Attorneys Offer Thoughts of How College Athletic Departments Should Cope with NIL Movement

Pity college and university athletic departments. They are treading water in a sea of chaos that is the Name, Image and Likeness (NIL) movement in collegiate athletics.

On one hand, they have to embrace it, given the recruiting advantage is imbues for coaches and their programs.

On the other hand, there are legal risks, such as breach of contract lawsuits associated with sponsor contracts and IP issues, and NCAA compliance risks if the envelope gets pushed too far.

We recently queried a cross section of lawyers about the issue. Their thoughts are shared below.

Question: What are the most dangerous things that can happen for an athletic department as it navigates NIL?

Answer (Michael Elkins, Partner and Founder at MLE Law): It's important to remember that NIL is generally governed by state law. So, there may be differences from state to state. That said, generally, athletic departments need to immediately understand that the old way of doing business in college athletics is over. Athletic departments need to make sure they're following the applicable NIL law. By way of example, in Florida, postsecondary institutions need to make sure that they do not make any rule or standard that restricts an athlete from earning compensation for the use of his or her name, image or likeness. Further, postsecondary institutions in Florida need to make sure that they're not taking into account a student athlete's NIL compensation when determining grant-in-aid or athletic eligibility. These are just some of the requirements in Florida. There are likely similar requirements in other states with NIL laws.

Answer (Mit Winter, Attorney at KENNYHERTZ PERRY LLC): The most dangerous things that can happen are (1) athletes entering into deals that either violate state law or violate the NCAA's NIL rules that prohibit NIL deals that are "pay for play" or recruiting inducements, and (2) a university/athletic department violating those same laws and rules. It's still unclear what type of consequences will result for athletes and universities that violate a state NIL law. I wouldn't want to be one of the first to find out. And we know that the NCAA will likely put a lot of effort into enforcing its NIL rules that still exist. Violating those rules could lead to harsh sanctions for universities and athletes.

Answer (Brett Bruneteau, Attorney at Kutak Rock): From a contractual perspective, the most dangerous thing an athletic department can do is to run afoul with its current or future contractual obligations. However, as an NCAA sponsored school, the most dangerous thing an athletic department can do is to let its student athletes run afoul with applicable state laws and/or NCAA rules. Thus, it is incumbent upon the schools to develop well-written NIL policies, stay up to date with emerging state laws, and develop educational resources for student athletes to take advantage. Moreover, it is important that schools facilitate an environment in which they, their student athletes, and their prospective partners can work together to achieve their goals.

Answer (Adam Bialek, Attorney and co-chair of the Intellectual Property practice at Wilson Elser): The recent Supreme Court decision and the NCAA's reversal of its position on student athletes being able to be compensated and earn money from the exploitation of the Name, Image and Likeness, has created a vast pool of potential influencers who are eager to profit off of their image. What many do not realize is that the universities also have intellectual property rights, and the misuse of the universities' IP could expose the athletes and their sponsors to liability for infringement.

Q: Please talk about the role of communication between senior athletic department officials and their student athletes and boosters?

Winter: This is very important. Athletes and boosters both need to be thoroughly educated on a school's NIL policy, the NCAA's NIL rules, and any applicable state law. Schools should have sessions that athletes are required to attend and there should be one person in the athletic department that athletes can go to with NIL related questions. There should also be an outreach campaign to boosters. Many boosters are very excited about doing NIL deals with athletes. But they need to be educated on what they can and cannot do. Otherwise, there's a big risk they put an athlete's eligibility in jeopardy.

Bruneteau: It will be important for athletic departments to clearly communicate their NIL policies, standards, expectations, and procedures with their student athletes, alumni, and boosters. A thoughtfully developed and well-communicated NIL policy creates alignment in the expectations of those alumni and boosters who seek to participate. These expectations create the framework by which the alumni and boosters can creatively work with student-athletes to maximize opportunity, while at the same time complying with all institutional, legal and compliance requirements. Thus, the result of a well-written and well-communicated NIL policy is, potentially, a fully leveraged alumni and booster database which has the ability to unleash its financial creativity within a reliable framework for the benefit of the student-athlete.

Elkins: Athletic department officials need to make clear to boosters that while NIL is a complete game changer, it does not mean boosters can start handing out money to student athletes. In fact, the opposite is true. In Florida, NIL payments must be pursuant to a valid contract, which must be provided to the school. Athletic department officials should make sure boosters understand that this not an invitation to create bogus NIL deals as a means to simply pay student athletes for athletic performance.

In Florida, athletic department discussions with student athletes should center on how the parties can work together to make sure a student's NIL contract does not conflict with the term of the student's team contract, as well as processes for disclosure and further compliance with the Florida NIL law.

Q: In what capacity can outside counsel assist the general counsel and athletic department as they navigate NIL?

Winter: Outside counsel can assist GCs and athletic departments in a number of ways. One, they can help with drafting NIL policies to ensure they adhere to state laws and NCAA rules. Two, they can help answer questions that athletes, boosters, and businesses have about entering into specific NIL deals and whether they adhere to applicable policies, rules, and laws. And three, they can provide assistance and representation if athletes or the school are accused of violating those same policies, rules, and laws. They can also provide representation if conflicts arise between the school and its athletes over whether a deal is permissible or not.

Elkins: As an outside counsel, I view my role as preventing lawsuits. To that end, outside counsel can alert general counsels and athletic departments to potential exposure areas. By way of example, in Florida, a student is required to disclose their NIL contract(s) to the school. The Florida NIL law allows for the school to determine the manner of disclosure. If a school were to set up a process that makes disclosure difficult or seems to be too complicated for what should be a simple issue, outside counsel could alert the school that it may want to re-consider the established process.

Bruneteau: Outside counsel will play an important role as athletic departments try to navigate (1) emerging state law, (2) NCAA compliance, (3) NIL policy and school-related contractual matters, and (4) working with a large number of student athletes (who may agree to thousands of NIL contracts). In this respect, many athletic departments may not have the bandwidth to address these challenges. Consequently, many athletic departments may turn to outside counsel to help analyze new state laws, review individual school NIL policies and compliance, and help facilitate contractual matters.

Q: What might be a vigorous action plan for a university to protect its IP:

Nancy A. Del Pizzo, a partner and litigator in our Intellectual Property department of RivkinRadler: Now that collegiate student athletes, depending on their jurisdiction, have opportunities for endorsement deals, universities may want to take a more active role in advising athletes about the use of school property. In other words, while some college athletes now have a right to monetize their name, image, and likeness, that does not give them the right to use the intellectual property owned by the university in doing so unless the school allows for it.

For example, if Sue Basketball Star can secure an endorsement deal based on her millions of Twitter followers, her school may want to restrict her from using school IP in materials disseminated to the public, such as the school's logo, uniform or mascot. Schools may be best served by limiting such use by way of a school policy or protocol. Or the school may allow the athlete some use by way of a limited license. Universities may

also need to more carefully review their own sponsorship opportunities related to their sports teams to determine whether athletes' rights of publicity are implicated, e.g., should they loop in the athlete early and get an agreement on those rights. Obviously, these decisions will likely be best handled case-by-case and state-by-state even if a uniform nationwide right of publicity law for athletes emerges.

Bialek: In order for universities to best position themselves to protect their own rights, they should ensure that their trademarks are registered, and that their rights in copyrighted material are secure and registered. Universities may also seek to secure and properly document their own licenses to use the name, image, and likeness of the athletes for their own exploitation. With more vigorous prosecution of rights, inclusive of copyrights and rights of publicity, for online usage, it is advisable for universities to implement guidelines for and educate those who populate websites and social media with images and content to avoid potential liability exposure.

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A Half Dozen States Legalize Sports Betting: Looking to be Ready for 2021 NFL Season

(The following appeared in My Legal Bookie, a publication produced by Hackney Publications and Ifrah Law. It is available on a complimentary basis at My Legal Bookie.)

Just a few years ago, sports betting was considered taboo; but now it is widely accepted, appreciated, and skyrocketing with at least six states in recent months passing legislation legalizing sports betting. These states have all expressed an interest in moving quickly, hoping to kick off sports betting by September 9, 2021, the date of the first regular season NFL game.

Arizona

On April 12, 2021, the state senate passed a bill permitting both online and retail sports betting. Three days later, Governor Doug Ducey signed the bill into law. Since then, the Arizona Department of Gaming has been busy preparing the official sports betting regulations. Twenty sports betting licenses will be permitted, ten associated with professional sports franchises and ten with federally recognized tribes located in the state. Each license allows retail betting and an online skin or brand. Each professional team will be allowed one primary sportsbook on-premises and a second "adjacent" location in the vicinity.

Currently, there are at least five major deals between teams/tribes and online sportsbooks including: BetMGM and Gile River Indian Community; Caesars Sports and Arizona Diamondbacks; DraftKings and PGA (i.e., TPC Scottsdale); FanDuel and Phoenix Suns; and William Hill and Ak-Chin Indian Community.

Connecticut

A new gaming compact between the Mashantucket Pequot and Mohegan Indian tribes was signed by Governor Ned Lamont on May 27, 2021. The compact awaits federal approval by the U.S. Department of Interior.

In preparation for launch by September 6, 2021, the regulatory and licensing process has begun. In addition to the tribal online and retail sportsbooks, the State Lottery is allowed to launch a single online sportsbook and online casino platform. Connecticut bettors will have the option of three online sportsbook apps. In addition to the Lottery's sportsbook app, the Mashantucket Pequot tribe partnered with DraftKings to operate their official sportsbook. The Mohegan tribe partnered with Kambi. The Connecticut Lottery is expected to approve the online sportsbook platforms before the launch of up to fifteen retail sportsbooks across the state. The Lottery itself will open two retail sportsbooks in Hartford and Bridgeport.

Florida

Governor Ron DeSantis signed a new compact with the Seminole tribe in April 2021 to expand the tribe's gaming capabilities and bring statewide mobile wagering, including sports betting, to the state. The compact in effect creates a monopoly for the Seminole tribe, wherein any and all sports bets must go through its tribal land servers. The state legislators approved the deal in May 2021; although the compact awaits federal approval by the U.S. Department of Interior.

The compact will permit online and retail sportsbooks through tribal casinos. Florida sports venues may also get in on the action; but the specifics of where