

PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 24: Marketing Representation Agreements: What You Need to Know! | Jan. 20, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Thank you so much for tuning into the protecting your possibilities podcast. I'm your host, Luke Fedlam. Excited to have another deep dive into a technical area of law. And I'll get into that in a second.

But first, let me say two things. Number one, thank you so much for checking out this podcast. Over the last kind of six months or so your support, you're listening, you're sharing your rating, you're providing me with feedback and comments has really continued to shape what the protecting your possibilities podcast looks like. So thank you so much for doing that. Please do continue, keep me posted on topics that are of interest to you. And please do continue to share and like and rate and all that good stuff for our podcast, it really does make an impact. And so thank you so much for that.

Secondly, before we get into the details of the day, this is the week in which we honor Dr. Martin Luther King, Jr. And I just thought I wanted to take a quick second to recognize that fact at the beginning of this podcast. Because I think that at a time where we are a country, where our communities are challenged in so many different ways, I think the words of Dr. King kind of echo throughout time, and just wanted to share with you some words that are impactful to me, that are some of the more motivating, promising words that Dr. King has said. And I know that there are so many different quotes that we can pull from in so many different ways. But these were remarks that Dr. King made at the Southern Christian Leadership Conference back in 1967. This is about maybe five or six months before he was assassinated. And I just felt like with all that's going on right now in our country and in our communities, as I said that these are important words to hear. So let me share them with you. And I quote,

"When our days become dreary, with low hovering clouds of despair, and when our nights become darker than a 1,000 midnights let us remember that there is a creative force in this universe working to pull down the gigantic mountains of evil. A power that is able to make a way out of no way and transform dark yesterdays into bright tomorrows. Let us realize that the arc of the moral universe is long, but it bends towards justice."

I think I think that's important to remember that our dark yesterdays can turn into bright tomorrows but it takes our work to make that happen. So just a quick word for the day.

But let's get into now the topic at hand. And I wanted to share some thoughts as it relates to marketing representation agreements or marketing agent agreements. Now I've had a lot of comments from people around this topic, in particular, and this is kind of the right time. Because as we have on the football side athletes who are transitioning from college into the pros, this is the time in which they're signing agreements with agents, they're signing agreements with marketing agents, if they're looking for someone other than their player agent to do their marketing for them.

And so this is a big topic. It's also a big topic, because in the name, image and likeness environment, there will be student athletes who will have the opportunity to sign agreements with marketing reps or marketing agents. And so this idea of spending some time to actually go through a marketing representation agreement, I think makes sense. And then what I'll do is share with you some of the highlights and things to think about when signing these agreements. And to be honest, those of you who I know listen to the podcast, who are entrepreneurs, who are business owners, and who maybe engage different agencies or marketing people to handle your marketing because you outsource it. Hopefully there's some good information in here for you, as well.

So let's just start let's break this down. But one of the first things that you see when you open an agreement or you open a contract in really just about any kind of contract is you'll see what's called the preamble. And the preamble is usually that first part of the contract. And it says, you know, this marketing representation agreement, dated on whatever the date is, is by in between and it lists the parties, you know, it sets forth the effective date, things like that. It's kind of the introduction if you will to the contract. And it's important though, to recognize a few pieces within this preamble. This is important because this tells you who the parties are to the agreement.

So if you're the person that's receiving the services, so if you're the athlete, if you're the business owner, if you're that, you know, student athlete who is looking to engage someone when the time comes, and that's another conversation for another podcast episode. But if you're that person who's receiving the services that you really want to understand, who is the party that's providing those services to you.

So sometimes it might be an individual, sometimes it might be an entity or a company that's doing that, when it's a company, there's a couple of things that you want to do. First, you want to make sure that that company is actually an active and engaged company. So one of the things that I will do is always look up that company, in whatever state they're registered to see if they're active, or inactive with the Secretary of State for that particular state. And that's important to do, because you want to make sure that, you know, if things go wrong, that you've, you know, that you've been established this relationship with a company that's actually active, not something that has been, you know, administratively cancelled, or administratively dissolved, you want to ensure that they're actually an active entity.

And the other piece too, is, you know, sometimes there might be a friend of a friend who wants to provide these services, and maybe they pull a contract off the internet. And it's just, you know, somebody's name, Jane Smith, who's going to be providing these marketing services for you. And you really want to understand whether it's going to be that individual, or whether you want to have an entity provide the services. And here's why, if it's an individual, that's a party to the agreement with you, then your recourse if they are in breach or end up breaching the contract, your recourse is just to go after that person, right. And if it's just that person, then your potential recourse your, your potential amount that you can go after is limited by the assets of that individual. If it's an entity, then obviously, you have the ability to go after the entire entity.

And so that's why you really do want to have a contract like this be with an actual LLC or corporation, you want it to be with a business as opposed to an individual.

Now, that being said, it might be that the agreement is with a company, but that you actually declare that there is an individual who is providing those services. So while you might have an agreement with, you know, marketing company, XYZ, and you want to make sure that there's an individual, Joe Smith, who's actually doing your marketing, because you like the work of Joe Smith, and you can also have him listed as well. But it gives you the protection then of being able to have an entity or a company be a party to that agreement, in addition to that individual.

Now, the other thing to think about as well is, is yourself, right? And it is, how are you coming to that agreement? Are you coming as an individual or are you coming as an entity yourself? Now, oftentimes, you know, a common structure that we see is to have a loan out company, for an individual, for a celebrity, and that loan out company is typically a single member, LLC, limited liability company, that's owned by the individual, the athlete, the entertainer, the individual. And in those instances, you really want to have that entity structure, because again, it provides you that liability protection, because you have the LLC, that's the part of the agreement. And it also can provide you with some potential tax benefits. Because it's the entity that's the party to the agreement. So when you think about this, it's important to know, because if you have the entity, the loan out company, that's the party to the agreement on your behalf, then that's where you know, you'll be paying for these services through the LLC. And that's obviously much different from a tax perspective than just paying for it out of your own pocket directly. So again, some things to think about here. Obviously, this is the work that we do. So you don't have to think about doing it yourself. But I often like to share these conversations with people so that they understand what it is that they're actually seeing when they are going through this process.

So that is the preamble right. Now, we've just spent the past few minutes talking about this and it is just usually the opening paragraph here. But this is important. And again, if it's a loan out company that you've created for yourself, then typically you would see something be stated in the preamble that would say athlete company LLC, an Ohio limited liability company for the services of Jane athlete, right. So, it that's how they get, you know the entity name as well as the individual name included. So again, preamble usually just an initial paragraph kind of starting off the contract, but so much information included. That's so very important.

Now the other piece to think about in these types of marketing representation agreements are, it's this idea of exclusivity. Right now, this is generally just one of the more important aspects for the recipient of these services, these marketing services to understand is this an exclusive agreement? Or is this a non-exclusive agreement? Right. So if it's an exclusive agreement, then that means that, you know, in this case, like the athlete will only receive marketing services from that marketing agencies, the who set forth in this agreement, right. And a non-exclusive marketing representation agreement would allow the athlete to engage other marketing agents in identifying and negotiating various marketing opportunities. So again, it's important to understand right off the bat is this exclusive or non-exclusive. And if the agreement that's put in front of you, does not set forth, what type of agreement it is, then you have to push back to make sure that there's understanding because what you don't want to have happen is you sign on to an exclusive agreement. Or rather, it's silent as to whether it's exclusive or non-exclusive, and the marketing agent believes that it's exclusive, and you think it's non-exclusive. And therefore, you know, you miss out on opportunities, or you do something that is out of line with what the agent believes the contract says, and therefore now you have disagreement and some conflict there.

So again, this is important to understand, and there are a lot of different kind of variations of this, when you think about what the writing actually says, right? So some marketing, you know, representation agreements can be exclusive, but there might be carve outs for certain areas, right. So there could be a carve out that says, hey, anytime a marketing opportunity goes directly to the athlete, or the athletes family, then that's carved out of the exclusivity requirements. So basically, what that means is that the marketing agent is saying, Hey, we're okay with you getting deals directly if they come to you or your family. But we don't want you engaging with another marketing agent who's out there trying to shop you to the industry. So that's one potential carve out.

The other carve out could be for very specific deals, where you could potentially have a marketing agent saying, okay, we're going to carve out the playing card deal, and the shoe deal, or apparel deal, and your player agent has the ability to do those two deals, but we as a marketing company are going to do all the other deals. So that could be another carve out that you might see, again, you know, this is where it's exclusive. You know, you really need to understand, are there any carve outs here? Or is it completely exclusive, where every single marketing opportunity, whether it comes to the athlete directly, whether it goes to the athletes family, whether it's through the player, agent or not, you have to understand, are there any carve outs? Or is it exclusive, and only going to be that marketing agent who can provide any type of marketing, negotiation or identification of opportunities. So, again, something to just think about in terms of understanding and even if this is with a business, and you're an entrepreneur or a business owner, you want to understand this as well, because that is what is going to set forth whether or not you're going to be able to hire another agency, right? Or is it only going to be one particular agency, there's going to be providing the work for you.

Another aspect that's big to highlight and again, we're not going to get through, you know, going through an entire agreement provision by provision. If you have any of those types of questions, obviously, feel free to give me a call and we can talk about it. But I wanted to highlight some of the important pieces - preamble very important because it sets forth the parties. Exclusive or non-exclusive, critically important because it sets forth your rights as the recipient of those services.

And then one other aspect that I'll highlight that's important to note is services, right? And this is what services is the marketing agent providing because this will tie back into the exclusivity provision, right. So if the services that they're providing are just services to build a website and enhance the social media presence and things like that, that's very different than their services being hey, we're gonna go out and find you deals finds you marketing opportunities, etc., right? So understanding what the services are that are being provided is critically important.

It's also important because that's how you hold the marketing agent or that agency accountable. Right? If they set forth the services that they're providing, and then they don't provide those services. That's how you hold them accountable. That's how you can then look to say, you know, I'm going to terminate this agreement, or I'm going to move on from this agreement. So again, knowing the services that are being provided, is critically important.

Obviously, it's important to understand compensation. And compensation, you know, typically, for athletes and entertainers, the marketing fee is usually in that 20% range, sometimes it's less, it's rare that I've seen it be more than 20%, if it is, you've got to negotiate that. And always remember this, if you're the one who is receiving the marketing representation, you're receiving these marketing services, at the very beginning, when you're negotiating this agreement, you have the leverage. This agent, or this agency, or these agents want to work with you. And so

you have to remember that you have the power to say, nah, you know, I don't I think 20% is too high, I want to only pay 15%, or whatever that number is, right. You have the ability to negotiate that. And I always try to, you know, empower athletes empower clients to realize their power of negotiation in various aspects of these agreements.

The last thing I'll touch on, and we'll get into these kind of conversations more and more in future episodes. But the last one is the term and termination provisions that you'll see the term is how long the contract goes, how long it stays effective. And termination is obviously what are your rights in terminating the agreement.

With term, the length of the contract as the recipient of the services, you're going to want to make sure that you negotiate as short a term as possible, right, because you want to be able to have the flexibility to that if the agents not providing you the services that you want, that you have the flexibility to make a move at a certain point. Or, you know, maybe they're providing you the service that you want, they're just not doing it frequently enough and not providing enough opportunities, then you want to make sure that you have the ability to get out of that potential deal.

Now, oftentimes, the flip side of that conversation is the agent themselves, the marketing agent is going to say, hey, we need time to develop and build a brand. So you're oftentimes going to see them requiring at least a one year term, to be able to really build your brand and get the opportunities that that they see for you.

So this is where term and termination go hand in hand, a longer term is okay to agree to, if you then have the ability in the termination provision, to terminate the contract for any reason upon a certain amount of notice, right. So if you have the ability to terminate the agreement with 15 days' notice, then it doesn't matter if you have a one year, two year term, because you have the ability to say, hey, if they're not providing what they need to provide, then I can go ahead and provide notice that I'm terminating the agreement. Right.

So that's how these two provisions kind of go hand in hand. Obviously, if you have a very long notice kind of provision within termination, and that that's a bit of a challenge, right. So sometimes, I've seen agreements where it says that termination is only available, we know within the 30 days at the end of the term. So if your term is one year, then you can only terminate at 11 months or something along those lines. But again, you have the ability to negotiate. And this is where we always look through this to help our clients understand that, hey, let's look at potentially negotiating a 15 day notice or maybe a 30 day notice for termination of the contract for any reason, right. And so I've seen people try to slip in only termination for cause. That's a legal standard. And it can be a challenge to achieve that standard and be able to execute your termination provision. So I oftentimes like to see that you have the right to terminate for any reason upon a certain amount of time notice.

So again, just hit on the highlights hit on some of the key areas to remember when you're going through a marketing representation agreement. So whether you're an athlete who has a marketing agent, that's looking to have you sign a contract, whether you are an entertainer that has the same kind of thing, whether you're a business owner that has an agency wanting to work with you. Understanding things like the preamble, who are you actually signing this agreement with, right? Who is a party to the agreement, understanding the services that will be provided, understanding whether it's exclusive or non-exclusive. And really then knowing the term of the agreement, and how you can get out or terminate the agreement, as you see fit.

Those are all critical aspects, among others, but those are some critical aspects to understand when it comes to marketing representation agreements.

So hopefully you found this informative. You know, feel free to share this with colleagues, with friends with teammates and others. If you have questions, if you have want to have a conversation more about these kinds of things, or you have a situation in front of you that you're evaluating, please do feel free to send me an email. Reach out on social media, however, is easiest for you to get in touch with me, and we can discuss it further. But again, these are some important things to remember before you sign any type of agreement with a marketing agent.

So that being said, please feel free to rate this podcast episode. Feel free to share it with others. And again, from the bottom of my heart. Thank you so much for tuning in. Thank you for engaging in this Protecting Your Possibilities podcast. It wouldn't mean anything if it wasn't for you. So thank you so much, and look forward to talking to you again real soon.

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