

THE MAGAZINE OF THE LOS ANGELES COUNTY BAR ASSOCIATION

Los Angeles Lawyer

APRIL 2020 / \$5

Semiannual
Guide to
EXPERT WITNESSES

EARN MCLE CREDIT

2019 Ethics Roundup

page 26

LACBA Goes to Mexico

page 7

Equal Parenting Protections

page 15

PLUS

Surprise Medical Billing

page 34

Rewarding Student Players

Los Angeles lawyer Jeremy M. Evans analyzes the various possible ramifications of the newly passed Fair Pay to Play Act permitting college athletes to pursue profitable sponsorship and endorsement deals in the future

page 20

CONTENTS



Los Angeles Lawyer
the magazine of
the Los Angeles County
Bar Association
April 2020
Volume 43, No. 2

COVER PHOTOS CREDIT:
TOM KELLER

LOS ANGELES LAWYER (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 1055 West 7th Street, Suite 2700, Los Angeles, CA 90017 (213) 896-6503. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of \$14 included in the Association membership dues. Nonmember subscriptions: \$38 annually; single copy price: \$5 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: Address Service Requested. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.

FEATURES

20 Rewarding Student Players

BY JEREMY M. EVANS

The Fair Pay to Play Act will allow college athletes in California to profit in sponsorship or endorsement deals similar to the publicity rights of professional athletes

26 2019 Ethics Roundup

BY JOHN W. AMBERG AND JON L. REWINSKI

High-profile misconduct by a justice, attorney fiduciary duty, separate counsel requirements, and just plain bad attorney behavior were among the professional ethics concerns California lawyers faced last year

Plus: Earn MCLE credit. MCLE Test No. 298 appears on page 29.



34 Another Kind of Medical Shock

BY ERIC D. CHAN, BRIDGET A. GORDON, AND ANNALEE M. CLUBB

The results of California's AB 72, which limits surprise medical billing, have been hotly debated, in part, because the results inform the debate over similar legislation at state and national levels

40 Special Section

Semiannual Guide to Expert Witnesses

DEPARTMENTS

7 LACBA Matters

LACBA celebrates *Día de los Muertos* in Mexico

BY VICTOR ACEVEDO

11 President's Page

National conference examines the evolving role of bar associations

BY RONALD F. BROT

13 Barristers Tips

Conducting and documenting proper evidence collections

BY CLAIRE-LISE KUTLAY

15 Practice Tips

Updating California parentage laws for the modern family

BY DENNIS F. HERNANDEZ

60 Closing Argument

Improving health and well-being in the legal community

BY FRED KIPPERMAN, ANITA BHAPPU,
AND DAVE BAIOCCHI

04.20

BY JEREMY M. EVANS

R E W A R D I N G

STUDENT PLAYERS

Implementation and enforcement of the Fair Pay to Play Act raises many questions about NCAA involvement in regulation under the new rules

In September 2019, California Governor Gavin Newsom signed into law the Fair Pay to Play Act (FPPA).¹ Otherwise known as Senate Bill 206,² the legislation allows college athletes playing a sport at a qualified academic institution in California that makes \$10 million or more in media rights annually to enter the marketplace and profit from their names, images, and likenesses. The law forbids educational institutions from suspending or otherwise penalizing a student for pursuing such sponsorship or endorsement deals. It also allows student athletes to retain the services of an agent and/or attorney to help them obtain and secure such deals. The law, which becomes operative January 1, 2023, exempts the California Community Colleges system until 2021, when a report will be submitted to the California Legislature to determine whether community colleges should be subject to the FPPA.

In October 2019, the Atlanta-based National Collegiate Athletic Association (NCAA) Board of Governors voted to remove restrictions on student athletes competing at member institutions, allowing them to profit from their names, images, and likenesses. The NCAA's decision followed that of the California Legislature, the first in the nation to pass such a law, and the introduction or dis-

cussion of similar legislation in the U.S. House of Representatives and in Florida and New York. NCAA President Mark Emmert said, "There's no question the legislative efforts in Congress and various states has been a catalyst to change."³

This foundational change of course pursuant to the California legislative effort and the NCAA will indeed open opportunities for student-athletes to make money while playing college sports. It is also a complete change from the NCAA's historical stance. In addition, the FPPA raises five important sets of concerns or issues:⁴

- 1) The law raises questions about implementation when looking at how the NCAA, the conferences, states, individual universities, and student-athletes will or will not be regulated, and, as important, what regulatory scheme will be in place, and when?
- 2) What about minor league player development? The NCAA has received a lot of criticism for not being student-athlete friendly, but it is the National Basketball Association (NBA) and the National Football League (NFL) that forbid high school students from entering their drafts, requiring them to go through the NCAA or a foreign league.
- 3) Does the Fair Pay to Play Act go far enough or too far? The

MICHAEL CALLAWAY

Jeremy M. Evans, founder and managing attorney at California Sports Lawyer in Los Angeles, represents entertainment, media, and sports clientele.



act raises questions about caps on student-athlete dollars made from their names, images, and likenesses and whether such money should be placed in a trust until the student leaves college. The law also raises questions about limitations on existing deals made with apparel, beverage, and tech companies with the universities that are mostly exclusive. For example, in the collegiate environment, generally, should protections be in place to allow amateurism to still exist or should the free market determine all?

4) The ability of a student athlete to retain an attorney or an agent is a game changer, but it also raises regulation issues and questions about whether the agent or attorney is now full or partial service. How can one administrator or court of law distinguish between advising on signing an endorsement deal and advising for the upcoming draft, and should there be a distinction?

5) What is amateurism in the wake of SB 206? Essentially, student athletes are being treated like Olympic athletes who can earn revenue while participating in the Olympics during school but do not lose their collegiate eligibility.⁵ What does this mean going forward? Will tension build in the locker room between the haves and have nots? What type of athlete does the law affect?

Compliance Issues

Implementation and enforcement of the FPPA may be the most difficult because these aspects have so many moving parts. How will each state comply with NCAA rules, once implemented, and how will the states comply with federal law, if implemented? How will individual universities and the conferences, specifically the Power Five conferences, comply with federal, NCAA, and state laws and regulations?²⁶ Lastly, how will agents, attorneys, coaches, athletic directors, and the student-athletes be regulated?

Until a scheme is in place, the new area of business development for student athletes will be prospective only. Whether or not one standard is implemented, or whether that is a good idea, universities will complain about unfair advantage when it comes to a player's marketability in Los Angeles versus Tempe, Arizona, or Oxford, Mississippi. The FPPA also opens administrators, coaches, agents, attorneys, and student-athletes to NCAA inquiries, civil lawsuits, criminal investigations, and liability because there is now a whole new area of business development that was once illegal. Moreover, what occurs when a coach decides to sit a player for reasons other than performance, like preventing marketing exposure, and how

could that be proven beyond the coach's discretion? What happens to broadcast copyrights when student athletes have their own media channels like first-person first sports distributed through social media channels and platforms for marketing purposes?²⁷

Nevertheless, the beauty of the FPPA is that it places the onus on the player to secure endorsement deals, not the university, and therefore the marketplace will determine who gets paid and who does not. Then again, no real date has been set by the NCAA on when changes will be implemented or how. Furthermore, California's FPPA does not go into effect until 2023 (when current student athletes are likely to have graduated). It is likely years, not months, before student athletes can begin to be paid for their names, images, and likenesses.

Minor League Development

The lack of an established minor league system for the NBA and NFL and the rules governing professional drafts are the main reasons the California Legislature and the NCAA chose to move forward with granting student athletes the ability to profit from their names, images, and likenesses. However, NBA Commissioner Adam Silver has discussed the possibility of removing the "one-and-done" rule for the NBA by 2021.⁸ Under this rule, players who have played at least one year of college basketball are eligible for the NBA draft. Current NFL rules permit only players who are three years out of high school to enter the draft. Thus, high school student athletes playing basketball and football are required to go to an NCAA institution to be drafted by a professional sports franchise in the NBA and NFL. The NFL has dabbled with the Alliance of American Football (AAF) and has challengers like the XFL,⁹ twice, and the Arena Football League (AFL), among others, but it does not have—and has never really had—a true minor league. However, the NBA and the NFL utilize the NCAA talent as its minor league pool for talent.

The NBA has the G-League (named for its lead sponsor, Gatorade), formerly the D-League (short for Development League), but it is not a development league like the minor and development leagues of Major League Baseball (MLB), the National Hockey League (NHL), or Major League Soccer (MLS). For these leagues high school athletes have a choice to go professional (get drafted) or go to college. If the player is drafted, the player goes into the minor league or development system to train for the highest level. Because the NBA and

NFL have been unwilling to change, California and the NCAA wanted to find a way to compensate student athletes for their names, images, and likenesses as they attend college. That said, the new system in which student athletes can profit from their names, images, and likenesses may be incomplete unless college athletes have a say in where and when they go pro or go to college.

In New York, one state senator proposed legislation that would require the universities to pay student athletes directly. More specifically, the law "allows student-athletes to receive compensation including for the use of a student's name, image or likeness; allows student-athletes to seek professional representation; requires colleges to establish an injured athlete fund to provide compensation to athletes for career-ending or long-term injuries" and was amended to give a "15% share of annual revenue to student-athletes, which would be divided equally."¹⁰ The provisions on paying for university-sold merchandise and use of the student athlete's name, image, or likeness, compensation for post career-ending or long-term injuries, and 15 percent of annual revenue are clear departures from the California's FPPA and not likely what the NCAA envisioned when it voted yes to change in October.

FPPA Compromise

Did the FPPA go far enough? The FPPA was a compromise considering the limitations on trade pursuant to the NBA and NFL drafting rules, understanding that, for the most part, academic institutions generally are debt-ridden as research universities not focused on business development,¹¹ and that beyond student fees, generally, the moneymaking athletic departments are in the Power Five Conferences, while most athletic programs are subsidized by the university.¹² Requiring universities to pay student athletes directly or for past or current sales is a much larger type of request and a longer debate, especially given the history of student athlete attempts at unionization and, more important, what the market will bear when it comes to paying student athletes to endorse a product. That said, if the NBA and NFL eliminated their draft rules, it would significantly diminish the effectiveness of the argument that student athletes should be paid when there is a choice to go pro or enroll in college. Without that rule in place, the California Legislature and the NCAA made a compromise to free student athletes to seek money-making ventures from their names, images, and

likenesses while attending college and playing a sport.

With enactment of the FPPA, the question becomes how the competition and acceptance of money for names, images, and likenesses might play out in the marketplace. First, student athletes and universities are now competitors. These parties may now compete for the same companies for sponsorships and endorsements. For example, UCLA has a \$280 million apparel deal with sportswear company Under Armour.¹³ A student athlete would not, according to the FPPA, be able to enter into a conflicting agreement with athletic apparel maker Nike, for example. It is conceivable that similar language would appear in any NCAA or university policy. Section 67456(e) (1) of the FPPA states: "A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract."¹⁴ Universities have similar

deals with beverage, tech, banking, and other company sponsors and therefore student athletes would have limitations on how they are able to compete in the market.

It also is conceivable to see student athletes enter into deals that are completely off the field, but the fine print of the underlying contracts with the universities will have precedence over the student athlete deals. In the marketplace, without a national or even a local television audience to see a player wearing or discussing a product, marketability is limited to the social media following of the player, which could be substantial for select individuals.

Student Athlete Deals

If a student athlete does land a deal, should those deals be capped in terms of how much money can be made and/or should the money be placed in a trust until the student athlete graduates from college? The question is whether student athletes should be able to walk around campus with thousands, hundreds, or millions of dollars in their proverbial pockets. Will this affect team morale? Will it cause issues with performance? Regarding these

last points, a trust is something that the Ed O'Bannon NCAA/EA Sports litigation discussed,¹⁵ but it could be a great solution to protect amateurism while allowing the free market to determine value.

When the NCAA allows student athletes to profit from their names, images, and likenesses while enrolled in school and playing sports, what are the repercussions of that financial benefit? Professional sports include both have and have-not athletes



in terms of large and league minimum contracts. Team chemistry is mostly unharmed because there is a process and a leadership track in the locker room and on the field. Will these same principles apply to amateurs who are not getting paid a salary? Time will tell, but the answer is likely to be yes because regardless of their status as amateurs, they have prepared their entire lives to be professionals in one area or another.

One thing is certain: As in Major League Baseball, the NFL,¹⁶ the NBA, and other professional sports leagues, player development programs that include personal, business, and financial training, similar opportunities will need to be available as resources to student athletes once marketing opportunities are made available to them. Arguably, it should have been provided sooner to help with preparation, and such programs are already being made available to student athletes at universities.¹⁷ Everyone needs experts, including soon-to-be college athletes ready to use their influence to profit from their names, images, and likenesses. A trust to hold that funding until graduation or leaving college is another idea that will be

considered, which may alleviate some of the issues discussed here. The trust idea will also be discussed alongside caps on revenue from the student athlete's name, image, and likeness, but setting caps will be the more difficult request because that will essentially do, in effect, what opponents claimed of the old system: prevent a free-market and individual decision-making process.

Somewhat lost in the shuffle of the FPPA is the allowance of attorneys and agents to enter the picture, working with student athletes at an earlier stage. An example of how the FPPA might play out is illustrated by former Duke University basketball player and New Orleans Pelicans phenomenon Zion Williamson and his deal with Gatorade.¹⁸ The deal was signed after he was drafted and signed with the Pelicans. Under the FPPA, if Duke were in California instead of North Carolina and the year was 2023, Zion would have been able to sign the Gatorade deal while in college and collect its proceeds. Again, however, had Zion not been

forced to go to college, one could surmise that choosing to be drafted over the NCAA would have been the choice anyway.

Representation

In addition to timing, representation is an important issue that has evaded student athletes by law, regulation, and possibly the fear of getting into trouble. Under the existing scheme, agents and attorneys must register with a school as an advisor, register with the underlying union of the professional league, and file agent paperwork with the state in which they are doing business and representing athletes.¹⁹ There are differences between attorneys and agents in terms of requirements, registrations, and sometimes education, but, under the existing sports agent scheme, both are treated equally.²⁰ However, student athletes are forbidden by the NCAA and individual university regulations from signing a contract with an agent or attorney or receiving anything of value (down to and including a car ride, lunch, a T-shirt, and the like).²¹ Communication is allowed, but without signing a contract and having the ability to make a deal, what would be the point?

The issues that arise are: How will agents and attorneys be regulated? Should universities and the NCAA, the likely enforcement arm of the FPPA, care about whether the agent or attorney's services expand beyond endorsements or sponsorships? What if the agent or attorney gives advice on entering the draft? Should someone be disciplined? An important additional concern is how best to protect some of the most vulnerable. Those who are leaving home for the first time with little to no real-world experience need protection, and the implementation and enforcement arm of the FPPA and any NCAA, state, or federal legislation will help create that structure. Some of that protection should also come from the agent or attorney in terms of giving advice when anything seems misplaced if there is a proper regulation scheme in place.

Amateurism

Concerning the FPPA legislation in California and the NCAA decision, what is the definition of amateurism now? One argument is that student athletes in non-Olympic sports are being treated exactly like student athletes competing in Olympic sports in which professionals do not play. This is a sound argument because Olympic athletes in college can get paid for endorsements. The FPPA and NCAA are expanding the pool of available talent. However, practically speaking, how many student athletes are really going to take advantage of the FPPA or changed NCAA rules in general? Before answering that question, it is necessary to consider the NBA and NFL rules regarding restrictions of age/experience on entering the draft. Also, athletes who receive the largest sponsorship and endorsement dollars generally are playing in sports that do not require helmets or hats so that visually the stars are more recognizable.²² In addition, individual sport athletes generally earn more in endorsements than team sport athletes²³ because there is no salary being paid by a team or franchise.

Companies looking to get into the action will want a return on the investment so any deal will have to make financial sense (meaning dollars given to a student athlete should be fewer than dollars received in prospective sales and market share).

The existing market with the added FPPA and NCAA changes will consist of the top one- or two-star athletes from the top 25 to 100 colleges in the country playing men's basketball and football. If the market expands beyond that, it will be because the student athlete has created a market through a strong social media following, personality, memorable play, and/or

competitive drive. This arena also is where agents and attorneys can help to land certain deals, but, ultimately, talent wins the day. Nevertheless, companies are more inclined to be inclusive today, so it is likely that a company would enter into endorsement deals with the top female and male basketball stars at certain colleges, or, possibly with more streaming options for less watched sports, companies might see value in lacrosse, volleyball, water polo, swimming, and even baseball, soccer, and hockey, which do have established minor league systems creating options. However, the pool of talent will likely be small. The option for the company paying the money and/or giving the product, or even ownership to the student athlete, must be profitable and that pool will be limited.

The Fair Pay to Play Act in California has indeed sparked a great conversation. Many are excited about the prospects of business development. However, implementation and enforcement, the idea of minor league development and draft rules, competition, representation, and the amateurism rules and regulations present issues that need to be resolved. The structure of the FPPA, similar laws at the federal level or in other states, and ultimately the NCAA and university regulations and policies will determine the success of this new frontier. ■

¹ Enacted as EDUC. CODE §67456, with parts added and repealed to EDUC. CODE §67457.

² California Legislative Information, SB-206 Collegiate athletics: student athlete compensation and representation, available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=2019202005B206.

³ Steve Berkowitz and Dan Wolken, *NCAA Board of Governors opens door to athletes benefiting from name, image and likeness*, USA TODAY, Oct. 29, 2019, available at <https://www.usatoday.com/story/sports/college/2019/10/29/ncaa-board-opens-door-athletes-use-name-image-and-likeness/2492383001>.

⁴ Jeremy M. Evans, *Five Takeaways from the Fair Pay to Play Act*, SPORTS RADIO AMERICA (Jul. 15, 2019), <https://sportsradioamerica.com/2019/07/15/5-takeaways-from-the-fair-pay-to-play-act>.

⁵ *Id.*

⁶ Zach Bigalke, *A New Approach to Assessing the Power Five Divide*, Fansided, <https://saturdayblitz.com/2019/12/01/college-football-new-approach-assessing-power-five-divide> (Last accessed Mar. 3, 2020).

⁷ Jeremy M. Evans, *Industry Innovations in Entertainment, Media, and Sports*, SPORTS RADIO AMERICA (Jan. 30, 2020), <https://sportsradioamerica.com/2020/01/30/industry-innovations-in-entertainment-media-and-sports>.

⁸ Sam Amick, *Move to eliminate NBA one-and-done rule gaining momentum, commissioner Adam Silver says*, USA TODAY, Jul. 10, 2018, available at <https://www.usatoday.com/story/sports/nba/2018/07/10/adam-silver-nba-one-and-done/773991002>.

⁹ XFL—Official Home of the XFL, <https://www.xfl.com> (last accessed Mar. 3, 2020).

¹⁰ Charlotte Carroll, *N.Y. State Senator Proposes Bill to Pay College Athletes Directly*, SPORTS ILLUSTRATED,

Sept. 18, 2019, available at <https://www.si.com/college-football/2019/09/18/ny-senator-kevin-parker-proposes-bill-pay-college-athletes>.

¹¹ Jon Marcus, *Why Colleges Are Borrowing Billions*, THE ATLANTIC, Oct. 10, 2017, available at <https://www.theatlantic.com/education/archive/2017/10/why-colleges-are-borrowing-billions/542352>.

¹² See, e.g., David Ridpath, *Who actually funds intercollegiate athletic programs?* FORBES, Dec. 12, 2014, available at <https://www.forbes.com/sites/ccap/2014/12/12/who-actually-funds-intercollegiate-athletic-programs/#380f027517af>; Brad Wolverton et al., *The \$10-Billion Sports Tab: How College Students Are Funding the Athletics Arms Race*, THE CHRONICLE OF HIGHER EDUCATION, Nov. 15, 2015, available at https://www.chronicle.com/interactives/ncaa-subsidies-main#id=table_2014; Steve Berkowitz and Christopher Schnaars, *Colleges are spending more on their athletes because they can*, USA TODAY, Jul. 6, 2017, available at <https://www.usatoday.com/story/sports/college/2017/07/06/colleges-spending-more-their-athletes-because-they-can/449433001>; Tom Joyce, *In college sports, non-athletes suffer just as much as the stars on the field*, THE GUARDIAN, Oct. 16, 2019, available at <https://www.theguardian.com/sport/2019/oct/16/college-sports-revenue-loss-making-programs-academics>.

¹³ Darren Rovell, *UCLA announces 15-year, \$280 million deal with Under Armour*, ESPN (May 24, 2016), https://www.espn.com/college-football/story/_id/15697609/ucla-bruins-announce-15-year-280-million-deal-armour.

¹⁴ EDUC. CODE §67456(e)(1).

¹⁵ William C. Rhoden, *The fight that Ed O'Bannon started with the NCAA isn't over yet: Division I athletes do get scholarships and supplemental cash, but more could be done*, THE UNDEFEATED (Mar. 16, 2018), <https://theundefeated.com/features/fight-ed-obannon-started-with-ncaa-basketball-isnt-over-yet>.

¹⁶ National Football League Players Association, *Choice: Financial Security*, <https://www.nflpa.com/active-players/financial> (Last accessed Feb. 19, 2020).

¹⁷ NCAA.org, *Overview of NCAA Legislation for NFLPA Financial Advisors*, <https://www.ncaa.org/sites/default/files/20160419Overview%20of%20NCAA%20Legislation%20for%20NFLPA%20Financial%20Advisors.pdf>; NCAA.org, *NCAA Student-Athlete Advisory Committees*, <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs> (both last accessed on Feb. 19, 2020).

¹⁸ Sam Carp, *Zion Williamson adds 'seven-figure' Gatorade deal to endorsement portfolio*, SPORTS PRO MEDIA, Sept. 27, 2019, available at <http://www.sportspromedia.com/news/zion-williamson-gatorade-endorsement-deal>.

¹⁹ Jeremy M. Evans, *Lawyers, Agents, and the Blurred Lines Regulating Talent Representation*, 34 ENTERTAINMENT AND SPORTS LAWYER, Winter 2018, available at <https://www.cslllegal.com/assets/files/entertainment-and-sports-lawyer-winter-2018-jme.pdf>.

²⁰ Jeremy M. Evans, *Ethical and Practical Implications and differences between Sports Agents and Attorneys*, 23 THE PRACTITIONER, Summer 2016, available at <https://www.cslllegal.com/assets/files/ethical-and-practical-implications-and-differences-between-sports-agents-and-attorneys-summer-2016-jme.pdf>.

²¹ 2018-2019 NCAA DIVISION I MANUAL, <https://www.ncaapublications.com/s-13-Manuals.aspx> (last accessed Mar. 3, 2020).

²² Kurt Badenhausen, *The World's Highest-Paid Athletes*, FORBES, June 11, 2019, available at <https://www.forbes.com/athletes/#4ab89f2c55ae>.

²³ Kathleen Joyce, *These athletes make more money through endorsements than sports*, FOX BUSINESS (June 14, 2019), <https://www.foxbusiness.com/features/these-elite-athletes-make-more-money-through-endorsements-versus-sports>.