

# PROFESSIONAL SPORTS

Reprinted December 2018

and the **LAW**

## Practical and Legal Considerations in Organizing Nostalgic Athletes into Revenue Generating Enterprises

By Edward H. Schauder

**M**iracle on Ice! The 1980 Olympic Hockey Team. Where were you on February 22, 1980? Most hockey fans remember the answer to that question. Do you believe in Miracles? For the players and coaches that comprised the 1980 Olympic Hockey Team, the answer will always be a resounding YES! One morning they were 20 college kids coached by one of the greatest motivators of all-time, and the next... they beat the Russians! For the players and their fans, it was, and will remain, the most memorable sporting event of their lifetime.

In 1999, Sports Illustrated selected the "Miracle on Ice" as the top sports moment of the 20th century. During one incredible weekend in February of 1980, chants of "USA! USA! USA!," and Al Michael's incredulous question "Do You believe in Miracles?" gave a discouraged America, a country besieged by high prime-lending rates and double digit inflation, unnerved by the Soviet invasion of Afghanistan, and frustrated by the plight of 52 hostages held by Iran, something really to cheer about.

After winning the gold medal at Lake Placid, President Jimmy Carter honored the team at a White House ceremony. Then? Team Captain Mike Eruzione, who

scored the game winning goal against the Russians, was quoted as saying: "You win a gold medal, you accomplish everything you set out to accomplish....It's the greatest moment of your life as an athlete! And its over, it ended too quickly.... I woke up Tuesday morning.... What, what happened? Is it a dream?"

Ed Charles was the oldest member of the 1969 Miracle Mets. The Mets, the "Lovable Losers" and an expansion team in 1962, in an era before free agency, went from next-to last place in 1968 to overtake Leo Durocher's 1969 Cubs and not only win the National League pennant but also the World Series, four games to one, over the mighty Baltimore Orioles. At a time when the country and New York city were reeling over the War in Vietnam, racial tension, a blackout and the assassinations of Robert Kennedy and Dr. Martin Luther King, Jr., the New York Mets gave baseball fans everywhere something to feel good about and memories that would last a life-time.

"I can't believe that it's more than 40 years later and people still want to talk about the 1969 Mets," said Charles, who was the part-time third baseman on the 1969 Mets. "There's not a day that goes by that somewhere in my travels somebody doesn't want to talk about the 1969 Mets," said Art

Shamsky, an outfielder on those 1969 Mets. Shamsky, a Missouri native, has made New York his permanent home after his baseball career primarily to leverage his affiliation with the 1969 World Champion Mets.

So what do these two championship teams—two of the most fabled and iconic championship teams in sports history—have in common? As in the case of most championship teams, after the victory parades, the thrill of victory and the cheering have subsided, the years pass and members of the team are scattered across the country. While the members of these teams will forever be linked together by their collective accomplishment, geography and continuing on with their lives and new careers preclude them from dictating their destinies and commercially exploiting their historic accomplishment as a team. Aside from an occasional reunion here and there, the players seldom have an opportunity to collectively interact as a cohesive unit with each other and their fans.

When players are active in professional sports, they are represented by their respective players association that negotiates licensing arrangements on their behalf. Their representative negotiates endorsement, appearance, memorabilia, sponsorship and other opportunities on their behalf.

With respect to the 1980 Olympic Hockey Team, after they stunned the hockey world, virtually the whole team was represented by super agent Art Kaminsky. However, once players retire, they are no longer represented by their respective active player associations. As time passes, the typical athlete (mega-stars excluded) do not get the same level of attention from their representatives who, no longer receiving a percentage of the player's contract, turn their focus on representing today's current talent and stars.

In the 1990s I conceived and implemented a unique concept in sports marketing. By forming incorporated entities or unincorporated associations made up of members of championship sports teams or professional athletes linked together by similar accomplishments, I created and developed programs to protect and market their intellectual property. From initial contact with the athletes to obtaining licensing rights, corporate sponsorships, endorsements, autograph memorabilia deals and appearances, I represented and negotiated the contracts for some of sports history's most beloved and storied teams, including the 1969 Mets, 1977 Yankees, 1972 Miami Dolphins, 1980 United States Olympic Hockey Team, and the 1986 Giants. I also co-founded the Negro League Baseball Players Association on a pro bono basis to represent the great men of color that played baseball before Jackie Robinson became the first African American to play Major League Baseball. These programs not only generated multiple revenue streams for the players but I'm very proud to say generated over a million dollars for many worthy charities as well. Through carefully coordinated efforts with the applicable leagues, governing bodies and holders of any other intellectual property rights that were

necessary for the success of the program, we created a win-win scenario for all involved.

That the members of the 1969 Mets and the 1980 Olympic Hockey Team each took the initiative to organize themselves into a single-minded, revenue generating and fan-friendly entity years after their momentous accomplishment (and in the process benefited many worthy charities) is another thing that these two historic teams have in common!

The balance of this article will focus briefly on 8 practical considerations in organizing nostalgic athletes into revenue generating enterprises.

## **1. Team Marketing Programs Protect the Intellectual Property of its Members**

One advantage of nostalgic players organizing is that it affords them an opportunity to protect their publicity rights and control their collective destiny when it comes to licensing, sponsorship and endorsements. For example, the members and coaches of the 1969 Mets were organized into Miracle of 1969 Enterprises and the members of the 1980 Olympic Hockey Team were organized into Miracle on Ice Enterprises. Once organized, these entities, controlled and governed by the rules adopted by its members, assumed the role of the applicable players association or super agent, as the case may be, for its members.

The 9th Circuit Court of Appeals recently issued a ruling on May 2, 2011 on whether EA Sports and the NCAA owe former Nebraska Quarterback Sam Keller and former college football players royalties for portraying their image and likeness in the popular EA Sports NCAA Football game franchise. This ruling may have a major impact on Hollywood's and other

industries' ability to depict public figures going forward. The court granted EA's motion to dismiss Plaintiff's claims for failure to state a claim. The court found that the Plaintiffs had failed to adequately allege in its claims "(1) that EA participated in a price-fixing conspiracy with use of their images, likenesses and names; and (2) that EA participated in a 'group boycott refusal of the deal' conspiracy for use of their images, likenesses and names." The court granted the Plaintiffs leave to amend to plead facts that would show that EA agreed to participate in the alleged conspiracies.

I encountered a similar legal issue in 1994 while representing the 1969 Mets. There were many companies that were commercially capitalizing on the players' images on t-shirts, plaques, trading cards and other products. The players had never received any compensation. "Without a doubt the 1969 Mets were one of the most exploited teams in baseball history," said Art Shamsky. Since the players were scattered all across the country, there was very little they could do about it at the time. By organizing themselves, all of that changed.

Once such company was Garan Industries. For years Garan had produced a very popular t-shirt with a picture of the 1969 Mets on the front of the shirt and the names of the players on the sleeves. Right to Privacy laws in many states (including New York Civil Rights Law Section 50) prohibits the use of an individual's likeness for commercial purposes without consent. Under my direction, twenty members of the 1969 Mets, including Art Shamsky, Bud Harrelson, Tommie Agee and Tug McGraw, sued Garan. Garan had claimed that the picture celebrated "team identity" thereby not entitling individual players to any compensation. However, Justice Mar-

tin Schoenfeld ruled in *Shamsky v. Garan Inc.* that “these players have the right to commercial exploitation of their individual identities, even if collectively these identities may be somewhat less valuable than the identity of a greater, more memorable, whole.” The case was eventually settled for a six figure cash settlement. *Shamsky v. Garan* remains an often quoted right of publicity case.

## 2. What Legal Structure Should be Employed in Structuring These Programs?

There are many potential legal structures that may be utilized in organizing nostalgic athletes including forming a corporation or a limited liability company with each player holding stock or membership units, as the case may be, or forming a special purpose management/licensing entity to serve as the collective group’s representative with each player conveying to such entity the requisite rights to represent such player for licensing, appearances, sponsorship, merchandising and other desirable deals. The exact legal structure for a particular team will need to take into account many variables including certain tax implications, federal and state securities laws, existing exclusive agreements that certain members of the teams (or their estates) may have entered into over the years and the comfort and trust level that the particular former teammates have with each other so many years later.

## 3. What Are Some of the Revenue Streams Generated by These Programs?

The programs are typically designed to be flexible to allow the participants to participate as little or as much as they would like to. The potential revenue streams and revenue

generated will therefore vary accordingly. As a general rule, these programs generate the following revenue streams (many of which are passive):

- Licensing and merchandising transactions;
- Endorsements and sponsorship revenues;
- Memorabilia signings and card shows;
- Clinics and fantasy camps;
- Charity dinners and golf tournaments; and
- Settlements from companies that have exploited member likenesses without proper authorization.

The 1969 Mets were even entertaining offers for a traveling exhibit of their personal memorabilia and an interactive musical and time capsule experience to chronicle the year 1969!

I believe that there are many additional passive revenue streams that will benefit athletes through internet technologies including webinars with the players and password protected exclusive content and offers. The key for the players to always remember is that there is always strength in numbers! By compelling a third party interested in securing the rights to members of the team to negotiate with a single representative acting on behalf of such members, the leverage shifts to the players to dictate and negotiate the best deal terms for a particular transaction.

## 4. What are Some of the Ancillary Benefits for the Players Participating in These Programs?

Nostalgic marketing programs allow former players to reconnect with each other and relive their accomplishments, not only amongst themselves, but also with their

families, friends, business associates and their fans. Shortly after I organized the 1969 Mets, Ron Swoboda, who made a spectacular catch in Game 4 of the 1969 World Series, was quoted as saying: “We are trying to create a fan friendly environment for our fans to interact with each other. If someone wants to talk to me about my catch, let him bring his glove and we can play catch while we do so!” The programs also are an excellent opportunity for the players to become relevant again and afford them an opportunity to promote their businesses and charitable causes with the publicity generated by their reunion platform. When the 1980 Olympic Hockey Team played an exhibition game against the New York Rangers at Madison Square Garden in 1995 many of the players not only brought along their family members but their clients as well.

These programs are structured so as not to interfere with a player’s existing post-career opportunities. This is especially important if a particular team has members that are in the Hall of Fame or that are considerably more accomplished than some of their lesser known teammates. To the contrary, the programs are designed to create additional opportunities for such players that did not exist before and to allow them to help their former teammates (many of whom have unfortunately fallen on hard times) generate additional revenue and get themselves back in the public spotlight and on their feet.

## 5. “One- Stop Shopping” for Potential Sponsors and Licensees

I cannot begin to tell you how happy many potential licensees and sponsors were when they discovered that they could secure the

rights of all of the members of the 1969 Mets or 1980 Olympic Hockey Team with one single phone call! We had done all of the hard work for them by securing the requisite intellectual property rights necessary to create and distribute a particular product or air a particular commercial or advertisement capturing that championship moment! Many companies, determined to commercially exploit the likenesses of historic teams, do so innocently not realizing that the individual members of the team (even in a collective team picture) enjoy certain rights to privacy. Other companies are more calculating and “assume the risk” that the players, scattered across the country, will never find out about the infringement or simply shrug their shoulder in disgust and do nothing. To the reputable potential licensees and sponsors, these programs afford them an opportunity for “one-stop shopping” to secure the valuable collective rights of the members of the group. To the disreputable companies that have historically exploited the players, there is always the lesson to be learned from Shamsky vs. Garan once the players are organized.

## **6. Who Is in The Best Position to Organize These Programs? (This Answer May Surprise You!)**

Historically, I have actively been the catalyst in reaching out to players that have won championships to organize them and represent them. Oftentimes this proves to be extremely challenging trying to track down players that played on the team and convince them (sometimes one by one) of the benefits of a team marketing program. Sometimes you get lucky. In 1994 when I was determined to organize the 1980 Olympic Hockey Team, Boston

University and the University of Minnesota were playing in the Frozen Four in Saint Paul Civic Center in St. Paul Minnesota. Since many of the members of the 1980 Olympic Hockey Team hailed from these two perennial hockey powerhouses, having already pitched the idea to Mike Eruzione, at his suggestion I flew to this event and was able to pitch the concept to 17 former members of the team at one time.

I have since come to believe that the entity that is in the best position to organize these programs are the former teams that the athletes played for! Here’s why. In an era where teams are selling game used equipment and other memorabilia, PSLs, fan experiences and fan tours to increase their bottom line revenue, teams often neglect capitalizing on their greatest asset—the goodwill of their alumni and especially championship teams. I am aware that many teams have active alumni associations that are sponsored by a major corporation. However, these alumni associations for the most part, have limited and sporadic events and are not structured to become a potential 24/7 revenue generating stream that benefit the players and also the team. In such a circumstance, a particular team will benefit in its capacity as the holder of certain additional intellectual property rights and also as the promoter/agent seeking and negotiating opportunities on behalf of its alumni. The team, especially if it has an active alumni association, also has a logistical advantage in coordinating these programs since many alumni are already involved with the franchise in some capacity and the franchise undoubtedly already has contact with the other members of its championship team. Accordingly, a franchise is in the best position to approach its former players and create a joint venture nostalgic marketing

program with its alumni. Furthermore, the teams are in a great position to work with the league’s governing bodies and existing sponsors to create additional fan friendly and revenue generating opportunities that will not result in a conflict with the franchise’s existing sponsorship arrangements.

## **7. What Are The Costs Associated with Putting Together A Successful Program?**

The costs for organizing these programs are relatively inexpensive. I should note that I have never asked an athlete to contribute a single penny in forming these programs. Instead, I have usually relied on licensing advances or on a third party investor/promoter or on a particular or entity to cover the start up expenses. Recently, I was approached by a former member of a World Championship team who wanted my help in organizing his former teammates and offered to front all of the start up costs (including legal fees). In one instance, all of the program’s members equally contributed to the start up costs. The start up costs are generally comprised of:

- Legal fees associated with forming the entity and securing the requisite player rights;
- Creating a unique player owned program logo that does not infringe on the intellectual property rights of the team or any other third party;
- Costs associated with applicable trademark filings;
- The development of marketing materials; and
- Website design and hosting.

Depending on the complexity of the foregoing, startup costs will vary. Ongoing costs will consist of accounting, legal and



public relations services (which is optional). Oftentimes many of these fees are covered by a portion of third party licensing fees and/or are passed on to third parties contracting with the program.

## 8. Other Issues to Consider Prior to Launching a Program

Although getting into specific detail is beyond the scope of this article, set forth below are some of the additional considerations that must be addressed in creating programs for nostalgic athletes:

- Which members of the team should be part of the program? For example, Miracle of 1969 Enterprises was limited only to the players that were on the active World Series roster, the coaches and the estate of Gil Hodges.
- How will deal specific decisions be made by the players? Members of the program may designate a committee to approve transactions or require majority approval and allow certain players to opt out of a particular deal if there is a conflict.
- How will revenue be divided among the players? Most programs will divide licensing royalties pro rata and allow the market to dictate appearances fees and signing fees. There have been notable exceptions to this rule. For example, Hall of Famer Tom Seaver participated in many events during the 1969 Mets program for the same consideration received by the lesser-known players on the team. In doing so, Seaver afforded all of his former teammates the opportunity to receive additional revenue from the program.
- Do players have exclusive arrangements that could preclude their participation in certain specific deals? Typically, any issues are flushed out by asking the athletes or their representatives to complete a detailed questionnaire prior to the launch of the program.
- What third party rights will be required if the program is envisioned as a joint licensing program? Typically, I will meet with the applicable governing bodies (e.g. Major League Baseball Properties or USA Hockey, as applicable) to fully inform them about the program and address any potential conflicts ahead of time. The goal is to secure a letter of support for the program from the applicable governing body prior to formally launching the program. These concerns may be somewhat mitigated to the extent that a team is taking the initiative of organizing and promoting the program.
- Determine if there are any conflicts between potential sponsors of the program and the current sponsors of the franchise. To eliminate potential conflicts, corporate sponsorship of the program should be offered to existing current sponsors of the franchise and conflicts between potential program sponsors and existing sponsors of the franchise (in particular exclusive sponsors) should be avoided and/or resolved ahead of time.
- Retain experienced professional advisors that are experienced in building and protecting a brand to offer their expertise in organizing and launching any program involving nostalgic athletes.

*For more than 30 years, Ed has negotiated sponsorship and endorsement agreements in transactions involving some of the most iconic athletes, entertainers and brands of our generation including: the 1969 Mets, 1980 Olympic Hockey team, Tiger Woods, Arnold Schwarzenegger, The Cleveland Cavaliers, Derek Jeter, Mariano Rivera, Manchester City Football Club, Mike Tyson, Alex Rodriguez, 1994 New York Rangers, David Wright, Walt "Clyde" Frazier, Larry Bird, Odell Beckham, Jr., Triple Crown Winning Jockey victor Espinoza and countless Hall of Famers in all major sports league. Ed Has also represented Steiner Sports for the past 10 years including Steiner's player agreements and partnership agreements with the New York Yankees, Madison Square Garden, the Boston Red Sox, Notre Dame and Syracuse Universities and the Brooklyn Nets. Ed is also an experienced corporate lawyer who received his JD from Columbia University Law School in 1987. Ed has previously represented numerous public and private companies in complex M&A, financing and other strategic transactions.*



*Edward H. Schauder  
Partner  
Phillips Nizer LLP  
(212) 841-1340  
eschauder@phillipsnizer.com*

PHILLIPS NIZER LLP