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## Sporting Judgment

### Athletes face some legal risks with social networking

By Timothy L. Epstein

It cannot be denied that social networking websites have become both legitimate media sources and essential communication tools. Facebook has about 750 million users and Twitter sees over one billion "tweets" posted each week. Perhaps most conspicuous among these users are athletes. Often, social media use by athletes can be both useful and entertaining. Just recently, Minnesota Timberwolves forward Kevin Love demonstrated this dual benefit when he broke the news of the team's hiring of former Houston Rockets coach Rick Adelman with the witty and informative tweet, "Houston, we have a coach."

While many athletes maintain a positive Internet profile, inevitably this open forum gets abused and athletes find themselves in hot water. For sports lawyers, it is essential to educate clients as to the potential legal risks and guide them to avoid these pitfalls.

At the professional level, athletes should be made aware that imprudent use of social media can have an adverse effect on their earning potential. Professional sports leagues, as private employers, have broad discretion to regulate athletes' social media usage. The NFL bans players from tweeting during games and imposes substantial fines as great as \$25,000. The NHL recently took regulation a step further and banned players from using Facebook or Twitter at all on game days. Athletes must be cognizant of not only what they say, but when.

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Sometimes, the consequences of a questionable posting extend beyond the proverbial slap on the wrist. Pittsburgh Steelers running back Rashard Mendenhall found this out the hard way. Following the death of Osama bin Laden, Mendenhall posted a series of controversial tweets on his Twitter account, one of which suggested that the United States may have played a role in the demolition of the World Trade Center towers. In response, the athletic apparel company Champion promptly terminated Mendenhall's endorsement contract stating that his comments were, "inconsistent with the values of the Champion brand and with which we strongly disagreed." As representatives and advisors to professional athletes, sports lawyers bear the burden of protecting athletes' reputations and checkbooks.

Interestingly, Mendenhall decided to challenge the legality of his termination on the grounds that Champion violated his First Amendment right to free speech. Mendenhall claims that he did not forfeit his right to free speech upon signing with Champion. He is unlikely to prevail, however. Endorsement contracts often contain valid morality clauses that require endorsers to act in accordance with a standard commensurate with the image a company projects, and Champion did not actually restrict Mendenhall's First Amendment rights. It simply chose to disassociate with the views in which he expressed.

The legal ramifications of reckless social networking at the collegiate level are potentially more grievous. The NCAA has permitted its member institutions to construct social media policies as each sees fit. Some schools, such as Penn State University, do not undertake to limit student-athletes' social networking rights in any way. Most schools, however, have begun to monitor social media use by student-athletes, which the NCAA has

implicitly recommended in recent enforcement actions. This oversight greatly increases the chance that a college athlete could be punished for inappropriate content posted on a social networking site. The repercussions for a collegiate student-athlete are severe because, unlike contractually bound professional athletes protected by players' unions, student-athletes can be suspended or dismissed for social media improprieties. Mississippi State University basketball coach Rick Stansbury recently kicked a player off the team for what was referred to as "repeated actions deemed detrimental to the team" after the player made several profane postings on Twitter. Sports lawyers cannot serve student-athletes in a representative capacity due to NCAA amateurism regulations, but they can educate and inform them as to the long-term consequences of their actions. Student-athletes dismissed for impetuous postings may be jeopardizing both their professional careers by forfeiting the right to showcase skills to professional scouts at the collegiate level, as well as their scholarships.

Certainly institutions have the right to discipline student-athletes for improprieties exposed on Facebook or Twitter, and student-athletes must tread lightly, but they should also be cognizant that they too have rights. A student-athlete could conceivably bring a First Amendment suit against a school for punishment stemming from social media usage if the institution was a public school and the restriction was not a product of a contractual agreement between the university and the student. The crux of a potential First Amendment claim against a university would likely center upon the fact that its monitoring policies are overbroad. That is, the monitoring schemes that seek to prohibit unprotected speech unnecessarily proscribe protected speech as well.

A student-athlete could also raise an alternative constitutional claim based on the Fourth Amendment's prohibition of illegal search and seizure. A Fourth Amendment claim would also require that the search be conducted by a public institution and that the student-athlete was not contractually bound. A court analyzing a student-athlete's Fourth Amendment claim would likely analyze three factors: the nature of the privacy interest asserted, the character of the intrusion complained of, and the nature and immediacy of the governmental concern. See, *Veronia School District 47J v. Acton*, 515 U.S. 646, 663 (1995). Ultimately, a court would likely rule that the school's interest in protecting its student-athletes was a valid governmental concern, but a good faith Fourth Amendment claim could be asserted. Sports lawyers must protect student-athletes not only from themselves, but from the universities as well.

In the high school context, student-athletes must be wary of the ramifications of their social media use as schools are much more willing, and have been afforded greater leeway by the courts, to punish students for their online activity, even when such activity takes place off campus. It is rather commonplace for student-athletes to be punished for their Facebook posts. For instance, in Luxemburg, Wis., five student-athletes were suspended for half an athletic season when photos of them drinking made their way to the high school principal. The punishments were

justified as a violation of the school's code of conduct. In Melrose, Mass., no fewer than 11 student-athletes were suspended in May after the school received photographs of students in possession of alcohol and/or tobacco. There are countless other examples of student-athletes being punished under similar circumstances.

Have schools overstepped their bounds in punishing students for out-of-school conduct? In many states, schools avoid this question by having student-athletes sign pledges not to drink alcohol, which would provide the authority to punish students for a violation of said policy. Absent an express agreement that would subject students to punishment for off-campus conduct, a court would likely defer to a school's punishing of student-athletes on the basis of a diminished expectation of privacy that comes with participation in extracurricular activities. See *Board of Ed. Of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002), where the Supreme Court noted: "Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."

The Supreme Court has yet to address a case involving students being punished for truly off-campus conduct. Where the court has considered free speech claims involving high school students for in-school speech, the analysis has centered

on whether the speech created a risk of substantial disruption within the school environment. Given that the nexus between the administration of order at a school and a student's online conduct is more attenuated than the cases considered by the Supreme Court, it is likely that a new standard will need to be formulated in addressing high school students' online speech.

Social media sites offer many benefits to athletes at all levels of competition, from the professional athlete with multi-million dollar endorsement deals to the JV bench warmer just looking to get on the field. With said benefits come numerous hazards for the unwary, however. Privacy on social media sites is far from iron-clad and is often illusory, and where athletes choose to make their online activity public, the scope of the online networks such as Facebook and Twitter greatly enhance the visibility of such postings.

It may seem a matter of common sense that one should exercise extreme caution before posting less-than-flattering or controversial material on these sites, but the preponderance of cases involving apparently unwitting athletes being punished for their online sins goes to show that common sense doesn't always guide these decisions. What can be said for all social media users has particular cogency for athletes at all levels: Be careful what you put on Facebook. From a practitioner's standpoint, this is perhaps the best advice one can give to an athlete client.