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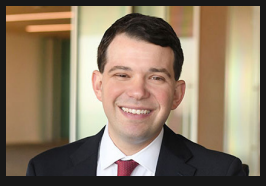

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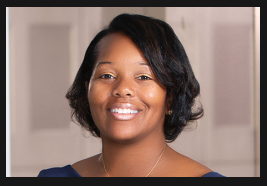

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JUMBO AND NOT SO JUMBO RISKS OF DISPLAYING FAN IMAGES AT SPORTS AND EVENT VENUES

STEVE COSENTINO, CIPP AND ISABELLA CUEVAS

Sports venues have displayed images of individuals attending their events on jumbotrons for decades. This practice continues to thrive largely due to the principle that people do not have an expectation of privacy at public events. Marketing teams have increasingly upped their jumbotron creativity in recent years through popular programs such as the "kiss cam," "karaoke cam," and the more recent trend of comparing attendees to celebrity lookalikes. Although these types of uses have not resulted in significant litigation to date, it is nevertheless important for sports teams and venues alike to exercise caution in how they administer such programs. Of potential concern may be claims concerning the right of publicity, copyright, and other privacy issues.

More than half of the states recognize the right of publicity in some form–either through statutory protections, common law precedents, or both. In the states that recognize these rights, obtaining consent to use an individual's name, image, or likeness can help defend against a publicity rights claim. It is common practice for event tickets to include language that grants the venue (or its partners such as a sports team or event performer) the right to use attendees' images for event-related purposes such as capturing fan enthusiasm. However, this consent may not reasonably extend beyond event-related purposes if the individual's likeness is used for more commercial purposes. For instance, using the individual's likeness for advertising or promotional purposes may be considered "commercial" and thus increase the risk of liability. This is because several of the states' statutes or common law concerning the right of publicity impose liability on commercial use that was done without consent of the individual. Some states that recognize the right of publicity place more weight on commercial uses than others in assessing potential liability. Obtaining consent through event tickets, while prudent practice, becomes less reliable as the use becomes more commercial, particularly given the less than conspicuous consent method. In other words, capturing the moment and fun at the venue presents minimal risk, but using those images in larger publicity campaigns would be problematic.

Outside of the right of publicity, sports event marketers should be cautious of potential copyright infringement claims and false endorsement claims. When selecting an image of a celebrity to use in a celebrity lookalike program, marketers should procure the right to display the image on the jumbotron. Although there are arguments that the use of an image may qualify for the fair use affirmative defense given the "comparative" commentary aspects, the strength of the defense can be compromised if the comparison was used in a commercialized manner. This is analogous to "commercial use" discussed above for right of publicity concerns. Further, using the image in a manner that promotes the team or venue, could cause consumer confusion about the celebrity's endorsement, in potential violation of the false endorsement restriction under the Lanham Act. Ultimately, sports teams and venues should exercise caution in using these images to promote the team or venue, or sell or advertise other products.

Furthermore, in recent years due to the ever-evolving technological landscape, there have been concerns regarding biometric privacy issues. Several national (and international) sports leagues utilize biometric facial scans at their events. When purchasing tickets to events, many venues include a notice, typically in a small typeface. In around 20 states, privacy laws prohibit the processing of sensitive data (including biometric data) without clear, conspicuous consent which allows individuals to opt-in or opt-out. Texas, Illinois and Washington each have their own specific laws that require explicit consent for the use of biometrics.

Recently, a class action lawsuit was filed in the U.S. District Court for the Northern District of Illinois, regarding a sports team's alleged collection of biometric data of game attendees. Although this issue is developing and has yet to be fully litigated, sports teams and venues should nevertheless exercise caution in how they administer programs which use attendees' images–either be it on the jumbotron or in biometric facial scanning. Attendees should be cognizant of the limitations on privacy at public events, especially with facial recognition technologies, smart phones, and other novel technologies.

SPORTSBOOKS OR COMMODITY EXCHANGES? THE RISING LEGAL TENSIONS BETWEEN SPORTS BETTING AND PREDICTION MARKETS

BRETT SHANKS AND ALEX GUNNING

We have all seen the commercials with witty comedians and sports legends extolling how easy it is to pick up your phone and place a bet for your favorite sports team. That is, unless you live in a state where gambling on sports is illegal or highly regulated. Historically, even going back as far as the colonies in pre-revolution America, the legality of sports betting has been left to the states and local authorities to decide, but that may have dramatically changed.

Kalshi, specifically KalshiEX, LLC, came to prevalence a relatively short time ago, when it started offering events-based prediction contracts. To put it simply, users can buy binary "yes" or "no" contracts for specified future events related to politics, economics, culture, the environment and, most recently, sports. At one point, Kalshi users could buy an event contract for whether the Philadelphia Eagles will win the NFC Championship, with the "yes" at writing trading at 24 cents per contract, and the "no" trading at 78 cents. If yes is selected, meaning you purchased that contract at 24 cents, and the Eagles win the NFC, then you would receive one dollar, or a profit of 76 cents (setting aside Kalshi's fees) per contract purchased. If wrong, then you lose your 24 cents. But if the NFL is not for your portfolio, Kalshi also sells contracts for college football, the NBA, golf, soccer, tennis, chess, and whether Cardi B will have a #1 hit this year.

But how has Kalshi sidestepped state gambling authorities? The answer is Article VI of the U.S. Constitution, also known as the Supremacy Clause.

In 2020, Kalshi applied for and was approved by the Commodity Futures Trading Commission (CFTC) as a Designated Contract Maker (DCM). As a DCM, Kalshi is allowed to create and offer "event contracts" regulated by the Commodities Exchange Act (CEA) and to self-certify that such contracts are compliant with CEA and CFTC regulations. The catch is that the CFTC can review and prohibit certain types of event contracts that are contrary to the public interest, including those related to gaming (CFTC Prohibition Rule).

After obtaining DCM status, Kalshi started offering political event contracts, such as whether the Democrats would control the House after the 2024 election. This drew the ire of the Democrat-controlled CFTC, which used its authority to prevent Kalshi from offering political event contracts. Kalshi challenged the CFTC's regulations against it and, in a surprising result, the federal district court in Washington, DC, sided with Kalshi, holding that offering event contracts on politics was allowed under the CEA because the underlying event did not involve "gaming"–it involved politics (*KalshiEX LLC v. CFTC, 2024*). The CFTC initially appealed the ruling but dropped its appeal in May 2025 after the change in administration.

Since January 24, 2025, Kalshi has been offering event contracts based on sports, and the CFTC has taken no action. In response, several states, including Nevada, New Jersey and Maryland, sent cease and desist letters to Kalshi, claiming the company was operating in violation of state law and their respective gaming regulations. In response, Kalshi sued Nevada, New Jersey and Maryland, seeking a declaratory judgment that the federal CEA preempted state gaming laws, and also asked for a preliminary injunction to prevent the states from interfering with Kalshi's event contracts.

In Nevada and New Jersey, federal district courts sided with Kalshi and found the CEA preempted state law and state gaming regulations under field preemption principles inherent in the Supremacy Clause. The Nevada and New Jersey district courts reasoned that, because Kalshi is a DCM under the CEA, its event contracts are governed exclusively by the CEA. As a result, the CFTC is the only entity that can take authoritative action against Kalshi, and it has chosen not to do so (*KalshiEX LLC v. Flaherty, 2025*).

However, the U.S. District Court for the District of Maryland was less impressed with Kalshi's arguments, holding that Kalshi is not entitled to a preliminary injunction against

the state's gaming commission. The Maryland court reasoned that, while the CEA contains some field-preemptive effects, that does not mean Congress intended for the scope of the CEA's preemption to encompass state gambling and sports wagering laws (*KalshiEX LLC v. Martin, 2025*).

The split in the district courts and the CFTC's discretionary decisions raise significant questions about the viability of Kalshi's business model over the long term. Nevertheless, this uncertainty has not stopped other companies, like Sleeper Markets LLC, from attempting to get in the game. However, while the CFTC has allowed Kalshi to enter the world of sports betting, Sleeper Markets recently filed suit against the CFTC and its acting chair, accusing the CFTC of intentionally delaying Sleeper Market's application to register with the CFTC, which would allow it to offer sports event contracts (*Sleeper Markets LLC v. CFTC, et al., 2025*).

For now, the CEA appears to provide a viable vehicle for gaming companies to legally offer sports gambling across the country. Perhaps the days of betting against the house are fading, replaced by trading sports-based contracts with day traders and other speculators?

WHEN SPORTS AND EMPLOYMENT LAW COLLIDE – PLAYBOOK OF CONSIDERATIONS WHEN STARTING AN INVESTIGATION

AMY CONWAY, NAIMA STARKS AND MARSHALL KELNER

Allegations of misconduct are not unique to a certain type of workplace, but when they occur in sports, a larger spotlight and the potential for serious financial and reputational damage often follow. An effective investigation can mitigate or even prevent these consequences. Just in the past few years, we have seen the Washington Commanders (then the Washington Football Team), Dallas Mavericks, Utah Jazz, Penn State University, New England Patriots and many others deal with high-profile investigations. The claims range from sexual harassment and verbal abuse to racism and bribery. This article gives employers in the sports industry practical tips to consider when they receive a complaint and initiate an investigation. These questions should be considered upon learning of a potential issue, as the answers determine which way to proceed.

1. WHO IS THE COMPLAINANT?

Identifying the complainant at the outset is important for determining who might be the right investigator and what laws, policies or rules govern how the investigation will be conducted. In the professional sports context, if a player is the complainant, the investigation will need to be handled in a manner consistent with the applicable collective bargaining agreement. If a coach, administrator or other staff member of a team, league or other sports entity is the complainant, more traditional employment law principles will apply, and the investigation will be handled as it would be in most other industries. If the complainant is some other third party—such as a member of an ownership group, corporate sponsor, vendor or fan—the analysis is further complicated.

Due to the heightened public and media scrutiny on sports organizations, it is especially important to think critically about who is raising concerns before jumping into an investigation. While this is something to keep in mind during all stages of the process, it is most critical when choosing the investigator (question #3) to control the narrative from the outset. If the identity of the complainant becomes public before the process even begins, it could compromise the integrity of the entire investigation.

The 2020-21 Washington Commanders example reveals how quickly a sports investigation can turn into a massive media story. Before the investigation even began, over 100 current and former employees came forward with allegations of workplace misconduct and sexual harassment,

many made publicly in the *Washington Post* and while testifying before Congress. Eventually, the NFL took over and hired an external attorney to conduct the investigation.

2. WHO IS THE ACCUSED?

Knowing who the accused is helps outline the scope of the investigation, but it is also vital in order to make sure that person receives the requisite process outlined in any applicable contract or governing document. As with the complainant, the media attention on sports organizations makes this even more critical. If the media catches wind of who the accused is, a fair investigation becomes more difficult. An accused can also raise counterclaims if they believe the process is compromised or if allegations are defamatory.

In the Commanders case, owner Daniel Snyder was allowed to remain involved in team operations while the investigation was ongoing and there were allegations that he interfered in the process to intimidate witnesses. By contrast, in the 2018 investigation into workplace misconduct and sexual harassment within the Dallas Mavericks organization, owner Mark Cuban's approach was more broadly seen as not interfering and accepting the findings (and he paid $10 million to women's organizations).

3. WHO IS THE INVESTIGATOR?

Who conducts the investigation is another key question. Similar to the other questions, in some instances who conducts the investigation may be governed by policies or agreements. An employee handbook may outline who conducts investigations when there are complaints of employee misconduct. However—*purely hypothetically of course*—if Human Resources would normally investigate a complaint but the complaint involves the CEO and the head of Human Resources captured having a relationship on an arena jumbotron, it would be difficult if not impossible for a Human Resources employee to effectively investigate their boss(es). In other circumstances, typically with complaints that are less serious and do not involve executive-level employees, internal Human Resources is appropriate as an investigator. Keep in mind, however, that investigations conducted by internal Human Resources are generally not subject to attorney/client privilege, leaving the possibility that information related to the investigation could become public.

For more complex investigations and those involving high-level employees or non-employees (team ownership), it is typically advisable for an outside investigator—likely an attorney—to take the lead, particularly if the complaint could lead to subsequent litigation. Investigations conducted by attorneys for purposes of obtaining legal advice can be protected from disclosure by the attorney/client privilege. It is important to note that while an investigation report can be privileged in this context, the underlying facts are not. Further, an organization may choose to waive privilege on an attorney-led investigation if necessary to defend its actions in litigation.

Other factors to consider in investigator selection are that the investigator must be neutral (just like a good referee or umpire), free from conflicts of interest, and ideally have an expertise in sports regulations and employment law. The investigator will assess the credibility and potential motives of the witnesses, and must be comfortable making judgment calls. If the investigation is challenged, the investigator's qualifications, independence, and process will be scrutinized. For that reason, the investigator should understand the environment they are investigating. At the same time, the investigator should not be so ingrained in the environment being investigated that it would be easy for someone challenging the investigation to argue that the investigator was too embedded in the organization to be neutral.

The Commanders, Mavericks, and Jazz (2021) all chose to hire outside law firms in order to ensure independence and credibility. In the New England Patriots 2015 "Deflategate" scandal, the NFL was the client and hired external investigators. In the 2011-12 Penn State Jerry Sandusky child abuse scandal, the university commissioned the Freeh Report, led by former FBI Director Louis Freeh.

4. WHO IS THE CLIENT?

Who the client is, comes into play particularly when an outside law firm or other entity is conducting the investigation. Sometimes, this question is straightforward and involves only one entity: an attorney represents a team when––– an employee in the team's front office raises concerns about their

manager, and the manager is also an employee. But other times the parties can be complex, and it is imperative for an attorney conducting an investigation to be clear about who the attorney represents. The client could also be a sports organization or governing body. Most importantly, who the client is determines who holds legal privilege over the investigation's findings and which conversations are confidential. The client also determines the scope of the investigation, receives the final report, and is responsible for acting on the investigation's findings.

Although the Commanders and Patriots were the organizations being investigated, the NFL was actually the client in both cases. With the Commanders, the NFL decided to receive only an oral briefing of attorney Beth Wilkinson's findings and refused to release a written report, which generated substantial criticism. Commissioner Roger Goodell cited promises of confidentiality to over 150 witnesses as part of the reason the report was not released. On the other hand, the NFL did release a written report after the "Deflategate" investigation.

The Mavericks, Jazz, and Penn State were all the clients in their respective investigations. Therefore, they were responsible for choosing which external law firm to hire (if any), deciding whether that firm should produce a written report, and critically, implementing changes based on the findings.

CONCLUSION

One common theme demonstrated by these examples discussed is that they all received intense media scrutiny. Taking allegations seriously from the start and having a clear plan to address them is a good lesson for sports employers to take away from these high-profile investigations.

THE LINE UP

AALOK SHARMA AND MARSHALL KELNER

01 **$280 Million.** An Arizona developer and his son were both sentenced to prison in September for using forged documents and inflated revenue projections to deceive investors into investing $280 million into a Phoenix area sports park. Former Legacy Sports USA LLC President Randy Miller received a six-year sentence, while his son and former company CEO Chad Miller received five years. The Millers convinced investors to buy over a quarter of a billion dollars in municipal bonds to finance Legacy Sports Park, now known as Arizona Athletic Grounds, in Mesa, Arizona. The facility is roughly 300 acres and contains multiple stadiums and 158 sports fields and courts. The Millers both pled guilty to securities fraud and aggravated identity theft in May. Prosecutors said that they fabricated letters of intent and "pre-contracts" in order to convince investors that sports organizations had made binding commitments to use Legacy Park. After the project encountered financial problems, the Millers did not make a single bond payment, and bondholders recovered less than 1% of their total investment.

02 **1993.** Colorado Rockies fan Timothy Roeckel filed a complaint in May over a 2023 incident when he was hit in the right eye and side of the face by a foul ball while sitting in a suite at Coors Field. Roeckel claimed that he suffered his injury because the Rockies have performed so poorly that fans, like Roeckel, do not pay attention to the game. The Rockies record in 2023 was 59-103, 61-101 in 2024 and 43-119 in 2025. For other reasons, Roeckel claimed that he suffered injuries because it was impossible to see the foul ball coming from where he was sitting in the suite. Roeckel's complaint states that the Rockies violated the Colorado Baseball Spectator Safety Act of 1993 and provided inadequate netting to protect fans. Roeckel alleges that he suffered "catastrophic and permanent injuries."

03 **$800 MILLION.** Enhanced US LLC, the organizer of sporting events that allow athletes to use performance-enhancing drugs (PEDs), requested that a federal court strike down a rule banning athletes, coaches and support staff who participate in Enhanced's events. According to the rules by several governing bodies, including USA Swimming and the World Anti-Doping Agency, anyone who supports, endorses or participates in sporting events that promote doping is subject to a lifetime ban. Enhanced alleges that the promulgated rule violates antitrust laws. Enhanced is seeking over $800 million in damages and an injunction to prevent enforcement of the rule. The Enhanced Games, the organization's first major competition, is set for May 2026 in Las Vegas and includes swimming, track and weightlifting.

04 **$100 MILLION.** The NFL and Commissioner Roger Goodell petitioned the Nevada Supreme Court to reconsider a prior decision to keep a lawsuit filed by former Las Vegas Raiders Head Coach Jon Gruden out of arbitration. Gruden filed his lawsuit in November 2021 and accused the NFL of character assassination for failing to prevent the leak of emails that Gruden alleged damaged his reputation. After the emails were leaked, Gruden resigned from the Raiders, which caused him to forfeit the remaining money owed under his contract. The contract contained an arbitration clause, but in a split decision in August, the majority of the Nevada Supreme Court held that the contract was one-sided and unconscionable because Gruden was forced to accept the NFL's constitution as part of the negotiation, which is where the arbitration clause was located. In its petition for a rehearing, the NFL argued that Gruden was a sophisticated party with experience in the industry, worth millions, and the Court's decision would have "destabilizing consequences for real-world negotiations" across a variety of industries. All contracts where one party insists on a single provision could be rendered void. To that point, the NFL stressed that "[p]rocedural unconscionability turns on real-world power imbalances and unfair surprise, rather than the negotiability of a particular provision."

05 **$16,000.** The NCAA has permanently banned three men's college basketball players for their "coordinated effort" to bet on their own games and each other's games. The violations by Mykell Robinson and Jalen Weaver from Fresno State University, and Steven Vasquez from San Jose State University occurred during the 2024-25 season. According to the NCAA, the investigation was prompted by suspicious prop bets placed on Robinson's performance at the January 7, 2025 Fresno State game against Colorado State. Robinson, Vasquez and an unidentified third party bet a combined $2,200 on Robinson's performance during the game and collected nearly $16,000. Robinson purposely underperformed so that his scored points, rebounds and successful three-point shots would all be lower than anticipated. Vasquez was a former roommate of Robinson, and the two discussed the plan for Robinson to underperform over text. Weaver also admitted to betting on himself and Robinson.

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