

M/E INSIGHTS

SPORTS ISSUE | FALL 2010

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LETTER FROM THE GUEST EDITOR

By Richard L. Wirthlin

Sports and media are deeply intertwined. Sports rely upon the media to promote and economically support their industry. Similarly, sports provide all forms of media with content and product necessary to drive many of their economic engines. Sports and media are symbiotic. This issue of *Insights* is all about the current intersections among sports, media, business and the law.

A few numbers and historical facts are interesting in order to frame the impact of sports and media: The first Olympics commercially broadcast were in Rome, during the summer of 1960. NBC's host, Jim McKay, was not even in Rome, "but sat in a studio at Grand Central Terminal tapping out his nightly scripts on a portable typewriter as editors spliced together the half-hour shows." *The Road from Rome*, Newsweek, David Maraniss, July 26, 2008. "Sometimes the tapes were still cold from the belly of the jet, and McKay and the editors would stick them under their armpits to warm them up." CBS paid less than a half-million dollars for the rights. In contrast, the U.S. television rights for the 2010 (Vancouver, Winter) and 2012 (Summer, London) Games, just fifty years later, cost NBC \$2.201 billion—beating offers by Fox and ABC/ESPN during 2003 bidding. Sports are very big business; and, with big business, come big challenges and big opportunities. This issue of *Insights* speaks to those challenges and opportunities.

Sports develop, build and support a whole variety of media properties. ESPN is a great example. Founded by Bill and Scott Rasmussen, ESPN was launched in 1979 as a new cable television network, just as cable television was emerging. The original programming vision was to cover sporting events only in the state of Connecticut. However, it was less expensive to purchase a 24/7 satellite feed compared with daily blocks of several hours each for only local coverage. A national network was born. ESPN began filling their 24 hours with a variety of sporting events. Let us now fast forward to the beginning of the 2006 NFL season: ESPN began airing "Monday Night Football," an ABC institution for 36 years. The price-tag: \$1.1 billion for eight seasons.

We are pleased with the variety and depth of this issue on sports and media law. A sampling from our contributing authors:

Michael Harbert explores, in a most creative fashion, crisis management in the world of professional sports. With recent challenges faced by well-known athletes from Ben Roethlisberger to Tiger Woods, this article could not be timelier. Michael writes: "Although not part of the current job description for most General Counsel (or outside firms advising professional teams or NCAA schools), it is now imperative that they add another important task to their portfolio—

that of 'Chief Reputation Officer.'" Further, "[o]ne of the most essential roles played by the CRO must be to become that member of executive management who can openly, and without fear of retribution, tell the 'emperor' that they have no clothes."

In "Sports in Public Diplomacy," by Barry A. Sanders, Chairman, Southern California Committee for the Olympic Games, he persuasively advocates an even greater role for sports in public diplomacy as a means of diminishing the pervasive influence of violent extremism: "We use radio and television broadcasts, publications, concert tours, and all sorts of emergency relief to sway international opinion on behalf of American policy and security. Strangely, we fail to employ sports and athletic activity in this endeavor." Further, "[e]xtremism is a young man's game... [w]e cannot continue to omit the method most prevalent to divert the undirected energies of the young—active sports."

In 2005, the NBA players' union accepted a minimum-age rule during the last collective bargaining negotiations. This "one-and-done" rule, which went into effect in 2006, requires a non-international player to be at least 19 years old and one year out of high school before entering the draft. In "An End in Sight for One and Done? Surveying the Rule's Effect and Developing a Working Framework

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for its Replacement in the NBA's next CBA," the pros and cons of the rule—and, importantly, its impact on both professional and amateur basketball—is analyzed: "Yet, the tentacles of the rule reach so far beyond these two parties that it would be disingenuous to characterize its unintended consequences as collateral damage, mere shrapnel spraying the NCAA and its amateur basketball players nationwide." Further, "[l]ong-time basketball analyst Dick Vitale recently labeled the rule an 'absolute joke and fraud to the term 'student-athlete.'" This article is great reading and provides a good opportunity for debate.

Ambush marketing is addressed in "Stealing the Show," by Ben Mulcahy. Ben identifies a number of legal issues surrounding ambush marketing and observes: "The irony in pursuing such modest ambush efforts is that sometimes the response generates exactly the type of publicity that the ambusher was seeking to generate in the first place." In an insightful conclusion, Ben notes: "[I]n evaluating those popular ambush techniques that present little or no risk when used in isolation or in connection with one major sporting event, care should be taken to evaluate the laws that apply to the particular event in question and the

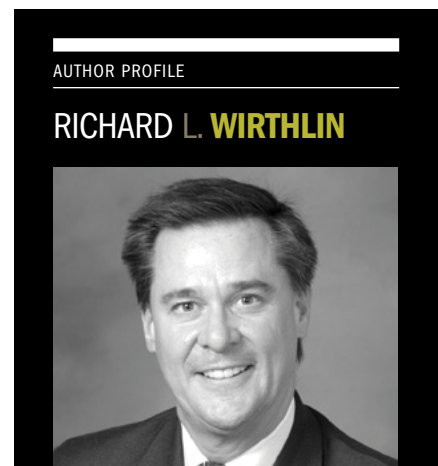
cumulative effect of each campaign element so that a campaign that legitimately ties into the excitement of the event does not also expose the ambusher to undue risk of liability."

In "An Interview between Vivica Mitras and Vijay Armitraj," the importance of sports and entertainment in the life of pioneering tennis star, Vijay Armitraj, is discussed. Vijay said, "the doctors wanted me to play an outdoor sport to improve my breathing; my parents chose tennis." Further, "Sometimes people say, I want the fortune and the ability to be the best, but I don't want the responsibility that goes with it. But, unfortunately, it goes hand in hand." Also included in our issue is an interview by NBA Hall-of-Famer, Jerry West.

A wonderfully entertaining article is "Football Season is Starting Soon: Is Your Fantasy Team Insured?" by Joseph G. Balice. Joseph examines the recent development of insurance policies in fantasy sports: "So what do we make of FSI? First, from a fantasy sports perspective, it's probably unnecessary... [and] [f]rom insurance perspective, it's probably void... [and finally] [f]rom an online gambling perspective, FSI probably violates federal law."

Joanna Mamey delivers "Behind Football: A Look at Player Negotiation" and takes an expansive look at how the NFL operates, along with the intricacies of the collective bargaining agreement between the NFL and the NFLPA. She also includes some observations on the effect of American Needle. Joanna states: "[T]he NFLPA could finance a suit against the NFL for antitrust violations if the NFL attempted to enforce a last, best, and final deal offer which included anti-competitive activity with regards to the draft, limits on free agency, or wage scale, etc."

Richard Wirthlin



Richard L. Wirthlin is a corporate department partner in Latham & Watkins' Los Angeles office, where he has practiced for almost 25 years. He is the chair of the firm's media & entertainment industry group, which includes sports transactions. Mr. Wirthlin's practice involves a variety of international and domestic business transactions, with particular expertise and focus on entertainment, media, internet, new media, sports and telecommunications. His practice also involves mergers high tech, telecommunications, mergers and acquisitions, private equity and emerging technology matters. He is also the former Managing Partner of the firm's Moscow, Russia Office.

Mr. Wirthlin currently serves as primary counsel to both the Los Angeles Sports Council (LASC) and the Southern California Committee for the Olympic Games (SCCOG). The LASC's members include professional, collegiate and other sports teams and organizations, along with media and other sports-related properties in Southern California. SCCOG is the 90-year-old institution that has hosted the Olympic Games in 1936 and 1984 in Los Angeles and which acts as bid committee for future Olympic Games.

Mr. Wirthlin served as DIRECTV's lead counsel in the 1990's, representing DIRECTV from its inception, concluding partnering agreements, acquiring media product (cable, pay-per-view, studio, sports, events, etc.) and securing the agreements and relationships necessary for the infrastructure required for the first direct broadcast satellite business in the United States. Among other agreements, he negotiated the ground-breaking "NFL Sunday Ticket" deal.

He also negotiated with FIFA rights to World Cups 2002 and 2006 (and other soccer tournament and content) for all of Latin America, excluding Brazil, for DIRECTV Latin America. He represents and has represented a wide variety of media companies and sports interests in the U.S. and around the world.

Mr. Wirthlin is a past Chair of the California Bar Association's International Law Section. He has lectured at and chaired many media, international and transactional seminars, meetings and conference. He has also authored various articles and publications on topics such as international business, media, entertainment and telecommunications law.

THE DEADLIEST WORDS IN CRISIS MANAGEMENT: “COULD HAVE AND SHOULD HAVE”

It's easy to imagine this scene – even if you haven't gone through it. Yet.

INT. OFFICE OF THE GENERAL COUNSEL – PRO SPORTS TEAM HEADQUARTERS – DAY

GENERAL COUNSEL, headset on, paces in front of the window as he talks.

GENERAL COUNSEL

(frustrated)

I don't give a damn what the Commissioner would like to do, we've already agreed there won't be a rule change this year.

General Counsel turns as he hears his office door open and COACH enters. He's obviously worried as he moves toward General Counsel who holds up his hand to stop his progress, then puts his finger to his lips as he mouths "quiet". Then:

GENERAL COUNSEL

I know it's a big pain-in-the-ass problem, but...

He listens as he paces and Coach maneuvers to get in front of him, slicing his fingers across his throat and mouthing "hang up" as:

General Counsel throws his hands up in the air, shaking his head "I can't" as:

General Counsel follows with his eyes as Coach moves to the phone on the desk, puts his finger on the "off" button and mouths "hang up now" as:

GENERAL COUNSEL

Sorry folks, got to bail out and call you back later.

General Counsel flips his headset off as:

GENERAL COUNSEL

(very edgy)

Better be damn important, Coach.

COACH
(sitting behind the desk)
And you better have a damn
great criminal attorney in Atlanta.

GENERAL COUNSEL
Because?

COACH
(typing on keyboard)
Because TMZ just posted video of two
of our superstars naked in a hot tub
with some very naked, very young girls.

Coach turns the computer screen toward General Counsel.

GENERAL COUNSEL
(looks at computer screen)
How young?

COACH
(standing)
Fourteen. Maybe.

GENERAL COUNSEL
(looks close at the screen)
What's that they're doing now?

COACH
Snorting cocaine, counselor.

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THE PLAYING FIELD YOU'RE ON:

And so it begins: A crisis management saga that will define not just the values and character of the team's brand/image/reputation, or its relationship with its fans, but also the scope of the damage to its economic value in the competitive marketplace.

While this is not your average day in the perpetually-under-the-microscope world of professional (and primetime NCAA) sports, it will surely be a crucible experience that tests top management to the fullest. For of all of the skills needed to run any organization successfully, crisis management is the one where the metrics of success are most easily calibrated and measured—and the most closely scrutinized in today's all-seeing, always-viral world of cell phone cameras, saved text messages, Facebook postings, and 24/7

global media coverage of the 'celebrity athlete industrial complex' (including of course all the wanna-be celebrities).

This is why there needs to be a separate playbook in every team's front office (and in the appropriate legal affairs office of every NCAA school) that lays out the strategies, tactics, and implementation methodologies developed and approved by the ownership and top management for how to deal with this, or any other variation of "SNAFU" or "TSJHTF" or, in printable language, "What in God's name were they thinking?"

Unfortunately, the answer is as obvious as it is painful: They, of course, were not thinking at all—not about their team nor their role as a representative of their sport or university, and certainly not about their obligations to their fans and community.

But this harsh reality doesn't help the organization deal with an event that, at the very least, can devalue or wipe-out a multi-million dollar investment in a talented player or the in-good standing ranking in the NCAA. Or, at the worst, inflict serious long-term damage to the franchise's brand/image/reputation, the loyalty of the fans that support it, and therefore its overall economic value to its owners, or in the case of NCAA schools, its value to the university/college, its alumni, supporters, sponsors, and business partners.

Just ask the folks at the Pittsburgh Steelers who are dealing with the hyper-embarrassing blowback from Ben Roethlisberger's character-defining, maximum-trashy, posse-supported behavior, not to mention his alleged criminality. (See "What Was He Thinking?" sidebar on pg. 8)

A NEW SHERIFF IN TOWN?

Although not part of the current job description for most General Counsel (or outside firms advising professional teams or NCAA schools), it is now imperative that they add another important task to their portfolio—that of **Chief Reputation Officer**. Why? Because they are the best trained and intellectually/psychologically prepared to be what this job requires: part investigator, cop, negotiator, litigator—and all diplomat.

This additional role must include the design, implementation, and management of a crisis **Early Warning Infrastructure** in their organization. When combined with the **Message Discipline** and **Master Playbook** components, it constitutes the **Organizational** attributes of a **Comprehensive Crisis Management Protocol** (see chart on pg. 8).

This approach to crisis management was developed after my colleagues at Core Strategy Group (Scott Miller and David Morey) and I realized that, most of the time, organizations treat SNAFU/TSJHTF events as one-off anomalies. They were not embracing the huge opportunity these events presented to build a crisis avoidance culture that would, to a significant degree, protect their institution from being

caught off-guard again and suffering the resulting deterioration of brand/image/reputation, not to mention the accompanying financial loss consequences.

Most importantly, it provides the operational mechanisms for management to get out in front of the crisis, control the conversation about the ‘allegations,’ and avoid being trapped in the often no-win, reaction-driven fox hole.

We’ve constantly heard rationalizations like “the bad boys are under control now”, or “we’re all on the same page”, or worst of all, “that’s why we keep our big PR company on retainer.” This is a mindset which ignores the fundamental reality that event-driven crisis management is, by definition, **situational** (every single one will be different), while crisis avoidance can only be **organizational**—truly organic in structure and operation.

How effectively any specific crisis event is dealt with will always be in direct proportion to how aggressively the ownership and management supports the design and implementation of the comprehensive protocol, and thus weaves it fully into the very fabric of the culture of the organization and all of its members (and family), and including sponsors/endorsers, outside advi-

EXPERT WITNESS:

“Look at what’s happened to the New York Knicks. The years of ‘benign neglect’ by the owners of the team’s management has resulted in an incredible reduction in franchise value that will take a long time to recapture. And the overall negative image of the team is most obvious in the loss of support from the fans.”

Henry Shafer,
Exec. V.P., The Q Scores Company,
henrys@Qscores.com

sors (including professional agents and managers), and even vendors/suppliers.

Implemented properly, the role of ‘Chief Reputation Officer’ (**CRO**) should immediately become essential to sustaining the long term success of the organization. Not to adopt this job-description augmentation would certainly expose the team to future failures best described by that great philosopher and baseball icon, Casey Stengel, who said, “I’ve had no experience with that sort of thing, and all of it has been bad”.

EXPERT WITNESS:

In his excellent Forbes.com blog (*USC and Reggie Bush: How Bad Behavior Showed Them The Money*) (6/11/10), Dr. Patrick Rishe said:

“The USC story is a cautionary if not predictable tale regarding why schools are tempted to skirt the rules while turning a deaf ear and blind eyes to whispered and suspected improprieties.”

When asked how ‘deaf ear and blind eyes’ could be permitted to exist inside a NCAA powerhouse (or any NCAA school) as sophisticated and well-managed as USC, Dr. Rishe replied, “I think there’s a culture of acceptance, especially at the bigger schools. They think all of their competitors are cheating, or gaming the system in some way, so they apply very passive enforcement procedures and just keep their fingers crossed that they

don’t get caught. They can be quite self-delusional and really never want to look too hard because they’re afraid they’ll find something”.

From former USC Coach Pete Carroll: “We couldn’t imagine the severity of the sanctions. But now the NCAA and all the schools will work hard to keep these kinds of things from happening again”... “I wish we did know what was going on” ‘Morning Joe’, MSNBC, 7/14/10

Truth. Or Consequences. Headlines from Wednesday, July 21st, 2010:

“Haden in, Garrett swept out as USC cleans house”
“Haden focusing on rules compliance”
“Garrett did many things right, but his arrogance helped lead to his fall”
The Los Angeles Times

“U.S.C. President-Elect Acts Swiftly to Clean House in Wake of Sanctions”

“Bush’s Heisman will be returned. Murals of him and Mayo will be removed.”
The New York Times

Hopefully these drastic, but needed actions, will serve as an object lesson to the rest of the NCAA schools. Only time will tell.

Blogs.forbes.com/sportsmoney/2010/06/11/usc-and-reggie-bush-how-bad-behavior-showed-them-the-money/

Dr. Patrick Rishe,
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NEVER AGAIN 'FINGERS IN THE DIKE':

The following are the tactical elements of the **Early Warning Infrastructure** component of the comprehensive protocol:

1. Conduct an **Everything Communicates Audit** of the organization in collaboration with the Sports Information Director [SID]. Passionately embrace the truth that *"what can be known will be known"* and become familiar with all communications platforms regularly used by every segment of the organization.

2. Design and operate an effective **Early Warning Communications System**. Forward observers and 'listening posts' have been part of astute military operations for centuries. The goal is to hear about 'trouble' before it turns into a grenade that blows up in your face.

HARD EVIDENCE: Is it even remotely possible that no one on 'Team Tiger Woods' knew about his off-course, multi-year, extra-marital 'recreational' activities? Of course not. But

there obviously was not an early warning system anywhere within Tiger's 'world,' and thus no secure, confidential mechanism for anyone who may have truly cared about him, as a professional athlete or as person, to summon help. Which means his major sponsors are still probably muttering to themselves, "we could have and should have done something to stop his self-destructiveness".

THE PEOPLE HAVE SPOKEN: Tiger Woods was ranked as #4 on the 6/18/10 Forbes "Most Disliked People in Sports" list.

<http://www.forbes.com/2010/06/18/vick-tiger-woods-roethlisberger-business-sports-disliked.html?partner=email>

3. **Design your Crisis Master Playbook on 'Take-No-Prisoners' Scenario Planning.** This includes all 'worst case,' 'best case,' and 'probable outcome' options for every valid variation of the crisis event (personnel misconduct and law enforcement matters, governing/sanctioning body actions, liability lawsuits, tabloid media allegations, etc.).

To be most effective, the **Master Playbook** must include insights learned from qualitative and quantitative research conducted at least bi-annually with the fan base, key sponsors and endorsers, and any other valuable constituency.

EXPERT WITNESS:

"It's very important that the team's ownership and management stop playing 'gotcha' or worse, looking the other way when players have an issue, break the rules, or the law, and instead have systems in place to help shape and, if necessary, modify their behavior. Because at the end of the day, what's good for the player is good for the institution, and vice versa."

*Trace Armstrong,
Head, Coach's Division and Co-Head
Broadcasters Division, CAA, Sports.
TArmstrong@caa.com*

WHAT WAS HE THINKING?

In the *Sports Illustrated* cover story [5/10/10] that should be a candidate for a Pulitzer Prize, John McCallum led an exceptional team of four other reporters in detailing the litany of atrociously bad behavior by superstar quarterback Ben Roethlisberger that included the "accusation of assaulting a 20-year old female college student in the restroom of a bar in Milledgeville, GA in the early hours of March 5, the second sexual-assault accusation leveled at the quarterback in nine months".

<http://sportsillustrated.cnn.com/vault/article/magazine/MAG1169185/index.htm>

If any organization's leadership resists the recommendation to create an Early Warning Infrastructure, and implement the entire Crisis Management Protocol, just give them this SI article along with a big sign to hang in their office:

"WHAT YOU ALLOW, YOU ENCOURAGE."

SOME RELEVANT EXCERPTS:

"From a football point of view I'm sure losing [Roethlisberger] would've hurt. But it's to the point where he's embarrassing the franchise". Ron Vergierio, a Pittsburgh-area bus driver who has spent over 200 hours having Steelers-themed tattoos drawn on his back, chest and arms.

"Throughout Pittsburgh there is strong sentiment that the Steelers should have parted ways with Roethlisberger... for behavior... that has deeply damaged the connection between the community and the family-run organization that has been built over 77 years."

"Franchise patriarch Art Rooney, known as 'Chief' to most of the old Steelers, used to walk around the locker room whispering sage advice. 'Chief constantly drove home the point that we were representing something larger than ourselves, that we had to conduct ourselves in the proper way,' says Andy Russell, a Steelers linebacker for 12 seasons through the mid-1970s."

THE PEOPLE HAVE SPOKEN:

Ben Roethlisberger was ranked #3 on the 6/18/10 Forbes 'The Most Disliked People In Sports'.

<http://www.forbes.com/2010/06/18/vick-tiger-woods-roethlisberger-business-sports-disliked.html?partner=email>

AUTHOR'S UPDATE (11/25/10):

Since this article was written, Ben Roethlisberger has completed his suspension by the NFL, has rejoined the Steelers, is playing like a Hall-of-Fame star, and is, by all accounts, behaving like Art Rooney would have expected. Good for him; better for the team and the fans. Same thing for Michael Vick. Which proves that elite athletes, just like the rest of us, can change their behavior if they want to—and if the organizations within which they work provide the atmosphere, rules, and necessary 'coaching' to help them become all that their talents enable them to achieve.

CRO OPERATIONAL ARCHITECTURE OPTIONS FOR NCAA SCHOOLS:

Unlike professional sports teams who will have either a General Counsel or a Legal and Business Affairs office in the organization's headquarters, the Athletic Department is not the best location for the CRO at NCAA schools.

There are far too many potential conflicts-of-interest inherent inside the AD for any executive to objectively embrace and execute the CRO function. Consequently, we recommend that the position be housed in a more neutral, but just as influential, position in the school's organization chart. The Chancellor/President, in consultation with the Athletic Director and General Counsel, should decide on the appropriate alignment of the CRO executive that reflects the importance of its role in maintaining the school's standards and values.

An added benefit of this approach is that the CRO shall be able to manage the Crisis Management Protocol for any/all situational events that confront the institution, not just those emanating from the school's inter-collegiate sports program.



4. Construct and Operate a Virtual War Room. When a real-life, in-your-face-now crisis hits, no time should be spent on "how" to implement your response(s) but only on "what" strategies and tactics will be actually executed.

And while a physical **Command and Control** 'bunker' may be necessary to handle a specific event, the **Virtual War Room** should be a secure and encryption-accessed web site designed to let all decision-makers and advisors communicate 24/7 from anywhere in the world.

5. Conduct Semi-Annual Crisis Training War Games. This may be one of the most important roles of the CRO: to trigger the 'red alert' and then, using a randomly selected 'probable event' from the **Master Playbook**, conduct a real-time exercise that drills selected strategic and tactical options that relate to the specific crisis being gamed. This is how all of the decision-makers and advisors will stay 'battle ready' and remain familiar with the mobilization options, strategic frameworks, and tactical 'weapons' available to them (i.e., legal, media, financial, personal relationships, etc.).

An invaluable component of the **War Game** is the post-event results analysis. Just like a down-to-the-DNA autopsy on *CSI*, the CRO's team must review every strategic and tactical decision made during the exercise to learn what they did correctly, and more importantly, what mistakes were made.

6. Become the Devil's Advocate. One of the most essential roles played by the CRO must be to become that member of executive management who can openly, and without fear of retribution, tell the 'emperor' that they have no clothes. By maintaining and coordinating the dissemination of all the event-related intelligence, intra-organization communications with all key opinion leaders and 'influentials,' and insight sustained by up-to-date market research, only the CRO will have the depth and breadth of information needed to give totally objective advice to those responsible for making final decisions.

The functional pay-off of the **War Game** will be to provide a regular opportunity for the CRO to role play this 'constructive confrontation' position with ownership, and thus reinforce its validity and integration into the entire protocol.

EXPERT WITNESS

"Most organizations faced with a crisis either act too quickly, or simply don't act quickly enough. Often, this means that the crisis isn't handled effectively, let alone decisively. Organizations, especially those in the high-visibility world of professional and collegiate sports, must have an infrastructure in place that provides for rapid analysis of the situation, immediate access to skilled advisors and consultants, and ultimately selection and execution of the most effective response or approach. Simply, owners and managers must be committed to have and maintain crisis management resources."

Richard Wirthlin, Esq., Partner, Latham & Watkins LP, Richard.Wirthlin@lw.com

THE CSG COMPREHENSIVE CRISIS MANAGEMENT PROTOCOL



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While it is obvious that each professional sports team and NCAA school with a high-visibility inter-collegiate athletic program must appoint a CRO, what about the organizations with rulemaking and oversight responsibilities—the Leagues, Federations, and NCAA Conferences?

With their multi-million dollar TV/Internet/video game and sponsorship/endorsement deals, professional and inter-collegiate sports are as much about the business of building, maintaining, and expanding “brands” as they are providing a “field of play” for the worldwide cultural touchstone of human athletic competition.

Consequently, these organizations, including the International Olympic Committee, the federations governing each Olympic sport, and the member National Governing Bodies, must embrace the CRO function as passionately as the privately-owned professional and NCAA institutions.

This ‘bottom-up-meets-top-down’ architecture will provide maximum crisis avoidance/management brain power throughout each individual sport, and thus promote and sustain a ‘value awareness’ culture that transcends any individual institution.



FOLLOW YOGI BERRA’S ADVICE: “WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT.”

The **Early Warning Infrastructure** is clearly the cornerstone building block of the entire protocol. Without it, none of the other components will be symbiotically synergistic.

But when a crisis event does occur, and the **Situational** mode is activated, the investment made in the infrastructure, **Message Discipline**, and **Master Playbook** design will support an aggressive, agile, and therefore successful execution of the **Crisis Resolution Strategy**, selection of the most effective **War Room Tactical Options**, and opportunistic implementation of the **Reputation Restoration Plan**.

Implementing broad and deep cultural change inside any highly visible organization, especially one as potentially provocative as designating and empowering a **CRO**, requires the vision, political will, and resource commitment of its ownership and executive management. And it must be constantly driven by the wisdom to appreciate that not cultivating a crisis avoidance environment is as irresponsible, if not worse, as not having a ‘prevent defense’ on the field, the court, or on the rink.

It will be impossible to always avoid the “could have and should have” embarrassment. But a well-trained **CRO**, managing a sophisticated and opportunistic crisis management infrastructure, will generate significant attitudinal, operational, behavioral, and financial benefits that will do much to protect and enhance the brand/image/reputation of the institution and all those constituencies upon which it relies for support.

By Michael Harbert

AUTHOR PROFILE

MICHAEL HARBERT



Michael Harbert is the Managing Director of the West Coast office of Core Strategy Group, a multi-national management consulting firm which designs and guides the execution of insurgent marketing strategies, brand/image/reputation enhancement strategies, crisis management protocol implementation and training, and executive coaching and media/presentation skills training for its clients including: Apple Computer, Pepsico, Google, News Corp., and The Walt Disney Company.

Although the CSG work in crisis management is confidential, Michael’s expertise in the field has been shaped in large part by over 30 years of executive management in combat politics. He’s a veteran of over 125 campaigns, including Mario Cuomo for Mayor and Lt. Governor, Ted Kennedy for President, George W. Bush for President, The Senate Republican Campaign Committee, Bill Richardson for President, and dozens of candidates for U.S Senate, Governor, and other state-wide offices throughout the country.

At ABC News, he was the International Managing Director of the Twentieth Century Project, the production joint venture between ABC News, NHK (Japan Broadcasting), and Gosteleradio (Soviet Union Broadcasting). Prior to that assignment, he covered major domestic and international news events as the Executive-In-Charge/North America for Worldwide Television News [owned by ABC News and ITN/UK].

His hands-on knowledge of the entertainment industry comes from his work as a writer/producer on award winning primetime dramas such as *Law & Order*, *Michael Hayes*, *Prince Street*, and *The Monroes*. He is a member of the Writer’s Guild of America, the Academy of Television Arts & Sciences, and the National Academy of Recording Arts and Sciences and holds a B.A. in Policy Analysis and Marketing Communications from New York University.

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INT. OFFICE OF THE GENERAL COUNSEL — PRO SPORTS TEAM HEADQUARTERS — CONTINUED

Coach gets up from the chair behind the General Counsel's desk, walks to the window and stares out as:

General Counsel taps on the keyboard and the TMZ video replays on the screen. He watches in silence as:

COACH
Stupid idiots.

GENERAL COUNSEL
Them... or us?

Coach goes to the couch and plops down as:

COACH
Us?

GENERAL COUNSEL
(sits behind his desk, video plays)
We could have and should have put in place a way to teach these guys how we expect our players to behave.

COACH
Hey, they're just young studs making five million a year.

GENERAL COUNSEL
That's a big damn investment we're supposed to be protecting, Coach.
(looks at the video playing on the screen)
Not let it blow up in our faces.

CUT TO:

We will provide your organization with a proprietary Crisis Management Protocol that will put in place both Organizational and Situational components that prepare you for any crisis, give you the tools to resolve it quickly and cost effectively, and rapidly restore your reputation, image, and brand.

ORGANIZATIONAL

Early Warning System
Message Discipline
Insurgent Strategy Training
Issues Management
Stakeholder Segmentation

SITUATIONAL

Crisis Event Resolution
Playbook
Virtual War Room Tactical
Options
Reputation Restoration
Action Plan

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AMEC SPOTLIGHT:

OPINIONS OF THE MOST INSIGHTFUL LEADERS WORKING
IN ENTERTAINMENT TODAY

SPORTS AND PUBLIC DIPLOMACY

America's greatest foreign policy challenge is to combat violent extremism. In our military commitments in Iraq and Afghanistan, global efforts at intelligence gathering, foreign aid, and diplomacy we deploy our resources in a long-term effort to assure our national security against a tide of distrust and anger. A facet of this campaign is the State Department's effort at public diplomacy: our program to influence foreign populations in ways that support our interests. We use radio and television broadcasts, publications, concert tours, and all sorts of emergency relief to sway international opinion on behalf of American policy and security. Strangely, we fail to employ sports and athletic activity in this endeavor. We may be leaving out our most effective tool.

The roots of violent extremism are many. Surely, some people are attracted to violent ideologies for the philosophies they offer. Some people believe that violence against Western or American targets may fulfill a religious goal or personal grievance. Some people may have specific political aims that they think will be achieved through violence. In its response to violent extremism, the United States assumes that one or another of these rational explanations is the motivation of the extremist. Perhaps we are giving the extremists too much credit.

For many people in the poorest parts of the world the source of violent extremism has more to do with demographics than with any coherent line of thinking. Extremism is a young man's game. In Latin America, South Asia, and West Asia about half the population is under 25. In Africa, almost two-thirds of the population is under 25. That contrasts with North America and Europe where about one-third of the population is young. Further, the world's poor young population is burgeoning. Almost all the world's population growth projected for the next fifty years (about 2.6 billion people) is expected to happen in Asia, Africa, and Latin America. These are also the places with the least economic opportunity. It is hard to see how these economies can absorb and employ the population bulges that are hitting them. As they fail to offer employment to the young, they cook a stew of inactivity, lack of opportunity and hope, boredom, anger, and resentment.

Idle young men are the usual raw material for all kinds of violent activity. This is not unique to international political causes. Young men are responsible for urban street crime in our own cities. The

startling drop in crime in American cities over the last 15 years correlates to the reduced percentage of young men in urban populations in the United States as our entire population ages (as well as to changes in police and judicial practices.) The potent mix of energy and hormones that leads to aggressive behavior among young men is hard to contain in an environment of failure and disappointment. It is no coincidence that the urban riots that American cities experienced in the 1960s and early 1990s occurred against a backdrop of inner city male unemployment in excess of 60%.

Unemployment among young men in large parts of the Middle East, Africa, and Asia is already at crisis proportions and will only get worse as their populations grow. The average level of 'inactivity' for the 16-24 year old age group across Africa is recorded by the World Bank as about 50%. That does not account for serious underemployment among the 'employed'. In many pockets in all these regions the real unemployment levels in that age group come close to 100%. In these environments, people will find things to do to relieve their frustrations and inactivity. The alternative activity does not have to have a doctrine or manifesto. Criminal gang activity often suffices. Drug running is frequently the answer. There is camaraderie, protection, plenty of violent physical activity, and some financial gain. But entering a "jihad" or its equivalent may be even more attractive, in that it offers some social acceptance in the local culture as well as the benefits of life with a purpose and perhaps some of the financial compensation that would also come from gang membership. Along the way, the recruit may come to adhere to the religious or philosophical principles of the jihadist cause, but that is hardly necessary. In places like Afghanistan the lines between jihadist groups and drug gangs are blurred or nonexistent.

Of course, the ultimate solution to this problem is to see that growing legitimate economies take root in these regions so that there will be opportunities for the young to work productively. The American policies aimed at improving local education, fighting crime syndicates, pursuing extremist leadership, etc. have merit. Other steps to improve people's lives and stem the rapid growth in destitute young populations would help. But we cannot continue to omit the method most proven to divert the undirected energies of the young: active sports. In Los Angeles, beginning three years ago, eight of the city's recreation centers in the highest crime areas were kept open and fully programmed with active sports until mid-

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night four nights a week during the summer. The program was so successful at reducing violent crime in the neighborhoods that it was expanded to 15 recreation centers last summer and 24 recreation centers this summer. It is not combating ideology or religion, just inactivity and boredom—and it works.

Middle class Americans cannot fathom how idle the life of a young person can be in urban poverty abroad. We cart our youngsters off to a crowded calendar of Little League, flag football, soccer games and the like in a constant flurry of over-programming. All children are expected to play something. It is an inheritance from England and its tradition of schoolboy sports. Most of the world is not like us. Even the Olympic sports powerhouses, such as China and Russia, offer organized sports activity only to children with clear potential to be trained to perform at elite levels. For the ordinary child, there is no opportunity to play other than the games he or she can arrange. For sure, on vacant lots and dusty streets all over the world kids are kicking soccer balls. Soccer demands little skill or instruction to play at a beginning level and requires no special equipment—only a ball. It is the game played everywhere—but normally among acquaintances and without organization except at a high skill level. It is good, but not enough.

There have been uses made of sports in public diplomacy efforts. The early spread of soccer, cricket, and rugby in the 19th century to the far flung reaches of the British Empire, from Jamaica to India, was done in the spirit of ‘civilizing’ the colonials by introducing to them the English concepts of fair play and gentlemanly competition thought by the English to be inherent in the games. The United States has always encouraged the spread of baseball in Latin American, the Caribbean, Taiwan, and Japan as a way of extending American culture and thus encouraging a common understanding. The Olympic Games are often seen as an exercise in public diplomacy that fosters friendly competition and various ancient Greek virtues. During the Cold War it contributed to world peace by providing a venue for a benign kind of proxy war between East and West.

In addition, the celebrities who are anointed in the Olympic Games become common cultural property among the people of the world. In 2006, the United States named Olympic skater Michelle Kwan its first public diplomacy envoy. At the Beijing Games in 2008 Kobe Bryant was the leading sensation among the Chinese public, even more popular than their own NBA star, Yao Ming. Further, the spread of sports is motivated by the commercial needs of the sports federations to reach new audiences. The NFL is always looking for new crowds in Europe and Asia. FIFA is still trying for a foothold in the United States. In all these cases, the effort is to extend a culture or expand the sport. These are not bad ideas, but they are not focused on the impact on the potential participants abroad.

The spread of a major sporting culture needs to be pursued to alleviate the emptiness of life that ultimately threatens us. The key object must be to help give people, especially boys and young men, a sense of accomplishment and enjoyment that is otherwise lacking in their lives. It cannot be the only thing that happens to help them find meaningful lives. Sports cannot be a full substitute for personal opportunity and freedom. It cannot prevent the adherence even by athletes to ideologies in which they believe but we do not favor. Fidel Castro played plenty of baseball, and he is no friend of ours. Diego Maradona, the Argentine World Cup coach, played lots of soccer and played it superbly, yet he associates with Hugo Chavez among other adversaries of the United States. But for the vast and growing population of purposeless youth around the world it offers an alternative to violent activity whether or not connected to any organization or philosophy. We should make the establishment of local sports leagues a priority of American embassy officials around the world, and encourage the national governing bodies of sports in the United States as well as our professional leagues to help make this effort a success.

By Barry A. Sanders

AUTHOR PROFILE

BARRY A. SANDERS



Barry A. Sanders is a professor of communications studies at UCLA, president of the Board of Recreation and Parks of the City of Los Angeles, and president of the Board of the Los Angeles Memorial Coliseum. He also chairs the Southern California Committee for the Olympic Games. Mr. Sanders practiced law as a partner at Latham & Watkins and chaired the firm’s international practice for many years. He belongs to the Council on Foreign Relations and the Pacific Council on International Policy. He is a leader on the Executive Committee of the Los Angeles Opera. He has chaired the Los Angeles Philharmonic and the Los Angeles Public Library

Foundation, among other civic engagements. Mr. Sanders has also chaired the Los Angeles County Bar and California State Bar International Law Sections. He is author of the forthcoming book, *American Avatar: The United States in the Global Imagination* (Potomac Books), to be released in March 2011.

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AN END IN SIGHT FOR 'ONE AND DONE'?

SURVEYING THE RULE'S EFFECT AND DEVELOPING A WORKING FRAMEWORK FOR ITS REPLACEMENT IN THE NBA'S NEXT CBA

I. INTRODUCTION

Kobe Bryant. Kevin Garnett. Dwight Howard. LeBron James. Korleone Young. Taj McDavid. Ellis Richardson. Leon Smith.

The former have earned their place in history as four of the most dominant hardwood athletes of their generation, while the latter symbolize the phenomenon of 'can't miss' youth talents who were unable to achieve their life-long dreams of playing professional basketball at the highest levels. Though their legacies could not be more divergent, their roots run parallel: each of these men attempted to jump directly from high school to the hallowed grounds of the National Basketball Association (NBA).

The mid-1990s was host to a pandemic of high school basketball players who finally washed up at the ripe age of 22 after listening to advisors who promised them immediate fame and success. As a result, the legal restriction commonly known as the 'one-and-done' rule was born by way of the collective bargaining agreement (CBA) negotiated in 2005 between Commissioner David Stern's NBA and the NBA Players Association (NBAPA), led by NBAPA President Billy Hunter. The CBA is the legal embodiment of all rules, regulations, and restrictions applicable to players and their agents. Since the

current CBA expires at the end of the 2010-2011 Season, now is the ideal time to determine whether the controversial—albeit de facto—'one-and-done' standard should simply be 'done'.

Whatever changes are ultimately made to the rule, it is virtually certain that 'one-and-done' will be one of the most hotly debated points in the NBA's upcoming collective bargaining negotiations. In advance of these CBA negotiations, such influential parties as new NCAA President Mark Emmert, current Secretary of Education (and former Harvard basketball star) Arne Duncan, Athletic Directors (and head basketball coaches) nationwide, and Commissioner Stern himself have joined the chorus to voice their frustration with the rule's effects—both intended and unintended alike. Since the 2010 NBA Draft featured a first round filled with 'one-and-done' selections, it is past time to reflect on the impact of 'one-and-done' by forecasting what considerations should take precedence when determining the legal and practical standards that the NBA should adopt.

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II. THE CURRENT RULE— ARTICLE X—SECTION 1

The ‘one-and-done’ rule is a collectively bargained regulation between the NBA and NBAPA that prevents a non-international player from entering the draft until he is at least 19 years old and one year removed from high school. The rule, contained in Article X, Section 1 (b) of the current CBA, reads as follows:

“(b) A player shall be eligible for selection in the first NBA Draft with respect to which he has satisfied all applicable requirements in Section 1(b)(i) below:

(i) The player (A) is or will be at least 19 years of age during the calendar years in which the Draft is held, and (B) with respect to a player who is not an international player...at least one (1) NBA Season has elapsed since the player’s graduation from high school (or, if the player did not graduate from

high school, since the graduation of the class with which the player would have graduated had he graduated from high school); and

(ii)...

(F) The player has expressed his desire to be selected in the Draft in a writing received by the NBA at least sixty (60) days prior to such Draft (an “Early Entry” player)...”¹

Despite the enormous effect this rule continues to have on outside parties, including high school and college-aged athletes, Commissioner Stern has remained steadfast in his pronouncement that the only relevant parties to consider when assessing the rule are the NBA and NBAPA. As Commissioner Stern has previously stated, “[t]his was a collectively bargained point that [the NBA and NBAPA] thought furthered the business interest of the NBA... [w]e did it for the simple reason that we wanted our teams to have the opportunity to see a more developed basketball player before they expended a

draft pick and [we] wanted them to have an opportunity to sign a player who was more developed in his personal life.”²

Commissioner Stern’s characterization of the rule is technically true in a legal sense, and it is far easier to categorize the ‘one-and-done’ rule as nothing more than a collectively-bargained business decision between management and the union. Former NCAA President Myles Brand recognized as much in stating that “[t]he NCAA has no role whatsoever to play in the age-limitation rules in basketball or any professional sport.”³ Brand aptly noted that he had “no idea how the next round of collective bargaining between the NBA and players’ association [would] go. The age-limitation rule is in their hands.”⁴ Yet, the rule’s tentacles stretch so far beyond these two parties that it would be disingenuous to characterize its unintended consequences as collateral damage, mere shrapnel spraying the NCAA and its amateur basketball players nationwide.

III. THE EFFECT OF THE CURRENT RULE ON NCAA MEN’S BASKETBALL

It is difficult to understate the effect of ‘one-and-done’ on college basketball (and, on a more global scale, the NCAA’s member institutions). Long-time basketball analyst Dick Vitale recently labeled the rule an “absolute joke and fraud to the term ‘student-athlete.’”⁵ Vitale’s comments echoed Secretary Duncan’s recent charge that ‘one-and-done’ is “intellectually dishonest... a farce.”⁶ Duncan poignantly remarked that a student who attends a college solely because the NBA prevents him from entering the Draft for a year creates a situation where those young men are in class for a single semester, “about three months or four months. Maybe six hours a week. They’re really not participating in the life of the university. They’re really not student athletes.”⁷ Indeed, ‘one-and-done,’ viewed honestly, has become ‘one-semester-and-done,’ though Commissioner Stern absolves the NBA of any responsibility for a lack of class attendance, saying only that “someone better step up and take responsibility for that.”⁸

Incoming NCAA President Emmert would seemingly love nothing more than to “step up and take responsibility,” and he has already pledged to take up ‘one-and-done’ with both Commissioner Stern and NBAPA President Hunter. Emmert correctly stresses that “the impact of their policies and rules on intercollegiate sports is significant,” but he may quickly find out—possibly in the same manner as his predecessor Brand—that there is little he can do to effect a change without cooperation from the NBA.⁹ University of Arizona Athletic Director Jim Livengood recently went even further in stating, on the record, that ‘one-and-done’ has no benefit for any party involved (Arizona recently lost Jerryd Bayless after his freshman year at Arizona to the NBA). Livengood insisted, “it becomes disruptive for the individual. It becomes disruptive for the team. And the biggest thing... is it really becomes disruptive for the institution, for the faculty, for your administration... We’re really doing a disservice to our institutions, to our programs and to the young person...there’s got to be a better way.”¹⁰

Some believe the problem has become so serious that it warrants governmental intervention and involvement. Big Ten Conference Commissioner Jim Delaney noted that ‘one-and-done’ is just one element that makes college basketball “the most challenging environment facing presidents, athletic directors, coaches [and] commissioners.”¹¹ Representative Steve Cohen (D, TN) has piggybacked on Delaney’s remarks, calling on Stern and Hunter to repeal ‘one-and-done’ in the upcoming CBA, and Delaney suggests that “the power of federal government and state government could be brought to bear on some conduct.”¹² Delany cannot be considered to represent the consensus on governmental intervention, however, and former Pac-10 Commissioner Tom Hansen serves as one example of opposition to Congressional involvement simply because “Congress just can’t get a depth of understanding of college athletics.”¹³

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IV. THE TENUOUS CONNECTION BETWEEN 'ONE-AND-DONE' PLAYERS AND NCAA TOURNAMENT SUCCESS

Interestingly, recent March Madness tournaments suggest that recruiting 'one-and-done' players is hardly a recipe for a national championship. Men's college basketball luminaries such as Duke Coach Mike Krzyzewski (otherwise known as "Coach K") and Michigan State Coach Tom Izzo have foregone players they deemed 'one-and-done' risks after being burned by such prospects in the past. The commitment to (largely) four-year players has paid off, with Duke winning the 2010 NCAA National Championship, and Izzo's Michigan State teams coming off of back-to-back Final Four appearances, both squads having been anchored by 'veteran' teams absent 'one-and-done' stars.¹⁴ To this day, Carmelo Anthony remains the lone freshman to lead his team (Syracuse) to a national championship and then leave for the NBA, and even Anthony did so prior to the implementation of the NBA's official age minimum.¹⁵

The influence and respect afforded to the recruiting philosophies of Coach K and Coach Izzo has not, however, resulted in a shift in recruiting trends. This is largely due to the

fact that everyone from Hall of Fame Coach Bob Knight to Brand to Emmert publicly gripes about the problem, but the constituencies have not, as of yet, rallied around a single proposed solution. Secretary Duncan got the (basket)ball rolling when he recently suggested that the NCAA enact penalties as strong as postseason bans for teams posting low Academic Progress Rates (APRs). Duncan specifically offered a minimum 40% graduation rate "as a starting point" for selection eligibility (to March Madness).¹⁶ To add more context to Secretary Duncan's proposal, of the 64 teams that participated in March Madness in 2009, 25% of the teams had less than a 30% graduation rate.

Coach Knight—who won an NCAA Men's Basketball record 902 games, including three national championships with University of Indiana—concur with Duncan in suggesting that the NCAA use a "more prodding approach, counting players who fail to maintain academic eligibility in any semester against their teams' collective Academic Progress Rates and subjecting low APRs to scholarship cuts and other penalties."¹⁷ At least one prominent sportswriter (Kevin Blackstone, also a professor of journalism at the University of Maryland) has urged Secretary Duncan to take the issue into the government's hands if all else fails by "threatening schools with losing their fed-

eral funding if, in fact, they're not living up to whatever standard they're going to set... [The government] can do a lot more."¹⁸

Of course, it is usually at this point that all parties concerned play the blame game and push responsibility on to someone else, claiming that it is not really their problem to solve at all. Is it the NCAA's fault that the NBA collectively bargained a minimum age for its players? Is it the government's fault that athletic directors, presidents and head coaches cannot seem to keep the 'one-and-done' athletes that they recruited in the classroom after their first semester on campus? Does fault lie with the NBA? The coaches? The teachers in the college classrooms?

Georgetown coach John Thompson III responds to this trend by noting that it is simply the wrong way "to force kids who have no interest in being in college, to come to college for a year."¹⁹ As Hall of Fame point guard Oscar Robertson noted in an op-ed for the *New York Times* prior to the 2007 NBA Draft that saw one-and-done college basketball stars Greg Oden and Kevin Durant selected 1-2, "the larger issue is why anyone thought 'one-and-done' was a good idea in the first place."²⁰

V. IDENTIFYING A CONSENSUS AGAINST 'ONE-AND-DONE'

Oklahoma coach Jeff Capel—who, unsurprisingly, played college basketball under Coach K at Duke—may put it best in stating simply that 'one-and-done' is "a really bad rule (which) makes a mockery of education in college."²¹ (Capel's own protégé Blake Griffin left school after being named college player of the year, and Griffin was promptly selected first in the 2009 NBA draft by the Los Angeles Clippers, but only after Griffin spent a second year at Oklahoma.) As the situation currently stands, many coaches have no choice but to recruit 'one-and-do-

ne' risks, because (as stated by LSU coach Trent Johnson) "it's all about winning."²² For that reason and that reason alone, college coaches, athletic directors and players find themselves powerless, effectively hamstringed from abandoning the 'one-and-done' norm. This makes Capel's further blunt statement that the rule is "condescending on the NBA's part" all the more important. Capel, like Secretary Duncan (but more direct in his challenge), questions the NBA's priorities: "To be honest with you, I'm not sure how much the NBA cares about college basketball. They're in the business of making the NBA the best product they can make it. I think the NBA is happy with the way their rule is. They get to market these kids

for a year (before they turn pro)" and save money on recruiting in the meantime.²³ Though it is a given that this is, first and foremost, the NCAA's problem, it cannot solely be "changed through NCAA legislation," for as Illinois head coach Bill Self recently declared, "[i]f the NBA is not on board, nothing is going to happen."²⁴

And so, with the necessity of a new CBA less than a year away, the question still remains: what can the NBA and NBAPA do about the problem? More importantly, what should they do?

They should start by looking to the policy developed by Major League Baseball (MLB).

*footnotes located on page 34

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VI. USING THE MLB RULE AS A GUIDING FRAMEWORK

The aforementioned Oscar Robertson piece succinctly identified the major problem with ‘one-and-done’: namely, that it is counterproductive to both the NBA and the NCAA. For the NBA, Commissioner Stern

claims he “wants more mature and better-behaved players” while the NCAA’s mission calls for the promotion of “the idea of the student athlete” and an improvement in graduation rates (or the APRs on which Secretary Duncan and others place significant emphasis).²⁵ Truth be told, it would be hard to find anyone of import in this debate who actually disagrees with Robert-

son. Furthermore, a reputable contingent of individuals already agrees that the new rule should be modeled after the MLB rule: a player can be drafted immediately after high school, but if he elects instead to attend college, he cannot enter the draft until the end of his junior year of college.

VII. IDENTIFYING THE BUDDING CONSENSUS REGARDING USE OF THE MLB APPROACH IN THE NBA

The primary question becomes why the NBA would not adopt the MLB approach in light of the history of ‘one-and-done’. Coach John Calipari, the college coach currently at University of Kentucky who has arguably benefited most from ‘one-and-done’ publicly stated, “I don’t agree with it. The rule should be, go directly to the NBA or spend three years in college, like the baseball players. I’ve said that for a while. But that’s not the rule.”²⁶ Coach Jim Calhoun of Connecticut, Coach Bill Self of Illinois, and the National Association of Basketball Coaches have also endorsed the MLB model.²⁷ Faculty representatives recently polled nationwide after news of the O.J. Mayo scandal broke stated that they overwhelmingly prefer the baseball or football model, both of which require students attending college to stay through the end of their junior season.²⁸ Secretary Duncan adds that

“[t]he model... much more beneficial to the student athlete, is the baseball model. Where for that tiny time, that 0.001% of players who should be able to go to the pros coming out of high school, Kevin Garnett or Kobe... let them do that... the truly exceptional players... let them go. Let them fly. But for the vast majority, being part of that college life and environment, I think it’s a tremendous benefit long-term. And we should think about that.”²⁹

Add Robertson to the budding consensus—after all, his name adorns the 1976 NBA rule resulting from a court settlement between the league and NBAPA which removed all restrictions from the NBA draft. Robertson believes that his eponymous 1976 rule should remain the policy, for: “If an 18-year-old can fight and die in the military, why can’t he pursue an NBA career if he’s good enough and someone is willing to offer him a contract?”³⁰ Robertson’s argument adds weight to the MLB model when viewed from both the NCAA and NBA perspectives. As Robertson notes, if the

NCAA truly wants ‘student athletes’, then it should allow an athlete who enters the draft to retain college eligibility, thereby empowering a potential student athlete to recognize that he may have made a mistake by entering the draft.³¹

Robertson believes that removing the age restriction (*i.e.*, following the MLB model) will reap two immediate dividends: “first, a lot of teenage athletes will get a reality check as to their readiness for NBA careers. Second, the NCAA... will benefit by having more players who realize that college is their better option. With luck, they will take their education more seriously.”³² The simple comment of LeBron James (the two-time NBA MVP and duke of ‘high school-to-the pros’) at the 2009 NBA All-Star weekend should be the death knell of ‘one-and-done’, the epitaph on the tombstone of this era: “What’s the point if you don’t want to be in school?”³³

VIII. CONCLUSION

Commissioner Stern and NBAPA President Hunter can will themselves to believe that their ‘business decision,’ collectively bargained, should not be judged as anything more than that—a business decision, collectively bargained. In reality, though, the MLB system affords the better business decision by allowing those superlative talents to jump directly from high school to the NBA. Simultaneously, the majority of teenage athletes will be afforded the opportunity to ‘course-correct’ by electing to attend college for three years upon the realization that they are not ready for life as a professional athlete—most likely paired with the realization that a professional athletic career is not viable (for most) past their mid-20s. The current system is broken, and the MLB model provides the best framework as a replacement to the ‘one-and-done’ rule,

which should promptly expire upon the termination of the current CBA. Though it is a given that the NBA is not legally required to be the party that “steps up and takes responsibility,” it would be unfortunate for the league to forego this opportunity to have a meaningful impact on the state of college basketball and, more broadly, on the concept of ‘student athletes’ while simultaneously ensuring that each of its rookies understands what it means to ‘go pro’. Indeed, this is the perfect opportunity to show just how much the NBA cares.

By Michael Paul

Please contact Alex Kargher (akargher@glaserweil.com) with any questions or comments for the author

JERRY WEST INTERVIEW

Jerry West played his entire professional basketball career with the Los Angeles Lakers. Known as both “Mr. Logo” and “Mr. Clutch,” he was inducted into the NBA Hall of Fame in 1979. The Lakers retired his famed #44 jersey in 1983. Mr. West was also the co-captain of the 1960 U.S. Olympic gold medal team in Rome and in 1996 was voted as one of the “50 Greatest Players in NBA history” in 1996. He is the recipient of numerous awards as a player, including MVP titles, and has also been a highly successful NBA executive, including as a coach and general manager, twice being named NBA Executive of the Year.

You’ve been a champion at every level—on the court and in the boardroom. What is your proudest moment as an athlete, and why?

Winning an Olympic gold medal as an amateur. We were all young, and it was the first time I’d ever made a trip of any substance—and certainly the first time I’d ever gone outside the United States. To go to Rome and represent your country at that point in time, because of everything that was going on in the world, was amazing. Our goal was to go over there and beat the Russians, because they were supposed to be the best team. It was incredible to have an opportunity to play for my country as an amateur. I think that was the greatest thrill of my life. I did not realize the significance of it until we [West and Oscar Robinson, the U.S. team’s co-captains] got up and received the gold medal. I would just love for people to know what it was like—the emotions running through your body—it was chilling.

What is your proudest moment as a basketball executive, and why?

If you look at the NBA Hall of Fame, you see a lot of guys. The players of the Los Angeles Lakers franchise are truly among the greatest of all time. They weren’t just Hall of Fame players; they were in the upper echelon of the sport. As a result, to be involved with those people—maybe to play some small part in the acquisition of some of them—was really thrilling. I think the thing that brings me the most pride is seeing the Lakers win so many championships and then go on to compete for more. After working with the Lakers’ organization for so many years, it was always gratifying to me that the fans deeply liked and supported our teams—this was the greatest motivator for me, personally.

It has been over a year since you were named Executive Director of the PGA Tour’s Northern Trust Open. At that time, you said, “The Northern Trust Open is more than a golf tournament; it’s an opportunity to bring all of L.A. together to make an impact on this great city.” How has this first year fulfilled that vision for you?

It has been one of the most uplifting things I’ve been involved with in my life. I’ve always admired golfers, and I love individual sports. Just being around these people... they’re among the nicest group

of people I’ve ever met. It was very uplifting for me to try to give back to the community. We can impact the people that need help most. That’s what really drives me, because the city has been so great to me and embraced me for years. Obviously, many charities today—because of all the crazy turmoil in the financial markets—are hurting. If we can do something to save kids’ lives and lead them in the right direction in terms of keeping them on the straight and narrow, then obviously, we’ve made a huge difference.

What else can you tell us about the charitable foundations associated with the Open?

We tried to enhance the fans’ experience with a thing called ‘The Grove,’ which was a big hit. The Annenberg Foundation was wonderful in its military outreach, and we’re going to try to do more for them this year. We had a great evening over at the VA Center, with over 400 veterans in attendance. This year, we’re going to meet with people from our military services around Southern California. My brother was killed in Korea, and I know how terrible it is to live through something like that. It made me feel good to see these people out there, letting them enjoy a free day of golf, food, fun, and meeting some people that they probably wouldn’t otherwise have an opportunity to meet. It was a great experience for me. If we can get all of Southern California involved—and we’re talking about one week, here—it would be incredible to give back to these local charities.

What is your view of professional sports, generally?

Professional sports have a huge impact on our country. I think people admire others who have the skill, expertise, and wherewithal to compete on that level. You have to be the best of the best to play in the NBA or the NFL—and even more so to compete in individual sports. I think that’s why people get attracted to teams, and; more importantly, to individuals. Individuals can command enormous respect. For example, take Kobe Bryant—his skill, his talent, his intensity, his competitiveness—it’s easy to see [those traits]. I saw young Ricky Fowler in a recent golf tournament; how he conducted himself was just amazing.

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How do you view the 'state of play' in today's NBA?

It's different, especially in the sense that publicity plays a much larger role, and you often see more style over substance. Expansion has also had a great impact on the Association. If you build a million cars, you're going to end up with some lemons. There are a lot of players out there, and I'm happy for them because they're getting an opportunity to play a sport they've loved all their lives. I do feel, however, that if we had fewer teams, you would see a lot more competition. You would certainly not see teams who suffer through 12 or 20 wins in a season. That's disheartening. If the Lakers ever won 20 games here, the fans wouldn't believe it... they've been spoiled. One of these days, [the city is] going to have teams that are not going to be able to compete at their current level. It happens in every sport; things are very cyclical. If you have a Kobe Bryant or a LeBron James on your side, you know your team is good—they're going to help win 30 games in a season by themselves! If you then add good players around them, it'll give you a solid chance to compete for a championship. Even more importantly, though, they have to play together. When you watch a great team play... boy, is it fun to watch. It's like one mind connected, and everyone's doing the little things they need to help the team win.

The media's impact on the world of sports continues to be significant and evolving, particularly with respect to advanced technologies such as high definition broadcasts, 3DTV, mobile Internet access, and so forth. What are your thoughts and reactions to the current state of technology and sports?

The world is definitely a smaller place thanks to technological advances in communications. At one time, if you were away from your home city, you didn't even know if your home team won until a day later. Media is great, but sometimes it can detract from the purity of the game. The media often writes things to inflame—just to invoke controversy. Even worse, they sometimes write things that are not true. I woke up one morning and received two phone calls: "I understand that Portland is pursuing you to go to work up there." I had no idea what they were talking about. I haven't been contacted by anyone! Many of today's media personalities often just wildly speculate.

What do you view as some of the legal issues or challenges facing sports, players and franchises alike, in 2010 and beyond?

In reality, the players work for the owners. They don't work for agents. That's the biggest conflict for people in the world of sports today. A non-player attorney can't have the same perspective as someone who's played the game in a professional capacity. They cannot. Sports and the law are two different animals. A lot of times, conversations with attorneys bring very important issues to players' attention, but past and present players can often point out an 'X factor' beyond the law and say, 'hey, look, have you thought about this?' In many cases, they haven't.

Jerry, anything in closing that you didn't have a chance to address relative to sports and media?

I think that people should understand that athletes are people who perform at a very high level, but who also have an enormous amount of pressure on them—particularly the ones at the top of the heap. Sometimes, the things that are written about them are pretty raw. I don't think athletes should be scrutinized for anything other than their performance and how they conduct themselves. If you want to criticize a guy who played a bad game, criticize him. But I also think it can be easy to forget the things that make a game the game that it is—players, fans and the beauty of the game itself.

By Richard L. Wirthlin

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STREET CRED... AND CORPORATE CASH?

EVOLVING BUSINESS ATTITUDES
IN THE WORLD OF ADVENTURE SPORTS



Photo by Ryan Miller

Over the last few years, businesses have been forced to deal with an economic volatility not seen in decades. Market uncertainty, evaporation of private equity funds, investor skepticism and tightening credit highlight a host of impediments making business management both a taxing and unsettling challenge. Yet, as consumers became more and more tight-fisted with their disposable income dollars and businesses became more desperate to capture and maintain market share, action sports companies have remained relatively insulated from the sharpest of the economic downturns.

The 2008 Surf Industry Manufacturers Association (SIMA) Retail Distribution Study, a biannual report launched in 2004 analyzing the surf and skate industry, found that retail sales experienced only a slight dip from 2006, with retail sales of \$7.22 billion and \$7.48 billion respectively (a decrease of 3.5%). Further, during the period of 2004-2008, the surf industry grew by 10%. Contrasting that with other industries, one finds that the business of surfing (and all its constituent parts) remains rather robust.

The lifeblood of the surf industry lies in its participants, traditionally the young. As more surfers enter the professional world and introduce the sport to their colleagues, however, surfing is fast becoming a lifestyle that embraces a more varied composition

than the 'Jeff Spicoli' stereotype of years past. Paddle out into almost any line-up and you will soon realize that sitting amongst you may be business executives, doctors, professors, waiters, students, plumbers, contractors, trust-fund babies and stay-at-home mothers, just to name a few—all chasing an arrested development, moment of zen, endorphin rush or simply an temporary escape from e-mail, missed calls... you name it.

Ask anyone who surfs and they will tell you that, if anything, the water is getting more crowded every year. Sean Smith, Executive Director of SIMA, noted that with the increased number of people surfing, there is a definite up-tick for surf companies. "The movie Blue Crush really ramped up popularity among girls, women and kids, and got others back in the water. Women's brands started taking off. Some of that popularity is still going," noted Smith. "We've got more people buying hard-goods and during the years of 2002 to 2005, surfboard sales increased, mainly long-boards and retro shapes."

However, even for companies which were relatively unfazed by the rough market, cost cutting measures and a drive to find efficiencies were the order of the day. Many mid-tier team pros ended up without sponsorships as corporate sponsors' budgets were reduced. Promising young surfers like Hank Gaskell

of Hawaii, barely removed from photo spreads in all the big magazines, are working construction to pay the bills. Even elite World Tour names recognize that the economic fallout has rippled through all levels of the industry. Taj Burrow, a threat each year for the championship, recently noted in an interview with Stab Magazine that he had just beaten the market in getting his current deal inked, "I signed... just before the financial meltdown. I'd probably get two-thirds of what I originally got if I had to sign now." Still, surfing has largely avoided the era of athlete free-agency. Smith points out, "There isn't a lot of bouncing around; almost all surfers tend to stay put." In 2009, Kelly Slater, the most acclaimed surfer to ever wax a board, signed a 5 year extension with long-time sponsor Quiksilver, and will now receive a portion of his compensation in the form of company stock. Though there is only one Kelly, it will be interesting to see if this practice becomes more common-place as a means of 'keeping' the talent that embodies a company's core values and culture—to the point whereby that individual is inexorably linked with the brand. One professional surfer (speaking off-the-record) isn't quite sure that surfers are likely to use the full weight of leverage, even when they have it.

"Guys aren't going to leave a sponsor they're hoping will take care of them after their pro career is over," he said. "They think that they'll be a team manager or have some spot

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made for them at one of the companies they ride for. When that's the case, it's hard to really dig in on a deal. Too many people are afraid to seem like they aren't 'bro's." There is a major flaw in the thinking of such surfers, and one to which the surfer above was keenly aware—there aren't enough team manager jobs to support even a fraction of the pro surfers as they move into the twilight of their career, let alone the non-pros who are angling to grab a team manager slot. For Greg Renfroe, founder of Pro Surfing Management (PSM), the current climate represents a new challenge for the athletes. "Guys like Jordy (Smith) and Dane (Reynolds) are getting big bucks, but after that guys are finding it more difficult. Companies are looking at younger and younger surfers, trying to figure out who will be that next guy. What you find is that you have amateurs doing better than a lot of the veteran or mid-level pros."

Case in point is the signing of rising young superstars Kolohe Andino and Carissa Moore by both Target and Nike. Young phenoms who, while practicing for driver's license exams, are simultaneously bringing home paychecks (and the corresponding responsibilities) that would make a financial planner giddy. These fresh faces are driving an economic mechanism betting large sums on the proposition that disposable income will be spent based upon which stickers are slapped on a surfboard or advertising posters displayed on the walls of retail establishments... and a good deal of those targeted dollars reside far from any rideable surf.

As is the case with any successful business, these companies are not blind, and the loyalty which surf industry consumers, young and old, demonstrate is not lost on those inside and outside the core surfing community. Endemic brands such as Billabong, Quiksilver and Rip Curl will always continue to wage their "friendly" battles over consumer dollars, but surfing is experiencing a growing trend of non-endemic companies pulling up and joining the party. From energy drinks and beer companies to cell-phone carriers, outside businesses are attaching themselves in an effort to ride the surfing lifestyle all the way to the bank.

While the Targets of the world inject dollars with which endemic companies may not be

able to compete, it will likely be how those dollars are used that define their place in the surfing community and whether they are viewed as an interloper welcomed begrudgingly or a valuable and symbiotic partner who shares the drive to 'fight the good fight' for surfing. "Non-endemics will undoubtedly find ways in," explains Smith. "And, the industry has a certain amount of pride in the fact that non-endemics want in. Some non-endemics are giving back to the sport and becoming ingrained in a good way." As Renfroe puts it, "Surfers can really benefit from the inclusion of non-endemics. Range Rover and Snickers sponsor events internationally. Surfers are starting to understand that non-endemic money is important if they want to make a living surfing and so they are starting to push for non-endemic sponsorship." But Renfroe has also observed that with increased external pressures hitting the industry added to the ever-present internal competition, some endemic companies have been uneasy with attempts by non-endemics to penetrate the surf community. Smith is quick to point out that non-endemic sponsorship is a nuanced issue, "Monster Energy Drink came in and did it the right way. In that respect there is little threat, they represent a different category, not a knock-off."

For better or for worse, most of the surf companies were businesses founded by surfers, talented and industrious individuals certainly, but often chasing a way to maintain a 't-shirt and sandals' lifestyle. As companies grew, executives were faced with decisions that had nothing to do with tides, wind direction and swell size, namely, profit margins, administrative concerns and potentially shareholder rights. "Prior to 2000, the industry was still seen as very 'cottage,'" says Smith. "There were very few publicly traded companies. Along comes success, and now we have surfers becoming business leaders. All these companies want to make their profits, want to find new consumers, but the executives, even at the top levels, still want to remain surfers."

While the almighty dollar is a constant reminder that commerce is a stern bed-mate, losing the lifestyle from which these companies sprang would lead to a loss in market share as well as non-endemic interest in the blink of an eye. It is a tenuous balancing

act whereby unbridled enterprise must be checked by authenticity. For Smith, that authenticity is worth its weight in gold. "If companies are to get big, they need to get big without forgetting their roots. If they give up their brand image and sell their soul, it can have dire consequences. It's important that the story doesn't change whether you're selling in Huntington Beach or Des Moines." As Renfroe notes, "That fine line exists for the athlete as well, they have a brand to manage just like the companies. If a surfer has one of the big endemics, then signing with a non-endemic doesn't look bad at all. But, in most cases, there is still a need for endemic sponsorship and the 'coolness factor' that brings."

Surfing is also proving to be an international player. Estimates put the total number of worldwide surfers at approximately 25 million. With the exception of Antarctica, every continent is home to sizeable (albeit largely coastal) populations of individuals regularly engaging in the exercise of riding waves. With participants ranging in age from three years to the nineties, few sports span such a wide breadth. The Yankees and Aussies no longer have a monopoly on the sport, either. In a few short years, there will be surfers competing at the highest levels of the Association of Surfing Professionals World Tour that hail from Brazil, Peru, Germany, Spain, France, Tahiti and Indonesia, among others. Just as generations of surfers before them, consumer bonds are formed with the brands supplying the goods here and abroad.

Surfing industry moguls certainly realize the dividends of further legitimizing the sport. Witness Fernando Aguerre (Reef), Bob McKnight (Quiksilver) and Paul Naude (Billabong) who are collectively spearheading a movement to have the International Olympic Committee recognize surfing as an Olympic event. If snowboarding (introduced in the 1998 Nagano games), a sport largely springing from surfing, has shown us anything, it is that the Olympics can be a star-maker in sports other than those which we traditionally think of every four years. Sean White, the 'Flying Tomato,' was the most sought after interview, and perhaps the biggest celebrity of these last Winter Games in Vancouver. He is, coincidentally, also sponsored by Target, which now markets a Shaun White line of clothing.

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There will always be a faction in any group that wants to keep things ‘inside the club’—surfers are no different. In fact, they are more so. Surfers yearn for nothing more than a perfect wave all to themselves (until they get a great ride and want the world to see it). As crowds increase, wave-counts go down. Competition for limited resources is just as much a part of the sport as it is the business built upon it. Yet the community relies on itself to a great degree. There is hardly another industry where competitive businesses are simultaneously so invested in having its members also function as custodians of the sport, industry and community.

Whether such lofty aspirations as the Olympics become reality, whether endemic and non-endemic companies alike grow the sport and participate in those spoils, or whether the popularity of surfing wanes and mainstream dollars flee to greener pastures, it remains clear that the core surf consumer will stay true. Surfers will continue to surf for as long as their bodies will allow, and they will pass on their love of the ocean to family, friends, boyfriends,

girlfriends, colleagues, and even passing acquaintances, some of whom will themselves become core consumers. At the end of the day, whatever the relationship, don’t we all fundamentally wish that we could rely on that type of loyalty and integrity from the ones who really have our back?

SPECIAL THANKS TO THE FOLLOWING INDIVIDUALS FOR THEIR CONTRIBUTIONS:

Greg Renfroe is the founder of Pro Surfing Management (PSM), a leader in the career management of professional surfers. PSM provides a full spectrum of services for their clients including contract negotiation, personal marketing, endorsement acquisition, financial management, travel assistance and fitness management. PSM’s clients include Gabe Kling (winner of the 2010 Nike 6.0 Lowers Pro at Lower Trestles, CA), Ben Bourgeois, Asher Nolan, Alek Parker, Sterling Spencer among other notable talents.

Sean Smith is the Executive Director of SIMA, the official working trade organization of more

than 300 surf industry suppliers. Founded in 1989, SIMA is a non-profit organization that serves to promote awareness of the surf industry and participation in the sport of surfing through public relations efforts and a variety of services, educational programs and research. Sean oversees operational duties for the association and manages the daily activities and initiatives to help strengthen SIMA’s role in the industry. Prior to joining SIMA staff in 2001, he was the former director of marketing for the Action Sports Group of magazines, now owned by Source Interlink, where he oversaw the marketing and public relations efforts for magazines such as Surfer, Snowboarder and Skateboarder.

By Christian Vance

AUTHOR PROFILE

CHRISTIAN VANCE

Christian Vance is a business affairs executive at BermanBraun, an independent media company with television, feature film and digital divisions. He specializes in negotiating and drafting a wide variety of entertainment agreements for such topics as: content distribution; script development; rights acquisition; on-screen talent; and product integrations.

Before joining BermanBraun, Christian was director of business and legal affairs at Fox Television Studios where he managed the business and legal affairs of the studios’ alternative programming and digital programming divisions. Prior to making

the jump to business affairs, Christian served as counsel in Fox Television Studios’ scripted legal affairs department. While in the scripted division, he supervised all the legal affairs for several scripted television series, including the hit series “Burn Notice” and “Saving Grace”.

Christian received his Juris Doctor degree from Loyola Law School, Los Angeles. He earned his Bachelor of Arts in English, Literature and Literary History from Georgetown University. While at Georgetown, Christian studied abroad at Oxford University, concentrating on Shakespearean Literature.

Christian is a member of the State Bar of California. In 2008, he was a founding member of the Emerging Leaders Section of the Association of Media & Entertainment Counsel, aimed at developing the skills of law students or attorneys with less than ten years of practice experience who are considering a career or have

just started their practice with an entertainment or media company. Christian currently serves as chair of the section for the 2010 calendar year. He has spoken at universities, law schools and business schools on various entertainment related topics. Christian is also a member of the Surfrider Foundation.

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STEALING THE SHOW?

AMBUSH MARKETING

The image of 36 women wearing skimpy orange dresses at a World Cup soccer match last June raised the ire of Fédération Internationale de Football Association (FIFA), which had two of the women arrested for organizing the ambush marketing stunt on behalf of Dutch beer brewer Bavaria. Meanwhile, Nike's 'Write the Future' soccer-themed commercial, which is a 3-minute *magnum opus* featuring players from various national teams that qualified for the World Cup 2010, was allowed to launch an epic reign on YouTube unfettered by any interference from FIFA. Commentators have already pointed that the players involved in Nike's "Write the Future" campaign had disappointing World Cups: Ronaldinho didn't even make the Brazil squad, while Cristiano Ronaldo, Wayne Rooney, Franck Ribery, Didier Drogba and Fabio Cannavaro were all knocked out of the World Cup 2010 before the quarterfinals, each after enduring various misfortunes. But that did not stop the spot from generating major brand exposure for Nike and accumulating more than 21,200,000 hits and counting on YouTube.

How can FIFA justify having women arrested for wearing orange dresses while doing nothing against Nike? Only FIFA can definitively answer this riddle, but FIFA itself publicly forecast that it would take this approach months before the World Cup 2010 even began.

With respect to Bavaria, FIFA indicated that it would aggressively prevent the use of fans as 'walking advertisements,' calling this one of its primary objectives and pointing to Bavaria's orange lederhosen stunt in 2006 as an example of what it would not tolerate. So it should have come as no real surprise that FIFA would go after Bavaria at the slightest provocation. The irony in pursuing such modest ambush efforts is that sometimes the response generates exactly the type of publicity that the ambusher was seeking to generate in the first place. Indeed, that is what happened for Bavaria, where a relatively minor local stunt ended up generating worldwide exposure solely because of the arguably disproportionate response that it provoked.

With respect to Nike, it's possible (though unlikely) that FIFA elected to let Nike run its campaign because it did not want to bring even more attention to the spot. Or maybe FIFA thought it just didn't have a reasonable legal basis for pursuing a claim against Nike.

In the United States, we do not generally arrest ambush marketers for campaigns that fall short of counterfeiting. But from time to time, we do find opportunities to sue them when the circumstances warrant it. The rules of the road for tying into the excitement surrounding major sporting events without authorization are defined in the United States primarily by the federal Lanham Act, which

prohibits the unauthorized use of a third party's registered trademark in connection with the sale, offering for sale, distribution, or advertising of the ambusher's goods or services if such use is likely to cause consumer confusion or likely to deceive as to affiliation, connection, association or origin (i.e., likely to cause viewers to think that the unauthorized campaign is endorsed by or affiliated with the event being ambushed). Relatedly, the federal Trademark Dilution Act prohibits the unauthorized commercial use of a famous mark that tarnishes or dilutes the distinctiveness and ability of such mark to identify the source of the goods associated with it, even though there is no confusion as to source.

Using these legal principles to its advantage, the United States Soccer Federation (USSF) sued The Sports Authority (TSA) last June, accusing the sporting goods retailer of running television and Internet ads tied to the World Cup 2010. The USSF serves as the national governing body of all things soccer in the United States and owns and controls the U.S. Soccer shield logo that appears above the heart on all U.S. national team uniforms. In its suit, the USSF claimed that TSA "infringed its trademarked crest and logo" by showing MLS Revolution player Taylor Twellman wearing the official national team uniform without permission in an ad that ran on Facebook and YouTube and that was televised during the June 12, 2010 World Cup match between England and the United States. Alleging unfair competition and trademark infringement under the Lanham Act, as well as unjust enrichment and state common law claims, the USSF obtained a temporary restraining order and preliminary injunction against TSA's ad the same afternoon it filed suit.

In contrast with the depiction of official U.S. soccer trademarks in the enjoined TSA ad, the Nike spot featured no official FIFA crests, emblems, logos, slogans, trophies, or other FIFA registered trademarks. Instead, the Nike spot portrayed fast-paced soccer play in a mythical stadium interspersed with scenes of the good things and bad things that follow the players based on the good things and bad things that happen to them on the field. The Nike spot did feature several of the marquee players in their official national team uniforms, but with the exception of the England away jersey, the official uniforms featured in the spot were manufactured by Nike and since Umbro makes the England away jersey and Nike owns Umbro, that uniform was effectively manufactured by Nike, too. So it was likely a relatively straightforward legal exercise for Nike to secure permission from each national team to use those marks in its spot, allowing Nike to authentically capitalize on the World Cup 2010 without blatantly infringing on FIFA's rights.

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Although that approach would not necessarily be bullet-proof under applicable United States law, in this instance Nike seems to have followed the very playbook that FIFA itself mapped out for non-sponsors who wanted to tie into the World Cup 2010. As part of its Rights Protection Programme, FIFA indicated that “an advertisement using an Official Mark (such as emblems, words, slogans, event titles, etc.) creates an Unauthorised Association”, whereas “advertising and merchandise using material related to football or the host country in general is allowed,” arguably giving non-sponsors more latitude than they would otherwise have under the Lanham Act in the United States and paving the way for Nike’s ‘Write the Future’ campaign and similar initiatives by other non-sponsors.

The guidance given by FIFA and the way the Nike spot carefully avoids featuring uniforms, logos, crests, emblems, slogans or other legally-protected elements owned by FIFA is reminiscent of a spot that Subway created around the Vancouver Winter Olympics earlier this year. Yet in contrast with the permissive position broadly articulated by FIFA, the United States Olympic Committee (USOC) strongly condemned the Subway spot at the time.

The Subway spot opens with Michael Phelps diving off the starting block, and instead of doing a flip turn at the end of the pool, the heralded gold medalist crashes through the outside wall of the natatorium, churns up concrete as he swims through the parking lot and continues across the wheat field while a map shows his trajectory being bound for Vancouver and a voiceover narration explains that Phelps fuels up on Subway sandwiches “so he can get to where the action is this winter”. McDonald’s is, and has long been, the Official Sponsor of the Olympics in the QSR category and pays handsomely for the privilege. McDonald’s reportedly complained that Subway was trying to pass itself off as the official fast-food sponsor of the Vancouver Winter Olympics, even though McDonald’s had bought those rights. In response to hearing that McDonald’s was upset about the spot, Subway’s CMO reportedly announced, “I’m Lovin’ It!”

Ambushers can legitimately claim that no one holds exclusive rights over the excitement that comes from a major sports event, and tying into that excitement using complimentary imagery and other popular techniques is just good business. But the Olympics deserve special handling when it comes to pulling off an ambush marketing campaign. First, if a non-sponsor is using an Olympic athlete in the campaign, care must be taken not to jeopardize the athlete’s status, and the rule of thumb is that campaigns featuring

Olympic athletes need to be continuous rather than concentrated during the Games in which the athlete competes. Subway’s campaign met that test because it has featured Phelps in several different campaigns, some coinciding with an Olympics and some not.

But even if an Olympic athlete isn’t involved, the Olympic symbol of five interlocking rings is granted extraordinary protection against unauthorized use. Under the Amateur Sports Act, even the word ‘Olympics’ has essentially been removed from the vocabulary of marketers unless they are official sponsors of the USOC. 36 U.S.C. § 220506. Moreover, the Act grants the USOC exclusive use of the word ‘Olympic’ in certain contexts without requiring the USOC to prove that the unauthorized use was confusing and without regard to the defenses typically available to a defendant that is sued for a trademark violation under the Lanham Act. Recognizing this special protection, the Subway campaign carefully avoided using either the term Olympics or the Olympic rings. Indeed, some knowledge of geography is needed to fully understand the Subway spot because the map that’s depicted doesn’t even identify Vancouver as the city that Phelps is ‘swimming’ toward.

Finally, beyond the legal exposure is the public pressure that can be brought to bear if the Olympics wants to embarrass the ambusher, as the USOC sought to do with Subway through public statements at the time that ambush campaigns undermine the ability of the Olympic movement to raise revenue for the athletes who compete.

The federal Lanham Act and state unfair competition laws provide event organizers (and in some instances their licensees) with powerful recourse against ambush marketers who do ‘cross the line’ in the United States, but ‘the line’ is less black and white than it is a grey range of activity. And as the differing positions of the USOC and FIFA demonstrate, the shades of grey can vary based on the event being ambushed and the entity in charge of such event. As a result, in evaluating those popular ambush techniques that present little or no risk when used in isolation or in connection with one major sporting event, care should be taken to evaluate the laws that apply to the particular event in question and the cumulative effect of each campaign element so that a campaign that legitimately ties into the excitement of the event does not also expose the ambusher to undue risk of liability.

By Ben Mulcahy

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<p>AUTHOR PROFILE</p> <p>BEN MULCAHY</p>		<p>Ben Mulcahy is a partner in the Entertainment, Media & Technology Practice Group at Sheppard Mullin Richter & Hampton, is based in New York, and is co-head of the firm’s Sports Industry and Advertising Industry Teams.</p>	<p>San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 531 107 S.Ct. 1971, 2978 (1987) (affirming an injunction against a non-profit group’s use of the “Gay Olympics” as the name of its athletic competition).</p>
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A CONVERSATION WITH VIJAY AMRITRAJ



Vivica Mitra and Vijay

Accomplished tennis champion Vijay Amritraj was the first Indian semifinalist in Wimbledon. He's also a noted philanthropist and a successful multimedia businessman. Recently, AMEC's Vivica Mitra sat down with Vijay to discuss the condition that launched him into tennis, his passion for sports and broadcasting, and his perspective on being a philanthropic role model.

VM: How did being one of the first Indian national athletes to compete in tennis professionally benefit you or create more obstacles for you?

VA: At the time I started playing, professional sports as we know it today didn't exist, especially in India. I started playing the game entirely because of health reasons. I was born with my lungs too close together so the doctors wanted me to play an outdoor sport to improve my breathing. My parents chose tennis. It was because of my mother's support that I was able to get anywhere in the sport. But when we started traveling the world and getting paid, it became a profession. It just took off and there was no looking back.

VM: It's fantastic that you were able to overcome that and you went on to become not only a professional but one of the top tennis players in the world! How has the increasing marketability of players such as Andre Agassi, Pete Sampras, Rafael Nadal, and Roger Federer over the last two decades helped to bolster the popularity of sports?

VA: Lately, there has been more splintering of sports on television because of so many networks... [and each] advertiser has their own splintered audience. But if you're a great professional athlete you're still going to make a lot of money through endorsements and your professional career. However, I think a career is much more short-lived today than when we were playing.

VM: Speaking of an athlete's success and how they go on to endorse products, how do you see that translate to them being a role model?

VA: The better you are, the more popular you get, and the higher echelons of the sport you reach, the greater the responsibility. I think we sometimes tend to forget that. Sometimes people say, "I want the fortune and the ability to be the best, but I don't want the responsibility that goes with it." But unfortunately it goes hand in hand. You have to accept the fact that there are people out there who want to emulate you. So there is a behavioral pattern you might have to follow if it doesn't come naturally to you.

VM: In the wake of the Tiger Woods scandal it really goes to show that these days being a professional athlete in your sport you are a role model.

VA: Yeah, but everyone is human. You just need to have a lot more self-discipline to be able to try and maintain some degree of character. But at the same time, it's tough for anyone to be able to judge the next person. I think behavioral patterns are important because kids are following you. But just because you see someone on the screen, tennis court, or football field, that doesn't mean that's the way he or she is. He might be a great athlete or a great actor or actress, but that doesn't mean that's the way he or she is.

VM: What aspect of the sporting and acting careers played the most important role in engendering the principle of your foundation?

VA: For me the sport itself has been my greatest education. It has taught me more about not just everyone else and everything around me but myself than anything else.

VM: So how did your career as a professional tennis player catapult you into acting and the world of sports broadcasting?

VA: I've enjoyed movies since childhood, as most of us do. It's the world's greatest form of escapism... And I've always thought at some point I'd like to do it if the opportunity arose. I was picked off the center court at Wimbledon to be in my first picture. The producer had tried out many actors in the role, didn't like what he saw, he saw me playing at Wimbledon... and he asked if I would do a screen test. And so I ended up doing a screen test at Fine-wood studios in London where I did the Bond picture in fourteen weeks. Then I did a couple other movies and TV shows in the US and eventually I had two series where I was one of the principal characters in show for NBC. I appeared in the Tonight Show. After my tennis career was over I was able to go into broadcasting immediately because networks were being launched all over the world and they wanted me to be an anchor for Talk Sports to South Asia.

VM: It's as if the whole acting side came out of your sports and you were discovered on the court. What would you say is your bigger love, tennis or acting?

VA: Nothing comes close to acting, nothing comes close to being in a big picture. But the one thing that beats it is by long shot in the ability to win.

VM: About Hyde Park Entertainment and your brother: You have similar backgrounds in the sense that at one point you chose acting and Ashok chose producing.

VA: We started in the business together, in producing. I started the company with him. I had a lot of connectivity in the marketplace, and I had a lot of people who could invest in pictures and things like that. So for all the initial movies we made, I raised all of the funding and raised the capital and got him involved in the business, and then I moved on to other things.

VM: Is there any reason why you chose to go in front of the camera instead of producing some more?

VA: I think I've always enjoyed doing a variety of different things, even in business. I've also been very conscious about credibility in the marketplace, representation of my country, etc.

VM: What kind of advice did you give your son, also now a professional tennis player, growing up regarding feeling compelled to follow in your footsteps?

VA: The only piece of advice I gave him was good news and bad news: "the good news is I'm your Dad, the bad news is I'm your Dad." So once he got used to that idea, he was fine... The great thing about sports is that you can never use influence or connections to get your son and daughter into anything. It's entirely to do with merit. You either win or you lose. Whereas in the movie industry, there's always people you know, and who you can meet, network and all that. That's the one thing I've always found it tough to get used to in real life, because in sports everything is very clear cut.

VM: Is there one moment in your career that you would feel holds the most significance?

VA: I've been blessed with a lot of good moments. The bad ones are the ones that make the good ones seem terrific. But the moment [I] put India on the map, [I] lead India to two Davis Cup finals, those are very special... Making my first major win in the United States, being live on CBS when nobody knew who I was. Every Indian in this country writing [me] a letter telling [me] that "you've put India on the map" and "you've given us a voice."

I met a Muslim man in Lucknow [who told me] that he only started going to mosque when I was playing and then stopped going to the mosque when I ended my career. A family in Delhi [told] me they prayed for me every night before their meal. These are people I don't know. Hopefully I've made some positive difference by touching people along the way.

VM: What was the best life lesson that you learned throughout your career?

VA: The thing about sports, especially an individual sport where you're on your own the whole time, is that it's the greatest character building exercise of all. It teaches you about yourself, how to take victory and defeat, that you're going to be defeated a lot more than you're going to be victorious. The longer you are in that sport the greater the education. You meet families and people all asking the same question so you tend to realize that the world is the same. It's tough to understand that we're only renting it during our time and that we're leaving it intact for the next generation, so we should leave it a better place.

Transcribed by: Tanvi Mirani

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FANTASY INSURANCE: REAL INSURANCE, OR A BET ON INJURIES?

Used to be, you could walk into a sports bar on a Sunday and expect to find the local fans rooting for the local NFL team... now, you're just as likely to find a fan cheering on the Minnesota Vikings' running back, the San Diego Chargers' quarterback, and a wide receiver on the Houston Texans—all at the same time. The reason? Fantasy Sports Leagues.

Even if you don't play fantasy sports, the statistics dictate that your colleagues and clients do. The Fantasy Sports Trade Association estimated that 27 million adult Americans play some version of fantasy sports every year. With that many people (*i.e.*, consumers) participating, it's no wonder fantasy sports has a multi-billion dollar impact on the national sports economy. Today, it's equally important for savvy sports attorneys and business executives to keep in touch with developments in the fantasy sports world and the 'real' sports world alike.

One of the most recent developments in fantasy sports is insurance. Last year, a company called Intermarket Insurance Agency, Inc. began marketing Fantasy Sports Insurance (FSI)—a line of insurance (underwritten by Lloyd's of London and other London market insurers) established for fantasy sports owners to protect their teams against the risk of catastrophic injury. The company has been mentioned by major national media outlets including CNBC, USA Today, and the Wall Street Journal. However, would-be policyholders should be aware of practical and legal problems surrounding the product before considering a fantasy insurance investment.

WHAT ARE 'FANTASY SPORTS?'

A fantasy league is a game in which players ('owners') select (typically by draft or auction) players from major league teams and compete against each other, earning points based on their players' performance in real-life games. The most popular versions are fantasy football and baseball. Fantasy leagues can be played for free, though leagues often require an entry fee and award cash prizes to the winners. Licensing and advertising are the main revenue streams for providers.

WHAT IS FANTASY SPORTS INSURANCE?

In 2008, New England Patriots quarterback Tom Brady was picked in the early rounds of fantasy football drafts around the country. Unfortunately for those fans, Brady suffered a season-ending knee injury in the first game of the season. Brady was coming off of the greatest statistical season in league history, so expectations were very high. Because of the prize money that typically comes with winning a league, CNBC analyst Darren Rovell estimated that Brady's injury resulted in a \$150 million swing in fantasy football fortunes. Brady's fantasy football owners were predictably disappointed.

FSI tries to address that disappointment by offering fantasy sports owners an 'insurance policy' to protect their financial investment in the team. FSI trades on the frustration of season-ending injuries

by displaying graphic images of the devastating injuries to Brady (torn ACL, torn MCL), former Milwaukee Brewer outfielder Geoff Jenkins (dislocated ankle, ligament damage), Danish soccer player Jacob Olesen (dislocated ankle), and former Los Angeles Clippers guard Shaun Livingston (torn ACL, torn MCL, torn PCL, torn meniscus, dislocated knee, dislocated kneecap).

Fantasy football insurance was again available for the 2010 season, and fantasy baseball insurance was also offered this year. Owners can insure all of the money they've invested into their team (including the entry fee, transaction fees, and additional expenses), up to a cap around \$2,000. FSI offers different coverage options, depending on how many players are covered. In football, for example, an owner might insure one player and be 'covered' if that player sits out for 9 regular season games due to injury. (Suspensions do not count towards missed games.) A team can only insure for players on the list published by FSI, purportedly representing the most valuable players. The premium (the cost of the insurance) is about 10% of the amount insured (plus fees), regardless of which player or players are selected

FIRST DOWN: A RUN FOR NO GAIN

There are a few problems with this product. First, FSI is based on the faulty premise that losing one of the players on the selected list for an extended injury dooms a fantasy team, so the only way you can recoup your investment is through insurance. This is not true. Though losing a top player to injury is always a blow to a fantasy team, it is by no means a death sentence. Cautious owners often 'handcuff' their stars by enlisting their backups as well. Additionally, every year certain players perform well above expectations and can be picked up either late in the draft or after the season begins.

Tom Brady's 2008 season (that FSI cites as part of its sales pitch) is a perfect example. In my league that year, the owner who drafted Tom Brady with the first pick also used late-round draft picks on Matt Cassel, Brady's backup, and Kurt Warner, a quarterback on the Arizona Cardinals who was expected to battle Matt Lienart for the starting job. Though Brady went down early, Cassel ended up as a top-ten fantasy quarterback and Warner finished number one. So that owner won the league, right? Wrong. As in real sports, one or two players are rarely enough to win (or lose) a championship.

Further, the notion that it would be 'devastating' to lose any one of the 'Key Players' offered by FSI is absurd. Yes, losing Andre Johnson or Drew Brees (top players at their positions last year) for an extended period would hurt your fantasy team substantially. Losing Justin Gage, Felix Jones, Devin Aromashodu, Fred Jackson, or Antonio Bryant would not. Jones and Jackson are rated by ESPN as the 27th and 36th best running backs this year. Gage is the 79th best wide receiver. Bryant was cut from the Cincinnati Bengals during the pre-season. All are 'insurable' players. To illustrate, the only running back, wide receiver or tight end I drafted for my team who was not considered a 'Key Player' was wide receiver Oakland Raider Chaz Schillens, who, ironically, I cut before the season started because he suffered an early injury.

SECOND DOWN: INCOMPLETE PASS

This product also has significant legal issues. FSI compares the policies it sells to disability insurance that athletes and teams buy to protect against player injuries. Those policies are very common. Team owners want to protect their investments in certain players. Many top prospects will take out an insurance policy while still in college to protect against career-ending injury. Colt McCoy, Sam Bradford and Tim Tebow, all highly-touted college quarterbacks last season, had such policies.

The problem with FSI, however, is that it doesn't require an owner to actually own the player, or even actually spend the money for which he's buying insurance. A true insurance policy requires what's called an 'insurable interest.' For example, I can buy a life insurance policy for myself because I have an interest in staying alive. My wife can buy a similar policy to cover me because she also has an interest in my continued life. Neither my wife nor I can buy a life insurance policy to cover Joe Montana because I have no insurable interest in him. Though Joe Cool was a great quarterback, my life would not be impacted if he died. Without such an interest, I'm just gambling on his misfortune.

FSI works the same way. There's no mechanism that ensures that the owner actually owns the player he's insuring in any fantasy league. FSI does not, and likely cannot, confirm that the would-be 'policyholder' actually drafted Peyton Manning before 'insuring' him. Even if he did, there's nothing to stop him trading Manning to another team for Matt Shaub. For example, I purchased an FSI policy on a player that I do not own on my fantasy team. I gave FSI the name of my league and my team, and the Internet service provider we use, and they sold me the policy even though I never owned the player. FSI never even asked whether I actually owned the player - I simply selected the player that I wanted to cover.

There's also no way for FSI to verify that the policyholder spent any money on his fantasy team because virtually no website actually processes league-level entry fees and payouts. This is almost always done among the participants themselves, with the websites making money through small service fees and/or advertising revenue. Just like our Joe Montana example, without an insurable interest, my FSI policy is merely gambling on the misfortune of the player I'm 'insuring.' Of course, my wager is merely academic, and I will donate the proceeds to charity should my insured player get injured and trigger 'coverage' under the policy.

THIRD DOWN: SACK!

Gambling on the Internet, no less, which has its own problems. The Internet Gambling Enforcement Act of 2006 (UIGEA) prohibits the transfer of funds from financial institutions to illegal Internet gambling websites. UIGEA specifically carves out fantasy sports in which “All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals... in multiple real-world sports or other events.” Because FSI is simply a wager on player injuries, it is unlikely that it would qualify under the fantasy sports carve-out, unless ‘games missed due to injury’ counts as “accumulated statistical results of the performance of individuals.” Though enforcement was delayed until just recently, a court would likely find FSI to be in violation of the UIGEA. Patrons of FSI would likely have no legal exposure, however, as the UIGEA targets the financial institutions (i.e., credit card companies) who process transactions.

AND THE PUNT TEAM TAKES THE FIELD...

So what do we make of FSI? First, from a fantasy sports perspective, it’s probably unnecessary. Though the very top picks in the draft often have a significant impact, it’s unlikely that losing many of the ‘key’ players would really doom an owner’s season, and other strategies are available to crafty owners who want to protect against injuries (*without* a 10% premium). From an insurance perspective, it’s probably void. (Though to be fair, the law in many states holds that only the insurance company can dispute the insurable interest, so if FSI is willing to pay, then there’s not much anyone can do about it.) From an online gambling perspective, FSI probably violates federal law, though existing ‘policyholders’ should still expect to get paid if their insured player gets hurt. The UIGEA prohibits only financial institutions from transferring funds to gambling websites, but does not prohibit those sites from mailing checks to its patrons. Nevertheless, anyone considering a Fantasy Sports Insurance policy should at least be aware of these issues before spending a dime on a dubious product.

By Joseph G. Balice

AUTHOR PROFILE

JOSEPH G. BALICE



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ANY GIVEN CBA: A LOOK AT FOOTBALL PLAYER NEGOTIATIONS

From September of one year through February of the next, countless sports fans follow their favorite football team in its quest to slowly beat its rivals and garner a spot in the almighty Super Bowl. For many sports fans, the weekly games are of the utmost importance and they will watch with a religious fervor. These fans will happily define and explain an 'interception,' a 'fumble,' or an 'off sides' ruling. However, ask them to explain what it means to be a free agent or a franchise player and you may trip them up. Ask them why there could be a potential lockout in 2011 and you may have them completely stumped.

THE BASICS

The NFL is a nonprofit organization which represents all of the independent football teams within the league, with the primary purpose of keeping a competitive balance between the teams. The organization exists in order to schedule games between the teams, promote the league as a whole, negotiate with the players and with television broadcasting networks, organize the draft, and grant various waivers as necessary.¹

Except in the case of the Green Bay Packers which is a publicly-owned team, each team has a private owner. Each owner represents or designates a representative to serve as a member of the NFL. In order to create a new team and become a member of the NFL, the NFL must decide to add a number of teams that can be equally divided according to the current system.² Currently, there are thirty-two teams divided into two conferences, the American Football Conference and the National Football Conference. Each has four divisions with four teams in each division. So, adding one team would throw off the entire scheme. To make it work, the NFL would probably have to add at least eight teams (one to each division) or create a new divisional scheme altogether, which seems highly unlikely. Once the NFL works out the math, it selects a location for each new team. Potential owners then send in applications with the hope of buying one of the new franchises.

Although the NFL coordinates the league, the teams have a high degree of autonomy. The team owners control their stadiums, hire their coaches, and negotiate all financial matters including non-player salaries, team debt, and licensing.

NFL players are represented by their union, the NFL Players Association (NFLPA), which is funded by membership dues. Each team elects a representative and an alternate representative to serve on the Board which directs the union.³ The NFLPA negotiates a Collective Bargaining Agreement (CBA) with the NFL.

COLLECTIVE BARGAINING

Collective bargaining is the process by which a similarly situated group negotiates with another entity or group of similarly situated entities. Collective bargaining in the field of labor law generally comes into play when a group of workers forms a union and the union bargains with the employer(s) to set the floor (lowest) wages and working conditions for all the union-covered workers. The floor cannot fall below the base that has been set by civil rights and labor law. Occasionally, a CBA will also set a salary cap, the highest amount an employer can pay or is forced to pay to union members.

The NFL formed the National Football League Management Council to act as "the sole and exclusive bargaining representative of present and future employer member Clubs of the NFL."⁴ The management council therefore serves as the representative employer for all the teams and bargains with the NFLPA.

If collective bargaining fails and the union and employer do not reach an agreement, there are generally a couple of different scenarios which may occur. One possibility is that the union may strike, with union members refusing to work, thus stopping the employer's business until the employer agrees to its demands. Another possibility is that the employer could impose a lockout. In this case, the employer refuses to let union members come to work until the members agree to the employer's demands. In both of these scenarios, unions not only need to hold out the longest without making money,⁵ but also run the risk of the employer replacing striking or locked out workers on a temporary or even permanent basis.⁶ A third possibility is that the employer will declare that both sides have 'bargained to impasse' (reached a stalemate) at which point the employer may impose its 'last, best, and final' deal offer. In order to fight those terms, the union must strike in an attempt to force the employer back to the table.

*footnotes located on page 34

Although none of these options are ideal for either party since both sides stand to lose financially, a lockout or ‘bargain to impasse’ may be the more likely scenarios for the current negotiations. For one thing, the NFL brokered a deal with various broadcast stations requiring payments from broadcasters whether or not the normal football season takes place. These deals could bring in up to \$5 billion dollars in 2011. However, these types of deals are customarily made and, if football is not televised, the money would be credited back to the broadcasters in future payment reductions.⁷ Either way, this means that the NFL will have a cash flow, whereas the players will not. In addition, strikes are traditionally less likely with professional sports unions because, unlike in other unions, members’ careers are relatively short.⁸ The average player’s career length is three and a half seasons.⁹ Thus, the members have more to lose.

Strikes and lockouts are functions that come into play with unions. Yet, there is one other option available to the NFLPA. The NFLPA can decertify as a union. This is a bold and risky move. However, it a move the NFLPA has made in the past. In the case where a union decertifies, the union ceases to exist and can no longer engage in collective bargaining. The entity formerly known as a union is able to engage in player association activities which include the ability to finance a law suit on behalf of the members in the player class. Thus, the NFLPA could finance a suit against the NFL for antitrust violations if the NFL attempted to enforce a ‘last, best, and final’ deal offer which included anti-competitive activity with regards to the draft, limits on free agency or wage scale, etc.¹⁰ Additionally, the NFL would be prevented from enacting a player lockout.¹¹

AMERICAN NEEDLE V. NFL

In early 2010, the NFL supported a request for Supreme Court review on a case they had already won in the District and Appellate Courts. The NFL formed National Football League Properties (NFLP) to handle the development and licensing of the NFL member teams various intellectual property. In American Needle, long-time NFL-licensee American Needle filed suit against the NFL alleging violations of Sections 1 and 2 of the Sherman Antitrust Act after the NFLP granted an exclusive license to Reebok International Ltd. to sell NFL-licensed headwear.

According to Section 1 of the Sherman Antitrust Act “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...”¹² Section 2 states “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”¹³

The District Court granted summary judgment to the NFL after the NFL raised the defense that “the NFL and its 32 teams are... acting as a single entity.”¹⁴ Limiting its review to the “licensing of teams’ intellectual property,”¹⁵ the Appellate Court stated that “when making a single-entity determination, courts must examine whether the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes.”¹⁶ Since “NFL teams share a vital economic interest in collectively promoting NFL football”¹⁷ the Appellate Court reasoned “that only one source of power controls the promotion of NFL football and it makes little sense to assert that each individual team has the

authority, if not the responsibility, to promote the jointly produced NFL football.”¹⁸ Thus, the NFL won on appeal.

The Supreme Court granted certiorari and a unanimous opinion written by Justice Stevens came down on March 24, 2010. According to the Supreme Court, the issue it was left to decide was “whether the alleged activity by the NFL respondents must be viewed as that of a single enterprise for purposes of Section 1,”¹⁹ specifically, “whether there is a contract combination or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decision-making, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.”²⁰ The Supreme Court found that the licensing of intellectual property is not for the betterment of the league as a whole but rather for the benefit of each individual team. The Court pointed out that teams have in the past and continue to be able to withdraw from the NFLP. Thus, the teams are independent with regards to licensing and the act of collectively licensing to one vendor does deprive the marketplace, resulting in actual or potential competition. The Court determined that since some NFL decisions must be made cooperatively in order for the league to exist, the various activities resulting in restraints on competition must be held against the Rule of Reason. The Rule of Reason tests “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied.”²¹ The NFL lost and the case was remanded back to the Court of Appeals so that they may judge the need for anti-competitive licensing against the Rule of Reason.

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If the Supreme Court had determined that the NFL and its teams could be considered a single entity, the NFL could not be in violation of antitrust laws. As decertification and antitrust suits have been successful strategies for the NFLPA in the past, an NFL win in American Needle would have been devastating for the union. Despite the NFL's loss, if the union were ever to attempt the decertification and antitrust suit strategy again, the NFLPA would still have to show that the NFL acted anti-competitively in the market for player services.²²

The slow pace of the CBA negotiations could have been due to the NFL waiting to see if it could win an antitrust exemption. Having failed to achieve that goal, it is possible that negotiations may once again resume.

FINAL LEAGUE YEAR

The current NFL CBA is an extension of the previous CBA, and this extension was set to expire on the last day of the 2012 league year, usually the last day of February. In May 2008, however, the NFL owners voted to terminate the current CBA early.²³ According to the NFL CBA, early notice of termination changes the end date of the contract to the last day of the 2010 league year. In addition, the 2010 league year becomes the Final League Year.²⁴ The Final League Year allows the NFL to discontinue funding some player benefits like a 401(k),²⁵ and triggers many special contract terms including the removal of the salary cap.²⁶

Uncapped years greatly affect free agency. A free agent is any player whose contract has expired or is not under contract. Free agents can negotiate and sign with any team.²⁷ These negotiations occur before the Draft. Although there are various types of free agents, the clearest classes are 'restricted' and 'unrestricted.' A restricted agent generally has not concluded his first four years in the league and is usually bound to his initial team through his rookie contract. Another team has to give something up, such as a Draft pick, in order to sign a restricted agent. On the other hand, an unrestricted free agent has no restrictions and can go anywhere.²⁸ It is clearly more advantageous to be an unrestricted free agent.

In an uncapped year, restricted free agency is prolonged to six years.²⁹ This means that a player must complete two additional seasons before they can take advantage of unrestricted free agency

negotiation. Whereas the restricted free agent pool expands, the unrestricted free agent pool contracts. Those players that remain are generally older with less time remaining in their careers.³⁰ This makes them less attractive and they may already find it harder to negotiate big, expensive deals with or without a salary cap. Players and the final eight teams of the last season are also hampered in that the teams have additional restrictions they must face in order to sign an unrestricted free agent.³¹ These restrictions help to prevent one team from spending tons of money to get all the best players, effectively keeping the competitive balance.

Another difference in the Final League Year is each team's ability to designate an additional transition player. In a regular league year, a team can designate an unrestricted or restricted free agent as a franchise player or a transition player.³² A franchise player is designed to be the player that epitomizes the team (i.e. fans can't imagine the team without this player). However, teams usually use their franchise tag on kickers and other players it would be inconvenient to lose rather than the team star. A franchise player must stay with the team as long as the player is offered no less than the average of the current top five player salaries for that position in the entire league.³³ Transition players need to be offered no less than the average of the top ten player salaries for the same position. However, transition players may always entertain offers by other teams. The transition player's current team retains the right of first refusal and can match any better offer from another team.³⁴ Both the franchise and transition player designations work, in effect, to restrict the movement of free agents.

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MAJOR ISSUES FOR THE CURRENT NEGOTIATIONS

There are many issues upon which the NFL and the NFLPA have yet to agree, including retired player benefits, changes to drug testing, and arbitrations.³⁵ However, as with most negotiations, the big issues have to do with money. Although the NFL is profitable, the NFL contends that its costs have skyrocketed. The NFL points specifically to the costs of stadiums as one of the major burdens it has incurred over the past couple decades. Whereas almost all stadiums used to be city- or state-funded, almost all stadiums are now privately funded.³⁶ These conditions led to the financial proposals which have created the most controversy: an expansion of the football season, the implementation of a rookie salary cap, and a reworking of the current revenue sharing system.

Currently an NFL season includes four pre-season games and sixteen regular season games. The NFL wants to consider reducing the pre-season and expanding the regular season by an equally proportionate amount. Although that would leave the complete schedule at twenty games, players are more willing to take risks to win during the regular season when it counts. If the regular season was expanded to seventeen or eighteen games, players would be increasing the risk of severe injury with each additional game. Accordingly, the players would want to be further compensated for the additional risk. This shift would also lessen the amount of time rookies would have to train for the regular season.³⁷

The rookie salary cap proposal by the NFL is designed to lower the initial cost and financial risk of unproven players. Rookie contracts would have fixed salaries set according to a scale. This would eliminate the current gross inequity between the first round pick salaries and later round pick salaries. The NFLPA does not seem to be completely opposed to this idea as they responded with a counter. The NFLPA would want rookie contracts to cover no more

than three years, rather than the common five or six year current contracts. In addition, the NFLPA wants money saved by this new scheme to be spent, at least in part, to benefit retired players.³⁸

The most controversial proposal from the NFL is a change to the revenue sharing system. The current system deducts agreed-upon expenses from the gross revenue coming into the NFL, and then places a percentage cap (58% for 2010) on the amount spent on player salaries and benefits. In the past the expenses have totaled a little over \$1 billion dollars. The NFL wants to increase the deduction amount for expenses. Thus, the percentage spent on players would not change, but the total pool of money upon which the percentage is based would decrease. The NFLPA has calculated the decrease in the revenue pool to be equivalent to 18%, in reality dropping the percentage cap to 47.56%. The union has alternatively proposed adding deductions for the creation of new revenue streams as well as stadium-related costs.³⁹ This issue will be the most hotly contested throughout the course of negotiations.

ON THE HORIZON

The NFL and the NFLPA have some big issues to work out before March 2011. If they are unsuccessful in reaching a resolution, there may actually be a lockout, stopping football and bringing grown men to tears. However, it seems far more likely that the NFL will declare that both sides have bargained to impasse and then implement its last, best, and final offer. In light of the American Needle case, however, the union may once again elect to decertify and hit the NFL with an antitrust suit. Either way, on and off the field, it will be an interesting year for football.

By Joanna D. Mamey

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AUTHOR PROFILE

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FOOTNOTES

AN END IN SIGHT FOR 'ONE AND DONE'?

SURVEYING THE RULE'S EFFECT AND DEVELOPING A WORKING FRAMEWORK FOR ITS REPLACEMENT IN THE NBA'S NEXT CBA

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AMBUSH MARKETING

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A LOOK AT FOOTBALL PLAYER NEGOTIATIONS

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