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Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section
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In this Issue:

1. **Chairman's Report, P. 2**

2. **For the Legal Record, P. 3**

3. **Recent Cases of Interest, P. 4**

4. **Student Writing Contest, P. 5**

5. **Article:**
   ***The Ethics and Dynamics of Negotiating a Professional Sports Contract*, P. 6**

6. **Recent Publications, P. 14**

Notes...

The statements and opinions in the Texas Entertainment and Sports Law Journal are those of the editors and contributors and not necessarily those of the State Bar of Texas, or the Entertainment & Sports Law Section. This publication is intended to provide accurate and authoritative information with respect to the matters covered and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

Join the Section

All members of the Entertainment & Sports Law Section are encouraged to make sure that their dues are paid. All dues payments are to be made directly to the Section's Treasurer. An application for joining the Section is provided at the end of this publication.

Invitation to Publish

Anyone think they have the talent to write an article? This is your invitation to put that talent to use. The Entertainment and Sports Law Journal is soliciting articles to publish in upcoming issues. Article formats vary from long footnoted analyses to more informal discussions, and topics may span the spectrum of the sports and entertainment fields. Contact the editor and discuss the possibility of writing an article on a subject that interests you.

Articles may be submitted to:

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Chairman's Report

On behalf of the Officers and Directors of our section, I would like to welcome you to another year of journals and seminars focusing on timely and relevant legal and business issues impacting your entertainment and sports law practices. As in the past, it is the considered purpose of such materials to be both practical and accessible. Along the same lines, to assist you in either developing entertainment and/or sports law practices, or to assist you in simply staying abreast of current practices or changes, we are pleased to once again offer independent seminars on sports and entertainment matters. Of course, the annual section meeting at the State Bar Convention will continue with the condition of offering concentrated programs addressing both Entertainment and Sports law topics, as was the case last June in Houston.

Special thanks again to last summer's speakers Assistant Dean and Professor Richard Alderman of the University of Houston Law Center, and Mr. Jeffrey B. Lewis, Senior Vice President - Business and Legal Affairs of Pace Entertainment Corporation, of Houston, Professor Alderman's sports tort seminar could not have been more timely, foreshadowing the Mike Tyson debacle by only one day; whereas Mr. Lewis' discussion of current problems and issues connected to concert venues and promotion served to fill in the cracks for many who have attended such seminars for years. As evidenced by the near capacity attendance, the section members seemed to agree.

Based largely on last year's success, the section is once again pleased to offer, in conjunction with the University of Houston Law Center and University of Houston Conrad Hilton College, its seventh annual sports law seminar to be held in Houston on November 7th. This year's seminar will focus upon various topics of interest to the sports law practitioner including: the opportunities and obligations arising from representing professional athletes; evaluating the value of a sports - related injury; legal issues surrounding building, financing and maintaining sports facilities; and legal connected to sports tourism, adventure sports and extreme sports, all of which will segue nicely with the issues and concerns addressed at last year's conference. Special thanks to Professor Gil Fried of the University of Houston and Sports Law Seminar Chair Steven Ellinger for again assembling a program that should appeal to sports law veterans as well as relative newcomers. Registration forms for the Sports Law Seminar will be forwarded in the very near future.

The ninth annual entertainment law seminar presented by the section in conjunction with the University of Texas School of Law is currently scheduled for March of 1998, in Austin, during the SXSW music conference. The planning committee for the seminar is currently assessing prospective speakers and topics and your input is welcomed. Such comments should be immediately directed to my attention and I shall forward such to the planning committee for consideration.

As always, I encourage you to contact me directly with suggestions regarding ways that we can make the section more responsive to your needs. I look forward to seeing you in Houston on November 7th.

Russell E. Rains

ENTERTAINMENT & SPORTS LAW SECTION of the STATE BAR of TEXAS MEMBERSHIP APPLICATION

The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has over 600 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or Sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

The "Entertainment & Sports Law Journal", published three times a year by the Section, contains articles and information of professional and academic interest relating to entertainment, sports, intellectual property, art and other related areas. The Section also conducts seminars of general interest to its members. Membership in the Section is from June 1 to May 31.

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of $20.00 (made payable to ENTERTAINMENT & SPORTS LAW SECTION) to Christopher A. Kalis, Treasurer, 2512 Boll Street, Dallas, Texas 75204-2512

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FOR THE LEGAL RECORD

College competition or antitrust violation? The Fiesta Bowl organizers are changing the legal playing field among bowls with their acquisition of the Copper Bowl. More ties to schools, conferences, advertisers, money, the NCAA? ...

Michael Irvin and Erik Williams and TV station KXAS decided they wanted no more of the press. The Dallas Cowboys' players settled their defamation lawsuit against reporter Marty Griffin and the TV station. After the players were cleared of sexual assault allegations and Nina Shahravan sent to jail on misdemeanor perjury charges, the players settled for a reported payment of $2MM, but are still pursuing lawsuits against the city of Dallas and the Dallas Police Department in federal court ...

Olympic distance runner Mary Slaney is considering a suit against USA Track and Field in an effort to change its drug-testing procedures. Threatening to "go into litigation" and "taking no prisoners" Slaney, after being cleared of allegations she used performance enhancing testosterone, may just be the high profile athlete to succeed where Houston athlete Delisa Floyd and former Olympic 400 meter runner Butch Reynolds laid the ground work, fighting with the U. S. Olympic Committee in changing regulations for the track and field federation's drug custodial board. Athletes have historically been guilty until they prove themselves innocent often requiring them to exhaust financial resources and lose opportunities for athletic competition and endorsements, while the federation does little or nothing to assist ...

Although a former Texas Tech defensive lineman's lawsuit was dismissed, after a Texas Tech eligibility audit concluded that 76 Red Raiders athletes in eight sports competed while ineligible during the past six years, can more lawsuits be far behind? The audit does not disclose how Tech representatives were involved. Although the faculty representatives signed off on all eligibility-certification forms, Tech chancellor John Montford did not lay the blame on its faculty representative, athletic department academic counselors, associate athletic director for student services, nor Tech's associate AD, or coaches. Montford did express his opinion that the actual procedure used by Tech lacked accountability. According to University of Oklahoma law professor David Swank, chair of the NCAA Committee on Infractions, "a misunderstanding of the rules that allows ineligible athletes to compete can be characterized as lack of institutional control." The NCAA's investigation of the university's athletic program is ongoing ...

Speaking of women's sports becoming more like men's sports, if you believe that your daughter's sport or team is not getting the same treatment as the boys' sport or team, Joe Gannon, a parent whose daughter plays softball at Oak Ridge High School in the Conroe Independent School District will be glad to help you voice your complaint to your local school district. Although characterizing his fight as a "rousing success" after the Conroe ISD voluntarily resolved Gannon's allegations that "blatant discrimination" against softball was taking place, he readily admitted that taking on the school district was an "intimidating task". After Gannon took his complaint to the Office of Civil Rights, the CISD elected to avoid an on-site investigation by the OCR and undertake voluntarily compliance with Title IX after the OCR agreed with various issues raised by Gannon ...

All you NBA player agents get ready for 1998, with the first rookie three year salary caps expiring in 1998 and Kevin Garnett's $120MM contract, expect to see NBA contracts reach levels never seen before. Can other league salaries be far behind? Of course as everyone knows, the club owners are their own worst enemies. Even with the salary caps in the NBA and NFL, the clubs use loopholes to pay unbelievable sums, and even less stellar players such as Vancouver Grizzlies center Bryant Reeves can get a seven year $65MM contract. Such numbers for such players clearly show that Michael Jordan was worth last year's $30.14MM, and certainly worth the reported $36MM he will earn for one more year ...

And with the Continental Basketball Association offering top high school basketball players money as an alternative to a college education, can agents be far behind? New York High School star Lamar Odom was offered $100,000 to play in the CBA. The offer was made by the league, exempted him from the CBA draft, and allowed him to pick his team ...

Speaking of changes in the law, Texas exotic elk and deer hunters are now required to have a hunter education certification card. The catch is that there are few state certified instructors available and those that are certified are probably booked. To locate a Hunter Education Program or instructor call 800/792-1112 ...

University trustees take heed, the widow of Hugh Culverhouse and her son have sued the University of Alabama to have the school return the $10MM pledge made by the deceased on the condition that the business school be named for him. Mrs. Culverhouse and her son claim the gift should be returned since the school failed to name the business school quickly enough ....

A list of jurisprudence in sports:

—Minnesota Vikings safety Orlando Thomas, plead innocent to starting a riot;

—Baltimore Ravens running back Bam Morris plead guilty to possession of marijuana (6 lbs) in exchange for the prosecutor dropping a cocaine possession charge (a gram);

—Dallas Cowboy coach Barry Switzer was charged with unlawfully carrying a weapon, a misdemeanor, to which he later plead guilty;

—Former New York Islanders owner John Spano was arrested on bank and wire fraud charges;

—Syrian triple jumper Maha Mohammed El-Hassan tested positive for banned stimulant nandrolon, and Tunisia basketball player Karima Shaniur tested positive for hiptamynol, a drug to combat low blood pressure; both athletes were disqualified from the Arab Games;

—Philadelphia 76er's Allen Iverson pleaded no contest to a weapons charge in Virginia, and Portland Trailblazers' Isaiah Rider pleaded no contest to possession of illegal cellular phones and was also convicted on possession of marijuana charges in Oregon, both players were suspended by the National Basketball Association;

—Washington Wizards' Rod Strickland faces trial on Jan. 21, 1998, on drunken driving and disorderly conduct charges;

—Mississippi State junior guard Bart Hyche, plead no contest to drunken driving charge and was suspended for part of the 1997-98 year;

—NBA referees Jess Kersey, George Toliver and Henry Armstrong plead guilty to filing false federal income tax returns;

—Pitchers Kuo Chien-chen and Chou Kun-yuan were given 30 month prison terms, and 18 players and a coach were given jail terms for throwing professional baseball games in Taiwan;

—NBC sportscaster Marv Albert plead guilty to misdemeanor assault;

and the list goes on and on ...

Sylvester R. Jaime

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law
Sports and Entertainment Law Society

Rockets logo flies on

In *Nash v. Houston Rockets Basketball Team*, No. H-96-4406-CV (S.D. Tx. June 23, 1996), the U.S. District Court for the Southern District of Texas granted partial summary judgment for the Houston Rockets in a suit brought by a freelance commercial artist who alleged copyright infringement and fraud arising out of a logo design contest.

The Houston Rockets announced plans to change their team logo and uniforms in the summer of 1994. The team co-sponsored a logo design contest with Foley's and the *Houston Chronicle*, which requested contestants to submit a logo design along with an official entry form. This form stated that the contestant agreed to the official rules of the contest, including the provision that the design became the exclusive property of the Houston Rockets. The winner was promised a $1,000 gift certificate at Foley's, an all-expense-paid trip to a 1995-96 Rockets road game, dinner with Rockets Coach Rudy Tomjanovich and Hall of Famer Calvin Murphy, six tickets for the 1995-96 home opener, an autographed basketball and team jersey signed by the Rockets, and a collection of Rockets merchandise featuring the new team logo.

Plaintiff Thomas Nash, a freelance commercial artist from Missouri City, submitted the winning entry. The Rockets held an unveiling ceremony in June 1995 and presented Nash with the $1,000 gift certificate. However, the Rockets never delivered the remaining prizes during the 1995-96 season. Nash allegedly contacted the Rockets six times during the season to inquire about the remaining prizes, but his calls were never returned. After being contacted by Nash's attorney, the Rockets made arrangements to deliver the remaining prizes, but were unable to technically comply with the terms of the contest because the 1995-96 season was over. The Rockets did offer Nash tickets to the 1997 home opener and an all-expense-paid trip to a road game for the 1996-97 season. Nash rejected the prizes and registered his logo design with the federal Copyright Office. He then sued the Rockets for copyright infringement and fraud.

In response, the Rockets filed a counterclaim against Nash and requested a declaration of its rights. The Rockets sought to enforce the contract with Nash as established by the contest rules, pursuant to which Nash agreed that his submission would become the exclusive property of the Rockets and that he would perform all acts necessary to perfect title to the logo in the Rockets name. The club asked for specific performance and recovery of its reasonable attorney's fees.

Nash argued that the alleged contract with the Rockets was void and that he retained ownership of the logo design, thereby enabling him to bring a copyright infringement claim. The court ruled that he owned the logo design only if the Rockets materially breached the contract. Otherwise, his appropriate legal recourse is breach of contract because the unambiguous terms of the contest rules expressly precluded Nash from suing the Rockets for copyright infringement.

The court rejected Nash's claim that the contest entry was an adhesion contract because there is no legal precedent holding that contest rules should be characterized in this manner. The court held that the contest entry form is an enforceable contract and that the Rockets had not repudiated the contract by failing to award the prizes in a timely manner. Although the Rockets technically breached the contract, Nash failed to make this assertion in his pleadings.

Because neither party disputed that there was a breach, the court determined that Nash was entitled to recover damages for the Rockets' breach and ordered briefing on the appropriate measure of damages. The court also rejected Nash's attempt to hold Rockets limited partner Les Alexander personally liable for the acts of the Rockets limited partnership. The court granted Alexander's motion for summary judgment because the only evidence offered by Nash in support of his contention was a *Houston Press* article that was deemed inadmissible hearsay.

By James D. Ezell

Assumption of The Risk May Bar Sports Injury Liability

In Davis v. Greer, 940 S.W.2d 582 (Tex. 1997), the Texas Supreme Court, in denying an application for writ of error, held that the intentional or reckless disregard liability standard for injuries to a fellow participant does not promote sound public policy.

Kenneth Greer and Martin Davis were playing in a softball game when they were involved in a collision at home plate. Greer alleged that Davis, who was attempting to score on a base hit, intentionally or recklessly collided with him, causing injuries for which he and his wife requested over $750,000 in damages. Defendant Davis moved for summary judgment on the ground that he did not act intentionally or recklessly and that Greer, as a voluntary participant in the softball game, assumed the risk that he would be injured in a home plate collision. The trial court, without explaining its ruling, granted the defendant's motion for summary judgment.

In *Greer v. Davis*, 921 S.W.2d 325 (Tex. App. - Corpus Christi 1996, writ denied), the court of appeals reversed and held that assumption of the risk is not a complete defense in a sports injury case, reasoning that a player does not assume all risks of injury during a contact sport. The court followed the current trend of the law developed by other states that allows recovery if a plaintiff proves intentional or reckless conduct by

the defendant. This standard often raises a fact question as to the defendant's state of mind that prevents summary judgment. [Ed. Note -- This case previously was summarized in the Fall 1996 issue of *The Journal*.]

The Texas Supreme Court rejected the appellate court's standard because public policy requires that participants in athletic contests obtain summary dismissal when they can show that an athlete's injury resulted from foreseeable and expected play within the sport to which all participants are deemed to have consented. Acknowledging that Texas abolished assumption of the risk as a complete defense in other contexts, the Court held that this defense may be used in contact sports injury litigation.

To better ferret out unmeritorious claims, the Court provided the following standard: "By voluntarily participating in a competitive sport, a participant is deemed to have consented to and assumed the risk of all harmful contacts and foreseeable injuries that are inherent to that particular sport. This more accurately reflects the understanding of sports participants." The Court explained that this will eliminate the need to determine the subjective state of the participant's mind and shift judicial focus to the objective inquiry of whether the injury is foreseeable or expected in the course of the particular sporting event. Allowing a defendant to assert this legal defense is intended to further the public policy goal of protecting defendants from the costly ordeal of defending suits for genuinely accidental injuries.

Although the Court's opinion concerns only a denial of an application for writ of error, it is being relied on by lower courts. *In McClain v. Baker*, No. 14-96-00487-CV (Tex. App. - Houston [14 Dist.], July 24, 1997, n.w.h.) (not designated for publication), an appellate court cited *Davis* in establishing a participant liability standard for non-contact sports. Frederick Baker was pulling Chris McClain behind his speed boat while teaching him how to water ski when McClain fell and suffered severe injuries to his knee and forehead. McClain asserted that Baker's negligence caused his injuries, but Baker claimed he is liable only if he acted with reckless disregard for McClain's well-being and safety. The court declined to apply the reckless disregard liability standard to non-contact sports or recreational activities because *Davis* recently rejected it for competitive contact sports. Without considering whether the assumption of the risk defense applies to injuries occurring during non-contact sports, the court dismissed McClain's suit because he presented no probative evidence of Baker's negligence.

By Kurt Whipple

Student Writing Contest

The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are soliciting articles for our third annual writing contest for students currently enrolled in Texas law schools for the best article on a sports or entertainment law topic. This year's winner was Kevin Joyce, a law student at South Texas College of Law, with his article entitled *The Ethics and Dynamics of Negotiating a Professional Sports Contract.*

The winning student's article will be published in the Journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the Journal. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than June 15, 1998.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½ x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Matthew J. Mitten Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-1845.

THE ETHICS AND DYNAMICS OF NEGOTIATING A PROFESSIONAL SPORTS CONTRACT

BY: KEVIN JOYCE[1]

INTRODUCTION

On July 11, 1996, the latest collective bargaining agreement between the National Basketball Association (NBA) and its player association became effective. This was the first day of that year's off season that member teams could negotiate with players eligible for free agency. The NBA, like all professional sports, is big business. Within one week, agent David Falk, who primarily represents NBA players, negotiated an estimated $356 million in contracts for six of his NBA clients.[2] Perhaps even more remarkable was the seven-year contract entered into between Shaquille O'Neal and the Los Angeles Lakers worth a reported $120 million.[3] This recent frenzy of multi-million dollar signings of NBA players exemplifies the need for professional athletes to employ competent and effective agents as well as the economic benefits of doing so.

This paper initially will discuss the beginning and growth of the sports agent profession. It then addresses an agent's ethical and legal duties in negotiating player contracts and the potential for the use of improper deceptive negotiating ploys. The paper next considers the most important aspects of negotiating a professional athlete's employment contract with a sports team. After providing an overview of the negotiating process, the paper concludes by reiterating the need for agents to maintain the highest levels of competence and professional responsibility in negotiating player contracts.

ADVENT OF SPORTS REPRESENTATION

The concept of athlete representation by agents was relatively obscure as recently as thirty years ago. Most athletes were either hesitant to allow another person to negotiate their contract or not paid enough to justify hiring an agent. In 1962, Earl Wilson, a pitcher for the Boston Red Sox who was involved in a near fatal car accident the previous year, threw an unexpected no-hitter that amazed many fans across the country.[4] Subsequently, he received numerous commercial and other public appearance opportunities. When Wilson became overburdened with the added hassles and legal implications of contract negotiations relating to these opportunities, he turned to his friend Bob Woolf, an attorney, for assistance. This relationship between Earl Wilson and Bob Woolf is often regarded as the birth of modern sports representation.[5]

In the 1960's and early 1970's, professional sports agents were not welcomed by the executives of sports teams.[6] Prior to this time, players had very little bargaining power with their professional sports team, and the owners, of course, did not want their favorable position to be diminished by having to negotiate with player representatives who are professionals. Jeffrey Crandall, author of *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation,* provides an example of the hostility directed towards player agents:

> The legendary coach of the Green Bay Packers professional football team, Vince Lombardi, had a crude but effective method of frustrating the fledgling attempts of sports agents to break into the field of organized football in the early 1960's. When informed that an agent had come to negotiate player Jim Ringo's contract, Lombardi walked into his personal office and closed the door. Upon his return a few minutes later he told the would-be negotiator, "You are negotiating with the wrong team. Mr. Ringo has just been traded to Philadelphia."[7]

Today, player agents are an integral part of the professional sports industry. There are three major developments that have occurred in the sports industry, and our society as a whole, that have led to the proliferation of sports agents.[8]

First, the public popularity of sports has increased substantially since the 1950's and 1960's.[9] This increased enthusiasm has stimulated greater media coverage of athletic events. As a result, television rights fees have generated large revenues for professional sports teams. Consequently, athletes have demanded a greater portion of this revenue and have employed professional representatives to further their objectives.

Second, there are more available positions on professional sports teams for athletes today than there were in the past. New minor leagues for men such as the Continental Basketball Association have been formed, and women's professional leagues such as the WNBA and American Basketball are now in existence. The presence of additional playing opportunities has increased player demands for the services of agents.

Third, and most importantly, the advent of free agency in professional sports has increased players' need for sports agents. Free agency provides athletes with the ability to leave their current team after their contract has expired and play for another franchise. The threat of movement to another team has provided the athlete with more bargaining leverage as a team is forced to offer an attractive salary or face the risk of losing its player. A professional representative often is needed to use effectively this additional bargaining leverage to maximize the player's potential contract benefits.

Because athletes generally do not have the necessary training or experience to negotiate agreements effectively, it is in their best interest to hire a sports agent with specialized expertise. Especially as the player's team contracts and endorsement agreements become more complex and economically valuable, athletes need the advice of an experienced and competent adviser.[10] Sports agents typically negotiate employment contracts, interpret the employment contract and/or collective bargaining agreement, and obtain and negotiate endorsement contracts and other commercial opportunities for players. Today's sports attorneys are also providing athletes with financial planning advice and present and post career planning and counseling as well as generating marketing opportunities and furnishing legal counseling for their clients.[11]

Agent's Ethical and Legal Duties

As a player representative, a sports agent assumes certain legal

Continued on page 7

Continued from page 6

responsibilities. An agent must act consistently with the principles of agency and any other applicable state laws. According to the laws of agency, the relationship between an athlete and an agent is fiduciary in nature.[12] The agent must act with good faith and loyalty to further the player's interest. In executing these duties, an agent must provide "adherence to instructions, exercise of ordinary and reasonable care, skill, and diligence in the performance of the agency."[13] For example, sports agents must act with diligence in representing athletes in contract negotiations.

Several states have attempted to regulate sports agents. More than one half of the states have enacted statutes that require sports agents to register with their secretary of state.[14] In addition, the players association for each of the four major professional sports leagues requires all agents to be certified by the league players association before they are permitted to represent an athlete.[15] Certification may be denied if the agent cannot reasonably carry out the responsibilities of representation.[16] The players associations also require certified agents to attend annual continuing education seminars that cover topics relevant to the proper discharge of the agent's duties.[17]

The rules and requirements established by states and players associations, however, are often criticized for being less than adequate to ensure that players are properly represented. Many requirements applicable to athlete agents are "primarily formalities."[18] In his book, THE GAME BEHIND THE GAME, NEGOTIATING IN THE BIG LEAGUES, Ron Simon, a sports attorney, states, "Any jock-sniffer, alumni booster, family member, or barstool patron can hang a shingle and say he's a sports agent." Leigh Steinberg, a prominent sports attorney who represents primarily NFL players, has stated that "all one needs to be a sports agent is a client and a business card."[19]

Sports agents are not required to have any educational degree or any minimum level of training or knowledge in the fundamental areas of athlete representation such as contract negotiation.[20] There are very few university courses or seminars offered relating to sports contract negotiation.[21] Ron Simon points out that "while lawyers, doctors, accountants, real estate agents, and insurance agents are regulated by the states, there are no specific qualifications required of sports agents."[22] The lack of any required minimal training has resulted in some sports agents entering the industry without an adequate education and the qualifications required to effectively discharge the fiduciary duties involved with representing athletes.

As professional sports have grown into a multi-billion dollar industry, there has been a dramatic increase in the number of player agents.[23] This increase can be attributed to the high-profile status of many star athletes and, of course, the tremendous salaries that often accompany the athlete's popularity. The relative lack of necessary qualifications, along with the potential for personal economic gain, has resulted in a large number of agents entering the field of sports representation. For example, the average salaries in Major League Baseball (MLB) and the National Basketball Association (NBA) are over $1 million, and the average salary in the NFL is $750,000 per year.[24] These figures, of course, appeal to many attorneys and other agents who aspire to capitalize on obtaining the most lucrative salary for their client.

Most attorneys in the sports industry charge a percentage of the player's salary from the contracts they successfully negotiate. Generally, the sports agents will receive between three (3) and six (6) percent of the negotiated salary of their client-athlete.[25] These percentages will vary depending on the particular sport and the talent level of the particular player. For example, an agent will receive roughly four (4) percent of an NBA salary, and five (5) percent of an NFL or MLB contract. In addition, an agent will generally receive another 20 percent of the compensation from any endorsement and/or personal appearance contracts.[26]

The glamour of being a sports agent and possibility of lucrative personal economic gain have led to tremendous competition in the quest to secure a star athlete as a player-client. In his article, *Criminal Liability of Sports Agents: It is Time to Reline the Playing Field*, author Ash Narayanan writes:

> As agents' fees and incomes have skyrocketed, the lucrativeness of the profession has resulted in incredible growth in the number of practicing sports agents. The rise in the salaries and other income of athletes, the growth in the number of player agents, and the expansion of the role of the agent in today's sports world can be isolated as the roots of some of the profession's current problems.[27]

The competition among agents within the sports industry is overwhelming. In 1993, the field was so crowded in the National Football League (NFL) that nearly 700 registered agents battled for the 336 college football players that were drafted that year. Today there are nearly 1,600 registered football agents and over 400 registered basketball agents.[28] Many agents represent up to 20-30 players in one particular sport. According to the NFL Players Association, only 17 NFL agents represent a total of 600 league players.[29]

Although there are numerous well-qualified sports agents, the number of problems arising out of agent-athlete interactions have increased as fast as the number of the agents themselves.[30] Many of these problems are caused by the incompetence and abuses of several "unscrupulous agents whose greed has interfered with their capabilities."[31] Some agents focus on the single-minded objective of obtaining the largest possible contract at all costs, and they lose sight of maintaining the integrity of their profession.

There are no specific rules governing the negotiation process other than general agency and fiduciary duty laws and attorneys' canons of ethics.[32] While law schools offer numerous litigation-related courses, they offer few negotiation-related courses.[33]

The applicable standards and regulations that a sports attorney must abide by include the Model Code of Professional Responsibility or Model Rules of Professional Conduct, depending upon the jurisdiction whose laws govern. For example, a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[34] In addition, DR 7-102, entitled "Representing a Client Within the Bounds of the Law," provides, inter alia, that a lawyer shall not:

> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
>
> ***

Continued on page 8

Continued from page 7

> (5) Knowingly make a false statement of law or fact.[35]

The application of these ethical rules is somewhat unclear in the context of contract negotiation. Agents are thus primarily left to their own standards of judgment, without a clearly articulated set of ethical guidelines to follow in contract negotiation. Furthermore, a representative who is a non-attorney sports agent is not bound by the ethical rules that apply to attorneys. Non-attorney agents may use whatever negotiation tactics they choose unless specifically prohibited from doing so by state law or player association rules.

To some agents, deception is a standard part of the negotiation procedure.[36] In his article, *Deceptive Negotiating and High-Toned Morality*, Walter Steele writes, "A lawyer's devotion to the client's interest is sometimes so compelling that some lawyers feel justified, if not compelled, to employ some deception when negotiating."[37] The media has portrayed the negotiating conduct of a well-known sports attorney named Drew Rosenhaus as something that may cross the line between ethical hard negotiating on a player's behalf and unethical deceit to further a client's interests.

Rosenhaus recently appeared on the cover of SPORTS ILLUSTRATED magazine with the inscription, "The most hated man in pro football."[38] An accompanying article describes Rosenhaus' alleged unethical practices.[39] A portion of the article reads:

> Deceit is a part of his job. He will not only lie, he will also scream, cajole, threaten and whine to defend his clients' interests. For Rosenhaus, client's needs come before the needs of a team, the league and even Rosenhaus himself. Which is why he is the hottest young agent in the NFL.[40]

In the article, Rosenhaus is quoted as stating:

> It's my job to represent my clients and use everything I can to do right by them. I'm not going to lie constantly. I'm not a pathological liar. But in some instances I'll bluff. Teams are not supposed to believe agents... I take pride in my ethics. But I am a relentless, ruthless warrior. I am a hit man. I will move in for the kill and use everything within my power to succeed for my clients.[41]

Deceitful negotiating, however, is not in the client's best interests. When the other side does not respect and believe the agent, the credibility of the negotiator, and the negotiation process in general, will be severely damaged. In this respect, agents who engage in deceptive tactics are undercutting the integrity, and possibly the future, of effective negotiations in the sports industry.

In his book titled FRIENDLY PERSUASION, Bob Woolf writes about negotiators such as Pete Rozelle and their successful style of negotiating that was formed by "respect, trust, even temperament, and diplomacy."[42] Woolf states, "None of these men had to resort to ploys, deceptions, double-dealing, or underhanded methods to be successful." He observes:

> I'm aware of the many books with clever and tricky titles that want you to believe that the only way to succeed is to be intimidating and devious, often at the risk of your own ethics and integrity... This is not so. In fact, people who use these methods usually find that their approach comes back to haunt them.[43]

This 1990 passage from Bob Woolf's book may prove to be prophetic. On July 24, 1996, two weeks after the publication of the SPORTS ILLUSTRATED article on Drew Rosenhaus, ESPN reported that the Miami Dolphins were upset after reading about Rosenhaus' tactics concerning stalled negotiations with all-star tight-end Eric Green, one of Rosenhaus' clients.[44] There is a possibility that Rosenhaus' conduct may have damaged Green's negotiating position with the Dolphins.

The use of deceitful negotiating tactics on a client's behalf is not the proper means of succeeding in the extremely competitive sports agent industry. The long-term effects of deceptive negotiating will reduce an agent's credibility and may ultimately destroy the agent's practice.[45] As Bob Woolf affirms, "Making your ethics subject to a whim is a prescription for mistrust. Almost certainly your negotiations will be doomed to failure."[46]

Player agents in the sports industry must adhere to ethical standards of good faith and fair bargaining. An agent's reputation will eventually suffer dramatically if deceitful tactics are employed. To maintain their respect and integrity, all sports agents must abide by existing laws and regulations in negotiating contracts. In addition, the agent's personal standards of good conduct and high morals must prevail over the temptations of deceit and immorality. It is necessary for appropriate standards to be practiced by all athlete agents when engaged in negotiations for the entire process to be accomplished with more efficiency and integrity.

NEGOTIATING A PLAYER-TEAM CONTRACT

The professional sports industry is big business, and players routinely receive multi-million dollar contracts. Since most players are not sufficiently educated regarding the economics of the sports industry and their actual market value, it is the agent's responsibility to ethically and effectively negotiate a player's contract to maximize his interests. This section analyzes the fundamental aspects of negotiating a player's contract.

Extensive Preparation

Careful preparation is the necessary foundation for a successful negotiation. Every negotiator must be thoroughly prepared to provide an adequate basis for his or her positions.[47] Without sufficient preparation concerning the substantive issues to be discussed, a negotiator is not only destined to obtain an unfavorable result, but also puts the opposing party in the awkward position of needing to decide what is fair for both clients. An unprepared negotiator, in effect, impairs both parties.

To be thoroughly prepared, a sports agent should determine the particular goals to be attained and develop appropriate strategies to reach them.[48] The agent should acquire all needed information concerning the issues and positions involved, even those that may not seem important at first glance.[49] Bob Woolf favors extensive preparation as he instructs, "Ask the next question. Research a

Continued on page 9

Continued from page 8

little longer. Make that extra call. Review your approach one more time."[50] Woolf further advises, "You can't always outsmart someone, but you can out prepare them."[51] According to David Falk, a sports attorney who represents basketball stars such as Michael Jordan and Patrick Ewing, an agent's first responsibility in preparing for a contract negotiation is to obtain a general knowledge of the essential documents governing the industry.[52] Therefore, one of the initial steps in preparing for a contract negotiation is to fully understand the league's Collective Bargaining Agreement (CBA) and the Standard Player Contract.

The CBA is the contract between the league owners and the players union. It contains many pages of legal jargon spelling out the relationship between the two parties.[53] The Standard Player Contract, like the CBA, is a legal document that sets forth the rights and duties of the parties.[54] It is vital that an agent thoroughly comprehend each document to understand the player's legal relationship with the league and his team.

In addition to understanding the CBA, an agent should be aware of significant trends in the sports industry.[55] It is, therefore, very important for an agent to become familiar with the terms and structure of other players' contracts in the particular league. The player's representative should also evaluate the projected, or anticipated, player salary levels within the league.[56] Once the agent is knowledgeable concerning the typical contract terms and basic economics of the league, the agent can identify the relevant issues that must be negotiated for his client.

In preparing for a contract negotiation, the player's fair market value is probably the most important piece of information to acquire.[57] Today's players need to be assured that they are being paid as much as, or more than, other players of similar ability within the league. The player's fair market value will help a negotiator determine a fair and reasonable offer to the team. This will enable the agent to make a realistic proposal, rather than initially offer some arbitrary figure that the athlete unrealistically may feel he is worth. The best way to determine an athlete's fair market value is to research the economics of the sport.[58]

Information concerning the player's fair market value can be obtained from a number of sources. The best source of information regarding an athlete's value can be acquired from the players association. The players association files and seminars play an important role in placing the player's agent on equal footing with the owners by providing information concerning the salary of every player in the league and their respective overall compensation packages.[59] Players associations also distribute newsletters to agents that provide an opportunity for them to exchange additional information regarding contract details. Of course, an agent can also obtain relevant information in a more informal manner such as periodic telephone communications with other agents.

In addition to the players associations, information about fair market value can be acquired indirectly from various media sources or analysis of events such as the league's annual draft. For instance, if a player is just entering the league, significant information can be discovered simply by looking at a player's draft position and the value of players chosen near him in the draft.[60] David Falk explains:

> In a general sense, professional representatives must be experts in value, not necessarily experts in the sport... The experts in the sport are the scouts and general managers. They determine that your client is drafted, for example, number six. You must then understand what impact your client will make as the number six pick based on the year, the composition of the team, and the players around him.[61]

Evaluating the fair market value of a particular player will also require the agent to determine the player's expected impact on the team's performance and the effect on spectator attendance.[62] An agent must determine and measure the intangible commercial factors that affect a player's value. Donald Dell, author of the book MINDING OTHER PEOPLE'S BUSINESS, provides an example as he explains:

> With an athlete such as a Michael Jordan, we will factor in his value to the franchise if Chicago Bulls owner Jerry Reinsdorf decides to sell the team. Additionally, Michael puts fans in the seats, brings PR value and excitement to the city of Chicago, allows the Bulls to raise ticket prices, and even lets them make better arena and concession deals for themselves. All these economic factors must be figured in to justify the player's value to and impact on the team -- and therefore his or her real worth in that situation.[63]

The indirect benefits that a particular player will bring to his team must be determined as accurately as possible to adequately represent the athlete. After an agent quantifies the actual value that the player will bring to a particular team, the contract will reflect an economically more justified agreement.

Another important piece of information an agent needs to acquire is the particular player's objectives and interests. A representative must become familiar with his client's economic, moral, psychological, and family concerns.[64] Once these interests are determined, the representative can better serve the player's needs and desires. An agent cannot simply assume that his client holds the same beliefs and objectives that he holds. Knowing the client's needs and objectives will also help the sports attorney decide what types of players he can best represent.[65]

Once an agent has completely analyzed his client's needs, it is important to research and analyze one's negotiating counterpart just as carefully.[66] An agent needs to become familiar with the general background and reputation of the person that is representing the team, who, on most occasions, will be the team's general manager. Just as important, a sports attorney must know the amount of money the team has available to pay the player's salary.[67]

Knowing the team's financial status is an essential factor in many negotiations due to the "salary cap" structures within the NFL and the NBA. The league's salary cap is a CBA provision that limits the amount of money an owner may pay his players in a particular year. It is, therefore, imperative that the player's representative know the amount of available money under the cap. This information will assist the agent in obtaining the player's fair market value.

Finally, a sports agent must set appropriate goals for the negotiation. Goals must be carefully and realistically planned, and once determined, the player's agent must not back down from them unless circumstances change. As Bob Woolf advises, "Be aware that these goals are pre-negotiation estimates. Like many other

Continued on page 10

Continued from page 9

estimates, they are expected to change... You should keep reassessing your goals as you negotiate so that you continue to ask or expect something that is realistic and not impossible to attain."[68] Once all necessary information is obtained and proper goals are set, the negotiator can better determine the bargaining leverage between the respective parties.

Use of Leverage

After a sports agent has gathered all relevant information and determined how to use it, the next important step is to assess the player's leverage in the negotiation. Leverage, or "bargaining power", is the strength of each party's position. In the sports industry, each side's leverage depends on who actually needs the deal more. The object is to evaluate the leverage of each party and then strategically use that leverage to the particular client's advantage.

Leverage may arise out of a number of different sources and factors. The most common source of leverage comes from the competition for the player's services among league teams because of free agency structures.[69] When a valuable player is eligible for free agency, he is free to negotiate with any other team. Competitive offers may come from one or more teams in the same league.[70] When a player is sought by more than one team, the agent can use the team's offers against each other to cause, in effect, a bidding war. This will put the player's current team under pressure to offer an attractive deal or risk losing him. In this situation, the player is in a very favorable position of choosing the best, or most lucrative, contract.

Another source of leverage can be gained from assessing the team's position within the league.[71] The bargaining leverage of a particular player will depend on whether or not the team could benefit from acquiring him. One example of when the team's position in the market will provide a great amount of leverage is when the player can make an immediate impact.[72] This will put added pressure on a team's owner or general manager to acquire a player who may contribute to a more successful team.

Other factors that will determine a player's bargaining strength include the particular team's minor league prospects, the attitude of the team's fans concerning the need to sign a big name player, the economic condition of the team, and any other specific team needs.[73] A player's representative must be creative and consider all possible alternatives, and then use them to produce the best possible deal. A complete analysis of the player's bargaining leverage also should lead to consideration of the strength of the team's leverage.

An agent needs to determine how important it is for the team to sign the player to a contract.[74] This information becomes necessary because, if the player is not in great demand and the agent delays the deal, market opportunities may be lost.[75] This puts the team in an advantageous position because the player may be faced with the consequence of sitting out an entire season without being paid anything. A player would be more likely to sign a mediocre deal than risk not being offered a contract at all. On the other hand, if the athlete will make an immediate impact on the team, he may possess enough leverage to minimize the risk.

In assessing the parties' respective leverage, a negotiator must also know beforehand whether or not he or she will be able to walk away from the table and terminate the negotiation. The more leverage a negotiator has, along with a corresponding willingness to break off negotiations, the more forcefully he or she can represent the client's interests and obtain a favorable contract. Conversely, when a negotiator is in a situation where he or she has little leverage and is required to make the deal, it will severely limit the ability to secure a good contract that his client will fully appreciate.[76]

Finally, it is very important for an agent to adhere to his or her statements and concessions. An effective negotiator must be prepared to follow through with stated proposals. If he or she takes a hard line on a particular issue and then subsequently backs down from that position, the negotiator will consequently lose credibility with the other side.[77] When this occurs, the player's bargaining power is greatly weakened and the agent's overall reputation as a competent representative may be adversely affected. Once the agent has gathered all of the relevant information and assessed the parties' bargaining leverage, he or she is ready to begin the bargaining process.

Bargaining Process

Negotiating a professional sports contract involves making trade-offs that will satisfy both parties' needs and objectives. Common trade-offs with respect to sports contract negotiation include the length of the contract; no-cut and no-trade clauses; incentive bonuses; guarantees or security provisions; current or deferred payments; and incentive bonuses.[78] Depending on the athlete's particular circumstances, a negotiator should offer and accept the options that are most favorable to his client, while at the same time remaining aware of and sensitive to the needs of the player's team.

Before negotiations begin, it is very important to first affirm that the person representing the team has authority to make a binding deal.[79] A player agent needs to be certain that he or she is making concessions to the ultimate decision maker and not "negotiating through a filter."[80] As David Falk warns, "The offers a general manager is throwing at you may just be an attempt to get you into a more comfortable range so the owner can come in and close the deal."[81] By using this tactic, the team may enhance its bargaining power since the player's agent might make concessions without getting anything from the team in return. When both parties possess the requisite authority to make concessions and close the deal, negotiations will proceed more efficiently.

During negotiations, the agent should make an effort to speak clearly and unequivocally. The first thing a negotiator should do is make sure the other side understands what he or she wants.[82] This will aid in persuading the other party that the agent's position is reasonable. Exact numbers, dates, times, money values, and even sentiments will impress the other side and assist in establishing the legitimacy of the player's interests and add weight to his position.[83] Of course, it is always important for the negotiator to maintain the appropriate manner and composure in presenting one's position to the other side.

A negotiation between a player's agent and the player's prospective team is not the typical contractual arrangement where, after the negotiation is over, the two sides go their separate ways.[84]

Continued on page 11

Continued from page 10

The negotiation actually establishes and secures the relationship between the athlete and his team. While a negotiator's first priority is to obtain as favorable of an agreement as is reasonably possible for the client, an agent must also construct a deal that will be fair for each party so as not to induce a breach of contract from the discouraged party. In MINDING OTHER PEOPLE'S BUSINESS, Donald Dell refers to this philosophy as making a deal that is 'at the high end of fair.'[85] A sports agent can accomplish this task by searching for joint solutions that will leave the other side satisfied, while at the same time sufficiently meet the needs and interests of one's client.

It is, therefore, very important to make a conscious effort to involve the other party in the process of reaching an agreement. In FRIENDLY PERSUASION, Bob Woolf informs, "In creating an atmosphere of good will, it is crucial to establish that negotiations are not win-or-lose situations but that both sides stand to gain. I make every effort to create win-win situations from the outset."[86] The parties to the negotiation should work in concert to arrive at a condition that is mutually beneficial.[87]

In addition to working with the other party, it is equally important to involve the athlete in negotiations. A sports agent should keep the client informed of any events or developments that occur throughout the entire process. If an athlete is uninformed, he may be less likely to make the appropriate decisions.

Invariably, there will come a time when a sports agent and player are forced to take a risk during contract negotiations. Risk-taking, of course, requires courage along with a firm belief that the odds are in the client's favor.[88] Some risks will pay off and others will not, but most successful agents agree that carefully calculated risks must be taken in order to achieve respect and success.[89]

It is also important for a sports agent, and the player, to control their emotions during and after the negotiation. If the team's owner or representative perceives an agent, or an athlete, is overjoyed by the result of a deal, this may cause the team to believe the contract is too generous and plan for a different result during the next contract negotiation.[90] On the other hand, if the agent or player appears sullen or angry, this may lead to conflicts with the team regarding the player's attitude. Ron Simon summarizes the appropriate emotional response as he states, "When you win, say little; when you lose, say less."[91]

A sports attorney must be able to close the deal.[92] To do so, a negotiator needs to set the appropriate tone. David Falk advises, "You have to somehow communicate to the other party that you are ready to make the deal now. Make your closing offer and clearly and unambiguously identify this offer as a closing offer."[93] Once the closing offer is recognized and the parties have made their decision, the bargaining process is finished.

At this point, it is very important to clarify and confirm all of the principal terms of the deal with the team's representative. Keeping in mind general principles of contract law, it is also important to reduce these terms to writing and require each side to signify their acceptance of them.[94] If the terms can only be written in an informal manner, then the parties should include a provision to this effect and reduce them to a formal written contract as soon as practicable thereafter.

CONCLUSION

The need for competent, ethical and experienced sports representatives is clear. Before entering a negotiation, an agent must acquire a complete understanding of the league's collective bargaining agreements, standard player contracts, and other relevant documents. In addition, the sports attorney must be thoroughly prepared with all relevant information carefully researched and readily accessible during contract negotiations.

An agent must also understand the art of negotiation. The hallmark of a successful negotiator is designing a contract that furthers the mutual interests of both parties. In the sports industry, negotiations are the beginning of a relationship that should be based on trust and mutual respect. Therefore, the agent must remember to keep the negotiation's atmosphere comfortable and congenial. At the same time, a player representative should strive to establish his or her own reputation for credibility, which will be a valuable asset in future contract negotiations on behalf of players.

Today's agents must maintain the highest level of good faith and professional responsibility when practicing their trade. This is accomplished by obtaining the knowledge and training necessary to effectively represent athletes. The proper negotiating techniques must be used. As all agents employ these principles in representing players, the negotiation process will become more cooperative and efficient to the benefit of all involved parties.

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7th ANNUAL SPORTS LAW CONFERENCE: EXPLORING NEW FRONTIERS

Sponsored by State Bar of Texas Entertainment and Sports Law Section and the University of Houston

Friday November 7th, 1997

University Hilton, University of Houston

Contact: Gil Fried (713) 723-0220 or (713) 743-9848 - Fax: (713) 743-9860

Pre-registration Fee: $125.00 Non-Section Members

$115.00 Section Members - $40.00 Students - $150 at the door

Mail Pre-registrations to: Gil Fried, Esq. 104 F Garrison Gym, University of Houston, Houston, Texas 77204-5331

6.5 CLE Hours *applied for*

7:45 a.m. Conference Registration

8:45 a.m. Opening Remarks: Steven Ellinger, Esq., Immediate Past Chair, Entertainment and Sports Law Section, State Bar of Texas

9:00 a.m. Professional Sports-New opportunities and ethical obligations associated with representing professional athletes.

Moderator: Kevin Hanratty, Esq., Dow, Cogburn & Friedman, Houston, TX

Panelist: Edward King, Esq., Attorney, King and Higgins, San Francisco, CA. Nationally recognized expert on sport agent misrepresentation and conflict of interest issues.

Lisa Masteralexis, Esq., Attorney, Associate Professor, University of Massachusetts, Amherst. Nationally recognized author and lecturer on sport agent client solicitation concerns and issues associated with representing athletes in new leagues.

10:30 a.m. **Break :** Sponsored by University Hilton

10:40 a.m. College-High School Athletics-Title IX shaping the athletic landscape.

Moderator: Diane Howell, Senior Women's Athletic Director, University of Houston.

Panelist: Linda Carpenter, Esq., Professor, Brooklyn College, Brooklyn, N.Y. Nationally recognized expert on Title IX as it applies to disparity with athletic administrators and techniques to help comply with Title IX's requirements.

Lisa A. Brown, Esq., Attorney, Bracewell & Patterson, L.L.P., Houston, TX

12:00 p.m. **Lunch-**On your own.

1:15 p.m. Amateur Sports-What is an injury worth and how to maximize or minimize a case's value. This presentation examines research tracking eight years worth of sports jury awards and settlements with results examining such issues as plaintiff age, gender, injury, award year, state-by-state comparison, sport comparison, injury type and the potential impact tort reform might have on sports awards. An additional presentation will be made on "Sports Medicine and the Law."

Presenters: Gil Fried, Esq. Assistant Professor and Coordinator Sports and Fitness Administration curriculum at the University of Houston, Of Counsel, Bisk & Lutz, L.L.P., Houston, TX.

Matthew Mitten, Esq. Professor, South Texas College Of Law.

2:30 p.m. Legal Issues Surrounding Building, Financing, and Maintaining Sports Facilities.

Moderator: Ruven Bisk, Esq., Attorney, Bisk & Lutz, L.L.P., Houston, TX-General Counsel Sportsplex Operators and Developers Association and the Resort and Commercial Recreation Association.

Panelist: Frank Rynd, Esq., General Counsel, Houston Astros and Astrodome USA, Houston, TX.

Steve Patterson, Esq., General Manager, Houston Aeros, Houston, TX.

Gary Pritchard, Pritchard & Hanszen, General Counsel for Bally's Fitness in Texas.

3:50 p.m. **Break:** Sponsored by University Hilton

4:00 p.m. Sports Tourism and the Law-analyzes legal issues associated with the hottest trend in the sports industry-sports tourism, adventure sports and extreme sports.

Moderator: JeAnna Abbott, Esq., Assistant Professor, University of Houston, Hilton School of Hotel and Restaurant Management.

Panelist: Ron Baron, Esq., Principal, From the Gym to the Jury, Dallas, TX.

Dr. Lisa Delpy, Professor, George Washington University, Washington, D.C.

5:15 p.m. Question and Answer Period with Presenters

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