

1-1-1989

# Sports Law and the Evils of Solicitation

Robert E. Fraley

F. Russell Harwell

---

## Recommended Citation

Robert E. Fraley and F. Russell Harwell, *Sports Law and the Evils of Solicitation*, 9 Loy. L.A. Ent. L. Rev. 21 (1989).  
Available at: <http://digitalcommons.lmu.edu/elr/vol9/iss1/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# SPORTS LAW AND THE "EVILS" OF SOLICITATION

Robert E. Fraley\*  
F. Russell Harwell\*\*

## I. INTRODUCTION

The number of lawyers representing athletes and other sports personalities has increased markedly in the past several years.<sup>1</sup> There are many reasons for this increase. First, there are considerable financial rewards in a sports representation practice. For example, from 1982 to 1988 the number of millionaire sports personalities grew from twenty-three to one hundred-eighteen.<sup>2</sup> This lucrative aspect, coupled with the perceived allure of the professional contracting process, has prompted a rush to represent clients in this area.

More significantly, athletes have turned to the legal profession for representation because of the widespread and much publicized abuses by sports agents.<sup>3</sup> Sports agents are occasionally reputed to be incompetent

---

\* University of Alabama (B.S., 1975; J.D., 1979); University of Florida (LL. M., in Taxation, 1980). The author, of Fraley & Associates, P.A., in Orlando, Florida, represents various sports interests, including players, coaches, and teams.

\*\* University of Alabama (B.A., 1986; J.D. expected, 1989). The author served as a summer associate in 1988 with Fraley & Associates.

1. "There has been an increasing move over the past five years for attorneys to represent players. Out of the 150 people who are currently representing [baseball] players, between 50 and 60% actually are attorneys." Telephone interview with Arthur Shack, Counsel to the Major League Baseball Players' Association (July 21, 1988). Sports clients not turning to the legal profession have traditionally retained sports agents, discussed *infra* note 3.

2. *Sport 100: Who Makes What in Sports*, SPORT, June 1988 at 23. The average salaries in the three major professional sports leagues, which clearly show the financial potential in sports representation, are as follows: baseball, \$412,454; football, \$250,000; basketball, \$510,000. Information provided by the Major League Baseball Players Association (MLBPA), National Football League Players Association (NFLPA), and National Basketball Players Association (NBPA) (July 1, 1988).

3. Legally, an agent is defined as "[o]ne who acts for or in place of another by authority from him," or "[o]ne who deals not only with things . . . but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons," or "[a] business representative, whose function is to bring about, modify, [or] affect . . . contractual obligations between principal and third persons." BLACK'S LAW DICTIONARY 59 (5th ed. 1979). As used in this article, sports agents are not only those that represent professional athletes in any sport, but those that attempt to do so, both within and outside the legal profession. For a further look at sports agents, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS 319-33 (1979) [hereinafter WEISTART & LOWELL]; Special Report, *Agents: What's the Deal?*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 74.

and to charge unreasonable fees.<sup>4</sup> Even worse, agents have been criminally charged with tampering with sporting events<sup>5</sup> and conspiracy to commit extortion.<sup>6</sup> Not surprisingly, they are particularly responsible for an onslaught of legislation directed at the sports representation industry.<sup>7</sup> These and other agent abuses, coupled with athletes' increasing reliance on the legal profession for representation, have resulted in increased scrutiny of the lawyer's behavior in the area of sports representation. Accordingly, increased public scrutiny requires that sports lawyers pay special attention to the ethical rules of their profession. This is especially true considering the competitiveness of this practice.<sup>8</sup>

---

4. See Special Report, *supra* note 3, at 74. In the past, agents commonly violated the "early signings" rule of the National Collegiate Athletic Association [hereinafter NCAA], which prohibits eligible college athletes from signing representation agreements. See *infra* note 55.

By adopting a Code of Ethics and initiating an organized continuing education program, sports agents and the Association of Representatives of Professional Athletes [hereinafter ARPA] have attempted to improve their ethical standards. The ARPA Code of Ethics addresses many of the same issues as the various ethical codes of the legal profession. See ARPA Code of Ethics, reprinted in G. SCHUBERT, R. SMITH & J. TRENTADUE, *SPORTS LAW* 284-90 (1987) (outlining basic duties such as conflicts of interest, competence, and reasonable fees). The primary criticism of these efforts centers on the problems of enforceability. See Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701, 723 (1987) (noting that since membership in the ARPA is not legally required, the Code of Ethics is not effective in remedying inadequacies of the law in dealing with the abuses of the sports agent).

5. See Mortensen, *Walters will go on Trial Today, Alabama Prosecutor: — 'We're Going to Show Those Agents,'* The Atlanta Constitution, May 9, 1988, at 7D, col. 5 (describing the indictments in Alabama state court of several agents for commercial bribery, deceptive trade practices, and tampering with a sports contest); see also Scorecard, *Soft Time*, SPORTS ILLUSTRATED, May 23, 1988, at 13. These indictments followed the conviction of another agent for tampering with a sporting event. See *Former Sports Agent Guilty, Abernethy Sentenced to One Year in Jail*, The Montgomery Advertiser, March 2, 1988, at 1A, col. 4.

6. Two New York sports agents were indicted in federal court in 1988 for mail fraud, racketeering and conspiracy to commit extortion, in their dealings with 44 eligible student-athletes of the NCAA. See Selcraig, *The Deal Went Sour: Sports Agents Norby Walters and Lloyd Bloom were Indicted for Racketeering and Extortion*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 32.

7. Sports agents have historically been unregulated. Encouraged by the aggravated conduct of several agents, in particular Norby Walters, Lloyd Bloom, and Jim Abernethy, 15 states' legislatures have passed laws requiring agents, and anyone serving in that role, to be certified. See generally Sobel, *supra* note 4; Kohn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified*, 6 THE ENT. & SPORTS LAW. 1 (1988). The most recent states to pass such legislation are Florida, Georgia, Indiana, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Ohio and Tennessee. As of 1988 however, these states, while vigorously pursuing and passing the laws, have not strictly enforced them.

8. For example, there are 227 "player agents" (encompassing lawyers and agents) registered with the NBPA and the Committee on Agent Registration and Regulation, while there are only 275 player-clients in that league. Information provided by Lori Weisman, Administrative Assistant to the NBPA (Aug. 1, 1988).

This article discusses the most debated issue in the area of sports law and ethics—solicitation. Indeed, forbidding lawyers from recommending legal employment to prospective clients raises unique issues in the context of sports representation.

After summarizing the policy and purpose of the rules prohibiting lawyer solicitation, the article examines the recent United States Supreme Court decision regarding solicitation, *Shapero v. Kentucky Bar Ass'n*.<sup>9</sup> This discussion includes the applicability of the case to the sports law area.

The article further analyzes various viewpoints in favor of and in opposition to the rules of solicitation as they apply to the sports lawyer, as well as persuasive arguments for exceptions in this area. Finally, the various policy considerations will be applied to hypothetical situations that would likely arise in the sports representation industry.

## II. THE POLICY AND PURPOSE OF SOLICITATION

“A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person, or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”<sup>10</sup>

The above rule and its predecessors<sup>11</sup> have stirred up more debate

---

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

10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) [hereinafter MODEL RULES]. The rule continues with a broad definition of “solicit.” Actions that constitute solicitation include “contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient. . . .” The rule also broadly labels certain conduct as not falling within solicitation. Solicitation does not include “letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.” MODEL RULE 7.3. The rationale of Rule 7.3 in allowing direct mail to those not needing legal services is to keep such contact from persons whose emotional or physical condition makes them susceptible to lawyer overreaching. C. WOLFRAM, MODERN LEGAL ETHICS 784 (1986). The Supreme Court has recently held that this type of direct mail contact (including mail to those known to be in need of legal services) is constitutionally protected commercial speech. *See infra* notes 37-48 and accompanying text.

11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1969) [hereinafter MODEL CODE] forbids attorneys from “recommen[ding] employment as a private practitioner . . . to a lay person who has not sought his advice. . . .” The original 1908 Canons of Ethics were even more strict, requiring members of the legal profession to inform the authorities immediately of this type of behavior, “to the end that the offender may be disbarred.” Canon 28 (1908). Model Rule 1.7, of course, prohibits solicitation, both in-person and through the mail. Evidence of breaking from the strict traditional approach to solicitation (primarily constitutional considerations) can be seen in an early draft of the 1983 Model Rules. The early draft would have lifted the blanket prohibition on in-person solicitation in favor of a rule permitting solicitation absent physical, emotional, or mental conditions diminishing the cli-

regarding lawyers in the sports representation industry than any other rule of professional conduct. Indeed, the "evils" of seeking prospective clients through in-person solicitation are at the forefront of discussions of ethics and the sports lawyer.<sup>12</sup> This section outlines the policies and purposes behind these ethical rules.

*A. The Prevention of Unscrupulous Tactics and Overreaching:  
Maintaining the "Profession"*

Solicitation is an unrequested communication to a non-lawyer made for the purpose of obtaining professional legal employment. The legal profession has traditionally frowned on this type of behavior for a number of reasons.

First, the solicitation rules address problems similar to those which sports agents have caused:<sup>13</sup> the concern of the bar in protecting the public from potentially coercive "sales pitches." This concern, as stated in the landmark case of *Ohralik v. Ohio State Bar Ass'n*,<sup>14</sup> and reflected in the Model Rules, was prompted by in-person solicitation, dangers of deception, overreaching, undue influence, intimidation, and other forms of "vexatious conduct."<sup>15</sup>

Second, solicitation is frowned upon because it supposedly lowers the status of the legal profession. As legal professionals, lawyers perform a public service,<sup>16</sup> which traditionally has not coexisted with the com-

---

ent's judgment about the selection of a lawyer. However, this rule was not enacted. See G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 146-47 (citing MODEL RULE 9.3 (Discussion Draft, Jan. 30, 1980)); Figa, *Lawyer Solicitation Today and Under the Proposed Model Rules of Professional Conduct*, 52 U. COLO. L. REV. 393, 394 (1981).

12. See generally Sobel, *supra* note 4, at 714-16; R. Berry & G. Wong, *Law and Business of the Sports Industries*, Vol. 1, at 213-14 (1986); G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 145-47; Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815, 830-33 (1981).

13. The general heading for this type of agent abuse is "overly aggressive client recruitment practices." Sobel, *supra* note 4, at 714-16 (summarizing the overall issue of this particular agent abuse, including various types of illegal inducements). For a complete discussion of aggressive recruitment and "early signings" of eligible student-athletes, see *infra* note 55.

14. 436 U.S. 447 (1978).

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

16. These self-imposed rules against solicitation can be traced to the early English bar, when lawyers were predominantly members of the upper class who practiced as a public service instead of a business. Solicitation, like advertising, was considered undignified since compensation was not a motivating force for serving as an attorney. H. DRINKER, *LEGAL ETHICS* 210 (1953).

mercialization of ordinary businesses.<sup>17</sup>

Third, solicitation has been prohibited in order to preserve the profession's standards and dignity. Since lawyers are officers of the court, any undignified conduct reflects negatively on the entire justice system.<sup>18</sup> Finally, solicitation has been banned to promote unity among members of the legal profession by preventing "client stealing."<sup>19</sup>

While maintaining professional standards is an important interest, the ban on in-person solicitation does not clearly protect it. The connection between solicitation and the erosion of professionalism is tenuous at best. Such an argument is "severely strained,"<sup>20</sup> as it is predicated upon an assumption that lawyers would conceal from themselves and their clients the real-life fact that they earn their livelihood at the bar.<sup>21</sup>

There are arguments opposed to the stated objectives of lawyer solicitation. For example, as stated above, professional standards are maintained by protecting consumers from unscrupulous attorneys. Nevertheless, the rules against solicitation serve to restrict the flow of information to potential clients regarding legal services.<sup>22</sup>

However persuasive the counterarguments may be, solicitation mandates are consistently upheld. States have "important" interests to protect, and can constitutionally "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers

---

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

18. H. DRINKER, *supra* note 16, at 212.

19. *Id.* at 190-91, 211 n.6. See MODEL CODE EC 2-30 (if lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment).

20. *Bates v. State Bar of Arizona*, 433 U.S. 351, 368 (1977) ("the postulated connection between advertising and the erosion of true professionalism [is] severely strained").

21. *Id.* at 368.

22. The *Bates* case addressed the issue of information regarding legal services, holding that states may not prohibit truthful newspaper advertising regarding the availability of routine legal services. Per se bans on advertising and solicitation do not clearly address consumer concerns, because they restrict the flow of information to potential clients regarding legal services. *Bates*, 433 U.S. at 374 n.30. The court stated that a referral system for attorneys' gaining future business "may have worked when the typical lawyer practiced in a small, homogeneous community in which ascertaining reputational information was easy for a consumer, [but] commentators have seriously questioned its current efficacy." *Id.* These outright bans on advertising and solicitation represent a misconception of how reputational information is disseminated in a complex urban setting. *Id.* See also Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 401, 414-15 (1980).

In 1977, the *Bates* Court did not allow direct mail solicitation, although in 1988, the *Shapiro* Court allowed direct targeted mailings. See *infra* notes 30-48 and accompanying text.

that the state has a right to prevent."<sup>23</sup>

*B. Permissible Solicitation: Friends, Relatives, Clients, and Lawyers*

The policy behind the solicitation rules clearly indicates that certain segments of the public are potentially vulnerable to overreaching lawyers. The facts of *Ohralik* exemplify one such segment, the personal injury client. In *Ohralik*, the in-person solicitation occurred when the lawyer, following an accident, contacted a hospitalized person who at the time was likely to be susceptible to the lawyer's "overreaching."<sup>24</sup>

This problem of overreaching, along with concerns of invasion of privacy and harrassment, are obviously not present in all settings. Professional rules of conduct recognize this, and allow a lawyer to recommend his or her services to a "close friend, relative, [or] former client."<sup>25</sup> These persons are presumably less likely to be subject to unethical practices or pressures since they know the lawyer, and can better evaluate the propriety of employing him than could other laymen.<sup>26</sup>

The solicitation rules also permit lawyers to solicit business from other members of the bar.<sup>27</sup> Once again, the significant risks of overreaching, misrepresentation, or invasion of privacy are absent.<sup>28</sup> An earlier version of the ethical rules did not include this exception, as it barred any solicitation that "stirred up litigation."<sup>29</sup>

---

23. *Ohralik*, 436 U.S. at 449. Among the state interests in banning solicitation that the Court mentioned were: maintaining the standards of the profession, discouraging fraudulent claims, lawyer overreaching, overcharging and underrepresentation and protecting the privacy of individuals. *Id.* at 460-62.

24. *Id.* at 449-51. This lawyer also solicited a second client, approaching her shortly after she was released from the hospital. The lawyer's actions in *Ohralik* were described as a classic case of ambulance chasing. *Id.* at 469 (Marshall, J., concurring). The attorney also engaged in other misconduct, including secretly taping a conversation with one of the women. *Id.* at 451.

25. MODEL CODE DR 2-104(A). The Model Rules do not mention the exception for friendships, and therefore may be read more narrowly. See MODEL RULE 7.3, *supra* text accompanying note 10; see, e.g., *Goldthwaite v. Disciplinary Board*, 408 So. 2d 504 (Ala. 1982) (allowing an attorney to recommend his employment to chairman of bank, friend and former client, to represent estate of dying cousin). See generally C. WOLFRAM, *supra* note 10, at 788-89.

26. *Goldthwaite*, 408 So. 2d at 507.

27. MODEL CODE DR 2-103(A) only prohibits contacting "laypersons." Similarly, Model Rule 7.3 disallows soliciting "a prospective client." The 1969 Code also allows attorneys to solicit clients when they are employed by a qualified legal services organization. See MODEL CODE DR 2-103(D).

28. C. WOLFRAM, *supra* note 10, at 789.

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

### III. DIRECT MAIL SOLICITATION: "IN-PERSON" CLIENT CONTACT DISTINGUISHED

Although in-person solicitation is the primary area of controversy in sports law, direct mail solicitation and advertising are also relevant in this area.<sup>30</sup> The United States Supreme Court in *Shapero*<sup>31</sup> addressed the issue of direct mail solicitation.<sup>32</sup> The holding, examined in this section, is a significant step toward relaxing the various types of client contact by lawyers. Under *Shapero*, states may no longer categorically prohibit lawyers from sending letters to potential clients known to face legal problems, as long as the letters are truthful and nondeceptive.

#### A. *Shapero v. Kentucky Bar Association*

##### 1. Facts

Richard Shapero, a member of the Kentucky bar, applied to the Kentucky Advertising Commission<sup>33</sup> for the approval of a solicitation letter, so that he could use it to expand his practice. The letter was targeted at specific homeowners who were facing foreclosure. It mentioned the homeowners' rights under federal law, and featured raised bold letters, which offered free information via a toll free telephone call.<sup>34</sup>

The Commission denied Shapero's application. The denial was issued not because the letter was misleading, rather because a state rule prohibited mailing or delivering written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."<sup>35</sup> The Kentucky

30. Prospective draft picks are commonly contacted through the mail. Although the greatest controversy is over direct in-person recruiting of potential clients, sports lawyers must now recognize the permissibility of direct, targeted letters to sports figures in need of legal services.

31. See *supra* note 9.

32. See generally Stoltenberg & Whitman, *Essay: Direct Mail Advertising by Lawyers*, 45 PITT. L. REV. 381 (1984).

33. This Commission regulates lawyer advertising, as authorized by the Kentucky Supreme Court. Ky. Sup. Ct. Rule 3.135(3) (1988).

34. The proposed letter read as follows:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor (*sic*) to STOP and give you more time to pay them. You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

*Shapero*, 108 S. Ct. at 1919 (emphasis in original).

35. *Id.* at 1919-20, n.2 (citing Ky. Sup. Ct. Rule 3.135(5)(b)(i) (1988)). That rule provides in full:

A written advertisement may be sent or delivered to an individual addressee only if



Supreme Court upheld the ethical rule, comparing the likely results of this specific, direct-mail solicitation to the "evils" addressed in the *Ohralik* case, namely, those receiving the letter would be subject to the pressures of a trained lawyer.<sup>36</sup>

The United States Supreme Court had to decide whether a state, without impinging upon lawyers' first and fourteenth amendment rights, could categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

## 2. Holding

The Court began its analysis by summarizing its recent decisions in the area of lawyer advertising and solicitation.<sup>37</sup> Lawyer advertising is constitutionally protected commercial speech;<sup>38</sup> nondeceptive commercial speech may be restricted only in the service of a substantial government interest.<sup>39</sup>

The advertising cases that the Court has faced in the past are distinguishable from a solicitation case like *Ohralik*.<sup>40</sup> The "unique" features of in-person solicitation, such as lawyer overreaching and intimidation, justify a prophylactic rule prohibiting lawyers from engaging in such contact for pecuniary gain. In the context of written advertisements,

---

that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Ky. Sup. Ct. Rule 3.135(5)(b)(i) (1988). This incorporates the common distinction between "specific" and "general" contacts with the public seen throughout the ethical rules. This distinction is usually also one of people who are known to need legal work (e.g., the star college athlete), and those who are not. This particular rule was upheld by the state bar's Ethics Committee, finding it consistent with Model Rule 7.3, which allows "advertising circulars distributed generally to persons . . . who are so situated that they might in general find such services useful." *Shapero*, 108 S. Ct. at 1920.

36. *Shapero*, 108 S. Ct. at 1922. For an applicable policy discussion, see *supra* notes 13-15 and accompanying text.

37. Overall such holdings have evidenced a changing judicial attitude toward the propriety of lawyer advertising and solicitation. See Note, *In-person Solicitation by Public Interest Law Firms: A Look at the A.B.A. Code Provisions in Light of Primus and Ohralik*, 49 GEO. WASH. L. REV. 309 (1981); Note, *Lawyer Advertising and Solicitation: The Revised Tennessee Code of Professional Responsibility*, 51 TENN. L. REV. 853 (1984).

38. See *supra* note 22.

39. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985). *Zauderer* addressed the validity of an Ohio rule prohibiting solicitation of legal employment for pecuniary gain through advertisements containing information or advice regarding a specific legal problem. This categorical prohibition was ruled unconstitutional.

40. See *supra* notes 13-15 and accompanying text.

however, these features are not present.<sup>41</sup> Nevertheless, the Kentucky Bar Association argued that *Ohralik* evils were present in the Shapero letter. The Court found this "*Ohralik* in writing" argument "facile."<sup>42</sup> Noting that the chosen mode of communication was crucial in distinguishing the cases, the Court stated that targeted, direct-mail solicitation "poses much less risk of overreaching or undue influence" than actual in-person solicitation.<sup>43</sup> A written communication does not involve "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation."<sup>44</sup> A reader of this type of communication could simply avert his eyes.<sup>45</sup>

The majority linked printed advertising with written solicitation. Both of these forms of communication "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by the attorney."<sup>46</sup>

The argument that the style or features of Shapero's letter<sup>47</sup> promoted the high-pressure atmosphere of in-person solicitation also did not persuade the Court. Although a bland letter with no special stylistic features may be less likely to catch the recipient's attention, the Court stated: "[A] truthful and nondeceptive letter, no matter how big its type and how much it speculates can never shout at the recipient or grasp him by the lapels, as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching."<sup>48</sup>

### B. *Shapero as Applied to the Sports Lawyer*

The *Shapero* holding, as well as consistent state court opinions,<sup>49</sup> have virtually given the green light to a certain type of specific client

---

41. *Shapero v. Kentucky Bar Ass'n*, \_\_\_U.S.\_\_\_, 108 S. Ct. 1916, 1921 (1988) (citing *Zauderer*, 471 U.S. at 641-42).

42. *Shapero*, 108 S. Ct. at 1922.

43. *Id.* (quoting *Zauderer*, 471 U.S. at 642).

44. *Shapero*, 108 S. Ct. at 1922 (quoting *Zauderer*, 471 U.S. at 642).

45. *Id.* at 1922-23 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

46. *Shapero*, 108 S. Ct. at 1923.

47. *See supra* note 34.

48. *Shapero*, 108 S. Ct. at 1924 (citations omitted). The State can thus claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient; states violate the first amendment with such a prohibition. *Id.*

49. *See, e.g., The Florida Bar News*, July 1, 1987, at 2, (citing Advisory Opinion 87-7, allowing attorneys to send direct mail solicitations to accident victims, provided requirements of Rule 4-7.3 are met). The Supreme Court had previously suggested in *In re R.M.J.*, 455 U.S. 191 (1981) that direct mail contact would be held as constitutionally protected commercial speech. *See generally* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 147.

contact. This type of contact further expands the advertising rights of attorneys first established in *Bates v. State Bar of Arizona*.<sup>50</sup> Although the legal profession has not welcomed targeted letters and other direct mailings with open arms,<sup>51</sup> sports lawyers, like all practitioners, may nevertheless utilize written solicitation to specific clients as an authorized means for increasing business.

An accident list or foreclosure list is quite similar to a draft list of prospective professional players. Thus, sports lawyers may aggressively contact athletes known to need legal services. Just as Shapero offered a free telephone call, a sports lawyer may suggest that the athlete contact him about a meeting. Contacting prospective clients in this manner is now constitutionally permissible, provided, that the sports lawyer's communications are truthful and nondeceptive.<sup>52</sup>

As a practical matter however, the holding of *Shapero*, while a significant step by the Supreme Court in the area of attorney solicitation, will have little impact on the sports representation industry. Athletes known to need legal services are usually deluged with mail during and after their college careers. This has been common practice in the sports representation industry long before the Court approved it in *Shapero*.<sup>53</sup> Although prospective client-athletes receive a considerable volume of mail, the letters alone have little impact on the selection process of a representative. These prospective clients are not only accustomed to direct mail contact, but they also have come to expect in-person meetings with agents and lawyers.<sup>54</sup> Any in-person meeting, if initiated by a lawyer, is clearly outside the scope of contact approved in *Shapero*.

---

50. 433 U.S. 351 (1977). See *supra* note 22.

51. For example, the Florida Bar approved a specific form of client contact where attorneys could obtain accident victims' names from police accident reports and then contact the victims directly by mail advertisements. While such contact was prohibited under the Model Code, it was approved under Rule 4-7.3(b) of Rules Regulating the Florida Bar. See *The Florida Bar News*, July 1, 1987, at 2. The conditions attached included the following: the mail must not be false or misleading, the top of each page must be marked "advertisement," a copy must be sent to staff counsel at the bar headquarters and retained there for three years, and if a form letter, the names and addresses of the addressees must be included. *Id.* (citing Fla. Rule 4-7.3(b)(1)(a-b)).

52. See *supra* note 48 and accompanying text.

53. Most of this contact has come from sports agents. See, e.g., Ruxin, *Unsportsmanlike Conduct: The Student-Athlete, the NCAA, and Agents*, 8 J.C. & U.L. 347, 356 (1982) (noting that over 100 sports agents contacted quarterback Neil Lomax in anticipation of the 1981 NFL draft).

54. See *infra* notes 65-78 and accompanying text.

#### IV. BROAD SOLICITATION EXCEPTION FOR SPORTS LAW?

The unscrupulous actions of sports agents have provoked considerable discussion.<sup>55</sup> Because of the many highly publicized cases of agent abuse, athletes may now consult numerous sources for information regarding competent representation.<sup>56</sup> While the most blatant abuses come from agents, there is no hard and fast rule that lawyers are more competent than agents to represent sports clients.<sup>57</sup>

---

55. The most flagrant of these actions, overly aggressive recruitment practices, is similar to solicitation. See Sobel, *supra* note 4, at 714-16. See generally WEISTART & LOWELL, *supra* note 3, at 319-28. While most of this type of recruiting is conducted by nonattorney agents, lawyers are increasingly engaging in similar conduct. See *supra* notes 1-8 and accompanying text. The best known example of recruiting occurs with NCAA student-athletes. Incidents of "early signings" of these athletes, primarily football players, to representation agreements are legion. It has been estimated that over one-half of the top NFL prospects every year have signed representation agreements before their college eligibility expires, whether they are signing with agents or lawyers. See Bannon, *Ex-agent: 80% Sign in School*, USA TODAY, Dec. 17, 1987, at C-1, col. 4 (quoting various sports agents in their estimates of how many of the top 330 senior college football players usually have accepted money from agents or signed with them prior to ending their eligibility); see also M. TROPE, NECESSARY ROUGHNESS 77 (1987) (former sports agent Mike Trope claims that during his time as an agent, some sixty percent of the players drafted by the NFL in the first three rounds had "made a commitment, in one form or another, to an agent before their senior season ended"); R. RUXIN, AN ATHLETE'S GUIDE TO AGENTS 35-36 (1982) (reporting that 60 to 75% of NFL draftees had made agent commitments prior to NCAA eligibility expiration).

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

56. See, e.g., R. RUXIN, *supra* note 55; E. GARVEY, THE AGENT GAME: SELLING PLAYERS SHORT (1984); NCAA Manual, *A Career in Professional Sports: Guidelines that Make Dollars and Sense* (1984); G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 127-30; Ruxin, *supra* note 53, at 347; Neff, *A Clean Sweep: How to Deal With the Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987 at 102, 104.

57. It could be argued that general practitioners are not, at least initially, competent to undertake representation of a sports client. While many lawyers feel that the knowledge and experience gained while acting as a negotiator in a general practice are immediately transferable to professional sports contract negotiation, this is not necessarily true. A practitioner in the sports representation industry encounters a wide range of issues which are familiar to a seasoned agent but outside the immediate knowledge of a general practitioner. See, e.g., ARPA Code of Ethics, *supra* note 4, Rule 1-104(C) (agents and lawyers required to become familiar with standard uniform player contracts, constitution and bylaws of the applicable league, as well as "such other relevant documents affecting wages, hours and working conditions of the players in the sport or sports in which [the lawyer] represents professional athletes").

These lawyers, of course, may later acquire the necessary expertise through independent study and investigation or through associating with a competent sports lawyer. See generally MODEL RULE 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). This requirement is no different than a lawyer referring a matter outside his adopted area of specialization.

It has, however, been stated that athletes are generally better represented by lawyers.<sup>58</sup> Nevertheless, lawyers often find themselves at a competitive disadvantage in attempting to acquire sports clients.<sup>59</sup> The solicitation rules are fair throughout the legal profession and apply equally to all lawyers. Yet, in an industry where lawyers must compete with agents for clients, they are prevented from taking part in the open recruiting practices of agents.<sup>60</sup>

In the area of sports law, not all sports agents are attorneys.<sup>61</sup> Because attorneys are bound by professional ethical restraints,<sup>62</sup> agents enjoy an "unfair advantage,"<sup>63</sup> even though the particular client might be better off being represented by a lawyer and the full services of a law firm.

One possible solution then, would be to relax the solicitation prohibitions that currently bind attorneys in the sports law area.<sup>64</sup> A "sports law exception" would be restricted to the personal representation of athletes and other personalities, and thus would not apply to the multitude of other areas falling within the guise of sports law. The following discussion develops several arguments for such an exception.

---

58. Neff, *supra* note 56, at 104 (quoting Barry Rona, Executive Director of the Major League Baseball Player Relations Committee, as stating: "I would hire a lawyer from a quality firm, and I'd pay him by the hour"); *see also*, Kohn, *supra* note 7, at 15 (athletes benefit when hiring lawyers over agents because of lawyers' formal legal education and law practice, which involves negotiating and drafting contracts, and also because legal ethics codes curb dishonest and incompetent representation).

59. Comment, *supra* note 12, at 832-33.

60. *Id.* at 831.

61. Over the past five years, for various reasons, there has been a tendency to turn to lawyers over nonlawyer agents. *See supra* notes 1-8 and accompanying text. Nevertheless, the competition from agents remains strong.

62. For example, some lawyers will not follow the ethical codes, stating that the codes are "largely irrelevant" because of the legal profession's historical failure to enforce them. Aronson, *Reforms are Needed to Correct Malaise in Enforcement of Canons of Ethics*, 2 Nat'l L. J., Nov. 26, 1979 at 27, col. 1.

63. Comment, *supra* note 12, at 832.

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

As a practical matter, even attorneys already representing sports figures likely gained their clients by solicitation. They typically attempt to "segregate" their practice, and hold themselves out as sports agents, thus fully participating in in-person recruitment like other agents. For a discussion of attorneys serving in the roles of "agents," and not following the ethical mandates of the legal profession, *see infra* notes 86-93 and accompanying text.

A. *The Nature of the Industry is Such That Sports Figures Expect In-Person Contact*

The customs in the sports representation industry are different from those in other fields of legal practice, especially in the areas of representative conduct and client expectation. Arguably then, the solicitation rules should not apply. Because potential sports clients are located throughout the country, a referral system for sports clients is unrealistic. Furthermore, because of the competition from agents and some sports lawyers, clients have become accustomed and indeed expect, in-person solicitation.

One argument for a sports law exception arises when comparing the realities of the sports representation industry to lawyer advertising generally. Of course, the ideal method of attracting clients is by referral, but this has become difficult in the competitive urban settings of most law firms. In turn, competition has brought about truthful and nondeceptive advertising as a permissible alternative for attracting legal business.<sup>65</sup>

As mentioned above, a referral system for sports lawyers is unrealistic in light of the national and international scope of potential sports clients. Thus, sports lawyers are not practicing in a "small, homogeneous community,"<sup>66</sup> where referrals remain the primary means for attracting clients.

In addition to the broad geographical client base, competition in the sports representation industry is a factor in the dispute over in-person solicitation bans on sports lawyers. Nonattorney agents, and even some lawyers, openly recruit clients throughout the country.<sup>67</sup> Because of this extensive contact, sports clients expect approaches regarding possible representation. Therefore, denying sports lawyers their right to recommend their own employment punishes not only the lawyer, but the client as well. The attorney's business development is frustrated, and the client is denied valuable information concerning legal services and possibly lower representation fees.<sup>68</sup>

---

65. *Bates*, 433 U.S. at 374. *See supra* note 22.

66. *Id.* at 374 n.30. *See supra* note 22.

67. *See supra* note 55, *infra* note 87.

68. For example, one argument in the sports law field is that lawyers, as opposed to agents, are more likely to bill sports clients by the hour, while agents commonly command a percentage of the total dollar value of the negotiated contract. *See* R. Ruxin, *supra* note 55, at 55-56. *But see* Special Report, *supra* note 3, at 83 (stating an hourly rate arrangement may erode the development of a personal relationship with a client, as the client may worry about when the meter is turned on and off).

### B. Sports Clients are "Sophisticated" Persons

The traditional purposes for banning lawyer solicitation<sup>69</sup> serve important state interests and are currently valid in the other areas of the legal profession. Those stated reasons, however, do not justify prohibiting the solicitation of sports clients. It could hardly be argued that a college all-star, for example, is "overwhelmed" by his legal troubles. He typically does not suffer from an "impaired capacity for good judgment,"<sup>70</sup> and is, thus, not at risk of being susceptible to undue influence.

Sports personalities are likely to have experienced more high powered face-to-face contact than members of the general public. Many of them have been subject to media scrutiny during their college careers and earlier,<sup>71</sup> since many star athletes are heavily recruited from high school. The process of selecting a lawyer or agent, and the subsequent signing of a representation agreement, differs little from signing a National Letter of Intent<sup>72</sup> with an academic institution.

Further, while the athletes' subsequent collegiate status is labelled "amateur,"<sup>73</sup> more realistically, they are an integral part of a lucrative business relationship with the university or college.<sup>74</sup> They are compensated by their scholarships and other benefits, and more properly are "professionals."<sup>75</sup>

Thus, sports personalities do not require ordinary consumer safeguards against overreaching, undue influence, and intimidation.<sup>76</sup> Their

69. Such reasons include the desire to curb unscrupulous lawyers and to maintain professional standards. See *supra* notes 13-19 and accompanying text.

70. *Shapero*, 108 S. Ct. at 1922.

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

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

73. The NCAA defines an "amateur" as "one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and to whom participation in that sport is an avocation." NCAA CONST. art. III, § 1. This definition has been under much scrutiny from commentators. The controversy seems to center around whether the NCAA has failed to clearly distinguish college athletics from professional sports.

74. See Koch, *The Economics of "Big-Time" Intercollegiate Athletics*, 52 SOC. SCI. Q. 248, 258 (1971) (providing a microeconomic model of the business conducted by major college athletic programs, and reporting that revenues actually exceed costs at such institutions). See also *Barile v. Univ. of Virginia*, 2 Ohio App. 3d 233, 240, 441 N.E.2d 608, 616 (Ohio Ct. App. 1981).

75. Comment, *Compensation for Collegiate Athletics: A Run for More Than the Roses*, 22 SAN DIEGO L. REV. 701, 702 (1985).

76. But see G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 147 ("Given the

past experiences often sufficiently prepare them to evaluate the sales pitches and appeals of a lawyer offering his legal services.<sup>77</sup> Star athletes, in short, are usually well equipped to face the "evils" of in-person contact with an attorney regarding a possible professional relationship.<sup>78</sup>

### C. *The Governing Bodies are Unconcerned*

The regulators<sup>79</sup> of sports representatives have shown little concern about the face-to-face contact between the athletes and representatives.

---

disparity in sophistication between lawyer-agents and many athletes, some limitation on in-person solicitation of athletes seems desirable.").

77. See, e.g., Note, *Soliciting Sophisticates: A Modest Proposal for Attorney Solicitation*, 16 U. MICH J. L. REF. 585 (1983) (advocating an amendment to the ethical standards to permit personal solicitation of prospective clients who qualify as "sophisticated," defined as those persons having general knowledge of their legal needs and the expertise to assess adequately the information and presentation of an attorney).

While it is argued that athletes' past experiences may serve as a reason for a sports law exception to the solicitation rules, clearly, this argument may be only theoretical. As a practical matter, some athletes, as much or even more than the general public, may suffer from an "impaired capacity for good judgment." This is exemplified in the following settings.

One egregious scenario concerns the athlete whose academic institution exploits him for the tangible benefits that he can provide the school, such as gate receipts, radio and television contracts, and alumni gifts. Cases are legion of student-athletes completing their playing eligibility, but lacking basic reading and writing skills. See Note, *supra* note 72, at 106-08 (institutions should be accountable to the uneducated athlete, as they have an "inherent conflict of interest," such that when confronted with an athlete who represents the potential for significant pecuniary gain, but who suffers from learning deficiencies, they are apt "to dismiss the 'student first, athlete second' precept").

Other examples are more relevant to the present discussion of athletes' ability not only to know their legal needs, but also to assess the information and presentation of a lawyer. While allegations of "early signings," see *supra* note 55, have been primarily directed at sports agents, the athletes party to such transactions have arguably been as blameworthy. The 44 athletes recently linked to a federal indictment of two sports agents, see *supra* note 6, were at best naive in openly accepting cash gifts and signing representation agreements in violation of NCAA rules.

Additionally, while many athletes are accustomed to face-to-face contact, they have not always demonstrated that they are "well equipped" to select an agent or lawyer properly. See, e.g., Papanek, *A Lot of Hurt: Inaction Got Kareem Creamed*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 89 (reporting the lackadaisical and trusting faith of NBA star Kareem Abdul-Jabbar, who suffered financially at the hands of his agent and business manager Tom Collins); Keteyian, *'At Times You Flat Cry,' How LaRue Harcourt's Baseball Player Clients Were Driven to Tears*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 90 (reporting the trust of fourteen athletes in their agent who commingled and lost his clients' funds).

78. A further interest in banning solicitation is to guard against deception. The ethical rules adequately address deception generally, in provisions outside of the solicitation rules. See MODEL CODE DR 2-101(A); MODEL RULE 7.1.

79. Agent regulation plans have been frequently adopted since the early 1980s. The number of states which have included such a regulatory scheme has increased rapidly in 1987-88. See *supra* note 7. Players association schemes are binding on those representing athletes as well. See, e.g., NFLPA Regulations Governing Contract Advisors [hereinafter NFLPA Regulations], a section of which is cited *infra* note 81. Also, the NCAA adopted its own agent



This fact weighs in favor of abolishing the solicitation rules for sports lawyers.

Regulators of solicitation in the sports representation industry have focused on different concerns than the *Ohralik* "evils."<sup>80</sup> Although there are rules that prohibit and guide "contract advisors" in dealing with prospective clients, these rules address substantive matters, and do not concern the dignity of the profession or the advances of a lawyer. The evils that the governing bodies have addressed are those most prevalent in the industry, including offering bribes to a player, providing materially false information to a player, and utilizing misleading business titles.<sup>81</sup> In fact, many administrators of the governing bodies openly assume that attorneys take part in in-person meetings with prospective sports clients.<sup>82</sup>

Other governing bodies voice concerns inconsistent with those behind the solicitation policies. For example, the NCAA only forbids an athlete from signing a representation agreement during the athlete's eligibility. Its regulations even contemplate face-to-face contact between athletes and representatives prior to the expiration of that eligibility.<sup>83</sup> Some state legislatures have sought to protect universities and colleges by attempting to preserve the student-athlete's eligibility for the natural four-

registration program in 1984. See Memorandum to Individuals Acting in the Capacity of Player Agents (cited in Sobel, *supra* note 4, at 724-25).

80. See *supra* notes 13-15 and accompanying text.

81. The NFLPA Regulations exemplify the efforts of major sports leagues in curtailing these practices. The "solicitation" section is as follows:

An NFLPA Contract Advisor is also prohibited from:

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

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

82. "Our regulations do not mention attorneys. We don't differentiate between agents and attorneys; our interpretation is that when an attorney is acting as an agent, he is an agent. All attorneys are in the process of recruiting players. I doubt very seriously that any attorney sits back and waits for the telephone to ring and players to call him. It just comes down to how the particular attorney goes about soliciting." Telephone Interview with Mike Duberstein, Director of Research, NFLPA (July 21, 1988).

83. NCAA CONST. art. III, § 1(c) ("Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent.").

year duration.<sup>84</sup> The only feared contact, in-person or otherwise, is during this eligibility term. For example, if a college or university allows an ineligible athlete to play, it may be forced to return considerable revenues, while its team forfeits victories. These legislatures and other regulators are generally not concerned with lawyers approaching prospective clients and offering legal services.<sup>85</sup>

*D. Solicitation Consequence: Holding Out As an Agent; Not "Practicing Law"*

Because of the unique nature of the sports representation industry, a potential option for an attorney attempting to avoid solicitation rules is to hold himself out solely as a sports agent. A lawyer in this situation might claim that his conduct is not governed by legal ethical mandates, but by general fiduciary principles under agency law.<sup>86</sup>

Lawyers choosing this route must make sacrifices. They should completely disavow their bar membership, though some do not. For example, a sports lawyer may attempt to avoid violation of solicitation rules by segregating his roles as "agent" and "lawyer."<sup>87</sup> While this may appear to be acceptable, the "agent" is more likely to discuss openly the general advantages of his experience and skills as a lawyer.<sup>88</sup> More importantly, by retaining his bar membership, the "agent" is engaged in a

---

84. All of the states adopting these schemes generally attempt to curtail "early signings" with agents or lawyers. If a student-athlete with remaining eligibility agrees either orally or in writing to be represented in the negotiations of a professional sports contract, he or she is declared ineligible. See NCAA CONST. art. III, § 1(c). Various states have attempted, in varying degrees, to incorporate the above NCAA rules into legislation.

85. Many institutions are implementing a screening process to help student-athletes in their selection of a proper representative. This can be seen as assisting student-athletes in dealing with in-person meetings with agents or lawyers. Such a screening process raises interesting solicitation issues. See *infra* notes 98-99 and accompanying text.

86. See, e.g., *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984) (nonlawyer sports agent violating conflicts of interest standards, when negotiating on behalf of a player with a team in which he was part-owner).

87. Many members of the legal profession actively recruit sports clients. Interviews with various sports lawyers reveal that many of them claim to be "agents" when they are recruiting their clients, but later claim to be "attorneys" when handling other matters. As a practical matter, lawyers who act solely as agents can be viewed as a separate industry. "Of course, I would prefer all athletes to be represented by attorneys. When that is the case, there is a standard of accountability. In reality, though, members of the industry are not all lawyers. What you are left with really is a situation of treating this industry as a profession apart from the law. This is much like the real estate industry; once a lawyer is in that area, he would not be guided by the various rules such as advertising and solicitation." Telephone interview with Dick Berthelsen, General Counsel of the NFLPA (Aug. 1, 1988).

88. This statement shows that the segregation obviously is not complete. The "agent" wants the best of both worlds: to be able to solicit clients without being bound by the ethical rules, yet claim the skills of a lawyer.

“law related” occupation, under the Model Code. The Code provisions, including those against in-person solicitation, apply equally to lawyers who practice law and those engaged in a law related occupation.<sup>89</sup>

Disavowing ties to the legal profession to avoid solicitation rules can be taken a step further. Assume, for example, that a holder of a law degree chooses not to become a licensed member of a state bar, or a one-time member relinquishes his license, but still claims to be a “lawyer” in his role as sports agent.<sup>90</sup> This claim would subject the individual to unauthorized practice of law statutes,<sup>91</sup> since he would be acting or holding himself out to the public as a person qualified to practice law.<sup>92</sup> Clearly, both of these scenarios illustrate impermissible means of circumventing the solicitation rules.

An equally impermissible means of avoiding solicitation rules would be to form a corporation to solicit sports clients. Courts would likely disapprove of such a scheme. One state bar opinion held that an attorney may not serve as a “shareholder, director, or officer . . . or legal counsel” of a corporation organized to represent professional athletes in contract negotiations.<sup>93</sup>

---

89. See Cole-Wallen, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations*, 8 HASTINGS COMM/ENT L. J. 481, 501 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972), which permits lawyers to conduct a law practice simultaneously with a law-related occupation, such as an accountant or real estate broker, “if he complies . . . with all provisions of the Code of Professional Responsibility while conducting his second, law-related occupation”). The various ethical mandates, including solicitation, will therefore bind lawyers serving “sports agent” roles, since clearly, negotiating sports contracts would be law-related. Therefore, the argument that principles of legal ethics are not binding on lawyers who act as agents is false.

90. Such individuals state, as their reason for not obtaining licenses to practice law, that attorney solicitation is unethical, yet to obtain sports clients, they must solicit. See, e.g., Ala. State Bar Disciplinary Comm., Op. 85-73 (1985) [hereinafter Ala. Op. 85-73] (law school graduates who are not bar members but who hold themselves out as attorneys while representing athletes as agents subject to unauthorized practice of law statutes).

91. One alternative argument is that *sports agents* are engaged in the unauthorized practice of law when they represent clients in contract negotiations, and perform other services. See Comment, *supra* note 12, at 844-45 (“court[s] should exercise [their] inherent power to confine . . . the preparation of contracts for those that are licensed to practice law in this state”) (citing Washington State Bar Ass’n v. Washington Ass’n of Realtors, 251 P.2d 619, 622 (Wash. 1952) (Donworth, J., concurring); see generally G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 149).

92. Ala. Op. 85-73, *supra* note 90.

93. Kentucky Bar Opinion E-89 (allowing an attorney to advise such a corporation when employment is confined to normal corporate matters, i.e., his services for legal counsel must not relate to the negotiations undertaken on behalf of an athlete, or provide legal services for an athlete). In addition, forming such a corporation may present problems with MODEL CODE DR 5-107, which requires attorneys to avoid influence by outside interests other than the client. See Kentucky Bar Opinion, E-89 (cited in Ala. Op. 85-73, *supra* note 90).

## V. SOLICITATION APPLICATIONS

Despite the persuasive arguments in favor of further relaxing the solicitation rules for sports lawyers,<sup>94</sup> the rules are binding even after *Shapero*.<sup>95</sup>

As mentioned below, the nature of the sports representation industry is one of competition.<sup>96</sup> Lawyers in this area battle with agents for clients throughout the nation, and the agents are not bound by rules of solicitation. Additionally, athletes are not only accustomed to being openly recruited, but expect contact by potential representatives.

The field of sports law gives rise to interesting applications of the solicitation standards. Indeed, just what rises to the level of solicitation and resulting lawyer discipline can be ambiguous and even inconsistent, when applying the various provisions of the ABA Code and Model Rules.

The following discussion poses typical sports law hypotheticals. They range from clearly permissible client contact to unacceptable in-person solicitation. A brief analysis under the ethical rules follows each hypothetical situation.

### A. *Typical Scenarios*

Obviously, a sports lawyer, like any lawyer, may advise and offer legal services if the client contacts the lawyer. An athlete may even contact a sports lawyer if the athlete has remaining eligibility. This type of contact commonly occurs when an athlete is deciding whether to "go hardship," and enter the professional draft early or to continue competing in college. Lawyers may counsel such athletes, so long as they do not also agree to represent them for contract negotiations.<sup>97</sup> A similar situation arises when a coach contacts a lawyer to advise several student-athletes on his team. Both scenarios are clearly acceptable referral contact, which the governing bodies of the legal profession have envisioned.

A lawyer may affirmatively attempt to contact sports clients through various forms of communication. One method is to send a personalized, targeted letter directly to an athlete, discussing the athlete's particular legal needs, such as the need for an effective negotiator for the athlete's initial contract with his team, estate planning, tax planning, in-

---

94. See *supra* notes 65-85 and accompanying text.

95. See *supra* notes 39-48 and accompanying text.

96. See *supra* notes 65-78 and accompanying text.

97. See *supra* note 83.

surance protection, investment management, endorsements, post career counseling, and the like.

Should this letter meet the test of *Shapero* (i.e., truthful and nondeceptive), it will conform to the new standards for permissible client contact, even though its target is an athlete who is known to need legal services. However, various states may require other formalities for approval, such as filing the letter with the appropriate bar association committee.<sup>98</sup>

A lawyer may also try to recommend his services to the athlete by contacting an institution's Pro-Player Agent Committee,<sup>99</sup> with the goal of meeting with a particular student-athlete or a group of athletes at the institution. Arguably, these in-person meetings would not amount to solicitation because the committees assist the athletes in guarding against the dangers of direct in-person contact, namely, overreaching and undue influence.<sup>100</sup>

### B. *Approaching, Violating Solicitation Mandates*

Lawyers may also be tempted to utilize third parties to contact prospective sports clients. This commonly occurs when a lawyer who already represents several athletes as clients, asks one of his clients to approach an undergraduate athlete to arrange a meeting with the lawyer.

This scenario is similar (albeit on a much smaller scale) to sports agents and their "runners," individuals who recruit around the country for sports agents. Here, the lawyer's conduct would be forbidden if he recommended himself for employment. This is the classic type of third-party solicitation conduct that Model Rule 7.2(c) forbids, if it includes the transfer of money or other items of "value" to third parties.<sup>101</sup> Any

---

98. See, e.g., Rules Regulating the Florida Bar, Rule 4-7.3(b)(1)(a-b), cited *supra* note 51.

99. Several schools, such as the University of Alabama, Duke University, the University of Florida, and the University of Miami, acting on the recent blatant abuses of "early signings" of eligible student-athletes to representation agreements, have implemented committees to assist athletes in screening and selecting potential agents or lawyers. See *New Miami Policy to Take Tough Stand Against Sports Agents*, ORLANDO SENTINEL, Dec. 20, 1987, at C-12, col. 1.

100. See G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 4, at 137 (screening committees help the athlete acquire helpful information about possible representatives; the committees "may be very productive in eliminating excesses that have been all too common in the player-agent relationship").

101. MODEL RULE 7.2(c). The provision reads: "A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization." *Id.* See also MODEL CODE DR 2-103(B), DR 2-101(B).

transfer of value would be a clear violation and constitute solicitation.<sup>102</sup>

Even without actually transferring "value" under Model Rule 7.2, sports lawyers using third parties to solicit prospective clients may nevertheless violate ethical principles. For example, lawyers often attempt to develop an extended relationship with certain universities, particularly those that traditionally produce professional athletes. One state bar committee has held that it would be professionally improper for a lawyer to solicit through the university's coach or athletic director, by communicating his availability to represent a particular athlete or that he is engaged in a sports law practice.<sup>103</sup>

A fertile recruiting period for sports representatives is during the various post-season all-star games. Agents commonly outnumber athletes at such events. By frequently attending these types of events, lawyers may possibly approach or even cross the bounds of permissible solicitation. For example, a highly visible lawyer may spend a considerable amount of time in the hotel lobby where the athletes are staying. The lawyer, seeking to meet clients in person, "happens" to meet a particular athlete. The lawyer then recommends himself for employment. Here, the lawyer has, for all practical purposes, personally solicited a client.

A lawyer may also seek sports clients by "cold calling" athletes. The lawyer in such a situation will likely recommend himself for legal employment and attempt to set up a meeting to discuss the lawyer's services, qualifications and experience more fully. As the *Shapero* case makes clear, an athlete in this position could not merely "avert his eyes,"<sup>104</sup> as he would with similar contact through the mail. While the content of the lawyer's communication may be identical to information contained in a

---

102. One obvious "value" to an existing client would be lower legal fees. For example, an attorney might tell an existing client that if the client recommends the attorney's services to an athlete, and that recommendation results in a representation agreement, the client will benefit from lower legal fees. This would constitute an impermissible third party solicitation. Numerous other examples of "value" can be applied in this situation, whether or not the value constitutes a money payment.

103. See Ill. Comm. on Professional Ethics, Formal Op. 700 (1980) (dual practice and solicitation), reprinted in *Lawyer's Manual on Professional Conduct* 801:3005 (1980-85) ("The committee is of the opinion, therefore, that the initiation of communications by an attorney to coaches and athletic directors to inform them of the attorney's availability to represent athletes would be professionally improper."). That opinion cited Rule 2-103(a) of the Illinois Code of Professional Responsibility, which states that "[a] lawyer shall not by private communication . . . directly or through a representative, recommend or solicit employment of himself, his partner or his associate for pecuniary gain or other benefit and shall not for that purpose initiate contact with a prospective client." *Id.* (stating that laypersons selecting a lawyer are best served if the recommendation is disinterested, and that "a lawyer should not seek to influence another to recommend his employment").

104. See *supra* notes 42-45 and accompanying text.

direct mailing, communication by telephone would be clearly impermissible.

Finally, a lawyer violates the solicitation rules when he personally travels unannounced to the athlete's residence. By recommending himself as counsel for the athlete's upcoming needs, the lawyer openly subjects the athlete to the dangers of in-person solicitation. States, of course, have important interests in curtailing these practices.<sup>105</sup>

## VI. CONCLUSION

Modern holdings in the solicitation area now state that lawyers may directly contact clients known to be in need of legal services, if the *form and content* of that communication are of a certain type. While this modern standard may widely impact the legal profession generally, it will do little to alter the sports representation industry. The competition between agents and lawyers is beyond direct mail communication.

Sports clients, seeing this competition first hand, arguably can be described as "sophisticated," as they have come to expect face-to-face contact from potential representatives. Additionally, the governing bodies of agents and lawyers in the representation industry are not concerned with the same "evils" of solicitation as are the disciplinary authorities throughout the legal profession. All of these factors lead to persuasive arguments that "solicitation," as the term is applied to all lawyers, should not apply to sports lawyers.

Notwithstanding these factors, all lawyers are forbidden from approaching prospective clients and offering their legal services. The present solicitation rules particularly limit sports lawyers from developing and expanding their clientele, and leave them at a competitive disadvantage to sports agents. Sports lawyers must continue to conduct themselves according to the ethical standards of the legal profession, and not those prevalent in the sports representation industry.

---

105. See *supra* note 23 and accompanying text.