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COMMENT

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

I. INTRODUCTION

In 1995, moviegoers watched as fictional agent Jerry Maguire waltzed out of his plush window office at Sports Management International to represent athletes independently.¹ However, from the time Jerry Maguire was representing “The Great Rod Tidwell”² until now, the agent industry has become one of enormous change. Industry giants such as IMG, Octagon, and SFX, among others, once unfamiliar to the sports world, have used their purchasing power to buy the businesses of boutique agencies,³ building an arsenal of athletes and leverage that has made it difficult for smaller firms to compete.⁴ At the same time, agents have begun to specialize, usually representing players in only one sport and often players at only one position.⁵ Perhaps most significantly, instances of unscrupulous and incompetent

1. See Cameron Crowe, *Jerry Maguire Movie Script* (2006), available at <http://www.godamongdirectors.com/scripts/jerrymaguire.txt>.

2. Rod Tidwell became Jerry Maguire’s only client following Jerry’s termination from Sports Management International by rival agent Bob Sugar, played by comedian and sports persona Jay Mohr. See *id.*

3. KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 38 (2003). An example of one such acquisition was the purchase of David Falk’s Falk Associates Management Enterprises (FAME). *Id.* at 39. Falk, Michael Jordan’s long-time agent, sold his practice to SFX for \$82.9 million, including \$38.75 million up front and \$15 million in bonuses per year for five years if FAME met certain cash flow requirements. Richard Sandomir, *Sale of Agency Opens New Doors for Falk and Clients*, N.Y. TIMES, May 6, 1998, at C6.

4. See SHROPSHIRE & DAVIS, *supra* note 3, at 45-46.

5. See Peter Keating, *Crash Landing*, ESPN THE MAGAZINE, Apr. 1, 2002, available at <http://espn.go.com/magazine/vol15no07steinberg.html>.

conduct by agents, including one involving hip-hop mogul Percy “Master P” Miller,⁶ have finally led Congress to draft, and George W. Bush to sign, the first piece of federal legislation regulating agent conduct.⁷ This legislation, the Sports Agent Responsibility and Trust Act (SPARTA), was signed in 2004.⁸

Today, while Jerry Maguire would no doubt find it difficult to compete independently, his biggest competitor may not be specialty-agents or even large umbrella corporations with 300-plus clients; his biggest competitor may be himself. Some may recall that Jerry Maguire was a lawyer, not just an agent.⁹ While SPARTA imposes penalties on agents who do not follow the rules,¹⁰ it is the lawyer-agents who still remain at a large competitive disadvantage with their non-lawyer counterparts.¹¹ Specifically, attorney-agents are still held to a higher standard of care for negligence claims and governed by an unforgiving code of professional conduct, the violation of which could lead to disbarment.¹² Also, and often overlooked, attorney-agents may be precluded from recovering for services rendered in a state where they are not licensed if they are determined to have engaged in the “unauthorized practice of law,”¹³ a phrase that courts have defined broadly.¹⁴

This comment will address how, despite being a highly regulated industry, the business of sports agents exists in competitive imbalance. Because courts have held that attorneys are always attorneys even when acting as agents,¹⁵ and because they have broadly defined the “unauthorized practice of law” to

6. Mark's Sportslaw News, *Williams Quits No Limit Sports: Fallout Over Controversial Contract Leads Saints' RB to Steinberg*, Mar. 27, 2000, <http://www.sportslawnews.com/archive/Articles%202000/WilliamsSteinberg.htm>. Leland Hardy, an agent with No Limit Sports, created by Master P, negotiated an incentive-loaded contract for then New Orleans Saints' running back Ricky Williams, which included mostly bonus money and little guaranteed salary. *Id.*

7. *See Sports Agent Responsibility and Trust Act: Hearing on H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary H.R.*, 108th Cong. 29 (2003) (statement of Scott Boras), available at http://commdocs.house.gov/committees/judiciary/hju87094.000/hju87094_0.HTM.

8. Melissa Steedle Bogad, Note, *Maybe Jerry Maguire Should Have Stuck with Law School: How the Sports Agent Responsibility and Trust Act Implements Lawyer-Like Rules for Sports Agents*, 27 CARDOZO L. REV. 1889, 1904 (2006).

9. *See* Crowe, *supra* note 1.

10. Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7804 (2006).

11. Tamara L. Barner, Note, *Show Me the . . . Ethics?: The Implications of the Model Rules of Ethics on Attorneys in the Sports Industry*, 16 GEO. J. LEGAL ETHICS 519, 523-24 (2003).

12. *Id.* at 521-22.

13. *See* David A. Gerregano, Annotation, *What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel*, 83 A.L.R.5th 497 (2000).

14. *In re Peterson*, 163 B.R. 665, 672 (Bankr. D. Conn. 1994).

15. *In re Pappas*, 768 P.2d 1161, 1167 (Ariz. 1988) (citing *In re Dwight*, 573 P.2d 481 (1997)).

include many of the services athletes expect from agents,¹⁶ attorney-agents risk losing everything, from their hard-earned money to their licenses. Prior to addressing the substantive issue, however, this comment will briefly explore the existing structure of the athlete agent industry and then evaluate the current state of agent regulation from all sources, both public and private. Finally, suggestions for bridging the competitive gap between lawyer and non-lawyer-agents will be presented.

II. THE ATHLETE-AGENT BUSINESS: EVOLUTION AND THE CURRENT STATE OF THE LAW GOVERNING AGENTS

As professional sports transitioned from chump-change in the mid-1900s to big business in the late 1970s and early 1980s, agents became commonplace,¹⁷ forcing changes to the landscape of sports, not all of which were good.¹⁸ Despite legislation from multiple entities—state, federal, and private—attempting to control rogue agents and their unscrupulous behavior, not all problems have been solved.¹⁹ The current state of the law governing lawyer conduct creates a competitive disparity between lawyer-agents and their non-attorney counterparts. Therefore, despite a melting pot of regulations governing agent conduct, qualified and ethical attorneys may still find it difficult, if not impossible, to enter the profession without putting their licenses, reputations, and money up for grabs.

A. Defining “Agent,” a Tumultuous Task

The term “sports agent” has varying definitions and meanings depending on the context and depending on the source defining the term.²⁰ The National Collegiate Athletic Association (NCAA) defines an athlete agent as “[a]ny person who represents any individual in the marketing of his or her athletics ability.”²¹ Meanwhile, federal and state legislatures have adopted their own definitions.²² SPARTA’s drafters defined “agent” as an individual who

16. See *Birbrower, Montalbano, Condon, & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 12-13 (Cal. 1998).

17. See SHROPSHIRE & DAVIS, *supra* note 3, at 10-11.

18. See *id.* at 99-100.

19. See Mark’s SportsLaw News, *supra* note 6.

20. ROBERT H. RUXIN, AN ATHLETE’S GUIDE TO AGENTS 10 (4th ed. 2004).

21. NAT’L COLLEGIATE ATHLETIC ASS’N, 2005-06 NCAA DIVISION I MANUAL art. 12.3.1.2(a), available at http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf.

22. Compare 15 U.S.C. § 7801 (Supp. 2004) with WIS. STAT. § 440.99 (2005-2006).

“recruits or solicits a student athlete to enter into an agency contract.”²³ Wisconsin has adopted the same definition but adds that an agent can be anyone “who represents to the public that the individual is an athlete agent.”²⁴ It is clear that the definition of “sports agent” is varied.

Regardless of the definition used, today’s sports agent performs a variety of tasks for his or her athletes that extend beyond simply negotiating the athlete’s playing contract with a team.²⁵ The modern-day agent not only manages and negotiates playing contracts, but also determines his athletes’ market value, uses that value to his players’ advantage by securing and sustaining endorsement revenue for the players off the field, secures personal appearances for the players, acts as a speaking agent for the players when dealing with the media, and counsels his rookie clients on pre-draft planning and preparation, including scheduling workouts, creating media kits and marketing collateral, and generally easing the players’ concerns as draft day approaches.²⁶ More and more, agents are performing these and other services for their athletes well into retirement.²⁷

In addition, savvy businessmen and lawyers have begun to dominate the profession by offering specialty services beyond those offered by traditional agents.²⁸ Today’s agents often have graduate degrees in business, usually finance and economics, or law degrees, and sometimes both.²⁹ Financial planners and Certified Public Accountants (CPAs) who moonlight as sports agents can offer their athletes traditional services in addition to financial and investment planning, tax planning, and money management advice.³⁰ Also, many lawyer-agents offer legal expertise to their athlete clients in addition to traditional agent functions.³¹ It used to be that anyone could represent an athlete, but now, with complex collective bargaining agreements and contract dynamics, lawyers and businessmen are commonplace.

23. 15 U.S.C. § 7801(2).

24. WIS. STAT. § 440.99(2) (2005-2006).

25. RUXIN, *supra* note 20, at 10.

26. *Id.*

27. Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349, 351-52 (1996).

28. Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 791-92 (2006).

29. *See id.* The National Football League Players Association (NFLPA) currently requires agents wishing to become certified to possess both an undergraduate degree and either a master’s or law degree from an accredited university. *Salary Cap and Agent Administration Department: Agent Certification*, NFLPA.ORG, <http://www.nflpa.org/RulesAndRegs/AgentCertification.aspx> (last visited Sept. 25, 2007).

30. *See* Champion, *supra* note 27, at 351-52.

31. *See* SHROPSHIRE & DAVIS, *supra* note 3, at 22.

B. The Athlete Agent Business, an Industry of Change

Agents are not new to the sports scene and have been representing athletes since the early 1900s.³² In 1920, sports agent Charles “Cash and Carry” Pyle³³ negotiated a \$100,000, eight-game contract for “Red” Grange of the Chicago Bears.³⁴ The contract was representative of what agents could accomplish for their athletes and is considered one of the first contracts negotiated by an agent.³⁵ However, not until the late 1970s did agents really begin to dominate professional sports, and the contract negotiated by Pyle for Grange was only a foreshadowing of things to come.³⁶

The boom of agents truly began in the late 1970s and early 1980s and can be directly attributed to a number of factors responsible for reshaping the economic landscape of professional sports.³⁷ Interleague competition increased as rival professional leagues formed and forced their competitors to spend more to keep players.³⁸ In addition, revenue-grossing television contracts and the cultivation of additional revenue streams put more money in the hands of owners, while the bargaining power of player unions was simultaneously getting stronger.³⁹ At the same time, successful challenges by players against the reserve and option clauses in their contracts led to the advent of free agency where players could bid their services on the open market.⁴⁰ Finally, the birth of salary arbitration in professional baseball created an additional catalyst for increased compensation to players in that sport.⁴¹ Almost instantly, it seemed, sports had become big business.

As a result, player salaries skyrocketed throughout professional sports,

32. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 671 (2005).

33. Besides athlete contracts, Pyle also represented Grange in endorsement opportunities and even movie appearances. *Id.*

34. RUXIN, *supra* note 20, at 5.

35. *Id.*

36. MITTEN ET AL., *supra* note 32, at 671.

37. *Id.*

38. The World Football League (WFL) was formed in 1973 and folded two years later. NFL History, NFL.COM, <http://www.nfl.com/history/chronology/1971-1980> (last visited Sept. 25, 2007). During its tenure, however, the WFL lured and signed several NFL star veterans to astronomical salaries. SHROPSHIRE & DAVIS, *supra* note 3, at 11. The United States Football League and the American Basketball Association were additional rival leagues that effectively competed with the NFL and National Basketball Association (NBA) respectively. *Id.*

39. SHROPSHIRE & DAVIS, *supra* note 3, at 12.

40. *Id.* at 10-11. For example, in *Mackey v. NFL* players challenged the “Rozelle Rule,” which required a team wishing to sign a player formerly under contract to provide compensation to the player’s former team. 543 F.2d 606, 609 (8th Cir. 1976). The rule was successfully overturned on antitrust grounds. *Id.* at 623.

41. RUXIN, *supra* note 20, at 6.

and the playing field was ripe for the entry of agents.⁴² For example, the average salary in the National Basketball Association (NBA) rose from \$20,000 in 1967 to \$90,000 in 1972.⁴³ Salaries in the National Football League (NFL) closely followed suit with averages escalating from \$90,000 to \$190,000 between 1982 and 1985,⁴⁴ while average salaries in the National Hockey League (NHL) and Major League Baseball (MLB) each jumped 150% from 1987-1992.⁴⁵ Today's player salaries have reached seemingly insurmountable heights with 2003-2004 average salaries reaching \$4.9 million, \$1.83 million, and \$1.33 million in the NBA, NHL, and NFL, respectively.⁴⁶ A recent example of the acute escalation of player salaries is the \$252 million, ten-year deal negotiated for baseball player Alex Rodriguez by super agent Scott Boras.⁴⁷ Escalating player salaries like the one exemplified by the Rodriguez contract, and the high commissions these contracts promise to the agents negotiating them, have attracted numerous agents to the profession while heightening competition.⁴⁸

Adding fuel to the already competitive fire is the fact that large corporations, once unfamiliar to the sports industry, began using their buying power to purchase smaller, boutique agencies.⁴⁹ Octagon, IMG, and SFX Sports are well-known examples of companies who began using their capital to buy up the businesses of respected agents beginning in 1995,⁵⁰ including those representing athletes in the four major professional sports, as well as those representing Olympians, tennis players, golfers, extreme and action sports competitors, and others.⁵¹ The result has been some of the most powerful agents in their respective sports joining forces under one roof.⁵²

42. See Stacey M. Nahrwold, *Are Professional Athletes Better Served by a Lawyer-Representative Than an Agent?* *Ask Grant Hill*, 9 SETON HALL J. SPORT L. 431, 431-32 (1999).

43. Roger G. Noll, *The Economics of Sports Leagues*, in *LAW OF PROFESSIONAL AND AMATEUR SPORTS* 19-1, 19-26 (Gary Uberstine ed., 2002).

44. *Id.* at 19-27.

45. RUXIN, *supra* note 20, at 7.

46. *Major League Salaries*, BASEBALL-ALMANAC.COM, http://www.baseball-almanac.com/charts/salary/major_league_salaries.shtml (last visited Apr. 11, 2007).

47. *The \$252 Million Man: Rodriguez Rose from Humble Beginnings to be the Highest-Paid Baseball Player in History*, CNN.COM, <http://www.cnn.com/CNN/Programs/people/shows/rodriguez/profile.html#top> (last visited Apr. 11, 2007).

48. Nahrwold, *supra* note 42, at 431-32.

49. See SHROPSHIRE & DAVIS, *supra* note 3, at 33.

50. Posting of Rick Karcher, Director, Center for Law and Sports, Florida Coastal School of Law, <http://sports-law.blogspot.com/2006/08/hollywood-talent-firm-consolidates.html> (Aug. 23, 2006).

51. See IMG - Sports, <http://www.imgworld.com/sports/> (last visited Apr. 11, 2007).

52. See SHROPSHIRE & DAVIS, *supra* note 3, at 35-36.

These powerhouse agencies have become attractive to athletes as one-stop shops offering everything from contract negotiations, marketing management, legal and financial planning services, and post-career opportunities.⁵³

In 2006, a momentous power shift occurred when Creative Artists Agency (CAA), a talent-marketing firm in California, entered the fray, purchasing the businesses of some of the agents originally owned by these three companies.⁵⁴ The move caused some of the most prominent agents in the business to shift allegiance to CAA and leave their former employers.⁵⁵ The purchasing that has occurred by CAA and others has put a large percentage of available athletes in the hands of a few dominant entities, forcing smaller agents to fight for the leftovers.⁵⁶ These umbrella corporations and the variety of services they offer clients have made it difficult, if not impossible, for many smaller agents to compete.⁵⁷

As the number of agents continues to grow and the number of athletes remains relatively stagnant,⁵⁸ competition between agents has grown fierce, spawning unscrupulous conduct by agents motivated by greed.⁵⁹ Probably the most notorious problem agent is “Tank” Black, a former coach turned agent who coaxed many college athletes into premature representation agreements, forcing many of them to forfeit their remaining eligibility and turn pro.⁶⁰ Adding insult to injury was the fact that Black lost some \$12 million of his clients’ money to poor investment schemes.⁶¹ Bad boy agents Norby Walters and Lloyd Bloom went one step further, allegedly offering drugs and prostitutes to potential recruits.⁶² The duo even threatened to break the legs of

53. *See id.* at 29.

54. Karcher, *supra* note 50.

55. *Id.* CAA purchased the rights to former SFX football agent Ben Dogra as well as the practice of former IMG agent Tom Condon, who has represented some of the biggest names in the NFL. *Id.* The firm also purchased the rights to prominent MLB and NHL agents, amassing a combined client roster of 140 athletes across the four major professional sports, currently the most of any agency. *Id.*

56. SHROPSHIRE & DAVIS, *supra* note 3, at 29.

57. *Id.* at 29. IMG has even developed its own training facility, “IMG Academies,” offering its athlete clients and amateur prospects the chance to train and rehabilitate at a state-of-the-art training facility located in Florida. IMG Academies, IMG Headquarters, <http://www.imgacademies.com/hq/default.sps?itype=7959> (last visited Apr. 11, 2007).

58. MITTEN ET AL., *supra* note 32, at 692.

59. Nahrwold, *supra* note 42, at 434-35.

60. Mike Fish, *A Black Eye: Headed to Prison, Black Should be a Lesson to Agents*, SPORTS ILLUSTRATED, May 7, 2002, http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2002/05/07/tank_black/.

61. *Id.*

62. *See* David Lawrence Dunn, Note, *Regulation of Sports Agents: Since at First It Hasn't Succeeded Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1032 (1988).

one of their athlete prospects if the athlete refused to pay back loan money.⁶³ Perhaps not as popular, but equally devious, was agent Richard Sorkin, who lost much of his clients' money to bad stock market decisions and compulsive gambling.⁶⁴

This hyper-competitive and often unscrupulous agent behavior, although deplorable, is not surprising given the increase in athlete salaries and the relative stability in the number of athletes coming out of college. The result has been a gorge of legislation from federal and state legislatures, as well as the NCAA and league players associations attempting to rid the industry of problem agents.

C. Tightening the Reins: Legislation Abounds as Everyone Takes a Crack at Agents

Misconduct by agents has led to a cornucopia of regulatory doctrines from multiple sources all aimed at controlling agent conduct.⁶⁵ While intensive regulation has to some extent solved the challenges presented by problem agents like Tank Black, it has also resulted in some problems of its own, not the least of which is inconsistency.⁶⁶ Also, despite progressive legislation such as SPARTA, the agent industry still exists in competitive disparity where attorney-agents struggle to compete with their non-attorney counterparts.⁶⁷

Regulation of agents by private associations such as the NCAA and the individual players unions is well intentioned, but cannot alone control problem agents. Specifically, NCAA bylaws prohibit athletes from reaching a representation agreement with an agent or from receiving gifts from an agent prior to the expiration of the athlete's college eligibility.⁶⁸ However, because the NCAA lacks the jurisdiction to regulate agents, any punishment for violating these rules falls on the athletes or their university.⁶⁹ In addition, while professional players unions have instituted regulations governing agent

63. John Gorman, *Bears' Douglass: Agent Said He'd Break My Legs*, CHI. TRIB., Mar. 16, 1989, at Sec. 4(1).

64. Paul L. Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros' Agent*, N.Y. TIMES, Oct. 9, 1977, at S1.

65. See Eric Willenbacher, Note, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1226 (2004).

66. See *id.* at 1243-45.

67. See *id.* at 1244-46.

68. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 21, art. 12.3.

69. Diane Sudia & Rob Remis, *Athlete Agent Legislation in the New Millennium: State Statutes and the Uniform Athlete Agents Act*, 11 SETON HALL J. SPORT L. 263, 268-69 (2001).

conduct,⁷⁰ the enforceability and effect of these rules is questionable because sanctions against agents are rarely levied.⁷¹

As a result of the ineffectiveness of private organizations in regulating agent conduct, individual states began regulating agents internally.⁷² While agents are subject to the same state laws and criminal codes as other state citizens, most states have drafted agent-specific statutes as well.⁷³ Some state registration statutes require agents to pay a fee to the state, post a surety bond, or even pass a competency exam before they are allowed to recruit athletes.⁷⁴ Other state regulations prohibit agents from engaging in certain types of conduct when soliciting athletes, the violation of which can subject them to criminal and civil penalties.⁷⁵ The result of states creating agent legislation unique to their own jurisdiction was an inconsistency in the law applied to agents.⁷⁶

70. See NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS (Mar. 2006), available at <http://www.nflpa.org/RulesAndRegs/AgentRegulations.aspx>. The NFLPA forbids contract advisors from offering anything of value to potential players or their families when recruiting those players. *Id.* § 3(B)(2)-(3). Agents are also prohibited from providing false or misleading information to athletes while recruiting. *Id.* § 3(B)(4).

71. See Barner, *supra* note 11, at 532. For example, while the NFLPA receives hundreds of complaints against player agents every year, the union filed only fifty-five individual disciplinary proceedings against agents between 1996 and 2003, twenty-two of which pertained to the agent failing his or her mandatory certification exam. 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, 47 (2003) (citing Interview with Mark Levin, Director of Salary Cap & Agent Administration Division, NFLPA, in Wash., D.C. (Apr. 8, 2003)). Therefore, only thirty-three of those proceedings dealt with serious agent misconduct. *Id.* at 48. The NFLPA's inability to punish misbehaving agents does not stem from a lack of resources, but rather from its inability to obtain evidentiary proof that the agent engaged in the alleged misconduct in the first place. *Id.* However, despite its lack of enforceability, the NFLPA still maintains the strictest agent regulations of the four major professional sports unions. Posting of Rick Karcher, Director of the Center for Law and Sports, Florida Coastal School of Law, <http://sports-law.blogspot.com/2006/11/another-agent-suing-nflpa-over-due.html> (Nov. 22, 2006).

72. See MITTEN ET AL., *supra* note 32, at 719.

73. See *id.*

74. Sudia & Remis, *supra* note 69, at 275.

75. CAL. BUS. & PROF. CODE §§ 18897.8-.97 (2006) (making it a misdemeanor to violate any provision of the state code governing agents and allowing any person harmed by the agent's conduct to recover punitive damages from the agent).

76. UNIFORM ATHLETE AGENTS ACT (2000), available at <http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm>. Prior to the adoption of the UAAA, twenty-eight states had adopted some form of legislation regulating athlete agents; however, inconsistencies across the board made the statutes hard to follow. *Id.* Specifically, only two-thirds of existing state regulations required agents to register with the state before representing athletes, and even those states had varied registration terms, ranging from one year in thirteen states, two years in four states, and for indefinite terms in two states. *Id.* Also, substantial differences in registration procedures as well as record maintenance, reporting, renewal, notice, warning, and security requirements created confusion among agents trying to follow

In 2000, in an attempt to reduce confusion and create parity among state agent regulations, Congress enacted a piece of model legislation called the Uniform Athlete Agents Act (UAAA).⁷⁷ The UAAA is not binding on the states and can be adopted by the states at their discretion to either take the place of or supplement existing state agent laws.⁷⁸ The UAAA standardizes agent reporting, registration, and record keeping requirements for agents in states that choose to adopt it, and it also includes a list of punishable misconduct for agents recruiting college athletes.⁷⁹ The UAAA also allows for criminal penalties against violating agents⁸⁰ and for the recovery of civil damages by the educational institution against the agent and student athlete.⁸¹ As of July 2007, thirty-six states had adopted the UAAA.⁸²

Congress passed SPARTA in 2004,⁸³ creating the first piece of federal legislation aimed at regulating agents.⁸⁴ Essentially, SPARTA compensates for the NCAA's lack of jurisdiction over agents by making it unlawful for agents to recruit student athletes by offering them anything of value or by feeding them misleading information.⁸⁵ However, SPARTA does not make the recruiting of college athletes illegal, it only requires that the athlete consent in writing to being represented by the agent and that the agent notify the athlete that consenting may render him or her ineligible.⁸⁶ Therefore, SPARTA does not completely safeguard college athletes from unknowingly losing their eligibility.⁸⁷

However, SPARTA is a valuable piece of legislation despite the UAAA and other state agent regulations. Specifically, SPARTA affords private parties recourse against agents in federal district courts, even in states that currently do not have agent legislation on the books.⁸⁸ Also, unlike the

the rules. *Id.* The Act's drafters expounded on the headaches such inconsistency must have caused rule-abiding agents, stating, "Conscientious agents operating in more than a single State must have nightmares caused by the lack of uniformity in the existing [state] statutes." *Id.*

77. *Id.*

78. See Uniform Athlete Agents Act (UAAA) History and Status, NCAA.ORG, <http://www1.ncaa.org/membership/enforcement/agents/uaaa/history.html> (last visited Apr. 11, 2007).

79. UNIFORM ATHLETE AGENTS ACT § 14 (2000).

80. *Id.* § 15.

81. *Id.* § 16(a).

82. See Uniform Athlete Agents Act (UAAA) History and Status, *supra* note 78.

83. Bogad, *supra* note 8.

84. See *id.* at 1914-15.

85. SPARTA, 15 U.S.C. § 7802(a) (2006).

86. *Id.* § 7802(b)(3).

87. See *id.*

88. See Willenbacher, *supra* note 65, at 1242.

UAAA, SPARTA allows both states and educational institutions to bring actions for damages, thereby compounding the potential blow to the misbehaving agent's pocketbook.⁸⁹ Finally, SPARTA treats a violation of its provisions as an unfair or deceptive trade practice punishable by the Federal Trade Commission (FTC) under the FTC Act, 15 U.S.C. § 57a(a)(1)(B).⁹⁰ In this way, SPARTA also imposes federal criminal penalties on misbehaving agents.⁹¹ Therefore, SPARTA was a valuable addition to existing agent legislation.

In addition to private regulatory provisions and state and federal laws governing traditional agents, attorney-agents are also governed by a set of model ethical rules that dictate acceptable behavior.⁹² The Model Rules of Professional Conduct (MRPC) was drafted by the American Bar Association (ABA) as a uniform code of conduct governing attorney behavior.⁹³ The MRPC has been adopted with minor revisions and modifications by most states.⁹⁴ Violations of the model rules in states that have adopted them have resulted in attorneys being fined, suspended from practicing law, and even disbarred.⁹⁵

It has long been thought that because the model rules impose restrictions on attorney behavior, some of which is considered business as usual for sports agents, the rules limit the ability of attorneys to effectively compete with non-attorney-agents.⁹⁶ For example, Model Rule 1.5 prevents attorneys from charging excessive fees.⁹⁷ Because agents are paid a percentage rate of the athlete's total compensation, as athlete salaries climb, the agent's fee increases.⁹⁸ Given the escalating salaries of professional athletes, a three to five percent commission, the industry norm for professional sports, of even a marginal salary could be considered excessive compared to what lawyers would normally make if they performed the same services at an hourly rate.⁹⁹ Similarly, under Rule 7.3, attorneys are not allowed to solicit business from

89. 15 U.S.C. §§ 7804-7805 (Supp. 2004).

90. *Id.* § 7803(a).

91. *Id.*

92. *See Bogad, supra* note 8, at 1907.

93. *Id.*

94. *Id.*

95. *See Barner, supra* note 11, at 523-24.

96. *See Nahrwold, supra* note 42, at 440-41.

97. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2007).

98. *See Barner, supra* note 11, at 524.

99. *See id.* at 524-25.

prospective clients when doing so for their own pecuniary gain.¹⁰⁰ This prevents attorneys from aggressively recruiting athletes about to turn pro,¹⁰¹ an activity most consider to be a staple function of successful agents, vital to their success.¹⁰² Also, Model Rules 1.4 and 8.4, which rightfully subject attorneys to punishment for fraudulently misrepresenting themselves to clients, do not hold weight for non-attorney-agents.¹⁰³ Therefore, non-attorney-agents have fewer restrictions on what they may say when selling themselves to college athletes.¹⁰⁴

Lastly, attorney-agents are subject to heightened expectations of competency under Model Rule 1.1 not demanded of non-attorney-agents.¹⁰⁵ While the competency requirement is a valuable protection for athletes, attorney-agents are required to exercise extreme caution learning the tools of the trade,¹⁰⁶ investing many more labor-intensive hours strictly scrutinizing league collective bargaining agreements, player contracts, and learning the economics of the relevant sport than their non-attorney counterparts are required to invest. Attorneys who fail to complete this due diligence are engaging in malpractice, which may be evidence of the attorney's negligence in a court of law.¹⁰⁷ Therefore, the Model Rules are often viewed as significantly handicapping attorney-agents.¹⁰⁸

Despite this disparity, some claim that SPARTA bridges the gap between attorney and non-attorney-agents by imposing federal restrictions on agents that mimic the MRPC.¹⁰⁹ One argument goes that because SPARTA requires

100. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2007).

101. *See id.* (declaring it unethical for lawyers to solicit business from prospective clients either in person, by telephone or through real-time electronic communication).

102. Russell Hubbard, *Out of Bounds - In the Battle for Pro Prospects, Some Sports Agents Break the Rules*, BIRMINGHAM NEWS, Dec. 21, 2003, available at <http://www.profilesports.com/news/outofbounds.html>.

103. Bogad, *supra* note 8, at 1909.

104. While the NFLPA does prohibit its agents from fraudulently misrepresenting themselves to athletes in their recruiting efforts, only statements that contain "materially false or misleading information" are punishable. NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, *supra* note 70, § 3(B)(4). On the other hand, the Model Rules of Professional Conduct uses broader language, making punishable the use of any communication "involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007). Therefore, attorney-agents are culpable for a larger scope of conduct than non-attorney-agents, and, given the inability of the NFLPA to gather evidence against most misbehaving agents, will likely be held accountable more readily than non-attorneys who are not subject to scrutiny by the bar.

105. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

106. *See id.*

107. *See* MODEL RULES OF PROF'L CONDUCT, Preamble and Scope [20] (2007).

108. *See* Barner, *supra* note 11, at 524-25.

109. Bogad, *supra* note 8, at 1908-09.

disclosure to student athletes while preventing agents from wooing athletes with false or misleading information, SPARTA effectively mimics Model Rules 1.4 and 8.4 for non-attorney-agents.¹¹⁰ Also, proponents allege that because SPARTA encourages states to adopt the UAAA,¹¹¹ it will eventually result in all states mandating background checks and competency evaluations prior to licensing agents.¹¹²

However, even if SPARTA imposes standards for all agents similar to the provisions of the MRPC, competitive disparity still exists between attorney and non-attorney-agents. Specifically, because courts have held that lawyers are lawyers twenty-four seven, even when they are performing non-attorney activities,¹¹³ attorneys are subject to a body of common law precedent governing their conduct even when acting in other professional capacities, not all of which is favorable.¹¹⁴ For example, lawyers are held to a higher standard of care than lay persons in the event they are sued for negligence.¹¹⁵ Also, while a violation of the MRPC does not itself give rise to a cause of action for negligence against an attorney, conduct that violates a provision of the MRPC can be used as evidence that an attorney was negligent.¹¹⁶ These and other issues affecting attorneys have made life difficult for attorneys wishing to branch out into other industries.¹¹⁷

A competitive disparity between lawyer and non-lawyer-agents that has been almost universally undervalued is how broadly courts have defined what constitutes the unauthorized practice of law. Namely, because attorneys are always attorneys, even when they are acting as agents, attorney-agents are not safe from court precedent broadly defining the unauthorized practice of law to include activities performed by lawyers that are typical of everyday agents.¹¹⁸ The next section will discuss how attorney-agents may be in danger of losing not only their money and their reputations, but also their licenses if they perform typical agent functions in a state where they are not licensed.

110. *Id.*

111. 15 U.S.C. §§ 7804-7805 (Supp. 2004).

112. *See Bogad, supra* note 8, at 1910.

113. *In re Pappas*, 768 P.2d 1161, 1166 (Ariz. 1988).

114. *See id.*

115. *See generally* 57A AM. JUR. 2D *Negligence* § 177 (2006). *See also Meyer v. Wagner*, 709 N.E.2d 784, 791 (Mass. 1999) (holding that the standard of care in determining whether an attorney was negligent should be based on whether he exercised the degree or skill expected of a qualified attorney).

116. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope [20] (2007).

117. *See Barner, supra* note 11, at 523.

118. *See Birbrower, Montalbano, Condon, & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 12-13 (Cal. 1998).

III. DESPITE THE CURRENT STATE OF AGENT REGULATION, LAWYER-AGENTS ARE STILL AT A COMPETITIVE DISADVANTAGE COMPARED TO THEIR NON-LAWYER COUNTERPARTS

Despite SPARTA and other progressive reshaping of the athlete agent industry by state and federal legislatures, the agent business still presents a competitive disadvantage to lawyer-agents. Because courts have determined that lawyers are always lawyers even when acting in the capacity of some other profession, attorney-agents could find themselves at the receiving end of litigation, facing suspensions, fines, potential disbarment, and even the non-fulfillment of contractual obligations by athletes who allege that their attorney-agent engaged in the unauthorized practice of law.

A. The "Two-Hat" Theory: Attorneys Are Always Attorneys

Kenneth Shropshire and Timothy Davis, professors of business and law respectively and experts on the agent industry, have stated that "[a]ttorney status carries with it assumptions made by the public as to the training, competence, ethics, and accountability of attorneys."¹¹⁹ Indeed, one of the selling points that attorney-agents can offer their clients is the fact that they are attorneys.¹²⁰ Therefore, with the best interests of the public at heart, courts have held that attorneys cannot shed their role as attorneys regardless of what activity or type of professional employment they are undertaking, even when that activity or type of employment is outside the practice of law.¹²¹

In fact, the strong weight of authority has held that an attorney can never wear multiple hats and is an attorney twenty-four hours a day, seven days a week.¹²² For example, the court in *In re Pappas*¹²³ found that an attorney, who was also a certified public accountant (CPA), was guilty of violating a number of provisions in the state code of ethics governing attorney conduct after he botched a business deal involving some of his clients.¹²⁴ Although the

119. SHROPSHIRE & DAVIS, *supra* note 3, at 93.

120. *Id.*

121. See Doman, *supra* note 71, at 42-43.

122. See *In re Dwight*, 573 P.2d 481, 484 (Ariz. 1977) (holding that an attorney acting in his capacity as an investment advisor was subject to ethical rules governing attorneys). The court held that "[a]s 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." *Id.*; see also *Kelly v. State Bar of Cal.*, 808 P.2d 808, 812 (Cal. 1991) (holding that an attorney who helped a client purchase an airplane was an attorney even in that capacity).

123. *In re Pappas*, 768 P.2d 1161 (Ariz. 1988).

124. *Id.* at 1168-69.

attorney was acting as a financial advisor to the clients at the time and had never represented them legally, the court refused to distinguish between the defendant's role as an attorney and his role as a CPA.¹²⁵ The court reasoned:

The duties of a lawyer who also holds other professional licenses cannot be circumscribed by the fine distinctions that we might draw between the nature of the services performed under a particular license. How is one to tell whether, in advising [his clients] about the tax consequences of the condemnation settlement, respondent acted as an accountant or a lawyer? . . . More importantly, how is any client to know when a lawyer *cum* accountant *cum* investment adviser removes one hat and puts on another?¹²⁶

Several courts have specifically ruled that attorney-agents were acting as attorneys in their role in representing professional athletes.¹²⁷ In *Cuyahoga County Bar Ass'n v. Glenn*,¹²⁸ the Supreme Court of Ohio held that an attorney-agent had violated a state ethics code governing attorney conduct by coaxing some \$20,000 from his client's team, the Chicago Bears, without his client's consent.¹²⁹ The court subsequently suspended the lawyer from the practice of law for one year and ordered that he repay the money in full, plus interest.¹³⁰ In *In re Horak*,¹³¹ the court held that an attorney who was representing the government of St. Vincent in its bid for the 1988 Olympic Games was operating in the capacity of a lawyer and not a sports agent, and was therefore subject to disciplinary proceedings for violating regulations governing the misappropriation of client funds.¹³² The court subsequently disbarred the attorney.¹³³

Some have argued wrongly that the decision in *Wright v. Bonds*¹³⁴ can be used as precedent to show that some courts have held attorneys to be sports agents and not attorneys.¹³⁵ In *Wright*, Barry Bonds' ex-agent sued Bonds for

125. *Id.* at 1166.

126. *Id.*

127. See SHROPSHIRE & DAVIS, *supra* note 3, at 92-93; see also Bogad, *supra* note 8, at 1900.

128. *Cuyahoga County Bar Ass'n v. Glenn*, 649 N.E.2d 1213 (Ohio 1995).

129. *Id.* at 1214-15.

130. *Id.*

131. *In re Horak*, 224 A.D.2d 47 (N.Y. App. Div. 1996).

132. *Id.* at 52.

133. *Id.* at 53.

134. *Wright v. Bonds*, No. 96-55586, 1997 U.S. App. LEXIS 16811, at *2 (9th Cir. July 3, 1997).

135. Barner, *supra* note 11, at 523.

breach of contract when Bonds defected to another sports management firm.¹³⁶ Bonds countered that the agreement between him and Wright should be null and void because Wright had never registered with the Major League Baseball Players Union.¹³⁷ The court held that Wright should be held to the standards of an agent even though he was an attorney.¹³⁸ The court reasoned that Wright was not acting as a lawyer and was instead acting as an agent, as evidenced by his sending of correspondence using his agency stationary rather than that of his law firm and the fact that the contract between him and his client specifically excluded legal work.¹³⁹

However, the holding in *Wright* likely will not disrupt the commonly held belief that attorneys are always attorneys even when acting as agents. While the court in *Wright* distinguished between attorneys acting as agents and those acting as attorneys, the court was simply interpreting a California statute that allowed attorneys to perform legal work for athletes without having to register with the state's Labor Commissioner, a requirement for athlete agents.¹⁴⁰ In that regard, it was not directly on point with cases specifically deciding the issue of whether attorneys are always attorneys.¹⁴¹ Also, the multi-hat theory expressed in *In re Pappas* suggests just how far the courts will stretch the notion that attorneys are always attorneys.¹⁴² There is nothing to suggest that an attorney who decides to be a sports agent will be treated any differently.

Therefore, courts will most likely hold that attorneys are attorneys even when acting as sports agents and cannot shed their attorney hat and the often burdensome body of law that governs them simply by acting in the capacity of another profession. Since lawyers are not free from the law governing lawyer conduct even as sports agents, one concern is that attorney-agents may be engaging in the unauthorized practice of law by performing typical sports agent duties in states where they are not licensed and exposing themselves to potential liability because of it.

B. Unauthorized Practice of Law

MRPC 5.5 states that "[a] lawyer may practice law only in a jurisdiction in

136. See *Wright*, 1997 U.S. App. LEXIS 16811, at *2.

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.*

141. Compare *id.* with *In re Horak*, 224 A.D.2d 47 (N.Y. App. Div. 1996) and *Cuyahoga County Bar Ass'n v. Glenn*, 649 N.E.2d 1213 (Ohio 1995).

142. *In re Pappas*, 768 P.2d 1161, 1166 (Ariz. 1988).

which the lawyer is authorized to practice.”¹⁴³ Most courts have agreed, holding that an attorney who practices law in a state where he is not licensed engages in the unauthorized practice of law in that state,¹⁴⁴ with the phrase “unauthorized practice of law” being one that is defined broadly by courts to include even the transactional and negotiation activities¹⁴⁵ viewed as traditional practices of modern-day sports agents.¹⁴⁶

Although many have called for reform in this area to loosen the restraints on a lawyer’s ability to practice extraterritorially,¹⁴⁷ the modern trend in the law strictly limits a lawyer’s ability to do so.¹⁴⁸ Most courts agree that an attorney who is not licensed to practice law in a state cannot recover for legal services performed in that state and may also be subject to additional penalties at the court’s discretion.¹⁴⁹ Therefore, given the fact that lawyers are always lawyers, even when they are acting as sports agents, attorneys wishing to become agents should be concerned about the unsettled nature of court precedent defining what is and is not the unauthorized practice of law.

Further broadening the competitive gap between attorney and non-attorney-agents is the fact that non-attorney-agents will likely not be held to the same standard as their attorney counterparts by courts determining if the agent has committed the unauthorized practice of law.¹⁵⁰ Specifically, courts have been hesitant to uphold allegations that lay persons have engaged in the unauthorized practice of law, and therefore, non-attorney-agents are not likely engaging in the unauthorized practice of law by performing their duties as agents.¹⁵¹

In addition, the majority of courts have broadly construed the unauthorized practice of law as extending beyond representation by a lawyer

143. MODEL RULES OF PROF’L CONDUCT R. 5.5, Comment [1] (2007).

144. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000) (stating that the unauthorized practice of law concerns any extraterritorial practice by a lawyer outside of the state in which he is licensed, unless that representation is ancillary to a representation of a client within the state he is licensed and unless the lawyer also obtains permission from the foreign state).

145. See *Birbrower, Montalbano, Condon, & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1, 12-13 (Cal. 1998).

146. Job Profiles, <http://www.jobprofiles.org/artspointsagent.htm> (last visited Apr. 11, 2007).

147. Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113, 133 (1993).

148. See *In re Application of Jackman*, 761 A.2d 1103, 1109 (N.J. 2000) (emphasizing the decision reached by the court in *Birbrower*, 949 P.2d 1 (Cal. 1998)).

149. C.D. Sumner, Annotation, *Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar*, 11 A.L.R.3d 907, §2 (2006).

150. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, Cmt. c (2006).

151. See *id.*

in court to also include transactional practice.¹⁵² In *Birbrower, Montalbano, Condon, & Frank, P.C. v. Superior Court*,¹⁵³ the court held that a group of New York attorneys were engaged in the unauthorized practice of law when they counseled a California client on strategy leading up to an arbitration proceeding over the terms of a contract.¹⁵⁴ The court held that both representing the client in arbitration and the attorneys' advice to the client not to settle constituted the unauthorized practice of law.¹⁵⁵ The New Jersey Supreme Court affirmed the holding in *Birbrower*.¹⁵⁶ The court held that "[o]ne is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required."¹⁵⁷ Both courts refused to allow the attorneys to recover for their services.¹⁵⁸

Courts have interpreted the phrase "unauthorized practice of law" as including activities by a lawyer in a state where he is not licensed even when the lawyer does not physically enter the state.¹⁵⁹ The *Birbrower* court held that even though the New York attorneys conducted a portion of their work from their New York offices, they were precluded from recovering to the extent that their services affected a California client.¹⁶⁰ The court opined that while "[p]hysical presence [in the state] is one factor [it] may consider in deciding whether the unlicensed lawyer has [engaged in the unauthorized practice of law] . . . it is by no means exclusive."¹⁶¹ The court overturned a California appeals court, which only a year prior held that a Colorado lawyer could recover fees for the portion of services rendered from his licensed state.¹⁶²

While there are no cases specifically interpreting whether an attorney-agent engaged in the unauthorized practice of law, the precedent discussed suggests that the everyday practices of attorney-agents may not be protected

152. *See Jackman*, 761 A.2d at 1109.

153. *Birbrower*, 949 P.2d at 1.

154. *See id.* at 12-13.

155. *See id.*

156. *Jackman*, 761 A.2d at 1106 (holding that an unlicensed associate handling merger and acquisition transactions had engaged in the unauthorized practice of law).

157. *Id.*; *see also In re Peterson*, 163 B.R. 665, 674-76 (Conn. 1994) (holding that a bankruptcy attorney who was not licensed in the state of Connecticut could not recover for services, some of which included basic negotiation).

158. *Compare Birbrower*, 949 P.2d at 13 with *Jackman*, 761 A.2d at 1109-10.

159. *Birbrower*, 949 P.2d at 6.

160. *Id.*

161. *Id.* at 5.

162. *Estate of Condon*, 76 Cal. Rptr. 2d 922, 928 (Cal. Ct. App. 1998) (holding that physical presence of the attorney in the non-licensed state was necessary to bar recovery).

from scrutiny. Specifically, the broad construction of unauthorized practice of law by *Birbrower* and others to include out-of-court activities like negotiation and dispute resolution techniques should be troubling to lawyer-agents because these services are typical, everyday agent activities.¹⁶³ Also, while negotiation is a staple function of athlete agents in all sports, arbitration advocacy is an additional function performed by Major League Baseball agents,¹⁶⁴ and therefore, should create additional concern for lawyer-agents representing players in that sport. Therefore, the inseparable fusion of dispute resolution techniques and professional sports, combined with the suggestion in *Birbrower* that dispute resolution constitutes the practice of law, should concern lawyer-agents who are not licensed to practice law in jurisdictions where they are negotiating and arbitrating on behalf of their athletes.

Even attorney-agents conducting business from their home offices in the state where they are licensed may not be protected.¹⁶⁵ The holding in *Birbrower* suggests that attorney-agents may be engaged in the unauthorized practice of law even when conducting business by phone, fax, or otherwise within the state in which they are licensed because physical presence in the non-licensed state is not required.¹⁶⁶ Therefore, it is at best unclear whether this problem can be avoided by setting up a home office in the state where the attorney is licensed and conducting business from that state by electronic means.

Some may argue, however, that all of this is irrelevant and that athletes do not go looking to poach attorney-agents for free services, entering into agreements with them only to later opt out of their promises and stop payment through an unauthorized-practice-of-law claim. However, disagreements between athletes and their agents over money do occur,¹⁶⁷ and when they do, it is not unrealistic to assume that the athlete would use any and all available resources to prevent payment to that agent, including a claim that the agent engaged in the unauthorized practice of law. Therefore, there should be at least some concern among attorney-agents that their status as attorneys could

163. See RUXIN, *supra* note 20, at 9-10.

164. See ROGER I. ABRAMS, THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION 151 (2000).

165. See *Birbrower*, 949 P.2d at 5-6.

166. See *id.*

167. See *Zinn v. Parrish*, 644 F.2d 360 (7th Cir. 1981). Leo Zinn was a prominent sports agent in the 1970s who negotiated a series of contracts with the Cincinnati Bengals for his client Lemar Parrish. *Id.* at 361. Before Zinn could collect for his services, Parrish terminated the relationship and refused payment. *Id.* at 362; see also *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 547-49 (E.D. Mich. 1984) (holding that an athlete-plaintiff was correct in asserting that his agent had a conflict of interest, thereby entitling the athlete to damages).

lead to problems down the road.

However, the state of the industry suggests that many lawyer-agents are not concerned,¹⁶⁸ and many in the industry even boast of the special niche services that their multifunctional law firm can offer clients, from contract negotiation to tax and estate planning.¹⁶⁹ A court only needs to look at the web sites of these law firms as evidence that what is truly being offered is a bundle of legal services, not simply the work of a typical sports agent.¹⁷⁰ But even if these law firms could show that the services they perform are typical of sports agents and not limited to attorneys, the holding in *Birbrower* and other cases suggests that even attorneys performing agent services may very well be engaged in the unauthorized practice of law.

In the age of multi-state negotiations for athletes who are sponsored by multiple companies and who may play for various teams throughout their careers, many of which may not be located in the state where the attorney-agent is licensed, becoming an agent is risky business for attorneys wishing to keep their licenses and their money. Also, given the dog-eat-dog nature of the agent industry, where conflicts over athletes are just part of a day's work, it is a very real possibility that a rival agent will encourage an athlete to allege his attorney-agent engaged in the unauthorized practice of law, thus voiding any contractual obligations owed to that attorney by the athlete. The unauthorized practice of law defense is therefore a very real concern.

IV. BRIDGING THE COMPETITIVE GAP BETWEEN LAWYER AND NON-LAWYER-AGENTS: A BIRD'S-EYE VIEW

The hyper-competitive and often unethical state of the agent industry has already caused some lawyers to leave the profession, despite their qualifications.¹⁷¹ Len Elmore, ESPN basketball analyst and lawyer with LeBoeuf, Lamb, Greene, & MacRae in New York,¹⁷² summarized his experience as an agent as follows:

In all candor what chased me from the [agent] industry was the shrinking revenue caused by wage scaling and my unwillingness to pay a young kid to become my client. I simply did not desire,

168. See Lynch, Gilardi, & Grummer, *Sports Law and Athlete Representation*, http://www.lgglaw.com/pa_sports.html (last visited Sept. 24, 2007); see also Williams & Connolly, LLP, Sports, http://www.wc.com/practice.cfm?practice_id=130 (last visited Sept. 24, 2007).

169. See Williams & Connolly, *supra* note 168.

170. *Id.*

171. See SHROPSHIRE & DAVIS, *supra* note 3, at 60.

172. LeBoeuf, Lamb, Greene, & MacRae Lawyer Directory, <http://www.llgm.com/leonardelmore/> (last visited Sept. 24, 2007).

nor could I afford, to 'stoop to conquer.' Betrayal by client family members . . . also had negative impact. Thus, I was left with a harsh business reality. It was time to fold them and move on.¹⁷³

Elmore's distaste for the industry highlights a greater concern than the industry's cost-to-value proposition. If attorneys are already discouraged by their inability to compete for athletes, the restrictive nature of the law governing lawyers could only add a further disincentive to qualified attorneys wishing to enter the profession. And there is little doubt that the agent industry, despite the progressive efforts by the NCAA, Congress, and the states would benefit greatly from well-trained, competent lawyers qualified to represent athletes.¹⁷⁴ The Ricky Williams fiasco and other incidents of incompetence by agents make this apparent.¹⁷⁵ Ironically, however, ethical attorneys may currently be the only attorneys discouraged by their professional ethos from entering the agent industry.

While the current state of the law governing lawyers may seem ominous to ethical attorneys concerned about their licenses and reputations, that law is not without the ability to change. The most practical solution that would seemingly bridge the competitive gap between lawyer and non-lawyer-agents would be a top-down approach, beginning internally with the ABA and trickling down to individual state bars, to rethink and modify the policy surrounding MRPC 5.5 and other rules as they relate to an attorney's participation in other professions. Doing so likely provides the best chance of bridging the competitive gap between attorney and non-attorney-agents.

Modifying the policy surrounding the law governing lawyers likely does not require much, if any, restructuring of the MRPC or the restatements. The solution may be as simple as amending ABA policy through an addendum letter or through some other written amendment sent individually to each state bar association, combined with an ongoing dialogue with those associations and with local and federal judges. 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, while still governed by the

173. SHROPSHIRE & DAVIS, *supra* note 3, at 60 (quoting Len Elmore, *Turn Out the Lights, Agents' Party Is Over*, SPORTS BUS. J., July 9, 2001, at 54).

174. See Bob George, *Poston Brothers Becoming NFL Laughingstock*, Mar. 28, 2004, http://www.patsfans.com/bob/display_story.php?story_id=2418.

175. *NFLPA Suspends Agent Poston for Two Years*, NFL.COM, July 28, 2006, <http://sports.espn.go.com/nfl/news/story?id=2530936>. In 2006, NFL Agent Carl Poston was suspended for two years by the NFLPA for leaving \$6.5 million in bonus money on the table when negotiating LaVar Arrington's contract with the Washington Redskins. *Id.* Arrington was forced to buy his way out of the deal, an expenditure of \$4.4 million. *Id.*

MRPC, should be able to engage in conduct that is reasonably expected of practitioners in those professions without the fear of reprimand.

Absent some modification to the existing structure of the law governing lawyers, ethical attorneys wishing to become sports agents, and those already in the business, may find it increasingly difficult to compete with their non-attorney counterparts on a level playing field. The unfortunate consequence will be the disenfranchisement of lawyers wishing to enter the profession—lawyers who would otherwise bring polished contract negotiating skills and zealous advocacy to the bargaining table.

V. CONCLUSION

Jerry Maguire would no doubt find being a present-day attorney-agent difficult if not impossible, and unfortunately, may be forced to leave the profession, contract expertise and spotless personal ethics in tow. While SPARTA takes a recognized step towards regulating agent conduct in recruiting college athletes, it only marginally closes the gap between attorney and non-attorney-agents. The looming threat of being disbarred or otherwise sanctioned for violating any one of numerous Model Rules applied to attorneys as agents may itself prove effective in keeping ethical, hard-working attorneys out of the business. Combined with the broad interpretation courts have applied to the unauthorized practice of law, these forces may be enough to discourage some of the best and brightest contract negotiators, namely lawyers, from ever becoming agents in the first place.

However, the purpose of this article was not to paint an ominous picture of the athlete agent business or to prevent otherwise qualified attorneys from trying their hand in the industry. The reality is that lawyers become agents all the time, and some of the best agents in the field are lawyers. Rather, the idea was to raise what is a very real concern affecting attorney-agents so that attorneys wishing to become agents can take precautions to protect their money, to protect their good names, and most importantly, to protect their licenses.

It is very possible that the day may soon arrive when the law governing lawyers begins to modernize, allowing attorneys to wear two hats instead of one. Given the increasingly demanding agent certification requirements being implemented by professional sports leagues and their unions, and given the need for good lawyers in the industry, it may only be a matter of time before the courts take a more modern, less restrictive look at what it means to be an attorney, allowing lawyers to branch out into other professions without the fear that just being a lawyer will place them at a competitive disadvantage. Until then, the Jerry Maguires of the world should not be altogether

discouraged from entering the business, but should at least take a more guarded approach to representing athletes.

Jeremy J. Geisel

