

2003

Panel II: Conflicts of Interest in Sports

John D. Feerick
Fordham University School of Law

David Feher
Weil, Gotshal & Manges, LLP

Craig E. Fenech
The Sparta Group

Charles Grantham
National Basketball Players Association

Steven C. Krane
Proskauer Rose, LLC

See next page for additional authors

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

John D. Feerick, David Feher, Craig E. Fenech, Charles Grantham, Steven C. Krane, and Nicole Coward, *Panel II: Conflicts of Interest in Sports*, 13 *Fordham Intell. Prop. Media & Ent. L.J.* 405 (2003).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol13/iss2/2>

This Transcript is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in *Fordham Intellectual Property, Media and Entertainment Law Journal* by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Panel II: Conflicts of Interest in Sports

Authors

John D. Feerick, David Feher, Craig E. Fenech, Charles Grantham, Steven C. Krane, and Nicole Coward

PANEL II: Conflicts of Interest in Sports

Moderator: John D. Feerick^{*}

Panelists: David Feher[†]

Craig E. Fenech[‡]

Charles Grantham[§]

Steven C. Krane^{||}

^{*} Dean, Fordham University School of Law, 1982–2002. Partner, Skadden, Arps, Slate, Meagher & Flom, LLP, 1968–82; Associate, Skadden, Arps, Slate, Meagher & Flom, LLP, 1961–68. Captain, Judge Advocate General's Corps., U.S. Army, 1962–69. New York City Representative, New York City Office of Collective Bargaining, 1980–87. Chairman, New York State Commission on Government Integrity, 1978–90. Special New York State Attorney General, 1987–90. President, Association of the Bar of the City of New York, 1992–94. Chair, New York State Committee to Review Audiovisual Coverage of Court Proceedings, 1996–97. Chair, Standards Review Committee, American Bar Association [ABA] Section on Legal Education & Admissions to the Bar, 1996–98. Director, American Arbitration Association, 1998–2001. Member, Task Force to Develop the Twenty-fifth Amendment to the U.S. Constitution. B.S., Fordham College, 1958; LL.B., Fordham University School of Law, 1961, LL.D. (Honorary), Fordham University School of Law, 2002.

[†] Of Counsel, Weil, Gotshal & Manges, LLP. Adjunct Professor of Law, Benjamin Cardozo School of Law. Member, National Football League [NFL] Salary Cap Revenue Accounting Committee. Member, NBA Salary Cap Revenue Accounting Committee. B.A., *magna cum laude*, Georgetown University, 1980; J.D., Duke University School of Law, 1984.

[‡] President, The Sparta Group. Staff Attorney, IBM Corp., 1973–77. Attorney, Federal Defenders of San Diego, Inc., 1977–80. Director, Sports Lawyers Association. Co-chair, Sports Lawyers Association Committee on the Federal Regulation of Agents. Adjunct Professor of Law, Management Institute of New York University, 1955. B.A., *cum laude*, University of Notre Dame, 1969; J.D., Boalt Hall School of Law, University of California at Berkeley, 1973.

[§] Executive Director & Executive Vice President, National Basketball Players Association [NBPA], 1980–95. Emmy-Winning Co-Executive Producer, *Whatever Happened to Michael Ray?* (TNT documentary, Feb. 2000). Board Member & Selection Committee Member, USA Olympic Basketball, Dream Teams I & II, 1990–95. Board Member & Selection Committee Member, Naismith Memorial Hall of Fame, 1988–95. Board Member, Basketball Alumni Foundation, 1988–95. Board Member, Women's Sports Foundation, 1988–94. Board Member, Sports Careers, Inc., 1988–95. Teacher & Coach, Darby-Colwyn High School, 1965–68. B.S., Cheney State University, 1965; M.B.A., Wharton School of Business Administration, University of Pennsylvania, 1973; Ph.D. Candidate, Administration & Organizational Management, University of Pennsylvania, School of Education, 1973–78.

MS. COWARD:[#] This panel will focus on the potential conflicts of interest that arise when different sports interests are represented by the same individual.

DEAN FEERICK: Thank you very much.

Why don't I go to the panelists? Mr. Feher?

MR. FEHER: I would like to start out by talking just a little bit about the basic labor structure and the roles that different actors in all this play, because unless you have a basic sense of that, you really cannot tell where the conflicts may or may not arise.

I will start with a simple question, which is: If any one of you wanted to go out tomorrow and sign up with an NFL player or any Major League Baseball player to become a sports agent, could you do that?

The short answer is, unless you have been registered by the union in that sport, the answer is no, because in each of the major league sports in the United States there is a union that represents all of the players in that sport.¹

Now, you may say: Well, what difference does that make?

^{||} Partner, Proskauer Rose, LLP. Associate, Proskauer Rose, LLP, 1981–84 & 1985–89. Law Clerk to Judge Judith S. Kaye, New York Court of Appeals, 1984–85. President, New York State Bar Association [NYSBA], 2001–02. Member, NYSBA Committee on Standards of Attorney Conduct, 1999–present. Chair, NYSBA Committee on Professional Ethics, 1990–94. Hearing Panel Chair, Departmental Disciplinary Committee, First Judicial Department, New York, 1996–99. Hearing Panel Chair, Committee on Grievances, U.S. District Court, Southern District, New York, 1995–2001. Special Prosecutor, First Department Disciplinary Committee, New York, 1991–93. Adjunct Professor, Georgia Institute of Technology, 1990–93. Adjunct Professor of Legal Ethics, Columbia University School of Law, 1990–93. B.A., State University of New York at Stony Brook, 1978; J.D., New York University School of Law, 1981.

[#] Nicole Coward, Co-Symposium Editor, *Fordham Sports Law Forum*, Fordham University School of Law. B.A., University of Virginia, 1999; J.D. expected, Fordham University School of Law, 2003.

¹ For example, professional football players in the NFL are represented by the NFL Players Association [NFLPA], professional hockey players in the National Hockey League [NHL] are represented by the NHL Players Association [NHLPA], professional basketball players in the National Basketball Association [NBA] are represented by the National Basketball Players Association [NBPA], and professional baseball players in Major League Baseball [MLB] are represented by the MLB Players Association [MLBPA]. See <http://www.nflpa.org/main/default.asp>; <http://www.nhlpa.com>; <http://www.nbpa.com>; <http://bigleaguers.yahoo.com>.

Well, there is a fundamental point there, because once you have a union in place, under federal labor law, the union, under the National Labor Relations Act,² has the exclusive authority to bargain on behalf of all of those employees on all terms and conditions of employment.³

If the unions wanted to, just like the United Auto Workers does with respect to General Motors or Ford or Chrysler, they could sit down with the National Basketball Association (NBA), the National Football League (NFL) and the others, with each of their respective unions, and not negotiate a system where players bargain individually together with agents, but instead have a wage scale where shortstops get, just hypothetically, \$20,000, first basemen get \$30,000, et cetera, et cetera.⁴ And I have to admit that the owners in the various sports have tried to have that done because it is a lot easier and simpler, given the marketplace for professional athletes, to have a situation where there is no competition for these players who are very sought after.⁵

But the unions in each of these sports have decided that they do not want to do that. In the exercise of their authority under federal labor law, they delegate a portion of their bargaining authority to

² National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000) [hereinafter NLRA].

³ *Id.* § 159(a) (providing that representatives selected to bargain for employees in a collective bargaining unit “shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining”).

⁴ See United Auto Workers [UAW], *About UAW: Who We Are*, at <http://www.uaw.org/about/uawmembership.html> (last visited Mar. 25, 2003) (demonstrating that the UAW is one of the largest and most diverse unions in North America); UAW, *About UAW: Departments*, at <http://www.uaw.org/about/barg.html#gm> (last visited Mar. 25, 2003) (providing examples of the wage-scale concept, as utilized in the UAW-GM National Agreement, the UAW-Saturn 1999 Agreement and the UAW-DaimlerChrysler 1999 Agreement).

⁵ See, e.g., *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (holding that the teams comprising Major League Soccer [MLS] do not violate antitrust laws in functioning as a single entity when negotiating employment contracts with players, thereby preventing players from negotiating contracts with individual teams, restricting player mobility, and facilitating a hard salary cap, which players claim prevents them from attaining market value for their services), *cert. denied*, 123 S. Ct. 118 (2002); Robert Wagman, *MLS, Players Are No Closer to Settlement; Trial Set for September 18*, Soccer Times, at <http://www.soccertimes.com/wagman/2000/feb24.htm> (Feb. 24, 2000) (explaining the history of the antitrust dispute between MLS and professional soccer players in the league).

the players with the agents who represent the players, or the players individually if the players decide they want to represent themselves.⁶

You may ask, why? Part of it is a basic function of economics, because if you are a coal miner or an auto worker, it is generally easy for your employer to find a replacement for you if you say that you are going to leave the job unless your wages are increased.⁷ That is why unions in the various industrial areas sought the right to unionize for so long, so that there would not be individual bargaining.⁸ If you look back in history, in the 1920s and 1930s, before the Wagner Act⁹ came into place, all of the

⁶ As the bargaining representative for a group of professional ballplayers, players' unions have the exclusive right to bargain with the relevant league on players' behalf. 29 U.S.C. § 159(a). Players' unions allow individual athletes to bargain with team owners through the use of agents, as this system enables players to seek the greatest available compensation for their unique skills and services. In order to, among other things, promote quality among the players' individual representatives, the unions demand that players use only certified agents who are properly qualified to engage in contract negotiation. See, e.g., NBA-NBPA COLLECTIVE BARGAINING AGREEMENT art. XXXVI ("The NBA shall not approve any Player Contract between a player and a Team unless such player . . . is represented in the negotiations . . . by an agent or representative duly certified by the Players Association in accordance with the Players Association's Agent Regulation Program."), <http://www.nbpa.com/cba/articleXXXVI.html>; NFLPA, *Agent Regulations*, at <http://www.nflpa.org/agents/main.asp?subPage=Agent+Regulations> (last visited Mar. 25, 2003) (explaining that agents must be certified by the NFLPA in order to represent NFL athletes); NHLPA, *Labour & Licensing*, at http://www.nhlpa.com/Content/ABOUT_THE_NHLPA/Labour_And_Licensing.asp (last visited Mar. 25, 2003) (explaining that agents must be certified by the NHLPA in order to represent NHL athletes); MBLPA, *Frequently Asked Questions*, at <http://bigleaguers.yahoo.com/mlbpa/faq> (last visited Mar. 25, 2003) (explaining that agents seeking to represent professional baseball players must have at least one client on a MLB team's forty man roster and apply to the MLBPA for certification).

⁷ See generally UAW, *United Auto Workers Local 2166: The History of Organized Labor*, at <http://www.uaw2166.org/labor.html> (last visited Mar. 25, 2003) (describing the history of the organized labor movement).

⁸ See 29 U.S.C. §§ 158–59 (providing that an employer may not "refuse to bargain collectively with the representatives of his employees" and that these representatives "shall be the exclusive representatives of such employees . . . for the purposes of collective bargaining").

⁹ National Labor Relations Act, 29 U.S.C. §§ 151–169. See also ABA, *THE FIRST SIXTY YEARS: THE STORY OF THE NATIONAL LABOR RELATIONS BOARD, 1935–1995*, at 10 (1995), <http://www.nlr.gov/publications/first60yrs/60yrs.html>.

2003]

CONFLICTS OF INTEREST IN SPORTS

409

major industries did not want the unions, they wanted to individually negotiate.¹⁰

In sports it is almost a complete mirror image, because the economics of sports are such that the individual employees have such unique individual talents, and the structure of the league is such where you have different people competing for those athletes, so it is more advantageous to have competition for the services of the individual players.¹¹

And so the unions representing all those players say, it is better for us not to negotiate a wage scale but to have the different owners competing for the individual players.¹²

And so when you look at agents, what does that mean in terms of what they do and how they function?

The bottom line is that if the National Football League Players Association (NFLPA) decided, even with sports agents, that with individual bargaining it wanted to have a hundred, ten, a thousand or even one agent representing all these players, the NFLPA could do that.¹³ There is a series of court cases, including one involving the National Basketball Players Association, the *Collins*¹⁴ case, where an agent challenged the whole system of agent regulation that was in place, where the agent got suspended. It went to federal court and on appeal to the Tenth Circuit; the federal court

¹⁰ See ABA, *supra* note 9, at 9–20 (describing the history of the NLRA); UAW, *supra* note 7 (describing the history of the organized labor movement).

¹¹ See generally Wagman, *supra* note 5 (explaining the dispute between MLS and professional soccer players in the league over whether each team should have to negotiate as an individual entity with individual players for services; the players are of the opinion that only such a structure will allow them to attain full market value for their services).

¹² Teams in the NFL, NHL, NBA, and MLB do compete against one another for players' services. These players' respective unions have determined that the players can best attain market value for their services via individual negotiations. Hence, the unions have guidelines permitting individual players to negotiate on their own behalf or through the use of agents. See *supra* note 6 and accompanying text.

¹³ Pursuant to 29 U.S.C. § 159(a), which provides that representatives selected to bargain for employees in a collective bargaining unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining," a certified union has exclusive control over the manner in which employees are represented.

¹⁴ *Collins v. Nat'l Basketball Players Ass'n*, No. 92-CV-1022, 1992 U.S. App. LEXIS 24069 (10th Cir. Sept. 21, 1992).

said: No, you can't challenge this under the antitrust laws because, as a matter of federal labor law, the decision as to what to do in terms of delegating this authority is completely up to the union.¹⁵

As a result, there are extensive agent regulation programs in each of the sports.¹⁶ So, for example, in the NFL, if you want to represent an agent, not only do you have to pay a fairly substantial fee at the outset to fund the agent program, but you also have to take and pass a test.¹⁷ If you do not take and pass the test, you cannot serve as an agent.¹⁸

One of the reasons the union does that in the NFL is because the NFL salary cap is incredibly complicated.¹⁹ If the NFLPA allowed agents who had no knowledge at all as to what the system was about to represent players, the agents could do an awful lot of harm.²⁰

It is difficult to police the agents when you have as many agents as you do. I am not going to say that any system is perfect, but at the same time, the NFLPA has done periodic examinations of the agents to try to ensure that the agents know what they are doing, so that the players are not hurt.²¹

Within a very, very large area, the union has discretion to pick and choose who they want to represent the players and the qualities

¹⁵ *Id.*

¹⁶ See *supra* note 6 and accompanying text.

¹⁷ NFLPA, *Agent Amendments: 2002 Agent Regulation Amendments*, at <http://www.nflpa.org/agents/main.asp?subPage=Agent+Amendments> (last visited Mar. 16, 2003). See also NFLPA, *supra* note 6.

¹⁸ NFLPA, *supra* note 17. See also NFLPA, *supra* note 6.

¹⁹ See NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT [CBA] art. XXIV-XXV (1998), <http://www.nflpa.org/members/main.asp?subPage=CBA+Complete>. See generally PAUL C. WEILER & GARY R. ROBERTS, *SPORTS & THE LAW* 314-21 (2d ed. 1998) (discussing the evolution of the NFL salary cap, which the NFL players agreed to in 1993, and explaining the economic trade-offs that take place in order to accommodate the owners desire for a salary ceiling and the players unions' desire to promote competition for player services and to establish a salary floor).

²⁰ See NFLPA, *supra* note 6 (stating that to ensure that agents have sufficient understanding of the league's financial structure, all agents are required to "[a]ttend an NFLPA seminar on individual contract negotiations each year."); NFLPA, *supra* note 17.

²¹ NFLPA, *supra* note 17.

2003]

CONFLICTS OF INTEREST IN SPORTS

411

of those folks.²² These are not just things that are in the legal books that do not make a difference day to day.

On Monday I am going to be in Los Angeles with one of my colleagues, Jeff Kessler,²³ who is almost always involved in these things with me, as some of the folks on the podium and in the audience know. There is going to be an oral argument in a case involving a dispute between Leigh Steinberg and David Dunn.²⁴ This has been very much in the papers.²⁵

Leigh was considered for many years, and I do not want to say he is not equally considered today, because these things are always subjective, but for the longest while, Leigh was considered the preeminent agent in the NFL.²⁶ He represented a series of first-round draft picks and quarterbacks.²⁷

He sold his sports agency to a Canadian company, Assante, in a fairly complicated transaction.²⁸ But in selling the sports agency, there was a basic question of what you can sell if the union can basically decide at any given time who can or cannot represent the players.²⁹ If you are an agent and you sell for \$100 million or \$50 million your right to represent the players, but at the same time the union has regulations in place that say the players can change their mind at any time as to who is going to represent them, then there are obviously limits as to what you can buy and sell.³⁰

²² See *supra* notes 13–16 and accompanying text.

²³ Jeffrey L. Kessler is a partner at Weil, Gotshal & Manges LLP. See *WGM Directory*, Weil, Gotshal & Manges, at http://www.weil.com/weil/pd_frames.html (last visited Mar. 25, 2003).

²⁴ See *Steinberg Sues Former Associate*, L.A. BUS. J., June 4, 2001, at 29.

²⁵ E.g., *id.*

²⁶ See Richard Weiner, *Steinberg Sells Agency for \$120 Million; Other Groups May Follow*, USA TODAY, Oct. 28, 1999, at 7C (describing Steinberg as “one of the NFL’s most powerful agents”).

²⁷ See E. Scott Reckard, *Steinberg to Sell Firm for \$120 Million*, L.A. TIMES, Oct. 28, 1999, at C1; Weiner, *supra* note 26, NFLPA, *Agent Profile: Steinberg, Leigh*, at <http://www.nflpa.org/agents/agentProfile.asp?ID=07396> (last visited Mar. 16, 2003) (listing Steinberg as having negotiated fifteen active contracts).

²⁸ See Reckard, *supra* note 27; Weiner, *supra* note 26.

²⁹ See Ron Borges, *No Vick up Their Sleeve*, BOSTON GLOBE, Feb. 27, 2001, at C7; *supra* notes 13–16 and accompanying text.

³⁰ Attorneys acting as agents are automatically employed at-will, subject to dismissal at the client’s discretion. MODEL RULES OF PROF’L CONDUCT R. 1.16, cmt. 4 (2001) (“A client has a right to discharge a lawyer at any time, with or without cause, subject to

What is going on in this federal litigation right now is that David Dunn, who was a senior person within the Steinberg firm and who was principally involved with client relations over the years, decided he was going to leave. He left and took all sorts of clients with him.³¹

Leigh Steinberg's firm, Steinberg, Moorad, and Dunn [SMD], went to court to try to seek an injunction under state law to basically force, directly or indirectly, the clients to come back to Mr. Steinberg.³² We are saying that cannot be done because, as a matter of federal labor law, state law cannot determine who is going to represent this player or that player.³³ So, our position is that it is absolutely clear under labor law that the union decides.³⁴ But because of this, all sorts of issues as to who represents whom also arise.³⁵

When you talk about the agents, they generally do not represent only a single player.³⁶ If the NFLPA wanted to, it could say every agent could only represent one player, which would not make sense for anyone. You want people who have broad negotiating experience, so you have agents representing a number of players.

And you have it in a sport where there is a salary cap, where, at least within certain rules, there are limits as to how much money

liability for payment for the lawyer's services."); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(b)(4) (2001). In addition, NFLPA policy guarantees that all player representatives are subject to discharge at-will. See Borges, *supra* note 29.

³¹ See Jonathan E. Kaplan, *Show Me the Subpoena!*, AM. LAW., June, 2002 (stating that Dunn left the firm in early 2001, taking sixty-eight clients with him).

³² See *Steinberg Sues Former Associate*, *supra* note 24, at 29.

³³ See 29 U.S.C. § 159(a) (2000); *Collins v. Nat'l Basketball Players Ass'n*, No. 92-CV-1022, 1992 U.S. App. LEXIS 24069 (10th Cir. Sept. 21, 1992).

³⁴ See 29 U.S.C. § 159(a); *Collins*, 1992 U.S. App. LEXIS 24069, at *1. The NFLPA's motion to deny Steinberg, Moorad, and Dunn's [SMD] requested injunctive relief was granted, after a jury trial that awarded SMD more than \$40 million in damages against Mr. Dunn and his co-defendants. See Brenda Samdburg, *Brobeck Team Scores \$2.7 Mil. in Attorney Fees*, LEGAL INTELLIGENCER, Feb. 12, 2003, at 4.

³⁵ See Kaplan, *supra* note 31; *Steinberg Sues Former Associate*, *supra* note 24, at 29.

³⁶ See, e.g., NFLPA, *supra* note 27 (listing Steinberg as having fifteen active contracts negotiated).

2003]

CONFLICTS OF INTEREST IN SPORTS

413

you can pay certain players, although teams can go over the cap in various circumstances.³⁷

But if you have an agent who is representing two players and the team only has a certain amount of money left under the salary cap and the agent is trying to negotiate contracts simultaneously with those two players, what does the agent do? There may be \$2 million under the cap that needs to be split between two players and that agent represents both players.³⁸

So in terms of a basic question—is there a conflict or isn't there a conflict? That is certainly something to talk about.³⁹ But the way the system is constructed, the NFLPA has said that so long as those possible situations are disclosed and known to everyone, if players can change their representation when they want, then that is fine.⁴⁰

There are certain limits as to what unions can or cannot do. In terms of conflicts in what agents do, I will just mention one thing that is in the news.

³⁷ See NFL-NFLPA COLLECTIVE BARGAINING AGREEMENT art. XXIV, *supra* note 19.

³⁸ See Robert E. Fraley & F. Russell Harwell, *The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 HASTINGS COMM. & ENT. L.J. 165, 185 (1989) (“[A] conflict could arise if a lawyer represents multiple clients who seek remuneration from a limited fund. For example, a lawyer may represent two NBA players on the same team, where the aggregate salaries of each team in that league must not surpass a ‘salary cap.’”). See, e.g., Len Pasquarelli, *Adams Still Searching for a New Home*, ESPN, at http://espn.go.com/nfl/columns/pasquarelli_len/1400183.html (June 28, 2002) (noting that agents Eugene Parker and Roosevelt Barnes together represent both linebackers Ray Lewis and Peter Boulware in contract renegotiations with the Baltimore Ravens).

³⁹ MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2001) (“A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . each client consents after consultation.”); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(a)–(c) (2001).

⁴⁰ In this respect, NFLPA policies require basic compliance with the rules of legal ethics, which bind attorneys, for all player representatives, whether or not they are members of the bar. Hence, agents must disclose any potential conflicts of interest arising out of their representation of multiple clients. MODEL RULES OF PROF'L CONDUCT R. 1.7; MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(a)–(c). In addition, agents may only serve clients as at-will employees, subject to discharge at their clients' discretion. MODEL RULES OF PROF'L CONDUCT R. 1.16, cmt. 4 (“A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.”); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(b)(4).

U.S. News & World Report recently had a cover story about frauds that had been committed on NFL players over the years by their financial advisors.⁴¹ In this case, the NFLPA, as the union, is very much concerned about these sorts of issues.⁴² In one case, there was an agent, Tank Black, who engaged in various frauds on players⁴³ where he was representing them in the negotiations with the teams but at the same time was giving them advice on their finances and investing their money.⁴⁴

The NFLPA has just implemented a financial advisors program so that financial advisors can be registered by the NFLPA as to whether they have complied with various regulations under the program.⁴⁵

But I want to note that there are certain limits as to what unions can or cannot do.

The NFLPA is the union, but in terms of what an employee is going to do with his money after he gets it from his employer, that is not generally a term or condition of employment.⁴⁶

And so this program that the NFLPA is undertaking, which is very important, is not mandatory. It is something in which advisors can participate if they choose, but the players will know the agent's choice one way or the other.⁴⁷

In terms of how this sort of program deals with potential conflicts, the basic principle is generally one of disclosure. If you

⁴¹ See Edward T. Pound, *Money Players*, U.S. NEWS & WORLD REP., Feb. 11, 2002, at 30.

⁴² See generally *id.* (showing that the NFLPA is very concerned with financial advisors defrauding players).

⁴³ See *id.*; *Agent Tank Black Gets Five-Year Sentence for Swindling Players*, SPORTING NEWS, May 7, 2002, <http://www.sportingnews.com/nfl/articles/20020507/401934.html>.

⁴⁴ See Pound, *supra* note 41.

⁴⁵ See Michelle Singletary, *Giving the Boot to Bad Financial Advice*, WASH. POST, May 2, 2002, at E3 (explaining that in 2002, the NFLPA initiated a "Financial Advisors Program" to establish a code of conduct and check the backgrounds and credentials of those proffering services to protect NFL players from financial fraud); NFLPA, *Financial Advisors*, at <http://www.nflpa.org/financial/main.asp> (last visited Jan. 18, 2003).

⁴⁶ See 29 U.S.C. § 159(a) (2000) (noting that employee representatives are empowered by the NLRA to bargain with employers concerning only "rates of pay, wages, hours, or other conditions of employment").

⁴⁷ See *id.*; *supra* note 45 and accompanying text.

2003]

CONFLICTS OF INTEREST IN SPORTS

415

have a situation with a financial advisor recommending investments, it is difficult. You can not just suggest an investment in a company in which you have an interest.⁴⁸ I think this is the case across-the-board. Many solutions for conflicts require that the person on the other end is fully advised of the conflict and is an adult in a position to have the information to make the decision.⁴⁹

DEAN FEERICK: Thank you very much, Dave. That is very helpful.

Craig?

MR. FENECH: The business of representation, obviously, is much broader than that. It involves people in individual sports. In fact, a good part of the last month or so of my time has been taken up with two Canadian figure skaters.⁵⁰ If you had said that to me a year ago, I would have laughed at you, but that is the way it has been.

“Conflicts of interest,” it is almost like a magic phrase. People say “conflict of interest” and everybody gasps, they shrink in horror—“this is terrible.”

I think that there are real and apparent conflicts of interest and there is a big difference between the two. There are conflicts which are acceptable and waivable by your clients and then there are others that are not.⁵¹ Let me give you some examples of what I am talking about, real-life examples.

⁴⁸ It is a conflict of interest for an attorney-agent proffering financial advice to encourage a client to invest in an entity in which the attorney has an interest without disclosing that fact. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(a) (2001) (“Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.”). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2001); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-1 (2001). The NFLPA program for Financial Advisors imposes similar requirements. *See Financial Advisors, supra* note 45.

⁴⁹ *See supra* note 48 and accompanying text.

⁵⁰ *See generally Man Accused in Figure Skating Fix Attempt to Be Extradited to U.S.*, CNN, at <http://www.cnn.com/2002/LAW/08/01/figure.skating.fix> (Aug. 1, 2002) (describing the scandal at the 2002 Olympics in Salt Lake City in which judges allegedly conspired to deprive Canadian skaters Jamie Sale and David Pelletier of gold medals).

⁵¹ If an attorney does not have a “reasonable belief that the representation” of one client “will not adversely affect the relationship with the other client” or “be materially limited by the lawyer’s responsibilities to another client,” or if it is not “obvious that he can

I represented two radio disc jockeys in another part of the country. I represented both of them in the first negotiation, and I talked to them about whether their interests were congruent with one another, and determined that they were.⁵² The fact that their contract expired the day before I met with them probably had something to do with their view in that particular case. So, I did the contract, and it was about three years long. I represented them over the course of the three years, during which time they would proceed to carp about one another to me and made my life kind of miserable.

It developed that one of them felt that he should be paid more money than the other. To me that is an irreconcilable conflict unless the other fellow says, "Yes, I agree," and you will wait a long time to hear those words.⁵³

In that particular instance, I considered that to be an irreconcilable conflict. Therefore, either the clients had to choose what they wanted to do, or I had to choose whom I wanted to represent.

As it turned out, it was sort of a mutual thing. The guy who did not want to earn as much money wanted to get a local lawyer, and he did so, and I wound up representing the guy who wanted to earn more money, and indeed he wound up earning more money.

So that, to me, is a conflict. All conflicts must be disclosed, but that is one that could not be reconciled, and therefore one of them had to go.⁵⁴

Now, often it will happen that you represent two people who are seeking the same position. Let me give you an example.

adequately represent the interest of each," a conflict is unacceptable and cannot be waived. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)-(b); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(c). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16.

⁵² After full disclosure, clients may consent to dual representation, provided that the conflict of interests is waivable. MODEL RULES OF PROF'L CONDUCT R. 1.7; MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(c).

⁵³ Hence, the conflict will probably not be waivable. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7; MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(c).

⁵⁴ If an unacceptable conflict arises after the commencement of representation, the lawyer should withdraw from the representation. MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 2.

2003]

CONFLICTS OF INTEREST IN SPORTS

417

Years ago, I represented three pitchers on the same Major League team. One pitcher I had represented for years, the other one I had picked up as a client a couple of years earlier by referral, and he referred me to a third guy who was in the minors who wound up making the club.

Well, the middle guy called me. His career had not gone as well as the other two. The truth is, he was not as good a pitcher. He called me one day and he said, "Craig, you know, I think you have done a great job for me, I really like you, and I am going to fire you."

I said, "Well, why?"

He said, "I think you have a conflict of interest."

I said, "I don't think that is really the case." I would have had a conflict of interest if I could have made the determination, or even had a substantial influence on the determination, as to who made the club.⁵⁵ But, first of all, the club was keeping ten pitchers, not three; and secondly, no general manager has ever asked me, "Gee, Craig, which of your clients should I keep with the ball club?" In point of fact, they do not want to hear from me on that subject.

So the conflict in that case, in my opinion, was more apparent than real.⁵⁶ I said this to him at the time, "Look, let's be honest. You know why I am being fired. You guys called me and said, 'We want to buy a house in Seattle. Do you think that is a wise thing to do?' and I said, 'No, because I think that you are on the bubble as to whether or not you make the club. I'm picking up rumors that you may in fact be traded, and there is a work stoppage

⁵⁵ If an attorney-agent could determine that one of her clients would succeed at the expense of another client, she could not possibly hold a "reasonable belief that the representation" of one client would "not adversely affect the relationship with the other client" or "be materially limited by the lawyer's responsibilities to [the other] client." In addition, it would not be "obvious that [s]he [could] adequately represent the interest of each," and the conflict would not be waivable by either client. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)-(b); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(c). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16.

⁵⁶ It is important to remember that even when an attorney-agent is comfortable with multiple representation, he should advise his clients of "any circumstances which might cause [them] to question his undivided loyalty." MODEL CODE OF PROF'L RESPONSIBILITY EC 5-19.

looming in the next twelve months, so for all those reasons I don't think it's a good thing to put all your assets into a house and encumber yourself with a heavy mortgage.”

That was not what his spouse wanted to hear. That was the wrong answer as far as she was concerned, and that is why I was being fired. Okay, you live with that, and he did fire me, and I guess he used the conflict of interest argument.

He said to me, “I've talked to other agents who say that no reputable agent would represent more than one player on a given team.”

I said, “That is nonsense. First of all, you can't control it. What are you going to say to me tomorrow if in fact you are traded?” By the way, about a month later, he was traded to a team where I do not have any players.

A lot of the time people employ arguments like conflict of interest when really what they are saying is, “My career isn't going as well as I think it should.” So that to me is an example of an apparent conflict of interest rather than a real one.

However, the client retains the right to view it differently.⁵⁷ It is his career, and if that is what he wants to do, then that is what he has to do, whatever the reason. He does not even have to give you a reason. You are employable at will.⁵⁸

I remember one agent who called me one day and he said, “What kind of deal is that? The guy can fire you at any time.”

I said, “I think that it behooves you then to make sure that you are always on the same page as your client and that he is aware of what your efforts are and that he has some appreciation for those efforts. But you are right. If job security is what you are looking for, this is the wrong business.”

So there are those kinds of conflicts of interest.

⁵⁷ *Id.* (“Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.”).

⁵⁸ MODEL RULES OF PROF'L CONDUCT R. 1.16, cmt. 4 (“A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.”); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(b)(4).

2003]

CONFLICTS OF INTEREST IN SPORTS

419

Now I will give you another example. At one point, I represented three collegiate basketball coaches in the United States. I do not know how many Division I programs there are, but I had coaches at three of them.

Two of them decided that they wanted the same job that opened up. I was thinking to myself, "What do I have to do, have one client in each sport in order to avoid a conflict?" That was a tricky one.

The *New York Post* was talking daily, speculating as to whether this guy or that guy was ahead or who the candidates were, and they did that very effectively. They named about twelve candidates, and at one point, named each one of them as the front runner, so that no matter who got the job, they would be able to announce that they had correctly predicted a month earlier that he was the front runner. It is an interesting journalistic technique.

The way it works is that athletic directors do not even want to hear from agents. They think that agents are vermin, and I think the agent who directly calls an athletic director and says, "Hey, Joe Jones is my client and he really wants the job," has pretty much stuck a dagger in the heart of Joe Jones' chances. But it is true that you can have some influence on the process from the outside, depending on your relationship with the media, your relationship with alumni or other coaches. So, I told them, "I will do whatever you want on this. I will stay out altogether or either one of you can fire me, hopefully not both."

Anyway, the bottom line was they both asked that I give my honest evaluation of each of their chances. Really, in that case you function more as sort of a counselor.

The guy will say, "I have a friend who has a friend who dated the president of the university. Do you think I should reach out to them?" You say, "No, I think that would be a bad idea" or a good idea, whatever. That is what you do.

In that case, neither of them fired me. One of them indeed got the job. The other one fell out rather quickly. I found out afterwards when I was negotiating the contract for the guy who got the job that the other guy did not have a chance, because in fact the university had considered suing him some years earlier, before I

was representing him. Although there were certain media people promoting his candidacy, he never had a shot.

So that to me is an example of where there is a potential conflict. You have a duty to fully disclose to your clients what the conflict is and what your role will be, but they are free to resolve that in whatever fashion they deem appropriate.

The final thing I will talk about is when I was representing two broadcasters who wanted the same position. This comes up all the time. But what never comes up is what happened next—I guess it does not “never” come up, it just rarely comes up.

The executive producer sat there and said to me, “So, Craig, which one of these guys should I hire?” Now, both of them currently worked for this organization, so he knew everything there was to know about them.

I looked at him and I said, “I’ll tell you what. I’ll answer that question if you tell me that my answer is dispositive of the issue, because I think you are yanking my chain just to watch me wiggle, and I am not about to give you an answer to that question. You know both guys, you know what you want from this particular position, and you are not about to cede the authority to make that decision to me. But if you are, I will answer the question.”

I was bluffing, because had he asked me to, I couldn’t have answered that question. That would have been to me an irreconcilable conflict. I would have had to step out and say to both my clients, “either you have to get somebody else, or you can keep me, but I can’t continue to represent both of you in this regard.”

However, I was pretty sure that he was bluffing, and indeed he was. He laughed and he said, “So you won’t even admit you have a conflict?”

So he just laughed and moved on. In that case, neither of them got the job. So that is an example of a conflict that was real, but turned out to be illusory, in that neither guy got the job.

But it depends on what your role is in securing the job. People misapprehend what the role of an agent is. I mean, you watch these movies on television and you think the agent walks in and

2003]

CONFLICTS OF INTEREST IN SPORTS

421

says, "I demand that my guy get hired for this." It is just nonsense. *Jerry Maguire*⁵⁹ was an amusing movie, but, frankly, it bore the same relationship to reality that most movies do, a distant one.⁶⁰

By the way, I am one of the few agents who did not claim to be the prototype for Jerry Maguire, and I did not think he was a better person at the end of the movie than he was at the beginning of the movie. It seemed to me that his big concern for the wide receiver was when the guy got hurt, and that was his only meal ticket. How does that differ from when he started?

DEAN FEERICK: Thank you for that very interesting presentation.

Charles Grantham?

MR. GRANTHAM: Thanks to David and Craig for providing an outline of what potential conflicts exist. I will share a few things and give you a historical perspective about why we created agent regulations in the first place.

We initiated the agent regulatory program back in the early 1980s, quite frankly, as a result of players complaints about the excessive fees charged for the representation of players.⁶¹ At that time, they were being charged from ten to twenty percent for contract negotiations.⁶² And, from a selfish perspective, players were asking, "What can you do about these enormous fees?"

That got me thinking as to how we, as an exclusive bargaining unit, could regulate player agents. That was back in the early 1980s.⁶³

⁵⁹ JERRY MAGUIRE (Tristar 1996) (feature film about a premier sports agent who opens his own business after he is dismissed from his firm).

⁶⁰ Cf. Reckard, *supra* note 27 (claiming that Leigh Steinberg "was the model for the agent portrayed in *Jerry Maguire*").

⁶¹ See Sam Goldaper, *Plan to Certify Agents and Limit Fees*, N.Y. TIMES, May 13, 1986, at B9 (discussing the NBPA's agent regulation program, initiated in 1986, which requires that agents wishing to negotiate contracts with NBA teams be certified by the union and agree to fee limitations).

⁶² See generally *id.* (noting that the 1986 NBPA agent regulation program limits agent fees to an annual maximum of four percent).

⁶³ See Danny Robbins & Manny Topol, *Certification Denied for Agent*, NEWSDAY (N.Y.), May 30, 1988, at 74.

Also, in the early 1980s came the introduction of revenue sharing and salary caps in professional sports.⁶⁴ We were the first to engage in such an arrangement with management.⁶⁵ However, if I had to do it again, I would say that we would not agree to a revenue-sharing arrangement which included hard salary caps.⁶⁶ This first agreement had exceptions that allowed teams to exceed the agreed upon cap. This first agreement had exceptions that allowed teams to exceed the agreed upon cap.

So there are two perspectives, one from just being the advocate of players' rights and two, those potential conflicts which would arise from the agreement.⁶⁷

But the reality of it is very simple, and that is that any of you in this room could be an agent tomorrow if you had a son or a brother or a cousin who was seven-feet, three-inches, who averaged forty-five points a game in college, and had a very adept left-handed hook shot. You could be his agent and probably none of the unions would prevent that from happening.⁶⁸

I mean, we can talk about the regulatory process: the test, the application, but the reality is you need a client. If you can get yourself a client: a football player, a baseball player, or a basketball player, then I guarantee you that you can become an agent very quickly.

I guess the other area of interest to me, is one that represents a conflict with the NCAA.⁶⁹ Of course, all of us on this panel could complain about the potential conflicts that they face.

⁶⁴ See Cerisse Anderson, *Players Seek End to NBA Salary Cap*, L.A. TIMES, Mar. 22, 1987, § 3, at 12 (noting that the NBA negotiated a revenue-sharing agreement with its players in 1983, guaranteeing them fifty-three percent of the league's revenues under the CBA and noting that salary caps imposing minimum and maximum team revenues were instituted in the 1984-85 season to promote competitive parity).

⁶⁵ See *id.*

⁶⁶ See generally Steve Ashburner, *Wanna Beat Magic? Put 'Em on the Line; O'Neal Clangs Iron the Loudest*, STAR TRIB. (Minn.), Apr. 23, 1995, at C6 (explaining that "hard" salary caps differ from "soft" caps in that soft caps allow teams to spend over the cap in order to re-sign free agents, while hard caps strictly limit a team's spending).

⁶⁷ See *supra* note 38 and accompanying text.

⁶⁸ But see unions' various regulations of agents, *supra* note 6 and accompanying text.

⁶⁹ See Greg Garber & Lyn Bixby, *Should We Pay College Players? Camby Case Puts Focus on Agents' Giving of Gifts*, HARTFORD COURANT (Conn.), June 23, 1996, at A1.

I wrote an article some ten years ago regarding giving some college players a share of the economic pie.⁷⁰ What was present then is clearly present today, which is that the television networks have someone representing their interests, the athletic directors have someone representing their interests, the college coaches have someone representing their interests, and the players have no one.⁷¹

As we watch “March Madness” today—a multibillion-dollar contract for CBS to present the games in March—we begin to wonder again: the issue of education,⁷² is it a priority or is it a distraction? At this point, it is clear that in March, academics become a distraction.⁷³ I have a keen interest in seeing that college athletes are represented, and represented fairly.

The whole conflict of interest question and understanding the issues relating to conflicts of interest, in most cases, is too sophisticated for some of your potential clients to totally understand.⁷⁴

Prior to 1980, for example, before there were regulations, the NBA was like the “Wild West.” You had agents representing the coach, the general manager, and the player, and you had players say, “I want that agent because he represents the coach, the general manager and another player on the team,” not understanding that

⁷⁰ Charles Grantham, *It's Time to Give Players a Cut*, N.Y. TIMES, Mar. 18, 1990, § 8, at 10.

⁷¹ See Garber & Bixby, *supra* note 69 (discussing the problem of “improper inducements by agents” and questioning whether agent representation of college athletes should be permitted).

⁷² See generally Barry Temkin, *Duncan Asks Why Colleges Don't Educate*, CHI. TRIB., Mar. 31, 2002, at 18 (addressing the issue of poor academic performance by college athletes). See Peter Alfano, *The Tug of War Between Athletics and Academics*, N.Y. TIMES, Mar. 27, 1983, § 5, at 1 (discussing the conflict between academic eligibility and success, and the pressures of athletic performance and success faced by student-athletes).

⁷³ See Tom McMillen, *March Madness Really About Frenzy for Money*, USA TODAY, Apr. 1, 2002, at 13A (discussing the influence of money on college sports in light of the \$6 billion contract signed between CBS and the NCAA for television rights to eleven years of basketball coverage, the deleterious effect of money on the education of student-athletes, and the inability of the NCAA to effectively reform this system).

⁷⁴ Where clients are unable to fully comprehend the nature of potential conflicts, disclosure requirements cannot serve their intended purpose. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(c) (2001).

down the road that conflict could be damaging to their potential careers.

So in many cases, it really will rely on how well you communicate with your client so that he understands what a conflict of interest is—whether it is perceived, whether it is real.⁷⁵ These issues are practical, the ones that you have to confront with your client.

DEAN FEERICK: Thank you very much. It is very helpful.

Steve Krane?

MR. KRANE: I think it is accurate to say that player agents frequently run into real or perceived conflicts that have to be dealt with in one way or another. Sometimes agents try to deal with these conflicts by saying, “I am not functioning as a lawyer for this particular player or for any of my clients. I am functioning just as their agent. You do not have to be a lawyer to be an agent. I am doing something that any non-lawyer could do if they pass the test or go through the registration process or whatever.”

But an important thing to remember if you are a lawyer is that you are subject to the ethical rules of the legal profession whether you are functioning as a lawyer or not, or whether you think you are functioning as a lawyer or not, and you will be held to those standards. So do not think you can avoid the conflict of interest rules when representing players with conflicting interests just by saying, “I am not providing legal services to them at this particular moment, or at all.”⁷⁶

We have had a number of instances over the years of agents who got raked over the coals in the press, the back pages of the tabloids, for representing what were perceived to be conflicting

⁷⁵ See generally MODEL CODE OF PROF'L RESPONSIBILITY EC 5-19 (“Regardless of the belief of a lawyer that [s]he may properly represent multiple clients,” she must disclose even the potential perception of a conflict of interest and “defer to a client who holds the contrary belief” as to whether representation should continue.)

⁷⁶ Once admitted to the bar, attorneys must comply with ethical standards in all dealings, whether or not they are of a specifically legal nature. MODEL RULES OF PROF'L CONDUCT R. 8.4(a); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(a)(1). See also MODEL CODE OF PROF'L RESPONSIBILITY EC 1-5.

2003]

CONFLICTS OF INTEREST IN SPORTS

425

interests. And sometimes a perception is reality and they are indeed doing things that perhaps they should not do.

Money drives the sports world like it drives everything else. It drives agents, and it is very hard to say, as a lawyer, as an agent, as any kind of professional, to a potential client, “I cannot take you on; go somewhere else.” Nobody likes to say those words ever, because you are losing out on whatever up-side potential may exist for representing them.⁷⁷

But sometimes you have to say that. Sometimes, as you have heard from the panelists so far, conflicts are irreconcilable. That comes out of the concept in the *Model Rules of Professional Conduct* that governs lawyers in most places in the country, or the *Code of Professional Responsibility*, which governs lawyers in New York, that sometimes even the informed consent of a client is not sufficient to allow you to take on a representation in the face of a conflict of interest. There will be some conflicts that are so extreme that, no matter what you tell a client and no matter what they say, you should not take on that representation. So bear that in mind.

This is not something that is just a sports issue. This is something that all lawyers face in various contexts, particularly when, in the sports context, you have team sports where there are salary caps in place, so any negotiation that you have for multiple players on a team is, in effect, a zero-sum game—somebody wins, somebody loses; somebody is going to get more, and if that somebody gets more, another somebody gets less.⁷⁸

That happens a lot in the commercial setting too, where, for example, you have an insolvent defendant in a litigation and you are representing two claimants against a single finite insurance policy. There is only so much money there that is available to pay these two claimants. How can you represent both of them? Can

⁷⁷ See Goldaper, *supra* note 61 and parenthetical accompanying note 62 (explaining that an agent can earn up to four percent commission on each player contract negotiation under NBPA rules).

⁷⁸ See Fraley & Harwell, *supra* note 38, at 185 (“[A] conflict could arise if a lawyer represents multiple clients who seek remuneration from a limited fund. For example, a lawyer may represent two NBA players on the same team, where the aggregate salaries of each team in that league must not surpass a ‘salary cap.’”).

you really effectively represent both, even if they both agree up-front to the simultaneous representation?⁷⁹ That is a difficult question that gets talked about quite a bit in ethics circles.

The adequacy of disclosure is something else to keep in mind. Are you really telling the clients everything they need to know, even in the context of a waivable conflict, for them to make an informed decision, a reasoned decision, as to whether you are the best person to represent them or whether they should go somewhere else?

It is a hard thing to do, to sit down with a client and tell them: this is the conflict, this is what could happen down the line, these are the implications of your waiving the conflict and agreeing to be represented by me because of these other interests that I have.⁸⁰

Sometimes you may not be in a position even to make that disclosure because it would require you to reveal confidential information that relates to another client. And if you cannot make that kind of disclosure, if there is something secret going on for one of these other clients that you have a conflicting interest with, you are not going to make to be able to make the effective disclosure that you need to even ask for a waiver.⁸¹

So these are all concerns that come up in every aspect of legal practice whenever you represent more than one client. Someone once asked me, "How do you avoid conflicts of interest?" I said, "Never have a client," because as soon as you have one client, there is the potential for a conflict between your business interests,

⁷⁹ See, e.g., Pasquarelli, *supra* note 38 (noting that agents Eugene Parker and Roosevelt Barnes together represented both linebackers Ray Lewis and Peter Boulware in contract negotiations with the Baltimore Ravens).

⁸⁰ Such a discussion would constitute full disclosure as required by the rules of legal ethics. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(c) (2001).

⁸¹ Attorney-client confidentiality requires that each client consent to all details of his representation before disclosure. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). If one client refuses to consent to the disclosure of information which another client would need to make an informed decision as to whether to waive a potential conflict of interest, the attorney may not attempt to seek a waiver in absence of full disclosure, and must instead decline or withdraw from representation. MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 5.

2003]

CONFLICTS OF INTEREST IN SPORTS

427

your personal interests and their interests.⁸² When you have two clients, you might as well hang it up. You are never going to avoid conflicts of interest.

The way to deal with that is to detect them quickly, talk to the client, and sometimes make the judgment that this is not something that you should be doing.

Now, this is not something that is peculiar to representation of individual athletes or entertainment personalities. My practice has been almost exclusively representing sports leagues. As you probably know, the major sports leagues are either joint ventures or unincorporated associations,⁸³ or in the case of Major League Soccer a single corporate entity—although we are still waiting for the First Circuit to tell us a little bit more information about that.⁸⁴ But, by and large, the leagues are associations of individual businesses that agree to come together in a joint venture or an unincorporated association to play a sport and have a schedule and officials and so on.

If you represent these leagues, you always end up representing the league entity and the individual franchises in the league. When the league gets sued, the complaint names the NBA and a list of all

⁸² See MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(a) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."). See also generally MODEL RULES OF PROF'L CONDUCT R. 1.8(a); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-1.

⁸³ A joint venture consists of "an association of persons or companies jointly undertaking some commercial enterprise." BLACK'S LAW DICTIONARY 839 (6th ed. 1990). An unincorporated association is a "voluntary group of persons, without a charter, formed by mutual consent for purpose of promoting common enterprise." *Id.* at 1531.

⁸⁴ In 1997, eight professional soccer players sued MLS, investor/owners who controlled some of the teams, and the United States Soccer Federation [USSF] for antitrust violations under the Sherman and Clayton Acts. See Wagman, *supra* note 5 (describing the dispute between MLS and professional soccer players in the league over whether each team should have to negotiate as a separate entity with players for services or whether the league should be permitted to continue operating all of the teams as single entity). In March 2002, the First Circuit decided that the existence of MLS as a single entity was not unlawful. See *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002), *cert. denied*, 123 S. Ct. 118 (2002).

of the franchise owners in the league, and you appear for all of them.⁸⁵

What then happens when a dispute arises between a team and a league, like a franchise relocation situation,⁸⁶ or a dispute over local TV rights like the Chicago Bulls litigation that went on for six and a half years in the early 1990s?⁸⁷ What do you do when the team then says, “Hey, you cannot be adverse to me, you represent me. You represent me in six other ongoing litigations, plus you advise me constantly by sitting with the Board of Governors and talking to us on legal issues?” How do you deal with that issue?

Fortunately, most of the time it does not get raised, and if it does not get raised, you sort of blink at it and go on. But it is an issue that has arisen.

It is dealt with in some leagues by the adoption of by-laws that involve an advance waiver by the individual teams that they will not object to the league being represented by a law firm that represents the league and the teams in other matters when and if it happens that they have a dispute with the league. So you get the advance consent to a conflict of interest.⁸⁸ That has held up so far. It has not been challenged, so it has held up very nicely. But it

⁸⁵ See, e.g., *Bridgeman v. Nat'l Basketball Ass'n*, 838 F. Supp. 172 (D. N.J. 1993) (listing the NBA and all the franchise owners as defendants).

⁸⁶ For example, six NFL teams relocated between 1982 and 1995, including the Raiders, twice. See, e.g., *City of Oakland v. Oakland Raiders*, 176 Cal. Rptr. 646 (Cal. Ct. App. 1981), *vacated*, 646 P.2d 835 (Cal. 1982); Chris Harry, *NFL Owners in a League of Their Own*, ORLANDO SENTINEL TRIB., Mar. 17, 2002, at C1. See also Alan Abramson, *Raiders, NFL Keep Arguing Before Case Goes to the Jury*, L.A. TIMES, Apr. 28, 2001, at D2 (discussing the Oakland Raiders' suit against the NFL in which the team argued that the league's failure to finance a new stadium forced it to relocate back to Oakland).

⁸⁷ See *Chi. Prof'l Sports v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (hearing a suit by the Chicago Bulls and a cable television station against the NBA for antitrust violations due to the broadcast restrictions and fees that the league sought to impose).

⁸⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, DR 5-105(c) (2001).

2003]

CONFLICTS OF INTEREST IN SPORTS

429

remains to be seen what will happen if somebody argues about that, because advance waivers are a controversial issue.⁸⁹

I would just like to briefly talk about one other conflict, the one time in my practice when conflicts of interest and sports law came together in a very prominent way and in a very unusual way.

It involved the president of the United States Olympic Committee (USOC) in the late 1980s and early 1990s, Robert Helmick.⁹⁰ Bob Helmick was a lawyer. He was a lawyer with a municipal bond practice in Des Moines, Iowa,⁹¹ and he was a sports volunteer par excellence and did a tremendous amount of good for the USOC and devoted a tremendous amount of time to the Olympic movement and moving it forward in the United States.⁹²

Unfortunately, this did not do particularly good things for his legal practice. His partners became very annoyed with him that he was spending so much time on Olympic matters and not enough on municipal bonds in Des Moines.⁹³ He was put on the so-called “eat what you kill” approach to partner compensation, which is essentially—we will call you a partner, but you are compensated based solely on what you generate yourself.⁹⁴ This put a tremendous amount of financial pressure on him to try to generate some business for himself so that he would have some income.

So he did what he knew best. He went to some clients, or potential clients, who were doing business with the Olympic Committee, or who wanted to do business with the Olympic Committee, or other entities within the Olympic movement and had them put him on retainer as a consultant and took hundreds of thousands of dollars from them over the course of a number of

⁸⁹ See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers As a Mature Solution to Ethical Gamesmanship*, 29 HOFSTRA L. REV. 971 (2001) (discussing of the controversy surrounding the use of advance waivers).

⁹⁰ See Phil Hersh, *USOC Boss Won't Quit over Conflict Charges*, CHI. TRIB., Sept. 6, 1991, at 3C.

⁹¹ *Id.*

⁹² See *id.* (listing other sports associations on which Helmick served).

⁹³ See Mike Dodd & Rachel Schuster, *Helmick Says Clients Were OK; Critics Disagree*, USA TODAY, Sept. 5, 1991, at 2C.

⁹⁴ See *id.*

years, \$50,000 which would be good for X number of hours of services,⁹⁵ and the services were generally “I’d like to meet So-and-So; could you arrange the introduction?”⁹⁶

This came out in the press. I am not telling you anything that is confidential.⁹⁷ This was widely reported in 1991.⁹⁸ I was the chief investigator for the Olympic Committee that delved deeply into this situation and reported and made recommendations to the committee.⁹⁹

Ultimately, Mr. Helmick was forced to resign from his position, not just as president of the Olympic Committee, but as a member of the International Olympic Committee (IOC).¹⁰⁰ At that time, even Nazi war criminals had not been forced to resign from the IOC.¹⁰¹ Of course, times have changed.¹⁰² He was really a pioneer in that regard of leaving the IOC.¹⁰³

But that was one area where sports law and legal ethics came right together, clashing on the front pages of the newspapers.

Conflicts are everywhere. You are lawyers or are going to be lawyers, and you will be dealing with conflicts, no matter what kind of practice you are in, everyday of your careers. The key, and I advise you if you are still in law school to listen closely in your ethics class, is that ninety percent of dealing with ethical issues is issue spotting and knowing enough to ask a question; knowing enough to see a problem approaching. You do not have to know the answers. If you do not know the answers, call me and pay me my fee and I will give you the answers.

⁹⁵ See *id.*

⁹⁶ See *Business Deals Draw Attention*, USA TODAY, Sept. 6, 1991, at 8C (describing the nature of Helmick’s relationships with various companies and individuals).

⁹⁷ See Mike Dodd & Rachel Schuster, *Helmick Report Has New Change*, USA TODAY, Nov. 22, 1991, at 2C (crediting *USA Today* with breaking the story).

⁹⁸ See *id.*

⁹⁹ See Ken Stephens, *USOC Probe Leaves Schiller with an Improved Attitude*, DALLAS MORNING NEWS, Dec. 22, 1991, at 18B.

¹⁰⁰ See *id.*

¹⁰¹ See John Powers, *Chaos Reigns with Soviets After Latest Developments; Many Uncertainties Must Be Hammered Out*, BOSTON GLOBE, Dec. 15, 1991, at 54 (stating that Helmick was the first member of the International Olympic Committee [IOC] to “resign under fire” in fifty-five years).

¹⁰² See *id.*

¹⁰³ See *id.*

2003]

CONFLICTS OF INTEREST IN SPORTS

431

At this point, I will turn it back to the Dean to open up for questions.

DEAN FEERICK: Thank you very much. We will have a comment from the members of the panel.

David?

MR. FEHER: I just wanted to note one thing, because it is interesting. Steve had mentioned that whenever in the bankruptcy context you have people going against a finite pool, there is conflict and how that would be analogized to the agent context.

I do not know how far this goes for sure, but it is a little bit different in the union context, in the sense that those sorts of moral questions arise all the time with unions, where in a collective bargaining negotiation they may be told by the employer: "You have \$1 million and you can spend that on your own employees however you want. If you want it to go to this plant, that plant or another plant, that is your choice. We do not really care, but that is all that we are going to spend." Then those union bargainers have to make that tough decision as to who gets the money.

Now, agent compensation is driven by how much player salary they individually help to create, and they are not on salary from the union, so it is slightly different.¹⁰⁴ But at the same time, they are exercising authority delegated by the union in a similar context, which can happen where clubs or even leagues will say, "You get this money and you can do whatever you want with it," and then the delegated agent of the union or the union itself has to decide.¹⁰⁵

The union faces tough decisions all the time as to where money goes between veterans or rookies, or this particular type of player or that particular type of player. Those are inherent in the structure of the labor laws because the union is the exclusive bargaining representative of everyone.¹⁰⁶

¹⁰⁴ See, e.g., Kenneth Abo & Jack P. Sahl, *A Professional Responsibility and Primer for Today's Entertainment Lawyer*, 18 ENT. & SPORTS L. 3, 7 (2000) (noting that sports agents are usually compensated by their clients on a contingency fee); Goldaper, *supra* note 61 (explaining that an agent can earn up to 4 percent commission on each player contract negotiation under NBPA rules).

¹⁰⁵ See 29 U.S.C. § 159(a) (2000); Fraley & Harwell, *supra* note 38.

¹⁰⁶ 29 U.S.C. § 159(a).

DEAN FEERICK: Thank you very much.

Let me ask the other two panelists if there is anything more they wanted to say, now that everyone has spoken?

MR. FENECH: First of all, the situation where an agent can represent the coach, the general manager and the players on the same team, exists today in the NFL.¹⁰⁷ It does not in the NBA¹⁰⁸ and it is sort of a gray area in Major League Baseball.¹⁰⁹ It used to not exist, and now there has been some blurring of that.¹¹⁰

The second is what Dave just talked about, and Charlie can speak to this better than anyone, that situation exists every time there is a collective bargaining negotiation, because not all of your membership is situated the same way and you have to trade off the interests of one group to get something for another.¹¹¹

The clearest example I can think of right off the top of my head was there was a collective bargaining situation in baseball where the union gave back the right to go to salary arbitration, which is one of the paramount rights that a player can earn in baseball,¹¹² and moved it back from two years to three years, thereby dropping the hammer on a whole class of players, one of whom happened to be Tom Henke, who I was representing at the time, who would otherwise have been eligible for salary arbitration,¹¹³ and it cost Henke and many of the players in that group hundreds of

¹⁰⁷ NFLPA agent regulations do not expressly prohibit such representations, but they do prohibit engaging in activity “which creates an actual or potential conflict of interest or the appearance of conflict of interest with the effective representation of NFL players.” NFLPA, *supra* note 6.

¹⁰⁸ See Richard Justice & Mark Asher, *Falk's Role in Jordan Deal Is a 'Concern'*; *Agent Rules Under Review*, WASH. POST, Jan. 15, 2001, at D1 (noting that the NBPA prohibits an agent from representing both a player and being a team executive).

¹⁰⁹ See, e.g., Thomas Hill, *Valentine's "Double Agent"*, DAILY NEWS (N.Y.), July 24, 1997, at 67 (indicating that then-MLB rules prohibiting player agents from representing management without permission of the players union).

¹¹⁰ See *id.*

¹¹¹ See 29 U.S.C. § 159(a).

¹¹² See generally Murray Chass, *Lacking Suitors, Bonds Remains with the Giants*, N.Y. TIMES, Dec. 20, 2001, at S1 (discussing the probable benefit to Bonds of his decision to exercise his right to salary arbitration).

¹¹³ Salary arbitration eligibility was increased from two to three years under the MLB-MLBPA CBA agreed to on August 7, 1985. *Baseball Labor Stoppages*, L.A. TIMES, Aug. 31, 2002, § 4, at 6.

2003]

CONFLICTS OF INTEREST IN SPORTS

433

thousands, even millions of dollars, and I do not remember anybody asking for any waiver of conflict of interest in that regard.

DEAN FEERICK: Mr. Grantham?

MR. GRANTHAM: I would add one thing. Keep an eye on the baseball negotiations, because from my perspective, they will probably not agree to a revenue sharing or salary cap.¹¹⁴ I think if you look at all the sports, the hard caps become real problems for unions and for individual athletes.¹¹⁵

I think the interesting thing to watch with regard to baseball is that the kind of revenue sharing that they are negotiating is revenue sharing among teams.¹¹⁶ As long as the union can keep management focused on revenue sharing among themselves, then the union will prevail and not have a salary cap or revenue sharing with the players.¹¹⁷

Revenue sharing as a technique is clearly, very simply put, a management technique, because they control access to the numbers and the process. They control access to the information and all the financial operations.¹¹⁸ In spite of what anyone will tell you on the union side,¹¹⁹ the union will not get access to every single entity and the revenue generated by them.¹²⁰ And if, in fact, you do not have a staff, from a forensic standpoint, to monitor management's

¹¹⁴ Steven Greenhouse, *This Time, a Tie Breaks the Deadlock*, N.Y. TIMES, Aug. 31, 2002, at D1.

¹¹⁵ See Anderson, *supra* note 64 (discussing the frustration of NBA players with the hard salary cap in that league).

¹¹⁶ Greenhouse, *supra* note 114. Cf. Anderson, *supra* note 64 (explaining that the NBPA consented to a hard salary cap in exchange for NBA owners agreeing to 53 percent revenue sharing with the players).

¹¹⁷ See Greenhouse, *supra* note 114. Cf. Anderson, *supra* note 64.

¹¹⁸ See, e.g., Dale Hofmann, *Selig's Biggest Battles Are Ahead*, MILWAUKEE J. SENTINEL, Sept. 1, 2002, at 1C.

¹¹⁹ See, e.g., Steven Greenhouse, *Coolly, Fehr Plays His Hand*, N.Y. TIMES, Aug. 22, 2002, at D1. According to Donald Fehr, head of the MLBPA, the union generally does not oppose revenue sharing, but opposes it only when coupled with a luxury tax, since the combination of the two effectively acts as a salary cap. *Id.*

¹²⁰ See, e.g., Hofmann, *supra* note 118 (criticizing the CBA reached between the MLBPA and baseball management on August 30, 2002, for failing to require that shared revenue be spent on the players and ensure that the additional revenue will be used to improve the teams).

conduct you will not get full disclosure and full information from them.¹²¹

As a result, the hard salary cap jeopardizes all these individual athletes.¹²²

QUESTIONER: One of the things that has always bothered me is the salary cap that you have in professional football and basketball. Of course, it is much worse, it seems, in football because you have so many players on one team that have to be let go because of the salary cap.¹²³ In baseball, they have their problems too, where you have somebody like Steinbrenner who can pay all kinds of money and there is nobody else who can compete with that.¹²⁴ But it seems that the salary cap, certainly in professional football, is not the answer, where a team might win the Super Bowl and in the next year they have to let go half of their players.¹²⁵

MR. FEHER: By the way, as counsel for the players, I want to say that I wholeheartedly agree that the salary cap is not an answer for anything.

I do want to say that in the NFL, the only reason the salary cap is there is because it is the result of a settlement after a trial where we won a verdict but there were threats of an appeal and the legal proceedings could have gone on, so it was not agreed to with a high degree of enthusiasm.¹²⁶

The other thing that I want to mention is that in terms of players getting cut, I cannot give you a percentage on this, but I wholeheartedly believe that the salary cap is in some ways the

¹²¹ See *id.*

¹²² See Anderson, *supra* note 64; Hoffman, *supra* note 118.

¹²³ See John Clayton, *Salary Cap Decisions Affect League Parity*, ESPN, at http://espn.go.com/nfl/columns/clayton_john/1260343.html (Oct. 6, 2001); Aaron Rennie, *Salary-Cap Ravaged Ravens Practically Starting Over*, CBS, at <http://cbs.sportsline.com/nfl/story/5645600> (Aug. 27, 2002).

¹²⁴ Clayton, *supra* note 123.

¹²⁵ See *id.*; Rennie, *supra* note 123.

¹²⁶ See Clark C. Griffith, *New Law Provides Optimism in the Coming Baseball Labor Negotiation*, ANTITRUST MAG., Spring 2002, <http://www.ccgpa.com/atart12.htm>.

2003]

CONFLICTS OF INTEREST IN SPORTS

435

world's greatest excuse for any team.¹²⁷ And I have talked to coaches about this, in terms of grievances as to why guys are cut.

At a grievance hearing where a coach just told a player that he was one of the greatest players in the world, and then he cut him, the question was—was the player released because of the cap or was it because he was not such a good player?

The coach said, “What do want me to do? Do you want me to go to the player and say, ‘I think you’re on the down-side of your career, we really don’t want you anymore,’ or do you want me to say, ‘We cut you because of the cap?’”¹²⁸

In that instance, and I think in a lot of other instances, the cap is an impersonal and ready excuse for a lot of teams who are going to cut guys anyway,¹²⁹ and where they do not want to be seen by either the teammates or in the papers as making a negative comment on a player.¹³⁰ The player is going to go out and try to get a job with another team, and in many instances he does go out and get a job with another team at a pretty good salary.¹³¹

And so I would just say that when you see these things, take it with a little bit of a grain of salt because there is some measure of courtesy involved and excuses, which are understandable. But it is easier to blame a cap than it is to blame a player or a team.

MR. GRANTHAM: If I can add for a moment, from the beginning, both the employer and employees must have a joint philosophy as to the league operation.¹³² On management's part, you have *X* number of teams. On the labor side, you have uniquely talented individuals to fill these teams' rosters.¹³³ Each of these is

¹²⁷ See NFLPA, *IT HAPPENS EVERY FEBRUARY: MEDIA MISPERCEPTIONS OF THE CURRENT NFL SYSTEM* (2002) (“Bottom line: The cap has become a most convenient strawman.”), http://www.nflpa.org/PDFs/Shared/Media_Misperceptions.pdf.

¹²⁸ See *id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *id.*

¹³² See, e.g., William J. Hoffman, Comment, *Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown With the NFL: National Football League Properties v. Dallas Cowboys Football Club et al.*, 7 SETON HALL J. SPORT L. 255, 260–64 (1997) (describing the NFL's philosophy of cooperation among its teams).

¹³³ See *Phila. World Hockey Club v. Phila. Hockey Club*, 351 F. Supp. 462, 501–02 (E.D. Pa. 1972) (stating that NHL owners paid high salaries to players as a result of the

a uniquely talented individual, and therefore a cap restricts and prohibits them from realizing their real worth in the marketplace.¹³⁴

Secondly, the difference between basketball and football, is that most contracts signed in football are not guaranteed,¹³⁵ and as a result, they have a hard cap and simply can replace or waive players in order to get under the cap for the following year.¹³⁶

You do not see that in basketball because they are guaranteed contracts,¹³⁷ and once they have signed the player, they must pay him, and will not likely waiver him unless a settlement is reached or a guaranteed portion of his salary.¹³⁸

So it goes back to the league's philosophy. For example, the NFL has decided that they would like to have a new Super Bowl winner every year or, it's the competitive balance argument.¹³⁹ They simply would rather for these teams to compete on a level playing field.¹⁴⁰ Gone are the days in football of dynasties.¹⁴¹ The NFL hard salary cap promotes parody.

Perhaps basketball will follow suit.¹⁴² However, the problem in the NBA is the current structure denies teams the ability to

players' skill, and holding that professional hockey players are not "interchangeable products" for antitrust purposes); Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 72-74 (2000) (outlining the differences between union members in construction work and unions in the entertainment industry).

¹³⁴ See Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 152-54 (2001) (examining labor market restraints in professional sports leagues).

¹³⁵ See Randy Cross, *Thoughts from a Dry Week of Owners Meetings*, SPORTING NEWS, Mar. 20, 2002, http://www.sportingnews.com/voices/randy_cross/20020320.html; NFLPA, *A New Look at Guaranteed Contracts in the NFL*, at http://www.nflpa.org/PDFs/Shared/Guaranteed_Contracts.pdf (last visited Mar. 16, 2003).

¹³⁶ See, e.g., Tim Tucker, *No Guarantees in the NFL*, ATLANTA J.-CONST., Mar. 3, 2002.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See Justin Brown, *Pro Football's Triumph of Equal Opportunity*, CHRISTIAN SCI. MONITOR, Jan. 3, 2003, at 3.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See, e.g., John Donovan, *In Search of a Dynasty*, CNN/SI, at http://sportsillustrated.cnn.com/inside_game/john_donovan/news/2000/08/04/dynasty (Aug. 4, 2000).

2003]

CONFLICTS OF INTEREST IN SPORTS

437

improve.¹⁴³ For example, the New York Knicks are stuck for the next five years.¹⁴⁴

Now, if you were the Commissioner of the NBA, you ask yourself, “The major markets—New York, Chicago, Boston, L.A.—I would like for them to be competitive every year.”¹⁴⁵ Therefore, the structure a revenue-sharing agreement, would enable all teams New York, Chicago, Boston, et cetera, or George Steinbrenner, for example, the right to pay what he wants to get a good team.¹⁴⁶ So it starts with the league’s philosophy and vision with regard to revenue sharing.

It ends in the collective bargaining agreement that you have negotiated with the players.¹⁴⁷

MR. FENECH: I just want to say one other thing. Everybody links revenue sharing with salary cap.¹⁴⁸ There is no reason why it has to be.¹⁴⁹ There is nothing to prohibit the owners in baseball, for example, from sharing the revenue in pretty much whatever

¹⁴³ See Jonathan C. Latimer, *The NBA Salary Cap: Controlling Labor Costs Through Collective Bargaining*, 44 CATH. U. L. REV. 205 (1994).

¹⁴⁴ See Joe Aquilar, *New York Knicks 2001–02 Season Preview*, SPORTS NETWORK, Oct. 25, 2001.

¹⁴⁵ See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 906 (1999) (stating that New York is the largest market in the U.S., with over 14 million people); *Top 50 Cities in the U.S. by Population and Rank, 1990 and 2000*, Info Please, at <http://www.infoplease.com/ipa/A0763098.html> (last visited Mar. 16, 2003) (listing the top five cities in the U.S., in terms of population, as New York, Los Angeles, Houston, Chicago, and Philadelphia, with Boston ranked at twentieth).

¹⁴⁶ See, e.g., Walter Adams & James W. Brock, *Monopoly, Monopsony, and Vertical Collusion: Antitrust Policy and Professional Sports*, 42 ANTITRUST BULL. 721 (1997) (stating that owners traditionally approve of competition between teams where it works in their financial favor and so long as they “receive their ‘fair’ share” of profits).

¹⁴⁷ See NFL-NFLPA CBA art. XXII, *supra* note 19; Peter N. Katz, Comment, *A History of Free Agency in the United States and Great Britain: Who’s Leading the Charge?*, 15 COMP. LAB. L.J. 371, 381–84, 394–96 (1994).

¹⁴⁸ See, e.g., Brien C. Bell, *Baseball’s Economic Woes*, BUS. TODAY, Winter/Spring 2002, at 12–13 (stating that revenue sharing without a salary cap is inflationary and ineffective), <http://www.businesstoday.org/mag/2002spr/nation-baseball.pdf>; Allen Barra, *Bud Selig’s Forked Tongue*, Salon, at <http://archive.salon.com/news/sports/col/barra/2001/12/14/selig/index1.html> (Dec. 14, 2001).

¹⁴⁹ See Piraino, *supra* note 145, at 937–38 (arguing that there are “less restrictive alternatives” available to ensure competitive balance).

fashion they choose.¹⁵⁰ And it really has nothing to do with the players. The players do not control that. If the owners really wanted to share revenue, they could.¹⁵¹

They do not, however. The George Steinbrenners, the large-market teams, do not want to share revenue, so the game in baseball, and I have spent twenty-two years watching this negotiation game in baseball, is the so-called large-market owners.¹⁵² And it is really not the size of the market, it is the size of the revenue that the team generates, and that may have to do with the expertise of the people running the franchise.¹⁵³ The large-revenue teams have interests that are antithetical to the small-revenue teams, but they both choose to fight the players and try to paper over their grievances with one another.¹⁵⁴ That is what happens in every single baseball negotiation.

MR. FEHER: By the way, in terms of this parity issue, the salary cap does not really make a whole lot of sense in terms of promoting parity, if that is your only goal.¹⁵⁵ The salary cap has a big effect on the owners' bottom line in terms of why we thought the owners were looking for it.¹⁵⁶ That is the only basis we ever believed.

¹⁵⁰ See RICHARD C. LEVIN ET AL., THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER'S BLUE RIBBON PANEL ON BASEBALL'S ECONOMICS (2000) (detailing the panel's various recommendations for revenue sharing in baseball), http://www.mlb.com/mlb/downloads/blue_ribbon.pdf.

¹⁵¹ See, e.g., Stephen F. Ross, *Light, Less-Filling, It's Blue-Ribbon*, 23 CARDOZO L. REV. 1675, 1680 (2002) (stating that "any changes in revenue sharing will require the voluntary agreement of the owners or an extraordinary edict by the Commissioner under his newly granted powers") (emphasis added).

¹⁵² See Marc Topkin & Bill Adair, *Amid MLB Woes, Rays Numbers Are Optimistic*, ST. PETERSBURG TIMES (Fla.), Dec. 7, 2001, at 1C.

¹⁵³ See Eric Fisher, *NFL Moving Toward Division of the Haves and Have-Nots*, WASH. TIMES, Sept. 9, 2001, at C3.

¹⁵⁴ See, e.g., Christopher Carey, *Cards Post \$7.3 Million Loss, Report Says; DeWitt Says He's Worried About Baseball's Finances*, ST. LOUIS DISPATCH, Dec. 7, 2001, at D1.

¹⁵⁵ See Ross, *supra* note 151, at 1697-99 (explaining why a blanket salary cap would be ineffective in creating parity among MLB franchises).

¹⁵⁶ See Christopher D. Cameron & Michael J. Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against a Salary Cap for Major League Baseball*, 22 FLA. ST. U. L. REV. 827 (1995) (arguing that a salary cap in baseball would have little effect on competitive balance).

There are other very ready solutions to parity, one of which is actually in the NFL's collective bargaining agreement, but that only applies in uncapped years. Basically if a team wins the Super Bowl or is one of the final playoff teams, they cannot sign as many free agent players the next year.¹⁵⁷

So you can have very limited rules promoting parity that do not have an effect on the total wage bill.¹⁵⁸ But the thing that the owners really want is to have rules that limit the total wage bill, which is usually what collective bargaining agreements are about, or what antitrust cases are about, in terms of employers trying to inhibit competition so that their total wage bill is lower.

For example, there is a very common practice in the NFL, which does not get talked about very much, of signing a long-term contract with a big roster bonus that kicks in in a certain year, where both the player and the team know that when that year comes the player is not going to make it.¹⁵⁹ The contract has a \$6 million roster bonus or something like that. It says it is a six-year contract, for signing bonus pro ration reasons. Because in the NFL, and I know this sounds complex, but the bonus is a form of guaranteed money.¹⁶⁰ The players get their money upfront.¹⁶¹ So they get a big signing bonus, there is a six-year contract, but because it has a huge roster bonus that is payable at the beginning of the fourth year everyone knows the player is going to get cut at the beginning of the fourth year.¹⁶² So he gets his big paycheck upfront and it is really a three-year contract for all practical

¹⁵⁷ See NFL-NFLPA CBA art. XXI, *supra* note 19; Adam W. Heller, *Creating a Win-Win Situation Through Collective Bargaining: The NFL Salary Cap*, 7 SPORTS L.J. 375 (2000) (outlining the basic provisions of the NFL-NFLPA CBA).

¹⁵⁸ See David Thomas, *Let's Wear a Patriots Cap*, EVENING STANDARD (London), Sept. 10, 2002, at 81.

¹⁵⁹ See David J. Sipusic, *Instant Replay: Upon Further Review, the National Football League's Misguided Approach to the Signing Bonus Should Be Overturned*, 8 SPORTS LAW. J. 207, 221, 239 n.233 (2001).

¹⁶⁰ *Id.* at 218-19. See also Ed Bouchette, *Pittsburgh's Heinz Field Helps NFL Team Stand Up to the Competition*, PITT. POST-GAZETTE, Aug. 24, 2001.

¹⁶¹ See Bouchette, *supra* note 160.

¹⁶² See Gary G. Roberts, *Interpreting the NFL Player Contract*, 3 MARQ. SPORTS L.J. 29, 33 (1992).

purposes.¹⁶³ It is just a totally different structure that happens to be negotiated that way.

In the NBA, the situation is different because you have guaranteed contracts.¹⁶⁴ Some of this results from the fact that the sports are different in terms of the type of sports they are—the number of players, the length of careers, and from where the sports were coming.¹⁶⁵

From the players' point of view, we do not think the current system is perfect by any means, and I am more than willing to take any idea you have that will not involve the continuation of the cap.

MR. KRANE: Here we have the polarization of the sports law field coming full-tilt at you. I have spent the last twenty years defending the legality and reasonableness of salary caps in various leagues.¹⁶⁶ It is not exactly on our topic of conflicts of interest, and it is also a subject that we could debate for the next three days without finishing.

But I will just say that, in defense of the leagues that do have caps, there is one fundamental question that you have to ask: If you are a professional athlete, are you going to take a "me first, I want as much money as I can get" attitude, or do you have a concern about there being a league at all ten years down the road?¹⁶⁷

¹⁶³ See Scott McPhee, Comment, *First Down, Goal to Go: Enforcing the NFL's Salary Cap Using the Implied Covenant of Good Faith and Fair Dealing*, 17 LOY. L.A. ENT. L.J. 449, 468–72 (1997) (describing how NFL teams use signing bonuses even with salary cap restrictions).

¹⁶⁴ See Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 VILL. SPORTS & ENT. L.F. 11, 37 (1994); Roberts, *supra* note 162, at 32.

¹⁶⁵ See, e.g., Roberts, *supra* note 162, at 30–31; Sipusic, *supra* note 159, at 218–19.

¹⁶⁶ See, e.g., *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir.) (holding that the teams comprising MLS do not violate antitrust laws in functioning as a single entity when negotiating employment contracts with players, thereby preventing players from negotiating contracts with individual teams and facilitating a hard salary cap), *aff'd*, 123 S. Ct. 118 (2002); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Bridgeman v. Nat'l Basketball Ass'n*, 838 F. Supp. 172 (D.N.J. 1993).

¹⁶⁷ See, e.g., Roger Adams, *Baseball: Safe at Home*, GLOBE & MAIL (Toronto), Aug. 29, 2002 (discussing recent tension in negotiations between baseball owners and players, during which the owners have expressed financial desperation).

2003]

CONFLICTS OF INTEREST IN SPORTS

441

MR. GRANTHAM: If I could make one point, and I do not represent a legal view, but strictly a business view. It is very simple economics: If I own a team and I must revenue share, would I rather share with the players?¹⁶⁸ If I share with the players, I will now have acquired a partner, and all partners then have financial certainty.¹⁶⁹ As soon as you engage in this type of revenue sharing you have agreed to a cap on wages.¹⁷⁰

If you read *The New York Times* this past Sunday, Len Koppett, who is notably one of the best writers in sports, wrote a very interesting piece.¹⁷¹ It simply said that the owners in baseball are being unpatriotic, and they are being unpatriotic because they are not sharing this “thing” with us, this “thing” that somehow escapes all of us.¹⁷² Maybe Enron could have had that thing.

Well, what is that thing? That thing is the ability to have a business or be in a business for 148 years, like some of the baseball teams, or for the last three decades, and lose money, most recently \$500 million, but still not go out of business, and at the same time increase your revenue by three-fold. What is that secret? Whatever it is, if you are not sharing it, you are not being patriotic to our people.¹⁷³ I rest my case.

QUESTIONER: Is the structure of bargaining units and player representation and leagues and clubs similar or different in the minor leagues for those sports that have minor leagues, and are there conflicts between the parent club and the minor league club?

¹⁶⁸ See Dan Lewis, *Look for the Union Label*, National Review Online, at http://nationalreview.com/nrof_comment/comment-lewis080202.asp (Aug. 2, 2002) (discussing how revenue sharing among teams decreases the amount which teams can spend on players, thereby reducing salaries and creating a “cap”); Darren Rovell, *Steinbrenner to File Antitrust Suit?*, ESPN, at <http://espn.go.com/mlb/s/2000/0719/641139.html> (July 21, 2000).

¹⁶⁹ See Lewis, *supra* note 168; Rovell, *supra* note 168.

¹⁷⁰ See Hal Bodley, *Fehr Blasts Owner's Proposals: Memo to Players*, USA TODAY, Aug. 20, 2002, at 1C (discussing how a plan to adopt revenue sharing is a wholesale attack on salary structure and would result in big losses for big spenders, such as the New York Yankees); Lewis, *supra* note 168; Rovell, *supra* note 168.

¹⁷¹ See Leonard Koppett, *Backtalk: The Business of America's National Pastime Is Unpatriotic Obfuscation*, N.Y. TIMES, Mar. 10, 2002, § 8, at 9.

¹⁷² See *id.*

¹⁷³ See *id.*; Darren Rovell, *Economists: Baseball's Debts Misleading*, ESPN, at <http://espn.go.com/mlb/s/2000/0719/641339.html> (July 21, 2002).

MR. FENECH: Let me answer that for baseball. First of all, there is no bargaining unit for minor league baseball players.¹⁷⁴ They are the abandoned stepchildren of the sport. That is point one.

Secondly, the minor league clubs have a contractual relationship with the major league clubs.¹⁷⁵ A few years back, the major league clubs saw that the minor league clubs were actually running a pretty profitable business, and they hammered them in the negotiation of their contract with the minor league clubs, so they now exist at the sufferance of the major league clubs.¹⁷⁶

You know, having an unregulated monopoly is a wonderful thing.¹⁷⁷ My favorite line from John Helyar's book, which I would recommend to all of you, called *Lords of the Realm*, was, and I cannot quote it exactly, Ted Turner is quoted as sitting in an owners' meeting saying, "Guys, we have the only unregulated monopoly in America and you are still"—I'll say screwing it up.¹⁷⁸ It is true. It is absolutely true.

So to answer your question, minor league players get the short end of the stick. Minor league players earn \$850 a month in their first contract year.¹⁷⁹ One of the guys in my office showed me his father's contract as a minor league baseball player, which would have been back in like 1960, and he earned \$650 a month. So that shows you how their wages have increased.

QUESTIONER: I have two quick questions. You said that if a lawyer is representing, and even acting as an agent, that they are

¹⁷⁴ See Michael Kinsman, *Ballplayers Union Proves So Successful*, SAN DIEGO UNION TRIB., Aug. 18, 2000, at H-2.

¹⁷⁵ See Lori Clark, *The Evolution of Minor League Baseball*, Western Michigan Whitecaps Captivations, at <http://www.whitecaps-baseball.com/PRESSBOX/FEATURE98/minors.html> (July 3, 1998).

¹⁷⁶ See Clark, *supra* note 175; Bob Hoie, *Minor League Farm Systems*, En El Punto, at <http://www.enel.net/beisbol/history/leagues/minors/farm.html> (last visited Mar. 20, 2003).

¹⁷⁷ See *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316 (N.D. Fla. 2001) (noting that the business of baseball has been exempt from the antitrust laws since 1922); WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMIC PRINCIPLES & POLICY* 258-64 (7th ed. 1997); JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL* (1994).

¹⁷⁸ See HELYAR, *supra* note 177.

¹⁷⁹ See *Hearing on S. 53 Before the Senate Comm. on the Judiciary* (1997) (statement of Dan Peltier), available at <http://www.diamondfans.com/minors-peltier.html>.

2003]

CONFLICTS OF INTEREST IN SPORTS

443

still held to the lawyer's standards of ethics.¹⁸⁰ What happens if there also is a lawyer involved on behalf of the player? Does the standard change for that agent who also happens to be a lawyer?

MR. KRANE: No. If you are a lawyer, you are subject to the *Code of Professional Responsibility* or the *Model Rules* in all of your dealings with clients, and sometimes in your personal life.¹⁸¹ Even when you are acting for yourself individually, there are some rules that apply to you as an individual. So there is no escaping it. You sign on as a lawyer, you take the baggage.¹⁸²

QUESTIONER: My other question was for Craig. I wondered if you could discuss any interesting merchandising conflicts of interest, as opposed to just conflicts arising in salary negotiations? For example, what if two players are looking to get on a cereal box?

MR. FENECH: Okay. Once again, though, the problem is that "Wheaties" usually makes that determination. I would love to make it for them and you would see my clients on the Wheaties box right now.

But I think that the point that was raised earlier, that there is the real world and then there is the world that we live in in law school. These conflicts come up and we sort of dance around and hope they do not arise. But actually, we have an ethical obligation to see that they do arise, do we not, to see that they are spoken about and that people are made aware of them?¹⁸³

¹⁸⁰ MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2001); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(a)(1) (2001). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 1-5 (2001).

¹⁸¹ MODEL RULES OF PROF'L CONDUCT R. 8.4(a); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(a)(1). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 1-5.

¹⁸² *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbL., § 4 ("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.").

¹⁸³ Clients may only consent to dual representation after full disclosure where a potential conflict of interest exists if an attorney has a "reasonable belief that the representation" of one client "will not adversely affect the relationship with the other client" or "be materially limited by the lawyer's responsibilities to another client," and it is "obvious that he can adequately represent the interest of each." Otherwise, a conflict is unacceptable and cannot be waived, even through full disclosure and consent. MODEL

I think the concept of advance waivers flies right in the face of all that we have talked about here. To me it is ludicrous to say, "I am going to represent the whole league and I am going to represent the individual teams. You do not know what it is, but you are waiving it." It is absurd and it is a fiction.

MR. KRANE: When you are dealing with sophisticated business-people, as we are with sports owners, who also have their own lawyers, they are at least beyond the age of consent and they know what they are doing.

MR. FENECH: That is a long way from sophisticated.

MR. KRANE: They know what they are doing. They know what they are getting into. It is different when you are dealing perhaps with individuals or with kids in college who are signing on with their first agent. Maybe there it is something to think about.

Ethics opinions on advance waivers make a distinction between the sophisticated business-person and the individual who may never have had an experience with a lawyer and has no advisors.¹⁸⁴

So you have to look carefully at each situation to see if it is really workable.

QUESTIONER: One of the things that was interesting back in the 1980s, I will not name the Players Association person I spoke with, but when I first started seeing players being victimized by people who were giving financial advice, that lost them all their money, I asked if the Players Association could do something. They said, "We tried and then too many agents threatened to sue us." So they dropped the whole thing.

What I find interesting is they spent all this time trying to ensure that players get the most amount of money possible on

RULES OF PROF'L CONDUCT R. 1.7(a)-(b); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(c). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16.

¹⁸⁴ *See, e.g.*, New York County Lawyers' Comm'n on Prof'l Ethics, Op. 724 (1998) (stating that a lawyer can seek an advance waiver with respect to future conflicts, and that the validity of the waiver will depend on the adequacy of disclosure given to the client under the circumstances, taking into account the sophistication and capacity of the person or entity giving the consent).

2003]

CONFLICTS OF INTEREST IN SPORTS

445

contracts, and then seem to be doing nothing until very recently to make sure that they try to retain that money.¹⁸⁵

With unions traditionally, you have pension funds that they invest their members' monies in, and they have served as financial advisors, at least in that sense.¹⁸⁶

So I do not understand why you would think that giving some type of financial guidelines is not appropriate for a Players Association and why they would not want to start certifying, or at least giving strong guidelines for, investment counseling.

MR. FEHER: On that, there are different buckets of money, so to speak. If it is money within the collective bargaining agreement that is in the pension plan, that is subject to all the normal federal rules governing that.¹⁸⁷ Those are monies received that are subject to the collective bargaining agreement.¹⁸⁸

What I was talking about is a little bit different, which is that, for example, if you are an auto worker, apart from your pension you also get say \$1,000 in a given week as part of your paycheck. Then your union says, "You're not allowed to go down to Charles Schwab because we have decided we are not going to certify Charles Schwab for this reason or that reason." That is money that the employees have gotten as salary which the employees as adults feel that they should decide as to how they are going to invest it personally.

¹⁸⁵ See *supra* note 45 and accompanying text.

¹⁸⁶ See Employee Retirement Income Security Act [ERISA], 29 U.S.C. §§ 1001–1461 (2000).

¹⁸⁷ See *id.*

¹⁸⁸ See DEPARTMENT OF LABOR, EMPLOYMENT LAW GUIDE: LAWS, REGULATIONS, AND TECHNICAL ASSISTANCE SERVICES, <http://www.dol.gov/asp/programs/guide.htm> (n.d.).

[ERISA] requires persons and entities that manage and control plan funds to: manage plans for the exclusive benefit of participants and beneficiaries; carry out their duties in a prudent manner and refrain from conflict-of-interest transactions expressly prohibited by law; comply with limitations on certain plans' investments in employer securities and properties; fund benefits in accordance with the law and plan rules; report and disclose information on the operations and financial condition of plans to the government and participants; and provide documents required in the conduct of investigations to ensure compliance with the law.

Id.

The other thing is that unions are democracies, and whatever unions decide to do is, in general, driven by what the players themselves want. And so quite often there are comments like, “Why doesn’t the union just do this because it is for the good of the players?”

In the union leadership there are certainly very experienced people who know what is going on, and the leaders of the union have tended to be there over a number of years.¹⁸⁹

It is very, very difficult for a union to say, “Even though my members do not want this, I am going to force it on you in terms of what is going to happen with your personal paycheck.”

This has been important enough of an issue for the NFLPA to implement this financial advisors program.¹⁹⁰

But, the program is voluntary.¹⁹¹ If one of the players does not want to deal with one of the registered financial advisors, he could take his money to his brother-in-law who is not registered, who says he should invest in some apartments or some options or whatever. That is money that is in his pocket. It is different.

Even though this is a country that allows unions, this is still a country that does not allow unions, as far as I know, to tell employees what they can do or not do with their money once it gets in the employees’ pockets.

QUESTIONER: My question involves the situation going on in baseball right now with the league actually owning a team.¹⁹² Whose role is it now to police transactions with the Montreal

¹⁸⁹ See, e.g., *Gene Upshaw*, Info Please, at <http://infoplease.com/ipa/A0109717.html> (last visited Mar. 20, 2003) (noting that Gene Upshaw, a former player with the Oakland Raiders, has been Executive Director of the NFLPA since 1987).

¹⁹⁰ Singletary, *supra* note 45 (explaining that in 2002, the NFLPA initiated a “Financial Advisors Program” to establish a code of conduct and check the backgrounds and credentials of those proffering services to protect NFL players from financial fraud).

¹⁹¹ See 29 U.S.C. § 159(a) (2000) (Employee representatives are empowered by the NLRA to bargain with employers concerning “rates of pay, wages, hours, or other conditions of employment,” but they are not empowered to instruct employees as to what to do with the wages that they receive.).

¹⁹² Meg Vaillancourt, *Sale of Marlins Clears Way for Close of Red Sox Sale*, BOSTON GLOBE, Feb. 19, 2002, at D1 (noting that in February 2002, MLB purchased the financially troubled Montreal Expos from owner Jeffrey Loria for \$120 million).

2003]

CONFLICTS OF INTEREST IN SPORTS

447

Expos, because that role is traditionally empowered to the Commissioner?¹⁹³

MR. FENECH: It is the Commissioner. He has assumed that authority himself.¹⁹⁴ He also owns the Brewers, although perhaps not technically.¹⁹⁵ But their answer to that is it is in a blind trust.¹⁹⁶ I gather he cannot remember that he owns the Brewers. I mean, it is laughable—talk about conflict of interest.

QUESTIONER: In terms of what we have seen in the industry lately, the trend towards consolidation, other than building the screening wall,¹⁹⁷ as SFX¹⁹⁸ has done, what else can be done to avoid the conflict of interest? And does creating a screening wall, destroy some of the synergies that you were potentially looking to achieve through consolidation?

MR. FENECH: The screening wall is a joke, as many screening walls in fact are.¹⁹⁹ It is a fiction. It is like the blind trust that Bud Selig has with the Milwaukee Brewers.²⁰⁰

¹⁹³ See Jack O'Connell, *Following His Lead; Selig Has Skipped Sport Through Changes, Strike*, HARTFORD COURANT (Conn.), Mar. 31, 2002, at L2.

¹⁹⁴ See Gordon Edes, *Caught Up in Spring; Here's an Early Fan's Guide to Everything Under the Sun*, BOSTON GLOBE, Feb. 15, 2002, at E1.

¹⁹⁵ Bud Selig, Commissioner of MLB since 1998, has owned an interest in the Milwaukee Brewers since the 1970s. When he became the interim Commissioner in 1992, he created a blind trust run by his daughter, Wendy Selig-Prieb, to oversee the Brewers. Nonetheless, Selig retains a financial interest in the club, an arrangement that has prompted conflict of interest criticism. See Tom Haudricourt, *Conflict of Interest? Owners Want It That Way*, MILWAUKEE J. SENTINENTAL, Jan. 13, 2002, at 13C; Ross Newhan, *Budding Leader; Bud Selig, Who Used to Say He Didn't Want to Be Commissioner, Is Expected to Be Near Unanimous Choice Today Because He's a Known Quantity*, L.A. TIMES, July 7, 1998, at C1; Ross Newhan, *Selig Gets Commissioner's Power*, L.A. TIMES, Sept. 10, 1992, at C1.

¹⁹⁶ See Haudricourt, *supra* note 195.

¹⁹⁷ BLACK'S LAW DICTIONARY 573 (7th ed. 1999) (A screening wall, also referred to as an ethical wall is "a screening mechanism that protects client confidences by preventing one or more lawyers within an organization from participating in any matter involving that client.").

¹⁹⁸ Clear Channel Communications, *About SFX*, SFX, at http://sfx.com/publish_static.asp?page=AboutSFX (last visited Mar. 25, 2003) (explaining that SFX, a subsidiary of Clear Channel Communications, is an agency representing professional athletes in baseball, basketball, football, hockey, tennis, and golf, and owning or operating approximately 130 live entertainment venues throughout the world).

¹⁹⁹ *Id.* See also David Greising, *Chinese Wall No Great Defense Against Conflicts*, CHI. TRIB., May 22, 2002, at B1.

But the answer to your question is if there really was this separation, yes, it would destroy the synergies, although it seems to me that they have had a lot of problems in defining exactly what those synergies really are. I mean, it is a nice word, but nobody knows what it means in practice.

DEAN FEERICK: Steve, I have a question to you. There are a lot of law students here. Would you add any additional comments on screening walls?

MR. KRANE: "Screens" are very controversial, highly controversial.²⁰¹

The American Bar Association (ABA) House of Delegates at its meeting two meetings ago, just within the last year, debated whether screens should be allowed in certain limited circumstances within law firms to wall off lawyers who at other firms had previously represented clients and now had come to a new firm that is going to be adverse to someone that they represented.²⁰² You screen them off so that they do not impart any confidential information that they learned from the old client.²⁰³ Is that good enough, without going to the former client and asking for a waiver, which is the standard?²⁰⁴

That was hotly debated, and it went down to defeat, as it did in the New York State Bar Association House of Delegates when I was the proponent of it several years ago.²⁰⁵ So the legal profession is not too keen on having screens, even in large law firms, even to cure problems.²⁰⁶ Today screens are used primarily

²⁰⁰ See Haudricourt, *supra* note 195.

²⁰¹ See Susan R. Martyn, *Conflict About Conflicts: The Controversy Surrounding Screens*, 46 OKLA. L. REV. 53 (1993).

²⁰² See Memorandum from Tom Edmonds, to the National Association of Bar Executives [NABE] (Aug. 10, 2001), <http://www.abanet.org/nabe/deleg07.html>.

²⁰³ Greising, *supra* note 199.

²⁰⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 (2001); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16, 5-19 (2001).

²⁰⁵ N.Y. STATE BAR ASS'N SPECIAL COMM'N ON THE L. GOVERNING FIRM STRUCTURE AND ORG., PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000), <http://www.nysba.info/whatsnew/maccrate.pdf>.

²⁰⁶ See Martyn, *supra* note 201, at 53.

2003]

CONFLICTS OF INTEREST IN SPORTS

449

as an adjunct to consent, as a way of convincing a client that it is okay to waive a conflict because we will implement these procedures to make sure that your confidential information is preserved and that it does not leak over to the lawyers who are representing the other side. So it is just a way of getting consent, not a substitute for consent.²⁰⁷

MR. FEHER: And just as a follow-on to what you are saying, I think that with consolidation there are important things that can be bought. You just have to be careful as to what you are buying, in the sense that if you buy somebody, buy an agency that represents a large number of players, if it is a stable agency that has a lot of goodwill with those players that is going to persist over time and you have confidence in them as businessmen, it is worth your money.

If it is a situation where you do not know whether tomorrow those players are going to be somewhere else, you should be a little more careful as to what you are going to do with your money, because, as I said earlier in terms of what the underlying rules are, they allow for a lot more freedom of choice on the part of the players.²⁰⁸

And so I am not saying do not buy them and that it's not important and you cannot get synergies with your marketing efforts, because you can, but you just need to be sure that you invest in solid entities. And I think that applies across the board.

MR. FENECH: Well, I think that these discussions are helpful, and I think that guidelines are very important. I usually see my role in these as being the guy who is sort of on the ground and, to quote Howard Cosell, tries to "tell it like it is."²⁰⁹

All of these considerations are very important, and the closer you can come to adhering to them perfectly the better off you are.

²⁰⁷ *See id.*

²⁰⁸ *See* MODEL RULES OF PROF'L CONDUCT R. 1.16, cmt. 4 ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(b)(4).

²⁰⁹ *See* COLUMBIA ENCYCLOPEDIA 691 (6th ed. 2001) (noting that this was Howard Cosell's mantra and an apt characterization of his approach to journalism).

I think everybody in the profession wants to see people playing by the rules. The problem is the reality out there is far different than that, and I would caution you when you get out there, some people get a little carried away and think that it is the “Wild West,” and you can wind up getting burned, particularly if you are not somebody who has a lot of clout in the industry, which typically you won’t be in the beginning. So be careful and adhere to these rules as best you can, but know that your competition probably is not.²¹⁰

MR. GRANTHAM: Just as a follow-up to answer the question with regard to unions and the advisory capacity with financial management, I would only say to you that unions are political units. You may want something for the players, but it is what they want for themselves that ultimately rules at the end of the day.

You may provide education as a union, however, with regard to financial advice, in particular, you must rely on trained professionals. The labor law is very specific about what the union can do regarding the management of individual players’ money.²¹¹ Negotiating their contracts and items in collective bargaining agreements is the union’s regulatory responsibility. With regard to financial management, the union can only act in an advisory capacity.²¹²

So it becomes political more so than anything at that point.

DEAN FEERICK: Thank you.

Steve?

MR. KRANE: Well, I will just echo everything that everyone has said, except the denigrating comments on the salary cap and so on. But really, just a reminder, in case you forget, that as lawyers,

²¹⁰ See Paul Ruschmann, *Are Sports Agents Facing a Regulatory Blitz?*, 65 MICH. BAR J. 1124 (1986), available at http://www.paulruschmann.com/clips/sports_law/sports_blitz.htm.

²¹¹ See 29 U.S.C. § 159(a) (2000) (Employee representatives are empowered by the NLRA to bargain with employers concerning “rates of pay, wages, hours, or other conditions of employment,” but they are not empowered to instruct employees as to what to do with the wages that they receive.).

²¹² See, e.g., Singletary, *supra* note 45 (explaining that in 2002, the NFLPA initiated a “Financial Advisors Program” to establish a code of conduct and check the backgrounds and credentials of those proffering services to protect NFL players from financial fraud).

2003]

CONFLICTS OF INTEREST IN SPORTS

451

your reputation is all you have, and it is very fragile. The financial pressures in the competitive business environment we are in to get clients and to keep clients, are tremendous and sometimes push you pretty close to the line. They will push you. If you have not been pushed already, you will be pushed.

Just when you reach the point that you think you are about to cross over the line, step back and think: Do I really want to risk everything I have worked for my entire career and throw it all away for a little bit of money or even a lot of money? I think the answer should be no.

I would just urge you to take the high road whenever you can and you will not be sorry.

DEAN FEERICK: I am sure you will agree with me that was a great panel.

Thank you very much.