

Athletes Need a Coach (Attorney) to Compete in the NIL Landscape

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Unless you have been living under a rock for the past few years, you have heard the buzz surrounding name, image, and likeness (“NIL”) in college athletics. In its first year alone, college athletes earned over an estimated \$900 million. Even so, NIL is like the “red-headed stepchild” of intellectual property. While equally significant because of the potential profits involved, NIL does not enjoy the uniformity of federal law like its relatives – copyrights and trademarks. NIL law is (for the most part) left to the states to regulate. Not surprisingly, this has produced vast differences in the law. However, this is not the only wrinkle with which college athletes must contend. They must also remain compliant with the regulations of their respective institutions, athletic conferences, and the NCAA’s bylaws, or face disciplinary action potentially jeopardizing their education, their eligibility, their team’s success, and their institution’s standing with the NCAA. Furthermore, while collectives have quickly risen to the forefront of the NIL-era, they may not be the best option for the athletes. Overall, as changes rapidly ensue, college athletes need guidance to navigate what has been termed the “wild, wild west” of college athletics. Each athlete could benefit from the advice of a personal attorney to “coach” them through surviving the potential pitfalls of NIL.

What is NIL?

Each American has the right to protect their name, image, and likeness from commercial use without their approval, and to sell those rights to any party they choose. Until recently, to maintain their NCAA eligibility, college athletes were restricted from profiting from the use of their NIL. This rule has recently changed. NIL is derived from the right of publicity, which has always been heavily linked with athletics. It began in 1953 when the 2nd Circuit held in Haelan Laboratories v. Topps Chewing Gum, Inc. baseball players had a right to profit from their publicity (image) being used to sell bubblegum.¹

In the past, NIL deals were largely relegated to professional athletes because college athletes could not get paid for their NIL without losing their amateur status under the NCAA. This began to change when O’Bannon v. NCAA² challenged the NCAA’s profiting off the commercial use of an athlete’s NIL without compensation to the athlete as a Sherman Antitrust Act violation. The NCAA was required to permit its schools to provide more scholarship opportunities, up to the cost of attendance; but, still refused to permit monetary awards to the athletes.

Other class action lawsuits against the NCAA followed and were ultimately consolidated into one case in 2019. NCAA v. Alston held the NCAA couldn’t limit non-cash education related benefits or cash-equivalent awards for academic purposes because it violated antitrust law. The 9th Circuit affirmed but still recognized the NCAA’s interest in “preserving amateurism.” On June 21, 2021, the Supreme Court unanimously affirmed the 9th Circuit’s ruling while leaving open the question of whether student-athletes could be compensated for their NIL.³ Even so, this case is most often cited for Justice Kavanaugh’s concurring opinion which states:

¹ 202 F.2d 866 (2d Cir. 1953).

² 802 F.3d 1049 (9th Cir. 2015).

³ 141 S. Ct. 2141 (2021).

“Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of anti-trust law, it is not evident why college sports should be any different. The NCAA is not above the law.”

Since the Alston case, the NCAA’s monopoly on restricting athletes’ NIL rights under the guise of amateur status crumbled. In 2019, California became the first state to make it illegal for schools to ban athletes from making money. The NCAA has also published its interim NIL policy⁴ requiring institutions follow the laws of their forum state and allowing institutions in states without NIL laws to implement their own NIL policies.

Today, especially with the marketing opportunities provided by social media, NIL deals available to college athletes are numerous. Among others, they can: endorse different brands; appear in commercials or other marketing materials; launch their own business; make public appearances; sell their memorabilia; and even partner with a political campaign. This only further complicates the playing field.

What are the Rules?

With no applicable federal law, the responsibility for the laws and regulations regarding NIL has fallen to the states, the NCAA, the athletic conferences, and the academic institutions. Unfortunately, this has established staggering differences among NIL laws, in addition to those pre-existing right of publicity laws. For instance, Kentucky recognizes that a person’s right in his name and likeness is protected from commercial exploitation without his consent; moreover, if that person is a public figure, the right extends for 50 years beyond death.⁵ Tennessee only recognizes the right for 10 years after the individual’s death.⁶ On the other hand, Indiana offers the most expansive right of publicity protection by extending the protection for 100 years after a person’s death.⁷

Since California enacted its NIL legislation in 2019, 28 states have followed suit. Kentucky provides broad protection for college athletes by: (a) not limiting the amount of money an athlete can earn so long as the NIL deal does not conflict with the institution’s sponsorships or school-sanctioned activities; and (b) establishing that NIL compensation cannot negatively impact an athlete’s scholarship eligibility; provided, however, that the compensation can be considered if the athlete applies for need-based financial assistance. The act also prevents NIL deals from being subject to the Kentucky Open Records Act, thereby protecting NIL deals from public disclosure. Protecting institutions as well, the act requires athletes to disclose their NIL contracts to a designated school official so the institution may identify any conflicts with its own agreements. Schools may also prevent endorsements which conflict with its image or mission, such as endorsing sports betting, controlled substances, or substances the NCAA forbids, promoting adult entertainment, or other products or services that would be illegal to possess or receive. If a conflict

⁴ NIL_InterimPolicy.pdf (https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf).

⁵ KRS 391.170.

⁶ TN Code 47-25-1104.

⁷ Ind. Code § ST 32-36-1-8.

is identified, the athlete is restricted from entering that deal unless amended to the institution's approval. Likewise, Louisiana forbids athletes from endorsing alcohol, tobacco, or firearms. It also specifies that NIL activities cannot use the school's intellectual property. For instance, athletes cannot attend photoshoots in uniform unless it is a photoshoot for the school. On a completely different note, potentially less appealing to athletes, Georgia allows schools to require athletes to share up to 75% of their NIL compensation to be pooled for the benefit of people previously enrolled as student-athletes at the same institution.

Despite the vast incongruity among the differing rules and regulations, there is general agreement on three simple rules. First, there can be no pay for play. NIL monetary awards cannot be based on athletic performance. Second, there can be no enrollment contingency. NIL deals cannot be contingent on the athlete's enrollment at a particular institution. And third, boosters, coaches, and staff cannot negotiate or facilitate an NIL deal. Reality notwithstanding, the deal must materialize organically between the athlete and the potential suiter interested in the NIL deal.

NIL Collectives at the Forefront

One might imagine college NIL deals looking similar to familiar professional endorsement deals like: Tom Brady and Under Armour; Patrick Mahomes and State Farm; or, Lionel Messi and Adidas. Certainly, there are some college athletes out there capitalizing on their NIL in a fashion akin to professionals. Take for example, LSU gymnast Olivia "Livvy" Dunne, or Colorado football player Shadeur Sanders. However, today the professional model is not the framework by which most college NIL deals are taking shape. Instead, the college NIL arena is being dominated by what are called "collectives."

An NIL collective is an entity which pools funds, facilitates NIL deals, and monetizes athlete's brands. A collective buys the athletes' rights to their NIL and pays them for it (handsomely in some cases). Collectives may be school-specific but must operate independent of the institutions. They are typically founded by prominent boosters and influential athletic supporters. Early NIL collectives were formed as both for-profit and non-profit entities. New IRS guidance has since undermined the benefits of a non-profit collective.⁸ Non-profit NIL collectives are, therefore, likely to become a thing of the past.

There are currently four types of NIL collectives: (1) the marketplace model, where the collective aligns athletes and businesses to generate endorsement opportunities similar to the way an agent would for a professional athlete; (2) the donor-driven model, where fans can donate funds on a one-time or subscription basis to then pay the athletes to satisfy the NIL deal obligations; (3) the hybrid model, where the collective provides endorsement opportunities as well as funds generated from fans' donations; and (4) the player-driven model, where athletes get paid in exchange for the collective providing meet and greet opportunities and other athlete appearances via one of several online programs.

⁸ IRS Chief Counsel Memorandum (AM 2023-004), published in June 2023, concluded that many NIL collectives do not qualify as tax exempt organizations under Section 501(c)(3) because they operate primarily to benefit the private interests of student-athletes.

Although widely adopted, these collectives may not ultimately be the best option for the athletes.

What are some Issues for Athletes?

Even though NIL rights have been recognized for over half a century in the U.S., their application to college athletes (and yes, high school athletes in the small number of states where it's legal) is still in its infancy. Governing bodies are trying to find their foothold, which has left the athletes to fend for themselves. To capitalize on NIL, find success, and prepare for their futures in a way unavailable to prior generations of college athletes, today's young athletes need lawyers more than ever before.

The significant differences between the states regarding the right of publicity and NIL laws is the first major hurdle for athletes to navigate. Next, multi-layered NCAA regulations over an athlete's eligibility must be considered. Simply put, if you don't follow the rules, you don't play! Motivated to attract the best college athletes by offering the best support system, athletic compliance departments across the country are establishing programs to assist athletes in navigating the applicable laws. Regardless, attorneys still stand alone as the best support for the athletes in this process.

Next, athletes must decide whether to go with an NIL collective or seek their own independent NIL deals. As of September 2023, there were an estimated 250 collectives focused on collegiate athletics. They now dominate the NIL arena. Collectives are the best option for the fans, boosters, and other donors because they provide greater access to the athletes and allow them the opportunity to provide direct support to the school's athletes. For those athletes who are unlikely to make the bigger NIL deals, collectives may make sense. It gives them a platform where they can still profit from their NIL, even if the individual incentives are much smaller. But there are potential red flags about which every athlete should be made aware, including:

- **Loss of bargaining power.** If the collective is seeking out and negotiating NIL deals on behalf of its athletes, will the collective negotiate fairly or make a sweetheart deal for one of its biggest donors?
- **Institutional influence.** Although not tied directly to a particular institution, school-specific collectives may craft deals to lure athletes toward that institution (without running afoul of the NCAA's bylaws).
- **Athletes' Autonomy.** Athletes in a collective may lose their ability to choose those deals they prefer because the collective may have a conflict or its own agenda.
- **Profits Split.** Most collectives take a piece of every deal they acquire for their athletes and may even have the right to receive a portion of the athlete's profits after the athlete has graduated. Do athletes really want to give up this piece when the profits are based off *their* name, *their* image, or *their* likeness? Is it fair to the athletes that, in some cases, the collective has a right to these profits even after they've exhausted their college eligibility?

Whether or not an athlete ultimately decides to join a collective, each NIL deal needs to be scrutinized and negotiated fairly. The average college athlete ranges from 17 – 23 years old and a large majority have little-to-no business acumen. Too often, these deals can promise what may seem to be life-changing money to an athlete and his or her family. This naturally puts pressure on them to rush through the deal, accept what is offered, and sign on the dotted line without even considering (or seeking advice on) the legal implications. Attorneys can assist athletes who need to understand these implications and the market forces involved to achieve a more beneficial deal.

After you're hired . . .

We, as attorneys, may be asked to walk an athlete through the applicable laws and regulations. Know which state's laws could affect your client's rights and reach out to attorneys in those other states. This is a new, novel and quickly changing area of law. Staying abreast of these developments is critical as the key requirements could change tomorrow.

You may be asked to draft, review, or negotiate these NIL deals. First, determine if the deal is compliant with the following: (1) all applicable states' right of publicity and NIL laws; (2) NCAA bylaws; (3) the applicable athletic conference's NIL regulations; and (4) the athlete's institution's NIL policy. This means, at a minimum, the deal: was not facilitated by any coach, staff member, or booster; and, doesn't include any provision tying compensation to performance or conditioning payment upon enrollment in a particular institution. Any deal contingent on winning championships or terminated (and possibly subject to a refund of the contract fee) upon the athlete's transfer to another institution is not appropriate!

Then, utilize your best contract construction and negotiation skills. Are you working for a brand, a collective, or on behalf of the athlete? As always, think about which provisions are more important to your client. This article is focused on assisting athletes, so the following are some items to look for on their behalf:

- **Term.** Is the term appropriate? Should it last only until the athlete's eligibility is exhausted? Most would say yes. Even if an athlete wants to carry a brand deal with them to the professional leagues, a new deal can always be negotiated. Beware: several NIL deals have come to light recently where companies and/or collectives have obtained the right to receive a portion of the athlete's profits far beyond the end of their collegiate eligibility.
- **Exclusivity.** Consider whether an athlete may want the freedom to enter multiple NIL deals, for different brands, different products, and in different industries.
- **Payment Structure.** Is the athlete getting a one-time payment or a percentage of the royalties? Are payments to be made after each social media post or on a regular schedule (say weekly or monthly)? Make sure these provisions are clear, reasonable, and fair.
- **Sharing Profits.** Is the athlete required to share a portion of the athlete's generated NIL profits with another party (for instance, the collective or the institution)?

- **Athlete’s Obligations.** What are the obligations of the athlete under the deal? Will they require too much of the athlete’s time or compromise his/her ability to fulfill the other duties required for school, sport, and a “normal” life? What happens if the athlete gets injured?
- **Athletic Performance Requirements.** If payment is contingent on athletic performance requirements, the deal is not going to be compliant with applicable laws/regulations. Remove these provisions.
- **Termination Clause.** Is there a fair termination clause? Does the athlete have an out when: payments aren’t made as required; the other party tries to unilaterally amend the deal; or, the parties do not agree as to the exact obligations of each?
- **Boilerplate provisions.** These provisions are often afterthoughts, but frequently come back to harm a party when it matters most. Which jurisdiction governs the agreement? Some states have NIL and right of publicity laws which are more advantageous than other states. Certain states may have requirements that limit the athlete. Is your client agreeing to alternative dispute resolution or litigation in the case of a conflict, where, and at whose cost?

For now, several traps await the unwary athlete in an NIL deal. A market savvy party may not hesitate to take advantage of a young athlete. Many of these athletes will never have a professional career. So, done correctly, NIL can supplement their livelihood while in college and bridge the gap to their future career. Presently, only the most gifted athletes are benefiting. Even so, NIL is here to stay. As more and more athletes participate, developments in the law are inevitable. Skilled attorneys have a role in this process.

What does the Future Hold?

On January 10, 2024, the NCAA Division I Council unanimously adopted a proposal that would implement athlete protections effective as of August 1, 2024. These new rules will include the following: (1) establishing a voluntary registration process for NIL service providers (agents, financial advisors, etc.) that would provide a centralized source of information for athletes; (2) all athletes will be required to disclose information (such as parties involved, term length, compensation structure, etc.) related to any NIL deal exceeding \$600 in value to their schools no later than 30 days after the deal has been executed, which data will, in turn, be deidentified and provided to the NCAA to develop a database for tracking NIL trends; (3) the NCAA will assist schools in establishing template contracts and recommended contract terms for their athletes’ and their families’ knowledge and use; and (4) the NCAA will develop a comprehensive plan to provide ongoing education and resources to assist the athletes with NIL.

A major question right now is what amount of involvement the schools will be allowed to have with their athletes regarding NIL. Two sets of proposals are being discussed. On December 5, 2023, NCAA president, Charlie Baker, proposed a rule change to all Division I member schools that, if adopted, would allow schools to enter into NIL deals directly with their athletes. In January 2024, the NCAA Division I Council introduced additional proposals that would allow schools to identify and facilitate NIL deals between their athletes and third parties. These January proposals that could be adopted as early as April 2024 would not, however, allow schools to directly

compensate or make NIL deals with their athletes. There is no clear indication of which proposal(s) the NCAA will adopt and/or reject. Either way, if a new rule regarding school involvement is implemented, the NIL landscape could change dramatically.

Finally, a major shift could occur to the entire landscape of college athletics. Within the NCAA President's December 2023 proposals was a new rule that, if adopted, would establish a new Division I subdivision to create its own set of rules for roster size, recruiting, and transfers, among others. If schools voluntarily join this subdivision, they will be required to deposit at least \$30,000 each year into an educational trust fund for at least half of its athletes. Distributions from the trust fund would be subject to Title IX. The NCAA is determined to stay involved in the NIL discussion and to maintain governance over college football. This proposal may be driven by the "Power 5" schools indicating a desire to become self-governed. Hoping to appease this movement, it is likely the NCAA will adopt these rule changes.

It is also likely that there will be federal law governing NIL akin to that of copyrights and trademarks. Bills filed over the past few years have attempted to standardize the patchwork of laws defining the NIL landscape, including: the College Athlete Economic Freedom Act; the Protecting Athletes, Schools, and Sports Act; and, the Student Athlete Level Playing Field Act. There is also an open draft proposal for the College Athletes Protection and Compensation Act. The success of these proposals remains uncertain although every indication points to the eventual adoption of a uniform federal NIL Act.