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Good Lawyers, Good Sports?: The Professional Identity of Sports Lawyers Representing Not-For-Profit Entities

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GOOD LAWYERS, GOOD SPORTS?: THE PROFESSIONAL IDENTITY OF SPORTS LAWYERS REPRESENTING NOT-FOR-PROFIT ENTITIES

by: Bruce A. Green*

ABSTRACT

ABA accreditation standards require law schools to develop students' professional identity, including by encouraging "an intentional exploration of" the legal profession's "values [and] guiding principles." This Essay invites legal academia as well as practitioners to explore issues of legal ethics, professionalism, and, especially, professional identity in the context of a new area of legal practice: sports lawyers' representation of "NIL collectives," which are not-for-profit entities that college boosters establish to enable college athletes to benefit financially from their name, image and likeness ("NIL"). The work of sports lawyers advising NIL collectives offers an interesting case study for considering how professional values might come into play when lawyers counsel clients and particularly when lawyers counsel not-for-profit entities. NIL collectives may be skirting the tax laws that require not-for-profit entities to serve a public, not private, purpose or circumventing the NCAA's rules, which forbid its member universities from using NIL compensation to recruit athletes. Even if they are not breaking the law, the collectives may appear to be acting unfairly in how they use financial inducements to assemble winning teams. Lawyers advising NIL collectives might take different views of whether to prompt the client's representatives to consider the rightness or fairness of the enterprise. Their decision whether and how to counsel their clients about "fair play" in this context will be informed by their sense of professionalism and their understanding of professional values, which are not fixed and uncontested. Among other things, this example illustrates that broadly accepted professional values are only a small subset of the values that shape individual lawyers' professional identity, influencing how they conduct their work. Therefore, to a large extent, law schools' role in developing future lawyers' professional identity requires helping students ascertain their own professional values and how their values apply to particular work.

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I. INTRODUCTION

This Essay explores issues of legal ethics, professionalism, and professional identity in the context of a new area of legal practice: sports lawyers’ representation of “NIL collectives.” These collectives are not-for-profit entities that college boosters establish to enable college athletes to benefit from their name, image and likeness (“NIL”).¹ The work of sports lawyers who advise NIL collectives offers an interesting case study for discussing how professional values might come into play when lawyers counsel clients and particularly when lawyers counsel not-for-profit entities.

By providing financial support to student-athletes in exchange for their commercial endorsements or charitable work, an NIL collective ultimately seeks to help the university it supports to recruit and retain top athletes. Professional norms expect lawyers to steer their clients away from criminal and fraudulent conduct, but that is not the major issue here. NIL collectives are unlikely to be committing crimes or fraud, but some may be skirting the tax laws that require not-for-profit entities to serve a public, not private, purpose, or they may be circumventing the NCAA’s rules, which forbid its member universities from using NIL compensation to recruit athletes. Even if they are not breaking the law, the collectives may appear to be acting unfairly in how they use financial inducements to assemble winning teams. Whether and how to counsel their clients about “fair play” in this context is largely for lawyers to decide themselves, informed by their sense of professionalism and their understanding of professional values. Law schools should help future lawyers think about questions such as these because law schools must promote law students’ understanding of and commitment to the legal profession’s values as an aspect of these future lawyers’ “professional identity.” Lawyers’ representation of NIL collectives can therefore serve as a contemporary case study for exploring legal ethics and professional values.

1. For short discussions of the rise of NIL collectives, see, e.g., Jordan Allen, Note, *Is the End Just the Beginning? NIL Changes and the New World of Intercollegiate Athletics*, 10 LINCOLN MEM’L U. L. REV. 53, 71–73 (2023); Spencer Jacobs, Comment, *Cash, Chaos, and Collectives: How the NCAA’s Punt on Student-Athlete Name, Image and Likeness Governance Created a Wild West and How Federal Legislation Can Bring Order*, 58 GONZ. L. REV. 297, 306–08 (2023); see also David A. Fahrenthold & Billy Witz, *College Football Now Has Wages Over \$100,000*, N.Y. TIMES, Oct. 22, 2023, at A1.

II. BACKGROUND: IF NIL COLLECTIVES ARE BEHAVING BADLY, “WHERE ARE THE LAWYERS?”

In March 2023, Notre Dame University’s president and athletic director co-authored a *New York Times* op-ed warning that “college athletics is in crisis,” having become “a lucrative business disguised as a branch of educational institutions.”² The problem began with *NCAA v. Alston*,³ a lawsuit challenging the NCAA’s restrictions on the education-related benefits that colleges could provide to their athletes. The lawsuit culminated in a unanimous Supreme Court decision in 2021 holding that the challenged restrictions violated federal anti-trust law. Justice Kavanaugh’s concurrence questioned the lawfulness of the NCAA’s other compensation restrictions, such as those forbidding “student athletes from receiving money from endorsement deals and the like.”⁴ As the case was making its way up to the Supreme Court, states began passing laws, beginning with California’s 2019 Fair Pay to Play Act,⁵ authorizing their states’ college athletes to profit by making endorsements.⁶ To level the playing field, the NCAA changed its rules in June 2021 to allow *all* college athletes to benefit in this manner.⁷

The NCAA envisioned that college athletes would pick up a few extra bucks by, for example, posing for photos and signing sports paraphernalia at the opening of the local used car dealership.⁸ But the NCAA

2. John I. Jenkins & Jack Swarbrick, *College Sports are a Treasure. Don’t Turn Them into the Minor Leagues*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/2023/03/23/opinion/college-sports-student-athletes-education.html> [<https://perma.cc/P98K-UX8D>].

3. Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021).

4. *Id.* at 108 (Kavanaugh, J., concurring).

5. CAL. EDUC. CODE §§ 67456–67457 (West 2021); see Steven A. Bank, *The Olympic-Sized Loophole in California’s Fair Pay to Play Act*, 120 COLUM. L. REV. F. 109 (2020); see also Sarah Traynor, Comment, *California Says Checkmate: Exploring the Nation’s First Fair Pay to Play Act and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203 (2020).

6. The first state to do so, California, adopted its “Fair Pay to Play Act” in 2019, prior to the *Alston* decision. As of now, more than 30 states have adopted different laws authorizing student athletes to profit from their name, image and likeness. See *NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level*, NIL NETWORK, <https://www.nilnetwork.com/nil-laws-by-state/> [<https://perma.cc/GFB5-UXA2>] (Aug. 27, 2022). Federal law on this subject has also been proposed. See Laura C. Murray, Note, *The New Frontier of NIL Legislation*, 60 HOUS. L. REV. 757, 784–85 (2023).

7. NAT’L COLLEGIATE ATHLETIC ASS’N, *Interim NIL Policy* (July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [<https://perma.cc/9F4K-5TWR>]; see Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT’L COLLEGIATE ATHLETIC ASS’N (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/6LF4-XMLT>].

8. Memorandum from Lynne A. Camillo, Deputy Assoc. Chief Couns., Internal Revenue Serv., to Stephen A. Martin, Dir., EO Rulings & Agreements, Internal Revenue Serv., and Lynn Brinkley, Dir., EO Examinations, Internal Revenue Serv. (May 23, 2023), <https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf> [<https://perma.cc/W4G7-RDNW>] (“The paid NIL opportunities for student-athletes typically include promoting

held fast to its rule, left untouched by the Supreme Court, forbidding colleges from paying their athletes and recruits for playing a sport—a restriction central to the concept of amateur athletics. Under the new NIL policy, students may be compensated only for NIL services actually rendered, and schools may not recruit college athletes with promises of NIL compensation.⁹

The problem, said the Notre Dame authors, is that colleges with top football and basketball programs and their boosters quickly found a way around the traditional restriction on compensating college athletes and recruits. “To avoid the N.C.A.A. prohibition,” they wrote, “many schools funnel money to recruits under the guise of a supposed third-party licensing deal—regardless of whether a player’s name, image and likeness have any market value whatsoever.”¹⁰ Sports Illustrated’s national college football writer concurred, observing that

college athletics . . . , at its highest level, is drifting toward a professional model where boosters and booster-led collectives are distributing salaries to players under the guise of NIL. The evolution of NIL has created an unregulated free agency and false market where college athletes are signing five-, six- and even seven-figure contracts to play for certain schools¹¹

This is not a story about football teams at Division III schools or about lacrosse teams at *any* schools but about top athletes playing popular spectator sports, especially football and basketball, at Division I schools (and especially those athletes playing in “Power Five” football conferences). According to a 2022 report, that year’s top-earning college athlete was the University of Alabama’s quarterback, who made over \$3 million in NIL deals.¹² When national companies make deals with college athletes, they are not seeking to circumvent NCAA rules but simply to receive valuable endorsements. The same probably cannot be said of wealthy donors and boosters or of NIL collectives, the not-for-profit organizations that boosters establish to exploit the new state laws and NCAA policy.¹³ For example, a Syracuse University

the collective or a partner charity through a video or social media post, attending a fundraising event, autographing memorabilia for the collective or a partner charity to sell, or participating in or leading a sports camp.”)

9. See *supra* note 7.

10. Jenkins & Swarbrick, *supra* note 2.

11. Ross Dellenger, *Notre Dame AD Says NCAA Could Break Apart Without Stronger NIL Guidelines*, SPORTS ILLUSTRATED (Mar. 23, 2023), <https://www.si.com/college/2023/03/23/notre-dame-ad-jack-swarbrick-calls-stronger-nil-ncaa-collapse> [<https://perma.cc/ZW93-M5PG>].

12. Cameron Gerbers, *Highest Paid College Athletes in the NIL Era*, ACTION NETWORK (Oct. 4, 2022, 4:27 PM), <https://www.actionnetwork.com/ncaaf/highest-paid-college-athletes-in-the-nil-era> [<https://perma.cc/H8PW-F439>].

13. For an overview of the NIL collectives circa mid-2022, see Pete Nakos, *What are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [<https://perma.cc/A3NB-GQ5E>].

supporter announced that he would give at least \$1 million to recruits for the school's basketball team.¹⁴ After consulting a lawyer, he concluded that he was complying with the NCAA rules because "he is not paying athletes to play for Syracuse."¹⁵ Rather, he "is paying them to do charity work with him in Central New York and they could pick any school in the area."¹⁶ Of a dozen experts polled by a reporter, only two thought that this stratagem brought Syracuse's supporter even technically in compliance with the NCAA rules, much less within the purpose or spirit of the rules.¹⁷

Things are in flux. In June 2023, the IRS issued a memo questioning whether NIL collectives serve a public purpose that would justify their tax-exempt status.¹⁸ Some collectives reportedly responded by closing shop,¹⁹ perhaps because their fundraising depended on contributors' ability to take a tax deduction, because the IRS's blunt description of the entities' objectives proved embarrassing, or because the collectives were no longer needed.²⁰ But then in February 2024, a federal district

14. Chris Carlson, *Adam Weitsman Says He's Paying \$1 Million to Syracuse Players and That's Just a Start*, SYRACUSE (Jan. 25, 2023, 6:21 PM), <https://www.syracuse.com/orangebasketball/2023/01/adam-weitsman-says-hes-paying-1-million-to-syracuse-players-and-thats-just-a-start.html&subscribed=google-oauth2%7C103972213057572648689> [https://perma.cc/5QES-XQJT].

15. Chris Carlson, *NCAA Wants to Rein in Boosters Abusing Recruiting Rules. Should Syracuse, Adam Weitsman be Worried?*, SYRACUSE (Feb. 10, 2023, 1:36 PM), <https://www.syracuse.com/orangebasketball/2023/02/ncaa-wants-to-rein-in-boosters-abusing-recruiting-rules-should-syracuse-adam-weitsman-be-worried.html> [https://perma.cc/L324-G6H5].

16. *Id.*

17. *Id.*

18. See generally Memorandum, *supra* note 8. The memo concluded that providing funds to student athletes in order to help schools recruit and retain them is a private purpose, not an educational purpose. *Id.* at 11. Also, because the funding was not need-based, it could not be justified by the interest in providing "relief of the poor or distressed." *Id.* at 10. The objectives of the NIL collectives, and perhaps of the college athletic programs they support, might be contrasted with the educational objectives of programs for younger athletes, such as a Little League baseball program for which "the attainment of a special athletic skill or the winning of games is secondary," and for which principal aim is "to firmly implant in the boys of the community the ideals of good sportsmanship, honesty, loyalty, courage and reverence, so that they may be finer, stronger and happier boys and will grow to be good, clean, healthy men." *Pomeroy v. Little League Baseball of Collingswood*, 362 A.2d 39, 41 (N.J. Super. Ct. App. Div. 1976).

19. Pete Hernandez, *Texas A&M's 12th Man Foundation Announces It Will Discontinue the 12th Man+ Fund*, AGGIES WIRE (Aug. 9, 2023, 6:23 PM), <https://aggieswire.usatoday.com/2023/08/09/texas-aggies-football-12th-man-foundation-12thmanfund-nil-collective/> [https://perma.cc/JE7T-JYVC].

20. The NIL landscape may also change because the NCAA has signaled stricter enforcement of its rules. See NAT'L COLLEGIATE ATHLETIC ASS'N, INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES (2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [https://perma.cc/V64M-JGBV]. Also, because lawyers and agents for top athletes can make better deals for their clients with other entities. Jeremy Crabtree, *The NIL Lawyer: Meet the Man Orchestrating Deals Reshaping Recruiting*, ON3 (May 19, 2022), <https://www.on3.com/nil/news/michael-caspino-nil-lawyer-orchestrating-deals-reshaping-recruiting/> [https://perma.cc/K3E3-LVMT]. Further change may lie ahead,

judge gave boosters a boost by issuing a preliminary injunction enjoining enforcement of the NCAA's "NIL-recruiting ban," finding that the states of Tennessee and Virginia "are likely to succeed on the merits of their claim that the . . . ban unreasonably restrains trade in the market of Division I athletics."²¹

One can debate whether the NCAA's restrictions on compensating athletes are good or bad for college athletes, college sports, or colleges. Some would argue that college sports is a multi-billion-dollar industry profiting from the labor of student athletes, particularly financially disadvantaged student athletes of color; that the NCAA is essentially a cartel employing anticompetitive rules to deprive college athletes of a fair share of the profit; and that college athletes should be allowed to share more fully and fairly.²² The Notre Dame co-authors argued otherwise, asserting that "[p]rofessionalizing teams, treating athletes more as employees than as students and weakening the vital connection with the educational mission of their colleges will rob college athletics of its special character," turning it into "a version of the professional minor leagues" to the disadvantage of "the vast majority of young men and women who pursue a college degree and grow personally while they play the sport they love."²³

Regardless of one's view of the current NCAA policy, which may one day be nullified by federal legislation or by legal challenges, there is a further question of how to judge the behavior of those who tried to circumvent that policy rather than challenging it in court—the schools' boosters who pooled their money to create collectives, the not-for-profit collectives they established to funnel money to college athletes under the pretense of compensating them for their endorsements, the school sports programs that strengthened their teams by recruiting athletes to

as members of Congress contemplate proposing federal laws to address this subject. See Murray, *supra* note 6, at 784. As the NLRB asserts the position, now the subject of litigation, that college athletes are employees. See Jennifer A. Shults, Note, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status*, 56 COLUM. J.L. & SOC. PROBS. 451, 480 (2023).

21. *Tennessee v. Nat'l Collegiate Athletic Ass'n*, No. 3:24-CV-00033-DCLC-DCP, 2024 WL 755528, at *3 (E.D. Tenn. Feb. 23, 2024).

22. Natalie Dowzicky, *There's Nothing Amateur About College Athletics*, LIBERTARIANISM, (Jan. 10, 2022), <https://www.libertarianism.org/articles/nothing-amateur-about-college-athletics> [<https://perma.cc/MVQ7-5YLY>]; Amanda L. Jones, Note, *The Dawn of a New Era: Antitrust Law vs. the Antiquated NCAA Compensation Model Perpetuating Racial Injustice*, 166 NW. U. L. REV. 1319, 1323 (2022) ("[P]ublic controversy over whether college athletes should be paid . . . is driven by concerns regarding fair compensation of labor; unjust restrictions on student athletes' ability to earn money; and universities, conferences, and organizations taking advantage of underprivileged student athletes."). Students may also benefit other than financially. For example, it has been suggested that student-athletes, who have limited time for classroom education, may develop "real-world life skills" regarding budgeting, contracts, taxes, and decision making generally. Luke Fedlam, *Game Changers: Rewriting the Playbook - A Sports and Entertainment Law Symposium*, 56 AKRON L. REV. 439, 446 (2023).

23. Jenkins & Swarbrick, *supra* note 2.

whom the collectives funneled cash, and the universities that profited from strong sports teams that recruited or retained college athletes this way. Whether these individuals or entities behaved badly, even if lawfully, would be an interesting question for any number of ethicists, including moral philosophers in general and those who specialize in the ethics of not-for-profit organizations, sports programs, or universities in particular.

But what does any of this have to do with the legal profession or legal academia? Lawyers and law students are not moral philosophers, after all.

When corporate America behaves badly, it has become almost a cliché to ask, “Where were the lawyers?,” a paraphrase of a question posed by Judge Stanley Sporkin in 1990 with reference to the savings-and-loan crisis.²⁴ That question, meant to encourage professional introspection, can be asked here. In the aftermath of the *Alston* decision, more than a hundred NIL cooperatives were formed.²⁵ Lawyers helped to establish the NIL collectives and to advise their founders and representatives about how to pursue their objectives in light of NCAA rules, the tax code, state NIL laws, and other applicable rules and laws.²⁶ Law firms attracted NIL cooperatives as clients by publicizing their sports lawyers’ experience and expertise.²⁷ If NIL collectives and those associated with them behaved badly, as they reportedly did,²⁸ where were the lawyers? Did the collectives’ lawyers question whether their clients were doing good or bad; whether their clients would be flouting NCAA rules, pushing the limits of the tax code, or perhaps even acting deceptively or fraudulently; or whether in helping their alma maters recruit and retain great athletes, the collectives would be embarrassing their schools or undermining aspects of their schools’ mission, such as that of encouraging good character and civic virtue?

24. See *Lincoln Sav. & Loan Ass’n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (referring to lawyers, he asked “[w]here were these professionals?”); see also Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 *VAND. L. REV.* 75, 76 (1993).

25. See *supra* note 1 and accompanying text.

26. See Nakos, *supra* note 13.

27. See, e.g., *Name, Image and Likeness (NIL)*, VARNUM, <https://www.varnumlaw.com/practice/name-image-likeness/> [<https://perma.cc/6FAH-C469>]; *Name, Image, and Likeness*, HAHN LOESER, <https://www.hahnlaw.com/practice/name-image-and-likeness/> [<https://perma.cc/PP92-JXP5>].

28. For example, a recent front-page *New York Times* article reported that “collectives have effectively hijacked the N.I.L. system to circumvent the N.C.A.A.’s still-in-force ban on paying players to pay,” that collectives only in theory operate independently of college athletic programs, and that “the scale of the available payments has become a critical factor as coaches seek to retain the best players and poach talent from rival schools.” Fahrenthold & Witz, *supra* note 1. The article gave examples of speeches made by college football coaches soliciting donations to collectives to enable the school to recruit top players. The article also raised questions about collectives’ tax-exempt status, suggesting that they did not predominantly serve a public purpose and, in some cases, had made misleading submissions to the IRS.

I have no insight into how lawyers actually thought, counseled their clients, or otherwise behaved. No one has documented how any particular NIL lawyer or law firm conducted their work, much of which occurred privately. It is doubtful that any of the lawyers can or will publicly discuss the details of the conversations they held and the advice they gave because the communications between and among the lawyers and clients are shielded by the attorney-client privilege and confidentiality.

Nonetheless, lawyers' work establishing and representing NIL collectives serves as an interesting case study, even if viewed from the outside and in hypothetical form.²⁹ What should lawyers do when their clients may be embarking on an enterprise that is lawless or, more likely, technically lawful but possibly morally troubling? Do the professional conduct rules—the rules of the game for lawyers—provide adequate guidance and guardrails for lawyers who find themselves in this situation? To the extent that lawyers can choose how to respond, which choices best accord with the values of the legal profession?

These kinds of questions are important for law schools to ask and for law students to consider because law schools have been assigned the task of affording law students opportunities to develop their professional identity, which, according to law school accreditation standards, involves “an intentional exploration of the [legal profession’s] values [and] guiding principles.”³⁰ Legal academics have examined lawyers' counseling function, often from a philosophical perspective, but law students who plan to become practicing lawyers need to consider these questions from a practical perspective (e.g., in the context of a recurring real-life problem), informed by the profession's rules and values. The rest of this Essay explores the legal profession's values and guiding principles in the context of sports lawyers' role as legal advisors to NIL collectives, focusing first on lawyers' fidelity to the law and then

29. See Bruce A. Green, *There but for Fortune: Real-Life vs. Fictional “Case Studies” in Legal Ethics*, 69 *FORDHAM L. REV.* 977, 977–78 (2000) (observing that unlike real-life case studies raising legal ethics issues “are often incomplete. . . . [P]recisely what the lawyers did and why they did it may never become fully apparent. The result is that, at times, the moral of the story is itself ambiguous”).

30. The law-school accreditation standards now require law schools to “provide substantial opportunities to students for . . . the development of a professional identity.” *STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS.*, Standard 303, at 18 (AM. BAR ASS'N 2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf [<https://perma.cc/374X-8TKP>]. The standards explain:

Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.

Id. at 19.

on the significance of nonlegal considerations, including moral and ethical considerations. Among other things, this exploration suggests that developing future lawyers' professional identity, as accreditation rules envision it, is no easy task.

III. ADVISING NIL COLLECTIVES ABOUT THE LAW

Among the values or guiding principles considered especially fundamental to lawyers' work is fidelity to the law.³¹ This has always been true: The American Bar Ass'n's ("ABA's") 1908 Canons of Professional Ethics, which drew from nineteenth-century professional understandings,³² said that "it is steadfastly to be borne in the mind that the great trust of the lawyer is to be performed within and not without the bounds of the law."³³ Today, the bar admissions process presupposes that lawyers and future lawyers must obey the law. Law school graduates can be denied a law license if they have been lawbreakers in their prior lives on the theory that lawbreaking is evidence of a character for lawlessness that would affect lawyers' professional work.³⁴ Once admitted to practice, lawyers can be disbarred or otherwise sanctioned for breaking the law in their private as well as professional lives because lawyers' lawbreaking is harmful, undermines public respect for the legal profession, and raises doubts about whether the lawyer will play by the rules in the future.³⁵ In their professional role, we assume that, as a matter of competence, lawyers' jobs are to promote their clients' legal compliance.³⁶ That is a premise of the attorney-client privilege: lawyers are allowed to promise their clients confidentiality, even though there is often a public interest in learning what clients told their lawyers, because lawyers

31. Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 *FORDHAM L. REV.* 1429, 1438 (2006) ("[O]ur professional norms (of which the ABA is a principal exponent) identify being 'law-abiding,' like integrity and trustworthiness, as an important professional and personal value or trait for lawyers."); *see, e.g.*, MODEL RULES OF PRO. CONDUCT pmb. 5 (AM. BAR ASS'N 2023) ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.").

32. *See generally* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395 (2003).

33. CANONS OF PRO. ETHICS Canon 15 (AM. BAR ASS'N 1908).

34. *See generally* Leslie C. Levin, *Rhode Was Right (About Character and Fitness)*, 91 *FORDHAM L. REV.* 1311 (2023); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491 (1985); Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 *ST. JOHN'S L. REV.* 1037 (2008).

35. *See* Bruce A. Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process*, 40 *FORDHAM URB. L.J.* 139, 173–74 (2012) ("[T]he idea of 'character' . . . is that people are either honest or dishonest, trustworthy or untrustworthy, law-abiding or lawless; that our character predicts our conduct; and that the admissions and disciplinary processes will, for the most part successfully, weed out the dishonest, untrustworthy, and lawless among us.").

36. *See* ABA Comm. on Ethics & Prof. Resp., Formal Op. 491 (2020); N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2018-4 (2018).

who receive their clients' full and candid disclosures will be in a position to discourage their clients from breaking the law.³⁷ In *Upjohn v. United States*, the Supreme Court suggested that the privilege is particularly important to facilitate "the valuable efforts of corporate counsel to ensure their client's compliance with the law" given "the vast and complicated array of regulatory legislation confronting the modern corporation."³⁸

Sports lawyers' fidelity to the law may be tested when they are asked to advise and assist NIL collectives and others who propose compensating college athletes to help colleges recruit and retain them. Consider, for example, a situation where a group of boosters retains a sports lawyer to establish an NIL collective as a not-for-profit entity to which boosters would make tax-deductible financial contributions to fund some of their alma mater's athletes in exchange for endorsing local businesses or working with local charities. If the collective's representatives are committed to operating well within the lines drawn by tax law, state NIL law, NCAA rules, and any other potentially relevant laws and rules, then the lawyer's job will be to let those representatives know how the lines are drawn and to help structure the collective's operations to steer far clear of the lines. But the collective's representatives may not be so committed. In that event, what if the lawyer concludes that the collective's intended operations would likely cause the school or its athletes to violate the NCAA rules?³⁹ What if the lawyer believes that financial contributions are probably ineligible for tax deductions? How should the lawyer advise the clients, and if the clients want to go ahead with their plans, may or should the lawyer assist?

Eighty-five years ago, in a joint report principally drafted by legal philosopher Lon Fuller, the American Bar Association and the Association of American Law Schools addressed lawyers' role in counseling clients about legally questionable conduct. The report explained that the lawyer's responsibility is to encourage clients not only to comply with the law but to comply with the spirit of the law. In counseling clients about their future conduct, lawyers should not exploit loopholes and technicalities or advance unpersuasive legal arguments as lawyers might do in litigation where a client is defending past conduct:

37. See, e.g., Bruce A. Green, *The Attorney-Client Privilege – Selective Compulsion, Selective Waiver and Selective Disclosure: Is Bank Regulation Exceptional?*, 2013 J. PRO. LAW. 85, 102 (stating attorney-client privilege's premise is that regulated clients "need the attorney-client privilege to promote candid communications that lead to greater voluntary legal compliance, and that the societal benefits of the privilege justify whatever impediments the privilege might pose to effective regulation").

38. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

39. See, e.g., Jacobs, *supra* note 1, at 319–21 (noting vagueness of NCAA's ban on "recruitment inducements" and offering, as an example in the gray area, that the University of Texas football program announced that its offensive linemen would receive \$50,000 annually for performing charitable work the next season).

The most effective realization of the law's aims often takes place in the attorney's office Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.

Although the lawyer serves the administration of justice indispensably both as advocate and as office counselor, the demands imposed on him by these two roles must be sharply distinguished. The man who has been called into court to answer for his own actions is entitled to a fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.⁴⁰

The report was foundational for the Model Code of Professional Responsibility, which the ABA completed in 1969; it “captured or influenced understandings that continued at least through the early 1970s.”⁴¹ For its part, the Model Code required simply that in the “representation of a client, a lawyer shall not . . . [c]ounsel or assist [a] client in conduct that the lawyer knows to be illegal or fraudulent.”⁴²

Many perceive that the legal profession and its norms no longer adhere to Fuller's understanding and that lawyers' paramount value has become helping clients achieve their goals.⁴³ That is in part because of the limited ambition of the current professional conduct rules addressing clients' and lawyers' misconduct.

To begin with, the rules are highly selective regarding the laws to which lawyers and their clients should adhere. It is not evident, for example, that either the tax code or the NCAA rules would be the sort of law to which lawyers are now expected to be faithful.⁴⁴ There may

40. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

41. Bruce A. Green & Russell G. Pearce, “Public Service Must Begin at Home”: *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1208 (2009).

42. MODEL CODE OF PRO. RESP. DR 7-102 (AM. BAR ASS'N 1980).

43. See, e.g., Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RESRV. L. REV. 85, 96 (2010) (“[A]n agency or client-autonomy vision characterizes much of the law governing lawyers. The client controls the goals of the representation, and the attorney owes duties of loyalty and care in fulfilling those goals.”).

44. The Model Rule drafters explained that the word “illegal” encompassed an area of “conduct that was neither criminal nor fraudulent,” and that “the ‘precise contours’ of this area are unclear.” Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A “Philosophically Informed” and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RESRV. L. REV. 177, 227 n.235 (1985).

have been some ambiguity about the meaning of “illegal” and therefore some area of uncertainty about the nature of law to which lawyers and their clients were expected to conform when the ABA adopted the Model Code more than a half century ago,⁴⁵ but the concept was a relatively broad one.⁴⁶ It would certainly have included the tax code and possibly the NCAA rules. That changed in 1983 when the ABA adopted the Model Rules of Professional Conduct, which replaced “illegal” with “criminal.” Model Rule 1.2(d) provides, in pertinent part: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is *criminal or fraudulent*.”⁴⁷ While *Upjohn* assumed that corporate lawyers would encourage regulatory compliance, lawyers might take the ABA’s rule change as a signal that they can assist their clients in violating regulatory provisions as long as the clients are not thereby committing crimes or fraud.⁴⁸

45. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 694 (1986). According to Professor Wolfram’s 1986 treatise, “[s]ome older cases have disciplined lawyers for advising clients to commit intentional torts or to breach contracts,” but there was “little case authority firmly establishing the definitional limits of the quoted term.” *Id.* at 703–04. The contemporary understanding is that a breach of contract is not “illegal” conduct. See, e.g., *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985) (declining to award punitive damages for breach of contract, in part, based on scholarly assertion that “breaches of contract that are in fact efficient and wealth-enhancing should be encouraged”); see also *Paoella v. Browning-Ferris, Inc.*, 973 F. Supp. 508, 515 (E.D. Pa. 1997) (“[A] breach of contract is not an illegal act.”) (citing *Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 664 (3d Cir. 1993)).

46. For example, in *In re Anonymous*, 274 A.D. 89, 80 N.Y.S.2d 75, 76 (App. Div. 1948), the court relied on this canon in concluding that a lawyer may not assist a New York domiciliary in obtaining a “Mexican ‘mail order’ divorce” in violation of “the law, procedure and public policy of” New York. It explained that: “[i]t should be unnecessary for the courts to have to expressly advise attorneys that their conduct is to be performed within the law and not in an attempt to flout it.” *Id.*

47. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 1983) (emphasis added). The change created an ambiguity in the Model Rules, because a different rule requires a lawyer to decline or terminate representation if it “will result in violation of the rules of professional conduct or other law.” *Id.* r. 1.16(a)(1); see Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 312 (2018) (“[T]he ABA, through its rule about assisting clients with misconduct, and the states that have chosen to adopt that rule, empower lawyers to participate in a defined, but not necessarily very limited, universe of unlawful conduct—any illegality that does not qualify as a crime or a fraud.”); see also Bruce A. Green, *May Lawyers Assist Clients in Some Unlawful Conduct?: A Response to Paul Tremblay*, 70 FLA. L. REV. F. 1 (2018) (suggesting that notwithstanding the language of Rule 1.2(d), courts have latitude to sanction lawyers for assisting clients’ conduct that is illegal but not criminal or fraudulent).

48. As I have previously written:

Nothing in the Model Rules encourages lawyers to refrain from assisting clients engaged in morally reprehensible conduct or exhorts lawyers to discourage clients from engaging in harmful or antisocial behavior. Further, nothing encourages lawyers to dissociate themselves from client conduct that is *potentially* criminal or that is merely *suspected* of being criminal. Lawyers may easily get the message that it is not only perfectly permissible from a disciplinary perspective, but perfectly acceptable from a normative perspective for lawyers to assist clients in conduct that is immoral, antisocial, or legally questionable.

Moreover, many lawyers have no qualms about assisting conduct of “doubtful legality,” even if the doubts are extreme. For example, even if a lawyer knew that the IRS would almost certainly disallow a tax deduction for a contribution to an NIL collective, and a court would uphold it in doing so, the lawyer might employ some barely nonfrivolous legal rationale to justify assisting an NIL collective in soliciting tax-deductible contributions. The professional conduct rules might be thought to authorize assisting clients in this way insofar as they forbid legal assistance only when the lawyer *knows* that the client’s conduct is criminal or fraudulent. Uncertainty may include not only uncertainty about the facts but also uncertainty about the law, and that encourages lawyers, who are well-versed in raising questions about the meaning of laws, to identify legal uncertainty.⁴⁹

It seems unlikely that the knowledge requirement was originally meant to invite lawyers to interpret laws creatively to enable clients to justify embarking on an illegal or legally doubtful course of conduct. Rather, this limitation on the rule’s reach was likely meant to give lawyers some breathing room when they are genuinely unsure about the propriety of their clients’ conduct and to enable clients to secure legal assistance in areas of genuine legal uncertainty. Over time, transactional lawyers advising their clients about future conduct have engaged in precisely the fallacy against which the 1958 report warned—that is, they have taken the advocacy norms, which permit making barely nonfrivolous arguments to defend past conduct in court, and incorporated those norms into the counseling function.⁵⁰ An infamous example of legal advice based on implausible legal reasoning is the so-called “torture memos,” in which Department of Justice lawyers legitimated the torture of foreign detainees during the George W. Bush administration.⁵¹

Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 DEPAUL L. REV. 407, 420 (2001).

49. ABA Model Rule 1.13(b) sometimes requires an organization’s lawyer to go “up the ladder” when an entity’s representative intends to engage in “a violation of law that reasonably might be imputed to the organization,” but, like Rule 1.2(d), the requirement also has a knowledge requirement. MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR ASS’N 2023). Further, the requirement to “refer the matter to higher authority in the organization” is triggered only if the intended violation “is likely to result in substantial injury to the organization.” *Id.* In the case of an NIL collective, it seems unlikely that the provision would be triggered by a plan to circumvent the tax law or NCAA rules and, in any event, the lawyer may already be interacting with the collective’s highest authority.

50. See Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. STATE U. L. REV. 251, 258 (2011) (“[T]he qualities of zealous advocacy—a representation by a nonjudgmental lawyer who pursues the client’s goals within the arguable bounds of the law—are incompatible with the needs of business clients seeking advice about future conduct.”).

51. See, e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347 (2007);

This sort of exercise is easy for lawyers, who are trained to see legal ambiguity, if they are willing to suspend judgment about what is a good vs. bad legal argument or interpretation rather than endeavoring to view the law objectively.

Further, although lawyers are not supposed to advise their clients how to get away with breaking the law, the rules provide an opening to do so because they permit lawyers to “discuss the legal consequences of any proposed course of conduct with a client.”⁵² Lawyers’ advice about “legal consequences” may influence clients such as NIL collectives to engage in legally questionable behavior if the law is unlikely to be enforced or if the enforcement consequences would be tolerable. Although the NCAA takes responsibility for enforcing its NIL rules,⁵³ it initially launched few publicly reported investigations and imposed only one public sanction in the first few years.⁵⁴ In other contexts, the lack of enforcement may be a sign that the law “in action” countenances conduct that transgresses the law “on the books,” such as when drivers go only a few miles over the speed limit.⁵⁵ But it would be hard to say that the NCAA was implicitly authorizing collectives to funnel money to student-athletes for doing virtually nothing. The enforcement efforts were just getting off the ground, and the NCAA may have lacked resources to pursue the many collectives that were proceeding in parallel fashion. Even so, in these circumstances, a lawyer’s advice might help a collective conclude that testing the limits or lawfulness of the rules, or

Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 112, 114 (2011) (arguing “the professional responsibility rules do not, in fact, permit the kind of one-sided legal advice that was a hallmark of the Torture Memos” because “Rule 2.1 . . . requires attorneys to inform their clients of differing views of the law”); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563 (2007); Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 336 (2009) (employing John Yoo’s production of the “torture memos” as a vehicle for considering “whether lawyers should offer legal advice that clients request—and will pay for—even when giving that advice might encourage wrongful behavior”).

52. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 2023).

53. See NAT’L COLLEGIATE ATHLETIC ASS’N, STANDARD OF REVIEW FOR VIOLATIONS RELATED TO NAME, IMAGE AND LIKENESS ACTIVITIES (2022), https://images.saymedia-content.com/image/cs_srgb/MTk1NTM0MTQ3NTgwNjAxMzk1/standard-of-review-for-nil-activities-2.pdf [<https://perma.cc/5WRU-NZU7>].

54. See Meghan Durham, *Recruiting Violations Occurred in Miami (Florida) Women’s Basketball Program*, NAT’L COLLEGIATE ATHLETIC ASS’N (Feb. 24, 2023, 12:00 PM), <https://www.ncaa.org/news/2023/2/24/media-center-recruiting-violations-occurred-in-miami-florida-womens-basketball-program.aspx> [<https://perma.cc/72VP-92QC>]; NAT’L COLLEGIATE ATHLETIC ASS’N, NEGOTIATED RESOLUTION WITH THE UNIVERSITY OF MIAMI (FLORIDA), CASE No. 020161 (2023), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102996> [<https://perma.cc/244D-8ML9>].

55. See Green, *supra* note 31, at 1430 (“The law ‘in action’ is a product of more than what the statute says and what a court would say its written words mean. The ‘law,’ broadly speaking, is also, in part, a product of how it is enforced.”).

even blatantly transgressing them, is an economically rational decision: The likelihood of paying a price for an infraction, and the likely price to be paid, are so low that it would be perfectly reasonable to ignore the rules.

Against this background, one must conclude that it is not the rules of professional conduct that determine how sports lawyers counsel and assist boosters and NIL collectives about the relevant law. Like athletes and sports teams, who can choose whether to adopt the philosophy that “winning is everything” on one hand, or that “it’s how you play the game” on the other, lawyers can adopt their own philosophy of lawyering and then represent clients in light of that philosophy.⁵⁶ Sports lawyers can decline to represent NIL collectives altogether. Or they can serve as “citizen-lawyer[s]” or “wise counselor[s],” consistent with the early- and mid-twentieth century ideal, by encouraging clients not only to obey the law when it draws bright lines, but to stay far away from the lines when the law is uncertain.⁵⁷ Or sports lawyers can simply pursue their clients’ objectives as long as the lawyers do not knowingly assist crimes or frauds.

IV. ADVISING NIL COLLECTIVES ABOUT “FAIR PLAY”

Lawyers are not confined to advising clients about the law and its restrictions. In deciding what course to pursue, clients presumably care about more than simply whether their conduct would break the law or put them at legal risk. The professional conduct rules state explicitly that in counseling clients, lawyers *may* refer not only to the law “but to other considerations . . . that may be relevant to the client’s situation,” including “moral, economic, social and political factors.”⁵⁸ And lawyers often *should* do so: A comment to the rules recognizes that while experienced clients sometimes want only “technical legal advice,” most of the time “[a]dvice couched in narrow legal terms” can “be inadequate.”⁵⁹

56. Tremblay, *supra* note 47, at 312–13 (“Lawyers who choose to participate in clients’ unlawful activity, taking advantage of the state’s license to do so, ought to be judged by their peers, and the rest of the relevant community, by the nature of the harm that participation produces and its effect on the justice of the resulting action. That license to collaborate with client unlawfulness is not a license to evade moral responsibility for the acts of their clients.”).

57. See Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1174 (2009) (“In advising clients outside litigation, the citizen lawyer is the ‘wise counselor,’ who sees her job as guiding the client to comply with the underlying spirit or purpose as well as the letter of laws and regulations to desist from unlawful conduct, and if needed, to do so with strong advice backed by the threat of withdrawal, and in extreme cases, of disclosure.”); see also Geoffrey C. Hazard, Jr., *Lawyer as Wise Counselor*, 49 LOY. L. REV. 215 (2003).

58. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 2023).

59. *Id.* r. 2.1 cmt. 2. In some cases, the failure to raise important nonlegal considerations may constitute incompetent advice. See *id.* r. 1.1, 1.4(b); see also Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients*

That is because clients have relevant interests other than legal interests and because lawyers can help clients identify and consider their other interests when making law-related decisions. That will seem obvious to some lawyers. Estate planning lawyers and family lawyers help clients figure out what they want to do in light of the clients' values. For a corporation's general counsel, there may be no line between legal advice and business advice: the lawyer participates fully with other corporate representatives in discussing whether to do a deal or to undertake some other course of conduct, chiming in on relevant business considerations, reputational considerations, and other considerations in addition to legal ones. But even if a particular client would settle for a legal technician and seek nonlegal advice elsewhere or not at all, lawyers have license to broaden the conversation. The premise is not that the lawyer is entitled to engage in self-expression, finding an outlet for the lawyer's own moral ideals and business preferences, but that the lawyer should help the client select a course of conduct that fully reflects the client's values and interests, not just what the law permits.⁶⁰

When a university's boosters ask a sports lawyer to establish a not-for-profit organization to provide financial opportunities for the school's athletes to profit from their name, image and likeness, the boosters may expect the lawyer simply to serve as a legal technician, drafting the legal documents necessary to form and operate the entity as contemplated within the clear bounds of the law. But the lawyer should not stop there if there are nonlegal considerations that the collective's representatives have not fully considered and that might influence whether they establish and operate the collective as initially contemplated. In particular, as a not-for-profit organization, the collective is created and obligated to serve the public good, and so a lawyer should raise questions that the collective may not have fully considered about whether the proposed conduct serves the public or, on the contrary, is antisocial or immoral.

Consider the obvious scenario where a well-financed NIL collective, having collected money from well-heeled donors, contemplates using football or basketball players' endorsements that have negligible value to justify providing tens or hundreds of thousands of dollars to these college athletes, with the obvious purpose of luring top athletes to a school's teams. Aside from possible legal questions, this raises

on *Nonlegal Considerations*, 18 *GEO. J. LEGAL ETHICS* 365, 419–20 (2005) (“[A]ttorneys may be ethically obligated at times either to advise clients on the nonlegal issues that relate to the legal issues in the representation or, at a minimum, to raise the nonlegal issues with their clients . . .”).

60. The extent to which lawyers may bring their own values into the conversation is a more debatable question. See, e.g., Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *GEO. J. LEGAL ETHICS* 19, 49–51 (1997) (asserting that there are limits on the propriety of interjecting the lawyer's personal values in counseling the client); Mitchell M. Simon, *Navigating Troubled Waters: Dealing with Personal Values When Representing Others*, 43 *BRANDEIS L.J.* 415 (2005); Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 *U. S.F. L. REV.* 659 (2002).

a question of whether the boosters would be doing what is right by their own lights. This is unlike the more familiar situations where lawyers might raise questions of morality, such as when a client invokes the statute of limitations to avoid paying a fair debt,⁶¹ thereby renegeing on a promise and hurting another undeservedly.⁶² In contrast, the NIL collective's representatives may think they are doing a good turn for both the school and its athletes: no one is hurt, many benefit. There is nothing inherently bad about putting money in students' pockets. Aside from possible violations of the NCAA rules or the purposes underlying them, there might be no questions to raise.

Precisely because the NCAA rules on amateur athletics are implicated, however, there is a moral consideration here—namely, the idea of “fair play.” This concept should be familiar to participants in college sports programs since the ethical principle was first developed in the context of amateur sports, where fair play includes following the formal rules and conforming to informal norms about how the game is to be played.⁶³ From little league on, those who work with young athletes teach them to be good sports, which includes playing fair. The idea of sportsmanship contrasts with the “win at all costs” ethos, which is more prevalent in professional sports where the rewards for winning are tangible and financial.

The idea of “fair play”—of sportsmanship as distinguished from gamesmanship—has carried over from sports into other areas of social engagement. Some political philosophers say that voluntary members of a community who accept the community's benefits have a reciprocal obligation of “fair play”—roughly speaking, an obligation to play by the community's rules and norms.⁶⁴ The organized bar assumes that members of the legal profession should also play fair and that laws and professional conduct rules, some of which embody the idea of “fair play,”

61. Stephen Pepper uses this example, among others, to illustrate the gap between law and justice. Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 189 (1999).

62. See, e.g., Robert Granfield & Thomas Koenig, “*It's Hard to Be a Human Being and a Lawyer*”: *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 496–97 (2003) (giving the example of a lawyer who elicited an admission from a disabled woman that led to the denial of her products liability claim, to illustrate that it is hard to “[r]emain[] a moral human being while simultaneously upholding the ethical obligations associated with the legal profession”).

63. For discussions of “fair play” in the sports context, see Oliver Leaman, *Cheating and Fair Play in Sport*, in *ETHICS IN SPORT* 201, 201–07 (William J. Morgan ed., 2d ed. 2007); ROBERT L. SIMON ET AL., *FAIR PLAY: THE ETHICS IN SPORT* 59–79 (4th ed. 2015).

64. See, e.g., John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 3–18 (Sidney Hook ed., 1964) (expanding on ideas in H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955) (“[W]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.”)); A John Simmons, *The Principle of Fair Play*, 8 *PHIL. & PUB. AFFS.* 307 (1979).

are not the outer limit: Professionalism statements encourage lawyers to engage in “fair play” wholly apart from enforceable rules.⁶⁵

Sports lawyers might ask their clients whether it would be unfair to operate the NIL collective as contemplated. Suppose the school’s athletes were to be paid to engage in charitable fundraising that brings in no donations or for endorsements that attract no customers so that the payments would plainly be pretextual, not genuine NIL compensation. In disguising compensation as NIL payments, would the collective be gaming the system because it would be helping a school to violate recruitment rules that the NCAA lacks the will or capacity to enforce or because it would be thwarting the NCAA rules’ purpose, which is to restrain schools from financially compensating college athletes in this manner? Alternatively, might the clients perceive that there are countervailing moral imperatives in that college athletes are being exploited when schools strictly adhere to the NCAA’s anticompetitive rules?

Lawyers and legal academics with a philosophical bent might analyze these questions and draw their own conclusions, but in the context of legal representation, these questions are not for them. These would be questions for the clients to decide in light of their own values—their own sense of whether fair play is important and what it means—or in light of ordinary societal understandings of fair play, assuming the clients feel a sense of obligation to comply with ordinary understandings. That is because the reason for inviting the client to consider the proposed conduct’s fairness is not to influence the client to conform to the lawyer’s values or the legal profession’s values but to enable the client to make a fully considered decision in light of the client’s own priorities. It would promote an informed decision to educate the client about common civic and moral understandings, such as the idea of fair play. While relevant civic or moral values may be incorporated (if incompletely) in the law,⁶⁶ they often will not be, as is true here. Lawyers cannot be expected to be moral or political philosophers, but they should be no less capable of identifying and articulating the relevant civic and moral considerations than of identifying and explicating relevant law.

Even if those who run an NIL collective are unmoved by the principle of fair play, there may be related questions. One question is whether the university’s mission will be undermined in ill-considered and collateral

65. See, e.g., *In re Code for Resolving Professionalism Referrals & Amends. to Rule Regulating the Fla. Bar 6-10.3*, 367 So. 3d 1184, 1196 (Fla. 2023) (per curiam) (“Courtesy, cooperation, integrity, fair play, and abiding by a sense of honor are paramount for preserving the integrity of the profession and to ensuring fair, efficient, and effective administration of justice for the public.”).

66. See generally W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS L.J. 497, 500 (2011) (“[T]he ethical practice of law should be understood as an engagement with ethical and policy issues using a distinctive style of reasoning . . . different from reasoning directly about ethics, as one might learn in a class on moral philosophy.”).

ways, since the boosters presumably care not only about the success of the university's sports teams but more broadly about the success of the university, another not-for-profit institution (and, in some cases, a public institution) established to serve the public good. For example, the university may be seeking to inculcate civic and ethical values in its students, including a sense of fair play. To do so, the school may try to be an ethical exemplar and may hope that its boosters will too. The collective's conduct may undermine the school's mission and its self-identity if the school tolerates and benefits from its supporters' blatant indifference to the NCAA rules. Even if the boosters think that skirting or thwarting the NCAA rules is consistent with the school's own values and with the values it seeks to transmit, there is a question of how others will see this conduct. Will students' enthusiasm for the school's sports program diminish because of how the sports teams were assembled? Victory in college sports may be less sweet when a school's players are essentially professionals. Will the school's reputation in the community take a hit? Even if so, are these problems tolerable given the ways in which the school will benefit, including financially and reputationally, from successful sports teams? And leaving aside the benefit to a school's sports teams, will flouting NCAA rules benefit college athletes, enabling them to profit more fairly from their labor while signaling that the school gives priority to its students' wellbeing? A college's lawyer giving advice about how to interact with an NIL collective might pose similar questions.

What may serve as an adequate legal justification for the NIL collective's conduct may seem unpersuasive as a matter of garden-variety ethics or civic obligation. For example, one can argue that universities and their sports programs have no legal obligation to comply with NCAA rules, which are rules of a private organization to which schools voluntarily belong. Compliance is a matter of contract—of agreement—not a legal obligation. Parties may breach contracts with the possibility of paying contract damages, and lawyers may help them do so.⁶⁷ But this sounds tone deaf when the question is not whether a school is acting lawfully, but whether it is acting ethically. By joining the Association, schools agree to play by its rules; by breaking the rules while continuing to benefit from NCAA membership, schools break their promise and violate a reciprocal obligation; if the violation is surreptitious, they act misleadingly as well. Even if this is generally true, however, might one justify rule-breaking when the rules themselves seem unfair and are of questionable legality, as here, and especially at the point where it appears that many other members of the Association are ignoring the rules, thereby seeking an unfair advantage in sports competitions? The example set by a school's sports program and its boosters, for better or worse, might serve as a model for students thinking about how to regard the school's rules as well as how to regard rules and laws after graduation.

67. See *supra* note 44.

Even if one concedes that NCAA members must abide by its rules, not only because they agreed to do so, but because they benefit from membership, one might argue that the NIL collectives need not do so because (1) they are not NCAA members and (2) the universities themselves are not doling out money to their athletes but are simply passive beneficiaries of the collectives' efforts. This may or may not be persuasive as an ethics or civics matter (as distinguished from a legal matter). The universities are not just incidental beneficiaries of the collectives' largesse to its college athletes; the collectives' precise purpose is to recruit students for the school's sports team by doling out money, which the schools may not do themselves. The collective acts in the interest of the school, and the school knows how the collective is operating and accepts the benefits of the collective's efforts rather than asking the collective to close shop. One might perceive that as a practical matter, the collective is an extension of the school. Whether or not the school is violating NCAA rules, the collective is teaming up with the school as its silent partner to do precisely what the rule forbids.

Discussions of right and wrong, as distinct from legal and illegal, may be hard for lawyers to initiate.⁶⁸ Clients may not be receptive to questions that imply doubts about the morality of their conduct. Lawyers, who are not moral or political philosophers, may feel uncomfortable discussing questions of civics or ethics about which they may not have well-developed, articulable views. The sports lawyer may have no personal qualms about the not-for-profit entity's contemplated conduct and for that reason may be untroubled by assisting NIL collectives' proposed conduct.⁶⁹ Other schools' boosters have established collectives that are already doing what the client contemplates, suggesting that the relevant idea of fair play is not universally accepted and certainly not uniformly conformed to.⁷⁰ But the lawyer should still raise questions about relevant nonlegal considerations that may matter to the particular client's decision if no one else has posed these questions to prompt the client to make fully considered decisions.

V. LAW SCHOOLS' ROLE IN SHAPING FUTURE LAWYERS' PROFESSIONAL IDENTITY

ABA-accredited law schools must give their students opportunities for "[t]he development of a professional identity," involving, among other things, "an intentional exploration of the values [and] guiding

68. See Pepper, *supra* note 61, at 193–94.

69. The choice of one's clientele has an ethical dimension and lawyers will presumably choose their areas of practice or clients based on the lawyers' ethical predispositions. See generally Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829 (2001).

70. In this respect, the collectives' recruitment practices create a collective action problem.

principles . . . considered foundational to successful legal practice.”⁷¹ The accreditation standard was a response, in part, to an influential 2007 report known as the Carnegie Report,⁷² which criticized contemporary legal education, concluding that law schools were failing in their responsibility to inculcate “the identity, values and dispositions consonant with the fundamental purposes of the legal profession.”⁷³ Both the Carnegie Report and the accreditation standard seem to assume that the profession has a fixed set of professional values and guiding principles.⁷⁴

These two writings have precipitated ever-increasing legal scholarship on how law schools should develop future lawyers’ professional identity.⁷⁵ The writings reflect many different understandings and approaches.⁷⁶ There is no settled understanding of the professional values to be inculcated.

Could there be? As the NIL collective case study illustrates, it may not be possible to identify a universally accepted set of professional understandings that would meaningfully guide lawyers’ work. Many might agree that lawyers owe fidelity to the law, but they probably would not agree on which law and what fidelity means. Some might say that lawyers should be faithful only to the law of crimes and fraud; others might

71. See *supra* note 30.

72. See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS (2007).

73. *Id.* at 8.

74. The ABA appears to regard lawyers’ professional identity as the product of a set of values that is shared among all lawyers while distinguishing them from members of other professions and from nonprofessionals rather than as a product of distinctive traits that may distinguish individual lawyers or groups of lawyers from each other. The implication that all lawyers share a “professional identity,” predicated on common values, reflects a contestable understanding of the concept of professional identity and a questionable view of the legal profession’s members. There are surely different “professional identities” among different subsets of lawyers—prosecutors as compared with criminal defense lawyers, for example. One reason for this is that lawyers may come to identify with their clients and to sympathize with their clients’ values. See Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 47 (2009) (speculating that “lawyers’ partisan affiliation with their client” may blind them to red flags). Individual members of the legal profession may assume or cultivate distinctive professional identities as well. See Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 941 (2006) (“All lawyers establish a brand—a distinctive professional identity.”).

75. Recent academic writings on forming law students’ professional identity include: R. Lisle Baker & Peter Scott Campbell, *Louis D. Brandeis and the Formation of a Positive Professional Identity*, 56 SUFFOLK U. L. REV. 275 (2023); Megan Bess, *Transitions Unexplored: A Proposal for Professional Identity Formation Following the First Year*, 29 CLINICAL L. REV. 1, 1 (2022); Kristen Uhl Hulse, *The Foundations for (Private) Practice: Building Professional Identity Through Law Firm Externships*, 89 UMKC L. REV. 583 (2021); Leah Teague, *Growing Number of Leadership Programs and Courses Supports Professional Identity Formation*, 62 SANTA CLARA L. REV. 149 (2022).

76. See, e.g., Harmony Decosimo, *A Taxonomy of Professional Identity Formation*, 67 ST. LOUIS U. L.J. 1, 2 (2022) (“[P]rofessional identity formation’ is an infinitely open-ended concept, being pioneered and defined simultaneously by a diverse array of stakeholders with a variety of goals that range from the mundane to the controversial.”).

add regulatory law or all law; and others might add the rules of private associations to which clients belong. Some might say that lawyers should simply avoid *knowingly* assisting clients' lawbreaking; others might say that lawyers should be vigilant to detect and prevent clients' lawbreaking or encourage clients to avoid legally questionable conduct and to act consistently with the law's purpose or spirit.

While the legal profession's enforceable rules are in writing and have been interpreted by courts and bar associations, its values and guiding principles are not fully articulated by official bodies. Even if one thinks that the values and principles that apply to any given situation can be identified, their scope and application may be contested, and different values may come into conflict.

For example, consider the following two sets of professional values or principles that might seem applicable to counseling a not-for-profit entity, such as an NIL collective, about its future operations. They address the two problems previously explored—the meaning and implications of lawyers' obligation of fidelity to the law, and the implementation of lawyers' authority and occasional obligation to counsel clients about nonlegal, including civic and moral, considerations.

First, lawyers should make conscientious efforts to persuade clients to obey the law, including regulatory law and rules of voluntary associations with which the clients have agreed to comply. This undertaking is more demanding than the requirements of professional conduct rules. It means that lawyers should attempt to learn the facts relevant to whether the client's proposed conduct is lawful rather than ignoring doubts;⁷⁷ that lawyers should make objective determinations regarding the meaning and application of the law using conventional principles of interpretation (e.g., those that judges use), including any reasonable alternative interpretations;⁷⁸ and that if the client's proposed conduct will violate the law, the lawyer should emphatically and sincerely urge the client to comply, employing whatever suasion is available to the lawyer, including a threat to withdraw from the representation. Of course, at times the law may be uncertain in meaning, and the lawyer can identify a reasonable reading that is consistent with the client's objectives, but not always.

Second, lawyers should encourage clients to be good members of society. This means that even if the client's proposed conduct would be lawful, the lawyer should discourage conduct that would contravene ordinary societal notions of ethical or civic conduct or the client's own ethical and civic commitments. If the client's conduct is questionable,

77. Cf. MODEL RULES OF PRO. CONDUCT r. 1.16(a) (AM. BAR ASS'N 2023) ("A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.").

78. See W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 107, 109 (2019) (discussing importance of interpreting the law as relevant to a client's situation).

this would require, at the very least, initiating a conversation about whether the proposed conduct would be unfair, wrongful, or antisocial. This would enable the client to make a well-considered decision.

Law students, law schools, or lawyers might wholly reject these as principles of the legal profession and offer alternatives, or they might offer refinements and qualifications. These proffered principles might seem less intuitive when applied to lawyers counseling other types of not-for-profit entities, such as environmental, civil rights, or animal rights organizations. For that matter, the case study of NIL collectives implicates the conduct of two other sorts of not-for-profit organizations—the NCAA, which is a voluntary association, and the schools that belong to it. One might consider how a lawyer should counsel the NCAA about whether to continue to restrict its member schools from making direct payments to college athletes against the background of antitrust and labor laws that call NCAA rules into question. One might similarly consider how a lawyer should counsel a school with a lucrative sports program about whether to exploit or discourage its boosters' actions.

Is it feasible to expect law schools to take some position on the relevant professional values and guiding principles or even for them to identify a range of acceptable alternatives, except perhaps at a level of generality?⁷⁹ If so, is it feasible for law schools to then take a position on how these values and guidelines apply to a scenario like that of counseling an NIL collective? Can one expect law students, who have minimal legal experience, to be able to independently identify and apply relevant professional values and guiding principles? An alternative is to acknowledge that lawyers have different professional identities, which are influenced by lawyers' differing conceptions of the legal profession's values as well as by the different settings in which lawyers work, and that law school is simply the start of the process by which law students develop their own professional identities.⁸⁰

VI. CONCLUSION

Whatever law applies to clients' proposed conduct is likely to be binding and is often relatively determinate, using conventional methods

79. See Tremblay, *supra* note 60, at 661 (“[T]here may be ways, at least pragmatic ways, to talk and teach about values and virtues with lawyers and law students. . . . There is much to be gained by a search for common, shared norms, and for ‘paradigm cases’ representing agreed-upon sentiments about how moral issues ought to be resolved, as a basis for reasoned conversation about more complex moral dilemmas and conflicts.”).

80. See, e.g., Paul R. Tremblay & Judith A. McMorrow, *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS L.J. 568, 569 (2011) (“We begin with the premise that the professional identity of lawyers and the values those lawyers embrace *matter*, and matter deeply. At the same time, that professional identity and those values are constantly being shaped and formed, at both a conscious and unconscious level, by the norms that arise from practice settings, the surrounding culture, and the structural systems in which the lawyers work.”).

of legal interpretation. For lawyers, the binding and often relatively determinate law includes the professional conduct rules. But the same cannot be said of societal or professional "values."

Consequently, college boosters can take different views of whether it would be immoral, antisocial, or otherwise contrary to their values to establish a not-for-profit entity to enable alumni to funnel tax-deductible contributions to college athletes. Because of the indeterminacy of societal values, as distinguished from laws, it was all but inevitable that even if some college sports fans might have qualms about establishing an NIL collective to circumvent NCAA rules, some would not: Colleges have many well-heeled boosters with a range of moral and civic views. Some college sports fans would see nothing wrong with exploiting the opportunity offered by state NIL laws and NCAA policy to help their favorite teams recruit and retain top players.

Those taking a dim view of the rise of NIL collectives might ask, "Where were the lawyers?" But the answer was unsurprisingly, "At the ready." Because of the indeterminacy of professional values as distinguished from professional conduct rules, sports lawyers advising boosters who formed and ran an NIL collective might take different views of whether to prompt the client's representatives to consider the rightness or fairness of the enterprise and, if so, how to steer the conversation. Some sports lawyers would have no interest in initiating this conversation. Perhaps lawyers enter this area of practice thinking that clients' morality is none of their business, or perhaps their colleagues socialize them to think that. Likewise, sports lawyers would differ in their view of the NIL collectives' conduct and in their willingness to assist clients whose conduct they personally disapprove. It was inevitable that some lawyers would serve these clients as long as the clients were not committing a crime or fraud. As it turned out, law firms competed for the chance to do so.

If nothing else, this discussion suggests the challenge facing law schools in developing students' professional identity, and particularly in encouraging "an intentional exploration of" the legal profession's "values [and] guiding principles," as contemplated by the new ABA accreditation standard.⁸¹ The ABA seems to assume that there is an authoritative, comprehensive set of values equivalent to the legally enforceable rules of professional conduct, but if so, the ABA has not listed them. In theory, law schools could themselves ascertain the relevant professional values and their impact on lawyers' work. But it would be hard for any institution to reach agreement on a set of professional values and their significance, which may be why the ABA itself has not undertaken this task. And if the organized bar and law schools cannot do this work, it is unrealistic to think that law students can. In any event, if there is a set of broadly accepted professional values that

81. *See supra* note 30.

shape lawyers' collective identity, they are only a small subset of the values that shape individual lawyers' professional identity, influencing how they conduct their work.

It is good to ask students to imagine themselves in situations implicating professional values and to consider how they would behave. It is unrealistic, however, to think that, in situations of any complexity, there will be an agreed-on set of professional values and guiding principles leading to a single right course of professional conduct, much less that law schools can identify them or that law students could intuit them. Just as sports lawyers' clients may have to decide for themselves—albeit with lawyers' prompting—whether they want to be a good sport who plays fair and what that means, lawyers may have to decide for themselves what it means to be a good lawyer and whether that is what they want to be.

