

**THE SETON HALL SPORTS &
ENTERTAINMENT LAW JOURNAL
SYMPOSIUM**

February 28, 2013

**PANEL DISCUSSION: LOCKOUTS: PAST, PRESENT,
AND FUTURE**

MODERATOR: CHRIS FONTENELLI – ASSOCIATE,
PATTON BOGGS, LLP.

PANELISTS:

HYMIE ELHAI, ESQ. – VICE PRESIDENT AND GENERAL
COUNSEL, NEW YORK JETS

JOHN RUZICH, ESQ. – SENIOR VICE PRESIDENT AND
GENERAL COUNSEL, LEGENDS, INC.

WILLIAM DENI, ESQ. – SPORTS AGENT & ASSOCIATE,
GIBBONS, PC.

DAVID CALDWELL – NFL PLAYER, NEW YORK GIANTS

**KEYNOTE ADDRESS: CONFLICTS OF INTEREST IN
THE PROFESSIONAL SPORTS CONTEXT: THE
ETHICAL OBLIGATIONS OF AN IN-HOUSE COUNSEL**

KEYNOTE SPEAKER:

BILL HELLER, ESQ. – SENIOR VICE-PRESIDENT AND
GENERAL COUNSEL, NEW YORK GIANTS

PANEL DISCUSSION: LOCKOUTS: PAST, PRESENT, AND FUTURE

DEAN LILLQUIST: My name is Erik Lillquist. I am the Vice Dean here at Seton Hall Law School. On behalf of the law school it is my pleasure to welcome you this afternoon to the Sports and Entertainment Law Symposium. To further the commitment to providing the sports and entertainment industries with analysis of current issues in the field, the Sports and Entertainment Law Journal has chosen to focus today's symposium on professional and ethical dilemmas confronting attorneys representing athletes, and specifically with work stoppage, lockouts and ethical obligations of in-house counsel.

Today's panelists have extensive knowledge and experience in representing high profile clients within the ABA model role of professional conduct in labor issues respecting the sports and entertainment fields. In addition, we will have the opportunity to hear from William Heller, senior vice-president and general counsel of the New York Giants.

As always, I am very pleased to announce that today's events award two New Jersey and New York CLE credits; and most importantly it offers one of those in the field of ethics, a welcome opportunity for all of us. Please be sure that you all sign in and sign out at the desk upstairs to make sure you get credit for your attendance.

I want to thank Mr. Heller, along with our panelists, for joining us and sharing their expertise with us. I also want to thank Chris Fontenelli, the symposium editor, Andrew Giarolo, the editor-in-chief, Amanda Leone, the managing editor, and the entire Journal of Sports and Entertainment Law key board for all their work in putting the symposium together. I also want to thank my colleague and friend Charlie Sullivan, the Journal's faculty adviser, for providing them guidance, and finally to thank Rosa Alvez and Theresa Rizzo for providing support to the Sports and Environment Law Journal in putting together this symposium.

With that I want to welcome Chris to introduce this evening's panelists. Thank you very much.

MR. FONTENELLI: Thank you for coming tonight. We have a great keynote speaker. It is going to be a great night. So, what I am going to do is briefly introduce the panelists and then I am going to allow them to speak, because that is really

2014]

Symposium Transcript

9

why you are here.

First to my right – we will just go down in order – I have John Ruzich, who is from Legends. He is going to explain to you what Legends does and what the corporation is all about. I am going to allow them to really get into that. To his right we have David Caldwell, who is recently a New York Giant. He just signed a two-year contract. So, you will get to see a player's perspective. To his right we have Hymie Elhai, who is the vice-president and general counsel to the New York Jets. And then lastly we have William Deni, who is an associate at Gibbons and he is a sports agent.

With that being said, I am going to turn it over to them. The first thing to get it started is really what you guys do, what your corporation or your employer is all about and what your perspective is going to do today.

MR. RUZICH: Thank you. So, the company I work for is called Legends. It was formed in 2008. Initially it was a joint venture formed between the Dallas Cowboys, the New York Yankees and Goldman Sachs. Early last year the Checketts Fund purchased or bought out Goldman Sachs and ultimately brought a new chairman, David Checketts, who some of you may know was chairman of Madison Square Garden for a period of time and was the owner of the Real Salt Lake and the Saint Louis Blues hockey club. So, Legends has three major business components. The first one and the most well-known is the hospitality division. Specifically, we provide concession services, merchandising, premium and suite concessions, special events and tours for venues. The most significant well known venues we have, we operate Yankee Stadium and Cowboys Stadium. We have a handful of minor league baseball stadiums, and recently we have come to terms to operate at the Etihad Stadium for Manchester City in the United States Kingdom.

Our second group we have is called CSL, which essentially does feasibility studies for teams or owners or prospective owners that would cover in market and demand consultation, financial feasibility, operational revenue – operational reviews and team valuations. So, specifically we are here to help owners assess their situation, or more importantly, a perspective to an owner who wants to bring a team to a new market. We give them the ability to go ahead and understand the economics and impact of moving a team and how to fund their business.

The final piece is we have a sales and marketing division where we perform market research, presales and XPX sales campaigns for teams. That can be done usually in two ways. The first one and most well-known and one of our biggest success stories is we have been managing all the sales inventory for the San Francisco 49ers and their new stadium in Santa Clara. So, specifically we will go, and we have been selling PSLs and skyboxes in the new stadium even before it is built. The second piece of that is we will go ahead and work with teams in existing venues and help them refine their sales process, whether it is going ahead and training their staff or actually bringing in our troops to go ahead and sell to their clients. With respect to my role, I am general counsel. I oversee all of the contract negotiations for our various lines of business. I deal with all the various corporate issues, mergers and acquisitions, labor negotiations, both with our staff, union and nonunion. We have several labor unions that we deal with. And finally I oversee our litigation.

MR. CALDWELL: Hello. Thank you. I am David Caldwell. Like he said, I play for the Giants recently, just signed with them. For the previous two years I was with the Colts. I will give you my perspective as a player, and that is about it.

MR. ELHAI: I am Hymie Elhai from the New York Jets. I think it is pretty obvious the company that I work for. In my role as general counsel, I handle all sponsorship, employer, broadcast agreements, litigation. Pretty much I am a department of one at the club. Pretty much anything that is related to the legal department runs through me. So, that is generally what I deal with on a day-to-day basis. It can vary. There is never a consistent day. These issues sort of pop up all the time. You just have to address them on the fly. So, we can talk through some of this stuff as it relates to the lockout, my experience with that when we went through that a few seasons ago, which was obviously a very stressful time, not only for fans, but for the players, for the staff. And obviously there is a lot of different ways that it can be handled. We will get into that a little bit more as we go into it.

MR. DENI: I am the sports agent. I represent David Caldwell of the New York Giants, formerly of the Colts. I am an attorney at Gibbons. I started the sports law practice about seven years ago. I work with another lawyer in my firm, Jordan Solomon, who is here tonight. We represent pro athletes. By the way, I am also a graduate of Seton Hall, and

2014]

Symposium Transcript

11

yes, that is my coffee shop downstairs, thanks to my father. We represent athletes in contract negotiations with NFL clubs. We also represent athletes in endorsement opportunities. Of course, we could also represent athletes from a true legal perspective, if they get in trouble. I have not had to do that with David Caldwell yet. I don't anticipate that will happen.

Lockouts are very important to me in my practice because if you are locked out, you do not get paid. And if you do not get paid as a player, I do not get paid as the agent, which is very important to me and more importantly my firm. Just to give you some perspective, because a lot of people ask me what is it like to be an agent, you have to be certified by the National Football League Players Association (NFLPA), which is the NFL union, the players union. So, Hymie is on the other side of that. Hymie is management and I am labor. There are about 900 certified agents. Out of those 900 agents that represent 1,600 players in the NFL, more or less, 550 of those agents have either zero or one client.

So, if you have more than I believe two clients, you are now in the top 40 percent of NFL agents. If you have three clients, you are in the top 25 percent of NFL agents. And if you have four clients, you are in the top 18 percent. People will ask me how many clients I have, and I say I am in the top 18 percent, but just barely. Other than that, I think move onto the next question.

MR. FONTENELLI: Let's take a turn to the actual lockouts. Hymie, if you want to describe, just set the stage for what a lockout actually is.

MR. ELHAI: Sure. I would like to start it from the fact that the collective bargaining agreement was signed in 2006 between the players union and the NFL. I think even as far back as 2006 we kind of knew what was on the horizon coming in 2011. So, it was done. I think it was a stopgap situation. Commissioner Tagliabue was on his way out at that time and Commissioner Goodell stepped in. So, I don't think they really wanted the commissioners bringing to an end in a lockout situation. So, I remember back even as soon as probably 2008 we were sort of preparing for that strategically internally that this could happen.

So, just to give you a little bit of background, a lockout is generally we do not give access to the players to our facilities, play games. Everything is completely stopped. It is a

complete work stoppage. As part of that planning process, that really meant that we had to really look at every single one of our contracts. Not only the ones with the players, but everyone with our business relationships, because there is revenue implications coming in and going out for all of these agreements. So, provisions that historically really didn't have much implication or weren't highly negotiated, whether it is force majeure provisions, straight-out work stoppage provisions, those became significantly, significantly important. And also the NHL was coming off a lockout around that period of time as well. So, sponsors and people that we had business relationships with were very attuned to this reality coming. So, that was about 2008 or so.

But then come 2009, '10, '11, things started to really ramp up and the media really started to realize that this was coming. There was a lot of tension between the league and the union; and that really meant from an internal perspective we had to strategically plan how we were going to keep our business running. The NHL, when they went through their lockout, even in the league office they had significant employee layoffs. They are only a shell of their former self. We didn't really want to put our employees back on the street and let them get new jobs because we knew that we would become up and running again. Also tied into this whole thing, we had recently opened a new stadium with the Giants, which is a very, very expensive stadium to operate and run. With the expenditures that were put into place to build the facility, that means there is a lot of debt service to keep it running. If we are not playing any games, where is that money really coming from? That meant the owners would have to reach into their pockets to not only pay the debt service at the stadium, but also keep employees on staff. We really went through a huge litany of scenarios of what could happen, just in terms of timing, how long this thing could run for. We really had no idea how long it could last.

What we did as an organization, we instituted furloughs for our employees. So, that meant each employee had to take, I believe it was a total of five weeks off from March to July, completely unpaid. So, effectively your salary is getting reduced 20 percent. That was really done with the idea of potentially keeping the expenditures from going out, but also maintaining people's jobs. Luckily the collective bargaining agreement got ratified in August, and that meant our

employees were able to come back to work. But people were collecting unemployment, things of that nature. That really sort of had everybody in a huge panic, because if the season didn't start, that meant that we weren't having any games. That meant that potentially people were getting laid off. That really affected employees more than people probably realized. I think they just viewed it as an NFL player sort of issue, but it was really front and center and affected everybody that was involved in the NFL.

MR. FONTENELLI: I would also like to hear, John, from your perspective how you essentially prepare when you know a lockout is coming. Now we see how the teams prepare or what they think about. What are all the scenarios you think about and how do you adapt going into it?

MR. RUZICH: I think Hymie hit it perfectly, the administrative aspects and labor aspects. Luckily for me joining baseball with the Yankees, we did not have any work stoppages for any period of time that has been an issue. But with the Cowboys we did have that. We look at it two different ways. One is that we try to reallocate our resources so that we can put personnel in different divisions. We do that. But also what we have tried to do – this is not just what we do, as our main business is the Yankees and the Cowboys. This is an industry standard. We try to go ahead and find different ways to maximize revenue from the facilities from non-football or business ball events. For example, the Yankees, they have had concerts last year with Muddy Waters and Madonna. This year we are having Jay Z and Justin Timberlake. Start doing things such as soccer matches with Chelsea FC and AC Milan, and ultimately the Pinstripe Bowl.¹ Obviously you have weather issues and logistic issues with Yankee Stadium. For Cowboy Stadium – as Hymie said, Metlife was expensive and obviously Cowboy Stadium I think was a little bit more.

MR. ELHAI: Actually, it wasn't. I just had to say that for our owners – and privately financed, by the way.

MR. RUZICH: There we have a lot more flexibility, and the Jones family is very aggressive in maximizing the revenue, so

1. The "New Era Pinstripe Bowl" is a college bowl game which is played in Yankee Stadium. The inaugural game was held on December 30, 2010 ending in a 36 to 34 Syracuse victory over Kansas State. *History*, PINSTRIPEBOWL, <http://web.pinstripebowl.com/history/index>.

not only just those types of events, but college football events or motocross or concerts. They actually go even a step further. We have an extremely profitable tour business. I don't know if any of you have ever had an opportunity to go on a stadium tour. We have the best stadium tour in Dallas, specifically because we let everybody do whatever they want on the field. I can show you the insurance claims about this high that guaranty that we let people do anything they want. We also go ahead and do a lot of special events. So, they will do everything from conventions to weddings. They will even do Boy Scouts camp out one night in Cowboy Stadium. We have a full list of events that are outside of football. And additionally when we know that a lockout is coming, we go ahead and make sure we have contingency plans in place, so make we can open it up and just mitigate the costs.

MR. FONTENELLI: Bill, from an agent's perspective, knowing that that is essentially your life is making money off of your players, how do you prepare for the lockout if you know it is coming?

MR. DENI: I make money with my players, not off of them. David can pitch in and add to what I am going to have to say. For me, there are two types of lockouts. This is not very technical. One is lockouts that occur when players don't get paid, during the season. This is what the NFL lockout was. It started in March and it ended in August. An NFL player gets paid from September until January. So, I can only collect three percent of his game check. If there is no game check to collect in the spring, it doesn't affect my revenue, so I don't freak out. I didn't freak out initially, until these guys were messing around – excuse me, negotiating in good faith. Then it was starting to turn into a lockout that was bad for me and for guys like David, because if you lose a game check as a player, that is anywhere from \$20,000 for a minimum player's salary to Eli Manning's \$1 million per game. An agent can make three percent of that, and that is a lot of money.

So, first thing we have to do, we have an obligation to put our clients on notice to let them know that there is a lockout coming and what and how you can prepare for the lockout. Now, the NFL Players Association helps us with that, and they have meetings – David can speak to that – as to informing the player what is going to happen, what could happen, and worst case scenarios as well. As agents we have

2014]

Symposium Transcript

15

a meeting three times a year. We have to go to one of those meetings. At the meeting at the NFL combine in 2011, we talked about it, what we were supposed to do. The key for preparation is to know. And you have to let your client know he is not going to have medical insurance when there is a lockout. He is not going to probably have the endorsement opportunities that he would normally have or the appearances, whether it is not-for-profit or for-profit, that would normally come about, because a team is prohibited from working with him. And then, of course, the actual financial issues if the lockout goes into the regular season, which affects the players and thereby affects me.

MR. ELHAI: There is something I want to add to that. When Bill says we weren't allowed to work with the players, we weren't even allowed to speak to them at all. If anybody had a special issue that they needed to speak to a player about, it was logged and it was sent in a spreadsheet to me on a daily basis so we had track of this. So, the good faith that Bill is talking about, that was being maintained, and there wasn't any sort of indiscretion going on during this negotiation period. And you need to maintain that to legally comply with the legal lockout. So, there were a lot of procedural things that were going on, and all the general counsels that had teams were dealing with this from a management standpoint.

MR. FONTENELLI: David, it's obviously fantastic having a player here. Give them what goes through your head, and plus one game versus the whole season, what kind of impact does it have on you?

MR. CALDWELL: It was definitely a rough lockout. So, it was the kind of situation where I was on the team, but I still had to prove myself because they hadn't really seen me play in any games in the NFL. All you are thinking is, wow, if this really goes on until September, then these checks aren't going to be coming in, and I am making different plans with my family and with other – just different ways to spend money. You don't know whether that money is going to come in or not. We get paid during the off season, but my agents, they don't get any of that. So, we are missing that work-out check. It is not as much as during the season, but it is still something that you are relying on.

But if you have your agent – and we had a bunch of representatives from the NFLPA come and prepare us for

what was a possibility and what ended up happening – then you kind of put that money to the side. You get paid a good amount, so you should be able to last – what did it end up, being about six months? So, you should be able to last that time. I know I was a substitute teacher, so I was substitute-teaching. My mom is a teacher. So, that was cool. I also – not only was I substitute-teaching, I started a company, and it is called OHGI. Throw it out there.

MR. DENI: It is on Facebook.

MR. CALDWELL: It is spelled OHGI. It stands for Out Here Getting It. I came up with the idea during the lockout watching *Bad Girls Club*. You know, it just kind of clicked. I didn't know what I wanted to do with it. Then I said I am going to make some coats with it. It has turned into an athletic apparel line. I wanted to make sure that if I wasn't reporting to meetings with football, that I take my time to do something else productive and hopefully turn into some money in the future. That is what I was doing.

MR. DENI: David Caldwell is also on Twitter.

MR. FONTENELLI: The next thing I would like to talk to you about is—you talked about how we prepared for the lockout. We talked about some things that go on during a lockout. But are there any external forces, especially with fans and public perception? What are the external forces working against all of you, or at least against your employer?

MR. ELHAI: I think from our standpoint the real tension came from our season ticket holders and suite holders. Obviously we typically invoice fans for their season ticket payments in April. And obviously that was right at the start of the lockout. So, needless to say no one was willing to pay us at that point in time without any guaranty that we were going to have any season. So, we really came up with a tiered structure to at least secure their seats. If I recall, I think we took 50 percent of their money in installments up until July, and then once it was announced that the season would come back, then they essentially had, I think, potentially two more payments to make to us to have that come. So, we were getting inundated with calls with every possible scenario. If we lose one game how much money are you giving me back? If we lose two games, how much money are you giving me back? I want to terminate the contract. Everything that you could possibly think of, everybody was calling. So, we really had to do damage control and maintain our fan base; and

2014]

Symposium Transcript

17

obviously it is that revenue stream that supports the organization. So, it was a very, very stressful time all the way around.

MR. FONTENELLI: John, from your perspective, what do you guys do contractually? I know you already talked about how you prepare.

MR. RUZICH: To go with Hymie's point, I think you really have to look at your business as a brand and what kind of effect that has on your brand itself. Even while the lockout is going on, we have a variety of contingencies. I am sure you have it too. What happens if they sign in seven days; what is our plan of action from our communication perspective? From the hospitality side, we actually make sure – we pride ourselves at Legends of having the best hospitality and the best service and quality. But we really try to overemphasize the training of our staff. When these people come back, they are spending good hard earned money to see the best America's football team and the New York Yankees, and we want to go ahead and make sure that they feel that extra level of service and gratitude. I have a shirt for you.

MR. ELHAI: I don't get enough abuse in the media every day.

MR. RUZICH: But obviously that is the point. We have different divisions of our business. Although we in no way, shape or form like work stoppages, our sales and marketing division from a consulting standpoint actually goes ahead and puts plans in place so that when a work stoppage ends, we go to a variety of teams and help them in their separate markets.

Let's do some focus, let's see what the fans are really feeling, let's see what we can do to go above and beyond to help them sell tickets to give them a better fan experience. So, it is literally looking at every type of contingency and how to make the best of it.

MR. FONTENELLI: David, I know we were talking about outside during a lockout, your experience – I know you talked about things that you planned on doing, but also in terms of staying in shape and what you are able to do from a legal standpoint. How are you affected?

MR. CALDWELL: It's hard because you're locked out of the facility, so you have got nowhere to work out. Little stuff you can get from the facility, whether it is a hot tub, getting a little treatment, you can't get any of that. I couldn't get any of it in Indianapolis, so I ended up coming back home to New

Jersey. You have to work out outside. It may sound like it is not that rough, but it makes your life a little bit difficult. You don't have a nice dome to work out in and things of that nature.

MR. FONTENELLI: From an agent's perspective, we talked about – before when we were outside we were talking about when they are negotiating, how you and your client communicate with one another and how your role potentially changes during a lockout.

MR. DENI: It is very difficult because you are just sort of in limbo. One handout that I had is an exhibit. It says National Football League on top. I don't know if everybody's got it. It's from the District of Minnesota, Brady versus NFL case.² And there is a cover letter to DeMaurice Smith, who is head of the Players Union, from Dennis Kerns, who is an in-house counsel at the NFL, and there is a form letter that the players received from their club that outlines what they can't do, what a club can't do, and what certainly an agent can't do. So, again, health insurance is a huge deal. Being inside, warm in a dome to me isn't as big of a deal because you can actually go outside, especially in the south. But there are other things that can't be done, like if you have child support obligations that need to be fulfilled, the team has to log those child support calls. Is that right?

MR. ELHAI: Yes.

MR. DENI: So, you literally are locked out. I mean, I was at the Jets and had lunch, I think during the lockout and there were a bunch of people that had nothing to do, the trainers and the weight room staff. The big thing – this did not affect David – but when you are an NFL rookie, so after the draft when you are a rookie, you are either drafted or you are signed as an undrafted free agent. And you go a week after to your team for two or three days to a rookie orientation camp. Okay. That is where you get your number and you meet all your coaches.

After that you go home for a week or two. Then you go back to your respective team for a seven-week rookie orientation where you learn the playbook. You learn where Chipotle is down the street where you can eat. You just get comfortable with your team and your coaches. You cannot do that during a lockout. So, you have got – whether you are

2. *Brady v. Nat'l Football League*, 779 F. Supp. 2d 1043 (D. Minn. 2011).

2014]

Symposium Transcript

19

drafted or not. So, you have got rookies that have nothing to do from March until I guess August, whenever the lockout ended, and all of a sudden they are thrust in without any orientation to an NFL camp, which is terribly overwhelming. Correct me if I am wrong, David.

MR. CALDWELL: Yes.

MR. DENI: You had the opportunity before the lockout during your first season to have the orientation coming in.

MR. CALDWELL: Like Bill said, I had the opportunity to go through the rookie mini-camps and all that. And I can't imagine just coming into training camp. Training camp is a lot different from college in the sense where it may not be as strenuous on you physically, but mentally it is one of the toughest things that I have ever been through. Just being thrown in there as a rookie would have been very difficult.

MR. ELHAI: I think it is also a challenge from our side. The coaches normally, as Bill will attest, they normally don't follow any rules. So, when you tell them, you can't talk to a player and you can't send him his playbook and you can't get his information ready for the season, they will normally dismiss that and actually say, what do you mean, I know this is going to end, we have to get ready for the season. It is all about meeting ends for those guys. So, the Commissioner actually sent out a notice telling all staff that if they had any contact with a player, particularly coaches, they would be fired for cause and they would not get their contract value back. So, there was a lot of fear going around and I think intimidation. That is the only sort of way to manage the situation internally.

MR. FONTENELLI: I was going to ask you another question regarding what we are talking about, negotiations and the labor negotiations. I don't know what your role exactly was in that, but I wanted to kind of talk about a line that potentially the owners set and to what extent do they think about if we cross that line. Is it going to be over for the entire season or how you deal with setting a certain limit?

MR. ELHAI: I think first off from my role, I was a spectator, just like everybody else. This is really handled at the league level; it really wasn't handled at the team level. There was a negotiating committee that included obviously executives at the league, but also ownership. John Mara, owner of the Giants, was on that committee. My owner was not. So, we were all just getting that information just like

everybody else, watching the news. Maybe you would get something in advance, but not too much. I mean, this was a daily sort of thing. Then when you hear that things weren't going well or they weren't meeting, everybody's anxiety level was obviously increasing to that standpoint. But really, I think that the parameters were really set ahead of time on what the league sort of wanted, and I think they just negotiated a lot of these things as they went along.

The rookie wage scale was obviously a big issue going into the lockout. Obviously the union wasn't in favor of that. But that was something that they obviously had to give on and I think the league decided to give in terms of what that value would be. So, there was a lot of these issues that were really big problems. Post retirement care and things of that nature were brought to the table. Drug testing. Everything you could possibly imagine in terms of a work force setting and how you were going to structure that environment was negotiated. Even things such as Workers Comp. So, everything that you could possibly think of that would impact the players, the organization and staff, that is really what was on the table. That is why it takes so long to get these things done.

MR. FONTENELLI: John, I wanted to ask you about what you think in your opinion, because you have been in the business a long time – what do you think can be done to prevent certain things? Do you think this is just going to be an ongoing thing where lockouts will occur no matter what?

MR. RUZICH: I think it really depends on the disparity of revenues between teams. I think you can see that. As that grows and the pie shrinks, you will see that you will have different owners and different agreements. As Hymie said, the Commissioners of the various sports go ahead and issue gag orders, so there is no obvious dissension between the team owners and the public. You will have small markets versus large markets, and you will have different issues. So, the National Football League, you have obviously television revenue that is split equally, but it is how you deal with other revenue sharing. The larger revenue clubs have to subsidize the smaller revenue clubs.

I think with the National Hockey League the reason they had – in my view, that they had such a problem with their collective bargaining agreement is because you have a lot of teams that are in the red. I think it has been well publicized teams in the south just were short on revenue. I think there

2014]

Symposium Transcript

21

was even a Forbes article which said that. I don't know if it was 50 percent of the NHL revenue was derived by the original six teams.

So, when you have that and you have such a disagreement there about – the owners need to get on the same page first and then have to deal with the issues. There are two battle fronts. It is a very difficult situation. I think a majority of the collective bargaining agreements that are in place are for significant periods of time, so they should, knock on wood, have some stability. But who knows what is going to happen in ten years or so.

MR. FONTENELLI: Bill, do you want to give your take on what you think the problems are regarding negotiations or if you have any other opinion on it?

MR. DENI: I am going to speak from a perspective of labor, and the management needs to give more money to the players. That is the problem, is that they don't want to – they make tons and tons of money. During the NFL lockout – and Hymie can correct me if I am wrong, and I am not wrong – they were going – the NFL was going to earn money from TV revenue, even though there weren't games on. That is a billion dollars, something like that, in the pocket of 32 different owners.

MR. ELHAI: It was really deferred payments; let's be honest. It wasn't a windfall.

MR. DENI: But it was earned, or going to be earned, and a player was not going to earn any money. And there is a disparity. It is never going to stop. I am not sure we can have 20 panelists on here to talk about it, but there is always a line, always a balancing, an equity that you have to get to where a player and the union are going to be satisfied with the money that is received. It is different in every sport. I can't speak to the NHL. I watch it on TV. I go to Devils games. I don't know much about it. I can't even skate. In baseball there is a very strong union. The NFL has a strong union, but it is not as strong as baseball. That is why you see more labor, for lack of a better term, unrest in the NFL than you do in Major League Baseball. I would imagine the weakest union is probably the NHL players union. I don't know. I don't want to make that statement. But I would imagine it is.

MR. RUZICH: I wouldn't want to go up against Donald Fair.

MR. DENI: The NFL was a serious lockout. They had the bad kind of lockout that I was talking about earlier, which is the players weren't paid for half the season. And they – I guess the players – negotiation is all about leverage. When you are not getting paid, there is a lot more room to negotiate when you are a player and on the player's side, because that is how the players make money. And a league is still going to continue to make money from licenses and TV deals. They pretty much always have more leverage than players.

MR. FONTENELLI: Hymie, if you want to respond to that, because I was going to ask you next about the tools that you use, or at least the owners use, when there is a lockout and negotiating and what type of tools are used.

MR. ELHAI: I think that is a fair point. Look, the reality is, though, in a short period of time there are revenue streams that are coming into the club, but if in theory the lockout were to go on for a long period of time, the teams would be losing significant amounts of money too. And the owners put in a huge amount of expense into this. All these markets are building new stadiums. Governments aren't really subsidizing those nearly as much in a lot of markets. So, owners have to reach into their pockets to do that. They are taking a substantial amount of risk to build these facilities and finance teams and pay players and all that. So, I think in terms of the negotiation strategy, clearly the agreement was signed in August. No one wanted to lose any games. So, I think everybody had a vested interest in getting a deal done.

So, the leverage play, yeah, in theory you could go as far as you possibly can to scare players into submission because they are not getting paid, but that is not really in anybody's best interests because there is huge expenditures and risks on owners to operate stadiums, teams, leagues, the TV revenue, all that stuff. Everybody becomes unsettled and angry because there is too much money at stake. You don't even think about all the local businesses that are impacted by this. The bars that you go into to watch football games on Sundays, they are impacted by no games. There is a huge trickle-down in effect when it comes to these four major sports and how it impacts society as a whole.

MR. FONTENELLI: Before we get into the post lockout questions, for David, I am sure that a lot of people want to know how you feel as a younger player, just entered the league, how you feel you are represented by the players union,

2014]

Symposium Transcript

23

when I would assume individuals that are watching on TV who constantly see these big time stars, that's what we think about. We see Brady, the NFL. But for you, how did you feel you were being represented?

MR. CALDWELL: You know, the guys that actually represent you, most of the time they are in a totally different position. They have been in the league for some years. Their probably financial status is a little different than yours. So, where it might be okay for them to take off some games, you may be feeling, I need to get these checks. But I think overall that everybody did a good job. And I sat in meetings, and we had Jeff Saturday on our team who did a great job representing the NFLPA, and I believe he fought for not only the players that had been in the league for years, but he also spoke for the younger guys as well. So, I think everybody benefited from having guys like Jeff on the NFLPA.

MR. FONTENELLI: To piggyback off that too, what were the biggest things discussed between the team and Saturday about what he was supposed to bring to the players association?

MR. CALDWELL: That's the thing. A lot of these guys, I believe the lockout was seen differently from different types of players. From a younger player such as myself, it was seen as basically we are just not going to be able to get paid. As from the older players, it was seen as no, we need these types of things before we can step on the field, whether it is not practicing as long or whether it is practicing without pads for certain days. Those are the types of things that were emphasized. In the meetings that we had, they made it clear to us and they made it clear what they were going into the negotiations to get across, and we actually took votes on different issues. And based on our vote, that is how they were going into the negotiations.

MR. ELHAI: The entire work environment changed significantly post lockout. David touches on it. The way practices were operated and are operating now is significantly different. There is only a certain amount of full-pad practices that you can go through. There is only a certain amount of time they are allowed to be on the field. This is all logged. This is all being managed right now. In the old days, even not that long ago, you could have two weeks straight of full-pad double session practices, and that doesn't happen anymore. It is not as rigorous as you go through the workweek.

MR. CALDWELL: I will add on to that. That is what I was trying to say earlier. That change from college to the NFL, in college you will feel like – we are having double sessions, wearing pads. You will feel like you are out there all day. But going into the NFL where you are in a situation where you have to prove yourself, there is 80 something guys, almost 90 guys, that are competing for 53 positions. I know I used to come out of practice where if you are only going to be out there for an hour and a half, two hours, there's not a lot of rest if eight people play your position. It was the type of situation that was harder for me – that is why I said it was hard on me mentally – because I need more reps. I need more. But from the older player's perspective, they are already proven, so they may not want there to be more reps. It is kind of like a tossup. As I said before, Jeff Saturday and these guys, they did a good job seeing both players' views.

MR. FONTENELLI: To get into the last round of the questions is really what do you do once the lockout ends? So, you went through this whole process, and essentially now what happens? I am sure most people want to know what happens that day lockout ends and everybody finds out.

MR. ELHAI: I can tell you from our perspective, everybody just wanted to know when they were getting their money back. When we announced it, we made sure that the staff – as soon as it was announced, Mr. Johnson made sure that everybody's lost wages was in their paycheck direct-deposited into their account that very moment. So, we were in the auditorium, not dissimilar to something like this. By the time everybody got back to their desk, their money was in their account. So, that was really the thing everybody was really concerned about.

MR. RUZICH: I think from a business perspective we always had these contingency plans ready to go – here is our seven-day window, our ten-day window, here's how we are going to reach out to business partners, here is how we are going to reach out to fans, here is how we are going to ramp up on our scheduling issues. You think no matter how many times you plan for this, no matter how much you think this out, it never goes exactly how you want it. It is kind of a frantic pace to go ahead and get everything lined up. It's just a lot of communication, a lot of messages. Damage control, a lot of just really strong communication with your partners, with your fans, with your labor force. You have a couple of

2014]

Symposium Transcript

25

thousand employees who need to know, you have to be here at one o'clock on Tuesday. It is a coordinated effort. It is kind of a crazy period, but eventually you get through it.

MR. ELHAI: We had significant scheduling issues as it related to training camp. We typically the past few years go to SUNY Cortland to host training camp. That was obviously an agreement that we had to effectively toll and skip a year of going up there. We had training camp at our facility, which was not part of the plans. And we had to make those adjustments to do that. So, there was a lot of those scheduling coordination issues. Even getting the players back into the building. Obviously the majority of the staff, they are not negotiating this thing; they are just an employee just like everybody else. We wanted to set the right environment for them to feel welcome and be around the staff again and feel like it was business as usual and everybody could just put the labor stuff behind them.

MR. DENI: I think from an agent's perspective, the appropriate quote is from Ari Gold in *Entourage* when the lockout ends, and that is "boom, now we get paid." There are two different perspectives from an agent. One is – I am not even sure I talked to David except for a quick text, hey, you have got to report back to the Colts, because the team takes care of that. I remember specifically Hymie, John and I were actually having dinner the day the lockout ended, I think, and I believe I sat and had maybe a half a sandwich because I was getting so many phone calls from teams, because I had two guys that were not drafted, one from the University of Washington and one from Louisiana Tech. That usually happens right after the draft when we get phone calls to sign players, but it happened – actually, two teams, not the Jets or the Giants, called earlier before they were allowed to, to try to get those guys to sign with their team. So, my negotiations started, and it was like a whirlwind for about a day and a half to two days. Then as soon as you sign the contract, even before, you just agreed to it, the player is on the plane, at the facility. So, it was just immediate; they would just be starting their NFL season. It was so different.

MR. FONTENELLI: Lastly, we don't have a ton of time left, but I would like to open it up to any questions that anybody has. You can ask any panelist. I am sure that you guys can answer all different variations. If anybody has a question.

AUDIENCE MEMBER: Yes, for David. I am wondering what it is like to communicate with the rest of the players during the lockout, since normally I would assume that is the team's perspective.

MR. CALDWELL: During the lockout?

AUDIENCE MEMBER: Yes.

MR. CALDWELL: We actually – I guess you would call them little mini-camps. Payton [Manning] e-mailed everybody and said, you need to be here and we are going to work out. So, most of the players actually came back. They had two of those sessions, I believe, and came back. We were running plays and going through everything just on a local campus. I believe it was a college campus in Indianapolis. Payton, he holds you to high expectations, but we were out there practicing.

MR. FONTENELLI: Does anybody else have a question?

AUDIENCE MEMBER: Yea, I've got a question for Hymie. You said you are the only one in your department, you want to call it. How do you break into, I guess, what you are doing? How did you get started?

MR. DENI: He is looking for an associate, by the way.

MR. ELHAI: He is actually hiring three people. I started as an intern when I was in law school. The Jets is the only job I have ever had. So, we didn't even have a formalized legal department at the time. And I really just started in the office helping out as much as I could in a marketing perspective. But when I graduated law school, they asked me to stay on. I developed some relationships. But it was really the perfect storm of the business opportunities opening up at the NFL. The league has historically controlled a lot of the advertising and promotional rights for teams. At that point they were giving teams more rights to sell advertising in credit card categories, automotive, beer. And I was a cheap option to do contracts for them. So, that is really kind of the short, short version of how I started.

I think the way the sports business has grown over a period of time, the intern route, it is great to get that on your resume and start out. But it is very challenging to have your career go the way it goes now. I mean, for me I feel very fortunate that I was in the right place, right time. I will tell you, it did not – it certainly had its hiccups during that period of time. There were periods where I would say to myself, I went to a good college, graduated from law school and I

2014]

Symposium Transcript

27

screwed up my life. I was literally just grinding it out and I wasn't really feeling the acknowledgment that I was hopeful for in my career. Hopefully you persevere, things change, opportunities open up. If you do good work, that eventually gets acknowledged. So, that is how I started out in my career.

MR. FONTENELLI: Does anybody else have a question?

AUDIENCE MEMBER: I have a question for David. I am not sure of the right way to phrase this, but how does the team interact with the players? Specifically, I know the Jets have a program where you can call anytime where they would pick you up so you don't drive drunk or anything like that. What are other things that you talked about doing and what is something else you would like them to do?

MR. CALDWELL: As far as?

AUDIENCE MEMBER: If you were out at a bar and you just called. I don't know if it is through an outside company.

MR. CALDWELL: There is actually a number. You have your NFL card. There is a number on the back, and it has DUI crossed out and it has a number. You can always get a ride.

AUDIENCE MEMBER: Is there anything else that you would like them to do? I know they are totally hands-on.

MR. ELHAI: I think teams have a vested interest in making sure their players have a certain level of success. I think, generally speaking, if a player wants an opportunity, whether it is to continue his education, to finish college, or internships or things of that nature, we help facilitate those things. We have had players that will intern at local restaurants because they want to learn about how to be a restaurateur after their career. So, the tools and the resources generally, I think at least at our club, are available to players for post career opportunities.

The drinking and driving situation that you bring up, I mean obviously we all have a vested interest in that not happening. So, we realize that our players are going to go out. They are going to have a good time, just like any other individual, but at least be smart about it. We want to give them the resources to make sure that they get home safe, because you are avoiding the PR hit. You're making sure your player is healthy, and you need him on the practice field and the game field. So, it doesn't really make sense for him to deal with suspensions or things of that nature.

MR. CALDWELL: I would agree. The NFL, they make you

as comfortable as possible for you. They give you anything that you need. Just like we were talking about the programs, I actually did a broadcast program. And they have a bunch of different programs, whether you are interested in music or going back to school for business. I actually went back to school. I was missing about six credits, and I went back to school, and they will help you with that. It is a great program.

MR. FONTENELLI: We have time for about one more question.

AUDIENCE MEMBER: I know you guys are NFL, but there was a lawsuit recently for the NBA players. The big schools out there make tons of money. I was asking about the legal ramifications of players not making money off merchandise and stuff like that; and do you ever see a movement where those college players are allowed to have agents and get paid, and I guess the legal background of that.

MR. RUZICH: Are you talking about the O'Bannon case?

AUDIENCE MEMBER: I don't know the specific players. I know they got certified to be a class.

MR. RUZICH: I think it is the Ed O'Bannon case with respect to NBA sports where the players' likenesses are – the players are alleging that the likeness in the video game is the players. They don't have a name, but they all have the numbers. You can actually go in and download off the internet all the players.

I think – I will just be totally transparent. I am a University of Miami alumni, so you are not going to find a fan in the NCAA. Rome is burning a little bit. I think the answer – obviously talking about being a trust exemption and about the players getting paid, it is the whole financial model turned upside down. I think it is going to be a pretty big fight. I think probably the NCAA will – this is my personal view. I think that the NCAA will try to increase the stipend for players, maybe increase health benefits, but I don't think it is going to be a mobilization of a union or change the way they do it. It is an economic issue, quite frankly.

MR. ELHAI: You do have the issues in the other sports, in the other opportunities, but football and basketball are generally the revenue-generating sports for universities. How do female athletes – would they be impacted with those issues? Especially when you are dealing with state institutions, it makes it very difficult to just – we are only

going to reward the football players or we are only going to reward the basketball players. There a huge litany of issues that will stem from that.

MR. RUZICH:I have talked to athletic directors specifically about that point. Title IX's purpose was to go ahead to create equality for women, but it is tied to – what athletic directors are faced with is you have got two sports that essentially in all college athletic programs, if they are in the black, are men's football and men's basketball. And what athletic directors say is, okay, well, if we have to have the same amount of programs for men and women, we will just cut the men's programs that are not going to make money. If what you are talking about there happens and there is less money to go around, you're going to see very few athletic sports. You are going to have two women's sports and then you will have football and basketball.

MR. FONTENELLI: On behalf of Seton Hall University, I really want to thank you guys. We had a great panel. We had a great discussion today. I am sure everybody has a lot of questions, but unfortunately we are on a timed agenda. So, thank you very much. We are going to take about a ten-minute break.

(There was a break.)

**KEYNOTE ADDRESS: CONFLICTS OF INTEREST
IN THE PROFESSIONAL SPORTS CONTEXT: THE
ETHICAL OBLIGATIONS OF AN IN-HOUSE COUNSEL**

MR. FONTENELLI: Thank you, everybody. If you haven't been here for the first panel, I appreciate your coming out to hear Bill Heller speak. He is the senior vice president and general counsel for the New York Giants. He really needs no further introduction. Without further ado, Bill Heller.

MR. HELLER:My wife would have some things to say about whether I need further introduction. It is great to be here again at Seton Hall Law School. I love being here and I am grateful for the invitation to be here again. What a difference a year makes. Last year I stood before you after the Super Bowl win, and it is easy to be funny and cocky after you win the Super Bowl. Of course I also took credit for it. You remember I said it was at the end of my first full year as general counsel and asked you to do the math. But this year was a little different. I have to be careful because one of our players is here, but he is not going to go back and say bad things about me when I say things this year. It has been a

tough year and tough off season. As you know, we are making some roster changes. So, I am here to tell you that I have been traded to the Jets and I am now working for Hymie. David, this is not true. I am offering – Hymie and I are offering these hats for a drawing of sorts, if the organizers can figure out a way to get your entries down at the cocktail parties, and these will be worn by two lucky people, or one lucky person and a Giants fan. It was a tough year for the Giants.

MR. ELHAI: Not as tough as the Jets.

MR. HELLER: So I guess we have to talk about ethics because that is what the agenda is. This is the title of my presentation. There are indeed many ethical issues that arise at a NFL team. But I have to say this, that it is a discussion of ethics. It is still ethics. So, we are going to try to have some fun in the process, but it is still ethics. I was going to say you are not even getting CLE credits, but this year you are, and I get double because I am teaching. So, I am going to do more law to really justify that.

In-house counsel at NFL teams are not any different from in-house counsel at any corporation. The ethical rules, the ethical conundrums, are still the same. It is a little bit different because of the pixie dust that accompanies what Hymie and I do as general counsel for our teams. I want to talk to you about the first ethical rule that you learned that applies only to NFL team counsel. The introduction is pretty standard. A lawyer for an NFL team represents the team, unless one of the following exceptions applies. Here is the first exception. Some of you are familiar with the American Needle case. Does everybody know what I am talking about, the antitrust case decided incorrectly by the US Supreme Court? Well, what the US Supreme Court decided was that we are not a single enterprise, among other things. And since we are on the record and someone from the NFL might read this, I have to be a little careful. But that is absolutely true. The teams have complete autonomy because the NFL never, ever, ever puts its nose in our business.

I'll tell you a story about the lockout. You will recollect – you might remember that the District Court judge enjoined the lockout and then the Eighth Circuit stayed the injunction, one day. On the day of the stay, Chris Canty, then a member of the New York Giants, came into our facility to work out. Coach and general manager and owner said, "What do we

do?” I said, “There is a court order. You can’t lock him out. Let him in. Don’t talk to him; just let him in.”

What does Chris do? He tweets: the Giants are a great organization. Here I am at the facility working out. I don’t know – I didn’t know what a millisecond was until the NFL call came in, when my autonomy went out the window. Of course, things happened after that and the lockout resumed. But it is a truism that we work closely with the NFL. The second exception is this one. This is the, you want to do what, when, exception. Let me give you an example. The NFL is very conservative, seriously very conservative against honoring rights against sexual harassment and other forms of discrimination. So, it fell to people like Hymie and me to make sure that everyone was trained, including players.

Of course, the third option is this one. It doesn’t happen often, and not only star players, because there was once a young man in training camp. It was the first week of training camp. He was undrafted and he was trying out and he got caught with a small amount of controlled substance. He gets his own lawyer. But the guys who are regularly on the roster sometimes require some representation. And I am going to get into that in a few minutes.

One of the things that we grapple with frequently is who is the client. And NFL teams for the most part are actually small, closely held businesses. That is hard for a lot of people to understand. People think about the Jets and the Giants, wow, these huge enterprises. It is not the case. We are small, closely held businesses with owners and a group of people called players who are very important for the success of the enterprise. So, the context in which we practice dictates how we deal with different ethical rules. We, of course, had the typical employee issue. Quick question. We get this all the time. I am talking mostly about non-players here. The marketing genius comes in and says, my neighbor’s tree fell in my yard, what are my rights; or someone defaults on a student loan, and can you help me.

And there are situations where we are asked to help players. Now, this is – I think I said this last year. As in-house counsel to an NFL enterprise and as football fans, it is very difficult for us to keep our ethical distance from the players that we love to befriend and know better. But it is important because they are employees of the enterprise, and we represent the enterprise. When asked these one-off

questions, most in-house counsel will defer. I know lots of in-house colleagues, especially at large entities, who will say, I can't represent you, I would encourage you to go to my friend who does this area of the law and get your own lawyer.

But the reality in the NFL is a little bit different. Hymie said something along these lines a minute ago. If a player has a problem and an NFL coach wants that player on the practice field, you help him with that problem. It could be as simple as a mandatory appearance in Secaucus municipal court for parking in a handicapped parking spot.

But the point is that why do I do that? Because if they have got that mandatory appearance, especially during training camp or season, coach wants them became on the field, doesn't want them sitting in municipal court for a few hours. So, the question is how can we deal with that situation in an ethical manner. There is some authority in the Third Circuit in the matter of *Bevill, Bresler and Schulman*,³ which talks about employee communications with in-house counsel. And most of you will remember that when any person talks to professionals like lawyers, and if that person perceives that a confidential relationship is being created, then you could be creating an attorney/client relationship and a conflict of interest.

So, what do I do on the occasion when I need to help a player or employee? First I talk to my boss, the owner of the Giants, John Mara, who is himself a lawyer, though not practicing anymore. And we make a decision on whether this requires separate counsel for the player or the employee or whether it is something on which I can help the employee or player. Second, if I do help the employee or player, I issue what I call a Miranda warning. And it is really not the Miranda warning, and it goes something like this. I represent the New York Giants and only the New York Giants, and you have asked for assistance. And I can help you and I have the approval of the Giants to help you. We need to have an understanding. The first understanding is that there is no fee and I don't want any gifts, other than perhaps a thank you. I don't want any autographed items. I don't want anything in return. Second, what you discuss with me is confidential within the confines of the NFL. We are going to talk about

3. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986).

that for a second. And the players and agents and the clients will understand what I am talking about. Third, I say especially to the players, do not talk to me anything about what you discuss with your own lawyer, your agent, your contract. I can't deal with that, and I won't discuss that with you. On that basis, I am able to do simple things like municipal court, some things that are a little bit more involved.

And the issue for us as NFL general counsel is to be flexible and ethical at the same time. I think that we have a unique situation in that regard because of the type of people who are employees, these very special people, these very talented and highly paid people called the players. They are in situations where a player got into a minor car accident and got a summons and I helped that player plead the charge down to something very insignificant. We have had a situation where a player was hit with an astronomical child support order during the season. And that is borderline, but what I did was I worked with the player's regular counsel, family law specialist. And we have had instances that are more serious. Quasi-criminal and criminal types of charges have arisen from time to time, in which case I hire or ask the player to hire his own counsel.

One of the reasons it is important for us to be careful is because of confidentiality.⁴ This is the ABA model rule with which you are familiar. If not, it is on the board. And New Jersey's rule⁵ is just slightly stricter, which causes issues for us on occasion.

You may or may not know that in the NFL players are regulated rather significantly. If there is a DUI or a substance abuse problem or a domestic violence problem or something like that, we have a reportable incident. We have an incident that has to go to the NFL because we have a substance abuse program in the NFL. When one of our players got into that car accident a while back, again during the season, he called me; and I was afraid to ask this question, but ethically I had to ask the question, are you okay and have you taken – have you been drinking or have you taken any prescription or other drug. I was relieved when the answer was no. Because if the answer is yes, I have got a

4. MODEL CODE OF PROF'L RESPONSIBILITY R. 1.6 (1980).

5. N.J. R. EVID. 504.

situation that has got to be reported to the NFL. The players know this. The players know this. And it is the rare occasion when they will come to me, but if they do – or Hymie, I think you probably have this situation as well – it creates an ethical issue and we have to be heads-up on the scope and bounds of our representation, what we can discuss with them, because if a disclosure is made to us, I may be required to tell the NFL. And the players know that; it is part of my kind of Miranda warning.

In our role, and this applies to both Hymie and me especially, we are co-owners of MetLife Stadium. The Jets and Giants are co-owners of MetLife Stadium, which has its own corporate structure and its own general counsel. There are many issues on which we work together as co-counsel for the stadium. In fact, we did before the stadium hired a new general counsel. But there are occasions where we are adverse to the stadium we own. Quite frankly, I haven't figured this one out, except that recently when one of our sponsors wanted to join with us and enter into a rental agreement for the stadium, we did it. The general counsel for the stadium negotiated with me over this rental facility agreement. I represented the Giants; he represented the stadium. At end of the conversation we talked about things on which Hymie, the general counsel for the stadium, and I were working together.

It is a very different situation that we navigate on a case-by-case basis. You can see the potential conflict of interest that arises in that context. Rule 4.2⁶ is another issue that comes up, especially when we are talking with players or asked to represent players. Why? Well, players have agents and players have lawyers. And if a player comes to me, or if our director of player development comes to me and says, could you represent this player on this issue, I am going to send him up to your office to talk to you, the first thing I have to say, add to my Miranda warning, is if you have an agent or your own lawyer, you should go to your agent or your own lawyer. And I remind them that the scope of our discussion cannot relate to the player's relationship with the Giants.

So that we have to navigate around Rule 4.2 by defining the scope of the representation sufficiently narrowly, just like you would do in private practice, for those of you who are on

6. MODEL CODE OF PROF'L RESPONSIBILITY R. 4.2 (1980).

the outside. One of the lessons I learned year after year in private practice was define the scope of your representation and make sure if it changes you redefine it; and when the relationship is over, make sure you document that it is terminated.

So, the way we navigate Rule 4.2 is to define the scope of the representation sufficiently narrowly so that we are not – we are not discussing a matter with a person known to be represented by counsel on that matter. Is it slicing it too thin? I don't think so. But that is the reconciliation I have made on these issues.

You can't have an ethics discussion without reference to the attorney-client privilege. The NFL teams with which I am most familiar, including the Jets, have a very small legal department. Some of them have none. None of them understands the attorney/client privilege. People in my office write e-mails to each other and they write attorney/client privilege and attorney work product because they see me doing it.

And the fact is that I was talking to our chief financial officer before I left today and she said, where are you going, what are you going to do. I described it and she said, are you going to talk about that privilege stuff. I said, yeah. She said, that is what your lawyers do; it is a little club you have to keep the rest of us out and guessing. It is very difficult for people in a closely held business to grasp the fact that we tell them that the privilege is something that applies only in narrow circumstances to confidential communications, seeking advice, the typical test with which you are all so familiar. I can tell you that everyone at the Giants – I would bet it is true at the Jets – think that all they have to do is copy Hymie or me on an e-mail and it is privileged. I say no, that is not how you create privilege. But it is a football team. You know, some things just – some people don't want to listen to what we lawyers have to say.

The more important issue I think when it comes to privilege issues is the distinction between legal advice and business advice. As all the lawyers in this room know, it is somewhat easier to be a lawyer because it is, can I do this or is this consistent with law, and we give the typical answers we give. And they say yes or no or if we do this – what did I do. I will talk and you fix. So, it is easier to be a lawyer and

that is our training. But for Hymie and me, we also have the title of vice-president. Many times, especially in my organization, people say yeah, yeah, yeah, okay, now tell us what we should do. And the “should” versus the “can” is an enormous gulf, and it is sometimes difficult for lawyers to bridge that gulf.

I will never forget the very first time it happened. We were negotiating an agreement with Amtrak to charter a train to go down to either Baltimore or Washington. It was to play a preseason game. Amtrak gave us this enormously complex contract and basically said, sure, you can negotiate anything you want; we are not changing a word, but have a ball and let us know when you are ready to sign. I did – I was talking to the club and I was saying, well, you know, if we sign this contract, we have this risk, this risk and this risk. I remember this clearly. It was the first time someone said, that is great, Mr. General Counsel, but let me remind you that you are also a vice-president, tell us what to do. And I remember the feeling in the pit of my stomach, which was akin to, hoo, I have got to make decisions too. And we had no choice, of course, but to take the Amtrak train, unless we were going to spend a lot of money to fly. But it is that distinction that characterizes much of what we do.

Why is that important? Because that piece of it is not privileged. The giving business advice is not privileged. And the distinction is often difficult. For all of you who have litigated and done privilege logs, you know that there is endless debate about whether the in-house lawyer was rendering legal advice or business advice at the time. It is the trade-off we make. Because as in-house counsel we have the benefit of becoming deeply involved in a single client’s business and operation, but the cost of that is possible jeopardy to the privilege. If I hire outside counsel, I don’t have that problem quite as much. And in important matters that is why I do that. I am sure the same is true for the Jets to go to outside counsel.

So, I have decided to keep my remarks brief this evening so we can take some questions. As I said last year, they always seem to put me right before the booze, and I never like to be before anybody – between anybody and booze. What is my conclusion? Be ethical. It is not hard. But I am also on a jag somewhat. And Professor White, who is in the audience tonight, who sometimes graciously invites me to some of his

2014]

Symposium Transcript

37

classes, knows that I am on a jag about civility. So I am just going to add this. There was a time when I was a young lawyer when I was a screamer and a table-pounder and it never got me anywhere. There are more movements now – judiciary, Bar Association – that talk about civility. And I just urge all of you that when you are thinking about your ethical obligations, here is another one, and it is to be and act civilly. Or David, you know I am going to say this, as Shakespeare said in the *Taming of the Shrew*, “and do as lawyers do at law, strive mightily, but eat and drink as friends.” So, with that, I open it up to questions and hope that the agents and players and the audience got my jokes.

MR. FONTENELLI: I have one question to get it started. You and Hymie – I was talking to Hymie before – can you kind of give everybody an idea of how you go about your business differently or how general counsel to other sports teams may proceed with their everyday matters, as opposed to how you do it.

MR. HELLER: I don’t know the answer to the second question. A lot of what Hymie and I do is the same. Some of it is different, dictated by our different organizations. For example, he has got really smart people in the marketing department. If you want to be in the marketing department of the Giants, you have to fail an IQ test.

Yes, sir.

AUDIENCE MEMBER: How often do you get involved with the actual negotiation of a player’s contract? It’s my experience with the Giants it’s never with you or their lawyer; it is always with their administration people. Is that pretty typical?

MR. HELLER: Yeah, that is typical.

AUDIENCE MEMBER: Why is that?

MR. HELLER: I actually know the answer. I would say something like 95 percent of every player’s contract is exactly the same because it is dictated by the collective bargaining agreement. There is almost never a discussion of force majeure or the entire controversy or whatever in the agreement. The negotiation, that last five percent, is all about the dollars, the bonuses, the incentives, all that kind of thing. That is done, at least in the Giants, by the general manager’s office. I believe the same is true for the Jets. I know the Bears are different because the Bears’ general counsel was an agent and he was hired specifically to help the Bears out on

that aspect of their legal work, which is somewhat really not legal work; it is really the business of football. And Hymie, I would say most general counsel don't negotiate player contracts.

MR. ELHAI: That is correct.

AUDIENCE MEMBER: There are things, they have gotten much more complicated, I've noticed, over the years too, partly because things have happened, like now there's clauses about tampering and a clause about player engagement. They are more legal than business. The answer is we are not going to negotiate it, which I understand, but I think at some point it would be appropriate for the general counsel to really get involved in some of those negotiations.

MR. HELLER: Again, most of those clauses are coming down through the NFL, which is dealing with the players association. Some of the clauses are drafted with the players association. Some of them are not. We have an addendum that is a Giants-specific addendum. For example, it requires players to file Workers Compensation claims in New Jersey.

AUDIENCE MEMBER: That was one of the clauses that I wanted to talk to you about. There are some of the things in there that are borderline.

MR. HELLER: I did prepare the addendum. Since I prepared the addendum, I can't remember a question arising about it, because the players and their agents, and this is rightly so, focus on the dollars. Think about it. Players in the NFL play for very short periods of time, and they—and I have no problem with this. They need to negotiate good agreements economically that recognize their tenure. They could get hurt. So, that is really what the focus is; the focus is not on the legal language. Where the legal language comes into play a lot is when the union or NFL files a grievance under the collective bargaining agreement and legal language in – I can't remember which team's clause was construed today. We got a decision today. Some team had an addendum with a specific clause about a player's physical. And the language was a team-specific addendum. So, what did I do? I wrote to the guys who negotiate our contracts to make sure that we have a similar clause. Again, it is not – I am not negotiating with the agents over this clause. It is less – I think it is less important and it is not getting changed, to my knowledge.

I will give you an example. There was one player who we

resigned – I don't know if it was last year or the year before – and had complicated options. So, the people at the general manager's office drafted something, and it was just an abomination, and they sent it to me and I said let's rewrite this. So, I rewrote that. Again, that was a question of rewriting and clarifying what had already been agreed, as opposed to negotiating. I hope I answered your question.

MR. HELLER: Any other questions?

AUDIENCE MEMBER: Do the teams play any role in the – like the health and safety issues? I mean, a lot of that seems to be coming from the NFL headquarters. headquarters.

MR. HELLER: Yes. In fact, all of it is coming from the NFL headquarters. We – at the December labor meeting, the NFL went over the rules that were coming into effect for equipment in the upcoming season. I am not sure of this entirely, but for example, you see a lot of players who never wear the old-fashioned knee pads. I think those are coming back and some other things with shoulder pads and the like.

Don't worry, David, I am not sure about this. The fact is it is all being done at the NFL level. But what the NFL is doing is emphasizing with training staff the need for player safety. It is like an obsession in the NFL right now. We—the NFL and the teams really care about these people who play football, and we are doing our best.

AUDIENCE MEMBER: What legal issues, if any, are the Jets and Giants facing with the Super Bowl coming next year?

MR. HELLER: This is a liability-producing question. I will give you one. Okay? When you host the Super Bowl, you really don't, because what you really do is you give the NFL your stadium and the NFL says thank you for your stadium, we are now going to hold the NFL.

So, there are sponsors who spent a lot of money to put their names on a stadium and there are suite holders who spent a lot of money to have suites for Giants and Jets games, and they find out that they don't have them for the Super Bowl; and if they want that suite for the Super Bowl, it cost a lot of money, paid actually not to the Giants and Jets. That is a legal issue that we have to grapple with, and we refer them to contracts and there is language in the contracts.

There are going to be a lot of legal issues surrounding the upgrade of cellular wireless technology in the stadium. We are actually embroiled in that right now. Hymie is smarter than I am and was too busy to attend the four-hour meeting

yesterday on the topic.

But Hymie and I and the stadium's general counsel are engaged with all of the cellular carriers—Verizon, AT&T, Sprint and T-Mobile—to upgrade the WiFi and cellular capabilities in and around the stadium. And we are dealing with contractual relationships among the carriers. We are dealing with contractual relationship between the carriers and the stadium.

We are—an interesting issue arose because we are replacing the field, the actual field turf, and they were getting bids. And the company whose turf is now on the field is called Field Turf, and there was an effort to get a competing bid, and Field Turf started waving a patent around for a tray system that is how the end zone turf is configured. Hymie and I were asked questions about, well, can we go to the other vendor and what are the issues if we do that.

So, those are the three example of issues that are coming off of the Super Bowl. I hope that answers your question.

Others?

AUDIENCE MEMBER: Are there any issues regarding the entertainment for the Super Bowl?

MR. HELLER: We don't do that; the NFL does.

AUDIENCE MEMBER: How is the lighting?

MR. HELLER: Pass. The power outage – I just want to tell you something. The power outage at the Dallas game in 2010 was due to a repair person's error. It was not our system. And they are doing everything they can to make sure there is enough power, and more than that I can't say.

Any more questions? I am not sure I took up enough time, so please ask some more questions. Otherwise they will fire me.

AUDIENCE MEMBER: Do you have any thoughts or any ideas about the concussions and the suit regarding that?

MR. HELLER: I really don't. I don't for two reasons. One, it is pending litigation, hotly contested litigation, so I am going to pass on that and say what I said before. The NFL and the teams are obsessed with player safety.

One example is the rule, the relatively new rule. I think it is only a year old. Player gets a concussion—sorry, player gets hit and shows signs of a concussion, that player cannot go back into a game or be reactivated until an independent neurosurgeon or neurologist says the player is okay to return. Independent, not a team physician whose interest might be to

2014]

Symposium Transcript

41

get the player back on the field. I think that is an important development.

I think the NFL is contributing millions to research with an institute in the Boston area, for example. So, we are hoping that is going to get better. But I would like not to comment on the litigation.

AUDIENCE MEMBER: You made a statement about player safety. How would you, looking back at Robert Griffin's injury where he had his own personal physician, the team physician, and somehow he ran back on the field—how would you advise your staff to handle a potential situation, given the heightened security and safety of athletes today?

MR. HELLER: That is a really hard question. I mean, I am a conservative boy and I believe in player safety. First of all, they would never ask me. But I am going to answer your question.

I am a conservative lawyer. The players I have met I really like. These are really nice young men, really. Sometimes you read stuff in the newspapers that would tell you otherwise. My judgment would be different. That is Bill Heller not speaking for the Giants, but that is the direct answer to your question. I didn't get that, I have to tell you, that whole scenario with Griffin.

AUDIENCE MEMBER: Have the Giants or other organizations looked at or the NFL mandated—I have seen a concussion policy as probably foremost in the public. But this is an injury that could potentially—we don't know the ramifications of it. So, is your staff or your doctors—are they looking at revising policies that you are responsible for because of it?

MR. HELLER: They are not revising policies for which I am responsible as a result of the Griffin episode, but I can tell you that our trainers are constantly concerned about whether a player is able to return to action.

There is a new rule now. I think this is in the CBA. When we communicate with a team physician and a team physician with a player, we are required to tell the—to tell the player's physician, personal physician, exactly what we told the player. So, there is no more of this old-time from the '60s and the '70s where like in the movies the coach nods and they shoot him up with something and get him on the field. It doesn't happen, not to my knowledge. But it was a great question. Thank you.

42 *Seton Hall Journal of Sports and Entertainment Law* [Vol. 24

MR. FONTENELLI: You filled your time, so you are good.

MR. HELLER: Thank you up for putting up with me. I really appreciate it.

MR. FONTENELLI: So, that ends that. We are going to have a reception downstairs in the atrium. Everybody can just head down there.

Remember, if you are getting CLE credits, stop at the table outside. Make sure you sign out. We are granting parking passes. On that note, thank you very much for coming. I appreciate it.

(The symposium was adjourned at 7:08 p.m.)