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Ethical and Practical Implications and Differences between Sports Agents and Attorneys



Jeremy M. Evans is the Managing Attorney at California Sports Lawyer, representing sports and entertainment professionals and businesses in contract drafting, negotiations, licensing, and career growth. He is

the Director of the Center for Sports Law & Policy at Thomas Jefferson School of Law in San Diego, California. Evans is an award-winning attorney and community leader. He can be reached at Jeremy@CSLlegal.com or via his website: www.CSLlegal.com.

By Jeremy M. Evans

A high profile athlete may be represented by a variety of professionals, including attorneys and agents. The educational requirements, licensing requirements, and the permitted tasks for each type of professional—specifically, an attorney versus an agent or an advisor—are very different. If you are reading this Article, you already know what it takes to become an attorney—the years of schooling, having moral character, taking (and passing) the bar exam, and meeting MCLE requirements—and you know the strict rules of professional conduct by which an attorney must abide. The purpose of this Article is twofold: (1) to show the difference between attorneys and sports agents; and (2) to explore the ethical implications of being an attorney versus being a sports agent.

WHAT IS AN AGENT OR ADVISOR, AND HOW DO YOU BECOME ONE?

As with attorneys, the laws governing agents differ by state. The following description is generally true.

An agent may or may not be an attorney, although generally, for the reasons discussed below, agents are *not* attorneys. Agents represent professional athletes for their contractual negotiations, public relations, and other needs. Athlete agents act much like talent agents for entertainers in that, from time to time, they may procure employment for their client and negotiate a contract for the client's eventual employment with the team, entity, league, or association. In addition, agents sometimes negotiate endorsement deals for their clients. Agents cannot practice law, but often perform tasks

that traditionally have been viewed as part of the practice of law, such as negotiating contracts. Agents are also subject to the Miller-Ayala Act¹ in California and similar laws and regulations in other states.

For example, in California, a player agent must register with the California Secretary of State as an agent, while making mandatory declarations and disclosures, paying a small fee, and obtaining a bond.² If the agent wants to advise and work with student-athletes, he or she must register at the school that the student is attending.³ Failure to comply may result in the agent/advisor being fined, suspended, or being disabled from representing athletes in one form or another.⁴ Further, certain acts by agents (or others) could affect the eligibility of the student-athlete—and could therefore result in liability on the part of the agent. There is no formal education requirement to become an agent in California.⁵ However, one must demonstrate relevant experience.⁶

Athlete advisors are like agents in that they are generally the same person with a different registration requirement completed. Athlete advisors work with high school and college athletes who are entering the draft or thinking about entering the draft for a team or entering as an individual in a professional sports league. Registration generally requires payment of a fee and paperwork. Advisors are generally *non-attorneys* and may *not* practice law unless they are licensed to do so.

Lastly, for an agent to represent a professional athlete in an American professional sports league (such as for the National Football League⁷ draft or in free agency, or a

Major League Baseball⁸ player's (athlete's) arbitration, free-agency contract, or related matter), the agent must register with the Player's Association of the respective league where the athlete plays or will play. As an example, the National Football League (NFL) and Major League Baseball (MLB) both require a fairly large application fee, annual fees, passing a knowledge-based test, a background check, have a player on a professional team's roster, and in some leagues must have a four-year degree and a graduate-level degree. MLB does not require a formal education, but if one has a formal education, he or she have the opportunity to be designated as an "Expert Agent"⁹ by applying and going through the approval process. Professional league agents are generally referred to as "Certified Agents" or simply "Certified." Certified Agents are generally *not attorneys* and may *not* practice law unless they are licensed to do so.

DISTINCTIONS BETWEEN ATTORNEYS AND AGENTS/ADVISORS

As discussed above, there are major differences between the education and preparation required in becoming an attorney versus becoming an agent or advisor. Most importantly, however, **attorneys can practice law, but agents and advisors cannot.** So, why do some agents attend law school, but do not sit for the bar exam, and others become licensed to practice law? Or, more importantly for the readers of this Article, why would an attorney also want to be an agent? There are four main differences between being an attorney and being an agent or advisor.

A. IN-PERSON CONTACT WITH PROSPECTIVE CLIENTS

Attorneys are limited in making *in-person contact with prospective clients*. American Bar Association (ABA) *Model Rule of Professional Conduct 7.3(a)(2), Direct Contact with Prospective Clients, Solicitation of Clients*, provides:

A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: ... (2) has a family, close personal, or prior professional relationship with the lawyer."¹⁰

Similarly, *California Rule of Professional Conduct 1-400, Advertising and Solicitation*, provides:

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following: ... (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship . . .¹¹

As non-attorneys, agents are not subject to the in-person contact rules. With recruiting being such an important tool of an agent/advisor's business and survival, these rules would literally end the recruitment process and an agent/advisor's businesses unless a prior personal or professional relationship existed before the contact. This rule is extremely impractical for attorneys wanting to work in sports, so agents simply do not become licensed attorneys (or if they are licensed as attorneys, they resign). In some situations, attorneys may take the careful path of opening both a law practice and an agency, with extreme caution to keep the two entities and businesses separate.

B. THE MULTIJURISDICTIONAL PRACTICE OF LAW

Second, and just as important as the first point, is the regulation against attorneys from the multijurisdictional practice of law. *ABA Model Rule of Professional Conduct 5.5(a), Unauthorized Practice of Law—Multijurisdictional Practice of Law*, provides:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.¹²

Similarly, *California Rule of Professional Conduct 1-300(a)(b), Unauthorized Practice of Law*, provides:

(A) A member shall not aid any person or entity in the unauthorized practice of law.

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.¹³

Essentially, one acting as an attorney must be licensed in each and every state in which one so acts—a very onerous burden. Agents and advisors are not attorneys, and are not subject to any multijurisdictional rule. They therefore may freely recruit and represent athletes in all states and territories provided the agent/advisor is registered with the proper league, where the agent resides (lives or does business), where the athlete resides, and/or where the athlete attends school.

A common example demonstrates the issue. An athlete lives in North Carolina, but the attorney is only licensed to practice law in California. The athlete wants to sign with a non-California based professional sports team, and California law does not apply. In such a situation, the attorney's potential services and fee(s) for those services end before they begin. An attorney must refuse the representation because he or she cannot practice law in a state where he or she is not licensed to do so. The attorney would otherwise be subject to discipline, suspension, or possible disbarment in both the home and foreign state of practice.

This rule is extremely impractical for attorneys so agents either forgo practicing law, or open both a law practice and a sports agency with the use of extreme caution to keep the two entities and businesses separate.

C. THE ATTORNEY-CLIENT PRIVILEGE, PRIVILEGED COMMUNICATIONS, AND THE WORK PRODUCT DOCTRINE

California Evidence Code sections 950-962,¹⁴ California Rule of Professional Conduct 3-100, Confidential Information of a Client,¹⁵ the corresponding ABA Model Rules¹⁶, specifically Rules 1.6¹⁷ and 1.7¹⁸[30], and the Attorney Work Product Doctrine¹⁹ all restrict, protect, and prevent attorney-client information, strategy, and the like from being disseminated publicly without client approval and sometimes attorney approval. Attorneys also are limited in their right to publicize their client's matters.²⁰ One can imagine these limitations would be difficult for an agent, advisor, or athlete to handle when presented with an opportunity to speak with the press, or to release information at the benefit of the athlete, but without having the athlete's, or in some

situations, the attorney's approval. These rules could be very restrictive in the sports realm, so it is yet another reason agents and advisors might decide not to become attorneys. On the other hand, the protections of these rules may strongly militate in favor of having certain work done by a licensed attorney.

D. ATTORNEY COMMUNICATION WITH A REPRESENTED PARTY

California Rule of Professional Conduct 2-100, Communication With a Represented Party²¹, and ABA Model Rule 4.2, Communication with Person Represented by Counsel²² prevent attorneys from communicating with represented parties without the represented party's attorney approval and/or a court order. These rules have a limited relationship in the sports industry with regard to athlete representation, although they could preclude an athlete's representative from talking directly to a team's management if the team has retained an attorney. Because athletes are generally represented by agents, not attorneys, in their team and endorsement matters, these rules seldom apply.

Conversely, when agents encounter, whether accidentally and/or purposefully, athletes already represented another agent, for business development purposes or otherwise, the Miller-Ayala Act²³ and MLB/NFL Player Association rules²⁴ regulate agent changes/designations, but are mostly quiet when it comes to solicitation and communication as long as the agent(s) are registered properly. Agents do have their own *unwritten rules* (like respect and courtesy) when it comes to soliciting and communicating with represented athletes, but athletes do switch representation from time to time based on such contact.

What this means practically is that agents are not subject to the strict communication rules with represented athletes as attorneys. You can imagine, as is the nature of recruiting in the sports and entertainment industries, restricting communication with represented parties would limit business development. In other words, restricting communication would be an extremely impractical rule for agents to follow.

CONCLUSION

In conclusion, attorneys are subject to strict rules that directly affect recruiting and representing clients,

whether professional athletes or not. These rules forbid attorneys from making in-person contact with prospective clients without a prior personal relationship, practicing law (negotiating contracts and securing employment) in different states/jurisdictions where the person is not licensed to do so, divulging client protected information, and communicating with represented clients/athletes for recruiting or other purposes. Agents do have fiduciary duties, but practicing as an attorney is impractical in the sports industry where the ethical and licensing rules go against a typical sports agent business model where agents are not otherwise subject to attorney rules. Therefore, most agents decide to forgo practicing law.

ENDNOTES

- 1 The Miller-Ayala Act (California Bus. & Prof. Code, div. 8, ch. 2.5, § 18895 et seq.).
- 2 The Miller-Ayala Act, *supra*, (art 1.5, § 18896-18896.8). A copy of the required Athlete Agent Disclosure Statement can be found here: <<http://bpd.cdn.sos.ca.gov/sf/forms/sf-aa1.pdf>> (as of July 5, 2016).
- 3 For example, a copy of the University of Southern California's Agent Registration Form can be found here: <http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2015-16/misc_non_event/Agent_Reg.pdf> (as of July 5, 2016).
- 4 Agents and Amateurism: Agent Information, NCAA <<http://www.ncaa.org/enforcement/agents-and-amateurism>> (as of July 5, 2016).
- 5 See the Athlete Agent Disclosure Statement, *supra*.
- 6 See section 17 of the Athlete Agent Disclosure Statement, *supra*.
- 7 *Information for Agents*, National Football League Players Association <<https://www.nflpa.com/agents>> (as of July 5, 2016).
- 8 *MLBPA Agent Regulations*, Major League Baseball Players Association <http://mlb.mlb.com/pa/info/agent_regulations.jsp> (as of July 5, 2016).
- 9 MLBPA Regulations Governing Player Agents, § 4(A) (5) (as amended effective February 15, 2016) <<http://reg.mlbpaaagent.org/Documents/AgentForms/Agent%20Regulations.pdf>> (as of July 5, 2016). A copy of the MLBPA's Designation of Expert Agent Advisor form can be found here: <<http://reg.mlbpaaagent.org/Documents/AgentForms/Exhibit%20A%20-%20Designation%20of%20Expert%20Agent%20Advisor.pdf>> (as of July 5, 2016).
- 10 *ABA Model Rules of Professional Conduct*, rule 7.3. We should note that California has not adopted the ABA Model Rules. See the State Bar of California, Commission for the Revision of Rules of Professional Conduct: Rules and Concepts that were Considered, but are not Recommended for Adoption (July 2010) p. 1 <[http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Rules%20-%20Concepts%20Considered%20but%20Rejected%202010%20-%20\(07-21-11\).pdf](http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Rules%20-%20Concepts%20Considered%20but%20Rejected%202010%20-%20(07-21-11).pdf)> (as of July 5, 2016). California licensed attorneys are subject to the California Rules of Professional Conduct. See California Rules of Professional Conduct, rule 1-100.
- 11 California Rules of Professional Conduct, rule 1-400.
- 12 ABA Model Rules of Professional Conduct, rule 5.5.
- 13 California Rules of Professional Conduct, rule 1-300.
- 14 California Evidence Code sections 950-962.
- 15 California Rules of Professional Conduct, rule 3-100.
- 16 Rice, *Email Communications with Clients* (2013) 39 L. Prac. Mag. 1, available at <http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/ethics.html> (As of July 5, 2016).
- 17 ABA Model Rules of Professional Conduct, com. on rule 1.6.
- 18 ABA Model Rules of Professional Conduct, com. on rule 1.7.
- 19 California Code of Civil Procedure sections 2018.010-2018.080; Baldwin, *Discoverability of Witness Interviews: To What Extent Do the Work Product Doctrine and/or the Attorney-Client Privilege Apply?* (2013) Cal. St. B.J., available at http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=70 (as of July 5, 2016); Adkins, *Taxation: Protection of Accountant Documents and the Attorney-Client Privilege and Work Product Doctrine* (1998) 2 Gen. Prac., Solo & Small Firm Division, Best of ABA, available at <http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/adkins.html> (as of July 5, 2016).
- 20 California Rules of Professional Conduct, rules 1-400, 3-100, 5-120, 5-200.
- 21 California Rules of Professional Conduct, rule 2-100.
- 22 ABA Model Rules of Professional Conduct, rule 4.2.
- 23 The Miller-Ayala Act, *supra*.
- 24 MLBPA Regulations Governing Player Agents, *supra*; NFL Players Association Regulations Governing Contract Advisors (as amended through June 2012) <http://nflparesources.blob.core.windows.net/mediaresources/files/PDFs/SCAA/2012_NFLPA_Regulations_Contract_Advisors.pdf> (as of July 5, 2016).