Ethics: Considerations in Representing Talent

October 12, 2019 | 8:00 am – 9:30 am

Program Description

Representing athletes and entertainers presents a unique set of ethical considerations that must to be taken into consideration by practitioners. This panel will explore the ethical considerations and dilemmas that may arise. It will also take a look at the differences in representing entertainers and athletes and how those differences might impact ethical considerations.

Lead Facilitator

David Lisko, Associate, Holland & Knight, Tampa, FL

Speakers

- Christian Dennie, Partner, Barlow Garsek & Simon & General Counsel, RG Sports, Fort Worth, TX
- Chris Vlahos, Partner, Ritholz Levy Fields, Nashville, TN
- Layth Gafoor, Lucentem Sports & Entertainment Law, Toronto, Canada

Program Materials

1. Ethics: Considerations in Representing Talent
Welcome to the...

ABA Forum on the Entertainment and Sports Industries 41st Annual Conference: “Ethics: Considerations in Representing Talent”

*Saturday October 12, 2019*

*8:00 a.m. – 9:30 a.m.*
“Ethics: Consideration in Representing Talent”

Panelists:

• *Christian Dennie*, Partner, Barlow & Simon & General Counsel, RG Sports, Fort Worth, TX;

• *Chris Vlahos*, Partner, Ritholz Levy Fields, Nashville, TN;

• *Layth Gafoor*, Lucentem Sports & Entertainment Law, Toronto, Canada.

Moderator: *David Lisko*, Holland & Knight LLP, Tampa, FL.
 WHEN ARE YOU ACTING AS AN AGENT?

Definition of Agent: The NCAA Bylaws, Section 12.02.1 defines “agent” as any individual who, directly or indirectly: (a) represents or attempts to represent an individual for the purpose of marketing his or her athletics ability or reputation for financial gain; or (b) seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete’s enrollment at an educational institution or from a student-athlete’s potential earnings as a professional athlete. An agent may include, but is not limited to, a certified contract advisor, financial advisor, marketing representative, brand manager or anyone who is employed or associated with such persons.

The State of Florida defines “athlete agent” as a person who, directly or indirectly, recruits or solicits a student athlete to enter into an agent contract, or who, for any type of financial gain, procures, offers, promises, or attempts to obtain employment or promotional fees or benefits for a student athlete with a professional sports team or as a professional athlete, or with any promoter who markets or attempts to market the student athlete’s athletic ability or athletic reputation. This term includes all employees and other persons acting on behalf of an athlete agent who participate in the activities included under this subsection. Fla. Stat. 468.452(2).
When Are You Acting As An Attorney?

The Practice of Law: The “practice of law” is the representation of the interests of another person by informing, counseling, advising, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances. Rule 31(a)(1), Rules of Professional Practice. The “practice of law” means providing legal advice or services to or for another by: (A) Preparing any document in any medium intended to affect or secure legal rights for a specific person or entity; (B) Preparing or expressing legal opinions; (C) Representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitrations and mediations; (D) Preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or (E) Negotiating legal rights or responsibilities for a specific person or entity. Rule 31(a)(2), Rules of the Arizona Supreme Court.

“Unauthorized practice of law” includes but is not limited to: (A) Engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d); or -2- (B) Using the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “JD,” “Esq.,” or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state. Rule 31(a)(3), Rules of the Arizona Supreme Court.
Ethical Solicitation of Clients

Solicitation: Rule 7.3, ABA Model Rules of Professional Conduct (a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a: (1) lawyer; (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if: (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

Conferring Benefits (i.e. upfront investments in development): Rule 1.8, ABA Model Rules of Professional Conduct

(a) A lawyer shall not enter into a business transaction with a client.
IS THE USE OF RUNNERS ETHICAL?

Rule 7.2, ABA Model Rules of Professional Conduct (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
(3) pay for a law practice in accordance with Rule 1.17;
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if: (i) the reciprocal referral agreement is not exclusive; and (ii) the client is informed of the existence and nature of the agreement; and
(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.
The NCAA deems maintaining amateurism crucial to preserving an academic environment in which acquiring a quality education is the first priority for student-athletes. As a result, all incoming student-athletes must be certified as amateurs. The NCAA Eligibility Center will determine the amateur status of all freshman and transfer student-athletes for initial participation at NCAA Division I or II colleges or universities. In Division III, certification of an individual’s amateurism status is completed by each college or university, not the NCAA Eligibility Center. The following pre-NCAA enrollment activities may be reviewed:

1. Contracts with professional teams (a team is considered professional for a college-bound student-athlete if it declares itself to be professional or provides any player more than actual and necessary expenses for participation on the team);
2. Salary for participating in athletics;
3. Prize money;
4. Play with professionals;
5. Tryouts, practice or competition with a professional team;
6. Benefits from an agent or prospective agent;
7. Agreement to be represented by an agent;
AMATEURISM – ETHICAL INTERACTIONS WITH STUDENTS

8. Delayed initial full-time collegiate enrollment to participate in organized sports competition; and

9. Any financial assistance based on athletic skill or participation.

NCAA Bylaws, Section 12.1

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

(a) uses his or her athletic skill (directly or indirectly) for pay in any form in that sport;

(b) accepts a promise to pay even if such pay is to be received following completion of intercollegiate athletics participation;

(c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1;

(d) receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletic skill or participation, except as permitted by NCAA rules and regulations;

(e) competes on any professional athletics team per Bylaws, Section 12.02.11, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1;

(f) after initial full-time collegiate enrollment, enters into a professional draft; or
AMATEURISM – ETHICAL INTERACTIONS WITH STUDENTS

(g) Enters into an agreement with an agent.

NCAA Bylaws, Section 12.1.2.

Example State Law Governing Interactions With Student Athletes

The Florida Legislature has found that dishonest or unscrupulous practices by athlete agents who solicit representation of student athletes can cause significant harm to student athletes and the academic institution for which they play and have, as a result, regulated the activities of athlete agents. Fla. Stat. 468.451. Any person who acts as an athlete agent in the State of Florida must be licensed pursuant to Fla. Stat. 468.453. Pursuant to Fla. Stat. 468.456, the following acts are grounds for discipline: (c) any conduct as an athlete agent which demonstrates bad faith or dishonesty; (d) offering anything of value to any person to induce a student-athlete to enter into an agreement by which the agent will represent the student-athlete; (h) committing mismanagement or misconduct as an athlete agent which causes financial harm to a student-athlete or college or university; and (k) violating or aiding and abetting another person to violate the rules of the athletic conference or collegiate athletic association governing a student-athlete or student-athlete’s college or university. Fla. Stat. 468.451.
Amateurism – Ethical Interactions With Students

Example University Rules Governing Interactions With Student Athletes

The Ohio State University Policy For Athlete Agents

II. Agent Registration Process

A. Registration Application

i. Agents seeking to represent current Ohio State student-athletes in their future professional athletics endeavors must: 1. Complete, sign, and submit an Agent and Financial Advisor Registration Form with the Ohio State Office of Athletic Compliance (“Athletic Compliance”). 2. Provide the following documentation: a. A current headshot; b. A copy of the agent/advisor’s current, valid registration and/or certification with any professional athletics players’ association (e.g., NBPA, NFLPA, MLBPA); c. A copy of the agent’s registration with the Ohio Athletic Commission or acknowledgement of pending registration (athlete agents only); d. An up-to-date client list from the last three years, including contact information and years of representation; and e. A copy of initial correspondence sent to current Ohio State student-athletes.
The Ohio State University Policy For Athlete Agents

III. Agent Contact with Current Student-Athletes and Their Families
Ohio Revised Code §4771 and NCAA bylaws impose specific requirements for agents seeking to contact current student-athletes and their families. All agents must comply with the guidelines set forth below when contacting current student-athletes or their families. Failure to abide by these guidelines may lead to a suspension of the agent’s registration with Ohio State, registration with the State of Ohio, and certification with professional athletics players’ association, and may subject the agent to potential civil, criminal, and administrative liability.

i. Agents may not initiate in-person or any other contact (e.g., phone, text message, social media) with student-athletes or their families unless: 1. The agent’s registration has been approved by Athletic Compliance; 2. The agent makes Athletic Compliance aware of his/her attempt to communicate with the student-athlete prior to making contact; and 3. If written or electronic materials are provided (e.g., booklets, letters, emails), the agent must simultaneously submit an identical copy of the materials to Athletic Compliance.

ii. If a student-athlete or his or her family initiates an in-person or telephone contact with an agent, the agent may continue the contact but must inform Athletic Compliance within five business days.

iii. Agents must provide written notice to Athletic Compliance within five business days of signing a contract with an Ohio State student-athlete.

iv. Agents may have contact at any time with student-athletes who have exhausted their intercollegiate athletics eligibility or have officially professionalized (or their families). Certain Ohio State teams and coaches have imposed additional contact limitations. Agents that identify those sports on their registrations will be notified of additional sport-specific rules.
AMATEURISM – ETHICAL INTERACTIONS WITH STUDENTS

The Ohio State University Policy For Athlete Agents

IV. Agent Requirement to Preserve Student-Athlete Eligibility To preserve the intercollegiate eligibility and amateur status of the student-athlete, agents are prohibited from performing actions that violate NCAA bylaws and/or State of Ohio statutes. The following actions will immediately jeopardize a student-athlete’s eligibility:

i. Securing a written or verbal agreement with a current student-athlete or family member of a current student-athlete for future representation and marketing of the student-athlete’s athletics ability.

ii. Negotiating on behalf of a student-athlete with a professional sports team or business.

iii. Providing benefits to current student-athletes or their family or friends including but not limited to:
   1. Free or discounted transportation, including flights, car services, and use of a vehicle;
   2. Free or discounted meals or beverages;
   3. Free or discounted clothing and equipment;
   4. Free or discounted lodging, including payment for hotel rooms and use of a home;
   5. Free or discounted tickets to sporting/entertainment events, including VIP/backstage access;
   6. Gifts or gift cards;
   7. Free or discounted use of training facilities;
   8. Payment of living expenses (e.g., rent, car/insurance/cell phone payment, etc.); and
AMATEURISM – ETHICAL INTERACTIONS WITH STUDENTS

V. Agent Conduct Ohio State and its student-athletes expect that individuals serving as agents conduct themselves in a manner that will: i. Assure the most effective representation possible in individual contract negotiations; ii. Avoid any conflicts of interest which may potentially compromise the best interests of Ohio State student-athletes; and iii. Avoid any involvement of Ohio State student-athletes in actions that could jeopardize their eligibility under the NCAA bylaws. The only exception to this rule is where full disclosure of the potential consequences of loss of eligibility has been made to the student-athlete and the student-athlete has indicated to the Head Coach and the Director of Athletics that he or she fully comprehends such consequences. Therefore, an agent is required to: i. Disclose upon request all information relevant to his or her qualifications to serve as an agent, including educational background, special training, experience in negotiations, past representation of professional athletes and coaches, and relevant business association or memberships in professional organizations; ii. Maintain the highest degree of integrity and competence in individual negotiations with professional sports teams; iii. Become and remain sufficiently educated in the areas of professional sports structure and economics, applicable collective bargaining agreements and other governing documents, and basic negotiating techniques, and in developments in sports law and related subjects; iv. Fully disclose any and all relationships, including but not limited to financial or employment relationships with professional sports teams; v. Fully comply with applicable local, state, and federal laws; vi. Fully comply with applicable NCAA and Big Ten Conference bylaws; and vii. Fully comply with The Ohio State University Policy for Athlete Agents.
AMATEURISM – ETHICAL INTERACTIONS WITH STUDENTS

An agent should not: i. Hold or seek to hold, either directly or indirectly, a financial interest in or a position of employment with any professional team or organization in which he or she is seeking to represent Ohio State student-athletes; ii. Engage in any other activity that creates an actual or potential conflict of interest for the effective representation of Ohio State student-athletes; iii. Conceal material facts from a student-athlete which relate to the subject of the individual negotiations in question; iv. Engage in unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other conduct which reflects adversely on his or her fitness as an athlete agent or jeopardizes the effective representation of Ohio State student-athletes; v. Provide or offer to provide any incentive (including a meal or any other extra benefit) to an Ohio State student-athlete in order to become the agent for such student-athlete; vi. Provide or offer anything of value to any other person in return for a personal recommendation of the agent’s selection by an Ohio State student-athlete; vii. Provide false or misleading information, including but not limited to information regarding continuing eligibility to participate in intercollegiate athletics (under NCAA or Big Ten Conference bylaws), to any person in the context of solicitation for selection as the agent for any Ohio State student-athlete; or viii. Use titles or business names which imply the existence of professional credentials which he or she does not actually possess.
Conflicts of Interest

Multiple Clients Seeking Similar Benefits (multiple actors); Clients At Different Levels (producers, directors, and actors)

Rule 1.7, ABA Model Rules of Professional Conduct (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal;

(4) each affected client gives informed consent, confirmed in writing.
Conflicts of Interest – Ethical Reductions In Rates

Ex: Reducing a coach’s rate because you expect him/her to refer student athletes?

Rule 4-1.7(b), Florida Rules of Professional Conduct A lawyer shall not represent a client if the lawyer’s exercise of independent judgment in the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person or by the lawyer’s own interest;

Rule 4-7.4(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain; and

Rule 4-8.4(c) A lawyer shall not engage in conduct involving dishonestly, fraud, deceit, or misrepresentation.

Prohibited Acts.- (1) The following acts shall be grounds for the disciplinary actions provided for in subsection (3): (e) Accepting as a client a student athlete referred by and in exchange for any consideration made to an employee of or a coach for a college or university located in this state; and (f) Offering anything of value to any person to induce a student athlete to enter into an agreement by which the agent will represent the student athlete. Florida Statute § 468.546(1)(e)
Duties Beyond The Practice of Law

Ex: NFLPA Regulations Governing Contract Advisors, Section 3: Standard of Conduct For Contract Advisors. A. General Requirements

A Contract Advisor shall be required to:

(7) Advise the affected player and report to the NFLPA any known violations by an NFL Club of a player’s individual contract or of his rights under any applicable Collective Bargaining Agreement;

(17) Act at all times in a fiduciary capacity on behalf of players; and

(20) Educate player-clients as to their benefits, rights and obligations pursuant to the Collective Bargaining Agreement; and to advise and assist those player-clients in taking maximum advantage of those benefits and rights, including, without limitation, Termination Pay, Severance Pay, Bert Bell/Pete Rozelle disability benefits, workers compensation benefits, second medical opinions, and right to choose their own surgeon.

• Physical and Mental Wellbeing? - https://www.youtube.com/watch?v=XqJkxtb8OAU
Ethical Compensation

Rule 1.5, ABA Model Rules of Professional Conduct (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

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.

• Ex: In 2000, attorney agent Scott Boras negotiated a $252 million contract for Alex Rodriguez; his fee for his services was $12 million. Tamara L. Barner, Show Me the ... Ethics?: The Implications of the Model Rules of Ethics on Attorneys in the Sports Industry, 16 GEO. J. LEGAL ETHICS 519, 530 (2003). Was the fee excessive?
Ethical Contract Negotiations (Misrepresentation v. Puffing)

Rule 8.4, ABA Model Rules of Professional Conduct. It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Rule 4.1, ABA Model Rules of Professional Conduct. (1) A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client.

(2) This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.
Questions?

**Important Notice** — This PowerPoint Presentation should not be used as the sole source of information when addressing any specific legal or ethical issue that arises. The laws, rules and regulations referenced herein are examples. Specific circumstances implicate different laws, rules and regulations and special circumstances may lead to different applications of laws, rules or regulations. Additionally, laws, rules and regulations may change.