

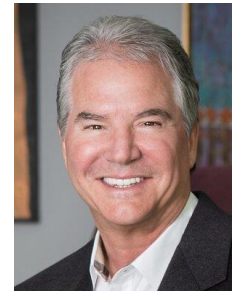
NCAA, Congress Should Do More To Guide Athlete Publicity

By **Frank Darras** (March 29, 2022)

Adidas recently announced a new name, image and likeness initiative. It's a new network that will be available to athletes in 109 NCAA Division I schools and could create compensation for roughly 50,000 collegiate athletes.

This is another major step in the ever-changing world of college sports, where athletes can now openly receive compensation.

For nearly a century, the NCAA prohibited college athletes from earning compensation by licensing their names, images and likenesses, or NIL. In June 2021, the NCAA adopted a uniform interim policy suspending this longtime NIL rule.



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There are bills currently being circulated in Congress that address these and other NIL issues, as well as at the state level to narrow bills previously passed.

The most promising federal bill, for example, was read twice to Congress since its introduction in 2021 by Sens. Chris Murphy, D-Ct., and Bernie Sanders, I-Vt. The College Athlete Right to Organize Act would allow some college athletes to unionize and classify as employees. The act was also introduced to the U.S. House of Representatives, but it has not yet been put to vote. Several other federal proposals have been introduced that represent both sides of the aisle.

Furthermore, 27 states have adopted student-athlete NIL laws, and several more have pending or proposed legislation. Oregon, for example, knocked one out of the park this month when it passed S.B. 1505. The new state law requires producers of team jerseys, video games and trading cards to pay royalties to students whose NIL is used.

Legislation is being proposed on the heels of the landmark 2021 decision in *American Athletic Conference v. Alston*, in which the U.S. Supreme Court unanimously sided with former college players in a dispute with the NCAA about compensation.

Meaningful change is being enacted for the first time in decades, affording college athletes the well-earned opportunity to receive remuneration for their NIL. I had strongly advocated for these protections for years, having represented clients whose promising sports careers were disrupted or derailed by injuries or career-ending sickness or injury, with some incurring hundreds of thousands in medical treatment. NIL endorsements can protect their financial future and wellbeing.

The Supreme Court's recent ruling was a giant step in the right direction but also left several hurdles ahead of us; ultimately *Alston* feels like a clutch playoff win rather than a championship victory.

By exploring some plausible scenarios, I discuss how NIL laws should inspire a fresh perspective on contract drafting and negotiations for college players. I will also illustrate how a federal standard and law for NIL would benefit all stakeholders in sports at the college and nonprofessional levels.

Name, Image and Likeness in New Contracts

Twenty-eight U.S. states have passed NIL bills (although Alabama recently repealed its law) and laws with various effective dates and provisions largely inspired by California's Fair Pay to Play Act. Several more states have laws currently in the works on these subjects. Among many provocative issues, the state laws address:

- Acceptable methods of payment and endorsement;
- Employment status; and
- NIL earnings and taxation issues.

So what does this mean for attorneys thinking about or currently representing a college athlete?

From the outset, how you draft NIL contracts for the college players takes careful preparation. Your clients may be minors — whether they are collegiate or perhaps even high school phenoms who are still carpooled to school but soon will be choosing colleges — and that could mean narrowly focused contract and endorsement language.

These players likely will not have very much business experience and may need certain permissions and co-signatures from their parents or legal guardians. This extends also to contractual agreements with their agents.

When you meet with the client, explain how and why his or her parents or guardian will need to be involved in the discussion and for how long. This is the chance to demonstrate trustworthiness among the family. There is a long history of financial and legal exploitation in sports, and, with your actions and honesty, you can show you are not looking to take advantage of a talented young athlete.

Setting the right tone is key, especially if your relationship lasts years, and you have to draft new agreements when the clients become legal adults and when encountering the more over-the-top elements of the sports business and endorsements.

Aligning the College Player With the Digital Presence

This is a brave new world. While men's sports have historically received more attention, new NIL laws offer a novel and potentially level playing field for men and women to earn. We can thank social media for giving female athletes the boost they needed to earn similar NIL benefits.

A study conducted in 2020 by AthleticDirectorU.com and the marketing firm Navigate found that 13 of the 25 college athletes with the greatest endorsement potential were women.[1]

Further, our female college athletes stand to earn annual endorsements as high as \$466,000. Athletes such as University of Connecticut basketball star Azzi Fudd, University of California Los Angeles soccer player Reilyn Turner and Aquinas College volleyball star Chloe Mitchell have signed endorsement deals with highly recognizable brands and companies.

Each athlete agreed to different terms, especially with regard to his or her off-the-field conduct and appearance. By appearance, I don't mean how they look but what sort of branding they are — or are not — allowed to include with their messaging.

Let's assume the start of best-case scenario:

Jane is a point guard and a rising star for the basketball team from a university based in Queens, New York, and she has more than 100,000 followers on Instagram. In an exclusive NIL endorsement, a popular local restaurant will pay Jane \$20,000 per year, provided she posts two shout-outs per week. Sounds simple enough.

Before anyone signs on the dotted line, Jane's attorney must establish and clear up some fine points. Chief among the details is whether Jane can be wearing her team's jersey or brandishing her school's logo when she's on screen. Wearing a school's logo requires an agreement with the school, and the terms must be clearly communicated to the player and the restaurant.

It is easy to imagine any player, especially a college athlete just using a phone, unwittingly violating the terms of a NIL agreement by encouraging their fans to pick up some local mozzarella sticks. The NIL agreement is with the player and not the school, so identifying — and avoiding — any conflict is the key to a successful sponsorship.

Remember, just because the NCAA is allowing NIL partnerships does not mean it has abandoned its principles altogether. The players and the sponsors must abide by the NCAA rules governing NIL as well as any of their own state rules or college guidelines. Lay out for your client why this shifting landscape pertains to on- and off-field appearances and how they interconnect. Their conduct and appearance off the field and on social media, for example, can have positive and/or negative impact with in-stadium attendance.

Ultimately, it behooves the attorney negotiating the contract to examine whether the school has taken prior action against students and athletes who have used their intellectual property without proper authorization or permission.

How the NCAA Can Embrace NIL

Since there is currently no standard NIL contract for appearances, autographs, brand partnerships, social media channels, memorabilia or personal appearances, our collegiate athletes need guidelines, counsel and clear direction.

Hopefully the NCAA will quickly enhance and broaden entrepreneurial class availability, teach business and finance fundamentals, and enrich the respect for reputation managers, because this new generation of athletes' currency is its character and integrity.

Our collegiate athletes will need help deciphering legal contracts, avoiding breach of contract and trademark issues, creating the proper business entities and filing appropriate tax documents as they get compensated for their goods, services and appearances. Learning about fee structures for their work and about investment philosophy are all within the NCAA's capability and educational wheelhouse.

After all, the NCAA has written and enforced the rules and has an army of lawyers and compliance personnel already in place to help educate, facilitate and assist our athletes.

The Case for a Federal Framework, Now

In the absence of a federal framework, there are additional questions that sports lawyers need to contemplate as they draft clients' NIL contracts. From practical challenges to current compliance issues, they should consider:

- The definition of amateur status;

- Antitrust exemptions;
- Whether a school can trumpet its players' NIL deals;
- Whether scholarships will be taxable if athletes are earning NIL compensation;
- Who will enforce booster, pay-for-play, and pay-to-come violations; and
- Whether college athletes will get a seat at the federal level with a voting voice on NIL issues, laws and rules.

There are currently bills being circulated in Congress that address these and other NIL issues. There are also bills circulating at the state level to narrow bills previously passed. Federal guidance would snuff out the checkerboard mix-and-match state laws and college-by-college written guidelines with a uniform code, bill or act that should also level the recruiting playing field.

For the first time in 30 years, the Supreme Court spoke out loudly on college sports with a unanimous 9-0 ruling in *Alston*. It is clearly time for a federal bill that could also eliminate the confusion left in its wake.

My college athlete clients have carried the burden and borne the career-ending injuries, yet they have been the uncompensated, unpaid workforce of the NCAA for more than a century. Their fundamental economic rights have been misappropriated for decades and have finally come home.

Now college athletes need legal protections that can better ensure their finances and potential path to professional levels. Fortunately, with the earning opportunity of NIL, our athletes can now buy career-ending disability coverage and drop-in draft slot protection to protect against sickness and career-ending accidents.

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[1] <https://athleticdirector.uconn.edu/articles/how-much-is-nil-really-worth-to-student-athletes/>.