THE ENTERTAINMENT AND SPORTS LAWYER

Publication of the ABA Forum on the Entertainment and Sports Industries
Volume 10, Number 4, Winter 1993

The NFL's Drug-Testing Policies
Are They Constitutional?

DANIEL R. GREGUS

Some professional sports teams maintain such a close relationship with the cities in which they are located that, it might be argued, their implementation of the National Football League's Substance Abuse Policies (NFL Policies) is subject to constitutional scrutiny.[1] In that light, the drug testing procedures recommended by the NFL are subject to the reasonableness requirements of the Fourth and Fourteenth Amendments of the United States Constitution.[2] This article explores the merits of treating the NFL Policies in this manner.

The NFL Policies may not be reasonable. First, they are not based on any degree of individualized suspicion, and second, where they are, they are overly broad. If the NFL Policies were determined to be unconstitutional, an athlete who refuses to submit to such a drug test would be constitutionally protected against any retaliation by the club as a result of that

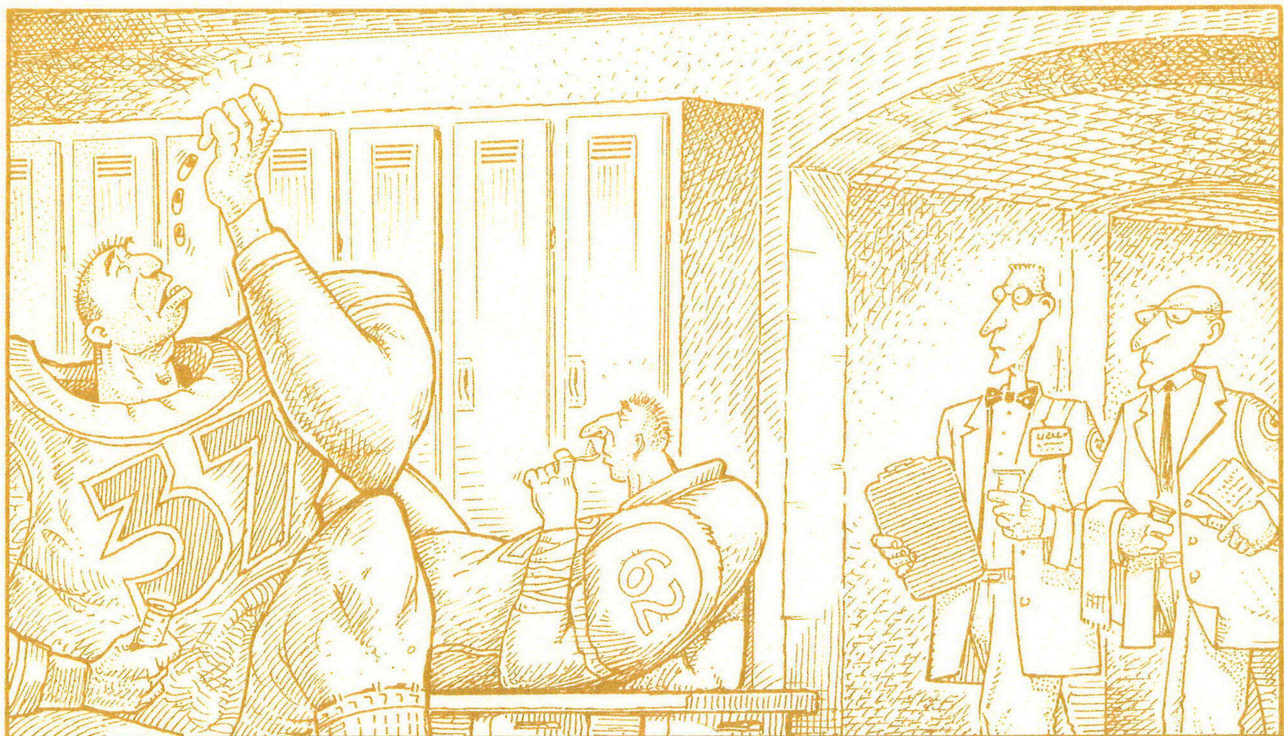

Illustration by Richard Laurent

Conflicts in the Entertainment Industry? . . . Not!

EDWIN F. McPHERSON

So what's all this about "conflicts of interest" in the entertainment industry? Just a few years ago the only conflict in this industry was when an actor on a series couldn't do a feature because of his series commitments or when a lead singer-turned-solo artist couldn't do a tour with the band because of his or her solo commitments.

Today, it's different; and it's all coming down on lawyers. One entertainment attorney, who requested anonymity, was recently quoted in the *Hollywood Reporter* as claiming that the only reason for which many potential clients come to the more established entertainment firms is *because* of the firm's inherent conflicts (and therefore connections), not in spite of them.

For instance, a hypothetical, prominent entertainment lawyer represents a powerful, successful producer. He also represents a powerful, successful actor and a powerful, successful actress. He puts them together, like an agent would package a deal, and the combination ensures a sure-fire, blockbuster hit, thus making the producer, the actor, the actress, and of course the attorney even more powerful and successful. It is a formula that is destined for success.

Even more obvious is the motivation behind the less powerful, less successful client, who also wants to be with our hypothetical lawyer. He could go with a younger, hungrier lawyer, who would probably try a little harder and pay a little more attention to him—and the lawyer would work with the agent, and negotiate the best deals he could for the actor—or he could go with our first lawyer, who has the right producer or the right director, and who can package an entire film just with his own clients.

Certainly, there is a risk that, at least for a small, less powerful artist, a lawyer who is tied to a studio or a label will not use his clout with the label to promote that particular artist but will reserve his heavy ammunition for his better-known artists. However, this is going to be a problem whether or not the attorney also represents the label or merely has a relationship with one. Moreover, the artist (or certainly the artist's personal manager) is aware of this potential problem but presumably goes with the lawyer because he or she is still perceived as the best lawyer for that particular artist's career.

Oddly enough, nobody has complained about these "conflicts" until very recently. Only now, in a time when the answer to everyone's recession woes seems to be "let's sue the lawyers" (after they try the more common solution of "let's not pay the lawyers"), do they even think of the word "conflict." Unfortunately, they usually do not even understand the significance of the word until they see another lawyer—usually not associated with the entertainment industry—who generally sees these issues as black and white, and who has no real concept of the realities of this industry.

Don't get me wrong; as a litigator I am acutely aware of conflicts of interest and the potential effects that such conflicts may have on the outcome of a case. Insurance litigators have to deal with *Cumis*,[1] under which insurance companies have to hire counsel of the insured's choice because the carrier's panel counsel might sell the insured client down the river because of his allegiances to the insurance company—and this *does* make sense (until it gets abusive *à la* Lynn Boyd Stites and the other Alliance indictments).

Also as a litigator, I have *never* represented both sides of a lawsuit, and I suspect that I never will. Why? Because I would hear confidential, privileged communications from each that the law (and the Code of Professional Responsibility) presumes I would use against one client for the benefit of the other, as in the aforementioned insurance situation. But, more important, because I cannot then effectively represent either side *against* the other.

But the key word here is "against." In an entertainment context is the entertainment attorney (who, unlike a litigator, is acting much less as *legal* counsel and much more as a negotiator) really representing an actor "against" a producer or a recording artist "against" a label? Is there really a conflict of interest in representing both? I am not so sure. An entertainment attorney *negotiates* on behalf of an actor–client presumably aiming for the amount of money, per-

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centage of profits, and the like, that the client wants. He or she is a deal maker.

The entertainment attorney who represents both sides is not generally going to receive confidential information from the client that could benefit his or her other client. In addition, as a general rule, whether the attorney represents just the actor or both the actor and the producer, the producer is not going to pay the actor any more than the producer feels that he or she can afford or any more than the producer feels the actor is worth in terms of box office draw. Similarly, the actor is not going to accept less than he (or his agent) thinks he is worth.

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Moreover, in many cases, when the attorney represents both the studio and the actor or both the label and the artist, the attorney will negotiate essentially on behalf of the actor or artist, and a business affairs representative or higher-ranking representative will negotiate on behalf of the studio or label. In fact, the client himself or his agent may negotiate the major deal points and leave only the paperwork to the attorney.

I was involved in one case last year in which a *major* entertainment firm was sued by the former wife of the line producer of several late seventies and early eighties blockbuster movies. One of the primary allegations of the complaint was that the firm had represented both her former husband and the production entity of the films, which allegedly constituted a conflict of interest. In truth, the firm did represent both parties, but the fact was that the two clients entirely negotiated their own deal, which the firm merely papered, and both clients made millions.

This year, another major entertainment firm got sued by a former client for representing both sides of a particular deal. Only months later, the same firm was sued by a former partner of the firm, who claims that he was terminated from the firm because he objected to the firm's practice of packaging television shows representing many sides of a deal.

In his recent suit against New York music attorney Allen Grubman, Billy Joel alleges that Grubman never told him that he (Grubman) also represented CBS Records, Joel's record company, at the same time he was representing Joel. The suit has received tremendous media attention, particularly in the *Hollywood Reporter.* At least according to Grubman's attorneys in the case, however this supposed conflict affected Joel, it got guarantees totaling $50 million for Joel, a huge amount of money even for the music industry and a sum about which most clients would not generally complain.

Grubman's response has been essentially that the suit merely exemplifies the proclivity of lawyer-bashing that is going around which is often employed to cover up other people's mistakes (in this case, Joel's personal manager). Grubman's attorneys go on to state that not only did Grubman not start representing CBS until long after he commenced representation of Joel and, in fact, long after Grubman negotiated Joel's recording agreement—and therefore there was no conflict at all—but also that Grubman only represented two divisions of CBS: manufacturing and the record club, neither of which, according to Grubman, had any potential or actual impact whatsoever on Joel or his recording agreements.

Clients like Billy Joel like to hold their entertainment lawyers to the same conflict standards as litigation lawyers and other lawyers but expect their lawyers to play a much greater role than would other lawyers. For instance, one of the allegations in the Joel–Grubman suit is that Grubman should have somehow realized that Joel's then personal manager and brother-in-law, Frank Weber, was stealing money from him and then had some duty to disclose this suspicion to Joel because Joel, at one point, allegedly could not afford to purchase a second house on Long Island. It is difficult to imagine that a non-entertainment attorney would be charged with the responsibility of investigating the reasons for which his or her client was broke or somehow ensuring that the client would not go broke.

I do not intend to imply that there is no room for abuse. In another case in which I was involved, Brian Wilson, who penned most of the Beach Boys' tremendous hits in the 1960s, sued his former publishing company and his music lawyer, alleging that his father had sold all of his (Wilson's) publishing to the publisher for a ridiculously low amount, which was then squandered by the father.

Wilson also alleged that his and other Beach Boys' signatures were forged on the deal and that he knew nothing about the sale until years later, when his attorney told him that it was a "done deal," that there was nothing to worry about, and that there was nothing that he could do about the sale anyway. Wilson also alleged that the same attorney had represented both Wilson *and* the publishing company in the deal, without bothering to mention to Wilson that the sale was taking place or that he was representing both sides. The case was reportedly settled prior to trial for an eight-figure amount.

Although clients most certainly must be protected from such gross abuses of the attorney–client rela-

tionship, no such protection is necessary or even warranted in the normal entertainment transaction. One of my problems with holding entertainment transactional attorneys to litigation standards is that disgruntled clients (and now, apparently, disgruntled former partners) fail to realize, often times, a better

Often times, a better deal can be negotiated because of the attorney's relationship with the label or the studio.

deal can be negotiated *because* of the attorney's relationship with the label or the studio. Another problem is that, in many cases, requiring a firm to send a conflict letter to both clients is clearly form over substance because, in general, a firm's representation of a particular studio, or production company, or record label is rarely a big secret.

For instance, it is certainly no secret in the industry that Mickey Rudin represents the Warner labels, or that Payson Wolf represents Capitol, or that Skip Brittenham represents Ted Field and Interscope, or that Peter Dekom represented M.C.E.G., or that Henry Holmes represents New Line, or that a Manatt, Phelps senior music partner now heads Hollywood Records, or that a Bloom, Dekom founding partner now heads Universal, or that a former Ziffren music partner just moved to Epic.

I will posit one final thought with respect to conflicts of interest with entertainment attorneys. What is the logical extension of some of these conflict malpractice cases? Where are we going with this? If an attorney's representation of both talent and studio/label is a conflict of interest, what else might be? Representation of two actors in a picture? What if one actor is a gross profit participant, which, by definition, will take money from the second actor, who might be only a net participant?

What about representing both an artist and her record producer? What about representing all of the members of a band? Do these situations really present a conflict? The entertainment industry is far too small to expect entertainment transactional attorneys not to represent more than one participant in a film, more than one player on a television series, more than one member of a band, or more than one participant on an album.

Another major concern: If the simultaneous representation of a studio or a label and an actor or a musician is a conflict of interest, what about a situation in which the attorney who represents the artist does not represent the label but would like to? One could argue that this presents a greater conflict of interest since a hungry lawyer may do more to bend over backwards for a *potential* label client then for a label that is already a client. In this case, must the attorney send a conflict letter to the client stating that he or she *would like to* represent the label, or *might* represent the label in the future, and therefore sell them out?

Perhaps the scariest prospect of all—to entertainment lawyers and other practitioners alike—is the recent discussion indicating that a written conflict waiver may not be sufficient to insulate an attorney from liability for such a conflict of interest. With the foregoing potential conflicts in mind, such a standard could virtually eliminate the entire legal/entertainment industry, requiring each entertainment attorney essentially to choose one client and only one client—a ridiculous prospect at best.

Again, this all presupposes that there are no present disputes between the two clients, in which case an actual conflict does arise. In that event, the entertainment attorney—and many of the more powerful ones do not have litigation departments (perhaps for this very reason)—should advise each client separately to consult a litigator, who will only represent one of them and therefore not have the same conflict problems.

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1. San Diego Federal Credit Union v. Cumis Insurance Society, Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (Cal. 1984).

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