

**2011 SETON HALL UNIVERSITY SCHOOL OF
LAW SPORTS AND ENTERTAINMENT LAW
SYMPOSIUM: PROFESSIONAL AND ETHICAL
DILEMMAS FACING ATTORNEYS
REPRESENTING ENTITIES, ATHLETES AND
ENTERTAINERS**

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INTRODUCTION

*by Elizabeth Blakely**

In recent years, issues in sports and entertainment have become more publicized due to the growth of media outlets. In light of this media exposure, athletes and entertainers have undergone both professional and personal scrutiny. As a result, attorneys have encountered an increased responsibility in protecting the interests of their clients. Additionally, during labor negotiations in the sports and entertainment fields, lawyers are called upon to protect the interests of their clients while tempering the opposition at the bargaining table. Such dilemmas were discussed by a distinguished group of industry representatives at Seton Hall University School of Law during the *Journal of Sports and Entertainment Law's* 2011 Symposium.¹

* Co-Symposium Editor, Seton Hall Journal of Sports and Entertainment Law

1. The 2011 Journal of Sports & Entertainment Law Symposium, "Professional and Ethical Dilemmas Facing Attorney Representing Entities, Athletes and

The first panel dealt with Rule 3.6—the Trial Publicity Rule—of the ABA’s Model Rules of Professional Conduct. This panel addressed the motivating forces behind Rule 3.6 and its impact in the sports and entertainment fields. The panel was comprised of renowned attorneys who have represented high-profile clients and attracted extensive media attention in connection with their representation. The panelists discussed the positive and negative effects of the rule on their litigation experiences.

Panel 2 concentrated on the labor concerns surrounding the sports and entertainment fields. In particular, the panelists discussed the labor issues facing the NFL, NBA and NHL as each league advances toward the expiration of its respective collective bargaining agreement. The panel also addressed the current MLS Collective Bargaining Agreement that went into effect last year. Further, the panel discussed the possibility of a labor stoppage and explored its potential effect on league operations. A representative of the Writer’s Guild of America East discussed the various labor issues that the entertainment industry has faced, including the 2007 writers’ strike. Her discussion focused on the NBA negotiations currently underway in relation to the Writers Guild’s collective bargaining agreement with the Alliance of Motion Picture and Television Producers (AMPTP).

The keynote speaker this year was Mr. Jeffrey Gewirtz, Executive Vice President & Chief Legal Officer of the New Jersey Nets Basketball/Brooklyn Sports & Entertainment. Mr. Gewirtz drew from his personal experiences in the industry and addressed recent trends in the sports industry.

I. TRANSCRIPT

*Panel I: Trial Publicity*Panelists:*John Vorperian*

Mr. Vorperian is Host and Producer of “Beyond the Game,” a community syndicated cable television sports show. Mr. Vorperian is also an active PFRA member and belongs to the Society of American Baseball Research.

Christopher D. Adams

Mr. Adams is a partner at Walder, Hayden & Brogan, P.A., where he specializes in the areas of state and federal criminal defense, attorney ethics matters and complex commercial litigation. Mr. Adams is also a member of the New Jersey Supreme Court Committee on Model Criminal Jury Charges, and has been appointed by the New Jersey Supreme Court to the District VC Ethics Committee for a four year term beginning September 2008. He is also a Trustee of the Association of Criminal Defense Lawyers of New Jersey, where he also serves as a member of the Amicus Committee.

Darren Del Sardo

Mr. Del Sardo is a partner with Damico, Del Sardo & Montanari. Mr. Del Sardo practices in the areas of civil litigation, employment litigation, personal injury, criminal defense, juvenile defense, property disputes, chancery litigation, guardianship for the incapacitated, and purchase and sale of business.

Ellen Marshall

Ms. Marshall is of counsel at Greenbaum, Rowe, Smith & Davis LLP. She focuses on family law matters, has tried complex cases to conclusion, and has argued before both trial and appellate courts. Ms. Marshall was named to “The Best Lawyers in America” in the Family Law category, and is a member of the American Bar Association, the New Jersey State Bar Association, and the Essex County Bar Association. She also received the Family Law Attorney Achievement Award from the Essex County Bar Association in 1997.

Michael McCann

Professor McCann is a professor at Vermont Law School, where he is Chair of the Faculty Appointments Committee. Professor McCann is also a Legal Analyst for *Sports Illustrated*, the “Sports and the Law” columnist on SI.com, and, along with Harvard Law School professor John Hanson, a co-founder of The Project on Law and Mind Sciences at Harvard Law School.

MR. LILLQUIST: All right. Good evening. My name’s Erik Lillquist. I’m the Senior Associate Dean here at the Law School, and I’d like to welcome you all to this evening’s *Sports and Entertainment Law Journal* Annual Symposium.

I’m happy to announce, as is always my great honor, to point out to everyone that there are three credits of CLE available for this evening’s program. And my favorite part is always telling people: and one of them is for ethics. So please make sure, if you want CLE credit, that you sign in and out at the front. Never want to miss out on the opportunity [to] pick[] those up.

Tonight’s symposium is going to focus on professional and ethical dilemmas confronting attorneys representing athletes and entertainers. This is part of the *Sports and Entertainment Law Journal’s* commitment to providing the Legal Sports and Entertainment Industry with analysis of current issues in the field.

The panelists today on our two panels have extensive knowledge and experience representing high-profile clients. They’ve interacted a great deal with the ABA’s Model Rules on Professional Conduct and various labor issues affecting both the Sports and Entertainment fields.

In addition, at the conclusion this evening, you’re going to have the opportunity to hear from Jeffrey Gewirtz, the Executive Vice President and Chief Legal Officer of New Jersey Nets, Brooklyn Sports and Entertainment, who’s going to discuss legal trends in the Sports industry. And, on behalf of my boss, the Dean, it’s my job to try and get Jeffrey to get rid of that Brooklyn part and really commit to Newark. So, hopefully, we can get there by the end of the evening.

But, in any event, it’s my honor now to turn the program over to Emily Battersby, the Co-Symposium Editor for the *Entertainment and Sports Journal*. Emily, thanks.

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MS. BATTERSBY: Thank you, Dean Lillquist. Good evening, everyone. My name is Emily Battersby. I am the Co-Symposium Editor for the *Journal of Sports and Entertainment*, along with Elizabeth Blakely. We are really excited tonight to introduce to you a distinguished group of panelists and moderators.

I'd like to begin by thanking each and every one of you for attending our event today and also to thank Trenk DiPasquale for generously sponsoring the event, as well as the Sports Agent Blog and the New Jersey State Bar Association.

The success of the symposium and the *Journal* in general is much to the credit of our Editor-in-Chief, Nicole DeMuro, and our Faculty Advisor, Professor Charles Sullivan. Lastly, I'd like to say a big thank you to the *Journal's* Symposium Committee for all your hard work, and to the Faculty and Administration who have done so much and really helped us throughout these last six months.

Now, I'd like to introduce you to our panels for tonight. To begin, panel one will focus on Rule 3.6 of the Model Rules of Professional Conduct.² And panel two will focus on the labor concerns in the Sports and Entertainment field[s].

Turning to panel one, our moderator tonight will be Mr. John Vorperian. He is the Host and Producer of Cable Television Show, "Beyond the Game," which began back in 2002 and is focused entirely on sports.

Also, out of respect for our panelists, we ask that everybody turn their cell phones off. And, with that being said, here is Mr. Vorperian.

MR. VORPERIAN: Thank you, Emily, for that nice introduction. Also, I'd like to take this opportunity to salute Elizabeth Blakely and Emily Battersby for their great efforts in putting this symposium together. And they deserve a round of applause, folks.

Just briefly, my background with regards to Sports is the television show, "Beyond The Game." And it can be seen in New York and on the Net, thanks to such sites as You-Tube, Blip.TV, and the like.

Essentially, the program started as a New York baseball

2. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002).

show. And we found that you could do more than just talk baseball. Sports is a subject that transcends heritage and social issues. So, whether it be having a Red Sox or a former New York Met, like Mo Vaughn, to come on and talk about his baseball memories, we get into topics such as affordable housing with NFL Hall of Famer Harry Carson.

Sure, we talk about the Super Bowl, but what about the plight of NFL retirees and the issue of concussions; James Ihedigbo playing for Gang Green can talk about hard knocks and the Jets, but also can talk about what he has done in the way of patient relief and fund development with regards to Africa.

But enough about me. I will ask each panelist to introduce themselves when it is their time to address you. Let me just give you a brief background as to the topic that we will cover tonight.

It's great to be a lawyer. And one of the things about Law School is we get to see battles. One of the great battles in law is Constitutional Rights. And, particularly with trial publicity, it is a titanic struggle between the First Amendment³ and the Sixth Amendment.⁴ Essentially, what we have here is a free speech of attorneys goes up against the right to a fair trial.

And Rule 3.6, let me just give a very brief history with regards to the Model Rule. May it please the camera, our media matrix is essentially over 1800 broadcasts and digital television outlets, 16,000 radio stations, over 1500 newspapers, and an ever-increasing astronomical amount of websites and bloggers.

Alan Dershowitz, in the forward to the book, *Spinning The Law*, brand new volume on this very topic of trial publicity, states: "In today's multimedia twenty-four[-hour] news cycles, the role of lawyers does not stop at the courtroom [door], or even the courthouse steps".⁵ Isn't it the job—and these are my words—isn't it the job of lawyers to advocate, to protect, to influence on behalf of their clients?

Trial publicity and the issues go back to the late-1700's. John Adams's arguments regarding representation of John

3. U.S. CONST. amend I.

4. *Id.* at amend VI.

5. KENDALL COFFEY, *SPINNING THE LAW: TRYING CASES IN THE COURT OF PUBLIC OPINION* 7 (Prometheus Books 2010).

Hancock in a forfeiture proceeding were extensively published.⁶ 1807, Aaron Burr gets charged with treason and unsuccessfully asserts that his right to a fair trial is precluded by extension publication.⁷ Nineteenth Century, we begin to see the codification of attorney behavior, *vis-a-vis* media; newspapers, in essence. 1887, Alabama passes the first code of legal ethics and; therein, a rule restricting statements made by attorneys outside of court are contained there.⁸ 1908, we have a nationwide limit on attorney's speech for pre-trial publicity, essentially the American Bar Association Canons of Professional Ethics.⁹ Again, if we read the original record, it's talking about newspaper publications.¹⁰

Flash forward to 1960—or the 1960's, I should say—essentially, two social[ly] significant events occur that really gels the movement towards Rule 3.6. [The first is t]he assassination of President John F. Kennedy.¹¹

You know what one of the things contained in the Warren Commission Report¹² that seems to be not publicized enough? The Warren Commission report condemned the unlimited stream of information about the alleged assassin, Lee Harvey Oswald, and suggested that, had he had not been murdered, Oswald would not have been able to get a fair trial.¹³ Then the Commission recommends that the Bar, Law Enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public.¹⁴

Additionally, in 1966, [in] *Sheppard v. Maxwell* the Supreme Court gives its decision in that case that the Court held that Sam Sheppard's habeas corpus petition must be granted because he was not sufficiently safeguarded from the

6. See LEGAL PAPERS OF JOHN ADAMS (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

7. United States v. Burr, 25 F. Cas 187 (No. 14,694) (1807).

8. See Katherine A. Smith, *Truth or Dare, The Rules of Professional Conduct and Stretching the Discovery Boundaries*, 16 MISS. C. L. REV. 455, 460–61 (1996).

9. ABA CANONS OF PROF'L ETHICS (1908)

10. See *id.*

11. Death of John F. Kennedy, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/November-22-1963-Death-of-the-President.aspx> (last visited June 1, 2011).

12. EARL WARREN ET AL., REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY (1963)

13. See *id.* at 231–42.

14. See *id.* at 242.

inherently prejudicial publicity that surrounded Sheppard's prosecution and certain disruptive influences that existed at his trial.¹⁵ Just for background, talk about docudrama, Hollywood, July 4, 1954, Dr. Sheppard's pregnant wife was found bludgeoned to death in the couple's suburban home.¹⁶ Sheppard claimed that, on the night of the murder, he fought with and injured a form whom he discovered standing next to his wife's bed.¹⁷ The form ultimately escaped and left Sheppard unconscious on the beach.¹⁸

Good fact pattern, but the subsequent trial was ultra-media saturation, unbridled attorney statements, public posturing, and all seventy-five prospective jurors being contacted by the press, friends, anonymous people, and law officials.

1983, the ABA issued its Model Rules of Professional Conduct; therein is 3.6.¹⁹ 1990, thirty-one states adopt the Rule. There is a Supreme Court case, which I'd like to give you the cite for further amplification, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

The ABA revises 3.6 in 1994 and in 2002. In a nutshell—let me see if I can just give a brief outline. It's there in the notebook, which those of you that are registered today with regard to CLE credits. For those that aren't, in essence, 3.6, paragraph A, adopts a standard prohibiting statements that an attorney knows, or reasonably should know, will have a substantial likelihood of materially prejudicing an adjudicated proceeding.²⁰

Paragraph B lists seven categories of statements that are considered likely to violate paragraph A.²¹ Paragraph C is a safe harbor provision permitting attorneys to make certain statements; better known as a right of a reply.²² And there is a D section concerning attorneys affiliated with law firms and government entities.²³

That's 3.6. As I mentioned, spinning the law, we find that

15. 384 U.S. 333 (1966).

16. *Id.* 335–36.

17. *Id.* 336.

18. *Id.*

19. MODEL RULES OF PROF'L CONDUCT R. 3.6 (1983).

20. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002).

21. *Id.*

22. *Id.*

23. *Id.*

public prosecutors, plaintiff attorneys call news conferences to get their message out. Defense counsel must do the same. So, without further adieu, I'd like to turn to the experts that have been kind enough to take time out of their busy schedules to be here today to discuss this.

And, first up, I'd like to ask Christopher Adams to address this key subject.

MR. ADAMS: Good evening, everyone. It's a pleasure to be here as an alumnus of this Law School and student of then-Dean Sullivan, now Advisor Sullivan, who I like to call, "Sully." And you all can try to tease him about that.

By Practice, my Practice exclusively focuses on Criminal Defense. I've had the good fortune to be able to represent some athletes, and still represent some athletes and entertainers. Most notably—at least in the State of New Jersey—was the criminal prosecution of Jason Williams.²⁴

In fairness, it's my partner, Joe Hayden, who was Jayson Williams' primary attorney. I'm Joe's partner, so I assisted him through the trial and tried the case with him the first time and the second time.

I have been at the firm of Walder, Hayden, and Brogan for the last seven years. And, at least in terms of representing a Sports and Entertainment person, I intend to give you some discussion this evening about the pitfalls under the Ethics Rules, as well as some of the decisional authority in New Jersey which tracks the Model Code.²⁵ But, in addition, New Jersey takes a very strong view and gives the court the authority to hamstring, as I like to call it, an attorney's ability to combat trial publicity.

At least in a criminal case, the way in which I'd like to talk this evening is how we have to fight a battle on two fronts: the courtroom is usually the least concern to the client. In the case of Jason Williams, for instance, Jason had just been given a contract at NBC and was just about to get the job that all of you may now know Charles Barkley has as a color commentator. He was first up in that seat and was about to get it. And, when the charges came out about what happened to that gentleman in Mr. Williams's house, he no longer had

24. State v. Williams, 919 A.2d 90 (N.J. 2007).

25. N.J. RULES OF PROF'L CONDUCT Introduction (2010).

the contract. They suspended him and then passed him over, which is no surprise.

But, in that circumstance, the perspective that I can share with you tonight is how to effectively represent a client, not only in court, but what seems to be more important to that client is outside of court, whether it's in the media, whether it's with his endorsements or her endorsements, or whether or not it's with a league. Not just Mr. Williams, we represent and I represent a couple of players in the NFL who have basic concerns over whether or not the league, in and of itself, based on allegations if they become public, will take action against them.

And I come at it from a criminal perspective. There are some of my colleagues here on the panel who can come at it from a different perspective, at least from the Civil Bar or the Family Bar—not to put Ellen on the spot—but representing someone who doesn't have that primary concern of how they are viewed in the media and trying to avoid the media.

So RPC 3.6, at least in New Jersey, certainly gives counsel to the entertainer, or the athlete, or whomever that might be, an obstacle to deal with when combating that.²⁶ But I hope tonight to be able to talk to you about ways to avoid running foul of the rule and also being able to satisfy your client's needs.

MR. VORPERIAN: Ellen, how do you represent a client who doesn't want the publicity, so to speak? How do you help that client where the media is fawning all over the other side?

MS. MARSHALL: It's a difficult challenge and a difficult path to walk. I think Chris walks an equally difficult, perhaps more difficult, path, because, as much as his client may be saying, "I want the publicity; you need to get my name out there in a more favorable way; you need to counter the spin the prosecution is putting on this." Chris also has the challenge of walking a gauntlet of press going into every courtroom, camera people, reporters.

I don't know about the Jason Williams's trial, but in one of my experiences, photographers were allowed in the courtroom, and that noise that you hear clicking now took

26. *Id.* at R. 3.6.

place about 150 times a minute, every minute that anyone was testifying.

So you have the unique challenge of trying to say to your client: “There is only one person in your life right now and that person is wearing a black robe and sitting slightly above you. The NFL doesn’t matter, the readers of the *New York Post* don’t matter, your own family doesn’t matter. Right now, you are trying your heart and soul to that one person. That is your universe. And your challenge is to remain uni-focused on that person and telling the truth.”

You’ll be surprised when you practice—and those of you who do practice I’m sure know this—even the most experienced and sophisticated witness pancakes. No matter how much you think your witness is prepared, poised, great at handling the public, when all of a sudden they’re on the witness stand, they forget things like when their kids were born, what they did, where they went to college.

And it is daunting to know how frightening it is to sit there. And add to that 150 camera clicks a minute and, in what must be the most boring news day in the history of the Human Race, live radio feed from outside the courtroom of a divorce trial, and you’re trying to say to your client: “None of this matters.”

To your question, when one is a criminal defendant under indictment who is accustomed to having an adoring press, or the spouse of an athlete, all of a sudden, the press is your friend and your enemy. Imagine you are coming to court trying to deal with the future of your children, your own financial future, your own reputation, lots of photographers, a lawyer saying: “Never mind any of that; just think of the Judge,” and, at the same time, realizing you’re almost trampled by autograph seekers; you’re glared at by people who believe you’re trying to steal your husband’s hard-earned money; there are people who work in the court system who are flooding in to watch the trial.

There was an appeal in a case where I represented an athlete’s wife, argued in the Appellate Division courtroom at Rutgers, which is probably about the size of this room. And I thought, this is fabulous; all these students want to hear an Appellate argument; isn’t that great. Well, the minute they realized the parties weren’t there, the rest of the courtroom was absolutely empty.

So you’re trying to balance an intrusion into the most

sensitive and most frightening part of someone's life with their desire to be loved by the press. In the case of someone like Chris [Adam]'s client, it had a direct impact on his ability to make his living going forward.

In the case of my representation of a wife of an athlete, she had been adored by the press. Her pregnancy, which ended only four months before the filing of a public complaint for divorce—by Chris's partner, I might add—went from her being a media darling, photographed eight months pregnant in the middle of a football field, to her being known as a gold-digger; people yelling at her: "Is that a Prada? Is that a Louis Vuitton? How do you feel today being here? What are you looking to get from your husband today?" And all she's trying to do, postpartum, post-abandonment, is come to court and say: "Deal with me fairly."

On that day, and to this day, the media was not her friend, because their interests were diametrically oppositional. Their's was sound bites; her's was life. So it is a very difficult and challenging area to walk.

And, if I may, I want to interject just one other thing—and I may be the only one on this panel who exhorts you to use the media as little as you can when there could ever be any question that you are doing it in part to get face time yourself.

There is no one in the world facing the challenges that our clients face who wants to feel that you said, "Yes," to the "Today Show," or to Charlie Rose, or there [are] all the people who persistently call you—and it's so flattering. [But,] you need to say, "No," more often than you need to say, "Yes," for two reasons: I know of no judge—and, after all, it will always be your judge who makes the decision, not the media, not the readers or the consumers of the media—I know of no judge who feels good about being usurped by the lawyer going to what is popularly known as the court of public opinion. And I know of no litigant, whether they're frightened because they're under indictment, terrified of not being able to support themselves, or nurture and raise their children, I think it's fair to say that there is no litigant who says, "Gee, I hope my lawyer's taking time away from my case to go on the "Today Show" tomorrow; I notice my lawyer is all over the *New York Post*, their name is more prevalent than the case name."

Use the media judiciously; recognize they can often do your clients more harm than good; and ask yourself, before every time you want to speak to them: "Who am I really doing

this for?" That is, I think, your highest ethical duty to balance what is the very flattering bright light of the camera against your client's very real need for dignity, focus, and privacy.

MR. DEL SARDO: Speaking of dignity, I had the opportunity to represent a reality personality, and, at the time, she was known as the most hated housewife on the "Housewives of New Jersey."

The difference between someone in her position and maybe someone who's a true entertainer or athlete, the way in which she got her career, so to speak, going is through publicity, both negative and positive. So publicity was very important to her and others like her, whether it be negative or positive.

The court of public opinion was her forum. I don't know how much, necessarily, these reality TV stars care about the courtroom proceedings. Although they claim it's very personal and very serious to them, I think they're very interested in getting on the entertainment shows and the gossip entertainment TV shows at nighttime.

I do primarily plaintiff's work, all types of civil litigation, and [my client is] usually the underdog. So I do feel that publicity is very important, because you may get your message out there and you may send a message to the court. You're not really supposed to use it like that, pursuant to the Rule, but you may send a message and have someone else, other than the court, listening to you and getting your story out there for you, because you have so very little time in court to do that.

My case involved a sex tape that was about to be released—[it] was reported through *Star Magazine* that a tape was about to be released. And, obviously, [my client] didn't want that tape to be released. So we had to file an Order to Show Cause in Passaic County.

Passaic County has a rule that it doesn't allow anyone but newsworthy reporters [to] appear in court and cover the story. Problematic with [this] general rule is that most of the entertainment shows are owned by the networks that run the news channels, so they're going to get those tapes anyway and be able to air them at night. Which they did [in my case].

You're dealing with an agent; you're dealing with a publicist; and you're dealing with your client, and they want their message out there in the media. There's no doubt about

it; they want a positive spin placed on them. And you, as their lawyer, if you don't do it, if you don't come to their defense, you may be discharged as their lawyer. So you have to walk a fine line and you have to ask yourself: "How do I do that? How do I get that message across?"

I started my career working for Tony Fusco. And, at the time, he represented Mike Tyson, during the time he liked biting ears. And there was a lot of publicity back then on that case. And, you know, Tony had a publicist—and you could talk about the benefits of having a publicist with a law firm and the negatives with that. The good thing is you don't have to field all those calls; the bad thing is anything that [your client] may say or release to the press, you may be liable for under the Rules.

What I like to do is, if someone wants to tell their story, you could read the Rule—you could talk about pleadings; you could talk about anything that's pending in court or related to the subject matter, as long as you don't materially prejudice whoever's going to decide the matter.

That's very broad. But you could get all of this through pleadings. When your client signs a certification in civil, you could get that message out there; you could have them state the facts in that pleading, and that gets the message out there. Now it becomes a public document and you're allowed to discuss it. So, you know, that's one way of complying with the Rule.

When I first started [working as a lawyer] and statements were made [to the press], I always followed [the ethical rules], [but] sometimes, you don't re-read these rules that you learned in law school. We, as attorneys, have a litigation privilege where we can talk about anything and it protects you; anything relating to that litigation.

The problem with that, if you don't read that in conjunction with 3.6, there's a problem, because you do have a litigation privilege, but that's with regard to torts, so no one can sue you for defamation because you're stating your cause of action or the facts which you intend to prove.²⁷ No one can sue you. However, you could still—and there's case law on it—you could still violate Rule 3.6. And I think [the standard is,] a substantial likelihood that anything you say materially

27. See *Hawkins v. Harris*, 661 A.2d 284 (N.J. 1995).

prejudice the trier of fact or a potential juror. So, you have to keep them separate and make the distinction.

It's very broad. If it's part of that litigation, you know, you could talk about it, but just keep in mind that there is someone out there that could be a potential juror that you may prejudice.

MR. VORPERIAN: With that being said, perhaps now from a journalist's perspective, Professor McCann?

MR. MC CANN: Sure. So, when I look at this issue, I always think there are really two legal systems at play: there's the court system that we've been talking about, with judge and juries and lawyers, but there's also league systems of justice that play a really major role in the legal rights of players and how they're perceived by the media and, in turn, by fans.

You know, just take the NFL, with the NFL's personal conduct policy, which empowers Commissioner Goodell to sanction any player for any violation that he deems harmful to the league.²⁸ And Commissioner Goodell decides the length of any suspension. And the player can only appeal back to Commissioner Goodell,²⁹ so it's sort of like judge, jury, and executioner. If the trial judge sentences you to prison, you know, you can appeal, but it's back to the trial judge. It's not really much of an appeal.

The concern there is that, well, is Commissioner Goodell a lawyer? No, he's not. How does he accumulate evidence? How does he review evidence? He does have lawyers who help, clearly. Could that evidence be subpoenaed should a court system go after it? And how will that impact the trial of a player?

Or take Major League Baseball and the steroids investigation. The Mitchell Commission was a commission formed by Major League Baseball, run by a law firm, that investigated whether or not players used steroids and which players did so.³⁰ Well, there were leaks from that report that

28. See NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 2-3 (2008), available at http://extras.mnginteractive.com/live/media/site36/2008/0624/20080624_064535_NFL%20Personal%20Conduct%20Policy.pdf.

29. *Id.* at 3.

30. For a report of the findings and recommendations see GEORGE J. MITCHELL,

clearly made its way to the media and that created headlines in terms of certain players who were revealed as those who would likely be targeted for either prosecution for using steroids or for lying under oath.

To what extent are leagues required under the law to in any way safeguard against leaks that they're not coming directly from the leagues, but perhaps from those who they're working with. When I look at 3.6, I think, well, there's really multiple systems in play when we're talking about sports.

There's clearly what we've been talking about, right, the athletes and entertainers who are subject to legal scrutiny and the impact of any leaks to the media and how those leaks would be played in the media. But I also think there's the role of player's associations and leagues and how they conduct investigations.

When Gilbert Arenas, for instance, was investigated by the NBA for carrying a gun, he hired a law firm, and the law firm was very sensitive, having written on the case and getting emails saying, you know, what you said wasn't exactly right.

So I'm aware that lawyers play a major role in negotiating player discipline issues with leagues in ways that I think are not as obvious to courts and nonetheless may play a major role in how courts perceive cases. Would Gilbert Arenas have been prosecuted if it had been a regular person who brought a gun into a gym? Would other players, like Paxico Burress, who discharged a gun, would he have been prosecuted for what happened, or was it because he was an NFL player?

There are a number of instances where we can wonder, if we change the identity of the defendant, that we can question whether or not the same charges would have been brought or prosecuted with the same sense of vigor.

And those are just some open-ended comments.

MR. VORPERIAN: At this point, I would ask if the panel has any rebuttal at this time, or questions that they would like to pose to one another?

MR. ADAMS: We're spending a lot of time talking about 3.6. And the one thing that I will say—I would like to see the

last time, at least in New Jersey, an attorney had an ethical charge for a violation of 3.6.

Because, given the carve outs in 3.6, yes, there is the threat there. Your biggest fear is not 3.6. It's not your local District's Ethic's Committee bringing you up on charges or somebody referring you to charges. It's not. It is, as Ellen perfectly stated before, it's the judge. You do not care, but for your client and but for your client's either love or hatred in the media, what happens in the press and how you defend the press.

You could have a client that wants to hide his or her face when they get out of the car walking into court, or you can have a client who wants to be a darling in the media again. It's the judge. If you are seen to be trying your case outside the courtroom, you will get hammered in the courtroom. I think that would be true in all of our scenarios.

In *Williams*,³¹ for instance, we had, not only 3.6 over our head, we had a gag order that the Court entered into that feared that prejudicial pre-trial publicity could impact the impaneling of a fair and impartial jury. That gag order was entered the morning after Mr. Williams appeared on Barbara Walters, the day before his jury was sworn in the first trial. And a gag order was entered, so we had a gag order. We had 3.6.³² We had 3.8,³³ in terms of prosecutor, covering what a prosecutor can and can't do.

You know, as a defense attorney, you have a prosecutor who's giving press conferences every day, because there is an obligation to the county and to the people and to the press to brief them on what's going on. And I would challenge anyone to find me a prosecutor or a U.S. Attorney, for that matter, who has given a press conference that would arguably be within the bounds of what the Debevoise Committee ultimately decided the rule should be looking like and what it's designed to prevent.³⁴

But you go back to the question of whether or not a "regular Joe" would have been prosecuted. Of course not. I don't think, in the Arenas case, an "average Joe citizen" would

31. *State v. Williams*, 919 A.2d 90 (N.J. 2007).

32. N.J. RULES OF PROF'L CONDUCT R. 3.6 (2010).

33. *Id.* at R. 3.8.

34. See REPORT OF THE NEW JERSEY COMMITTEE ON THE MODEL RULES OF PROFESSIONAL CONDUCT, reprinted in 112 N.J.L.J. 1, July 28, 1983 (supplement).

have been prosecuted. I think that could have been resolved without it. I don't think Jason Williams would have been charged with aggravated manslaughter, but for the fact that he was an NBA All-Star and was the darling of Hunterton County. I truly believe that, and I think that there's some media that believes that as well.

Would there be the attention in [the] Staub [case], but for the fact that she was on one of the highest rated reality TV shows? Would people have attacked Ellen's client in the media the way that they did, but for who her husband was? Of course not. So that creates a new dynamic.

And 3.6 is not something, at least in my view, that you have to worry about. You have to be more worried about the judge. Because you go out on the "Today Show"—and Ellen hit it right on the head—you go out on the "Today Show"; go for it. The next day, I challenge you to get more than one objection sustained. I would challenge. Because whatever you say is the teacher from Charlie Brown. The judge is aggravated; the judge is annoyed, because that's not what the trial is to be.

But that, then, begs the question; you have a client who needs that; needs it. In my case, it's sixty days—fifty some-odd days of jury selection, but sixty days of the prosecution case. So, every day in court, it was just the prosecution evidence.

In a criminal case, we're not going to come out front with what our defense is; we're not going to put our witnesses out there. Our cross is going to be very surgical; it's going to be set up for when the defense case comes out. So, all day in court, you hear the prosecution dumping on you, non-stop.

At night, on the news, you hear the news repeating that, and your client is miserable. The next day, you think you had a great day in court; "Oh, that was a great cross"; you get a pat on the back. The next day, they don't want to talk to you. They look at you and say, "I got hammered this morning; did you see the paper?"

So you have to find creative ways. And it is about avoiding, frankly personally, the media. You find emissaries. You know, the "Today Show" calls you—"No, we can't do it, but you should contact so-and-so: Your Defense Bar, seasoned trial lawyer, seasoned defense lawyer, former prosecutor; I'm sure he or she would be happy to come on your show. Here's their cell phone number; give them a call." And, the next day,

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you have somebody giving a perspective different than what the media's going to cannibalize and attack your client on. So 3.6 really isn't the problem.

We hired a media manager. Well, we didn't hire a media manager; our client hired a media consultant to manage that aspect of the media. That adds a different battle. You're fighting the prosecutor, and sometimes a judge, fighting the media, and you're fighting the media manager, much like a publicist who is handling what message they want to get out.

You know, when a media consultant starts giving statements to the press, either for attribution or not for attribution—and that's frankly what a gag order deals with—you have to reap the whirlwind the next day in court. So it truly does come back to something Ellen said before—it's whoever's wearing the robe; that is where the trial is.

But you definitely have to be sensitive to it. You know, and I'm sure everyone up here, and Ellen in particular—had to deal with what that message was; you don't want to just have the golddigger comment or the, you know, gunslinger comment. You want to deal with that.

MS. MARSHALL: There's that old quote that I'm going to misquote that "to those to whom much is given, much is expected."³⁵ And certainly there are gun charges brought against people who would otherwise have pled out, gotten PTI, or perhaps not even that much. There is attention paid in league investigations for infractions that, were we to do the same thing in our careers or in our lives, would probably be ignored.

The media makes its living reporting this. The athlete or the entertainer makes his or her living being an object in the press, like Darren's client who made her career by being a subject of the press. And, thanks to one of my students, I'm aware that there are shows like this, because I hadn't been aware of it until then. And you want to be aware that there are very competing issues.

Chris makes an excellent point—and probably none of us checked, but it would be interesting to see—when the last time there was an actual ethics trial on whether anyone

35. The precise quote is: "From everyone who has been given much, much will be demanded." *Luke* 12:48 (New International Version).

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violated the rule regarding disclosure to the media. But it doesn't mean you don't have huge amounts of dynamic tension among everyone's competing interests.

And, also, as I'm sure Chris being sensitive to the criminal arena can tell you, in league investigations, you may want to conduct yourself one way, with the possible exposure to the press and the public and a record being made. Where, in another arena, you may be much more circumspect, because the stakes are entirely different and the exposure is entirely different.

And add to that the bright light of public scrutiny, and it's a recipe for all that stuff they say rolls down hill and lands right in the lawyer's lap. So it's a difficult competing dynamic for sure.

MR. DEL SARDO: And, just to add to that, in terms of controlling the media and getting your message out there, if you don't think that the judges have the paper on their desk the next day when someone appears in their courtroom, they most certainly do. That paper's right out and they're reading it, and they want to know what people think before they make their decision. I truly believe that.

I truly believe that jurors, no matter what you tell them, they're going to read about their case. They're going to do whatever it takes. They get on the internet; they Google the names; and they find out what's going on, most certainly. I mean, cases that I've tried, [the jury] know[s] more about what you're trying than you do, because they do so much research to try to find out. And this becomes their life, and they want to know: wow, am I on a big case, am I not on a big case, what is this all about.

So, you know, whoever gets the message out first, I find, strikes hardest, because all the sudden now, the way the press is with the Associated Press—they're really giving the story to everyone. And you find out that the next day, whatever statement you gave is in five different languages all over the world. You know, your message is getting out there to everyone.

I had an issue where, Fox News put something up that they were talking about the ex-boyfriend with the sex tape, and they put my name as the ex-boyfriend involved in the sex act. So, I got a hold of Fox News and threatened them with a lawsuit and they immediately took it down, all of a sudden,

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it's all over the place, so—

MS. MARSHALL: Was it a positive or negative impact on your personal life?

MR. DEL SARDO: Well, this is being taped—
But—

MR. ADAMS: So was that.

MR. DEL SARDO: That's the issue. I mean, it gets out there quickly with the internet. And that's the trouble we have. Jurors could go right up on there; judges could go right up on there; and they're going to read whatever message you're conveying to the press.

MR. ADAMS: In any proceeding that's going to have a jury, especially in a criminal case, how many average people have a cell phone that has email on it: iPhone, BlackBerry, Android, whatever it is; they all do.

Federal court, you walk in; there's no cameras in the courtroom. The media can be there; they can't take photos; they can live blog, so that saves you a little bit, because they may be too tired to type. But the jurors are going to have that. And you are going to have them at their lunch break, or their cigarette break, the morning break, the afternoon break, getting their phones.

Forget whether they had a Google search, forget whether they went online, forget whether they have NJ.com as, one of their bookmarks, their friends are sending them text messages of quotes that are up already, or emails of what's up already.

And we've had that. You know, I've had the experience of losing jurors, good jurors, highly-rated jurors for you, that ended up being exposed to prejudicial pre-trial publicity. And it was the prejudicial pre-trial publicity that a criminal defendant doesn't consider so prejudicial. They consider it positive. And they're exposed to it. So you really have to be conscious also of the media angle; not media in terms of cameras, Channel 2, 4, 7, but media in terms of technological media.

MR. VORPERIAN: let's just go to a topic that you are

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covering, which is, you know, there was a time where juries got sequestered. And I'm wondering, with social media: Facebook, Twitter, does a plaintiff attorney, a defendant's attorney, have to essentially sequester themselves from social contact?

In particular, I'm thinking [about] calling a press conference. Well, Jerry Jones called a press conference. I can think of it in particular. The Dallas Cowboy owner just happened to be at a bar when some local asked him a question. He turned around on that bar stool, leaned back, and gave a response to a question concerning a former NFL coach. It was quite frank, candid. That was up on the internet immediately: press conference.

So what do you do as an attorney? Because BlackBerries, digital cameras, they're all out there. What steps can you take? It's one thing about calling a press conference; it's another.

MR. ADAMS: Well, there [are] two points: You [have] to think of it from jury selection, number one. The most probing and thorough voir dire that you can possibly imagine, which is, at least in New Jersey, has been trimmed away to barely finding out what a person's name is, given the recent directives from the Supreme Court.

But, in certain circumstances, in a higher profile case, you can enhance your questionnaire. I've had the experience of being able to have a very substantial questionnaire we had a twenty-page or twenty-plus page questionnaire in a case. And we handled jury selection like a death penalty case. We had a struck jury. So we brought in 350 people; they all got a questionnaire; it was very intrusive; it went into social media; it went into regular media.

Think about it. Think about the Twitter that you follow, or your Facebook friends, how many of them go on a Facebook, rant about something that you had never even heard about that they read or learned about. What have they heard? Who have they heard it from? And what impact has it had on them?

So that's the first aspect: what impact it's going to have on a jury. I don't think you have to worry about it, frankly, from a judge's perspective. And somebody may disagree with me.

But then you have to worry about it on a third front, from the media perspective, because that's a different battle

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entirely, you know, at least in our game, it's all about the first battle, which is trial. You could get crucified in the media. If you win a trial, you're a hero. If you are a hero in the media and a darling of the media, there [are] a thousand examples we can give. But your client goes to prison for a very long time, no, it's not really a great thing for repeat business.

MS. MARSHALL: A very long time being defined as more than a half hour.

MR. ADAMS: Yes, more than photograph.

MR. DEL SARDO: Yeah, I don't think there's much you could do. And I think you hit the nail on the head in terms of jury selection and finding out who your jurors are. I think one of the questions [asked in the questionnaire] is: "Where do you get your news from?" The problem is that a lot of people may say "Facebook" nowadays, because they read something posted on Facebook and they think it's gospel; someone said something causes cancer and, all of a sudden, it goes all around; people re-post it and that's their news.

You want independent thinkers. And, regardless of what they hear in the media, you want them to only view what's presented at trial in evidence. But that's hard to find, because they are swayed. They're swayed by what their spouses tell them; they're swayed by what their children think, their friends think. You know, they're on trial as well. How are they going to decide this case that everyone's watching? Are they going to let a potential murderer go free?

And half of those people, all they know of the case is what they read in the papers; they don't really view the evidence. And, of course, the media always puts a spin on whatever the evidence is.

MR. MC CANN: Yeah, and I think they form their opinions through that, right?

MR. DEL SARDO: Right.

MR. MC CANN: How will Roger Clemens get a fair trial this summer as whether or not he knowingly lied under oath. Everyone thinks he lied. It's hard to find anyone who doesn't believe that.

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And you wonder, if the media hadn't amplified the comments that he made that are arguably comprising perjury, whether or not they would have that opinion. If he, in fact, was tried as a regular person, without having the media already conduct his trial, maybe he would have a fair trial.

Maybe that gets back to 3.6, whether or not publicity itself is just harmful to one's legal rights. I think it's going to be very hard for Clemens to get a fair trial for that reason.

MR. ADAMS: Well, if he gets tried in the Southern District, he should be okay.

MR. VORPERIAN: Why don't we open this up to the floor.

MR. ADAMS: How about you piggyback on the Professor's comment about Roger Clemens? Think about this issue: We all talked about the fighting, the different battles, and dealing with the media. Whomever is responsible—and it may be Clemens, himself—for advising Clemens to do that interview. Whoever gave him that advice, if that was an attorney, now you go back to Ellen's comment about the vanity issue; about, you want to be out there; you want to be in the media and attack the media. [But] no, no, no, that absolutely crucified him.

Take Mark McGuire. How long did Mark McGuire deal with the repercussions of taking the Fifth. They called him how many different names for how long? Well, he's not on trial, and he's actually back in baseball, and probably will coach a Major League Team soon.

MR. MC CANN: What do you do with Clemens, though? Because the Mitchell report comes out—

MR. ADAMS: Smack him.

MR. MC CANN: —right? The Mitchell report says he used steroids.³⁶ He's defiant saying, "No, I didn't." It's not clear whether he volunteered to go before Congress, but it's clear that he took actions that made himself more likely to get subpoenaed to appear before Congress. Do you just really

36. MITCHELL REPORT, *supra* note 30, at 167–75.

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sequester him as a person?

Rusty Hardin, his lawyer has been vastly criticized, right, but what would he have done? I mean, what do you do with a client like that where the client seems so adamant that he's being set up and that his whole livelihood is being endangered by false reports about him using steroids? I mean, what do you—I'm just wondering—as lawyers, if you were Roger Clemens's lawyer back then, what would you have done?

MR. ADAMS: Quit. You say things like, "I will quit, if you do that interview." And that's no joke. I know lawyers who have looked their clients in the face and said, "If you do that interview, I will quit."

You know, that sounds like, "wow, wow, a very principled stance"—[but] you calculate it. It's yes, you will. Because you know nothing good can come from it.

Forget Sports and Entertainment; go to the President of United States when Bill Clinton stood in front of that microphone. What did that do for him? It got him impeached. If he just shut up and didn't have his Communications Director and didn't have his Press Secretary telling him you have to say something, if he just didn't acknowledge it, yeah, it's a repeating news cycle, but would he be impeached? No. Would Roger Clemens have been charged if he just kept his mouth shut? No.

So, if he goes on and you quit, you're a hero. You say, "I gave him the advice." If he doesn't go on, and you didn't quit. But you have to do things like that. You have to take that aggressive a stance. Otherwise, one, I don't think your clients are going to take you seriously.

MR. DEL SARDO: And that's the problem with publicists and people that handle the press for these individuals. They're saying you have to respond to this; we have to respond. And it's not in their best legal interest[] sometimes to say a word.

A lot of times they've developed a relationship with that person where they almost trust their publicist more than they trust their attorney. And, you know, you get no benefit, but to protect your client, by telling them to do something or not to do something. And they take, you know, their word over your's. And these people will drop them in a second as soon as they're no longer high profile. So it's tough.

MR. VORPERIAN: I was wondering about [the] revision of 3.6—and we’re talking about media management companies that do step in—that first section about a lawyer shall not make such statements, I’m wondering whether the Model Rule should consider, “A lawyer shall not cause statement.” It would give more leverage to the lawyer to shut down the PR guru. Does that give a sword to the attorney?

MR. ADAMS: Oh, God, don’t do that.

MS. MARSHALL: Because it’s impossible to control. It is a more attenuated relationship.

And, to what Darren said, people have longstanding relationships when they meet their lawyer: they have a publicist; they have a spouse; they have a brother-in-law; they have their sports agent. And, all of a sudden, they’ve met you under typically very difficult circumstances: indictment, divorce, sex tapes being revealed, and they’ve known you for a minute-and-a-half and you’re giving them enormously consequential advice that they may not want to hear and you’re having to manage all of the other people saying, “No, no, that’s wrong.”

I think Chris is right; I think it’s a very principled thing to do and it underscores your sincerity: If you do this, you have every right to do what you want, but I will cease representing you. That can be very powerful. You may lose the client for a week or a year. You may get them back. Because, at the end of the day, they may say, “That was the only voice that cared about me, that was willing to be unpopular.”

And I’m sure Roger Clemens wished that someone had said to him, “I will lock you in a closet until the mood to talk passes.”

You’re also dealing, though, when you’re dealing with athletes and entertainers, with titanic egos. And they’re not accustomed to being told no. I recall hearing a very well-known person say to a lawyer whom I know well, “Come on, that’s what I’ve got you for; spin it for me, baby; make it happen.” And I thought: I hope what’s going on on the other end of the phone is not printable. What an awful thing to say.

But it underscored these people are accustomed to being told, “We can make that happen. We can do that. Okay.” And, when suddenly they’re told, “I’ll resign; this is not in

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your interest,” it is powerful and often the only tool you have.

MR. ADAMS: I wouldn’t want 3.6 revised to say, “cause,” at all, because I’m happy not going out into the media; I’m happy not making the statement.

You know, you take the issue of Jason Williams—and I had said to our moderator before the start—the case is over. Everything I intend to talk about has been public, so there’s no real bar on me sharing it.

But this is a case where we had 3.6 over our head, a gag order on us, and the lawyers were sued for defamation because we filed a motion against the New Jersey State Police which named certain individuals who had things in their past which we’d like to find out about because it would show racial bias.

And, when we filed those, despite the litigation privilege, despite filing in open court, the media manager, the media consultant, took the filing and shared it with the media. That was enough to defeat the dismissal motion, to defeat summary judgment over litigation privilege.

Because, if the media went to the Clerk’s Office and got the briefs themselves, no matter how direct we were in our filings, we would have been fine. But, if now we change 3.6 to say, “cause,” well, I can’t now tell the “Today Show” when they call, “Call Ellen; she’d be happy to go on tomorrow. She’s a darling of the media, and she’s very well versed in the case,” because now I’ve caused it. You can’t have those emissaries deal with that battle.

And, you know, that’s not to say that there isn’t a fine line on 3.6 in which you can’t do. You change that, then frankly what are you going to do?

MR. DEL SARDO: And they’ll turn on you or say that you caused them to do this in a heartbeat. They’re going to point right at the lawyer. I mean, that’s just how it goes. You’re the one, you know, that I guess—well, insurance doesn’t cover it—but you’re the one that they think has the deep pockets and they can come after you, and they’re just going to point the finger at you.

MR. ADAMS: And a gag order only prohibits you for speaking for attribution, so you can talk to the media all you like.

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MR. VORPERIAN: Well, I've gotten the cue. Darren DelSardo, Christopher Adams, Ellen Marshall, Michael McCann, thank you for a wonderful panel. Thank you.

Panel II: Twenty-First Century Labor Concerns in Sports and Entertainment

Panelists:

Matthew D. Pace

Mr. Pace is an attorney with Herrick, Feinstein LLP. He represents sports leagues and teams, sponsors and properties, sports technology companies, investors, licensees and licensors, and sports marketing and promotions agencies in a variety of areas including licensing and promotional agreements, joint venture activities, and digital rights and mobile media issues. Prior to joining Herrick, Mr. Pace was the Executive Director of Major League Lacrosse; the Executive Vice President of Business Development and General Counsel for GM EventWorks, a company responsible for managing the sports and entertainment alliances for General Motors; and a player agent and a business development and partnership consultant to national retailers and marketing companies.

Jessica Berman

Ms. Berman is Associate Counsel for the National Hockey League, where she deals with issues of labor and employment law. Prior to joining the National Hockey League, Ms. Berman was an associate with the firm of Proskauer Rose LLP.

Ann Burdick

Ms. Burdick is Senior Legal Counsel for the Writers Guild of America East. Prior to joining the Writers Guild, Ms. Burdick worked at the American Federation of Television and Radio Artists, an entertainment union representing actors and broadcasters, and the General Counsel's Office of the New York State Teacher's Union.

Marc Edelman

Professor Edelman is an Assistant Professor at Barry

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University's Dwayne O. Andreas School of Law, where he teaches and writes in the areas of antitrust, contracts, property law and sports law. He is regularly cited by the media about how the Sherman Act applies to professional sports leagues, and his publications have been cited by three Supreme Court briefs in the case *American Needle v. National Football League*.

Alan C. Milstein

Mr. Milstein is a shareholder with the firm Sherman, Silverstein, Kohl, Rose & Podolsky, P.A. Mr. Milstein is nationally recognized as a preeminent litigator, expert, lecturer, and author. His expertise on bioethics issues has made him a sought-after television guest. He has appeared on Dateline, Sixty Minutes, 48 Hours, Hannity and Colmes, The Today Show, Sunday Morning, CBS News, NBC News, CNN, BBC's Science and Nature, ZDF German Public Television, and NHK Japanese Public Television.

William Z. Ordower

Mr. Ordower is the Vice President of Business and Legal Affairs at Major League Soccer and Soccer United Marketing. Prior to joining Major League Soccer, Mr. Ordower worked as a player agent for Pro Serv in Virginia.

MS. BATTERSBY: Hello. I'd like to quickly introduce panel two. This is our panel on labor concerns in the Sports and Entertainment industry. Our moderator for this panel is Mr. Matthew Pace, of Herrick, Feinstein.

Mr. Pace has over twenty years of experience representing various Sports and Entertainment industry figures. Prior to joining Herrick, he was the Executive Director of Major League Lacrosse. And so now I'd like to turn the microphone over to Mr. Pace. Thank you.

MR. PACE: Thank you. Thank you, Emily.

Twenty years experience, wow, sounds like a lot; certainly not that much. Thank you guys for joining us today for this panel on sort of current labor issues in professional sports. I think we have a really good panel put together here today. Thank you to Elizabeth and the rest of the team at Seton Hall for putting this whole thing together. They've been very helpful and cooperative, and I think they've really put

together something special for you guys today.

Before I introduce the panelists, let me just give you a little overview of the types of things we're going to go through, so, that way, you can know what to prepare for. And please do think of some questions, because I'm going to try to leave some time open at the end for a quick question-and-answer period.

We're going to start with just basically some overview concepts on labor law. Because, probably like many of you here, I actually am, you know, sort of dumbfounded sometimes when I hear all of the jargon coming out. And, frankly, the jargon is not that complicated once you understand what it means.

So I think we have a great panel of experts here, and they'll be able to tell us a little bit about the jargon and explain a little bit of the mystery behind that jargon. After that, we're going to try to tackle some of the issues that are in the paper these days, because that'll be probably most interesting with both the NBA and the NFL in the midst of labor discussions, negotiations, perhaps non-negotiations, depending on who you listen to. And so we'll try to identify some of those and then apply some of the concepts that we identified at the beginning towards those issues.

And then, I think, finally, you know, we tend to only to think of labor issues in the context of collective bargaining agreements expiring, or strikes, or lock-outs, or those types of things. But the reality is that, every day, labor issues happen and, every day, leagues and player's associations and trade associations have to deal with every day labor issues that you don't necessarily hear written about in the paper. So I think we'll give a little bit of insights on those issues as well.

At the end, as I said, we'll open it up to some questions and answers.

All right, so let me start here by first introducing on my right, Professor Marc Edelman. Marc's an Assistant Professor of Law at Barry University's Dwayne O. Andreas School of Law, where he teaches and writes in the areas of anti-trust, contracts, property law, and sports law. He is a magna cum laude graduate of University of Pennsylvania's Wharton School and a cum laude graduate of Michigan Law School. I think I'm going to actually leave, because I'm feeling a little intimidated. Professor Edelman had practiced anti-trust and sports litigation with the law firms of Skadden,

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Arps and Dewey, Ballantine, prior to entering the education field.

To his right is Ann Burdick. Ann is currently the Senior Counsel at the Writers Guild of America East. The Writers Guild is a labor union that represents writers in both television and screen genres, where she's involved in arbitration, negotiation, and litigation. Ann received her B.S. from Cornell's Industrial Labor Relations School and a J.D. from George Washington Law. Prior to her work at the Writers Guild, Ann worked at AFTRA, the American Federation of Television and Radio Artists, an entertainment union representing actors and broadcasters and the General Counsel's Office of the New York State Teacher's Union. Ann is also an adjunct professor at Rutgers University, where she teaches American Labor Law.

And to Ann's right is Bill Ordower. Bill is the Senior Vice President and General Counsel for Major League Soccer and Soccer United Marketing, better known as SUM, which is the company that controls all the commercial rights for MLS, among other soccer properties across the country and world—actually in North America mostly. Bill oversees all significant legal matters for the two companies, including areas of sponsorship, broadcasting, new media, licensing, property rights, acquisition, stadium lease agreements, and international game promotions. His responsibilities also include developing and managing the trademark strategy for the league in each of its clubs.

Bill spent the majority of his career at Major League Soccer. He's been working at the league office since 1997, which was, I believe, the second season of MLS. So he's been there a long time. And, prior to joining MLS, Bill worked on the other side of the table as a player agent for Pro Serv in Virginia. Bill is a graduate of GW Law School and BU undergrad; also a magna cum laude. So I'm definitely running out of here.

MR. ORDOWER: Not in law school though.

MR. PACE: And to Bill's right is Alan Milstein. Alan is with Sherman and Silverstein, and he's a nationally-recognized litigator in the area of Sports Law and Bioethics. He received his J.D. from Temple University with honors and was a member of Temple's Law Review.

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Alan's represented some very interesting cases in the sports area. He represented a college athlete who was seeking early entry into the NFL. I'd say that was Maurice Clarett, I'm assuming, for those of you familiar with the Maurice Clarett case.³⁷ He's also represented an NBA player whose team is demanding that he submit to a DNA test, and an athlete suing their agent for misappropriating funds, and jockeys in an action against their guild. Alan's listed as a member of Who's Who in American Law, New Jersey Super Lawyers, and he's lectured extensively on Bioethics and Clinical Trials and Sports Law.

And, last, but certainly not least, to Alan's right is Jessica Berman. Jessica is an Associate Counsel for the National Hockey League. She advises the NHL clubs on their rights and obligations under the collective bargaining agreement and works with the NHL Players Association on day-to-day matters relating to the CBA. Prior to working for the NHL, Jessica was an Associate in the Labor/Employment Department at Proskauer Rose; probably familiar to many of you as the law firm that represents a lot of these leagues in their labor negotiations. Jessica's a graduate of Fordham University Law School, where she was [Editor-in-Chief] for the *Fordham Sports Law Forum* and Associate Editor of the *Urban Law Journal*. And she's a graduate of the University of Michigan. Go Blue.

I think we have another Michigan graduate on the panel; is that right?

MR. EDELMAN: Go Blue.

MR. PACE: There you go, all right.

Okay. So, as I said, I want to start off with talking about some general principles of labor law. And I think one of the first things I want to talk about is what exactly is a collective bargaining agreement. Is every instance of labor negotiations a collective bargaining agreement, or are there instances of labor negotiations where collective bargaining agreement is not involved?

And, Jessica, I'm going to start with you on that one, if that's okay.

37. See generally *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004).

MS. BERMAN: Sure. Well, just generally, a collective bargaining agreement is an agreement between an employer and a union, and it governs the terms and conditions of employment with respect to the workers.

In a sports context, and in sports leagues in particular, sports leagues are set up as multi-employer bargaining units, so that, for example, in the NHL, where we have thirty teams in our league, the NHL is the collective bargaining representative for all thirty teams, and we negotiate on behalf of all teams with our players associations, which is NHLPA. And the NHLPA represents hockey players.

We negotiate a collective bargaining agreement, as I said, that governs all the terms and conditions of employment. So things as basic as minimum salary, maximum salary, you know, that would be the most obvious example. But it also kind of governs things that you might not expect, like whether a player's entitled to mortgage reimbursement; and, you know, whether he's entitled to a salary when he's injured and what standards might be applied in that context; you know, league scheduling, how many games we play, all the procedures with respect to hearings, grievances, disclosures, due process for players, a lot of that you'll find in collective bargaining agreements.

Our collective bargaining agreement is, I think, 500 pages. I actually usually carry it with me. It's kind of my Bible. I don't have it with me tonight, but I almost never leave home without it, because I consult it pretty much all day, every day. It's really our kind of book of rules that we live by, day in and day out.

MR. PACE: And, Alan, from a player's perspective, what is the advantage to having a collective bargaining agreement versus say each individual player being able to negotiate their own deal without a collective bargaining agreement? Why is that the sort of procedure that's set up?

MR. MILSTEIN: Well, it certainly doesn't benefit the top athletes. It benefits, to some extent, the athletes at the bottom of the rung.

A lot of interesting issues come up with respect to the fact that these things are binding on college athletes who want to come into the league. And there's real questions as to

whether or not it should apply to college athletes.

In the *Clarett* case,³⁸ it was interesting in that one of the first things we did in the case was ask the NFL: Show us where the rule that says you've got to go through three years after high school, because it's not in the collective bargaining agreement. And one of the key issues in the case was whether or not it was collectively bargained.

The Second Circuit said it was collectively bargained.³⁹ It's not in the collective bargaining agreement. It was in some memo that Pete Rozelle would send to the leagues that predated the collective bargaining—actually pre-dated the union. So we lost on that point some how, some way at the Second Circuit.

MR. PACE: Interesting. And then, I mean, so, Jessica, how would that work though? How is it that the collective bargaining agreement—does that apply to all people that are currently working in the league, or does it apply to those that are also seeking to work in the league?

MS. BERMAN: Well, it's controversial. I don't think it's cut and dried, necessarily.

You'd have to ask the union. I think a lot of the unions purport to represent incoming players as well. For example, in our bargaining agreement there's procedures for our draft, and the players being drafted are not yet players in our league.

But I think the second part of your question, and what Alan alluded to about it not being in the collective bargaining agreement, is an important one, because I referenced our collective bargaining agreement is 500 pages, but what it's collectively bargained and what would be deemed binding on both parties goes far beyond what's in the collective bargaining agreement.

And, in fact Ann might speak to this as well. For example, there are often cases on past practice which some arbitrators might find to be binding on the parties if the parties have acted consistent with a certain past practice, such that it becomes, in essence, part of your collective bargaining

38. *Id.*

39. *Id.* at 142.

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agreement, an interpretation of your collective bargaining agreement, that becomes essentially collectively bargained.

MR. PACE: Interesting.

MS. BERMAN: So kind of the way you operate day-to-day under your agreement could form the basis for rules that you have to follow.

MR. PACE: And, so as we understand collective bargaining agreements, they're entered into; they have a term; and then their term expires, presumably, right? Or perhaps it's renegotiated prior to its expiration and extended.

When a term expires, it seems that there are two options for players and for management. The players can come try to negotiate and come to some sort of resolution. Short of that, they can use probably two different types of mechanisms: the owners can opt to lock out the players, which is a term that we hear quite often, or the labor can opt to strike, which is, again, another term probably that we are more familiar with.

Ann, you were recently with the Writers Guild through a strike or a lock-out?

MS. BURDICK: In 2007, there was a three-month strike.

MR. PACE: Okay. And so what process do you go through as representing the writers, or labor in general, when a collective bargaining agreement is set to expire that leads you to a strike or to exercise some of those remedies?

MS. BURDICK: I think I can speak for the whole panel to say that both parties want to avoid either one of those two things. A strike or a lock-out is very expensive for both sides. It's politically very intense for both organizations.

With the Writers Guild in 2007, following your question, most union collective bargaining agreements and the constitution of that labor union will detail how a labor union will approve a strike. It's usually by majority consensus from the members that are actually voting.

So, in 2007, the writers voted to go out on strike once it appeared that the parties were at impasse, which is also an important word to know. At impasse, it essentially means that the parties have negotiated and negotiated and they

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can't seem to make progress.

So, in 2007, over several issues in the collective bargaining agreement, the writers did vote to strike, and it lasted for a three-month period.

MR. PACE: So you have a majority that rules there—let's say you just have a very simple majority—to say there's a hundred members, and fifty-one vote to strike and forty-nine vote not to strike, what is it that keeps those forty-nine sort of to abide by the majority rule to honor the strike?

MS. BURDICK: Well, I think Alan also touched up this; that, in our field, it's majority rules. And it can be a very difficult situation where you have forty-nine. I think, as someone that works for a labor union, if that were the case, I would inform the leadership that you need to seriously think about actually implementing that majority vote to go out on strike, because, if you have the ninety percent approval to go out on strike, you bet that, as the days tick by, that your support is going to decrease.

And, to take, especially in the case of the Writers Guild, a labor union that's going to be impacting people [who] had no chance to vote on that strike vote; that's a very serious thing. You're affecting directors; you're affecting actors; you're affecting the crew; you're affecting hair designers and makeup artists. So, technically, they could go out on strike if that's what is permitted in their constitution. But I think, politically, that that would be a very poor idea.

MR. PACE: And, Alan, how do you advise a client who's stuck with this dilemma: my labor union voted to strike; I'm in the minority; I don't want to strike; I need these payments; my career's coming to an end; I really want to play. How do you advise a client in that case to either abide by the labor law or not, or his labor union or not abide by his labor union?

MR. MILSTEIN: I'd advise him to save money.

MR. PACE: Good advice.

MR. MILSTEIN: We've done that. And, you know, unfortunately, many of the players spend it like it's going out of style and they don't have it.

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MR. PACE: Right.

MR. MILSTEIN: If the NBA locks out these players, you're going to have some serious deprivation of very rich—formerly rich people.

MR. ORDOWER: I was just going to say, going to what Ann was saying, really, when you're making that decision, if it's going to be a strike or it's going to be a lock-out, most importantly is you have to be prepared that it's going to be a long-term event. And that, if you think that a little bluster and a short lock-out or a short strike is going to get you anywhere, it's not; it's going to have the opposite effect. Because, if you can't sustain it for as long as you need to, you're going to lose all leverage at the bargaining table.

MR. PACE: Right. And, Jessica, you guys actually faced that. I mean, you guys faced a lock-out. So, I mean, you probably had a very long-term plan, because it turned out to be a very long-term lock-out. So what's the decision-making process in going through a lock-out, from the perspective of a league?

MS. BERMAN: Well, not very proud of it, but, yeah, we're the first major sports league to have a season-long lock-out or work stoppage. In the past, they've kind of managed to come to an agreement at some point during the season to salvage some portion of it.

MR. PACE: But you're stronger now, right?

MS. BERMAN: I mean, economically, absolutely. And, we're facing tough economic times, which, you know, the timing of coming back after our work stoppage wasn't great, considering that, since 2008, the economy's been struggling.

But, yeah, even following our work stoppage, we've had record revenue, record attendance. And, because of the new economic system that we have, which is a hard salary cap, we've been able to keep teams financially afloat that, in our old system, in this economy, it would have been very difficult.

But, in terms of the process, I mean, we have thirty teams and thirty teams that have owners, and we meet and have

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Board of Governors meetings. And, like any business, at the union end, I mean, you need strong support. And people — like Bill said—the people have to be in it for the long haul. And, if you have kind of a simple majority, as you put it, it would be tough. You need people who feel passionately about it and believe in the cause, that it makes sense to kind of give up the short-term revenue for the long-term gains.

Probably the situation has to be bad enough that people are willing to do that. That's when the agreement expires, like whether people are bluffing or not, that's when you find out how serious the problems are. If people are willing to shut down the business or not work for money, you have to assume they really believe in their cause.

MR. PACE: And, I mean, do you guys also have a majority rule for that, or is there a super majority for a lock-out vote or is it—

MS. BERMAN: It depends on the context of the vote. So, I mean, it's kind of a long answer, but—

MR. PACE: Okay.

MS. BERMAN: —yeah, I mean, in our world, I think I could speak for all the leagues, people wouldn't be doing anything, unless there was strong support.

MR. PACE: Right. And, Marc, not that I've forgotten about you, all right, so one of the things that a player's association or a labor union might do to sort of prevent against a strike or against a lock-out, actually, is something called, "decertification," and a move to decertify a union. Can you perhaps explain a little bit about what decertification means and what the antitrust implications are around decertification?

MR. EDELMAN: Okay. Just to begin with a little bit of backdrop, in the NFL, back in 1987, I don't know how many people remember back that far, but I'm sure many people in the room have seen the movie, "The Replacements," which is meant to be a mock on what happened in 1987. It was the last time that a collective bargaining agreement in that league came to an end, an impasse was reached, and the NFL

players decided to go on strike.⁴⁰

Now, that strike turned out to be a complete disaster, because it didn't overall have support from the players. And, while a majority of players were out on strike and picketing, you'd see some of the premier quarterbacks and some of the premier linebackers in the league crossing the picket line. You had Mark Gastineau playing, when the guys who are making a lot less money who remained on strike.

So the union called back the strike, and they attempted to decertify the union. Now, usually, outside the context of sports, decertifying a union seems to make no sense. This would be taking away the bargaining power of each of the individual employees.

But, in sports and in multi-employer bargaining units, you have an interesting interaction between two laws: the labor law system and the antitrust law system. That labor law, in real general, creates a mandatory duty to bargain over hours, wages, and working conditions as a multi-employer bargaining unit. On the other hand, with antitrust, section one of the Sherman Act says any combination, contract, or conspiracy in restraint of trade is illegal.⁴¹

Now, they don't really mean every contract in restraint of trade, but, generally, something like a salary cap, which would be an agreement to pay the same amount of money for every team in the league, or free agency rules to re-enter the league, or even perhaps an age or education requirement, would violate section one of the Sherman Act.

Now, if both laws applied at the same time, labor law and antitrust law, that would create an absurdity, meaning that whatever the teams did, they'd be violating one or the other. If they didn't get together to negotiate salaries of the players, they'd be violating labor law for not negotiating over wage. But, if they do get together, there will a contract combination of conspiracy that would restrain trade and arguably harm consumers.

Now, courts have said, because one has to trump the other, that, during the collective bargaining process, when there's a

40. See Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26, 26 (1988).

41. See Sherman Act § 1, 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

union in place, something known as the Non-statutory Labor Exemption to antitrust law means that labor law trumps antitrust law.⁴²

And, thus, as long as there's a union attempting to collect a bargain—and we could disagree a little bit about the outer thresholds, but along those lines—you can't challenge the restraint; you can't challenge the salary cap; you can't challenge the free agency limit rules, under antitrust law. You only have labor law.

Now, the decertification strategy has been used once by the NFL, and you saw it used after the failed strike in the late-1980's, which was the idea of the players getting together and saying, you know what, we are not going to be a union anymore. Because, if the union goes away, then at least arguably there's no longer a conflict between labor law and antitrust law, because, without a union, there can't be labor law. Thus, antitrust law would have to trump.

And the argument is then that the players could bring a suit challenging some of these rules they don't like, such as salary caps, under section one of the Sherman Act. And that's been done. In fact, that was done by the NFLPA successfully in the *McNeil* case, which was decided in the District of Minnesota in 1992.⁴³ And they got a very large settlement, which ended up giving them, under antitrust law, what they were not able to get under labor law.

MR. PACE: Interesting. So another reason sort of for collective bargaining agreements are to avoid antitrust restrictions that the leagues want to collectively bargain, if you will, with the players.

MR. EDELMAN: It would be fair to say that sports leagues, overall, seem to prefer—and maybe it's the only industry out there—but seem to prefer the players be unionized. Because, as long as they're unionized, there's a broad insulation from antitrust law for league-wide agreements, which affect wage.

MR. PACE: Which is always a hot button when you're

42. See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (explaining the scope of the non-statutory labor exemption).

43. *McNeil v. Nat'l Football League*, 790 F. Supp. 971 (D. Minn. 1992).

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talking to leagues is antitrust. Major League Baseball enjoys an antitrust exemption⁴⁴ and you'll notice that, when a lot of these labor problems happen, they're very quiet, because they don't want people looking into that antitrust exemption. So interesting.

MR. MILSTEIN: The guys who are left out of this is the college athletes who could make a lot. In the NBA, you know, they're restricted to I think it's \$2 million for each of the first four years. I mean, these guys could make a lot more money. There [are] so few professions where people don't have the right to go work in the city they want to work at or for the coaches they want to work for and bargain for the salary they deserve.

And, you know, so these guys are not in the union; they want to enter the leagues; and yet they're bound by this collective bargaining agreement that my colleague to the right says, gee, you know, the player's unions are doing it for the college athletes. They're not doing it for the college athletes. They're keeping those college athletes down. The whole purpose of the draft—

MR. ORDOWER: Well, it does depend on the sport, right? You're definitely talking about an NBA or an NFL example where you pretty much have a sense of who the top guys are and what they'll be able to make.

Soccer is a totally different boat. It's not going to be the college athletes that are going to be coming in and driving huge numbers. They're actually—

MR. MILSTEIN: It's the fourteen-year-olds.⁴⁵

MR. ORDOWER: In one well-known case. But at the end of the day, it's actually our union. It's a benefit to those guys coming in, because they would ultimately be paying for a lot less money and a lot fewer benefits.

44. See *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

45. Mr. Milstein was referencing Freddy Adu, who signed his first Major League Soccer contract at fourteen-years-old. See *Freddy Adu Says Hello*, CBS NEWS (Feb. 11, 2009, 8:23 PM), <http://www.cbsnews.com/stories/2003/11/20/national/main584743.shtml>.

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MS. BURDICK: Can I just comment as the union rep on the panel, that we recently engaged in a detailed analysis as to where our writers exist in different salary scales, like who are we really representing; how much are people making in television; how much are people making in film.

And I can't speak for the sports field. I can say for entertainment that we do have say ten percent of the union that's making well over millions and millions of dollars and their salaries are supporting our health and retirement funds. But the vast majority of our writers are in the \$150,000 to \$500,000 a year. And they would not be making that amount if they did not have the collective bargaining agreement protecting them with a certain floor.

We don't have the same salary caps and the same restrictions that you might see in the sports field.

MR. MILSTEIN: But can you imagine if the soap opera industry is saying, "You have to work for us," [to the writers], and these other writers, "Well, we're going to pick second; this is a good writer; he has got to work for 'American Idol' for a year." It's just so absurd the way the sports leagues are set up that these players don't get to work where they want to work. And, in virtually every other profession, you can go to work where you want to work.

MR. PACE: Although, and it's interesting, because I think that the perspective from the sports league is that they need these restrictions in order to put together a competitive entertainment product.

MR. MILSTEIN: That's such a myth.

MR. PACE: Perhaps.

MR. MILSTEIN: I mean, the old rule was everybody would go to play for the Yankees. Who wants to play for the Yankees? Cliff Lee—

MR. PACE: —Cliff Lee wants to play for the Phillies. You know, and there's no telling some people's tastes.

MR. MILSTEIN: It's the myth of the NFL that the whole purpose of the draft is for competitive balance. The whole

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purpose of the draft is to hold down the salaries of the people coming in.

MR. PACE: I certainly hear that side, but I also hear the side that the reason for the draft is so that the last team can pick first, so that you have competitive balance in the league. Which, frankly, in the NFL, if you look at the way that the Super Bowl's been won by so many different teams over the last, you know, thirty years or so since they've had collective bargaining agreements, sort of bears itself out.

MR. ORDOWER: —I actually think the NFL did a good job of holding down the salary of Sam Bradford who comes in without having played a game and making \$60 million in guaranteed money.

MR. EDLEMAN: But, on the other hand, just to jump in here for a second, with the NBA, they have a salary cap. The salary cap's effective. Dan Gilbert of the Cleveland Cavaliers is up in arms because LeBron James ran to the Miami Heat.

So here we see with a salary cap where a player's going to get the maximum amount. They have an opportunity to get the maximum amount wherever. Now his incentive is go play in the warm climate with friends. What would happen if there was no salary cap in the NBA? Might if the demand was greatest for LeBron James to be in Cleveland, might Cleveland have offered an amount so much greater than Miami that he would have stayed?

MR. MILSTEIN: No, he still would have gone to Miami.

MR. PACE: And, actually, it brings up an interesting issue —and I think it's sort of more in Bill's bailiwick. What does a league do with its sponsors, with its television partners, with its constituents, to prepare itself for some sort of labor outage, whether it be a stoppage [or] whether it be a strike or a lock-out? And how do you work within your contracts to try to make sure that those issues run seamlessly without causing big problems to your sponsors or to your league?

MR. ORDOWER: Sure. Well, I mean, first and foremost, it's about communication with those partners, whether they be broadcast partners or sponsors. There's obviously the

nuance of dealing with it in your contracts and making sure that a work stoppage of any type isn't a force majeure event that will allow somebody to terminate an agreement and is also not a breach that would allow a termination. And then, depending how sophisticated you are or how much leverage you have, such as the NFL, you're actually able, in the NFL's case, in the event that there is a lock-out or a strike, they will be getting all of their television revenue for that year, which will help their ownership better sustain a work stoppage.

In other cases, leagues like our's, if we have those types of clauses, it's more likely that we're just deferring payments, or, you know, there'll be on hold until the season picks up again. And there's also just the fact that you may set in a threshold to kind of anticipate, if, like Jessica said, that that's the only time when there's ever been a complete loss of a season. So, in many cases, something will go on for a few months, and, if you're able to protect against that, then you're still in a pretty good situation.

MR. PACE: I mean, it's interesting. It poses a lot of problems for sponsors who have to plan for this, right, because an advertiser who is building a campaign based on the NHL or MLS or one of those properties has to think about, well, if there's going to be a work stoppage, do I go ahead and spend all this money to promote this player or this team, this league, when I don't even know if I'm going to be able to use that, or, when the league starts, whether I'm going to have any advertising, production, or inventory to use.

So it's a very complicated issue that really probably falls more to the business side than it does to the legal side, but it's something that lawyers need to be aware of and thinking about when advising their clients.

After that sort of brief primer, if you will, which was very well done by you guys, thank you, on labor law, let's try to tackle some individual issues that we're talking about right now with respect to the NFL and the NBA and also how they relate to, you know, to non-sports leagues, which Ann will be able to enlighten us with.

We all hear about things like salary caps and revenue share, which I think are, as I think Alan pointed out, unique to sports leagues and, as Marc pointed out, would probably, in most context, be considered antitrust violations, but, in a collective bargaining agreement, they're not, because they

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are, as Marc, you know, rightly pointed out, sort of trumped by the labor law collective bargaining.

Ann, do those concepts of salary caps and revenue share, do those exist in your world, or are they uniquely to sports concepts?

MS. BURDICK: I think, as I said earlier, we went and, you know, through a salary analysis and we do not have salary caps in our collective bargaining agreements. Especially in film, the top writers, which tend to be about ten to twenty writers that are used, or, say the "Bourne Identity," for those kind of high-earning films, you know, the sky's the limit and they usually have their own counsel and/or agent representing them on their personal services contract.

I think your second point about salary caps—

MR. PACE: Revenue sharing.

MS. BURDICK: Okay. It's interesting, because, unlike the 500-page collective bargaining agreement, the Writers Guild's contract's about 450, so I know that there's one out there that's longer than our's.

MR. PACE: You're missing the fifty pages on salary caps.

MS. BURDICK: In the Writers Guild contracts, the Directors Guild, also for Actor and for SAG, they have what's called, "residual payments". Essentially, if you have a film that is released in a foreign market or if you have a film that is on Pay-Per-View, if it's originally released in the theaters, usually the minimum payment the writer receives is for that specific use. And, if there's supplemental use of that film, then the writer receives additional payments for that.

And some of them are flat payments; some of them are percentage of the revenue, so that's where it would tie in a little bit there, where, if the more successful a movie is or a television series and it's going to be more successful when it's used in those supplemental markets, so there is a little bit of sharing there.

MR. PACE: But the revenue doesn't get shared among other members of the Guild, does it? It just goes to that individual writer.

MS. BURDICK: Yes.

MR. PACE: Which is, I think, a unique concept again to sports league. And, Bill, you guys are a single-entity league—I believe you're still a single-entity league—

MR. ORDOWER: Right.

MR. PACE: —and Jessica's NHL is not a single-entity league; it's a franchise system.

So, when you guys talk about revenue sharing, what is the issue for you? And, more importantly, when we're talking about now with the NFL and the NBA, what they're talking about is salary cap, which is a percentage of what they call, "basketball-related income" or "football-related income"; that's how they base their salary cap. They say that there's a concept that there's "x" amount of dollars that is basketball-related income and the players are entitled to receive fifty-five percent—fifty-seven percent, I think now—and they want to make them, you know, thirty-five or forty percent, whatever it is that they want to go.

But what is that concept? Do you guys have a concept of soccer-related income that your players share in, or how does that work in your league?

MR. ORDOWER: Well, it doesn't work that way for us, because our league is still losing money, so there's not a pie to be divvied up, so it's a little bit different.

When you're talking about it generally though in terms of revenue sharing, you know, one of the bigger issues is really how it's being shared amongst ownership. So, when you have the billion-dollar television deal, it's how that gets divvied up. But then the disparity between what the New York market can get, in terms of local television, versus what they're going to be able to get in Kansas City, and that's where a lot of those types of issues and discussions get in.

And then, when you sit at the table with the union and you talk about how you have teams losing money, their counter to that is, well, that's something that you guys really need to figure out, which is how you're going to share the revenue amongst yourselves, as opposed to how that's going to impact the player group.

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MR. PACE: Marc, do you guys have a concept that everybody takes an equal slice, or do different markets get different amount? And does all the money go into one pot, or is there local money that's kept out for local teams?

MR. ORDOWER: Right. There is some degree of sharing. I mean, as you said, we're a little bit different because we are structured as a single entity, so the owners are investing in the league itself and then they're acquiring operating rights to an individual team. So there is more shared revenue with our league than with others. But there are still individual revenues that are club specific, that aren't shared.

MR. PACE: I'm sorry, Marc, your wanted to add something?

MR. EDELMAN: Yeah, I don't want to pick too much on semantics here. The term, "single entity," now has been thrown around a few times with Major League Soccer. Are you talking simply in terms of the fact that you're centrally planned, or is that an antitrust statement that's being made when I hear the term, "single entity"?

MR. ORDOWER: It is an antitrust statement. There was an antitrust litigation, and it was determined that we were not in violation of antitrust laws. I think we could get sidetracked on a whole day worth of discussion on this.

MR. PACE: That's *American Needle*⁴⁶ in a nutshell, basically.

MR. ORDOWER: We were sort of the opposite of the decertification model, in that our players brought an antitrust case against the league, prior to ever having created a union. And we went through about ten years of litigation there, very costly, and the league triumphed in that situation.⁴⁷ And ultimately we went out and voluntarily recognized the union and now we completed one cycle, and we just entered into a

46. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

47. *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002).

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second collective bargaining agreement.

MR. PACE: And, Jessica, you guys are, as I said before, a franchise model, not a single-entity model at the NHL, and so you do have probably disparities between television contracts that go to the New York Rangers, which probably are, you know, much more significant than say the television contract that goes to the New Jersey Devils.

How do you deal with that in the context of a strike or a lock-out because I'm sure that probably weighs very heavily on each of those owners, you know, in that context.

MS. BERMAN: Well first, let me just say—and American Needle touched on this—I mean, all the single-entity, for what purpose? I mean, I'll just preserve the right, for the record, that there might be instances where we claim to be a single entity for a given purpose.

MR. PACE: Right.

MS. BERMAN: It just depends on for what issue you're talking about. And, you know, it would be a fact-specific analysis as to whether any of the leagues are a single entity for any given purpose.

But all that being said, we are structured differently from Major League Soccer in that our teams are individually owned. And, in our collective bargaining agreement, as you kind of alluded to, in the NBA, it's basketball-related income. In our league, it's called, "hockey-related revenue," HRR.

MR. PACE: Funny how that works, right?

MS. BERMAN: Yeah, exactly. And so HRR is really kind of what makes up the pie, the big pie. And that is just as heavily negotiated as what percentage the players get, obviously, because, if something's not counted in the pie, then it doesn't have to be split with the players in any kind of salary cap system.

And that's probably 100 pages of our 500 pages, and I admit I don't know it off the top of my head, but, for every kind of different topic, whether it's television, regional contracts, national contracts, all of that, you know, seat licenses, tickets, sponsorship, everything is kind of spelled out

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in excruciating detail in the collective bargaining agreement as to whether it counts or doesn't count in HRR.

MR. PACE: For those of you sort of paying attention to recent trends in sports, you'll note that sports owners are now trying to own their stadiums, right? You'll see people building stadiums. They built one, you know, in the shadows over—whichever way it is from here—that's owned by the owners of the Jets and the Giants.

A lot of the reasons that they build those stadiums—there's a number of them—but one of the reasons is because they're able to sort of use some of that income that doesn't go into the pot for shared income or shared revenue that goes to the players. So just something to keep an eye on as you examine these issues.

And, Alan, let me ask you something. So I mentioned this idea of sort of the Devils versus the Rangers, one with a very lucrative local television, you know, revenue pot; one with a not-so-lucrative local revenue pot.

When you're advising a player who now is beyond the draft and has a choice as to where they can go play, how does that enter into your advice to a player as to, you know, do you go to a bigger market. Is it always preferable to go to a bigger market? Is it that simple?

MR. MILSTEIN: No, I don't think it's that simple. Look, there [are] some players who will go where the money is, you know, whoever's going to pay them the most. So Jason Worth goes to the Washington Nationals where he's going to be in last place for the rest of his career. Cliff Lee goes to the Philadelphia Phillies, where we're going to win the World Series every year.

MR. PACE: We?

MR. MILSTEIN: We.

MR. PACE: Okay.

MR. MILSTEIN: You know, but somebody like LeBron James, I mean, he went; he could have gotten more money elsewhere. He went where he wanted to go, where he could be with his friends, and where he thought he could win an NBA

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title.

So I think there's a lot of factors that go into that.

MR. PACE: So it's not just money, money, money.

MR. MILSTEIN: For some of them, it is. And, you know, For some of them, it isn't.

MR. PACE: Right.

MR. MILSTEIN: But, you know, you were talking about the stadiums. I think the bigger deal now is the TV.

MR. PACE: The RSN's, right.

MR. MILSTEIN: So the Mets are listed as the third-most valuable franchise,⁴⁸ because they own their own TV station.

MR. PACE: Yeah, I think that, recently, the *Sports Business Journal* valued the Yankees at \$1 billion and the YES Network at \$2 billion. YES Network's in, what, you know, seven million homes and has been in existence for ten years?

MR. MILSTEIN: And I was shocked to see that the Mets were the third-most valuable franchise in baseball. The Mets are going to be in last place for the next—

MR. EDELMAN: They're the top of the pyramid.

MR. MILSTEIN: What?

MR. EDELMAN: Top of the pyramid.

MR. PACE: Yeah, exactly. When you look at those valuations, just so you know, the reason why these RSN's are sort of valued so much more is because, when you look to value a business, a media company, or a network like YES network, or Sports Net New York is valued at a multiple of its

48. *The Business of Baseball*, FORBES.COM (Apr. 7, 2010, 6:00 PM), http://www.forbes.com/lists/2010/33/baseball-valuations-10_The-Business-Of-Baseball_Rank.html.

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revenue or of its earnings that is, say, ten or fifteen times perhaps what the earnings are.

When you look at a sports franchise, it's really not valued like that. It's definitely got a stick value; it's definitely got a vanity value; but it doesn't have that fifteen times multiple on earnings like you will. So that's why, as I think Alan rightly points out, a lot of these professional sports teams are looking for opportunities to grow that revenue, also outside of the collective bargaining agreement.

Let me talk again, one of the issues that I think's coming up in the NBA and the NFL case. There [are] two issues: One, particularly, is regulating off-field conduct; and regulating on-field conduct. There's talk about, you know, hits to the head in the NFL; concussion's a big issue; player safety. There was a big showdown between one of the owners, Jerry Richardson, and Peyton Manning at their labor negotiations the other day about player safety.

Ann, in your world, do you have anything in your collective bargaining agreements that would regulate the behavior of your labor, sort of off the field, if you will, or outside of the scope of their engagements?

MS. BURDICK: I can't think of anything, except the obvious sort of bad publicity that any star, if you will, engages in.

I mean, obviously, there's going to be an impact on a writer's career if he or she is accused of a violent crime and is found guilty of that—I mean, those are sort of, I think, generic things that we could say impact anyone in any career.

But, when it comes to specifically drug testing and other issues that you see in athletes, I sort of smirk because the entertainment field is known to have—maybe it's more of a quiet issue. It's not something that we talk about.

MR. PACE: Drug testing may leave you with very few clients left to represent.

MS. BURDICK: I didn't say that. But, with athletes, it's obviously something that will, you know, impact their performance on the field. The writers function very much in their own world; that our screen writers, television writers work as a team, as a group. And, obviously, anything that you might do outside of work that could affect your ability to

be on that team will obviously impact your career, but not for the CBA.

MR. PACE: And, Marc, I'll ask you this question. I don't know if those of you [who] were at the last panel heard Michael McCann make a very interesting statement when they were talking about what the rules are in the court for athletes. And Michael pointed out that athletes, when they are tried in a court, have more than just a court of law to worry about; they have the court of their own individual league to worry about and the sanctions that they could get for their individual league.

Marc, what are the issues for, in a labor negotiation as to, you know, on the players' side trying to sort of keep as much of that stuff out of a collective bargaining agreement and, on the owners' side, trying to keep as much control over your product, if you will, or your assets as you possible[ly] can?

MR. EDELMAN: I think, frankly, it's something that, until this collective bargaining agreement, the players, at least in football, had not paid all that much attention to.

And, if you look at the NFL, before Roger Goodell became Commissioner, Paul Tagliabue, who is a lawyer, who is a partner and as of counsel at Covington and Burling, would suspend players for wrongdoing, for one game, for two games, fine them. We weren't seeing indefinite suspensions of players until a few years ago.

I guess it's an open and debatable issue as to whether the NFL's current policy towards conduct is even something that is collectively bargained. But I presume we'll see the NFL Player's Association, if they continue to negotiate with the NFL, to try, first, to curtail the power to suspend and, second, I presume they would want to move to a system more like Major League Baseball's, where, if a commissioner suspends, there would be an appeal, but the appeal wouldn't be back to the commissioner, himself, as Michael McCann pointed out. They probably would prefer a system like baseball, where you'd be moving to a neutral outside arbitrator,⁴⁹ perhaps someone from the American Arbitration Association, to

49. See MAJOR LEAGUE BASEBALL & MAJOR LEAGUE BASEBALL PLAYERS ASS'N, 2007-2011 BASIC AGREEMENT Art. XI(A)(9), at 35 (2007) [hereinafter MLB CBA].

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resolve the claim.

MR. PACE: And Bill, do you have those issues in MLS right now? What do you do for off-the-field conduct and how is that resolved within MLS?

MR. ORDOWER: We do have those issues. And I think what's probably fair to say is, since we're only in our second cycle of this and the first CBA was negotiated after we had won a lawsuit, is we had very broad rights coming in. So, similar to the NFL, our commissioner has authority to discipline players in the case of off-field conduct and, similarly, the appeal to that goes back to the commissioner, or the commissioner's office.⁵⁰ And it was an issue of contention during the last negotiating sessions, and, it's something that we'll probably continue to work through.

But look, I think it's something that's important to all leagues. I mean, you want your players out there. And, for the most part, you know, you're talking about ninety-eight percent of the players are good citizens and great people. And then you have those few bad apples and you don't want it to spoil the league.

And it's a difficult battle for the players to win publicly, certainly to go back and say, hey, we don't think you should have this, or maybe I should only get a one-game suspension for doing what I did at the nightclub. But, you know, I think that's tough, when you look at it from a fan perspective, because I think they certainly side with the leagues on that one.

MR. PACE: And, I mean, to use Michael's words in the last panel, he called the Commissioner—in this case Goodell—judge, jury and executioner. And as Emily pointed out, I was actually Commissioner or Executive Director of Major League Lacrosse for a few years and actually had an opportunity, when we had two players who were fighting, we had a no-fighting policy to decide whether or not to suspend the two players, or one, or both of the players, who were involved in the fight.

50. MAJOR LEAGUE SOCCER & MAJOR LEAGUE SOCCER PLAYERS UNION, COLLECTIVE BARGAINING AGREEMENT Art. 20, at 42–45 (2004).

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And I will tell you that we have a similar rule. We were a single-entity league, and I was judge, jury, and executioner. There were many different constituencies. And there was no player's union either, but there were many different constituencies arguing both sides of the argument.

So I don't think it's as simple to say that one person has the control and it's just sort of in that person's discretion[] how to do it. There really are a lot of different things that go into that.

MR. ORDOWER: It's definitely not on a whim.

MR. PACE: Right.

MR. ORDOWER: There are a lot of people contributing to that discussion. And you're looking at precedents from other leagues and other similar situations.

MR. PACE: Absolutely.

MS. BERMAN: And I also just want to make a point about collective bargaining agreements in terms of the benefits to the players. It's another example where the collective bargaining agreement actually benefits the players. Because, if it's collectively bargained, they can collectively bargain for procedures, due process, appeal rights, disclosures, hearings, the opportunity to testify. I mean, all of that is outlined very clearly in the CBA where it's required.

In the context in the NFL, it's kind of outside that scope. And the collective bargaining agreement, in a lot of instances—and I think in most instances—really protects the players. For example, you talk about how you want players to be able to sign anywhere and have free market, but where in the world can you have a job that they can't fire you and they have to pay you out for the rest of your contract, unless you're like an individual, under an individual contract with the company.

But, I mean, there are a lot of benefits for the players, as well, under the collective bargaining agreement, that they would never have otherwise.

MR. PACE: Jessica sort of alluded to this guaranteed contract issue. It's a very heated discussion right now in both

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the NBA and the NFL—actually more so in the NBA—as to whether or not there should be guaranteed contracts. And that benefit that Jessica just alluded to, whether that could very well go away in these next labor negotiations.

MR. MILSTEIN: But I just think there's so much hypocrisy with these leagues with respect to trying to legislate off-the-field activities of the players. I mean, is Major League Baseball going to look at Mr. Wilpon and his involvement in the Madoff scheme and suspend him or take away his franchise?

MR. ORDOWER: Well they did in Cincinnati with Mark Shaw.

MS. BERMAN: And there are lots of examples.

MR. MILSTEIN: But that was racism and it had a much more direct relationship to the players that supposedly she was supervising.

You know, with somebody like Michael Vick, who gets in trouble with respect to the dog fighting, that has nothing to do with his abilities as a football player. Ben Roethlisberger should he get suspended for six weeks because of allegations, when he's never been convicted of anything?

I just think the hypocrisy is rampant with respect to the kinds of pressures that these leagues are trying to put on these players—the kinds of images they're trying to portray. Another great example is the NBA trying to legislate what the players can wear.⁵¹ You know, what we call the "Allen Iverson Rule." You know, we don't want the players to look like hip-hop stars; we want them to look like corporate citizens. It's outrageous. It's just not something that the owners should get into.

And, to say it's collectively bargained, I mean, the players don't really get a chance to bargain over every little item in that agreement. Some representative of the players look at it. But there are large issues that the players insist on, and, in order to get those issues, they give up on all the other issues.

51. See *NBA Player Dress Code*, NBA.COM (Oct. 20, 2005, 6:42 PM), http://www.nba.com/news/player_dress_code_051017.html.

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MS. BERMAN: That's on both sides.

MR. PACE: Right.

MS. BERMAN: Everyone chooses their battles. That's the whole point of the bargaining process. You choose what's important to you and you fight for it. Everything else goes by the wayside.

MR. PACE: And that's the reason for a collective bargaining agreement, right, so they can put together a business that they can now go out and sell to television partners, to sponsors, to fans that ultimately are the ones responsible for paying the salaries.

MR. MILSTEIN: The provision that allows the Commissioner to suspend a player for some drunk driving during the off-season on a motorcycle in Montana, you know, what does that have to do with his ability to throw the football?

MR. PACE: I think Alan's point is good, though to think about it, particularly in the context if you look at Isaiah Thomas and the whole situation with the New York Knicks a couple of summers ago. I think the issue there is that, if you suspend Ben Roethlisberger for an allegation. There's really very little remedy that Ben Roethlisberger has against the league that really makes the league quake in its boots, okay?

However, if David Stern were to take the New York Knicks franchise away from Jimmy Dolan because of the way that he and his employee, Isaiah Thomas, behaved in the sexual harassment incident that is now something where the NBA has to worry about a lawsuit from a very powerful man, with very significant resources, that could perhaps challenge, you know, perhaps the antitrust rules that apply to that league.

So I think that it's a fair point, and it may be something that's, I think, contested in some of these labor negotiations coming up.

Okay, so we have five minutes left, and I'm sorry I didn't get to the day-to-day stuff, which I think is interesting too. And, perhaps, if you guys want to come back tomorrow, we'll do another panel. Are you guys all right with that? Can I

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take some questions from the audience? Go ahead.

AUDIENCE MEMBER: [Question regarding reaching impasse in CBA negotiations.]

MS. BURDICK: This is off the topic, I think, of the panel, but I used to work in the public sector, and there are usually more specific guidelines in the public sector demanding that, because of the fact that you're representing workers that are performing a public service.

I think, as far as with the writers, that that is not something on the table. I think that both sides would have to agree to that. I can't speak for everyone else.

MS. BERMAN: There have been examples in sports where both parties will agree to have it mediated, either because they feel it might help or because they were trying to move to the next phase and want to be sure that they're really at impasse. But it's basically by joint agreement of the parties.

MR. EDELMAN: Now, arbitration is different from mediation, in the sense that mediation isn't binding. But the most famous instance that comes to mind for me was after the 1994 strike lock-out of Major League Baseball. Early that following season, they had a mediator come in, one of President Bill Clinton[s], to try to help settle it.⁵² It did not work.

MR. PACE: Question?

AUDIENCE MEMBER: [Inaudible question].

MR. PACE: The question's for those who didn't hear it is that what kind of pressure does a labor union assert on its members to go for the highest dollar amount that a player can probably get, in order to raise the water level basically of the salaries being paid to the players.

Just so you know, the Kansas City Royals owner came out today and said paying a player \$300 million is absurd, you

52. See W.J. Usery, Jr., GA. ST. U., <http://www.library.gsu.edu/spcoll/pages/pages.asp?ldID=105&guideID=509&ID=3622> (last visited June 2, 2011).

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might as well just give him the franchise. [Does] anybody have any comments on that?

MR. MILSTEIN: What?

MR. PACE: The comment was that he thinks the agents are pushing that. Which would make sense.

MR. ORDOWER: I'm from St. Louis and a big Cardinals' fan, so I absolutely blame the agent and the union on this one.

MR. EDELMAN: In baseball, you have to keep in mind that, in addition to there being players that become free agents, there [are] the players that are eligible for salary arbitration. And the salary arbitration process, what you have is both sides come in and argue what the players should make. And one of the variables they look at. In fact, one of the variables that the CBA says they can look at is what comparable players make.⁵³

Now, I don't know what the union said. I don't know what the union did, but it's in the interest of any player that's going up for arbitration, salary-wise in the following year, for Albert Pujols to get a larger salary, because they can compare the Pujols stats and the Pujols salaries.

MR. PACE: Questions? Sorry.

AUDIENCE MEMBER: [Inaudible question pertaining to the NFL labor negotiations underway].

MR. MILSTEIN: Arrogance. This whole NFL thing, I mean, talk about hypocrisy. The biggest thing the NFL wants is this eighteen-game season. Now, we heard all season long how the NFL cared about the physical well-being of these players. An eighteen-game season is going to shorten lives of these players; it's going to result in more and more injuries. And it's just the height of hypocrisy for the NFL to try to force this issue.

You know, if it was up to the players, they'd move back to the twelve-game season.

53. MLB CBA, *supra* note 49, at Art. VI(F)(13), at 19.

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MS. BERMAN: And make the same amount of money.

MR. MILSTEIN: Why not? The NFL, they said, is a \$13 billion pie to break up.

MR. PACE: Yeah, and what is the issue here? Why has the NFL said that the players have failed to negotiate in good faith during this negotiation? And what is a union's obligation, or management's obligation, to negotiate in good faith?

MS. BERMAN: Well, both parties have an obligation to bargain in good faith. The unfair labor practice charge that was filed by the NFL alleged that the union was engaging in surface bargaining, which means basically that they weren't bargaining in good faith.

And, you know, I'm not involved in negotiating—I can't speak to why they did that. I assume they did that because they felt that they're getting closer to the end and that they weren't making process and they feel that this might be one of the reasons. They have the deadline—the expiration deadline looming and a lot of things can happen once the agreement expires. There's this kind of threat of decertification out there, which we alluded to earlier, which I found interesting. Because, from a labor lawyer's perspective, there's two concepts here which I think are worth clearing up: there's decertification, and then there's disclaimer of interest. And they're two different things.

Disclaimer of interest is when the union says—Ann could speak to this better than I can—but just from strictly what you learn in law school labor law, disclaimer of interest means that the union says, “I don't want to represent you.” It's kind of a charge led by the union.

When the decertification process happens, which is what everyone's talking about with the NFL, in theory, it's supposed to be initiated by the constituents themselves, when they say, “I no longer want you to represent me”.

In this instance, and I'm just kind of laying out the facts. I mean, you can kind of surmise from it what you'd like, but, in this instance, the union has been kind of surveying their constituents on decertification, so that they can kind of take the temperature of their constituents to know whether they

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should disband their union. I just find it interesting, because I think those concepts are co-mingling here in this context and others.

And, you know, I'd be curious to hear what Ann thinks from a union's perspective. But, really, when people talk about them decertifying, it sounds to me like this is more like the union deciding to do it, as opposed to the players kind of saying, "We no longer want you to be representing us."

MS. BURDICK: Disclaimer of interest, I don't think I've heard that since law school. I mean, it essentially means that I walk away and say that I no longer am representing, as you said, a group of employees. And I find it interesting that that's an interplay, you know, there, because that's a very bizarre situation.

Decertification, as far as being a labor union attorney is probably the worst word, after lock-out. It essentially means that the majority of the employees are saying that they no longer want the labor union to represent them.

And I can't speak for the specifics in this negotiation, but a claim that the union is not negotiating in good faith is an 8(b)(5) violation.⁵⁴ And, essentially, the only relief that the employer can get is the government body, the National Labor Relations Board, saying, "Go back and be nice and bargain." So it really doesn't do much. So maybe that is playing into this whole situation and complicating it for the labor union.

MR. MILSTEIN: If the players decertify, arguably you have no draft; you have no salary cap; every player's a free agent. It would be a wonderful world.

MR. EDELMAN: I think Jessica and Ann hit the nail on the head, but there's one little trinket which seems to have been missed by all the media stories today, the way I look at it. It lies in the CBA itself. And I believe it's on page 156 of the CBA; there [are] two back-to-back paragraphs.⁵⁵ Because there was the whole situation in the past with the players attempting to decertify and being an antitrust trust, both Labor and Management were aware, when they negotiated

54. National Labor Relations Act § 8(b)(5), 29 U.S.C. § 158(b)(3) (2006).

55. See generally NFL MGMT COUNCIL & NFL PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012 (Mar. 8, 2006).

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the CBA, this might be a possibility.

The first paragraph which I'm referencing, the players promise that they will not bring an antitrust suit or do anything towards bringing an antitrust suit, until impasse is reached. The second paragraph, the teams agree that, if impasse is reached, they will not contest the players decertifying.

I think that could be put together with what Ann and Jessica said—that means, once impasse is reached, the players, if they choose, could go through this decertification route. But, if they're not bargaining in good faith, you can't go to impasse; thus, they can't decertify. I could be wrong, but I think that's a little piece of information that the media has been missing in the story all day.

MR. PACE: That's a great point. I think Marc's saying that they're basically trying to force them to impasse, so that they can start exercising remedies. And I think that's the last word. Thank you, panelists. You guys did a terrific job. Thank you to the audience. Great job. Thank you.

MS. BLAKELY: Thank you, Mr. Pace, and thank you to all the panelists.

Because we're running behind schedule a little bit, we're going to take a five-minute break, instead of a 15-minute break. And I hope you guys all stay. We have the keynote speaker, Mr. Jeffrey Gewirtz, who's going to speak after this, so I hope you do come back.

But, again, a five-minute break, and then we'll resume. Thank you.

Keynote Speaker Address

Jeffrey B. Gewirtz

Mr. Gewirtz joined NETS Basketball in May 2007 as Senior Vice President and General Counsel. Mr. Gewirtz oversees all legal affairs for the team, as well as for the team's planned relocation to the Barclays Center in Brooklyn. He is also responsible for interfacing with the NBA on a wide range of compliance and transactional matters.

Prior to joining the NETS, Mr. Gewirtz served as the United States Olympic Committee (USOC) General Counsel and Chief Legal & Government Affairs Officer, where he

oversaw all USOC legal matters, as well as the USOC's government relations activities with Congress and federal government agencies.

Before he joined the USOC, Mr. Gewirtz was Counsel in The Coca-Cola Company's Corporate Legal Division, where he negotiated many of Coca-Cola's most significant sports marketing transactions, including its more than \$500 million NCAA Corporate Champion marketing and media alliance with CBS Sports. Prior to that, Mr. Gewirtz was Director of Legal Affairs for IOC Television & Marketing Services SA, based in Lausanne, Switzerland, where he was a primary negotiator of global Olympic sponsorship and technology alliances for the International Olympic Committee and for the Salt Lake and Athens Olympic Organizing Committee, respectively. He has also served as General Counsel for the PGA Tour and has worked in-house with the WTA Tour. Mr. Gewirtz began his legal career as an associate with the law firm of Dunnington, Bartholow & Miller, LLP, where he served as the associate to the General Counsel of the USTA and worked within the firm's Corporate and Advertising Industry legal groups.

In 2009 Mr. Gewirtz was selected to the prestigious "Forty Under Forty" by *Sports Business Journal* as one of the forty top sports executives under the age of forty in the United States. Mr. Gewirtz was formerly on the faculty of Brooklyn Law School and New York Law School, serving as an adjunct professor of sports law at both schools. He is currently Chair of the Sports Division within the American Bar Association's Forum on the Entertainment and Sports Industries and he sits on the Board of Directors of both the National Sports Law Institute and the Sports Lawyers Association. He is also on the Board of Editors at the *Journal of International Media & Entertainment Law*. In June 2010, Mr. Gewirtz was appointed to the Board of Trustees of Jewish Vocational Services of MetroWest New Jersey and he sits on the Executive Committee of the UJA-Federation of New York Sports for Youth Initiative.

MS. BLAKELY: Well, good evening to those of you that are listening. My name's Elizabeth Blakely and I'm the Co-Symposium Editor for Seton Hall's *Journal of Sports and Entertainment Law*. And, tonight, I have the distinct pleasure of introducing to you our keynote speaker, Mr.

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Jeffrey Gewirtz.

Mr. Gewirtz is the Executive Vice President and Chief Legal Officer of the New Jersey Nets and Brooklyn Sports Entertainment, where he oversees all legal issues for the team, including the team's planned relocation to the Barclays Center in Brooklyn, New York. In 2009, Mr. Gewirtz was named [to] *Sports Business Journal's* "Forty Under Forty," which is a highly selective honor.⁵⁶

Prior to joining the Nets Organization, Mr. Gewirtz held positions with the United States Olympic Committee, the Coca Cola Company, and IOC Television and Marketing Services. Mr. Gewirtz has also served as a General Counsel for the LPGA Tour, working in-house for the WTA Tour, and has been Associate to the General Counsel of the U.S. Tennis Association.

For more information about Mr. Gewirtz's background, you can look at your program or you can consult our website for a full biography. Mr. Gewirtz's diverse background sets a foundation for a very interesting keynote address. And his focus tonight will be on the anatomy of sponsorship agreements.

So, without further adieu, I give you Mr. Gewirtz. Thank you.

MR. GEWIRTZ: Thank you for this nice gift. I appreciate that.

I did not know this. Elizabeth just told me that she works this semester with Devils Arena Entertainment, which is our landlord, so I'm sure we'll probably be working together over the coming months as we finish up the season, hopefully with many more wins than we have now.

I've been familiar with Seton Hall and its Sports Law program for quite some time. The *Seton Hall Sports Law Journal* launched in 1991, when I started law school in September of '91. And I was very interested in sports law, what it was all about; didn't know very much about it. And I spent a lot of time in the library by call number or key number—do you even have libraries anymore in law school or everything's online now?

56. *Forty Under Forty*, SPORTS BUS. DAILY (Mar. 23, 2009), <http://www.sportsbusinessdaily.com/Journal/Issues/2009/03/20090323/Forty-Under-40/Jeffery-Gewirtz.aspx>.

KF3989, that's the designation for all sports law materials. And that's how I became familiar with the *Journal* and subscribed to it. I still do. And the articles are very, very informative. It's a wonderful, wonderful publication; certainly one of the two or three leading sports law publications in the country. So you guys should keep up the good work.

One of the questions I get working in the Industry, when I say I'm a lawyer for the Nets, they said, "Well, why do they need a lawyer?" Besides the fact that it runs like a business and has a P&L and has liability issues and everything else that a lawyer would do for a garden-variety corporation, sports has become a very big business. And, where there is business, there's a need for lawyers, thankfully.

Among all the things that a sports lawyer will do, the two primary things a sports lawyer does is they need to protect the assets of the entity. And, for the most part, those assets are intellectual property and very valuable intellectual property.

And the other thing that we do, or that I do and spend more than half my time doing, is structuring and negotiating transactions. And those transactions are the revenue generators, whether it's licensing, merchandising, sponsorship, our food and beverage agreement for the Barclays Center, which we're moving to, as Elizabeth mentioned, for the 1213 NBA season.

One of the things I love about working in Sports is that, in the Sports business, you're producing a product, providing a service—in this case, really, entertainment services—that people consume in their leisure time.

So, when they're away from the office, what do they do? Many people are consuming the product that you protect, mold, and ultimately provide to the consumer. It's something that people are passionate about. And, if they're passionate about it, it makes it a lot easier to run your business, because sponsors want to be affiliated with you. People want to buy tickets for the events that you're staging.

You can be driving home late one night; you turn on Sports Radio. And Joe, from Bergen County, can call in. And the guy has never played baseball; he's never been a baseball coach or manager, and yet he is an expert in why the Mets need to put a reliever in the starting rotation. And so it's something that people really have an avenue to even self-designate themselves as experts in, and it makes them feel

good, and they have something to be passionate about. And that's really what makes the business run is the passion. Passion's really at the epicenter of the business.

To me, Sport, at its purest, from the spectator's standpoint, is watching sport when someone's representing their country.

There obviously is a lot of passion for the New York Yankees. There will be, of course, for the Brooklyn Nets. For all Brooklynites, I'm sure we'll embrace the Brooklyn Nets. So it's one thing to be passionate about a sports property that represents a city or a region. You look at the Carolina Panthers—they're more than representing Charlotte; they certainly represent, you know, at least a two-state region, and there's passion behind that.

But, when you watch Sport at the international level and the athlete is representing their country, to me, that's the most impactful experience.

So, before getting to the CLE portion of my speech, for me, the greatest moment that I ever experienced—this was in my professional capacity, because I was at the Sydney Olympic Games representing the International Olympic Committee at the time—was watching an athlete, named Cathy Freeman. She was a 400-meter runner.

A couple of days earlier, before the 400-meter final, she lit the torch at the Olympics.⁵⁷ The greatest honor any athlete can receive is lighting the torch in your home country for an Olympic Games. Muhammed Ali, as you may recall, did that for the '96 games.⁵⁸ And the 2002 Salt Lake Olympic Winter Games, the torch lighter was actually twenty-some-odd guys who were the 1980 Gold Medalists in Hockey.⁵⁹ Now, that was, until then, the greatest Olympic moment.

But one that I experienced, live and in person, was at the Sydney Games. And Kathy Freeman walks out. At that point, the stadium was known as Olympic Stadium. Of

57. *Photos: Cathy Freeman Lights the Olympic Flame*, BEIJING 2008, <http://torchrelay.beijing2008.cn/en/archives/modern/2000/headlines/n214035952.shtml> (last updated Apr. 14, 2007).

58. Christie Succop, *Amazing Moments in Olympic History: Muhammad Ali Lights the Cauldron in 1996*, TEAM USA (June 10, 2009), <http://www.teamusa.org/news/2009/06/10/amazing-moments-in-olympic-history-muhammad-ali-lights-the-cauldron-in-1996/13391>.

59. *U.S. Hockey Team Lights Cauldron*, SI.COM (Feb. 9, 2002, 12:28 AM), http://sportsillustrated.cnn.com/olympics/2002/news/2002/02/08/hockey_team_ap/

course, it's now been re-branded with a bank name, ANZ Stadium, which is a bank in Australia and New Zealand.

But, interestingly enough, the Olympic Committee does not allow the naming rights for any of its venues.⁶⁰ As commercial as we perceive the Olympics to be, in terms of the execution, the field of play, the venues at which competition takes place, it's the least commercial of all of the major properties.

So, for example, at the 2002 Olympic Winter Games in Salt Lake City, there's the Delta Center where the Utah Jazz play. For those seventeen days of the Games, it was known as the Salt Lake Ice Palace. They actually allowed the Delta sign to stay up and they didn't have to cover it because Delta happened to be the official airline for the U.S. Olympic Committee and the Salt Lake Organizing Committee; otherwise, that sign probably would have had to be covered. But they would not allow the venue to be called by a corporate name. That's just a sidebar.

So the 400-meter final started. It was a night session. And, in September, when the Olympics took place, it's still early-Spring in Sydney, so it was a very cool night. And Kathy Freeman walked out in head-to-tow sprinters outfit, so all you could see was her face. She had a hoodie on, but it was, you know, form-fitting.

And, of course, the only two logos present were the crest for the Australia team and the Nike logo. And the Nike logo could only be three square centimeters, another Olympic rule.⁶¹ I mean, all governing bodies, except maybe NASCAR, which it seems they have no rules and regulations when it comes to branding, have size restrictions in terms of how large a logo could be, whether it's on playing equipment or on the apparel that the athletes wear. So, of course, it's slightly commercial; there's a small little Nike logo and there was Nike on the footwear that she was wearing.

So she comes out. It's over 100,000 people. The stadium now only seats about 65,000, but it was built out larger for the Olympics. Sold out, 105,000 people, you could hear a pin

60. INT'L OLYMPIC COMMITTEE, OLYMPIC CHARTER R. 51, at 98 (2007), http://multimedia.olympic.org/pdf/en_report_122.pdf.

61. See *Uniform Advertising*, INT'L HOCKEY FEDERATION (Jan. 2010), <http://www.fihockey.org/vsite/vfile/page/fileurl/0,11040,1181-203567-220790-169353-0-file,00.pdf>.

drop. Because, not only was she running for Australia, she was running for the Aboriginal community. She is of Aboriginal descent.⁶² And, obviously, there's a difficult history, to say the least, that the Aborigines had in Australia. They didn't receive voting rights, for example, and that's the least of it. But they didn't receive voting rights until 1967.⁶³

So the impact of this moment, not only for Australia and for Australia sport, but for the history of Australia and who she was running for, was tremendous. In 1996, at the Atlanta Games, she lost by a tenth of a second to a French runner and she got the silver,⁶⁴ so tremendous pressure on her. She gets ready to run, and the gun goes off. I've been to Yankee games. I've been to Giant games, Jet games, the U.S. Open—nothing compared to this moment, the sound that you heard. It was unbelievable.

And it was a very close race. She comes around the back stretch; she takes the lead; and she wins. And [out of] every Aussie—so, of 105,000 people, probably 97,000 were Aussies and the rest were visitors, what have you, I'm guesstimating—there was not a dry eye in the house. And it showed really what kind of impact sports could have and the history she made, not only for a country, but for a people. And it was a great moment.

So that really validated for me what sport can do and what sport can achieve if it's done in the right way. And, you know, it makes me proud—I'm not always proud to work in the business—but, at that moment, I was certainly very, very proud.

And, interestingly, when she did her victory lap, she, not only was carrying the Australia flag, but she was carrying the Aboriginal flag. And the IOC Olympic Charter prohibits any athlete from carrying the flag or exhibiting the flag of any flag, other than the Olympic flag or the flag of their home nation. So she actually violated IOC rules.

62. See *Cathy Freeman*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/218600/Cathy-Freeman> (last visited June 2, 2011).

63. Aboriginal individuals did have the right to vote prior to 1967, but the 1967 referendum "enabled the Federal Government to make laws . . . [to] override discriminatory laws in any State . . ." *Voting Rights, Citizenship, and the 1967 Referendum*, DEP'T OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS (Aug. 2002), http://www.dh.sa.gov.au/reconciliation/images/voting_rights.pdf

64. See *Cathy Freeman*, *supra* note 62.

They didn't take her medal away. Had they done that, I assure you there would have been an uprising that would have made what happened in Cairo look tame. So the IOC, obviously sometimes, rightly so, selectively enforces its rules, and she got to keep her gold medal.

So sports is a business. What are the revenue streams? I'd rather talk about the revenue streams than the expense side, because the expense side depresses me quite a bit. Player salaries, for example, are quite a large line item if you run an NBA team. I think the highest average salary of any organized league in the world goes to an NBA player. It's something like \$4.6 million on an average.⁶⁵

Now, we have a smaller roster than what you have in European soccer or the NFL or the MLB. But, nevertheless, it's quite high. So that's our largest expense. I wish it was my salary, but it's not. My outside counsel fees, also, I try not to think about.

But, on the revenue side, there are really four main areas; gate receipts being the most obvious. And the gate receipts, it's your tickets, it's also your personal seat licenses, which obviously were highly controversial when the Jets and Giants launched those, especially for the Giants, because I think they had PSL's for every seat in New Meadowlands Stadium.

And suites. Obviously, if you build a new arena, one of the most important revenue streams you've got to license [are] those suites. Those suites are sold at a premium. It is a premium product. The suites at the Barclays Center are going to be nicer, I think—I say this objectively—than any suite that I've been to around the world. So we're in the process of licensing our suites. So that falls within the ambit of gate receipts.

Underneath that, by the way—I'm not going to really count this—are food and beverage, parking, things of that nature. Who keeps those streams of revenue is very much dictated by the lease that the particular team has with their landlord.

Now, it so happens that we're going to have a significant amount of common ownership, so there is a lease between the

65. The NBA leads with a \$4.79 million a year average. *NBA Leads in Highest Average Salary*, Post to *NBA News*, FOX SPORTS, <http://msn.foxsports.com/nba/story/NBA-leads-world-in-average-player-salary-042211> (last updated Apr. 22, 2011, 12:10 PM).

Nets and the Barclays Center, but it's not necessarily an arms-length situation, so the team will enjoy some of those ancillary streams of revenue. And I say, "ancillary"; food and beverage is a massively important stream of revenue when it comes to the business of running an arena or a stadium.

The next major bundle of rights—and I say, "major"; certainly, in the United States, it's the most major—is media rights. And that takes the form of, not only team's licensing, their local media rights. Our's is with the YES Network. The Devils is with MSG Network; they're on MSG Plus. But new media rights as well. And that's becoming, slowly but surely, a very, very important—and will grow exponentially—form of revenue for teams and leagues.

Leagues, in particular, control a lot of that revenue. So the NFL, really, is at the forefront, I think, of monetizing new media rights. And the ability to watch games remotely, if you have a Direct TV package, which is the Sunday ticket, you can watch a game, not only from your TV where you have your Direct TV Satellite Dish, but also from your Apple iPod anywhere in the world.

So we actually had games in China this year. Who did we play in China? The Washington Wizards, I think it was. So we had games in China. And, on the way back, we had a stopover in Alaska, and a bunch of guys are pulling out their iPads. And I said, "What are you watching?" And they said, oh, we're watching this NFL game and then I said, "How are you doing that in the middle of Anchorage, Alaska in the airport?" And it's because they had the Direct TV package and they were able to watch digitally, stream any game they wanted.

So that digital extension makes the Direct TV package incredibly valuable. And that is why they were able to charge Direct TV \$1 billion a year for the out of market package.

Merchandising is not the most important revenue stream, but it is important. The LeBron James, Miami Heat jersey being the most important piece of merchandise for the NBA's merchandising business. And, interestingly enough, all of the revenue generated, outside of a team's arena in the NBA, does not go to the particular team for that aligns with the transaction for that team's trademark.⁶⁶ So, when a LeBron

66. See NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS ASS'N,

jersey is sold on NBA.com or at the NBA Store on Fifth Avenue, that revenue is divided by thirty and split equally among the teams, much to the chagrin of the Miami Heat.

But, when the Miami Heat sell the LeBron James jersey in American Airlines arena, they keep all of that revenue.⁶⁷ So that's just an interesting nuance of how we bifurcate the merchandising business between the team keeping the revenue versus the league keeping and splitting equally the revenue.

And the last major stream of revenue is sponsorship, which is what I'm going to talk about primarily for the next twenty minutes.

Price Waterhouse Coopers, their hospitality and leisure report that they issued covering the years 2010 to 2013, stated that sponsorship would remain the fastest growing sports sector.⁶⁸ It would grow to 4.6 compounded annual growth rate.

Now, that's hard for me to believe, because, only yesterday, the Lakers announced their new local media rights deal. Currently, they're with Fox Sports and Prime Ticket in LA. They announced a deal with Time Warner Cable, which is not an RSN, but there's no reason why they couldn't be an RSN, because they actually own the pipes, the cable through which the televised Lakers games is shown, because they have a significant presence in the Southern California market. That deal is estimated to be at \$3 billion for the next twenty years for local media rights;⁶⁹ "local," meaning the seventy-five-mile radius, basically, around where the Staples Center is situated.

Now, I think there are some households in Hawaii that get Lakers games, pursuant to some extended market agreements that the NBA allows. But, for the most part, this is a local media rights deal. How much is that? \$150 million or so a year. It's absolutely staggering.

ESPN Monday Night Football just renewed their deal.

COLLECTIVE BARGAINING AGREEMENT Art. VII (2005).

67. *See id.*

68. *See generally* PRICEWATERHOUSECOOPERS, GLOBAL ENTERTAINMENT AND MEDIA OUTLOOK: 2010–2014 (2010)

69. Mike Ozanian, *Los Angeles Lakers' New Cable Deal Could Propel Team Value to Over \$1 Billion*, Post to *SPORTSMONEY*, FORBES (Feb. 15, 2011, 1:40 PM), <http://blogs.forbes.com/mikeozanian/2011/02/15/los-angeles-lakers-new-new-cable-deal-propels-team-value-to-over-1-billion/>.

And that was reportedly at \$1.9 billion for, what is it, eighteen, [or] nineteen weeks of coverage; twenty weeks of coverage, including preseason.⁷⁰ It is absolutely staggering. That's a three-hour programming window, twenty nights a year, \$1.9 mil. You've got to sell a lot of advertising and a very aggressive thirty-second spot rate to recoup those dollars.

Of course, the advantage that ESPN has, that FOX and NBC and CBS don't have, is subscriber fees. So ESPN can always pay a more aggressive rights fee than any of the terrestrial stations, because, not only do they get advertising revenues, but they also get, as I said, the subscriber fee.

So, on average, every subscriber, you, me, we all have cable television, right, or satellite, and you all have ESPN and ESPN2 and probably ESPN Classic on Basic Television. You might even have ESPNU as part of your basic package. The average subscriber rate that ESPN gets for its flagship brand, ESPN, is \$4.50; blows away CNN, blows away FOX News, by far the largest in the country.⁷¹

So they've got all of that revenue, plus they get to sell advertising for what is always the highest-rated programming on cable, NFL Monday Night Football. So they can also sell advertising at a very, very aggressive rate, almost as aggressive as what the terrestrials can, because ESPN has virtually full penetration.

There's a couple of folks that still use rabbit ears, not many. But, most people in the United States seem to have cable television. The penetration rate's over 100 million households. So ESPN can actually recoup that obscene rights fee of \$1.9 million.

The IOC is about to sell its U.S. television package. NBC's last year is for the 2012 London Olympic Games, so they're about to go to market for the 2014, 2016 quadrennium package, which includes the Sochi Winter Games in 2014 and the Summer Games that was just awarded to Rio. That was the vote in which Chicago, after Obama made the trip

70. *Report: ESPN, NFL Nearing New Deal*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=5995093> (last updated Jan. 6, 2011, 11:53 AM).

71. *See ESPN Says: Cable Subscribers Defecting to the Internet? Nah. Move Along, Nothing to See Here*, Post to *Company Town*, L.A. TIMES (Dec. 6, 2010, 12:34 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/12/espn-cancel-cable-cord-cutters.html>.

oversees, came in last place, which made a lot of us very, very upset and, frankly, pissed off, at the result. But I would expect that that quadrennial rights will go for \$2 billion. That's for thirty-four nights of coverage; seventeen for the Winter Games, seventeen for the Summer Games.

Now, it allows the incumbent network to usually win that night. Now, against "American Idol" the Vancouver Games did not win every night, but they won most of the nights. So is going to be worth \$2 billion? That's something that the likes of NBC and apparently ABC, ESPN, FOX and CBS Turner may bid. They're going to have to decide whether they could recoup that, or is it worthy of a loss leader[ship].

Is it worth losing? Because NBC reportedly lost, on the 2008 Beijing Games, believe it or not, even though they sold out their advertising, production costs and the rights fee that they paid which was close to \$1 billion for seventeen days of coverage,⁷² they lost \$300 million.

Now, the prestige of having the Olympic Games and being America's Olympic network and being able to use the rings on all your other sports programming—as a logo—that might be worthwhile to NBC. That's a decision they have to make. But, I think shareholders, at this point, and ComCast who has taken over NBC, I can assure you their mantra's probably very different. They don't want the Olympic Games; they don't want the Sochi Games, which is not in a great time zone, or the Rio Games, which they believe probably should be in Chicago, and they don't want to lose money on that package. So I think what you may see is, not necessarily a crossover into the \$2 billion mark; you'll probably see a flat rights fee.

But, nevertheless, outside the U.S. and a couple of other markets, sponsorship really is a bigger driver, believe it or not, than media rights. So why is sponsorship important? Why do companies spend money to sponsor events?

First of all, there's a lot of academic studies that gauge the return on investment for sponsorship, that gauge that sponsorship does work. If you're trying to reposition a brand, sponsorship is a great way to do that. If you're trying to alter your consumer perception, if your brand has been, you know,

72. See Sally Jenkins, *Talk About Smoking the Competition: With the 1996 Atlanta Games Already in Hand, Dick Ebersol of NBC Sports Has Grabbed Five More Olympics—In the Years 2000 to 2008*, SPORTS ILLUSTRATED, Dec. 25, 1995, available at <http://sportsillustrated.cnn.com/events/1996/olympics/storyolympic/nbc.html>.

more middle class and you want it to be upper middle class, you may decide to buy a sponsorship with respect to a high profile PGA Tour event, which tends to skew upper middle class— as opposed to Major League Baseball, which tends to skew a little bit lower, demographically.

Sponsorship works efficiently. If Gillette is going to want to get in front of male consumers, Major League Baseball works for them. Predominantly the viewership is male, and they sponsor the Rookie of the Month. Why do they sponsor the Rookie of the Month? Because they know that consumer perceptions and consumer tastes are set very early. Guy's getting out of college; he's now got his own place; he's got to shave every day for his job. Whatever brand he gets affiliated with early on is the brand he may use for the next thirty years.

And Gillette sponsoring Rookie of the Month—and this is just a supposition on my part—they may see that there is a very good use spend of dollars to align with a Rookie of the Month property for Major League Baseball to try to get a brand affinity for those that view Major League Baseball and follow whoever wins the Rookie of the Month competition, that that's a good spend of money.

Sponsorship works better than advertising. Buying a thirty-second spot is great, but in the world of TiVO, advertising doesn't work as efficiently. Now, advertising can get more creative. And the good news about sports is most people watch live, but not everyone. I mean, all the time during the U.S. Open, I have friends texting me, "Don't tell me who won the Federer match, because I'm TiVo'ing it." And they don't want to know. So, if they're TiVo'ing it, they're not watching the advertising. And that certainly is the case in sports, less so than it is in entertainment programming, but it's something to consider.

So sponsorship, you're actually imbedding yourself in the sports property itself and you're creating that brand affiliation, while people are actually watching the competition. So that's another benefit.

The last three major benefits are: Hospitality, access, and business opportunity.

John Hancock was sponsor of the Olympic Games for decades. They bought very little in the way of advertising on NBC during the Olympic Games. They did very little print, very little digital. They used to say, "We're buying this

sponsorship,” which was reportedly over \$40 million for a quadrennium—it’s a lot of money—”strictly because we want to incent our sales force, the insurance sales people around the world, to sell as much insurance as possible.” Because those that sold the most insurance got to go themselves and bring a guest and sometimes their entire family and spend, you know, two weeks in Sydney, Australia, or two weeks in Salt Lake City, or two weeks in Athens, first class watching the games. It was an unbelievable sales incentive. And so that is why they embarked on an Olympic sponsorship. Now, they used the Olympic rings on their business card, and that was a source of pride, and on their letterhead, and other communications, but it was primarily to incent[ivize] their sales force.

Kodak used to primarily sponsor the Olympics because they would run the digital imaging and all the imaging services—now, it’s all digital, obviously—for the Olympics. So, when photographers would take their film to get developed, Kodak would do that. And so Kodak would bring their best B2B customers to the Olympics, provide hospitality, but also show them this incredibly efficient operation for what produces more images than any other sport on the planet; it’s that seventeen days of the Olympics, all the iconic photographs that are sent around the world. So Kodak used it really as a B2B platform.

The PGA Tour, now we’re talking about hospitality on some level. I know for a fact that when we did our PGA Tour deal—we, meaning Coca Cola; I’m talking now two employers ago—we sponsored the Tour Championship. So it was called the Tour Championship presented by Coca Cola. And one of the benefits we got during the Tour Championship, which is the last tournament of the FedEx Cup, was we got a certain number of Pro Am spots, okay? And those Pro Am spots are very valuable, because you’ve got three of your best customers playing with a PGA Tour pro.

Now, who do you think Coca Cola would put in Tiger Woods Pro AM—Tiger Woods was required to play the Pro Am. Everybody in the tournament is required on Wednesday—or, usually, I think the Pro Am was usually—maybe it was on Tuesdays, because Wednesday was a practice round—so, with Tiger Woods, they would put their three best customers. McDonald’s buys more Coca Cola syrup than any other customer, so I assure you, if the McDonald’s CEO didn’t

play golf, then they went to the CMO. If the CMO didn't play golf, they went to the CFO. But someone from McDonald's, pursuant to this Coca Cola sponsorship deal, was playing in the Tiger Woods foursome. And that's obviously a very, very important B2B platform for Coca Cola, and it's not something that you think about in a sponsorship.

General Electric made no bones about the fact that, when they sponsored the Olympics, NBC was the incumbent broadcaster. And, in order for NBC to ensure that they would get the renewal rights for the 2006 and 2008 Olympic Games, they asked GE, the mothership, to come in and say, "Will you be a sponsor?" GE evaluated the sponsorship. GE does not do a lot of consumer advertising; it's mostly B2B. So they evaluated the sponsorship, and they came in and ultimately sponsored, because they knew that, with the Games in China, there would be a lot of infrastructure built out, in and around Beijing.

And GE ended up getting the lighting contract, the power systems contract, for many of the venues and also for a lot of businesses that even had an ancillary or tertiary relationship with the Beijing Organizing Committee, which was part of the Chinese Government, frankly. So GE did it with the designs on, not using the trademark, not using the rings, but simply as an entree, as a platform, to get more business.

So the reason why you do sponsorships are varied. It's not always just to license a trademark. But, obviously, sponsorship works. According to PWC, it continues to grow very fast—a big clip. And, fortunately for us, Barclays being our biggest sponsor, we sold the naming rights to them. And that's another whole form of sponsorship.

Farmers Field, you may have read about. The L.A. NFL team doesn't exist yet; may never exist, but Farmers Field, on the hedge that AEG would be able to build a stadium in L.A., decided they would come in and be the naming rights sponsor. So Farmers Field is the naming rights sponsor to a phantom, basically, plot of dirt and, obviously, they're not going to start paying their rights fees until ground is broken and presumably until an NFL team is awarded. And they probably won't build until they know that an NFL team will be awarded.

My prediction is that [in] San Diego—[where] the Chargers can't get a new deal done for a new stadium, and their lease is up in a couple of years—you'll see the Chargers

move up to L.A.. That's just an amateur prediction.

Let me also throw out an acronym as it relates to sponsorship, and that acronym is C.O.I.. Does anyone know what C.O.I. stands for? Contractually Obligated Income; the three most important letters in the world of sports financing.

When we financed the Barclays Center—it's being built now, finally—we used primarily tax-free municipal bonds. We met with all the rating agencies; we met with Moody's; we met with S&P; we met with Fitch; and we had to get a rating.

One of the first questions they asked is what type of revenues do you already have committed to this arena. Now, the obvious answer might be: Well, none, sir, none, madam, because it's not been built yet and we haven't sold sponsorships yet; we don't have a team playing there yet, so there are no revenues. Well, fortunately, we did have our Barclays Center sponsorship in place. And, obviously, the sponsorship was ultimately contingent on us building. We also had a number of founding partner sponsorships in place. And that gave the rating agencies comfort that we had contractually-obligated income and revenue guaranteed that would come in to help us fund the operations of this arena.

Now, what makes a sponsorship in the bucket of contractually-obligated income versus just a sponsorship that can't count as C.O.I.? Well, what the rating agencies do, and what any lender will do, whether it's Citi, Goldman, what have you, because you don't necessarily have to use bonds and sell debt to finance an arena or stadium; you can just secure the money through a bank loan, and the banks will look at the same thing; what is your contractually-obligated income.

Well, the banks and the rating agencies will look at two things: They're going to look at the termination provision of any contract, and they're going to look at the force majeure provision. And the termination provision, if it says, "Sponsor shall have the right to terminate unilaterally without cause on thirty days notice," it ain't going to be C.O.I., okay? But, if the termination provision is written in such a way that it makes it very, very difficult and very unlikely for the sponsor to lawfully be able to early terminate the agreement, it's likely to fall as C.O.I.

Now, why is force majeure important? Force majeure is important because we have work stoppages in the world of sports. And they want to see that, if there is a work stoppage and you lose an entire season, what is the effect of that on the

contract. Can the sponsor terminate in that instance?

And you better write your force majeure provision as it relates to your termination provision in a way that, not only if you lose a season, but, hypothetically, you have to lose a season and then the first regular season game of the following season, which would require you to have a work stoppage and a lock-out, strike, what have you, for an entire season, then the full next summer, and then you don't start the regular season on time. So you end up having eighty-one games, instead of eighty-two, if you're an NHL or NBA team.

So you want to be able to draft that force majeure provision in such a way that the work stoppage, even for a couple of weeks or a late start to the season, does not trigger a termination. Because, if it does, they're not going to count it as C.O.I. and you're not going to get a rating above junk status. And, if you're not going to get a rating above junk status, you're not going to be able to sell your bonds. So you have to be very strategic.

And I'm sure, in the Farmers Field naming rights agreement, they're going to have to finance this thing. They may use bonds; they may get equity. If you get equity, it's not quite as important, but, if you're using bonds or you're securing a loan through a bank, this becomes an absolutely critical provision that folks are going to look at.

Over the last two months, what was the most impactful sports marketing moment for you that you saw? Now, I know all of you think it was probably the degradation of the Christina Aguilera entertainment. But, in my mind, it actually was something that probably none of you noticed, but it's just to try to kind of teach you the way a Sports Marketing Lawyer will think. This happened at the Australian Open.

Evian is a sponsor of both the Australian Open and the U.S. Open. One of the entitlements that Evian gets is a branded cooler on the court where they keep the water—and they might also keep a sports drink there, if the sports drink company did not also negotiate to have branded cooler rights on the court. I actually worked on both of these contracts several iterations ago when I was at Coca Cola, so I'm going to take credit for one of these, and I'm going to take the blame for the other, because it's very divergent.

This is going to be impossible for you to see, but this is Arthur Ashe Stadium, okay. And I'll give you a more close-up look of the Evian cooler. So this is Arthur Ashe Stadium. The

Evian-branded cooler is back here. The players sit up here, right next to the umpire's chair.

Now, for a normal tennis match on a major stadium, you have five cameras: two behind the court; one low angle, one high angle. The low angle is the main camera you see when you see action. Then you have two on the court itself: one following one player; one following the other player. And then you have a reverse-angle camera.

Now, the low-angle camera that shows ninety percent of the action when you're watching a point in Arthur Ashe Stadium in Flushing doesn't pick up the Evian cooler. So the Evian cooler only gets picked up on television when they are actually showing the players walking to their sideline chair, in-between every other game when they get their ninety-second break. And Evian occasionally, sporadically, will get on camera. But, by no means is it the majority of the time. It might be ten percent of the time.

Conversely, [at] the Australian Open, in Rod Laver Arena, the players sit further back—and this is the umpire's chair—and the Evian cooler is right here.

So, if you watched the Australia Open on ESPN2—and you all have it, because ninety-nine million households have ESPN2⁷³—and I'm sure you all set your alarm for the final Sunday, 3 a.m., to watch the Djokovic, Andy Murray match like I did—actually, it turned out not to be a good match. I was upset that I even got up for it, but the low-angle camera picks up the Evian cooler—it's pretty much a static camera. It doesn't move very much because it shows the court, but the Evian cooler is close enough to the court that it shows on that camera angle at all times.

Now, why is that significant? Assuming they're both paying the same; Evian is paying "x" to the U.S.T.A. for its sponsorship rights and "x" to Tennis Australian for its sponsorship rights to the Australian Open; they're paying the same exact amount. There's another acronym you need to know known as C.P.M.. What does C.P.M. stand for? In media, Cost Per Thousand. What are you paying to reach a thousand viewers, or a thousand spectators, as this case may

73. See *ESPN2 to Televises the BNP Paribas Showdown Final; All Three Matches on ESPN360.com*, SPORTS MEDIA NEWS (Feb. 22, 2010), <http://sportsmedianews.com/02/espn2-to-televises-the-bnp-paribas-showdown-final-all-three-matches-on-espn360-com/>

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be. But, in this case, think of it media-wise. What are you paying to reach a thousand viewers?

The C.P.M. efficiency of Evian's sponsorship by the Australian Open is so many multiples better than the C.P.M. for their U.S. Open. They are reaching over 220 countries. Many of the same networks televise both events around the world, and their logo is getting picked up virtually at all times for one property and only ten percent of the time for the other.

Now, the sports marketers may not think about it. They should think about it. But, when you're buying signage—because we talked about what are some of the main entitlements that a sponsor gets, putting the Olympics aside, because there is no branding on the field of play, and putting the NFL aside, frankly, because the branding is only the upper tier and above; there's no branding on the court. But, obviously, the NHL, the dasher boards; there's branding on the ice. We have branding on the court for the naming rights sponsor, plus we have courtside and baseline signage. You know that's going to be all in camera view, but, for a tennis tournament, you're getting cooler rights, [and] you think, great, I'm getting cooler rights; I'll get some, but you want to see what the camera angle will be. And that will certainly tap into whether or not you are going to pay "x" amount for a sponsorship.

But, to me, it was so dramatic, the C.P.M. difference, and the fact that one logo was in camera, one was out. And yet, basically, I can tell they were, years ago, roughly the same rights fee. But the value they're getting in one and the other is—I've never seen such disparity in my life between two similarly-situated events with a cooler being five feet to the left of where a cooler is in another event.

So, again, just stupid nonsense to think about in the world of Sports Marketing that make a huge difference and can make careers or end careers very, very quickly.

What else? I know we're running out of time. Let's open up for questions. There's a lot of things I didn't cover, but let's just open it up.

AUDIENCE MEMBER: (inaudible question regarding revenue streams and putting sponsorship logos directly on team jerseys, a practice that is very popular in Europe but shied away from in the United States)

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MR. GEWIRTZ: It's a great, great question and the subject of massive debate.

The NBA is dipping their toe in. For practice jerseys, which you don't see on TV much, except when the local reporter goes to our practice facility—our practice facility is known as the PNY Center. We were the first NBA team—and you talk about some of the smaller teams—the Brooklyn Nets will by no means be a small team; rather [located] in the fourth largest city in America. So just wanted to make that clear.

PNY is a company that makes computer chips. It's based in New Jersey. And the NBA is now allowing, with size restrictions—I think it's five or six square centimeters—branding on our practice jersey. So that does show up a lot whenever there is still images in the newspapers of a guy, you know, in practice, or when the local reporter is wanting to interview players. And PNY is getting a nice hit out of that. That doesn't apply, obviously, for any game competition.

For some reason here, it's sacrosanct that, if you were to put the Microsoft logo on the Yankees uniform. They already have the Adidas logo. The Adidas logo's on the Nets jersey—it's on every NBA jersey. They have the game uniform license, so there already is a logo on there, but, again, it's the logo of the apparel manufacturer, so it's not as provocative. But, if you were to also throw on, you know, Microsoft or Hooters or whatever it is—I mean, obviously, there's different levels of blasphemy involved—the fans might go nuts.

But this is a huge lost revenue opportunity, I think, for the leagues. Because you look at Manchester United, they now have Aon on their shirts. Manchester United is the most revered soccer, football sports property in the world—you know, I think the folks at Real Madrid, Barcelona, Chelsea, or Liverpool may disagree. It's watched all over the world.

And so you would think that the largest logo on the Kit—the uniform that the players wear—would be the Manchester United crest. It's tiny. It's about four square centimeters. The largest logo is Aon. And it used to be Vodafone. And this jersey sells more than any other jersey—now it might be Real Madrid or Barcelona; I don't know—but it's certainly one of the one, two, or three best-selling jerseys around the world of any sports property, anywhere.

And people don't seem to mind that there is an insurance broker on the front and there used to be a a mobile phone

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service provider on the front. But it's part of the ethos of what was the premier league and now it's in all of the other league—BWIN, I think, has one of the big ones—but that is ubiquitous for basketball too in Europe, for the super league.

Major League Soccer now does it, but people didn't really care, frankly, the fact that they used the European model. I think it's only a matter of time, for example, the NHL may be the first. And, again, the NBA's slowly dipping its toe in with the practice jerseys. But it's a massive lost revenue opportunity, and twenty-two of thirty NBA teams lost money last year. We need the revenue, or we need to fix the labor situation. But that's another story.

AUDIENCE MEMBER: (inaudible question)

MR. GEWIRTZ: Yeah, there's something called the NBA Constitution and Bylaws, and there's something called the NBA Operations Manual. Those are my three Bibles. They in the aggregate amount to over 900 pages, highly regulated. If that decision's going to be made about on-court apparel and uniforms—even our practice jerseys is regulated by the NBA—the NBA will make that decision. And that decision will be made through the NBA properties executives; ultimately, the Commission[er] will chime in; and it would probably be the subject of an NBA Board of Governors vote.

Now, I think everyone would vote in favor because those are the teams. But that would have to be generated by the league. And, right now, I mean, the more we get into this thing, I think it's going to be discussed more. Because, in Europe, it works fine and people love buying those jerseys.

AUDIENCE MEMBER: (inaudible question regarding team names)

MR. GEWIRTZ: For team names, one of the problems you have is that, when the Memphis Grizzlies were looking for a new name—they were going to be the Memphis Express; they wanted to be—Federal Express wanted naming rights not only to the facility where Memphis plays—Fed Ex, I think, has naming rights to the facility—they effectively wanted naming rights, basically through the back door, to the team. And the NBA Trademark Lawyers [said] we're not going in that direction.

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MLS is a different business model. That I don't think you're going to see. Because corporations come and go. The guy files for bankruptcy; they get acquired; they change the brand name. That's another problem for continuity of name. The NBA's not going to go there. MLS is an outlier on that.

AUDIENCE MEMBER: (inaudible question regarding sports teams and leagues and potential conflicts in sponsorship)

MR. GEWIRTZ: Any major sponsorship program, from the Olympics to an NBA team, will sell sponsorships on a category-exclusive basis. When you're a sponsor and you're doing your due diligence and you're negotiating your exclusivity, you have to really know what that exclusivity means.

For example, VISA is the official credit card and credit payment system of the Olympic games; the only card accepted at the Olympic Games, VISA. And that is true if you go to London and you're within any venue that requires a ticket or a credential to get in, so you're at the Olympic games, as opposed to some store down the street, and you want to buy something, you have to have your VISA, or you need to have Pound Sterling. That is a factual statement and it can be substantiated.

American Express is not an Olympic sponsor. And, back 1994 during the Lillehammer games, they bought time on CBS, which is the broadcaster. The advertisement said, "If you're going to Norway for all the fun and games this Winter, you'll need your passport, but you won't need a VISA . . . American Express accepted wherever," blah, blah, blah, blah, blah.

Ambush marketing. VISA went ballistic. A letter penned by Dick Pound, who was head of the Marketing Commission, Samaranch signed it, sent a letter to the American Express CEO threatening. They went public. They said, you know, you're undermining the sponsorship program which funds the athletes, allows third-world countries to attend the Olympics; without this essential revenue, you're going to undermine opportunities for athletes; basically guilted them through PR.

But was there a legal cause of action there, under the Ted

Stevens Olympic and Amateur Sports Act⁷⁴ which governs in the United States? It's questionable, so yes, exclusivity is sacrosanct; it's everything. But, when you're getting exclusivity, truly know what you're getting.

And, when you're drafting an exclusivity provision, the devil is in the details. So you give someone the beverage category. Well, what is the beverage category? Well, you've got alcoholic beverages, okay, so that's malt beverages, wine, and spirits.

If I'm Anheuser-Busch, which sponsors virtually everything other than Coors, and they're getting the malt beverage category, does that mean that I can do a deal for Stolichnaya Vodka, which has a sponsorship with the Barclays Center? And I also have an Anheuser-Busch deal, by the way, with the Barclays Center. So we were able to slice-and-dice that category. So, when I did a malt beverage deal, I was also able to reserve a wine deal and a spirits deal.

But, often times, if Anheuser-Busch pays enough, they're going to want the entire alcoholic beverage category, even though they don't make spirits and they don't make wine, because they want to block out anybody that will share stomach when you want to consume alcoholic beverages.

On the non-alcoholic beverage side, you're drafting the product category, the easy category. When I was at Coca Cola, and we paid enough for exclusivity, I could just say, "I get all non-alcoholic beverages. If it rolls down hill, I get it. And, if it doesn't have alcohol, I get it."

But if you're getting the water category, what does that mean? Well, that is: Spring water, Artesian water, or purified water. Dasani and Aquafina are from the tap, but purified, with some minerals added. But does that mean I get the enhanced water category, which is all of the Glaceau Vitamin Water products? Now, that's water too, right? It's bottled water. No different than Evian and Aquafina and Poland Spring, except there are additives. And what are those additives? Those additives tend to be nutritive or non-nutritive sweeteners, sometime coloring—I love how the vitamin water's so healthy for you, this, that, and yet it's got additives, and some of the additives are good; some maybe not so good.

74. 36 U.S.C. §§ 220501–220512 (2006).

But you've got to be very specific.

Carbonated soft drinks is a great example. That's easy; it should be Coca Cola, Pepsi, and the diet iterations thereof. What about Energy drinks? What is an Energy drink? The traditional Energy drink—Red Bull being an example—is a carbonated soft drink, right, because it's got bubbles. It has sweetener in it.

The only difference is two things: It has more caffeine than your typical equivalent-sized serving of Diet Coke or Coke—it's an obscene amount of caffeine above that—and it also has some exotic ingredients: Guarana, Ginseng, but in such trace amounts, it's really for marketing purposes; it doesn't have any effect. But that's the only difference. It's a carbonated soft drink with caffeine. It's just got a little more of this punch.

And so if you're going to do a carbonated soft drink deal, but you want to reserve the Energy drink category, you better reserve it and describe, with great particularity, the differences between a normal CSD and an Energy drink. So the devil is in the details when it comes to exclusivity.

Any other questions?

AUDIENCE MEMBER: With the economic situation as it is right now, I know a lot of the leagues are struggling to maintain their revenues. Is there interplay between the leagues that are being fed and those minor leagues, and what is it exactly? Do they have sponsorship deals [whereby] the smaller leagues can take revenue from the larger leagues?

MR. GEWIRTZ: Well, MLB has very complicated alliances with Minor League systems. There is an Independent League, but a lot of the other leagues, the teams are wholly owned—so I guess there's the Staten Island Yankees, which I think is owned by an affiliate of the Yankees Limited Partnership.

In the NBA, there is the D league, the NBA Development League. We have an alliance, we've just announced, with the Springfield Armor. And that alliance will allow us to run basketball operations as of May 1 for the Springfield Armor, meaning we do all the player trades; we hire the coach; we hire the assistant coach; we hire the trainer. And they deal with all the business operations: the sponsorship, the ticketing, the lease at the arena they play at.

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And so we have this alliance where we can freely move players back and forth, subject to certain collective bargaining restrictions. So that effectively will be our exclusive Minor League team. We don't own the team, but we have this hybrid relationship where we control basketball operations.

And will I include in my sponsorship deals for the Barclays Center and the Brooklyn Nets rights to the Springfield Armor? With all due respect to them, probably not. It's not going to move the needle and get me an extra 500 grand by including the Springfield Armor; it's just not.

Any other questions?

AUDIENCE MEMBER: (inaudible question regarding marketing agreements)

MR. GEWIRTZ: Well, I mean, a perfect example is, after we closed our deal with Mr. Perkeroff, we shortly thereafter negotiated a deal with Aeroflot. And we probably had an entree with Aeroflot because now we had some identity in Russia.

Now, Aeroflot does two things. When you're buying an NBA team sponsorship, the most valuable inventory you have will be the courtside and baseline signage. Because, not only is the YES Network camera rolling at our games and running it, but that feed is taken and shown in 200-plus countries.

You know, when we had Yi Jianlian, the Chinese player, more than half our games were shown in China, which is a fairly large market. So we had literally five Chinese sponsors. Almost none of them did any business in our seventy-five-mile local territory where I could grant rights. But, because I was able to show that inventory, courtside, that was TV visible, it was shown back in China an inordinate amount of time.

With Aeroflot, two things that benefitted them: Number one, they fly into JFK, so they want to market in the New York metropolitan area; and number two is their deal included courtside and baseline signage, and that is televised back in Russia, and there are a lot more Russians now watching Nets basketball. And, certainly when we go to Brooklyn, I think it'll be, you know, significantly more.

So there is a benefit. Certainly, that helped us get that deal. But they're benefitting, certainly, through the inventory we're giving them.

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MS. BLAKELY: Thank you, Mr. Gewirtz, and thank you to everyone in the audience for attending tonight.

Emily and I would also like to thank all of our panelists and moderators. Tonight was a huge success and we couldn't have done this without everybody's cooperation. Also thank you to our sponsors: Trenk DiPasquale, as well as Sports Agent Blog, and the New Jersey State Bar Association.

We have a reception to follow. So, if you would like to make your way outside and grab some food and drink, that would be great. So thank you again and good night.

Oh, one last thing, sorry, if you want to get your parking validated and didn't get it validated already, we will have validation at the reception desk, so thank you.