

The Ethical Sports Lawyer: Does Avoiding Conflicts of Interest Mean Avoiding Competition?

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INTRODUCTION

A fundamental rule of legal professional responsibility is that lawyers shall not represent a client if such representation involves a conflict of interest.¹ A conflict of interest exists if “the representation of one client will be directly adverse to another client” or “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”² Of course, exceptions exist, and conflicts of interest can be permitted, if each affected client gives written consent, or if the lawyer reasonably believes that he will be able to provide capable representation to all affected clients.³ Despite the explicit rules surrounding conflict of interest as defined by the *Model Rules of Professional Conduct*, there remains confusion in the realm of sports law as to what exactly constitutes conflicts of interest when representing multiple clients in the same league.

Both sports lawyers and agents, as well as their clients, have raised the issue of conflict of interest for decades. Though sports agents without law degrees also face a set of ethical considerations, this Note will focus on lawyers acting as sports agents. Over fifty percent of professional sports leagues’ representatives are lawyers.⁴ This percentage increases dramatically for top professional football players.⁵ Lawyers acting on behalf of their clients as sports agents still must follow the *Model Rules of Professional Conduct* and avoid conflicts of interest, but defining conflicts of interest remains challenging.

One of the most recent and public examples of a conflict of interest in sports law occurred in 2006 when Vanderbilt University star quarterback Jay Cutler, largely considered to be one of the best rookie quarterbacks during that period, signed with James “Bus” Cook, a well-known sports attorney and agent, allegedly

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1. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7 (2020). [hereinafter MODEL RULES].

2. MODEL RULES R 1.7.

3. MODEL RULES R. 1.7.

4. Robert Fraley & F. Russell Harwell, *The Sports Lawyer’s Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11(2) HASTINGS COMM & ENT. L.J. 165, 170 (1988).

5. *Id.* (stating that between 1985–1988, the top ten draft choices in the National Football League chose attorneys as their agents seventy-eight percent of the time).

under the condition that Cook not “represent another top quarterback.”⁶ Cook ended up signing Vince Young, a top quarterback who was picked third in the draft, with Cutler picked eleventh.⁷ While there is not necessarily a causal connection between Cook’s decision to represent Young and Cutler being chosen much later in the draft than expected,⁸ Cook’s decision does raise some questions. Namely, did he violate his duty to not represent a client if such representation involved a conflict of interest?

More broadly, Rule 1.7 poses clear ethical dilemmas when it comes to certain fundamental aspects of lawyers representing professional athletes: especially, representing clients on the same team when a salary cap is involved and representing clients who play the same position. Often, an agent⁹ will try to avoid these conflicts by claiming that he or she is “not functioning as a lawyer for this particular player or for any of my clients. I am functioning just as their agent.”¹⁰ However, lawyers are subject to the ethical rules of law whether they are functioning as a lawyer or not.¹¹ In the case of *In Re Dwight*, the Arizona Supreme Court held that “[a]s long as a lawyer is engaged in the practice of law, he is bound by the ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity.”¹² If representing various players on the same team or players who play the same position, doesn’t the successful representation of one client inherently disadvantage the other?

This Note will argue that Rule 1.7, though it clearly prohibits engaging in representation that could lead to a conflict of interest, is largely ignored in the sports law world with little to no consequences.¹³ The sports law world’s turning a blind eye to conflicts of interest is not because the sports law world does not take seriously conflicts of interest; rather, there are not appropriate rules and regulations defining conflict of interest in terms of professional sports agents and why consent on behalf of a client is not always an option. In order to rectify this clear breach of the *Model Rules of Professional Conduct*, this Note will argue that certain safeguards must be put in place for sports lawyers signing clients, including, but not limited to, limiting the number of players on a given team who play a

6. Liz Mulley, “Big 3” Shake Up The Agent Signing Process, STREET AND SMITH’S SPORTS BUS. J. (Jan. 6, 2006), <https://www.sportsbusinessjournal.com/Journal/Issues/2006/01/16/Labor-Agents/Big-3-Shake-Up-The-Agent-Signing-Process.aspx> [<https://perma.cc/FF5S-FGNU>].

7. Chris Chavez, *Titans Coaches Rated Vince Young Below Matt Leinart, Jay Cutler Ahead Of 2006 Draft*, SPORTS ILLUSTRATED (Jun. 27, 2017), <https://www.si.com/nfl/2017/06/27/vince-young-tennessee-titans-nfl-draft-matt-leinart-jay-cutler> [<https://perma.cc/K5P3-ADF9>].

8. *Id.*

9. Agents hereinafter will refer to sports agents with law degrees.

10. John D. Feerick, David Feher, Craig E. Fenech, Charles Grantham, Steven C. Krane & Nicole Coward, *Panel II: Conflicts of Interests in Sport*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 405, 424 (2003).

11. Paul T. Dee, *Ethical Aspects of Representing Professional Athletes*, 3 MARQ. SPORTS L.J. 111, 118 (1992).

12. *In re Dwight*, 573 P.2d 481, 410 (Ariz. 1977).

13. See MODEL RULES R 1.7.

certain position that an agent can represent, barring certain types of representation, and making clear rules and regulations as to what constitutes informed consent on behalf of a client. These rules will bolster lawyers' duties to avoid conflicts of interest and allow them to be transparent and loyal to their clients. It will also give courts and the legal profession a firm understanding of what constitutes conflicts of interest by creating easy to follow and apply rules.

Harvard law professor Paul Weiler alluded to the need for stricter rules regarding agents when he stated that "the reason we had to have agents in the first place was to protect the players from owners . . . The problem we now have is how to protect the player from the agent. In a sense we've just pushed the problem back one stage."¹⁴

Part I of this Note will address the inherent and potential conflicts of interest for sports lawyers who represent clients on the same team. Part II will address the potential conflicts of interest for sports lawyers who represent clients playing the same position on the same team (or who want to play the same position on the same team). Part III will analyze the conflicts for sports lawyers who represent clients who play the same position, and the last part of this Note will discuss what these scenarios mean in the real world and how to rectify them.

I. REPRESENTING CLIENTS ON THE SAME TEAM

A. SALARY CAPS

Currently, most professional sports teams have what is termed a salary cap, or a set amount of money that a given team can spend on its players' salaries.¹⁵ Salary caps are one of the biggest issues that sports agents face in the modern world, specifically in relation to the National Football League (NFL) and the National Basketball Association (NBA). The NFL was the first professional sports league to introduce a salary cap in 1994, and the NBA soon followed.¹⁶ The salary cap was initially introduced so that leagues would be more competitive and not inherently favor wealthier teams.¹⁷ Although these caps have benefited the league through instilling a level playing field, they have also led to inevitable complications for sports lawyers.¹⁸

With salary caps in place, "any negotiation that you have for multiple players on a team is, in effect, a zero-sum game—somebody wins, somebody loses; somebody is going to get more, and if that somebody gets more, another

14. Craig Neff, *Den of Vipers: A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED (Oct. 19, 1987), <https://vault.si.com/vault/1987/10/19/den-of-vipers-a-sports-scourge-bad-agents> [<https://perma.cc/S5FT-V2XX>].

15. Ramy Elitzer, *NFL And NHL Salary Caps Have Worked Out Well For Players*, THE CONVERSATION <https://theconversation.com/nfl-and-nhl-salary-caps-have-worked-out-well-for-players-165739> [<https://perma.cc/Y5PN-JCWE>].

16. *Id.*

17. *Id.*

18. Chris Neiger, *How Salary Caps Changed Sports*, INVESTOPEDIA (Jul.4, 2021), <https://www.investopedia.com/financial-edge/0910/how-salary-caps-changed-sports.aspx> [<https://perma.cc/P6JA-7ZLY>].

somebody gets less.”¹⁹ In other words, the more money you can secure for one of your clients may inversely affect another client on the same team.²⁰ Of course, this potential conflict of interest is null if appropriately described to an agent’s clients, but it is unclear as to how much detail an agent gives to his clients— i.e., does the client know that the effects of his agent obtaining more money for another player may negatively affect his own income under a salary cap?

According to the NFL Players Association (NFLPA), if these types of situations are disclosed and known to all, lawyers are allowed to represent clients with conflicting interests such as these.²¹ Though the NFLPA Regulations stipulate full disclosure to all clients involved, the issue then becomes the adequacy of disclosure.²² In order to appropriately represent players with conflicting interests, an attorney must disclose any potential conflicts of interest and get informed consent.

B. INFORMED CONSENT

According to Rule 1.7, “informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client,” and must include the advantages and disadvantages of such representation.²³ Another complication involves confidentiality, as the only way to get around a conflict of interest is via written consent of clients. However, if disclosure to certain clients would require revealing confidential information, this sort of waiver would be impossible to ethically obtain.²⁴

In *Detroit Lions v. Argovitz*, the U.S. District Court for the Eastern District of Michigan defined the degree of knowledge that a client must have to fully consent to representation.²⁵ Disclosing other similar professional athletes to a client, which many sports agents often view as disclosure, is not sufficient to be considered full disclosure.²⁶ Neither the *Model Rules* nor the NFLPA Regulations have defined what disclosure would entail in light of a sports lawyer representing multiple clients of the same team.²⁷

Further, representing clients on the same team may push a lawyer to “sacrifice or compromise one player’s demands to negotiate a more favorable contract for the other. Negotiating such a ‘package deal’ may force the lawyer to independently (and perhaps arbitrarily) rank the relative worth of both athletes.”²⁸ As

19. Feerick, Feher, Fenech, Grantham, Krane & Coward, *supra* note 10, at 425.

20. *See id.*

21. *Id.* at 413.

22. *Id.* at 426.

23. MODEL RULES R 1.7. cmt. 19.

24. MODEL RULES R 1.7. cmt. 31.

25. *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 548–49 (E.D. Mich. 1984).

26. Fraley & Harwell, *supra* note 4, at 208.

27. *See* MODEL RULES R 1.7; *see also* NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION REGULATIONS GOVERNING CONTRACT ADVISORS (2016) [hereinafter NFLPA REGULATIONS].

28. Fraley & Harwell, *supra* note 4, at 184.

established in Comment 1 of Rule 1.7, “loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”²⁹ Comment 6 further expounds on a lawyer’s loyalty owed to a client by stating that this loyalty prohibits representing a client directly adverse to another without written consent.³⁰

In the case of Bus Cook and Jay Cutler, it seems clear that Cook violated (at least) Rule 1.7 by ignoring Cutler’s request to not represent another top quarterback, knowing this could negatively impact his draft ranking.³¹ Despite this clear breach, Cook only faced negative press, when he should have faced an ethics panel.

According to American Bar Association Guidelines, cases involving conflicts of interest can lead to sanctions including disbarment, suspension, reprimand, or admonition.³² Disbarment is typically appropriate when a lawyer

[E]ngages in representation of a client knowing that the lawyer’s interests are adverse to the client’s with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.³³

Suspension is a lesser sanction appropriate when a lawyer does not disclose the effects of a conflict of interest to a client and causes injury or potential injury to a client.³⁴ Reprimand should be applied when a lawyer is merely negligent in determining if his or her client will potentially be affected by the lawyer’s own interests.³⁵ Finally, admonition should be applied when a lawyer “engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer’s own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.”³⁶

According to these factors, it seems appropriate that Cook should have been disbarred. He represented Cutler and later Young, knowing that his representation of Young would likely negatively impact Cutler. Not only that, but he also represented Young after Cutler explicitly asked him not to represent other top

29. MODEL RULES R. 1.7 cmt. 1.

30. MODEL RULES R. 1.7 cmt. 6.

31. See Mulley, *supra* note 6.

32. AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS 4.3.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

quarterbacks, which should warrant a greater sanction that just admonition, reprimand, or even suspension.

C. LEVERAGING PLAYERS AGAINST EACH OTHER

Another prime example of a clear conflict of interest occurs when an agent represents players on the same team and leverages certain players to either get better deals for another, or to close a contract for a player. One significant example of this occurred in 1981 when Tony Pace represented two players on the Kansas City Royals— Hal McRae and Frank White.³⁷ When negotiating contracts for both teammates, he refused to agree to White's contract until the Royals agreed to extend McRae's contract.³⁸ White had not consented to such talks and was completely unaware of Pace's plan to use him as leverage, even stating that he "does not want to be used as leverage in negotiations for another player."³⁹ Despite this very real conflict of interest, Tony Pace faced no repercussions.⁴⁰ Clearly, had Pace been an agent with a law degree, under Rule 1.7, Pace would have had the obligation to disclose this plan to White to gain his informed consent before moving forward with such a plan.⁴¹ Even as a sports agent without a law degree, Pace was still under a fiduciary duty to his clients to avoid conflicts of interest and still should have faced repercussions.⁴²

D. SOLUTIONS

To address the inherent and potential conflicts of interest in representing players of the same team, certain safeguards must be put in place to protect both sports lawyers as well as their clients. Too many sports lawyers argue that this is a non-issue so long as their clients are informed of possible conflicts, but most of these conflicts are not adequately addressed to the players, especially given their lack of legal sophistication and their increasingly young age.⁴³ Because of this dilemma, there needs to be the "adoption of an industry-specific set of guidelines for sports agents that suggest a standard method of addressing conflicts of interest, an idea that has been generally suggested before but never expanded upon."⁴⁴

More specifically, it would be beneficial in these situations (situations in which an agent is representing multiple players on the same team) to limit sports lawyers to one player per position on each team. Limiting sports lawyers to

37. *Agent Working for White, Hal*, LAWRENCE JOURNAL-WORLD, Jan. 6, 1981, at 13.

38. *Id.*

39. *Id.*

40. *Id.*

41. See MODEL RULES R 1.7.

42. See NFLPA REGULATIONS, *supra* note 27.

43. See Scott Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L.R. 194, 223 (2004) (finding that a client's level of sophistication is inversely proportional to the amount of information that should be relayed by an agent to constitute consent).

44. *Id.* at 237.

representing one player per team would be far too stringent and would burden agents' careers. But by limiting agents to one player per position on each team, agents would be best able to give their clients undivided interest and loyalty and obtain the best results for their clients. The National Basketball Players Association, though not addressing this exact problem, recently enforced a rule barring the representation of the General Manager or coach of any NBA Team by an agent already representing a professional athlete.⁴⁵ This decision was largely decided because of the players who wanted "agents that represent their interests to provide complete loyalty."⁴⁶ With this same reasoning, it seems obvious that a similar decision should be reached, given that representing players on the same team would also affect an agent's complete loyalty to his clients.⁴⁷ The primary difference in situations seems to be that professional players may not be aware that their agents are unable to give complete loyalty when representing other players on the same team; if they were aware of the consequences, it seems unlikely that they would consent to waive their rights.

It would also be beneficial to create a standardized set of regulations necessary for adequate disclosure, including, but not limited to, a list of an attorneys' clients on the same team, an explanation of the team's salary cap (how an increase in one player's salary could potentially lead to a decrease in another's), as well as a rule stipulating that agents cannot give personal opinions on a player's skillset or any other subjective attribute if asked by any team. It would likely be necessary to create different materials depending on the professional league, as they have different rules and regulations.

Finally, in case of a clear breach of Rule 1.7 by a sports lawyer, the bar association should immediately classify such a breach as a grounds for discipline, rather than lesser misconduct.⁴⁸ According to Rule 9(B)(2), a violation should not be considered lesser misconduct if it involves "substantial prejudice to a client or other person" or it involves "dishonesty, deceit, fraud, or misrepresentation by the respondent."⁴⁹ By not adequately disclosing such conflicts of interest, or even by downplaying the consequences of such representation, agents are prejudicing at least one client (likely many) and are intentionally making fraudulent statements, or lack of material information, to obtain multiple clients of the same team.

45. Ken Berger, *NBPA Mounting Crackdown Against Agents Over Conflicts of Interest*, CBS, Feb. 19, 2016, <https://www.cbssports.com/nba/news/nbpa-mounting-crackdown-against-agents-over-conflicts-of-interest/> [<https://perma.cc/ACY2-BBND>].

46. Telephone interview with George Cohen, Legal Counsel to the NBPA Committee on Agent Registration and Regulation (Aug. 3, 1988).

47. See Fraley, *supra* note 4, at 204.

48. MODEL RULES R. 9.

49. MODEL RULES R. 9(B)(2).

II. REPRESENTING CLIENTS ON THE SAME TEAM WHO PLAY THE SAME POSITION

A. SALARY CAPS

The most complex potential issue of conflict of interest in sports law thus far involves agents who represent clients on the same team who play the same position. The number of players who play the same position on a given team is obviously limited. Because of this, salary caps have a huge impact on players on the same team who play the same position.

As mentioned under Part I, professional sports teams typically have a salary cap that limits what that team can spend on its players' salaries.⁵⁰ Salary caps inevitably lead to a zero-sum game in which one player's increased salary leads to a lower salary for another player.⁵¹ Teams often assign value contributions per investment at each position.⁵² In other words, there is a "rookie minimum salary for the number of players a team must have at each position" and teams "allocate each additional dollar to the position that has the highest current marginal benefit."⁵³ Using this method, teams are able to create a breakdown of how much each position should be paid to create the best use of its resources.⁵⁴

Although this method is highly efficient, it also leads to a built-in dilemma in that teams will not want to pay a high premium for multiple players of the same position, leading to competition between players of the same position. Because this model determines that certain positions should be worth a higher investment,⁵⁵ these positions that the model finds to be compensated more will likely face more competition, as a team will not have the funds under a salary cap to hire as many players for that position as they would like.

B. CONSOLIDATED POWER

Not only that, but representing a finite number of players on the same team who play the same position can also lead to an issue of a limited number of sports agents maintaining a significant level of power.⁵⁶ When agents are involved in a situation such as that described above, they often "develop a sense that they are part of a team's management and can dictate the team's player personnel moves in a manner usually reserved for coaches and general managers."⁵⁷ By acting as

50. Elitzer, *supra* note 15.

51. Feerick, Feher, Fenech, Grantham, Krane & Coward, *supra* note 10, at 425.

52. Jason Mulholland, *Optimizing the Allocation of Funds of an NFL Team under the Salary Cap, while Considering Player Talent*, UNIV. OF PENN SCHOLARLYCOMMONS (2016).

53. *Id.* (defining marginal benefit as "the highest partial derivative with respect to salary").

54. *Id.*

55. And, therefore, those positions will receive a larger salary on average.

56. Rosner, *supra* note 43, at 201.

57. *Id.* at 213–14.

management, they have undue influence over teams and their clients, leading to a number of conflicts of interest.

Agents representing players on the same team who play the same position is atypical; however, it does happen. SFX Sports Group represented Elton Brand, Quentin Richardson, and Corey Maggette—three players of the Los Angeles Clippers.⁵⁸ During this time, the SFX Sports Group leveraged their representation of these key players to acquire the best deal for one of these players, showing a clear and undeniable favoritism of this player and therefore a clear conflict of interest on this group when representing all three of these players.⁵⁹ In fact, SFX Sports Groups' leveraging can (and did) lead to a lesser contract negotiation for the other players involved.⁶⁰

C. UNCONSCIOUS BIAS

Another unique dilemma facing sports agents who represent multiple players on the same team who play the same position is the unconscious bias that they face in representing each of their clients.⁶¹ Lawyer and sports agent Craig Fenech addressed this dilemma by giving a personal anecdote during a conflicts of interest in sports panel.⁶² His example involved his representation of three pitchers on the same Major League team. One of these pitchers, whose career had not been as successful as the other two pitchers, called Fenech and fired him for having a conflict of interest.⁶³ Interestingly, Fenech claims that there was no conflict of interest and instead he “would have had a conflict of interest if I could have made the determination, or even had a substantial influence on the determination, as to who made the club.”⁶⁴ He then cited two major reasons there was no conflict of interest: first, the club was keeping ten, not three pitchers, and second, no general manager had ever asked his opinion on which client to keep in the club.⁶⁵

Despite this (somewhat) convincing reasoning behind Fenech's claim that there was no conflict of interest, the evidence suggests otherwise. Fenech did have a substantial influence on the determination as to who made the club—not explicitly, as he pointed out through giving his opinion on who the club should keep—but through the simple representation of these three pitchers.⁶⁶ Fenech admitted that the pitcher mentioned above had a less successful career because

58. *Id.* at 213.

59. *Id.*

60. *Id.*

61. See Audrey Murrell, *On The Tennis Court And In The Workplace: When Unconscious Bias isn't Unconscious*, FORBES (Sep. 20, 2018), <https://www.forbes.com/sites/audreymurrell/2018/09/20/on-the-tennis-court-and-in-the-workplace-when-unconscious-bias-isnt-unconscious/?sh=1316110d5aa4> [https://perma.cc/4AQU-RSE8].

62. Feerick, Feher, Fenech, Grantham, Krane & Coward, *supra* note 10, at 417-18.

63. *Id.* at 417.

64. *Id.*

65. *Id.*

66. *Id.*

“he was not as good a pitcher.”⁶⁷ However, this is clearly Fenech’s subjective opinion. Because of his inherent bias, it is very possible that Fenech did not advocate for this specific client as much as he could have. Or maybe Fenech just advocated for his other two pitchers more than this pitcher. It is not the duty of a lawyer or sports agent to determine the relative worth or skill level of an athlete. Because of his action of representing these three pitchers on the same team in different ways or to varying degrees, it seems that there is an inherent, insurmountable conflict of interest that Fenech faced and succumbed to—one that cannot be overcome even by a client consenting to such a conflict.

D. SOLUTIONS

Although this is certainly a drastic proposal, the only true solution to reducing conflicts of interest when representing clients on the same team who play the same position is to bar attorneys from this sort of representation. Not all attorneys who act as sports agents are inherently burdened by conflicts of interest when representing multiple athletes. However, when one factors in representing many clients of the same team in addition to them playing the same position, causing them to directly compete against each other, the conflict of interest becomes inevitable, and the potential damages can be harmful.

This potential conflict differs substantially from the scenario previously mentioned and the scenario mentioned later (representing clients who play the same position) and thus should accordingly be treated differently. The possibility of an agent gaining too much power through contributing to the determination of whom is hired for a particular team and the unconscious bias that an agent has combined create a very real conflict of interest that, in my opinion, has no resolution except for an agent to remove himself from this situation entirely.⁶⁸

III. REPRESENTING CLIENTS WHO PLAY THE SAME POSITION

A. SALARY CAPS

Another issue at the forefront of sports law involves the potential conflict of interest involved when an agent represents players of the same position. Although the situation of representing clients who play the same position is the least problematic (and possibly the simplest) of the three scenarios presented, it still displays a clear conflict of interest for sports agents. Unlike the other scenarios presented, salary caps are not much of an issue for agents who represent clients who play the same position. The issue of a salary cap ceases to exist because in this scenario, a sports agent would be representing players who play for the same position but on different teams. Although the issue of a salary cap does not exist,

67. *See id.*

68. *See Murrell, supra* 61; *see also Rosner, supra* note 43, at 201.

a clear conflict of interest arises in a similar manner as formerly stated, through agents' subconscious bias.⁶⁹

B. UNCONSCIOUS BIAS

As previously mentioned, sports agents inherently have an unconscious bias by representing players who play the same position. The Fenech example again proves this point by being a clear example of how a sports agent has a clear, perceived bias of his clients—a bias that clouds his or her judgment as a lawyer advocating for his client and causes him to not receive the best deals for clients he deems as less than.⁷⁰ As determined in *Burleson v. Earnest*, a client is “entitled to the best efforts and unbiased judgment of his agent . . .”⁷¹ Although this statement was used to address a sports agent being both buyer and seller at the same time, it also relates to the possibility of a sports agent representing clients of the same position. It is even applicable to other potential conflicts of interest and is still entirely relevant more than 80 years later.

Another crucial element often overlooked, especially by sports agents, is the underlying reasoning of self-removal in cases of conflicts of interest: “the policy of the rule is to shut the door against temptation, and which, in the cases in which such a relationship exists, is deemed to be, of itself, sufficient to create the disqualification.”⁷² In other words, when temptation exists in a legal scenario which creates a conflict of interest, although there is a possibility to avoid the temptation and skillfully avoid such a conflict, oftentimes there must be a removal of the lawyer in such a situation, or a “disqualification.”⁷³ For example, when a sports agent has three clients who are NFL quarterbacks, looking to join a new team, and a position for quarterback of the New Orleans Saints opens up, what is the agent's duty to avoid a conflict of interest? To tell all three clients of the opportunity and disclose the potential conflict, allowing them to decide whether to continue with representation? To advocate equally for all three clients for the position? Or to advocate strongly for the client the agent thinks has the best potential?

According to the rules of conflicts of interest, it would be acceptable for an agent to tell each of his clients of the opportunity and, if they are willing to move forward with representation, to then advocate for each of the clients. The issue evolves, though, when it becomes apparent that no human can advocate for three different people equally. Inherent biases, opinions of a player's suitability for a team, and a subconscious judgment of skill, are inevitable.⁷⁴ It is undisputed that an agent must not “place himself in a position where his own interests or those of

69. See Murrell, *supra* 61.

70. Feerick, Feher, Fenech, Grantham, Krane & Coward, *supra* note 10, at 417-18.

71. *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App. 1941).

72. *Id.*

73. *Id.*

74. See Murrell, *supra* note 61.

any other person whom he has undertaken to represent may conflict with the interests of his principal.”⁷⁵ Although this is widely agreed upon in the legal community, there fails to be a clear definition of what constitutes a genuine conflict of interests when it comes to an agent representing multiple players of the same position or how to address the conflict of interest once it becomes apparent. While it is impossible to negate inherent (or learned) biases, it is possible for the American Bar Association (“ABA”) to create a standard that removes bias from contributing to a conflict of interest for an agent.

C. SOLUTIONS

Of the three scenarios, this is the least drastic in terms of conflicts of interest and because of this, the solution should be less drastic. To be more precise, specific limits should be put in place to address the potential conflicts of interest that arise out of this situation and similar ones. As previously mentioned, it is nearly impossible to rid oneself of biases, but with safeguards in place, these inherent biases should not affect the representation of clients who play the same position.⁷⁶

First, it should be mandated by the ABA that before an agent signs a client, he must provide them with a list of all current clients who play the same position. He must also routinely update the list so that former clients are made aware of new clients who play the same position. A list of these clients is not enough, though. As stated in *Financial General Bankshares, Inc. v. Metzger*, “full disclosure” was defined as the “affirmative revelation by the attorney of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation. A client’s mere knowledge of the existence of his attorney’s other representation does not alone constitute full disclosure.”⁷⁷ Although this case gives a great guideline as to what information an agent must disclose to his clients, the ABA should form a panel to create a standardized set of information necessary to disclose to clients before representing them when dealing with a potential conflict of interest such as this.

Second, it should be mandatory for agents to tell his or clients of any position that the client may be interested in. For example, if a position for a point guard for the Pelicans becomes available and an agent represents two NBA point guards, that agent must disclose that opportunity to both players. If a client is not interested in the position, then and only then would the agent release his duty to advocate for them to the team with the open position. By instituting this rule, there will be no temptation for an agent to only disclose the open position to whom he views as the best fit.

75. Floyd R. Mechem, *Outlines of the Law of Agency*, 78 (1901)

76. See Murrell, *supra* note 61.

77. *Fin. Gen. Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 771 (D.D.C. 1981).

If both clients are interested in the available position, mechanisms must be put in place to ensure that an agent adequately and equally represents his clients competing for this competition—in this scenario, two point guards. To ensure equal representation does not mean that the agent must demand the same salary for each player and the exact same benefits. Instead, it should require that the agent discuss with each of his clients separately what they are looking for in employment—exact salary figures, benefits, etc. The agent should then do everything in his power to obtain that for his client without preference for either client.

There should also be a stipulation in place that if ever asked his personal opinion about a player's skillset or how he would interact with a given team, an agent should be required to refrain from answering. By doing this, there will be no question of equal representation and there will also be less inappropriate power on behalf of an agent on a team. This will also reduce any bias that an agent may have concerning his players.⁷⁸ Again, an agent's job is to obtain the best deal for his client, and he should leave evaluating a player's skillset to the team and coaches involved with hiring.

CONCLUSION

With the increasing importance of adequate player representation at the professional level, it is more important than ever that agents act according to the *Model Rules*, especially by avoiding conflicts of interest unless their clients give informed and explicit consent, which is sometimes impossible to do. There are clear examples of agents acting with disregard to Rule 1.7 with little to no consequences.⁷⁹ Because Rule 1.7 poses so many difficulties—namely, what constitutes a conflict of interest and how to define informed consent, the *Model Rules* would benefit from clearly defining appropriate and inappropriate conduct on behalf of agents representing clients from the same team, who play the same position, or both.⁸⁰ It also would benefit the *Model Rules* to provide clear rules that differ according to the particular situation, as the three scenarios outlined in this Note differ drastically (and of course, many more such scenarios exist).

Though this Note focuses on sports law at the professional level, it can be applied to not only other sports law but also to other legal matters involving the question of conflicts of interest. Because of this, a set of guidelines outlining an explicit approach for agents should be modified to apply to a range of questionable legal situations.

78. See Murrell, *supra* 61.

79. See Bus Cook example, *supra* Part I.

80. MODEL CODE R 1.7.