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NEGOTIATIONS INVOLVING AGENTS AND GENERAL MANAGERS IN THE NHL

BRIAN BURKE*

I. INTRODUCTION

At the outset, I do not think that you can overstate the importance of drafting. As you are merely filing in the blanks of a Standard Player's Contract, the drafting you undertake is minimal. However, it is of critical importance. When I was an agent, and while I was a general manager, I would try to leave language I had drafted overnight and look at it again with a fresh set of eyes the next day. I would play the devil's advocate or ask another attorney at my firm, "How can I make this drafting better, and what could go wrong?" I would go through the various scenarios asking "What if?" I would take a Murphy's Law approach, asking "What could possibly go wrong?" Furthermore, you must attempt to envision every possible scenario. What if your client's contract contains a bonus for 30 goals, your client scores 29, and is suspended for the last two games of the season? Can that situation be covered?

II. CONDUCT OF AGENTS AND GENERAL MANAGERS

A huge problem has developed in recent years with regard to player contract negotiations. With the onset of collectively-bargained salary systems, there is incentive for general managers to work with agents to circumvent the confines of those systems. This problem is evident in the Rick Mirer contract in football,¹ the Kelly Miller and Craig Simpson contracts² in hockey, and the Chris Dudley contract in basketball.³ I think you are looking at a huge problem for professional sports. In two

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1. See for example, *Tagliabue Voids Mirer's Contract*, NEW YORK TIMES, August 14, 1993, Section 1, at 30; *NFLPA, LEAGUE SETTLE DISPUTE OVER ROOKIE CONTRACT BONUS*, SPORTS INDUSTRY NEWS, September 10, 1993, at 353.

2. See for example, *Bettman's Assist Helps Capitals in Miller Deal*, THE WASHINGTON POST, July 24, 1993, at C6 [Kelly Miller]; *Union head: Oilers shouldn't complain about free-agent loss*, USA TODAY, July 21, 1993, at 8C [Craig Simpson].

3. See for example, *Judge sides with Dudley*, USA TODAY, October 28, 1993, at 6C; *Federal court rejects NBA bid to block free-agent opt-out*, SPORTS INDUSTRY NEWS, October 29, 1993, at 424.

sports you have a salary cap, and several instances of agents and general manager circumventing the salary cap have occurred.

This is just the tip of the iceberg. There will be more of these cases, and there is going to be more arbitration and litigation on just these issues. In my opinion, a general manager has no right to circumvent the collective bargaining agreement. Given a choice between losing within the rules and winning with some blurring of the lines, many general managers will *not* remain within the salary cap. This is an owner level problem. If the general manager is allowed to be creative and circumvent the system, then the system is useless. For example, no one fired the general manager in Seattle for the Rick Mirer contract, nor are they going to. I think issues associated with the attempted circumvention of salary caps or other systems are going to be the next wave of things you read about in publications like the National Sports Law Institute's various submissions.

Expanding on the issue of appropriate conduct, I do not think either side of the sports industry can claim any monopoly on integrity, ethics, honesty, or ability. My experience has been that the bulk of the agents in the business are honest, hard working people with integrity. The bulk of the general managers I have met fit the same description. However, I am amazed at some of the aspersions that are cast on both sides. I do not think either agents or general managers can claim the moral high ground on any of these attributes. Most of the people in the business, thank God for all of us, are honest people.

III. PLAYER CONTRACT NEGOTIATIONS

You must decide going in what your negotiating style will be. I prefer a professional relationship - cordial, yet not warm. I have found that several general managers try to be an agent's friend and vice versa. Having been a general manager, I never wanted to be any agent's friend for ethical reasons. I did not feel it was appropriate or beneficial to the process. I did not go out socially with agents, and I always resented that approach from general managers when I represented players. I wanted the manager to sweat when I came into the room. When I represented players, I wanted the general manager to think this is one prepared, bright, tough, son-of-a-gun, and I never wanted to think that the first question would be "how my kids are". I wanted the first question to be, "How much is this going to cost us?" From my perspective, this advice applies whether you are on my side of the table or the other.

If you remember nothing else from this seminar, just remember, preparation and hard work are the keys. There is no question that this is

axiomatic. The person who works the hardest in a contract negotiation, usually obtains the best results.

When I represented players and was negotiating player contracts I prided myself on never having to look at a note. I would take in a folder in case I had to turn to something, but I prided myself in not having to consult any documentation in the course of the negotiation. I did not have to look to see how many goals this player scored three years ago, or what his plus/minus ratio was four years ago; I had all of the necessary information committed to memory. The preparation took hours and hours of work, but it gave me a great advantage. If the other side is shuffling through his notes, and you are sitting there and have not even opened a folder, you are going to be in command of that negotiation.

The general manager generally has less time to prepare than does an agent. In fact, he is not going to be able to be as prepared as the agent. Therefore, full preparation should be the general manager's goal when entering a negotiation. In recent years, more and more clubs have hired attorneys to negotiate their player contracts.

The first step in preparation is to involve the athlete in the process. A client is going to give you very different instructions than you might anticipate. If you have a client that wants security, a certain length of contract, and guarantees, than that has to be in your proposal. You have to be prepared to bargain for what your client wants.

For instance, if your client is someone like Kirby Puckett, you have a client who is willing to accept the risk. I think Puckett made some brilliant decisions early in his career by making short term contracts every time, and then he played great baseball. Subsequently, he was the fastest player in the history of Major League Baseball, if I am not mistaken, to earn \$3 million a year. If you have a client that is willing to run risks like that, they must set that out for you. You can not make those judgments.

You must also go into the negotiation with a series of acceptable alternatives. Flexibility is a key to getting deals done. The more acceptable alternatives you have, the greater the chances of making a deal.

As a general manager I never went into a negotiation without having my mind made up before it started as to what would be an appropriate contract. Let me explain how most general managers in hockey prepare for a contract negotiation. Around March or April of a given year, (most teams' fiscal year ends around June 30) the general manager must prepare and submit a budget which includes what the general manager believes it is going to cost to sign all his players. You do not like to be over budget on even one player, so the process of determining what a

player is worth begins months before you negotiate with the general manager. The general manager has set a figure months before you walk in the door. When you come in you have to negotiate with the general manager from that figure. So you are not starting from scratch. The general manager, after careful consideration is sitting across from you with his mind made up as to what is appropriate. So it truly takes hard work and preparation on your part.

I believe it is good strategy to let the club make the initial offer. In fact, most contract negotiations begin with an offer from the club, as certain tenders and offers are required. A good example is the Pete Rose story, which has been going around since 1978. Pete Rose's agent promised him he would obtain an offer of \$600,000 a year. This occurred at a time when free agency had just opened up in baseball. The club's first offer was \$650,000, and the resulting contract was \$800,000 a year. Teams do make mistakes, and I have seen a general manager negotiate with himself and up the ante.

Keep in mind that you are filling in the blanks of documents that have been negotiated between the sport and the union. You are generally negotiating *only* the length of the contract, salary, and bonuses. The negotiating process involves familiarity with three groups of documents.

There are three documents with which you must be intimately familiar: the Standard Player's Contract; the Collective Bargaining Agreement; and, the By-Laws of the league in question. I am horrified when I cite a paragraph of Standard Players Contract to an agent and he has to look it up (there are only a half dozen which are directly affected in a contract negotiation). For instance, in the Standard Players Contract there is a morals clause, a termination contract clause, and a fitness clause.⁴ If I ask an agent, "Do you see any Paragraph 11 issues here?" and the agent has to look at the contract, I know the agent is unprepared. An agent must be intimately familiar with those three documents, and this is not a simple task. A proper level of familiarity requires a great deal of work.

IV. THE USE OF THE MEDIA IN NEGOTIATIONS

The use of the media in a contract negotiation, in my mind, should be a last resort. I do not think the media will help with the negotiation of a deal. The media people may tell you that they will help but that may not

4. NATIONAL HOCKEY LEAGUE STANDARD PLAYER'S CONTRACT, Paragraph 2c, 3-5, 13, & 14 (1988).

be the case. For example, a reporter may say "Look, I can help put some heat on the team. Tell me what they are offering and I will crank it up for you." It usually backfires, because the general manager knows he has not told the media what the figures are, and if they are in the newspaper, he knows that you have revealed the information. The next time you come in to talk with him, it will be a hornet's nest. You are going to spend the first twenty minutes explaining to the general manager that his comments about your ancestry and sexual activities are not accurate. The media should only be used as a last resort. As a general manager I have often said to an agent, "If this falls apart, I am going to go public with all of the figures. Let the public decide who is being reasonable."

V. INTEGRITY

Please remember that your integrity is only for sale once. Once your integrity is sold, it no longer has any value, and you do not have any value in the eyes of the industry you are in. Word spreads around very quickly and your career will be short. If you think that you can compromise your integrity and have a long life in the business, I would suggest that you are wrong. That goes for both management and agents.

VI. ENDORSEMENT INCOME

Another important consideration when dealing with a client is to keep in mind that endorsement income is only available to a very few athletes. Do not promise to your athlete that you are going to make them a lot of money doing endorsements, because very few athletes (on a percentage basis) make any meaningful or significant income through endorsements for a number of reasons. Many athletes do not like to do the work, because much of it is in the off season. Often, even if it is during the season, they do not want to do it.

An agent called me last year complaining that he had set up a golf game with one of the NHL players and four very wealthy Japanese businessmen who flew in from Tokyo. The player did not show up. Knowing the player involved, I could have told him that he was not going to show up for the engagement. It simply was not that important to that player.

These types of offers do not materialize for most athletes, and if they do, they are not very lucrative. There are only a few athletes that make much money on endorsement income, so do not promise it. I am constantly amazed when this type of income is promised to a player.

However, you should note that the fees generated by endorsement income are generally different than they are for normal contract work.

It is generally accepted in the industry to take 25-33% on endorsement deals, on the theory that it is "found money."

VII. TAX PLANNING

The next important issue is tax planning. I recommend that you follow one GOLDEN RULE: *if you are doing any work other than tax work, such as litigation, or representing athletes full time, you can not possibly comprehend the scope of the Internal Revenue Code on a current basis. You must retain tax help.* My advice to you is that the individual or firm that provides this advice to you should be under written agreement to you, and to your client.

When I was practicing law and representing athletes, that was how I did it. My law firm had an agreement with an accounting firm that provided accounting services to the athletes at a specified rate. Therefore, we had a contractual relationship with that firm, and we had a right to sue them if they breached their agreement with us. We also made them sign an agreement with our client.

If your athlete receives horrible tax advice, and ended up in a terrible financial situation (like Tony Dorsett), there will always be somebody to chase. If you do not follow this advice, I guarantee you two things: you will get sued if your client has tax problems, and you will have difficulty getting another client. Finally, don't be greedy. Be aggressive, but not greedy.

VIII. INVESTMENT INCOME

I offer the same *advice* with regard to investment income. If someone claims they can give you good investment advice, they should be willing to sign a contract that specifies that they will provide that advice for certain fees, and that they are properly and adequately insured for malpractice or any other purposes. Make them sign that contract with you or your firm. Also make them sign that contract with the athlete.

IX. CONCLUDING REMARKS

I would like to add a few closing remarks. A lot of people come to these conferences (i.e., NSLI's *SPORTS DOLLARS AND SENSE* conference.) that want to be sports lawyers, whether it be as an agent or on the management side. This business can always use bright, young, qualified people.

I would especially challenge any women with interests in this area. Team sports is the last area where women have not yet made a signifi-

cant impact in the law. Moreover, because it is the only area, it is the last wall, and I would encourage you to break it down. There is absolutely no reason why women have not been and could not be more prominent in this field. I would encourage you to be the people to break this final barrier down.

If you have any uneasiness about what athletes are paid, if you have ever picked up a newspaper and said this person makes too much and high school teachers only make \$35,000 a year, then practice some other type of law. Do not get into this business. These athletes have short careers. They depend on their agents almost exclusively for their ability to earn income during those careers. If you are not going to go into this with fervor and zealousness, then do something else. Do wills, patents, or whatever other attorneys do, but do not enter this area of practice. These athletes deserve a better shake than that.

Although the opportunities are limited, please make an impact in this area. The practice of sports law is like a sponge, it can always absorb more bright, young people that can do this job well.

APPENDIX A

SPORTS LAWYERING A PRACTICAL GUIDE

- I. *The Chicken or the Egg: How to Begin?*
- A. *Looking Like A Sports Attorney*
 1. *Education*

Take any available sports law and negotiating courses and seminars.
 2. *Build a Resume*

Through membership in various trade and professional groups, you can acquire valuable information and training and look like a veteran sports attorney. See APPENDIX B.
 3. *Know Your Sport*

Read several sports pages, trade publications and magazines on a regular basis. To cope with the amount of information, pick one or two sports. Keep a notebook containing key information. If possible, attend coaching seminars. Acquire fluency in terminology. What is an "MRI"? An "AC separation"? A nickel defense?
 4. *Build a Data Base*

Contact each league and union to acquire directories, media guides, addresses and telephone numbers. See Appendix B.
 5. *Comply with Applicable Statutes*

Several states have agent registration statutes. Check to make sure you are in compliance. See Appendix C.
 6. *Union Rules*

You must register with the union in order to represent athletes in football (since 1983), and in basketball (since 1986). NHLPA registration is voluntary. However, the NHLPA will send salary disclosure information only to those agents who have registered.
- B. *Solicitation Rules*
 1. *The Code of Professional Responsibility*

The Code of Professional Responsibility (CPR) prohibits solicitation of clients. The biggest problem facing a sports attorney is obtaining clients without violating the CPR. Your options:

 - a. Sit around and wait for athletes to call you (i.e., starve).
 - b. Ignore the CPR (sad to say, many do).
 - c. Comply with the CPR:
 - i. Work for a sports team or union, then set up shop.

- ii. Work for an established agent or sports attorney.
 - iii. Join a law firm already doing sports work.
 - iv. Handle other, non-athletic matters for athletes in a proficient manner.
 - v. Socialize with athletes.
 - vi. Contact local colleges following NCAA registration (See III(C) below).
 - vii. Form an alliance with an out-of-town agent or sports attorney.
 - viii. Form a sports management company and completely disregard the CPR.
2. *Written Contract*
Advisable for both the athlete and the attorney. Required by the NFLPA.
 3. *NCAA Rules*
Be familiar with the NCAA rules (Section 12.3 of the Rules) regarding agents. These may be obtained from the NCAA (See Appendices B and D).
- II. *Hitting the Big Time: Servicing Your Athletes*
- A. *Getting the Money: Four Sources*
1. *Contract Negotiations*
 - a. The most critical area of your job. A player has a short career: he *must* earn every available cent while he is playing.
 - b. What are you negotiating? You are filling in blanks of the SPC: signing bonus, salaries, length, and bonuses.
 - c. Preparation is the key. Involve the athlete in defining your objectives. Go in to negotiate with a series of acceptable alternatives. You must be intimately familiar with *three* documents: the Standard Payer's Contract, the Collective Bargaining Agreement and the League Bylaws and Rules.
 - d. Let the club go first: the Pete Rose contract.
 - e. Present your entire proposal: do not leave portions out in the heat of battle.
 - f. Few contracts are done in one session. Take extensive notes during each meeting and telephone call.
 - g. Keep tax consequences in mind.
 - h. Get union help whenever available.
 - i. Argue performance, achievement and intangibles first: do not get hung up on numbers.

- j. Silence is golden.
 - k. Use incentives to bridge gaps.
 - l. Cover your athlete against injury whenever possible: guaranteed contracts.
 - m. Cover yourself against the Richard Dent problem: include bonuses or salary revision clauses.
 - n. Has your athlete graduated? If not, include educational guarantees.
 - o. Once a deal is struck, send a telegram at once.
 - p. Review the contract *three* times, and keep copies.
 - q. Make sure the contract is filed properly.
 - r. Send your client a copy of the contract.
2. *Endorsement Income*
- a. The demand for your athlete will be tied directly to his public image. Educate him as to the importance of the media.
 - b. Be aggressive.
 - c. Think long-term: avoid the Roger Staubach Roloids syndrome.
 - d. Always include time limitations.
 - e. Always include media scope limitations.
 - f. *Always* preserve your athlete's right to endorse non-competing products.
 - g. Cover transportation and expenses.
 - h. Avoid or restrict "Morals Clauses."
 - i. Fees.
3. *Speaking Engagements*
- a. Respect your athletes' schedules.
 - b. Cover transportation and expenses.
 - c. Use a written contract or form letter.
 - d. Help prepare your athlete's speech, and assist in his technique.
 - e. Get paid by bank check in advance.
 - f. Charitable appearances.
 - g. Fees.
4. *Investment Income*
- a. See section II(C) below.
- B. *Keeping the Money: Tax Planning*
- 1. *Get Help*: work with a professional under written agreement.
 - 2. *Educate Your Athletes to Keep Track of All Deductible Expenses*

3. *Get Credit Cards for Your Athletes*
 4. *Deferral*
 5. *Incorporation*
 6. *Annuities*
 7. *Interest-Free Loans*
 8. *Alternative Minimum Tax*
 9. *Post-Career Planning*
- C. *Building the Money: Investments*
1. *Get Help:* work with a professional under written agreement.
 2. *Tax Considerations*
 3. *Budgeting a Must*
 4. *The Investment Advisor Act*
 5. *Post-Career Planning*
 6. *Home Ownership*
 7. *Life Insurance*
 8. *IRA's/401(k)*
 9. *Key:* tailor the strategy to the athlete.
 10. *Teach Your Athletes Restraint*
- III. *The Sports Illustrated/USA Today Syndrome: Getting to the Top of the Heap*
- A. *Monitoring Your Athletes Progress*
1. *Maintain Contact*
 - a. Maintain personal and telephone contact with your clients on a regular basis: service is the key.
 - b. Maintain personal and telephone contact with your client's *teams* on a regular basis.
 - c. Pay attention to your clients' families.
- B. *Educating Your Athletes*
1. *Monetary Discipline*
 2. *Charitable Activities*
 3. *Teach Self-Sufficiency*
 4. *Career Counseling* This is a key area: prepare your clients for post-playing days. Your athlete is one injury away from retirement. Have your clients complete their education. Summer internships are useful. Major corporate sponsors of teams will look for such athletes.
- C. *Building Your Reputation*
1. *Develop Name Recognition*

- a. Maintain your membership in the appropriate trade and union groups: NFLPA, NHLPA, NBAPA, ABA Sports and Entertainment Law Division, Sports Lawyers Association, and more. See Appendix B.
 - b. Nurture and maintain your contacts with the media. They are a great asset, and must be cultivated for *your* benefit.
 - c. Develop contacts with people who work *with* the teams in your sport: press relations people, general managers', secretaries, scouts and others.
 - d. Develop and maintain working relationships with other agents/attorneys: they can be useful.
 - e. Participate in seminars or other teaching roles.
- D. *Business Considerations*
1. *Automate*
Get all your data on a word processor. Reduce repetitive acts (like writing every team about a free agent).
 2. *Expenses*
Plan your travel carefully to reduce expenses. Try to avoid trips with only one business objective. Keep precise records of all expenses.
 3. *Time Commitments*
To be successful, you *must* make a significant time commitment. Everybody wants to do this type of work.

APPENDIX B

1. *Baseball*

Major League Baseball
350 Park Avenue
New York, New York 10022
(212) 339-7800 Commissioner's Office
(212) 339-7600 American League
(212) 339-7700 National League

Major League Baseball Player's Association
805 Third Avenue
New York, New York 10022
(212) 826-0808

2. *Basketball*

National Basketball Association
645 Fifth Avenue
New York, New York 10022
(212) 826-7000

National Basketball Association Player's Association
1775 Broadway
New York, New York 10019
(212) 333-7510

3. *Football*

National Football League
410 Park Avenue
New York, New York 10022
(212) 758-1500

National Football League Player's Association
2021 L Street N.W.
Suite 600
Washington, D.C. 20036
(202) 463-2200

4. *Hockey*

National Hockey League
650 Fifth Avenue
33rd Floor
New York, New York 10019
(212) 398-1100

National Hockey League Player's Association
One Dundas Street West
Suite 2406
P.O. Box 84
Toronto, Ontario
Canada M5G 1Z3
(416) 408-4040

5. *Soccer*
Major Indoor Soccer League
7101 College Boulevard
Suite 320
Overland Park, KS 66210
(913) 339-6475

Major Indoor Soccer League Player's Association
2021 L Street N.W.
Suite 600
Washington, D.C. 20036
(202) 463-2200
6. *Track*
The Athletics Congress
57 Reade Street
4th Floor
New York, New York 10007
(212) 227-0071
7. Sports Lawyers Association, Inc.
2017 Lathrop Avenue
Racine, WI 53405
(414) 632-4040
8. Ms. Nancy Mitchell]
Director of Legislative Services
National Collegiate Athletic Association
6201 College Boulevard
Overland Park, KA 66211-2422
(913) 339-1906

APPENDIX C

Alabama Code § 8-26-3,-41
California Labor Code 1500-47
Florida Stat. Ann. § 468.452,-57
Georgia Code Ann. § 43-4A-2,-13
Indiana Code Ann. § 35-46-4-1,-4
Iowa Code Ann. § 9A-1,-12
Kentucky Rev. Stat. & R. Serv. § 518.080
Louisiana Rev. Stat. Ann. § 4:421-30
Maryland Ann. Code Art. 56 § 632,-40
Michigan Comp. Laws Ann. § 750.411e
Minnesota Stat. Ann. § 325E.33
Mississippi Code Ann. § 73-41-1,-23
Ohio Rev. Code Ann. § 477.01,-06 4771.99
Oklahoma Stat. Ann. Tit. 70, § 821.61,-71
18 Pennsylvania Cons. Stat. Ann. § 7107
Tennessee Code Ann. § 49-7-2101,-2109
Texas Rev. Civ. Stat. Ann. Art. 8871, § 1-10

APPENDIX D

CASES

UNITED STATES v. WALTERS, 711 F. SUPP. 1435 (N.D. ILL. 1989) Walters and partner Lloyd Bloom were convicted of one count each of racketeering conspiracy, conspiracy to commit mail fraud, wire fraud, and extortion and two counts each of mail fraud. The pair were charged with signing NCAA players to "offer sheets" before the athlete's eligibility was up. They admitted to advancing cash to players and having them sign irrevocable offers which could not be accepted by the agent until the athlete's last collegiate game.

PEOPLE v. SORKIN, NO. 46429 (NASSAU COUNTY, N.Y. NOV. 28, 1977), SENTENCE AFF'D MEM., 64 A.D.2D 680, 407 N.Y.S. 2D 772 (1978). Sorkin pleaded guilty to seven counts of grand larceny. Sorkin, a former sports writer with no experience in contract negotiations or monetary investments, placed himself in charge of all his clients' financial affairs. A poor investor (lost \$271,000 in the stock market) and an addictive gambler (lost \$626,000 wagering at the track and on basketball and football games) Sorkin had little discoverable assets for his former clients to recover. Bobby Nystrom and Ron Greschner lost \$145,000 and \$86,000 respectively.

BURROW v. PROBUS MANAGEMENT, INC. CIV. NO. 16840 (N.D. GA., AUG. 9, 1973) (UNPUBLISHED ORDER). The district judge ruled that an agent's advising a football player to accept a bonus in a lump sum was not in the best interest of the plaintiff, but was "for the purpose of acquiring immediate funds for the benefit of the defendant which created additional tax liability" in the amount of one thousand two hundred dollars.

JIM ABERNATHY The Alabama Attorney General sought a criminal indictment against Abernathy for tampering with a sporting event, commercial bribery and deceptive trade practices. Abernathy was convicted on the misdemeanor tampering charge and received the maximum sentence of one year in jail and a \$2,000.00 fine. The agent had signed at least six Georgia Tech football players to personal service contracts before their eligibility had expired.