

# Daily Journal

## VERDICTS & SETTLEMENTS

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### There is no 'I' in team: electronic discovery and professional sports

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Interdependence, the mutual reliance of individuals and entities on one another, is a crucial feature of professional sports. As the interconnectedness of a point guard, power forward, and center on a basketball team, the athlete, the agent, the team, and the league are interdependent entities, each with a distinct but related responsibility.

However, this interdependence creates several unique legal issues in the context of professional sports. One such problem is how these interdependent entities must police and preserve each other's documents and information. This article aims to examine some of the intricacies of these interrelated responsibilities, particularly in the context of the athlete/agent relationship.

This issue is not academic. On the contrary, the question of who is legally responsible for various documents has become increasingly pertinent in our contemporary information age as a result of (1) the sheer amount of information created and amassed; (2) the expansiveness of rules governing legal discovery and information production; and (3) the demonstrated willingness of courts to enforce information governance and punish, with monetary and other sanctions, the destruction or failure to preserve and produce information, even if such destruction is unintentional. These three factors have heightened the importance of quality governance and preservation of electronically stored information (ESI) in this digital



Former New England Patriots quarterback Tom Brady (12) looks to pass the ball against the New York Jets at MetLife Stadium in 2012. Brady is currently the quarterback for the Tampa Bay Buccaneers. | Shutterstock

age. See, for example, *Waskul v. Washtenaw County. Community Mental Health*, 2021 WL 5049154 (E.D. Mich. Oct. 31, 2021), the U.S. in which the Court warned attorneys appearing in federal courts either to be competent and cooperative in discovery of electronically stored information (ESI) or to partner with someone with ESI expertise.

On a large scale, major professional sports leagues are vast and complex networks that must be cognizant of all the players, such as athletes, teams, owners, and sponsors, and situations that make them a reasonable provider of electronic documentation. Unlike a sports agent who pre-

serves communications with and about a specific client, leagues face countless limitations and responsibilities related to information preservation and production from their member teams and players. As established by the lower courts in *National Football League Properties, Inc. v. Superior Court* (1998), the League may be responsible for producing information between the League office and any of its affiliated for-profit entities. For example, during the "NFL Spygate" scandal in 2007, in which Coach Bill Belichick and the New England Patriots were caught videotaping defensive plays called by other teams, in violation of League rules, the

NFL was responsible for obtaining all copies of the Patriots' tapes over the seven-years of videotaping activity. After receiving and reviewing the tapes, the NFL sanctioned Belichick the maximum \$500,000 fine, the Patriots \$250,000, a firstround draft pick and subsequently destroyed all videotapes.

On a smaller scale, one of the critical relationships in the world of sports impacted by e-discovery is the relationship between professional athletes and their agents. This is a context in which vigilance is particularly important. Agents are often considered trusted advisors and friends of their clients and therefore are

privity to the great majority of documents and data associated with the athlete. As such, an agent owes a fiduciary duty of undivided loyalty to their client, which, in essence, requires them to step into the shoes (whether they be Nike Jordans or Vapor cleats) and place the athlete's interests above their own. However, an agent or player may not fully realize that the agent's fiduciary duty extends to the documents and information they keep on behalf of their client – placing the responsibility of preserving documents related to potential or existing litigations involving both present and former clients on an agent. As a result, an agent's failure to maintain relevant documents and information, however unintentional, may expose the player to litigation sanctions and subject the agent to liability, including the imposition of enhanced or punitive damages for breaching their fiduciary duty.

A party's duty to preserve and produce information, including ESI, during a legal dispute is extensive. For a party to the litigation, it is irrelevant whether the requested party possesses or legally owns a requested document – all that is required is "possession, custody, or control" of the requested information. If any of these criteria are satisfied, the parties are usually obligated to preserve that information and produce it upon request. See, e.g., Federal Rule of Civil Procedure

34(a) (1) (A) (adopting "possession, custody, or control" as the test for the production of electronically stored information). It is well-settled that, where a principal-agent relationship exists, the principal (the player) "controls" any personal information that may be in the physical possession of his agent. Thus, if an agent destroys information under the player's "control," a court may sanction the player for engaging in "careless and indifferent collection efforts after the duty to preserve arose." In turn, the player may contend that the agent's failure to control and preserve information on their behalf is tortious and constitutes a breach of the agent's fiduciary duty.

An agent cannot waive its fiduciary duty but can lessen its exposure to help protect clients. First, the agent and the player should be aware that relevant documents and information in the agent's possession are potentially discoverable in any litigation involving the player. Thus, it is prudent for players to include their agents in any litigation hold, and, even if the player neglects to do so, an agent should proactively impose a litigation hold once it becomes aware of litigation or potential litigation involving the player.

Second, a best practice would be for the agent to inform its clients in writing that the client's preservation duty may extend to information in the agent's possession – providing players with

a copy of the agent's customary document preservation and destruction policy. For example, suppose the agent has a policy of destroying all emails older than six months or all information older than two years, except for tax return information. In that case, they should inform their clients of the policy to avoid future misunderstandings. Any information retention and destruction policy should be strictly adhered to by the agent in the absence of a litigation hold. By informing clients in advance of their document retention and destruction policies, agents fulfill their fiduciary duty and protect themselves in a legal dispute where a player neglects to disclose the existence of information in the agent's possession. Similarly, only once a player is informed of the agent's policy are they equipped with the means necessary to ensure the information in the agent's possession is preserved for legal discovery.

The duty to preserve and produce documents and ESI extends to the information under the possession and custody of sports leagues, teams, key stakeholders, and those under their control.

Failure to preserve documents can trigger monetary and non-monetary judicial sanctions and harm parties through follow-on lawsuits and potential state or federal investigations. Considering the substantial time and resources professional athletes, agents and leagues expend

developing their respective businesses and brands, an investment must also be made to prevent tarnishing their reputations and damaging their livelihoods through the uninformed and unintentional destruction of information. Attorneys counseling athletes, agents, owners, leagues and other sports organizations should inventory their clients' processes for preserving electronically stored information and protocols for production.

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