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Selected Issues of Client Representation by "Sports" Lawyers Under the Model Rules of Professional Conduct

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SELECTED ISSUES OF CLIENT REPRESENTATION BY "SPORTS" LAWYERS UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

This essay will focus on the Model Rules of Professional Conduct. In part because of these rules, agents and attorneys representing clients in the sports field are no different than the attorneys who represent actors or actresses, corporate executives, factory workers, or an unemployed person. An attorney's obligation under the Model Rules of Professional Conduct do not differ regardless of the industry or the client with whom you serve. However, some of the factual situations do require different substantive knowledge and discretion. I will not accept, nor do I agree with the statement that the relationship between an agent and his or her client does not fall within the traditional Model Rules. That type of statement lends itself to the artificial creation of differences between lawyers and a belief that if there is a proscription in the Model Rules, it does not apply to all of those in the legal field.

II. PROMULGATION OF THE MODEL RULES

The Model Rules of Professional Conduct are essentially based upon what the American Bar Association (ABA) has laid out. These rules are of no force and effect in and of themselves. Lawyers are primarily regulated by their state Supreme Court or State Bar Associations which have adopted the Model Rules of Professional Conduct in whole or in part.

A. State Differences

There are significant differences from state to state as to what these rules are. For example, under Rule 1.6, the ABA suggests that if your client is about to commit a serious crime and you believe that the action is going to happen, causing serious harm to another party (including fi-

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nancial harm) you may disclose the nature of the crime.[1] However, Rule 1.6 does not identify to whom you may disclose this information. All that it states is that you *may* disclose the information.

If you were to practice in the State of Wisconsin or any other state with a rule that is stronger, you may be compelled to disclose the information pertaining to your client being involved in a crime.[2] The rule in Wisconsin is not exactly the same as the ABA's Rule 1.6. Under those same circumstances in Wisconsin you would have to disclose the information. You would be given no choice in the matter.

B. Multi-States Practices

What happens if you are a sports agent and you are dealing in multi-states? I can suggest this to you. Under Model Rule 8.5, it is not entirely clear under which state's rules you will be regulated.[3] For example, if you practice law in a state which gives you discretion to disclose such information about your client, what happens if your legal services are also being performed in a state which requires disclosure? Many lawyers would say that if they were in a situation like this they would simply withdraw. The Wisconsin rules say that if you are subject to a jurisdiction that must disclose, withdrawing is insufficient.[4]

These are just examples of the issues with which lawyers will often be confronted. Therefore, it is very important for lawyers to study the rules of ethics in the states in which they practice to see what the rules in each state entail and how they should undertake client representations according to these rules.

C. The Preamble and Ethics

Most states have adopted the Preamble of the Model Rules of Professional Conduct. The Preamble goes beyond mere dollars. There has been thorough discussion concerning the economic impact of attorneys' services on taxation and client representations. There is often some suggestion that the issue of ethics may be merely academic. I disagree with this suggestion. For purposes of analogy, I do not perceive anyone to be merely a plumber who has a higher hourly rate, or merely an insurance broker who has a different type of degree. The Model Rules of Professional Conduct do separate non-lawyers from lawyers for a valid pur-

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992).
2. WIS. STAT. ANN., S.C. RULES § 20:1.6 (1994).
3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (1992).
4. WIS. STAT. ANN., S.C. RULES § 20:1.16 (1994).

pose. But I do not believe that it is merely academic to be licensed to practice a profession. That privilege comes with responsibilities. One of these responsibilities is to know the rules of professional conduct.

Furthermore, I respectfully differ with the statement that, "Ethics get in the way of being a sports agent." From my experience of being a lawyer and dealing with professional conduct or misconduct, if being a lawyer is being a sports agent or sports lawyer, and the focus is exclusively money, you are doomed. Such a lawyer or agent will get into trouble because he or she will take shortcuts during their representation. And there will never be enough money to satisfy them.

III. Requirements for Attorneys

A. Fees

It is important to recognize that most states have adopted the rule that fees must be reasonable. There are about eight criteria in the rules as to what defines a reasonable fee.[5]

I suggest that the idea of a percentage rate, instead of an hourly rate, is not foreign. In 1986, the ABA adopted a formal opinion suggesting that prior to agreement with a client, the client should be offered a hourly fee agreement.[6] Still, it must be remembered that the basic rule of a client-attorney relationship is that the client is the one making the decisions, assuming that the client receives an informed opinion from the lawyer. In one Supreme Court case involving lawyer fees, Justice Rehnquist observed that when establishing fees, clients and lawyers are in a conflict of interest. Therefore, the statement that a reasonable fee for a sports agent attorney is $ 300 per hour would be very difficult to argue against in a vacuum unless there was some empirical data to the contrary.

But assume that a sports agent was able to accomplish a $ 20 million deal in 8 hrs of phone conversations with a 4% contingency fee. I submit that an athlete would make a different judgement as to what is a reasonable fee in that instance.

I am not trying to advocate cutting fees. I am only trying to suggest a principle of ethics. Many people who became lawyers probably did not have the making of the most possible money from their clients very high

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5. Model Rules Of Professional Conduct Rule 1.5.

6. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-373 (1993) (which discusses and in part adopts ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1521 (1986) (which discusses offering an hourly fee agreement to a client prior to reaching a fee agreement)); Rule 12.8.6.

on the list of what they were going to accomplish as lawyers. I assume that there is a positive goal in helping young men and women who are professional athletes, who may be uninformed on their value in the market, or unsophisticated as to investments. I am also assuming that there are numerous positive things that we as educated individuals can offer to that kind of client. I am not convinced, however, that the correlation of the good that we do in affording the services to the client is directly commensurate with a contingency fee.

I would suggest another look at Model Rule 1.4.[7] This rule suggests that a lawyer should explain a matter fully enough to allow a client to make informed decisions regarding his representation.

B. Competence

Lawyers really are schizoid, by definition. I know of no other profession which demands the following: (1) loyalty to your client; (2) duty to courts and the judicial system; (3) duty to society; (4) duty to yourself, your family and your loved ones. How do you balance that? The license you retained gives you the opportunity to challenge those conflicts in your life. And it gives you the opportunity to meet those challenges which may often overrule a decision you would make regarding the Rules of Professional Conduct.

You would be surprised to know that prior to 1970 there was no affirmative duty for American lawyers to be competent. We are not talking about malpractice. We are talking about a duty to a judicial system, to a client, and to yourself, to be competent. Competence is defined by legal knowledge, skill, thorough verse, and preparations. It is not necessary to define this fully. What will follow are a few hypotheticals to emphasize this point.

Assume that a professional football player in 1993 tells you his wife is due to deliver a baby on September 15. The date arrives and the player says that he wants to be with his wife, and he leaves. The general manager of the team calls you. As the attorney for the football player, or the team, what advice would you give to each party if the player was fined or fired?

The Family Medical Leave Act states that given a thirty day notice, the player is entitled to such a leave, unless he is one of the key players.[8] As the attorney to the player you may opt to inform him of his vested

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1992).
8. The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et. seq.

right under the statute. The team is liable, not only for wages lost, but also for liquidated damages, interest on lost wages, attorney's fees, and any other equitable remedy. I would suggest that the duty of being a competent representative includes the discussion with your client of the Family Medical Leave Act.

Approximately twenty states have adopted this Act.[9] A small provision in the Federal statute says something to the effect that nothing enacted here will supersede state laws dealing with the same subject matter.[10] So, not only do you have to know the federal law, but you must also know any applicable state laws to determine which statute gives you the greater benefits, not only in terms of the length of the leave, but also in terms of the other indicated benefits.

As a further example, assume that under the Collective Bargaining Agreement (CBA) there is a provision providing for a sick leave.[11] The statute specifically allows substitution, which means that the athlete can say, "I want December 15 as my leave, and I want to substitute that amount of money which I have accrued under the CBA or my personal labor agreement to apply to the time I have chosen for the leave."

There are no cases on this point. The statute became effective in August of 1993.[12] Actually, it was to become active in August 1993, or the first date following the expiration of the next CBA.[13] So in the hypothetical it should be assumed that a CBA was negotiated. Regardless, the principle remains the same in terms of what and to what degree your competence should be. The point is that there is a basic level your competence must achieve.

It is my belief that you are obligated under the duty of professionalism to know the contents of the Civil Rights Act and Title VII Amendments to this Act,[14] the Americans with Disabilities Act (hereinafter ADA),[15] the Federal Rehabilitation Act of 1973,[16] and the Discrimination in Employment Act.[17] These are all important Acts and it would probably take an extensive period of time to discuss these Acts and the responses a lawyer or agent would give as counsel for either the em-

9. *Id.*
10. *Id.* at § 2651.
11. *Id.*
12. *Id.* at § 2601.
13. *Id.*
14. The Civil Rights Act Of 1964, 42 U.S.C.S. § 2000 et. seq.
15. The Americans With Disabilities Act Of 1990, 42 U.S.C.S. § 2112-14.
16. The Federal Rehabilitation Act Of 1973, 29 U.S.C. § 701 et. seq.
17. The Age Discrimination In Employment Act Of 1967, 29 U.S.C. § 621 et. seq.

ployer, or employee in the further hypotheticals contained in the appendix.

Lastly, assume that you have filed a case in federal court. You are talking negotiations with the club owner or club counsel. What issues do you talk about? Assume that you come to a number (i.e., for salary, benefits, bonuses, etc.) for your client's contract. That is not enough. There are still issues on taxability.

The hypothetical I use is of a fifty four (54) year old African American, gay, diabetic. A lawyer or agent should know that the current state of the law on the taxability of settlement awards from age discrimination cases comes from a 1993 tax court decision. It was a split decision but the majority opinion suggests that such a settlement award is not taxable. However, a week later, a District Court in Florida decided that such settlement awards were taxable. The issue is still up in the air.

Moreover, two Acts can also apply to this situation: Title VII of the Civil Rights Act, and the ADA, which states that any damages or settlements are not taxable.[18] In the end, when a lawyer or agent structures the resolution to a similar type of litigation that arises out of their professional representation, they must know taxation for their representation to be competent.

I am not attempting to add on to the volume of knowledge that there is on taxation, but I do want to point out that counting dollars and simply getting the largest amount of money for your client in negotiations does not mean that your representation has ended. Unless that is all you want to be. Unless you simply say to your athlete client, or proposed client, "I will do nothing but negotiate your contract."

I think that lawyers and agents must learn that almost every issue they are involved in will touch on many different areas of the law, i.e. even signing bonuses will have some tax impact. A lawyer's goal or quest must be to learn as much as they can about many different areas of the law, and that goal may never end.

C. Solicitation

The last topic is solicitation. Perhaps the largest number of inquiries I get from lawyers and agents are "How can I solicit clients?" Solicitation is no longer a dirty word. In the past, had I been asked a question similar to, "Can I go talk to Frank Thomas or some other current ath-

18. Americans with Disabilities Act, 42 U.S.C.S. § 2114.

lete," saying, "I want to be your agent?" Up until February of 1993, I would have said "No." Now I am not so sure.

Appendix E contains a very short description of the history of lawyer solicitation and advertising. That history is essentially a lecture on constitutional law which will not be repeated here. However, lawyers should be aware that in February of 1993, the U.S. Supreme Court issued a decision involving a Certified Public Accountant (CPA).[19] This CPA was a very successful practitioner in New Jersey. He went from door to door saying, "Hi, my name is John Doe and I specialize in representing small employers and small corporations." When he moved to Florida he wanted to do the same thing. However, Florida, similar to 20 other states, has specific laws prohibiting in-person solicitation. In the case, the United States Supreme Court, in an 8 to 1 decision said that the Florida rule was overbroad.[20] What was really significant in the Florida decision was that it discussed the cornerstone decision of the *Ohralik* case.[21]

What I believe the Supreme Court did in this case was to explain the real reason why the court found Ohralik's actions so unconscionable. *Ohralik* was a case in which a lawyer went to a hospital with a nearly comatose patient and was able to get the patient to sign a contingency, retainer agreement for a personal injury case. In the present case the Court went out of its way to say that it had decided *Ohralik* very narrowly under those specific circumstances.[22] The Court went on to say that it did not intend for all professional services to be impacted by the way the *Ohralik* case was decided.[23] In large part from this case I would come to several conclusions concerning solicitation.

In analyzing these conclusion it must be realized that there is a present rule in the Model Rules that precludes in-person solicitation.[24] The State of Wisconsin has adopted a form of this rule in its Rules of Professional Conduct, and most likely, nearly every state in the nation has some form of this rule.[25] A very strong argument can and will be made concerning solicitation and a sophisticated client; whether it is a bank, or a business person, or an athlete who has an established record in dealing with lawyers, owners, accountants and investors. A sophisticated client

19. Edenfield v. Fane, 113 S.Ct. 1792 (1993).
20. *Id.*
21. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).
22. Edenfield, 113 S.Ct. at 1795.
23. *Id.*
24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1992).
25. WIS. STAT. ANN., S.C. RULES § 20:7.3 (1994).

is not the type of person who will be taken advantage of by an in-person telephonic communication.

According to the Model Rules, you can send a letter to all of the athletes in the world as long as you label it advertisement. Now, if you say to me, "Well Dan, are you saying that there are at the present time American Bar Association rules which are unconstitutional and invalid?" The answer is unequivocally, "Yes!"

In the appendix there is a reference to Rule 7.4.[26] This rule prohibits a lawyer from announcing to the consumer public what their area of specialization is. In 1990, the United States Supreme Court in a split decision ruled that an Illinois rule which was comparable to Model Rule 7.4 was unconstitutional.[27] Therefore, for several years the American Bar Association has kept on the books a rule which is clearly unconstitutional and unenforceable. Every state probably has rules that are comparable to Rule 7.4. These rules would prohibit a lawyer from even suggesting language that states to the public that their practice is limited to representing athletes, or limited to representing people in the sports industry. All such rules are unenforceable.

What has happened is that the ABA, for the last few years, has been attempting to restudy the area of specialization and the impact it has on advertising. As a result, in the next few years there will probably be a new Rule 7.4. Each state will then have to allow all attorneys to advertise their particular area of specialization.

IV. CONCLUSION

Finally, it must also be realized that specialization is something that will be allowed only if the lawyer can fulfill some objective criteria to justify the specialization. In other words, it will not be enough to simply have the Beverly Hills Bar Association say, "Give us $100 and we will certify you as a domestic relations specialist." The criteria will have to be established by the ABA and each particular state. The ABA is currently studying various lawyer groups who will seek accreditation for different specialty areas.

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26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1992).

27. Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990).

APPENDIX A

Every man is the creature of the age in which he lives; very few are able to raise themselves above the ideas of the time.

Voltaire

I. SELECTED MODEL RULES OF PROFESSIONAL CONDUCT

RULE 1.1

Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.2

Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c),(d) and (e) and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

RULE 1.4

Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5

Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
    (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    (3) the fee customarily charged in the locality for similar legal services;
    (4) the amount involved and the results obtained;
    (5) the time limitations imposed by the client or by the circumstances;
    (6) the nature and length of the professional relationship with the client;
    (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
    (8) whether the fee is fixed or contingent.
(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and

whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:
  (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
  (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
  (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
  (2) the client is advised of and does not object to the participation of all the lawyers involved; and
  (3) the total fee is reasonable.

RULE 7.1

Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with the other lawyers' services, unless the comparison can be factually substantiated.

RULE 7.2

Advertising

(a) Subject to the requirements of Rule 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory,

legal directory, newspaper or other periodical, outdoor advertising, radio or telephone, or through written or recorded communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may
  (1) pay the reasonable costs of advertising or written communication permitted by this Rule;
  (2) pay the usual charges of a not-for-profit lawyers referral service or legal service organization; and
  (3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

RULE 7.3

Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact when not otherwise prohibited by paragraph (a), if;
  (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
  (2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 7.4 [*But *see Peel* decision, 110 S. Ct. 2281 (1990)].

Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty", "Proctor in Admiralty" or a substantially similar designation; and

(c) [provisions on designation of specialization of the particular states].

APPENDIX B

HISTORICAL PERSPECTIVE OF MODEL RULES

In 1908, the ABA adopted the original Cannons of Professional Ethics which were principally based on a code of ethics adopted by the Alabama Bar Association in 1887, which were adopted liberally from the lectures of George Sharswood, a 19th Century legal scholar. In 1964, the ABA House of Delegates created a special committee to determine whether changes should be made in the then existing Cannons of Professional Ethics. In 1969, the Model Code of Professional Responsibility was adopted by the House of Delegates and subsequently adopted by numerous states. In 1977, the ABA created the Commission on Evaluation of Professional Standards, and ultimately determined that merely amending the Model Code of Professional Responsibility would not adequately address issues then governing the legal profession; the Commission then began a six year study which resulted in the House of Delegates of the ABA adopting the current Model Rules of Professional Conduct. CAVEAT TO ALL ATTORNEYS: Your state bar association or supreme court may not have adopted all of the Rules verbatim. Lawyers' professional conduct will generally be reviewed within those Rules established by the jurisdiction in which the lawyer practices.

APPENDIX C

PREAMBLE TO THE MODEL RULES OF PROFESSIONAL CONDUCT

1. A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
2. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client, but consistent with requirements of honest dealing with others. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.
3. In all professional matters, a lawyer should be competent, prompt and diligent and maintain communication with a client concerning the representation, and keep in confidence information relating to the client's representation, except as either required or permitted under the Model Rules or other law.
4. In addition to the substantive and procedural law, a lawyer is also guided by personal conscience and approbation of professional peers and should strive to attain the highest level of skills, to improve the law and the legal profession.
5. Lawyers may confront conflicting responsibilities in the course of their representation. The Model Rules of Professional Conduct provide a framework of rules that can assist the lawyer in resolving such conflicts. However, it is recognized that difficult issues require professional discretion, and that such discretion may require the exercise of sensitive professional and moral judgement guided by the basic principals underlying the Model Rules.
6. Sharswood, *supra*, commenting on the standards in defining the appropriate role of the lawyer in society said:

   > High morale principle is the lawyer's only safe guide, the only torch to light his way amidst darkness and obstruction" Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, VI GEORGETOWN J. OF LEGAL ETHICS 241, No. 2 (1992).

APPENDIX D

HYPOTHETICALS

Example 1: A professional male athlete under a collective bargaining agreement advises his general manager in October, 1993, that his wife is pregnant and expects to deliver a baby on or about December 15, 1993, and requests a leave on or about that date. Assume further that the "season" will still be going on and the athlete's contract would normally contemplate the completion of the season. The general manager is a "blood and guts" type, and is livid and wants to suspend, fine or discharge the athlete.

If the general manager consults you as the attorney for the club, what advice, if any, do you give the general manager? What advice do you give the general manager if the general manager has the authority to and has already fined the athlete?

Assuming you are the attorney for the athlete, what advice, if any, do you give to the athlete either prior to or subsequent to the general manager's fine?

Example 2: Assume that a professional club has an assistant coach who is a fifty four (54) year old gay diabetic who is an African American. The head coach and general manager have told you, as counsel for the club, that they want to terminate him because they don't like his attitude and he rubs them the wrong way (figuratively speaking). Assuming you are representing the club, what advice do you give the coach and general manager? What kind of information do you seek to elicit? Assuming you are counsel to the assistant coach, what advice do you give to him? What information do you elicit?

Example 3: Assume a federal court action has been commenced by the assistant coach referred to in example 2 and counsel for the athlete and club are engaged in settlement discussions. In addition to the amount of dollars, what other factors are relevant to your consideration in the negotiations, regardless of whether you are representing the club or the employee?

Example 4: Assume that you presently do not represent any of the parties in discussion hypothetical 1 or 2, and assume that you would like to; how, if at all, can you ethically solicit such representation?

APPENDIX E

CASES AND OTHER RULES TO FOLLOW

A. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), held that commercial speech is entitled to limited first amendment protection.

B. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), upheld a state's right to regulate lawyer advertising that is false, deceptive or misleading.

C. In *In re R. M. J.*, 455 U.S. 191 (1982), Justice Powell held that:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: truthful advertising related to lawful activities is entitled the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading, or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

455 U.S. at 191.

D. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), upheld a lawyer discipline case involving a lawyer who approached an injured automobile driver while she was lying in the hospital and secured a contingent fee agreement. The U.S. Supreme Court affirmed the discipline of the lawyer for in-person solicitation for pecuniary gain. The court confirmed Ohio's interest in preventing in-person solicitation as "particularly strong" indicating the state's responsibility for maintaining professional standards and preventing solicitation that involves "fraud, intimidation, overreaching and other forms of vexatious conduct." 436 U.S. at 462.

E. *In re Primus*, 436 U.S. 412 (1978), decided the same day as *Ohralik, supra*, involved an ACLU lawyer writing to a potential client to inform her of her legal rights and to offer her legal representation without fee. The U.S. Supreme Court reversed the South Carolina Supreme Court discipline of the lawyer and held that the state's application of its

no solicitation rules violated the First and Fourteenth Amendments. The solicitation in the *Primus* case involved associational freedoms protected by the First Amendment, and thus afforded a higher degree of protection to political speech, and required the state to prove a compelling interest.

F. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), involved a lawyer's newspaper advertisement that publicized his willingness to represent women who were allegedly injured by using the Dalcon shield intrauterine device. The Supreme Court rejected the Ohio court's reprimand of the lawyer for use of an illustration in the newspaper ad as violating the lawyer's First Amendment rights. Justice White said:

> The state's power to prohibit advertising that is 'inherently misleading' . . . cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

436 U.S. at 455. The court continued to recognize the difference between print advertisement and a personal encounter between the lawyer and client since the client would have more opportunity to consider the representation upon review of printed advertisement, as contrasted to personal solicitation.

G. In *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988), the lawyer sent direct mail letters to persons not his clients whose property was being foreclosed. In a six to three decision, the Supreme Court ruled that the First Amendment does not allow states to allow blanket bans on targeted direct mail solicitation of potential clients. Justice Brennan, speaking for the court majority, rejected the argument that Shapiro was merely "*Ohralik* in writing," and said that:

> The mode of communication makes all the difference and that print advertising does not pose the risk of overreaching that a lawyer's personal presence would have.

486 U.S. 470.

H. In *Peel v. Attorney, Registration and Disciplinary Commission of Illinois*, 110 S. Ct. 2281 (1990), the United States Supreme Court, in a four, two, one and three plurality decision reversed the Illinois Supreme Court decision to reprimand Attorney Peel. The plurality opinion by Justice Stevens, joined by Justices Brennan, Blackmun, and Kennedy, assumed the lawyer's letterhead was entitled to application of the commercial free speech doctrine, as established in the *Bates* case, *supra.*

Justice Stevens observed that the "facts" stated on the lawyer's letterhead were true and verifiable, and observed that neither bar associations

nor states may rely upon an argument that the consuming public will be mislead by the juxtaposition of the lawyer's assertion of certification and licensure. In essence, the court struck down Rule 7.4 and any state attempt to regulate the advertising of specialization.

I. In 1993, the ABA, after intensive study, recommended the following:

> Be it resolved that:
> A lawyer shall not hold him/herself out publicly as a certified specialist, except as follows:
> 1. A lawyer who is certified as a specialist in a particular field of law by an organization that has been accredited by the American Bar Association may hold him/herself out as a specialist certified by the (named) organization.
> 2. A lawyer who is certified as a specialist in a particular field of law by ——— (state bar or specialization program), or by an organization that has been approved by ——— (the same state), or an organization that has been accredited by the American Bar Association, may hold him/herself out as a certified specialist by the certifying organization. (STATES MAY ADOPT ONE OR TWO.)

J. TEXAS LAWYERS SPECIAL ATTENTION: Texas makes lawyer solicitation a felony—see MARK HANSEN, *Texas Makes Solicitation a Felony*, September ABA JOURNAL 32 (1993).

K. Current speech, commercial free speech, and lawyer solicitation.

In *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the court struck down a Florida restriction on certified public accountants solicitation of clients by either telephone or personal contact. The Florida rule provided that a CPA:

> Shall not by any direct, in-person, uninvited solicitation, solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of the CPA unless such person or entity has invited such a communication.

Florida Administrative Code, § 21A-24.002(2)(c), 1992. The regulation continued:

> Direct, in-person, uninvited solicitation means 'any communication which directly or implicitly requests an immediate oral response from the recipient' which, under the Board's rules, include all 'uninvited in-person visits or conversations or telephone calls to a specific potential client'."

§ 21A-24.002(3). CPA Fane was a New Jersey practitioner specializing in providing tax advice to small and medium size businesses. He had previ-

ously solicited business clients by making unrequested telephone calls to the executives and arranging meetings to explain his services and expertise. New Jersey law did not prohibit such practice. For the most current opinion of the court's view towards professional (including lawyers) solicitation of perspective clients, see *Fane*. Perhaps, under appropriate factual circumstances, the window of opportunity for in-person lawyer solicitation of perspective clients is "open a crack."