

WHO CAN BEST REPRESENT PROFESSIONAL ATHLETES

Lawyer vs. non-lawyer

By Marc J. Kessler

Choosing an agent is one of the most important and difficult decisions an athlete and his or her family must make. It is akin to college recruiting and a process an athlete cannot afford to take lightly. The athlete has a wide choice of agents – competent and incompetent – who are competing for a few available clients and the prospect of glamour, glory and riches.

The athlete should not rush into a decision. He or she should decide only after consulting parents, coaches, other players and a non-agent lawyer. Reputable agents will welcome the heightened scrutiny. As you can well imagine from watching Jerry Maguire or simply reading the newspaper, when selecting an agent to represent the star student-athlete in professional sports, the problem is not finding an agent, but finding the right one. The agent industry is extremely populated and has a limited supply of new business. The National Football League Players Association (NFLPA) reports that there are approximately 900 registered agents and there are only 250 to 260 draft picks in any given year depending upon compensatory picks. This makes for a very competitive marketplace.

The industry is populated with two types of agents. First, there is the pure agent. This individual needs nothing more than a client to qualify as an agent and the ability to pay a fee to the players association regulating athlete agents in the particular sport. Some scholars have stated that it is more difficult to obtain a driver's license than to be an agent because in order to get a driver's license, you have to show some level of competence. There are many non-lawyer agents who perform well for their clients. Only in the last several years have players associations instituted minimum educational requirements or required an exam relating to competency. It used to be that sports agents were bridled only by their imagination. Unfortunately, some still may be, especially when it comes to recruiting new clients. However, even though the players associations have taken great steps forward to protect their members, the industry of sports agency is devoid of systematically enforceable regulations, which truly dictate minimum levels of professional expertise or accountability. Although regulatory standards may exist within a particular players association and there is a certification process, the players associations do not have the resources (like state bar associations) to conduct comprehensive moral character investigations or background checks.

Second, there are lawyers who also serve as athlete representatives. Lawyers are college-educated, law school graduates, have been admitted to state and/or federal bar associations, and are compelled to abide by enforceable codes of ethics and responsibility. Failure to satisfy prescribed codes of ethics can subject lawyers to sanctions and the possible loss of license to practice law. Many



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collegiate and professional sports practitioners believe that lawyers, and only lawyers, should be allowed to represent professional athletes. This is true not only because a non-lawyer agent may be thrust into the unauthorized practice of law by negotiating a contract or providing legal advice, but because lawyers are held accountable for their actions.

If a professional athlete believes his or her individual interests have been ill-served by a lawyer representative, that athlete can hold the lawyer accountable by virtue of the respective state's Rules of Professional Responsibility. Lawyers are subject to various rules of conduct that control their business activities and are designed to protect the public from attorney malfeasance. For instance, lawyers, unlike pure agents, are prohibited from actively soliciting clients. Solicitation of clients can result in severe monetary and disciplinary sanctions that can include public reprimand, suspension or a loss of the license to practice law. Lawyers cannot charge excessive fees for services provided. Lawyers must avoid conflicts of interest. In other words, it would be a violation of the ethical rules in one's state to represent multiple clients that may engage in the same business transaction. Thus, a lawyer representing two or more professional athletes competing on the same team for the same job and thus the same salary cap dollars is, as defined by the Professional Code of Ethics, unable to zealously represent both of those clients in their respective quests to secure that same job. Absent that lawyer's full disclosure of this conflict to each athlete, and the acquisition of an executed express waiver and acknowledgement of said conflict from each athlete, the representative attorney may be subject to the discipline of his or her governing bar, disciplinary counsel, and/or state Supreme Court.

Substantively, lawyers are best equipped to understand the professional sports leagues' complicated collective bargaining agreements. It is absolutely critical that a professional athlete's representative completely understand each and every tenant of their respective collective bargaining agreement. In particular, a comprehensive mastering of each collective bargaining agreement including,

but not limited to team salary cap provisions, rookie salary cap rules and benefits, is imperative if that representative is to provide the athlete with competent service in the negotiation of the player contract.

Complicated legal documents are best deciphered, interpreted, massaged, and utilized creatively by lawyers. Lawyers drafted the complicated bargaining agreements, and the lawyers should represent the athletes whose financial futures are reliant upon the accurate interpretation and implementation of these agreements. If a representative does not understand the collective bargaining agreement, it will be impossible to educate the client about the document itself. If a lawyer misinterprets a collective bargaining agreement, and the salary cap provisions are poorly or inaccurately reflected in the ultimate terms of the player's agreement, the player may seek redress by filing a malpractice action or by filing various complaints with the appropriate federal and state bar associations. If the athlete was similarly maligned by a pure agent, the athlete would have no similar method of redress other than possibly with the players association. However, the players associations typically have very weak grievance procedures with which a player may seek to discipline a wayward agent.

When it comes to choosing a sports agent, whether lawyer or non-lawyers, here are some suggestions for what an athlete should consider.

Get help. It is wise for the athlete to ask his or her parents, coaches, professors or athletic department for help screening agents. Generally, the athlete's lack of business experience, coupled with an agent's persuasive presentation, can make it difficult for the athlete to make an objective decision.

Don't rely solely on educational background or titles. Incompetence spans the educational and occupational horizons.

Ask a prospective agent for proof of educational background, training and work experience – particularly in the sports field. The agent's experience and record is crucial if he or she is going to represent you.

If the agent is a young attorney, ask for character and professional references from clients and persons such as a lawyer not involved in sports, an accountant, or a law school professor. Talk with those references. Find out how long the clients have been with him or her.

Inquire about a particular agent's reputation. Try to speak with former clients to find why they are former and not current clients. Otherwise, you may find yourself in a situation similar to an athlete that met a guy claiming to be a law student and promising that he could do a good job negotiating a contract. The athlete called the prospective agent one night, and he was told that he was working at the gym. Assuming that the law student was working out after a long day of studying, he called the gym and discovered that the would-be agent was doing "law," as in cleaning Lavatories And Windows.

Be wary of an agent who advises a player to change positions to help his chances of getting drafted or tells a player he should play in a different manner.

If the agent will handle any of the athlete's funds, find out if he or she is bonded. A bond is a form of insurance that provides some protection for clients if an agent mishandles a client's funds. Bonding is not essential and may not indicate anything about the agent's ability, but it is an important factor to consider in evaluating the safety of trusting an athlete agent with substantial amounts of money. Some

states, such as Ohio, require agents to be bonded or have malpractice insurance.

Question the agent in detail about the fees for each of his or her services provided, the scope of representation, the agent's relationships with club management, the likely impact of other clients on your interest, the agent's attitude towards holding out, the length of the contract with you, circumstances under which you can dismiss the agent, whether the agent feels bound by any code of ethics, or any other topic that seems at all relevant.

Consider an agent's track record of maintaining a client for an entire career and after retirement.

Reject an agent who seems more concerned with quick cash than with your long term best interests.

If the agent is not a practicing attorney, make sure he or she agrees to have a lawyer of your choice review your playing contract or any investment agreements.

Look for an agent who can and will devote enough time to your interests. Some agents over-extend, taking on too many clients.

Avoid an agent who offers money or gifts as an inducement to sign, especially if the contract is for several years. If an agent is willing to buy you, there is no question that he or she will be willing to sell you.

Be wary of outrageous claims by agents such as they will get you drafted or can guarantee endorsements. This is nonsense!

Avoid an agent who by his or her own practice or admission is violating certain rules or laws. If this person is willing to cheat others openly, what will stop him or her from cheating you?

Look for an agent who will take the time to explain answers to any questions you ask.

Approximately 125 Division I schools have established sports counseling panels to assist student-athletes about professional careers. The NCAA permits university presidents to appoint university employees from outside the athletic department as panel members. Such panels provide information and expertise from a variety of sources to help athletes objectively evaluate the services and proposals made by agents. The value of each panel varies from school to school. The NCAA supports these panels by holding an annual seminar for its members and providing a comprehensive handbook, including information on pro salaries, the athlete disability insurance program, and basic financial planning. The NCAA has expanded the scope of the panel's role by authorizing them to assist student-athletes in arranging loans to purchase disability insurance and to review contracts authored by teams. Some panels have set up registration programs for agents who wish to contact student-athletes and be eligible for a screening process.

Regardless of whom the athlete chooses to be represented by, the decision should be an informed decision, using all available resources. By following these simple suggestions, there is no doubt the athlete and his family will find not only an agent, but likely find the right one.



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