

Senate Bill 206 (Skinner-D, 2019) Statutory Community College Athlete Name, Image, and Likeness Working Group Agenda

Thursday, September 24, 2020

10:00 a.m. to 3:00 p.m.*

Zoom Virtual Meeting:

<https://cccconfer.zoom.us/j/94390681479?pwd=ZDZoWmdrMUFEVWZzbnltemdTUkRUUT09>

(669) 900-6833 | **Webinar ID:** 943 9068 1479

Webinar Passcode: 208980

Captions are provided during the webinar

*All times are approximate and subject to change

Order of items is subject to change

ORDER OF AGENDA

Standing Orders of Business

- Roll Call
- Introductions

Consent Calendar

Item 1.1: August 31, 2020, SB 206 Working Group Minutes (Dr. LeBaron Woodyard)

This item presents the August 31, 2020 SB 206 Working Group meeting minutes for review and approval by the SB 206 Working Group.

Information and Reports

Item 2.1: Name, Image, and Likeness Consultant Research (Anita Moorman and Dr. Adam Cocco)

This item provides the SB 206 Working Group with important information on legal issues, legislation, and the role of economic impact and economic demand related to compensation for use of athletes' name, image, and likeness (NIL). This information includes a an overview of issues raised during the last meeting, such as the CCCAA Constitution and Bylaws, proposed NIL rules for the NCAA and NAIA, and other ongoing efforts to create uniform state laws related to college athlete NIL. It also provides a facilitated discussion that will engage members of the SB 206 Working Group in the provided content.

Action

Item 3.1: Meeting Norms for SB 206 Working Group (Dr. Rod Githens and Nileen Verbeten)

This item provides a continued facilitated discussion that will engage members of the SB 206 Working Group to develop a framework for how they will work together and requests adoption of a set of norms and group agreements for working together.

New Business

Item 4.1: Role With the Public (Dr. Rod Githens and Nileen Verbeten)

This item provides a facilitated discussion that will help members of the SB 206 Working Group prepare to be effective when interacting with the public, witnesses, and information throughout the project and during hearings.

Item 4.2: Agenda Items for Future Meetings (Dr. Rod Githens and Nileen Verbeten)

This item provides a facilitated discussion that will engage members of the SB 206 Working Group and provides them with an opportunity to request specific agenda items for a future meeting.

Public Forum

Members of the public wishing to comment on specific items or matters not on the agenda during the Public Forum may do so using one of the following methods. Your comment will be read by a Chancellor's Office employee.

- A.** You may submit your comment by email to SB206@cccco.edu. In the email title specify the item number you wish to comment on or put Public Forum. You can identify yourself or specify that you wish to remain anonymous at the top of your email.
- B.** You may submit your comment using the Question and Answer (Q&A) feature on the Zoom platform. You can identify yourself or specify that you wish to remain anonymous.

Regardless of the method of comment, all comments will be limited to three minutes.

Adjournment

Persons requesting reasonable accommodations should notify SB206@cccco.edu no less than five working days prior to the meeting.

Item 1.1: Monday August 31, 2020 Senate Bill 206 Statutory Community College Athlete Name, Image, and Likeness Working Group

Standing Orders of Business

- Call to order. Dr. LeBaron Woodyard called the meeting to order at 10:00 am.
Roll call. The following committee members were present on Monday August 31, 2020: Susan Armenta, Jennifer Cardone, Taylor DeBenedictis, Rob Dewar, Dr. Erika Endrijonas, Brian Harper, Hayley Hodson, Joycie Kaliangara, Stephen Kodur, Juliana Garcia Man, Randy Totorp, Genaro Trejo, and Dr. LeBaron Woodyard.
The following committee member was absent on Monday, August 31, 2020: Gabriella Knudsen.
- Introductions. SB 206 Working Group members and meeting facilitators introduced themselves.

Consent Calendar

Item 1.1: July 30, 2020, SB 206 Working Group Minutes (Dr. LeBaron Woodyard)

Dr. Woodyard presented the July 30, 2020 SB 206 Working Group meeting minutes for review and approval by the SB 206 Working Group.

Dr. Erika Endrijonas moved to approve Item 1.1: July 30, 2020, SB 206 Working Group Minutes; Stephen Kodur seconded the motion. The motion passed with a vote of 13-0 (Gabriella Knudsen was absent during the vote).

Information and Reports

Item 2.1: Name, Image, and Likeness Legal Issues and Actions (Anita Moorman and Dr. Adam Cocco)

Anita Moorman and Dr. Adam Cocco provided the SB 206 Working Group with a legal and economic overview related to compensation for the use of athletes' name, image, and likeness. The presentation included litigation summary, economic injury issues, a national legislation summary, and a market analysis project. Afterwards, the presenters engaged the working group members in an in-depth discussion.

Three public comments were received and read during the public comment period for this item. All questions were answered after they were read aloud by the working group members and/or meeting facilitators.

Action

Item 3.1: Meeting Norms for SB 206 Working Group (Dr. Rod Githens and Nileen Verbeten)

Dr. Rod Githens and Nileen Verbeten facilitated a guided discussion which engaged the working group members to develop a framework for how they will work together and adopt a set of norms and shared agreements. Four focus areas were identified; positional power, future focus, consuming information and intent. Due to time constraints, this item was tabled.

Jennifer Cardone moved to table Item 3.1: Meeting Norms for SB 206 Working Group until the next meeting; Dr. Erika Endrijonas seconded the motion. The motion passed with a vote of 11-0 (Hayley Hodson, Gabriella Knudsen and Genaro Trejo were absent during the vote).

New Business

Item 4.1: Information and Resources for Future Meetings and Public Hearings (Dr. Rod Githens and Nileen Verbeten)

Dr. Rod Githens and Nileen Verbeten provided the working group members with information to assist the group with recommending policy, law and economic experts, as well as resources to be utilized for future meetings. The discussion also sought to identify key stakeholders to be invited to participate during the upcoming SB 206 Working Group public hearings.

Item 4.2: Agenda Items for Future Meetings (Dr. Rod Githens and Nileen Verbeten)

Dr. Rod Githens and Nileen Verbeten provided members of the SB 206 Working Group with a facilitated discussion and opportunity to propose agenda items and/or topics to be discussed during the next scheduled meeting.

Future discussion of impacted regulations that may need to be modified will be facilitated by Jennifer Cardone who will provide the Chancellor's Office with areas of the CCCAA constitution and bylaws that may need to change if community colleges become subject to SB 206.

Public Forum

No public comments were received.

Adjournment

Jennifer Cardone moved to adjourn the meeting; Stephen Kodur seconded the motion. The motion passed with a vote of 9-0 (Dr. Erika Endrijonas, Hayley Hodson, Gabriella Knudsen, Randy Totorp and Genaro Trejo were absent during the vote).

The meeting adjourned Monday August 31, 2020 at 3:10 pm.

Documents

The following documents were provided at the meeting and were not included in the published agenda. These documents are available to members of the public upon request by emailing SB206@cccco.edu.

Legal and Economic Overview (PDF)

State Legislation Overview (PDF)

Padlet Responses (PDF)

Group Agreements Presentation (PDF)

Resources for Future Meetings Presentation (PDF)

PRE-PREPARATION RESOURCES AND WORKSHEET FOR SEPTEMBER 24, 2020 MEETING

In December, the Working Group will need to consider a preliminary question such as:

Should the California Community College system relax restrictions on community college athletes related to receiving compensation for the use of their name, image, and likeness consistent with the approach adopted by the Legislature in SB 206?

This pre-reading will support the Working Group in assessing factors impacting the relaxation of restrictions on community college athletes consistent with the approach adopted by the Legislature in SB 206. Please read the materials, consider these questions, and take notes about your initial conclusions.

Topic	Resources	Questions to Consider	Notes
1. Law and Policy Factors	NCAA Divisions I, II, and III Resources on NIL NAIA Legislative Proposal Title IX Issues Related to Expanding NIL Opportunities	What aspects of proposed new rules for the NCAA and NAIA would be relevant or applicable in the context of California Community College athletics? What, if any, impact would relaxing restrictions have on Title IX compliance if the CCCAA was not directly involved in providing compensation to athletes for the use of their NIL?	
2. Administrative Burden and Processes	California Community College Athletic Association (CCCAA) Constitution/Bylaws	What oversight or compliance systems are currently in place to monitor NIL activities of athletes? What is the purpose of that oversight, in your opinion (e.g., amateurism, eligibility, team/coach rules, education, professional	

development)?

If current NIL restrictions are changed, will these existing systems require new resources?

Or, can existing resources currently used to monitor the non-occurrence of athlete NIL activities be redistributed to oversee approved NIL activities?

3.
Mission and
Role of
Athletics in
Community
Colleges

[Article: "Eyeing Future Profits"](#)

[Article: "Using Esports to Recruit, Engage Students"](#)

What purposes are served by imposing different rules for community college athletes than other community college students?

What opportunities or advantages might be presented to both athletes and athletics programs if athlete NIL restrictions were relaxed?

Will relaxing restrictions on athlete NIL rights have a disparate impact on community colleges across the CCCAA system (e.g., metropolitan-rural, large-small, diverse-more homogenous, various conferences)?

Prepared by
Anita M. Moorman, J.D.
Adam Cocco, Ph.D.
Githens and Associates LLC
For the Athlete Name, Image, and Likeness Working Group

SUMMARY OF LEGAL CHALLENGES TO NCAA RULES RESTRICTING COMPENSATION FOR ATHLETES

Beginning in 2009, multiple lawsuits have been filed by former and current college athletes asserting a variety of claims against the NCAA, the major athletic conferences, and third-party licensees, such as Electronic Arts (EA) and Collegiate Licensing Company (CLC). These cases originally challenged NCAA rules limiting college athlete compensation in two primary areas: name, image, and likeness (Publicity Rights), and grant-in-aid/scholarship amounts (Compensation). The Publicity Rights suits originally asserted that the NCAA *et al* were misappropriating the publicity rights of college athletes in violation of state right of publicity statutes and/or common law rights of publicity (specifically, California, New Jersey, and Indiana). As these lawsuits evolved, anti-trust claims were also asserted challenging the NCAA rules prohibiting athletes from receiving compensation for the use of their NIL as a violation of the federal Sherman Anti-trust Act. Later lawsuits further asserted NCAA rules that limited “grant-in-aid” amounts were also a violation of the Sherman Anti-Trust Act.

Key Cases and Outcomes

Hart v. EA, 717 F.3d 141 (3d Cir. 2013) (May 21, 2013)

1st Amendment does not protect the use of players’ likeness in video games – balance tips in favor of publicity rights.

Keller v. EA, 724 F.3d 1268 (9th Cir. 2013) (July 31, 2013)

California transformative use defense (rather than the *Rogers* test) is the appropriate test. EA’s use of likenesses of college athletes is as a matter of law not protected by the 1st Amendment.

Keller and *O’Bannon* lawsuits were consolidated under the name *In re NCAA Student-Athlete Name and Likeness Licensing Litigation* (January 15, 2010)

EA Videogame Settlement (Right of Publicity Claims) (\$40 million) approved August 3, 2014. (Class members included NCAA Div. 1 football and men’s basketball included in EA NCAA branded videogames since May 4, 2003.)

NCAA Videogame Settlement (Right of Publicity Claims) (\$20 million) approved August 3, 2014. (Class members included NCAA Div. 1 football and men’s basketball included in EA NCAA branded videogames since May 4, 2003.)

O’Bannon’s claims for an injunction (Anti-Trust Claims) proceeded to trial concluding June 27, 2014.

Overview of Antitrust Law and Challenges to NCAA Regulations

O’Bannon v. NCAA and more recently, *Alston v. NCAA*, have reshaped anti-trust claims involving college athletes and the NCAA. In both cases, the plaintiffs filed an antitrust suit against the NCAA, claiming the NCAA violated **Section 1 of the Sherman Antitrust Act** by unlawfully restraining economic activity in the college athletics marketplace. To determine whether the NCAA violated antitrust law, the court in both cases applied what is known as the **Rule of Reason Analysis** commonly applicable to anti-trust challenges in a sport context.

Section 1 of the Sherman Antitrust Act¹

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of *trade or commerce*.....is declared to be illegal.”

“The modern legal understanding of *commerce* is broad, including almost every activity from which the actor anticipates economic gain. That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it.” – Circuit Judge Bybee, *O’Bannon v. NCAA*

The Rule of Reason Analysis

The Rule of Reason Analysis is essentially a burden shifting analysis to enable the court to balance alleged pro- and anti- competitive effects of NCAA rules and regulations restricting economic activity and allegedly causing economic injury to college athletes. The analysis occurs in stages:

1. Can the plaintiff (college athletes) demonstrate that the restraint of commerce produced *significant anticompetitive effects* within a *relevant market*?
If **no**, then plaintiff (college athletes) did not suffer economic injury
If **yes**, then →
2. Can the defendant (NCAA and P5 conferences) show evidence of the restraint’s *procompetitive purposes*?
If **no**, then defendant’s (NCAA & P5 conferences) action caused economic injury to plaintiff (college athletes)
If **yes**, then →
3. The plaintiff (college athletes) must provide evidence that any legitimate pro-competitive objectives can be achieved by a substantially *less restrictive alternative*, with the alternative being “virtually as effective” in serving the pro-competitive purposes “without significantly increased cost.”

*O’Bannon v. NCAA*²

Plaintiffs

Current and former NCAA Division 1 men’s basketball and football college athletes

Main Defendant

NCAA

Complaint

The NCAA’s rules prohibiting college athletes from being paid for the use of their names, images, and likenesses (NIL) are subject to antitrust laws and are an unlawful restraint of trade or commerce.

Summary Outcome

¹ 15 U.S.C. Section 1

² Quotes sourced from majority opinion written by Jay S. Bybee, Circuit Judge, U.S. Ninth Circuit Court of Appeals

The district court found the NCAA's compensation rules were an unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act. This unlawful restraint caused economic harm to the plaintiffs. The district court ruled that the NCAA could not prohibit its member schools from:

1. providing college athletes scholarships up to the full cost of attendance (*upheld* by appeal court)
2. placing deferred compensation of up to \$5,000 per year in a trust for college athletes to access after they leave college (*overturned* by appeal court)

Relevant Markets Identified

1. The college education market (anticompetitive effect found)
2. The group licensing market (no anticompetitive effect found)

Rule of Reason Applied

Anticompetitive Effects

1. The college education market exists and colleges compete for athletic recruits by offering them scholarships and other amenities, such as coaching and facilities.
2. If the NCAA's compensation rules did not exist, schools would compete for recruits by offering them compensation opportunities for their NIL.
3. The NCAA's compensation rules have a significant anticompetitive effect on the college education market by fixing the price schools pay to recruit athletes.

Pro-competitive Purposes

1. Preserving "amateurism" in college sports (*accepted in part*)
2. Amateurism does play some role in determining consumer demand for college sports
3. Promoting competitive balance in FBS football and Division I basketball (*rejected*)
4. Economic conclusion: NCAA's compensation rules do not promote competitive balance
5. Integrating academics and athletics (*accepted in part*)
6. Increasing output in the college education market (*rejected*)

Less Restrictive Alternatives

1. Allow schools to award stipends to college athletes "up to the full cost of attendance" (*upheld* by appeals court)
 - Providing college athletes with full cost of attendance scholarships would have "virtually no impact on amateurism"
2. Permit schools to hold a portion of licensing revenue in trust to equally distribute to college athletes after they leave college (*overturned* by appeals court)
 - Would not be equally as effective in promoting amateurism
 - \$5,000 limit deemed "arbitrary" and determined without required evidence
3. Permit college athletes to receive compensation from school-approved endorsements (*rejected* by district court)

*Alston v. NCAA*³

Plaintiffs

Division I men's basketball, women's basketball, and football college athletes

³ Quotes sourced from majority opinion written by Sidney R. Thomas, Chief Judge, U.S. Ninth Circuit Court of Appeals

Main Defendant
NCAA

Complaint

The NCAA rules restricting education-related benefits for college athletes are an illegal restraint of trade under antitrust laws.

Summary Outcome

The district court found NCAA limits on education-related benefits offered to college athletes was an unlawful restraint of trade. The court's ruling prohibited the NCAA from enforcing rules that restrict education-related benefits offered to students. An appeals court upheld all materially relevant portions of the district court's ruling.

Relevant Markets Identified

(1) College athletes selling their "labor in the form of athletic services to schools in exchange for athletic scholarships and other payments permitted by the NCAA."

Rule of Reason Applied

Anticompetitive Effects

1. Schools artificially cap compensation at a level that is not proportionate to the college athlete's value
2. If restraints were removed, schools would offer compensation to college athletes that more closely aligns with their talent
3. There is no viable market alternative for elite college-aged football and basketball players

Pro-competitive Purposes

1. NCAA rules allow for "amateurism," which drives consumer demand for college sports because "consumers value amateurism." (*accepted* in relation to cash compensation unrelated to education; *rejected* in relation to non-cash educational benefits)
 - Consumer demand (measured through revenues) increased since full cost of attendance decision in *O'Bannon v. NCAA* case
 - No evidence of a decrease in consumer demand at one university after \$7,500 post-eligibility grants offered to college athletes
 - Survey evidence suggested no change in consumer behavior when asked about eight hypothetical changes to NCAA's education-related compensation rules
 - Amateur sports provide consumers with broader choice of consumption options
2. Rules allow college athletes to integrate into campus community (*rejected*)

Less Restrictive Alternatives

1. Invalidate all NCAA compensation limits (*rejected*)
2. Invalidate NCAA limits on education-related compensation and existing limits on benefits related to athletic participation (e.g., healthcare) (*rejected*)
3. Allow the NCAA to continue to limit grants-in-aid and compensation unrelated to education, but prohibit limits on most compensation related to education (*upheld* by appeals court)
 - NCAA member institutions remain free to independently restrict compensation

Main Economic Takeaways

1. The NCAA's compensation rules for college athletes violated federal antitrust law by illegally restraining trade

2. This violation of antitrust law caused economic injury to Division 1 football and basketball players.
3. Economic evidence shows an increase in consumer demand for college sports even after NCAA loosened restrictions on cost of attendance scholarships
4. Survey evidence suggests increasing non-cash education-related benefits to college athletes would not negatively impact college sport consumer behavior
5. Amateurism does provide a pro-competitive purpose for the NCAA by allowing a distinction between amateur and professional sports, thereby widening consumer choice
6. Limits on non-cash education-related benefits offered to college athletes are mostly prohibited, while limits on cash compensation for non-education purposes remains intact

Prepared by

Anita M. Moorman, J.D.

Adam Cocco, Ph.D.

Githens and Associates LLC

For the Athlete Name, Image, and Likeness Working Group

KEY RESOURCES

SB 206 and CCCAA Information

[Section 3 Directive Regarding Working Group](#)

[California Community College Athletic Association \(CCCAA\) Constitution/Bylaws](#)

National/Federal Legislative Developments Resources

Hearings and Remarks held in the United States Senate

[Commerce Committee](#)

Hearings held before the U.S. Senate Commerce Committee. Link includes remarks from invited speakers including: Vice Chancellor of Intercollegiate Athletics, University of Mississippi; Chairman of the NCAA Board of Governors; Law Professor, University of Baltimore; Commissioner, SEC Conference; Former NFL Player and College Athlete;

[Judiciary Committee](#)

Hearings held before the U.S. Senate Judiciary Committee: Link includes remarks from invited speakers including: Athletic Director, Clemson University; Executive Director, National Sports Law Institute, Marquette University Law School; Former Member of NFLPLA Board of Representatives; President, NCAA; Executive Director, National College Players Association.

Approval of a Drafting Committee by the Uniform Law Commission

[Information on New Committee](#) (see page 6)

[Committee Information Page](#) (currently empty but will be populated as committee begins its work)

Study Committee on College Athlete Name, Image and Likeness Issues: Commissioner Higer reported on the progress of this study committee. This committee has studied the need for and feasibility of state legislation addressing the rights of college athletes to earn money from their name, image, or likeness without affecting the student's scholarship eligibility. The committee has met by conference call several times and has identified areas of potential focus for a drafting effort addressing name, image, and likeness issues. The committee requests the appointment of a drafting committee. The Executive Committee approved the recommendation on July 14, 2020 to establish a Drafting Committee on College Athlete Name, Image and Likeness Issues.

NIL State Legislation Tracking Resources

[Tracking Name, Image, and Likeness Legislation by State](#). Comparative report forthcoming.

[State by state summary](#) prepared by Julie Sommer for The Drake Group.

NCAA Divisions I, II, and III

[Committee Reports and Status Reports; and New Legislation Groups](#)

NAIA Status Update and Legislation Update

[NAIA Name, Image, and Likeness Overview](#)

Monetization of College Athlete NIL Rights in the Media

[Article: "Marketers Bullish On Monetization Opportunities For NCAA Athletes With NIL Rights"](#)

[Article: "Eyeing Future Profits"](#)

[Article: How Much Is NIL Worth To Student Athletes?](#)

Recently Announced University Programs to Promote Athlete NIL Marketing
[Article: Student-Athletes Will Soon Be Social Media Influencers. And One College Program Is Helping Them Do It](#)
[Texas Launches 'LEVERAGE' Program to Help Athletes Build Personal Brands](#)
[Article: Oklahoma State Partners With INFLCR, Gets Access To NIL Suite](#)

White Papers from Advocacy Groups related to Name, Image and Likeness

The Drake Group

“The mission of the Drake Group is to defend academic integrity in higher education from the corrosive aspects of commercialized college sports.”

[College Athlete Name, Image and Likeness – Issues Causing Confusion](#)

The Knight Commission

“The purpose of the Knight Commission on Intercollegiate Athletics is to develop, promote and lead transformational change that prioritizes the education, health, safety and success of college athletes.”

[The NCAA and “Non-Game Related” Student-Athlete Name, Image and Likeness Restrictions](#)
[Knight Commission Initiatives On The Use Of College Athletes’ Name, Image And Likeness](#)

The National College Players Association

“National College Players Association mission is to protect future, current, and former college athletes.”

[Name, Image, and Likeness: The Players’ Plan for Economic Liberty and Rights](#)
[The Players' Plan: Name, Image, & Likeness Pay](#)

Prepared by

Anita M. Moorman, J.D.

Adam Cocco, Ph.D.

Githens and Associates LLC

For the Athlete Name, Image, and Likeness Working Group, Submitted on September 4, 2020



GROUP AGREEMENTS

Photo by [Charles Deluvio](#) on [Unsplash](#)



FOCUS AREAS

Positional Power

Future Focus

Consuming Information

Intent



PROCESS TIMELINE





PROCESS TIMELINE

