58. See generally Craig Neff, *Den of Vipers, A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 76; CARFAGNA, *supra* note 13, at 1-7, 9.

59. See Arizona State Bar, Formal Ethics Op. No. 99-07.

60. See *id.*

61. *Id.* (citing ARIZONA RULES OF PROFESSIONAL CONDUCT, RR. 4.2, 4.3, & 5.5).

62. See Arizona State Bar, Formal Ethics Op. No. 99-07 (citing *In re Fleischman*, 188 Ariz. 106, 933 P.2d 563 (1977) (advising about legal rights and negotiation of a contract are examples of practicing law) and ARIZ. R. SUP. CT. 31(a)(3) & 33(c) (practice of law requires bar admission)).

63. Arizona State Bar, Formal Ethics Op. No. 99-07, citing ARIZ.REV.STAT. § 20-281.

64. See Arizona opinion, *supra* note 59. But see REST., *supra* note 52, § 4 cmt. a (unauthorized practice of law “is well understood not to imply any necessary area of permissible

must follow the state supreme court's ethical guidelines; so, just as it would be wrong to assist in the unauthorized practice of law by negotiating with an out-of-state lawyer, negotiating with a non-attorney adjuster is impermissible.⁶⁵

One of the two dissenters on the committee questioned both (i) whether the definition of law practice as including negotiation of a contract (from a case involving wrongful law practice by a judge) should be read so broadly to imply that a non-lawyer who negotiates a contract for another is necessarily practicing law,⁶⁶ and (ii) whether the term "assist" should be read so broadly as to include negotiation with a non-lawyer (as opposed to cooperation or affirmative aid of some kind, as "where a lawyer has a business relationship with a nonlawyer engaged in unauthorized practice").⁶⁷ Most importantly, with a valid statute on the books authorizing public adjusters to negotiate settlements, it seems absurd to treat their practice as unauthorized under Arizona Supreme Court rules:

The Committee majority's conclusion has immense implications. If negotiating an agreement for another is "the practice of law," then real estate brokers, sports agents, and accountants (to name only a few of the most obvious examples) are "practicing law." The Committee's . .

practice by a nonlawyer," other than pro se representation). The Arizona ethics committee noted (i) that other states have found insurance adjusters to be engaged in the unauthorized practice of law (and struck down licensing statutes allowing adjusters to negotiate settlements), see Arizona opinion, *supra* note 59 (citing *Prof. Adjusters Inc. v. Tandon*, 433 N.E.2d 779 (Ind. 1982) and *Meunier v. Bernich*, 170 So. 567 (La. App. 1936)), and (ii) that one state made a distinction between independent adjusters who engage in the unauthorized practice of law and adjusters hired by insurance companies who are supervised by insurance counsel, see Arizona opinion, *supra* note 59, (citing *Rhode Island Bar Assn. v. Lesser*, 68 R.I. 14, 26 A.2d 6 (1942)).

65. See Arizona State Bar, Formal Ethics Op. No. 99-07.

66. See Arizona State Bar, Formal Ethics Op. No. 99-07 (Dissent #1) (quoting *In re Fleischman*, 188 Ariz. at 111:

We find that respondent's effort and work [negotiating a contract for a client] constitute acts that are customarily performed . . . in the ordinary practice of members of the legal profession. That they also may be performed in part or in whole by nonlawyers from time to time does not exclude them from the practice of law.

Id. This dissenter paraphrased this quote as follows:

[N]ot every activity that is the 'practice of law' for a lawyer...is reserved exclusively for lawyers," see Arizona opinion (Dissent #1), *supra*, but the quote also is susceptible to the majority's interpretation, which might be paraphrased, "just because nonlawyers negotiate contracts does not mean that negotiating contracts is not the practice of law and therefore not unauthorized by non-lawyers.

Id.

67. Arizona State Bar, Formal Ethics Op. No. 99-07 (Dissent #1), ("The ordinary meaning of the word 'assist' is not so broad. Ordinarily the word connotes cooperation or affirmative aid of some kind").

. opinion would prevent a lawyer from negotiating on behalf of a client with any of those professions[—a] startling conclusion⁶⁸

For this dissenter, if there are incompetent or untrustworthy adjusters, the solution does not lie in unauthorized practice restrictions, but, like some of those who propose reforms to stop sports agent abuse, in more and better regulations:

We believe that the appropriate authorities should act as soon as possible, to ensure that public adjusters do not give advice beyond their lay knowledge or treat their clients and adversaries unfairly or dishonestly. The Legislature can amend [the public adjuster statute]; the Supreme Court can decide the statute's constitutionality and its scope.⁶⁹

For two reasons, I do not agree that the conclusion of the committee majority is startling.

First, in my experience as a sports attorney, I knew agents who were very good at signing clients, finding a team for a player, getting the best offer, marketing the player to obtain endorsement and appearance opportunities, and offering career counseling advice. I also thought that the player needed an attorney to represent him in his contract with the agent, to advise him regarding the terms of his team-player contract, and to draft endorsement or appearance contracts. I did not believe that a non-attorney agent should be drafting contracts or counseling the client on legal terms and their effects, especially since all of these contracts included payments to the non-attorney agent.⁷⁰ Moreover, if the agent was not a competent financial advisor, I also believed that a player-client should have an independent financial advisor.⁷¹

Second, the regulation of real estate agents to prevent the unauthorized practice of law is not unheard of, and not startling. It is, however, controversial—a “battleground between lawyers, who want to be included in all transactions, and consumers, realtors, title companies, and lenders who would often prefer to handle transactions without the

68. *Id.*

69. *Id.*

70. Likewise, if the athlete client was represented by an attorney-agent, I believed the player should have independent counsel with respect to all contracts that included terms of payment to the attorney agent. *See supra* note 10.

71. *See generally* David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, Attorney-Agents, Full-Service Agencies, and the Dream Team Model*, 3 VA. SPORTS & ENT. L. J. 31 (2003-2004) (discussing the need for independent attorneys and independent financial advisors for athletes represented by non-attorney agents and, in some cases, attorney-agents).

added expense of a lawyer.”⁷² Although prosecutions for the unauthorized practice of law are generally in decline,⁷³ the debate over alleged unauthorized practice by realtors is alive and nationally prominent.⁷⁴ States can require that all real estate documents are prepared by lawyers, allow all real estate documents to be prepared by non-lawyers, or allow some documents to be prepared by non-lawyers (e.g., preliminary documents or standard contracts) but not others (e.g., mortgages and deeds).⁷⁵ Those states that aggressively pursue unauthorized practitioners are often seen as protectionist regarding the legal profession and paternalistic toward the public; in that view, competency should be the concern,⁷⁶ and non-lawyer specialists may be more competent for some transactions than generalist lawyers.⁷⁷ Moreover, protectionist measures seem to ignore the unmet legal needs of the poor,⁷⁸ and they draw the attention of the Federal Trade

72. George C. Leef, ‘UPL’ Lawyer Welfare Revisited, REGULATION, Winter 2002-2003, at 8.

73. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2585 (1999); see also Pamela A. McManus, *Have License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 540-42 (2002) (arguing that UPL laws are selectively enforced, citing *Cape May County Bar Assoc. v. Ludlam*, 211 A.2d 780, 782 (N.J. 1965) (layman who prepares mortgages is engaged in UPL) and *Spivak v. Sachs*, 211 N. E.2d 329, 331 (N.Y. 1965) (drafting a simple legal document for a small fee is not UPL)). Income tax preparers, certified public accountants, and even stock brokers and financial planners, as well as real estate agents, obviously deal in legal matters and documents; Colorado allows lay agents to represent clients in employment hearings. See *id.*; see also *In. re: Opinion No. 26 of Comm’n on Unauth. Pract. L.*, 654 A.2d 1344, 1359 (N.J. 1995) (holding that, if parties are aware of risks and potential conflicts of interest, then closing a real estate transaction is allowed even if it is an example of the unauthorized practice of law).

74. See Tara Austin, *Legal Professionalism: Doe v. McMaster and the Lawyer’s Role in Real Estate Transactions*, 55 S.C. L. REV. 591, 591 (2004).

75. See Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 902-09 (1996). While almost every court would prohibit brokers from giving legal advice, the term “legal advice” is difficult to define. See *id.* at 911-12. See generally Margaret Onys Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 311-16 (2005) (survey of various state approaches). See also ABA 2009 Survey of Unlicensed Practice of Law Committees, available at <http://www.abanet.org/cpr/clientpro/combined-charts.pdf> (results of ABA Standing Committee of Client Protection survey on unlicensed practice of law).

76. See McManus, *supra* note 73, at 552. See also Joyce Palomar, *The War Between Attorneys and Realtors: Empirical Evidence Says ‘Cease Fire?’*, 31 CONN. L. REV. 423, 508 (1998) (empirical evidence shows very little difference in error rates between states requiring lawyers at real estate closings and states where closings are done without a lawyer). As to paternalism, the public may not want strong UPL prohibitions. See Denckla, *supra* note 73, at 2596.

77. See Denckla, *supra* note 73, at 2594. Also, lawyers do not have an “exclusive claim to integrity.” See *id.*

78. See *id.* at 2595; see also Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L. REV. 363, 367 (1980).

Commission and the Department of Justice's Antitrust Division because of the potential financial burdens and lack of choice for consumers.⁷⁹

The Virginia State Bar guidelines for real estate *settlement* agents allow non-attorney agents to complete form documents "selected by and in accordance with the instructions of the parties to the transaction," but not to draft or select ("if to do so requires the exercise of legal judgment") such documents.⁸⁰ Non-attorney agents may not give legal advice; giving legal advice, or creating or drafting a legal document, is the practice of law.⁸¹

Defining what is "legal advice" is difficult; however, examples . . . include: explaining . . . legal obligations . . . ; explaining the meaning of legal terms . . . ; drafting legal instruments . . . ; providing legal opinions in response to the following types of questions: a. "What should I do?" [;] b. "What are my rights and obligations under this document?" [;] "What are the lender's rights and obligations under this document?"⁸²

The analogy between real estate agents and non-attorney sports agents is, in my experience, a strong one. Non-attorney sports agents may complete form documents, like the standard NFL team-player contract, but they should not be drafting legal documents or giving legal advice.

Targeting the specific practices of real estate agents is a virtue of Virginia's guidelines.⁸³ For example, in late 2007, the Hawaii State Bar Association proposed to the Hawaii Supreme Court a broad ban on the unauthorized practice of law—defining the practice of law as including "selecting, drafting or completing documents that affect the legal rights of another person or entity."⁸⁴ However, even the state attorney general thought that it was too broad,⁸⁵ and opposition from the insurance industry, realtors, accountants, and do-it-yourself legal service providers

79. See Leef, *supra* note 72. See, e.g., Letter from Federal Trade Commission to the Executive Director of the Virginia State Bar, Sept. 20, 1996, available at <http://www.usdoj.gov/atr/public/comments/0886.pdf> (letter was prompted by the proposal in Virginia UPL Opinion no. 183 (1996) to require lawyers to conduct real estate closings).

80. See Unauthorized Practice of Law (UPL) Guidelines for Real Estate Settlement Agents, available at <http://www.vsb.org/site/regulation/upl-guidelines-for-real-estate-settlement-agents>. Agents likewise cannot draft deeds, deeds of trust, deed of trust notes, or deeds of release. See *id.*

81. *Id.*

82. *Id.*

83. See Letter from Federal Trade Commission, *supra* note 79.

84. Ken Kobayashi, *Justices Consider Legal Aid Proposal*, STAR-BULLETIN, vol. 13, issue 21 (Jan. 21, 2008) (citing a proposed rule on unauthorized practice of law) available at <http://archives.starbulletin.com/2008/01/21/news/story02.html>.

85. Jeffrey Sia, *Clarifying Rules on the Unauthorized Practice of Law*, PAC. BUS. NEWS, Feb. 13, 2009, available at <http://www.bizjournals.com/pacific/stories/2009/02/16/editorial2.html>.

was immediate.⁸⁶ The debate over the proposal has continued, and the latest version of the rule is so full of exceptions (especially for realtors) that its effectiveness is in question.⁸⁷ After all, one of the major justifications for *allowing* non-lawyer legal service providers is that they provide a public service to those who would otherwise not use or be able to afford attorneys.⁸⁸ While a narrower and less ambiguous regulation targeted at non-attorney sports and entertainment agents would certainly face opposition, the specific practices of agents would be openly discussed, and their clients would generally not be poor—well, maybe musicians, but not professional athletes. It would be hard, I believe, to argue that non-attorney agents should be drafting contracts and offering legal advice.

IV. CONCLUSION

Most athletes are understandably more comfortable letting agents negotiate their contracts. A good and trustworthy agent can reasonably be expected to get a better deal than the average athlete, especially the youngest and least savvy Yet somewhere along the way the cavalry that rescued the athletes turned on them—or a good part of the cavalry did, anyway. “The reason we had to have agents in the first place was to protect the players from owners,” says Harvard law professor Paul Weiler . . . “The problem we have now is how to protect the player from the agent. In a sense we’ve just pushed the problem back one stage.”⁸⁹

Proposals to solve that problem, of how to ensure competent and trustworthy representation of athletes and celebrities, include (i) more and better regulation,⁹⁰ (ii) relaxation of attorney ethics so that attorney-agents can compete with non-attorney agents,⁹¹ (iii) requiring all agents

86. See Kobayashi, *supra* note 84.

87. See Sia, *supra* note 85. A revised version of the rule was proposed following the October 23, 2008, meeting of the Hawaii State Bar Association after a “long and thoughtful dialogue with representatives of accountants, insurance companies, real estate agents, paralegals, automobile dealers . . . and others.” *Id.* The revised rule had eighteen exemptions, including one for realtors that exempted negotiating and preparing real estate agreements, as well as providing advice regarding those agreements. *Id.* A bill was also proposed in the Hawaii Senate, and opposed by the state bar, providing that licensed real estate brokers will not be deemed to be engaged in the practice of law when providing services for which their license is required. See S.B. 1219 (Haw. 2009) (deferred until next session).

88. See generally Denckla, *supra* note 73, at 2595.

89. Neff, *supra* note 58, at 76.

90. See Doman, *supra* note 40.

91. See Geisel, *supra* note 8.

to be law graduates,⁹² and even (iv) deregulation of the sports agent business.⁹³ The current focus on ethical dilemmas and the need for more regulation often eclipses the problem of the unauthorized practice of law. However, solving the problem of sports and entertainment agents with restrictions on law practice is a much more conventional solution—it is only rendered unrealistic by the conventions of the field of sports and entertainment representation.

92. See Lea, *supra* note 51.

93. See Jim Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 367 (1977).