

NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 15

SUMMER 2019

NUMBER 3

PROCEEDINGS OF THE EIGHTH ANNUAL
SPORTS LAW COLLOQUIUM*

PRESENTED BY:
NYU JOURNAL OF LAW & BUSINESS
NYU SPORTS LAW ASSOCIATION

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PANEL 1: THE FUTURE OF AMATEURISM IN THE NCAA

Presented by: Winston & Strawn LLP

Brette Trost:

Good morning everyone. We are going to start today's program. My name is Brette Trost and I am the president of NYU Law's Sports Law Association. I want to thank everyone for attending today's Eighth Annual Sports Law Colloquium, and I also want to thank the NYU Journal of Law & Business for helping us with today's event. We are very lucky to have such renowned panelists joining us today. We'll begin our first panel, which will examine the most recent challenges to the NCAA amateurism rules. Moderating this panel is Steven Tugander.

* Editor's Note: The transcript has been edited for clarity. The Q&A sessions with the audience are not reflected in this transcript.

Steven is a trial attorney in the New York office of the United States Department of Justice, Antitrust Division, and has investigated and prosecuted numerous criminal antitrust cases. Steven, I'll let you take it from there.

Steven Tugander:

Thank you very much, Brette. Since I am an attorney with the Department of Justice, I have to make, and I apologize for this, but I have to start everything with a disclaimer. Any views I express today are my own and do not necessarily represent those of the Antitrust Division or the Department of Justice. I don't really intend to express any views today, they're all going to come from this great panel, but I have to get that out there. So, let me just start by saying, today is February 15th, which means that on the sports calendar, we're midway between two of the biggest events in college sports: college football playoffs in January, and the NCAA basketball tournament in March. And as sports fans, we know that these two events contribute to the billions of dollars that are generated by the college sports industry. But as sports fans, we also know that college athletes do not share in the billions of dollars generated by their sports.

In college sports, schools collectively enforce amateurism rules that prohibit the players from getting paid. It seems like for years, the feasibility of these amateurism rules have been a constant source of debate. If you listen to Sports Talk Radio, I think for as long as I can remember, amateurism rules have been debated. But I think that debate has really become its strongest now, as college sports have increased in popularity, size, and revenue. So, that all leads us up to this morning's question: what is the future of amateurism in the NCAA? So, we do have a great panel here to answer those questions. I'm going to do a brief introduction of each of the panelists. They all have outstanding resumes, so I'm just going to hit a few highlights, but what I say about them doesn't really do them justice to how much expertise they have in this area.

Sitting to my immediate left is David Green-span, who's a partner in Winston & Strawn's New York office and chair of the firm's college

sports sub-practice group. He's litigated numerous types of sports related cases, and he currently represents a class of collegiate players in the *Jenkins* antitrust lawsuit against the NCAA, and that suit is going to be a focus of our discussion this morning. Sitting next to David is James Keyte. He's the director of global development at the Brattle Group. That's an economics consulting firm. He plays a lead role there in growing the firm's practice, and James previously spent about—was it twenty-five years—as a partner at Skadden law firm, where he handled, among other things, a wide variety of sports related matters. He's currently the director of the Fordham Competition Law Institute and is an adjunct professor at Fordham Law School. James is also a former student athlete, having played baseball and football at Harvard, and was there a third sport, Jim?

- James A. Keyte: One year, I did track but track didn't work out that long.
- Steven Tugander: Three-sport athlete, and pitching, and quarterback?
- James A. Keyte: Watching from the bench mainly, but yeah. But it certainly got me to the school.
- Steven Tugander: Okay. Sitting next to James is Stan Wilcox, who is the Executive Vice President of Regulatory Affairs for the NCAA. Stan has over thirty years of experience working in athletics administration at Notre Dame, Duke, Florida State, and the Big East Conference. Stan was also a student athlete at Notre Dame. He made it to the Final Four tournament in 1978. Stan is also a lawyer. Stan, I did a little research, is it true on that '78 team you had Kelly Tripucka, Orlando Woolridge, Bill Laimbeer, and you were coached by Digger Phelps?
- Stan Wilcox: Yes, and unfortunately on the Digger Phelps piece.
- Steven Tugander: All right. And sitting next to Stan is an old friend of Stan's, Mike Cragg, who is the athletic director at St. John's University and has been there since September 2018. Prior to St. John's, Mike spent over 30 years at Duke University in various capacities, but he played a major role in the tremendous growth and success of the Duke

men's basketball program, which I'm sure we're all familiar with. At St. John's, he also serves on the president's advisory council. And Mike, I don't want to put any pressure on you, but all of New York is counting on you to get St. John's back to the Final Four this year.

Mike Cragg:

That's great. Well, we'll work on that. I will say my first five years at Duke, we went to five straight Final Fours, but I had nothing to do with it, other than I was there. So, it'll be the same case with here, but we have a good program.

Steven Tugander:

St. John's is definitely on the rise this year, so you've done a great job. And finally, we have Alan Milstein. Alan is a shareholder in the Sherman Silverstein law firm, where he chairs the litigation department. He has expertise in many areas of law, and I particularly want to point out that he's a pioneer in the field of bioethics litigation. But for the purposes of this panel, Alan is a sought-after commentator on sports law and he represented Ohio State running back Maurice Clarett in the highly publicized antitrust lawsuit against the NFL a few years ago. And that lawsuit will also be a topic of discussion this morning.

Steven Tugander:

So, with that introduction, why don't we start with Stan. Let's start from the stars. Stan, can you provide us with a brief background on the NCAA's amateurism rules? And for the interest of time, we're just going to "stick to" keep our focus on Division I.

Stan Wilcox:

Yes. And providing a brief background on the NCAA amateurism rules is definitely a tall task, because the amateurism rules, obviously over the years, have morphed and they continue to morph. There was a time when the amateurism rules basically indicated that you couldn't entice an individual to come to your institution with any type of monetary dollars for education. You'd have to come and be admitted just like any other student. And then sometime in the—I think it was the late 1900s or the '50s, that they basically allowed institutions then to actually provide scholarship dollars to student athletes or individuals that would participate at the highest levels at a collegiate institution. And then

even further after that, during my tenure as a student athlete, the rules basically then to where you can get a full scholarship and that was basically athletics' aid that can cover your tuition fees, room, board, and books. Just slightly before I started, there was also \$15 that you can get for laundry money. That was actually taken away during my time.

As I was a student athlete at Notre Dame, and coming out of Notre Dame as a student athlete, there are things that you pick up obviously as a student athlete back then and obviously those things are being picked up by student athletes today, which I think is a part of, or particularly, why I think where we're at today, because college athletics is really a public trust. The more the public sees the dollars that are being generated by institutions and conferences. There's always that looming question of why student athletes are not sharing in those dollars. Well, as you come up to more modern day and you look at now what the scholarship is worth and what is a scholarship to participate at a collegiate institution, well, you're now not only getting your full scholarship, but you're getting up to the cost of attendance. And also, certain student athletes are now allowed to get a Pell Grant on top of that.

Over the years—and again, I was in this from my playing days in the '80s to now, looking at things, how they morphed—nowadays, not only are you getting your Pell Grant, all your expenses for tuition fees, room, board, and books, you're getting the cost of attendance, you're also now getting—in other areas that really also touch upon what would be considered “amateurism”—other benefits that flow. Things such as, recently, student athletes, now their parents, their immediate family members are allowed to get their expenses paid to go to the College Football Playoff, to the NCAA Final Four. They also allow student athletes to tap into what is called a Student Athlete Opportunity Fund, or as well as a Student Athlete Fund, which allows student athletes to apply for monies to help them go home, for emergencies, or

to get home for at any time, also for providing for different clothing, other things as well. And on top of that, student athletes are not only getting these particular benefits, but they're also then—on top of their scholarship, their cost of attendance—used to have to include in your financial aid package, any work performed, so, if you had time to go work, those dollars that you earn would have to also be included in your financial aid package, but it's no longer—you can actually work if you have time during the academic year, during the summer you can work.

I guess my point is, we use the term amateurism, but really what we have is a collegiate model in which you include in your collegiate model participation in athletics at the highest level. Now, every college and university also has rec[reational] sports for the regular students, and intramurals, but they've created athletics departments and included those within the collegiate experience to also provide for means in which individuals can continue participating in athletics, but at the collegiate level, at the highest level. The more opportunities that become available for individuals that are coming out of high school or coming out of the "amateur" system within the United States, the more opportunities they have to go directly into professional leagues, the less you'll have the pressure for the collegiate model to be more like the professional model, because it truly has always been, how do you incorporate athletics at the highest level at your collegiate institutions?

The tradeoff obviously, again, is you come to this institution for quality education and you get an opportunity to participate in athletics at the highest level. When that balance is not struck appropriately, that's when we have problems, that's when we have many that believe that they ought to be actually paid for participating in athletics. And there are many of us that still believe in the collegiate model and believe that you can have athletics at the highest level within your collegiate institutions, and not have to go down the professional route of particularly

paying student athletes directly for their participation in college. So, I think that's mine in a nutshell, and I know we'll get into many other issues as it surrounds that.

Steven Tugander: Thank you, Stan. With that, I think we'll turn to David. I know you have a different view. You recently tried the *Jenkins* lawsuit out in Oakland, California, which alleges that the NCAA amateurism rules are a violation of section 1 of the Sherman Act. And one of the remedies you look for in your suit is for a place to have the ability to receive compensation above just the cost of attendance. So, in your view, how do the amateurism rules violate the Sherman Antitrust Act? And David, if you have time, could you also talk a little bit about some of the evidence that was introduced during the trial?

David Greenspan: We spent five years trying the issue of amateurism under the antitrust laws; I'll try to cover it in five minutes. No one doubts, no one can deny the value of a free college education, but the question isn't whether that's a lot of value; in a free market economy, fair value is determined by competition, not what a bunch of college presidents who want to bloat their endowments decide. I don't think people in this room think that a strength and conditioning coach should be paid a half a million dollars, an assistant coach \$1 million, a head coach \$10 million, but the kids get only a free ride. But antitrust law doesn't allow us to substitute our judgments of what these individuals are able to get from the benefit of competition. So, in terms of what the *Jenkins* case was about, we can start from a couple indisputable premises. Number one, these colleges compete vigorously with one another to recruit the best football and basketball players to come to their school. Number two, if it wasn't for the NCAA compensation cap, these athletes would get more than they currently do.

This was undisputed in our case, the NCAA does not deny this. We won summary judgment on the point that the NCAA compensation rules cause significant anti-competitive harm. So, what the trial was about is the burden then shifts to

the NCAA and to the athletic conferences that we sued to show: do these rules have some pro-competitive justification? In other words, there's no debate that, on the one hand these rules cause anti-competitive harm by constraining salaries, but do the rules cause some economic good that justifies it, and how does that come out in the balance? And it's very clear in anti-trust law, and the justification that matters, it's not some philosophical, moral, social, educational objective; it has to be an economic rationale. And the economic rationale that the NCAA and conferences rested their entire defense on is that amateurism is pro-competitive because it is what drives consumer demand for college sports.

David Greenspan:

Put another way, what you all like about college sports is the fact that kids can't get anything more than a full scholarship, and if they were allowed to allow basketball and football players to get a penny more than a full ride, you're going to turn off the games, you're going to turn in your tickets. You don't need all the expensive economists and consumer survey experts that we hired at trial to know how preposterous that is. I don't think most college fans could care less what the kids get, except they'd like to see them share a little more, but it's certainly the case that they're not going to watch and attend less sports because a kid can get additional educational or health benefits beyond what's permitted today or the scholarship can go above a full ride. That's what the case was about. And what's interesting and Stan's history of amateurism is completely consonant with the evidence at trial; it has nothing to do with economics. You didn't hear anything about a consumer demand justification for these rules, which is all that matters in antitrust trials, and that's what the trial showed.

David Greenspan:

Amateurism as a driver of consumer demand is something, with all due respect, that NCAA lawyers have made up over time to defend their rules. What the evidence did show is when NCAA considers how to change its amateurism rules, they consider how much it's going

to cost schools; that, they consider. And this amateurism line, it changes all the time—it means nothing more or less than whatever the NCAA membership says it means on a given day—and over time, as athletes have received more compensation, what’s happened to consumer demand? Has it eroded? No, the sports are as healthy as they have ever been. Amateurism is the original fake news.

Steven Tugander: So Mike, with that, I want to switch to you.

Mike Cragg: I’m not the lawyer in this group, just so to be clear; I’m the Athletic Director.

Steven Tugander: As we mentioned, you were at Duke for over 30 years, and I think we all know how successful Duke has become over those 30 years. I mean, not only as a basketball team, but I think as an institution. I’m curious to hear from you, what impact did the success of the men’s basketball program have on the university as a whole?

Mike Cragg: Well, I came to Duke in 1987 in a communications role, and at that point, I was young so I was learning a lot as well. I would say that Duke University was known as a pretty regional—successful regional—institution. It was definitely not an international student body, you could say it really wasn’t an inclusive or diverse student body. What basketball brought is attention to a school that is basic in that, people do see it on TV and say, “Oh, I wonder where that is.” Number one, they learn about Durham. Number two, they find out that Duke has a great law school, it has a great communications department, et cetera. I think that’s how, at the real basic level, how I look at our role in athletics as a high profile role that is a front porch to a university. What I mean by that is it provides an opportunity for people to discover all the parts of higher education. And I’m a believer in that. Part of the value is education, and that then attracts better professors, attracts higher student achievement. So, I think that’s what, in the case of Duke, and a number of schools could say the same thing, that it allows the university to be found by using athletics at the highest level.

Stan Wilcox: I was just going to say, the one thing that the football, basketball, gets a lot of attention. At

Duke, there's twenty-seven sports, 650 student athletes. At St. John's where I've been for the last four months, we have seventeen sports, we have 350 student athletes, and so it's easy to focus on the 14 or 13 men's basketball players or the eighty-five football players as that represents all of the university and the athletic department, and that's not what it is. Part of that also, is then it is about recruiting, and so at Duke, your question, where was it in 1987 compared to now, is that as an athletic department it was not achieving at that higher rate. So, other kids found Duke via, in this case, basketball, and play women's lacrosse, and play men's lacrosse, and softball, and et cetera. And it's highly competitive, and we are recruiting in all of those sports as well.

The investment made by the university and by an athletic department, in your question about Duke, has grown immensely: facilities, nutrition, mental health—all of the things that support high achievement, sports performance. As an institution, and I think we're mostly talking about Division I, Power Five, that's a high, high level of investment. What I oversaw at Duke in the last ten years was about a \$250 million growth of facilities. Whether it's football, basketball, every sport, twenty-seven different sports, all are trying to attract the best possible student athletes to come represent Duke at the highest level, and to hopefully bring success.

Steven Tugander:

And Mike, do you think that the overall improvements at the university would have been possible, had amateurism not been the rule for those 30 years?

Mike Cragg:

Yeah. It's interesting. It's hard to deal with hypotheticals. I think there would have still been, obviously as alums, there would still be support. A lot of our success, I just described \$250 million, that's all philanthropic, private gifts. I think it'd have been a different challenge; it's a different message you're telling. And in all of this—I'm looking forward to hearing more of the discussion—I have not heard or seen a model that works. I believe in capitalism and free market too, but I don't know how that

would work in the scope of having 650 student athletes. And so, your question is, would it change? Of course, it would be different. Would it have made it so it wouldn't have happened? I don't know that it wouldn't have happened.

I think people, at the end of the day, whether in the case of Duke right now—Zion Williamson went to the Knicks last year instead of next year—would that make people not cheer for Duke? Of course not, they'd still cheer for Duke. Whether they're one-and-done or not, that the game of men's basketball has become, at that high level, basically, a quick in and out, and so is that good or different for the game? It's totally different. That's been the adapting of all the schools, Duke being one of them, St. John's being another, that it's a different game than it was thirty years ago.

Alan Milstein:

What year did Coach K get there?

Mike Cragg:

Coach K came in 1980/81 season. So, I was about six years later.

Alan Milstein:

Six years after you?

Mike Cragg:

No, he was there in—

Alan Milstein:

Or you were six years later?

Mike Cragg:

Yeah. So he started in 1980, he was, get this, he had a losing record as the head coach at Army and was named the head coach at Duke. He started off 38–47 in his first three years.

Alan Milstein:

And what was the salary?

Mike Cragg:

He tells a story, his salary was \$40,000. He accepted the job without asking how much he was going to get paid.

Alan Milstein:

And what's it now?

Mike Cragg:

I think that's not in public disclosure. It's roughly somewhere around \$6 million.

Steven Tugander:

So, Alan, why don't we bring you more formally into the conversation?

Alan Milstein:

He's there.

Mike Cragg:

I don't mind questions.

Steven Tugander:

So a few years back, was back in 2003, you represented Maurice Claret against the NFL, and he had been at Ohio State at the time and was looking to get into the NFL—

Alan Milstein:

The Ohio State.

Steven Tugander:

The Ohio State, exactly. So, you challenge the NFL's eligibility rules that prohibit players

from entering the draft until they're at least three years removed from high school. The NBA has a similar rule that's resulted in the "one-and-done" phenomenon, which I think we'll touch on again later. Is it your view that these types of eligibility requirements are unfair? Do you think they're exploitive? And if so, in what ways?

Alan Milstein:

They're certainly unfair. The question is why. Essentially, why do we have the system that we have? I think one of the questions you posed to me was, do the NFL and the NBA, they're profit-oriented, why wouldn't they want the best players at the earliest time? I think the best example is Kwame Brown, if you all remember. Kwame Brown was the first high school player drafted number one in the NBA draft. And he's used as an example of why we need to have eligibility rules. But really, he's the reason why eligibility rules are so unfair. Kwame Brown, while an adequate player, was a disappointment. He never averaged more than five, six, seven points a game. So, it's clear to me, and it was certainly clear that the reason the NFL and the NBA want college sports to have eligibility rules is because they don't want to make the mistakes—they want the risk of the mistake to be on the player, not on the team.

So, the question is not if Kwame Brown had gone to college for one year or two years, would he have been LeBron James? No, he wouldn't have been LeBron James. He would have been the same player that he was. He made a lot of money because he was able to essentially be the number one pick at a time when, if the NBA had really had the one year or two years to observe how he played against premium competition, he wouldn't have been number one. So, is it unfair to Kwame Brown that, essentially, he got as much money as he did even though he didn't deserve it? Should he have had the risk? You can say the same thing with respect to players who get injured. Who should bear the risk of an injury for this great Clemson quarterback and his great wide receiver who were freshmen? If they get injured next year, is that their risk to bear?

When everybody knows that each of them could be drafted in the first round, this coming draft, of course it's unfair. There's no other activity that you can think of, where if someone is ready to participate at a high level and there are employers out there willing to pay top dollar for these guys to participate, but they're not allowed to participate because they've got to basically go through the sham of a year in college or two years in college.

Steven Tugander: Alan, you raise an interesting point, but I want to move over to James, who has worn a lot of hats in this area. I guess from a literal sense, you've worn the baseball hat, the football helmet, but also you're a former student athlete and attorney who's represented professionals and sports leagues, you've taught and written on sports and antitrust law. So, from that perspective, I'm curious to get your perspective on the main point really raised by Alan. Do you think there are any valid reasons for the NFL and the NBA to maintain eligibility requirements? Do you think these rules serve any sort of pro-competitive business purpose?

James A. Keyte: Yeah, and in some sense before we get to that, we're at law school, so law really matters in this area, especially with the professional sports leagues that have collective bargaining. If you don't know the area, I think the first place to start is to read now-Justice Sotomayor's Second Circuit opinion reversing Judge Scheindlin in *Clarett*, where she finds that the non-statutory labor exemption applies, which means the anti-trust laws don't apply in favor essentially of promoting collective bargaining. And she writes that this dispute, even though, again, the equities, the fairness, with respect to the non-statutory labor exemption, is simply a prospective employee's disagreement with the employment criteria established by the employer and the labor union. There's a lot of detail in dispute and about whether that Second Circuit opinion is right, and there's no doubt there could be a conflict with the Eighth Circuit in *Mackey* at some point, but that would then likely go up to the Supreme Court, and I am sure Justice

Sotomayor would write that opinion. So, I think it's an academic debate at this point in terms of eligibility rules. Set that aside, we'll put an anti-trust perspective on this, and it'll spill over a little bit into the NCAA. The NFL and other professional sports leagues are legitimate collaborations that create a product. The NCAA in 1984/85, the *NCAA* decision essentially said these are collaborations. The *per se* rule for those who have taken some antitrust just doesn't apply; it's the rule of reason.

Then part of the question was, what type of rule of reason? This is where the *NCAA* case developed the so-called "quick look" following Professor Areeda's "look" or writings, and partly because, in the *NCAA*, there was what appeared to be an obvious effect on price and output in the TV marketplace. It dealt with markets—and for those who haven't taken antitrust, antitrust deals with the markets and whether the markets are performing, not really with the individual interest. So, that fit nicely into this. We'll take a quick look and see whether this affects markets, and then we look at those justifications given those effects. But if you look in the eligibility rules, I think Judge Scheindlin, who was not familiar with sports and, at that time, I wouldn't say was quite familiar with analytical frameworks. I've been in front of her a few times before she retired and I retired. She drew from pre-*NCAA per se* cases to apply the quick look, and I think she just felt the unfairness of it, and she's a champion of the underdog. But along the way, I think she didn't quite get the quick look right either, because frankly, there was no effect on the marketplace by having one individual not be eligible under certain rules.

In terms of justifications, I think if you look at Sotomayor's opinion, and then you also look at the *American Needle* opinion that talks about sports leagues, they need to do things—and yes, they do it together with their unions—but they need to decide on things like the field of play, things like the draft. I think in *American Needle*, they essentially said there could be a quick look to say it's reasonable at the back of that opinion.

I think the language in *American Needle*, and if you look at the language in *Clarett* in the Second Circuit, they both view those things as things that these collaborations have to do. So, I think it could easily find that as a matter on a quick look, that as matter of law, eligibility rules are just things that leagues have to do.

Let me just say one thing about—a free for all—the less restrictive alternative, and I'll say one anecdote. When I was in a little town in California thinking I was all that as a quarterback, my senior year of high school, there was this kid that moved into the town across the valley who kept throwing 700 yards a game. And so, one Friday night we didn't play, we went out and looked at this guy. He was 16 years old, and his name is John Elway. I watched this kid, 6'3", he was pretty skinny then, throw the ball 75 yards, as a 10th grader, on a dime. I think he ran a [4.6 second 40-yard dash]. There is not a doubt, if you look at Judge Scheindlin's less restrictive alternatives, her view is you should just test people, see if they're physically ready and then everybody can just do that one at a time. I could tell you that—and again—you'd be challenging high school rules. You could go to a private school, and be more like in tennis, there is no doubt that John Elway could have been drafted at 16, and he probably still would be—I don't know if he'd be the top—but he would be in one of those rounds. We had another guy on our high school team; we had three of us who were drafted for baseball, actually. One of our guys, a guy named Bobby James, when he was 15, he threw over 90 miles an hour, when he was 15. He's barely in high school. Now, he ended up being the seventh pick in the draft, as an 18-year-old. But on an individualized basis, I don't know where that line is, and I think Justice Sotomayor would find that it's okay for these collaborations to draw that line.

And final thing I'll say is, and again, by the way, I should say, I don't speak on behalf of the leagues, these are just my views—really now as an academic. There's a lot of talk—isn't it wrong for the NFL, essentially to get a free ride on the

NCAA, to not have a minor league to essentially train athletes? I think from an antitrust perspective and a collaboration, I think it's a perfectly legitimate view—and I'm not even sure they offer that justification—that if my product can be better because there are top NCAA programs that make those athletes better, I don't think that's an unreasonable or inappropriate decision at all.

Steven Tugander: Thanks, James, for that perspective. I want to now turn back to Stan and Mike. And maybe you can both take turns, a couple of minutes each. Is the NCAA concerned about the one-and-done trend in college basketball? And just for a follow-up question, with all of the demands that are placed on athletes in major programs today, is it a myth to describe them as student athletes?

Stan Wilcox: I guess I'll start. Yeah, the one-and-done is a concern for collegiate athletics, and personally for me, it's a concern because we're losing touch, I think, with what collegiate athletics is supposed to really be all about. And I understand, because I was one of those highly recruited student athletes who also had the blinders on wanting to utilize collegiate athletics as my means to get to the professional levels. I wanted to be that Clyde Frazier and Earl "the Pearl" Monroe, and Dr. J, et cetera. So, the way or the means that you got there to the professional ranks was through college, and in the recruiting process, you would take that into consideration as to what institution you would go to. Now, you're seeing issues within collegiate athletics with the individuals who are making that decision on the front-end, but then, if they find out that they are not getting the playing time that they want, et cetera, they're looking to transfer, and then we have transfer rates creating all kinds of issues and problems.

But if on the front-end, you really are making a decision and you have choices, you have choices of either going the collegiate route or going directly into the pros. I think then you'll have maybe a more informed individual. Kids coming out of high school do need to have very

good individuals that can provide them with the information they need to make those choices, the right choices. But to choose to go and participate at a collegiate institution, you should be doing it because you understand and realize the value of a higher education. That light sometimes doesn't come on soon enough for many of our athletes who are playing at the highest level, because they are looking at it as a means to get to the professional ranks. That's the fallacy, or that's the problem, I think, that we're facing currently in collegiate athletics. Because as an athletics director and as a student athlete coming to this understanding later in my career, when you go to our institution to participate in collegiate athletics, you have to get the most out of that institution from an academic perspective, as you're going to put into that university and as they're going to get out of you from an athletics perspective. And it really didn't crystallize for me until I got into law school, because it's very, very competitive in the classroom. That's what I used to tell all of my kids, when I was an [Athletic Director] at Florida State. I would say to them, you have to go into that classroom and you have to compete at the highest level and at the same intensity level that you compete on the playing field, because the normal student or regular student sitting next to you, that's what they're doing. They're competing to become the top 10% of their class, the valedictorian. They want to be top of their class. Why shouldn't you want to do the same in the classroom as you're looking to do on the playing field? Now, if you are going to do that, then the collegiate model makes sense, and the collegiate model is right for you. But if you really want to just go play professional athletics and get to that level, then there should be other options for you.

Our student athletes would be better off today if they have, number one, more options professionally, two, when they're coming and they choose the collegiate model, they actually have what I call—and this is my own personal opinion—a stage where student athletes should

be negotiating the terms of their education. They should be able to determine how they're going to get the most out of that institution from an educational perspective, as much as they're going to put in from an athletics perspective. And if they're able to do that, then they are truly using the collegiate model for what it's worth. So the one-and-done rule just continues to foster this unrealistic idea in student athletes' minds that are coming out of high school or that's going into college. They're using it just to get to the pros, and that should not be the case. They really should be making very informed decisions as to why they're going to participate in athletics at the collegiate level.

Steven Tugander: It makes sense. Mike, real quick, do you have anything to add to Stan's?

Mike Cragg: I mean, I agree with everything Stan said as far as that experience and opportunity. I think the current system, for basketball in particular, is really the worst-case scenario for college basketball. I'm a believer, like Alan said, the kids, if they're talented enough and they're given that opportunity, and if an employer, being the NBA, wants to draft them in their system that there is, then they should be allowed to do that. What happens is the NBA, with that, would have to develop a minor league more robust than it currently has. They are being better trained in college and the facilities and everything around them than a NBA minor league team, and you could even make a case, coaching wise, better in college than pros. That's just the nature of the game itself. I'm all in favor of the student athletes or students, in this case, and athletes, to be able to go right straight to the pros if they're good enough, and talented enough, and an employer wants to hire them, draft them.

Steven Tugander: Thanks, Mike. Going quickly to David and Alan, to get your perspective, is the concept of a student athlete in 2019 at a major sports program a myth or reality?

David Greenspan: The term student athlete, like amateurism and much of what we hear about is a NCAA rewriting of history. Student athlete is a term invented by NCAA lawyers in the 1950s to fend

off workers' compensation claims for athletes who are getting hurt on the teams. I think that to blame the one-and-done rules of the NBA for what's going in college sports is an absolute abdication of responsibility by the NCAA. This is not a problem just for the 1%, the less than 1%, who go pro. The NCAA polls its student athletes, the vast majority of whom have no aspirations of going pro. Overwhelmingly, they tell the NCAA: I can't choose my major; I can't even pick my classes; I don't have enough time for sleep; I work more hours a week for my team than you do. The NCAA conducted a public poll where 80% of people believe that colleges put money before their athletes, so no one is buying into this. The commissioner of the Big 12 has publicly said, you can't tip off basketball games at 10 o'clock at night, play football on Tuesdays, and say you care about a college education.

So, the system and the problems inherent in it are not the blame of the pro sports leagues. It's the blame of the commercialization of sports in the NCAA, where everything has become professionalized and commercialized, except for the way the athletes are compensated. The last point I'll make is that all of the studies show that academic outcomes are better for students who have more financially. So, to allow athletes to share in the revenues that they are the most important part of contributing to, will only help their academic outcomes, not undermine it. And the NCAA has no answer to it. Everyone shares in the pot except for the athletes.

Steven Tugander:

Alan, do you want to—

Mike Cragg:

He's very passionate, you should probably just say, "I agree."

Alan Milstein:

Absolutely. I mean, it's not just a myth, it's a fraud as David says, and it was invented so that the NCAA and these schools wouldn't have to pay workman's compensation when somebody on the team got terribly injured. It's not that amateurism is dead; there was never amateurism. If you give athletes a scholarship, they're professionals. The only issue is, how much should they be paid, and what kinds of compensation?

With respect to academics, a lot of people don't realize that the way the *Clarett* case started was: he was a freshman at The Ohio State University. They didn't care at all about his school; they fed him tutors, they fed him tests. But there was one professor who taught African American history, and she said to Maurice, "I don't care about what you do in other classes, I want you to come to my office every Monday morning at 8 o'clock and discuss what's going on in our class." And then when it came time for the midterm, Maurice did extremely poorly, and she gave him a second chance at the midterm, an oral exam. She was the only professor who cared about Maurice as a student. And then what happened is, because the prior year, Maurice had said the unthinkable, which is essentially there are things more important in life than football. Somebody leaked to the *New York Times* that Maurice was able to take his second test. The *New York Times*, in the front page of the sports section, ran a huge article about how unfair it was that this athlete was able to take the test a second time, and what a fraud that that was on the other students. That article led to the NCAA examination of Maurice Clarett, and everything else that followed essentially had him banned from playing football in college.

Steven Tugander:

So, James, I want to turn to you. Unfortunately, we're running out of time. I think we could go on for a couple of hours with this. But in 2008, there were two major developments. One was the pay-to-play case that was prosecuted in the Southern District of New York, and I think there was a conviction in October. And then there was a Rice Commission report that was made by former Secretary of State Condoleezza Rice on behalf of the NCAA that made some proposals and recommendations about amateurism. So, James, if you could just summarize those two events in a nutshell and maybe talk about what those two events mean for the future of amateurism.

James A. Keyte:

Okay. As usual, I will address those but, of course, I'm going to respond a little bit to—

thank you, David and Alan for defining the way the student athlete—Stan—

Stan Wilcox:

Yeah, I'm telling you.

James A. Keyte:

You lost four years. I lost three because I had to quit after three years.

Stan Wilcox:

We weren't student athletes.

James A. Keyte:

Let me start with Condoleezza Rice, because I think she put her finger on something; she recommended get rid of one-and-done so that that model could be different for basketball. But what she focused on is student athletes and, as opposed to going to college, not going to college, what does that do for your life, what can that do for your life. When I was 17, I was also drafted by the San Francisco Giants and so I had two, I had like, should I just go do that or should I follow the student athlete model? Nobody had gone to college in my family, and I looked to see how many people that are drafted actually signed pro contracts, actually play in the majors? It was like 2%. And so, one thing I want to talk about is the focus here seems to be on the 1% as you said. Well over ninety, ninety-five, ninety-nine percent are going to go to college and become student athletes. Sure, some of them might have aspirations, but they get the opportunity to become, to evolve, into students who are athletes who will then open doors.

I think that's what Condoleezza Rice focused on. I think the litigation and the press all focused on, in a sense, the 1% who might be able to do those deals. I think that's what she properly focused on. I think the pay-to-play stuff just shows, yes, when there's so much money, whether it's through coaches and third parties, the incentives for getting money in there to get people to go to are there for bad behavior, but I'm not going to forgive anybody for bad behavior. And also, I think it's on a student and a family, frankly, to be ready to be a student athlete, rather being an athlete without being a student at all.

The last thing I'll say is, just on the law a little bit, everybody should know the Supreme Court of the United States has said, and it was Justice Stevens, no conservative judge, in the

NCAA opinion, that the product that the NCAA creates and sells is amateur sports, which means, and he said it, not paying these students. You could fight about whether that's the state of the law, the dicta, I think that's where the main fights will be eventually on appeal in these cases. But the important thing is that a collaboration like the NCAA gets to choose what its product is. I think the challenge that is going on with—it's kind of "well it should be a free-for-all, it's America"—is essentially to change the product, which is not the role of the court or very clever, very nice and clever, attorneys.

Then you have to look at what is the counterfactual. What would be there if you had a complete free-for-all where these aren't students, they're just people who are restrained from selling their images or signing deals, the 1%? I think you could end up with a small quasi-professional league of top D1 programs, and then the rest is club sports. That takes away from not only the mission of the NCAA, the product they're allowed to create, it takes away from that 99% who may not think they're going to be a student—they really think they're an athlete. Some of them become really great athletes; some of them become average athletes and decent students. But that 99% is what I think this is really all about.

Steven Tugander:

Thanks, James. I want to get to questions, but before we do, there's a real quick, I just want to ask Stan, if you can talk at all about the status of the recommendations made in the Rice report, and I want to ask David to just update us on the status of the *Jenkins* suit. So, we'll take those two, and then we'll open it up to questions.

Stan Wilcox:

Sure. Most of the recommendations from the Rice report are going to be implemented. Most of them have already gone through the NCAA legislative process, been put into proposals, and voted on and adopted by the membership. Some of the things you're probably starting to hear about, and will see, relates to allowing—similar to in baseball—basketball student athletes to have agents to help them decide

whether or not they should continue to participate in collegiate athletics and potentially test the professional waters. [The changes also allow for] the ability to work with the NBA in basically determining who are the top athletes within college athletics who may then participate in their top—I forget what it’s called—100 camps or et cetera, but if it doesn’t work out, [they are] able to still come back and participate at the collegiate level. Things such as—and this has already been there—it’s now going to be mandatory across the board for schools to have degree completion programs available for basketball student athletes. This will also actually affect all student athletes, where if they happen to leave their educational institution prior to getting their degrees—going professional, going for other reasons—they will have opportunities to come back and complete their degrees and get the educational expenses to complete their degrees. Many schools have had that already on the books, but this is now an NCAA-legislated thing.

As well as people really looked at how the NCAA processed violations, and that there is a number of cases that are very difficult to get to. The whole issue of the Rice commission was, let’s get to the issues that are surrounding the Southern District of New York cases in which individuals were basically paying players to go to certain institutions. And I’ll tell you, that’s been a battle for as long as I know, that there has always been a number of bad apples who were looking to get individuals to come to their institutions by paying—

Alan Milstein:
Stan Wilcox:

No, it was third parties though.

[I]ndividuals to come there. They used to come directly from the coaches, and then they start using third parties, individuals that are involved in AAU teams, et cetera. I was saying it that way because, going back to during my time when I was recruited, I did have an institution that basically offered to pay for my brother’s education, to pay for my girlfriend’s education, to pay my parents to come and have a house in

that location. If they didn't want to have a house, they would be flown down.

David Greenspan:

Stan was really good.

Stan Wilcox:

It's been going on for years, and we have enforcement procedures and processes to try to stop that, and these Southern District of New York cases really brought to light some of the ugly underbelly of recruiting in men's basketball that we're now going to be dealing with. We've been following the cases and been working with the Southern District of New York and listening to them as far as holding off on moving forward until they've been able to complete the cases. Now that they've been completed, we have not only information that we've already garnered through our investigative process, but we have information that obviously came out of the trials. In addition, out of the Rice Commission, we've created another method of being able to deal with what we call complex cases to hopefully get those through the system a little faster. But everything is moving forward, and you'll probably be hearing more about it in the coming months. As institutions that are going to go through the process, it's always dependent upon what side of the fence you are and how you then respond. Obviously institutions will be trying to defend themselves as vigorously as possible, but they also have to understand that they are a part of the association and they have to abide by the rules. When they go afoul of the rules, then we have to protect the rest of the membership because of their violations.

Steven Tugander:

Thanks, Stan.

David Greenspan:

The status of the *Jenkins* case, which is not about transforming an amateur product into a commercial product; the NCAA conferences did a fine job of doing that themselves. The trial ended in September, we frankly expect a decision from the judge, it was a bench trial, any day; we are seeking an injunction against the NCAA's compensation rules. The injunction we've asked for would basically shift to the conferences. Each individual conference would determine for itself, what appropriate compensation rules are. Whoever loses this trial will most certainly

appeal, and in the Ninth Circuit right now, which is where the case is pending, it's probably two years from an appeal to a decision. So, this issue, although we'll get a district court decision very soon, is going to go on for some time.

Steven Tugander: Makes sense. We're running behind schedule. I think we probably can go on for a couple of more hours. I just want to say thank you very much for this great panel.

PANEL 2: INTELLECTUAL PROPERTY ISSUES IN SPORTS GAMBLING

Cameron Myler: Thank you, Brette. Pleased to be here today with a fantastic panel. Without further ado, I'm going to introduce our panel, and then we'll have some very interesting discussion about the intersection of intellectual property issues and sports gambling. I know it's certainly a topic of interest in the last year, particularly after the Supreme Court's decision that Matt actually worked on. I'll start introductions with Matt McGill, who is a partner in the Washington, D.C. office of Gibson Dunn & Crutcher. He practices in the firm's litigation department and its appellate and constitutional law, intellectual property, sports law, and betting and gambling practice groups, and has been named a future litigation star, sports law MVP, all sorts of accolades, and has argued a number of cases that before the Supreme Court—21 and prevailing in 16, is that right?

Matthew McGill: Yeah.

Cameron Myler: Okay. I think the one we'll be very interested to hear about today is the *Murphy v. NCAA* case. To Matt's left is Sophie Gage. Sophie serves as counsel of business and legal affairs for NFL Players, Inc., which is the licensing and marketing subsidiary of the NFLPA. She handles a broad range of complex licensing, equity, and partnership transactions with major corporations on behalf of the NFLPI, as well as its affiliates, and guides strategy, business development, and risk mitigation for new ventures. Prior to being at the NFLPA, Sophie did a lot of work in unions and labor and employment matters, so a great fit to be on the players' side at the NFL.

To Sophie's left is the first of two Marks, Mark Conrad. Mark directs the sports business concentration, and is an Associate Professor of Law and Ethics of Fordham University's Gabelli School of Business. He teaches sports law, the business and ethics of sports, as well as contracts, business organizations, and media law. For any of you professors in the room who are looking for a new textbook, he has the third edition of his book, "The Business of Sports: Off the Field, in the Office, and on The News," just published by Routledge.

To his left is Marc Edelman. This Marc is a tenured professor of law at the Zicklin School of Business at Baruch College, City University of New York, where he specializes in sports law, anti-trust, IP, gaming, and fantasy sports law, and has published dozens of law review articles, one of which I think is particularly relevant to our conversation today, which is called—and we'll get to this a little bit later—*Lack Of Integrity: Rebutting the Myth that U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*. Marc might have an opinion on that question coming up.

Cameron Myler:

I thought we would start our discussion today with Matt to hear a little bit about, and I'm sure everyone in the room knows of the *Murphy v. NCAA* Supreme Court case and its broad ranging impact on sports betting in this country, but Matt worked on the case for six years, and I'm sure he could give us some insights, which I'm definitely interested in hearing.

Matthew McGill:

Thank you, and thank you for having me here today. To me, the case is known as *Christie v. NCAA*. When I started the case in 2012, Chris Christie was the Governor of [New Jersey]. He actually was still the Governor of [New Jersey] when the case was argued in the Supreme Court in December of 2017. It was not until that January that Governor Murphy took office and took the name of the case, which he has warmly embraced.

In thinking about the topic of today's panel, I went back to one of the earliest hearings

we had in the case which was before in District Court in Trenton, New Jersey, before Judge Shipp and Judge—his first name is escaping me—but one of the interesting facts about Judge Shipp is that his brother was an NFL running back. He immediately had an interest in our case in which we were trying to legalize sports betting in the state of New Jersey. The counsel for the sports leagues, Jeff Mishkin, who had been the General Counsel of the NBA, stood up and said, “These are *our* games. They want to bet on *our* games.” He just put the intellectual property right front and center, and I thought to myself at that time, “Are they your games in Nevada? If so, why can they bet on them and not us?” But in fact, the law has not really respected the assertion of the leagues that they are their games.

Going back to 1977, there was a decision by a district court in Delaware, in a case brought by the NFL, that challenged the Delaware lottery’s NFL parlay games. Even before the *Christie* decision, there was sports betting not only in Nevada but, to a very limited extent in the state of Delaware, also in Montana and Oregon. But in Delaware it’s basically football parlay cards, and that’s what they had going back to the 1970s. In the 1970s, the NFL sued Delaware on an intellectual property theory and said, “You cannot bet on our games.” The district court there rejected that contention and said that people are betting on basically amounts to historical facts and news that is publicly available when you’re betting on the results of a sports game. I think that has held up. There was a subsequent decision, thirty years later, that rejected the contention that leagues owned certain statistics that were used in fantasy sports.

There has not been, to my observation anyway, a lot of respect for the league’s assertion that they have some property interest in the results of sporting events. But now that sports betting is legal, you are seeing the sports leagues turn their thoughts to how they can monetize sports betting, how they can make money off sports betting. I heard, in the morning when I

drive my daughter to school we sometimes listen to the Freakonomics podcast. One recent episode was about the business of sports. In the course of this podcast, there was an interview with Mark Cuban, who is the famous entrepreneur, “Shark Tank” host, but also the owner of the Dallas Mavericks, and he said he expects that sports betting is going to result in a doubling of the valuation of his basketball franchise. It’s going to mean that much to them. That’s because of increased fan engagement, and perhaps because they can figure out a way to monetize sports betting. I think there is the integrity fee, which is really this idea that the league should get 0.25% of whatever is bet on again, which it’s not so much a fee as a tax.

Cameron Myler:

On that, I’m just going to jump in for a moment with a couple of quotes from the commissioners on this issue of the integrity fee, which I’d like to hear from the other panelists on this as well. Adam Silver said, “It’s the use of the NBA’s intellectual property and, as we’ve discussed before, we’re very focused on integrity provisions to protect our fans, to protect those who choose to engage and bet on the NBA.” Rob Manfred also said, “First and foremost protects the integrity of the game—these so-called integrity fees—but equally important protects our intellectual property.” Then Gary Bettman of the NHL said, “From our standpoint, we believe that whether it’s our IP, our data, whether it’s the video of our game, we have some important assets and if someone wants to avail themselves of those assets, we’re going to need to have a negotiation.” Maybe I’ll turn to Marc Edelman on thoughts on this integrity fee and what are these alleged IP rights that the leagues might have an interest in.

Marc Edelman:

First, I think the world of Adam Silver. He spoke here as the keynote four years ago; he did a wonderful job. He did it literally right before his Passover Seder. But with all the respect that I have for Mr. Silver, I believe this is a case in which the statement he’s making advocates on behalf of his league but is incorrect. We can have two totally different conversations. One is,

as a matter of public policy, should we grant an intellectual property right over statistics and data to the leagues? I'm going to leave that one aside. Maybe it'll come up later in the conversation.

The other topic is, as a matter of law, the way our intellectual property issue stands right now, do the leagues have an intellectual property right? If we look only at existing law and where the law stands right now, I think there's a pretty easy answer to that. The answer would be no. My first question would be when the leagues say "is there an intellectual property right," what type of intellectual property are we talking about? If students have taken a survey course in intellectual property, they know there's the federal property rights—we have patent, we have copyright, we have trademark, there is right of publicity. Then there's a common-law hot news claims that come out of *Associated Press v. INS*. When they say they have an intellectual property right, first thing that stands out to me is that they're not explaining where it's from. But we could go through each of them and ask if any of them make sense.

Now, just for starters and to keep it short here, let's throw patent and trademark right off the board, because it doesn't seem to be a patent claim or a trademark claim. As a matter of copyright, the first thing that I would note is that sports teams do not have a copyright in their actual games. They might have a copyright in the game broadcasts, but not the games [themselves]. To get a copyright, you need an original work of authorship in fixed tangible form, which would mean that something needs to be scripted. You have both a Second Circuit Court of Appeals case and a treatise that was written by Nimmer, which reached the same conclusion. And that is, because the sports games are not pre-scripted, there would not be an original work of authorship in fixed tangible form, meaning that the underlying data cannot derive from a copyright.

If we turn now to the hot news argument or the argument that somehow we have free-riding

involved by use of the data, that similarly seems to fail. Now, this is my first time speaking on a panel where I really feel that I am dating myself here, but if we turn back to a case from the mid-1990s, right when AOL was becoming big and right when beepers were becoming big, it's a group of private—

Cameron Myler:

You are dating yourself.

Marc Edelman:

I still have an AOL address too.

Cameron Myler:

Wow, that's pretty old school.

Marc Edelman:

People presume I'm old. Motorola, in conjunction with America Online, created a product called stat tracks [SportsTrax].¹ They had individuals coming to NBA arenas, they were watching the games, they were providing information of what was happening in the games, and then people that gambled on sports or were involved in high-stakes fantasy were able to get this information almost instantaneously on their beepers and then through AOL.com, which you had to boot up the long way at the time.

Marc Edelman:

The NBA decided they did not like this, and the NBA wanted to offer a competing service, and they wanted to make the Motorola/AOL product go away. So Jeffrey Mishkin, who was one of the people you quoted, was actually a lawyer in this case, arguing that [SportsTrax] and Motorola were not allowed to do what they were doing because it was free-riding like *INS v. Associated Press*. Motorola and AOL won; the NBA lost. Now, again, this was not a Supreme Court case, this was a Second Circuit Court of Appeals case. But the court stated that because of the fact that the people that were working with [SportsTrax] and Motorola were actually in the stadium, and they were actually collecting

1. Editor's Note: The "stat tracks" here is most likely referred to SportsTrax, a pager created by Motorola and Sports Team Analysis and Tracking Systems, Inc. ("STATS"). Information regarding live NBA games was gathered and distributed by STATS via SportsTrax pagers and STATS website. See John Holden, *Making Sense of Pro Sports Leagues' Search for Sports Betting Data Fees: Case Study No. 6*, LEGAL SPORTS REPORT (Aug. 10, 2018), <https://www.legalsportsreport.com/22073/sports-betting-data-fees-case-6/>. For greater clarity and accuracy, "SportsTrax" will be used instead of "stat tracks" hereinafter in this transcript.

the data themselves, they were providing their own work product, and thus it was not free-riding the same way that copying a teletape or a newspaper story in *Associated Press* would've been, so we can make that one go away.

Marc Edelman:

As far as the third one, the right of publicity claims, people could turn to and talk about a lot of cases that said the First Amendment trumps the right of publicity in fantasy sports cases like *CBC v. Associated Press*.

Cameron Myler:

I think I might ask the other Mark to comment on that case, please.

Mark Conrad:

Mark to Marc. First, I would simply say, why do the leagues want integrity fees? Yes, it's the money; there is no question. Why the players associations want a cut of publicity rights, let's say, or negotiate that, it is for the money. There's potentially a lot of money in gambling. It's a potentially strong revenue stream depending so far on the success of the [gambling]—about eight states have legalized it in one form or another. Clearly, sport is a money business on all levels.

Obviously taking that truism aside, the question was that about 2007-ish, you had the *CBC* case. I'll talk about the case that led to the more recent decision in *Daniels v. FanDuel*. Marc is right, there have not been a lot of cases on the statistics issue dealing with intellectual property, but *CBC* was probably the most prominent. At one time, *CBC* had a license with major league baseball to deliver content. They had season-wide fantasy games, and I'm dating myself, because season-wide fantasy games is really the initial incarnation of what we know or evolved as DFS, daily fantasy sports. The license expired and *CBC* said, "Hey, let's run our own game without MLB's license." What they did was they simply put names and statistical information about the players. No photos, no logos, no uniforms, just the names and statistics. It was very plain site listing a player X: at bats, hits, home runs, etc.

MLB, MLBAM actually—advanced media division which, at that time, was a division [of MLB]—was not too happy, brought a lawsuit

with support of other leagues saying, “Hey look, this is two. One, you violated our contract because you have contract provisions of non-compete,” which turned out to be more secondary. Number two, the issue was, “Hey, you’re using our property rights.” The Eighth Circuit ultimately decided—in a decision, unfortunately, way too short, only about eight pages—by the majority said, “There is an intellectual property right in the statistics, but the First Amendment trumps it.” The problem with the decision is twofold. One, Missouri had a peculiar right of publicity law, and two, it was interpreted by a test that was somewhat unique to Missouri. Its precedential value nationwide was somewhat suspect, even though one may agree with the conclusion—one may not; I suspect many on the panel would not. There was one other case, a CBS case involving the NFL about a year later in, I think, Minnesota district court that more or less said the same thing.

But now we move on, 10 years later, we have daily fantasy sports which, in some circles’ saying, is almost a precursor to sports gambling because you’re using a lot of information for daily fantasy, ergo for gambling and, not surprisingly, you had these defendants—FanDuel, DraftKings—now in the gambling business too. But the case had to do with daily fantasy, and some former college athletes brought an action in a district court in Indiana, claiming right of publicity, also a false endorsement under the Lanham Act, which is a little bit different, and a couple of other copyright claims. Lower court basically said, “Indiana right of publicity law pretty much creates an exception to this issue,” and a strong opinion dismissing the case said, “Hey look, here we are in this matter, statistics are not the same kind of protected property.” Going to the Seventh Circuit, and here the Seventh Circuit says, “We don’t want to decide this. We want to go the Indiana Supreme Court for guidance because the Indiana law is twenty years old, a fairly standard right of publicity law à la California with some very specific exceptions.” Indiana has a 100-year right of dissentability,

which is longer than most states. But one of the problems in a case like that is because right of publicity is not a federal statute, unlike copyright or trademark, so you're really at the whim of the thirty states that have statutes, and the rest of them have common law or combination thereof.

The problem was, I think Marc alluded to that, you don't always know what you're going to get. A court in California could say applying their statute is one thing. A court in Indiana saying another type of statute, maybe another thing, and one of the things in this case was what's the scope of this one exception called "newsworthiness"? We waited with bated breath, so did the Seventh Circuit. And about in October, the Indiana Supreme Court makes its ruling and it says, "By the way, we don't think there's a viable cause here because this type of statistical information is newsworthy, and it's newsworthy as reported information like what you'd find in a newspaper or a betting line in the old days." In addition, they distinguished *Zacchini*, which is the one Supreme Court case, the "human cannonball" case. It's an odd case, everyone's laughing, because it really is. It said that was an expropriation for the entire of this guy's cannonball act at the state fair on the local news and therefore it's different. But that was 40 years ago. It's really not that applicable to what we've seen in right of publicity since the 1990s, which has been more of an expansion.

Cameron Myler:

I'd love to turn to Sophie on the right of publicity and athletes and IP issues that are relevant to players.

Sophie Gage:

Yeah, absolutely. The players make, as everyone knows, their money on the field through their contracts. Our whole business, NFL Players, Inc., was really the first of the unions to get together and the players to do and say, "We have tremendous value through our images, likeness, and right to publicity rights, or the IP rights that are based in and rooted in right of publicity. So as Players Inc., what we do is we manage the group licensing rights for players, for six or more players. This is great for players because

they supplement their income; they're able to go out and do all of these marketing and commercial deals, leveraging the value of these rights. I think when it comes into the sports gambling, there's a lot of to-do around this integrity fee.

I think that the bigger issue is we're going to have all these different state systems in place, and if we don't have some sort of bigger legislative body or some sort of regulatory system to make sure that the integrity and the safety issues are monitored and enforced and that there are procedures in place, and I think that's a bigger issue. Frankly, I think from a commercialization standpoint, the money to be made in the space, and I think it's going to be a lot, is going to be on the marketing, the sponsorship, the actual commercial agreements that go into place between the relevant leagues. Some have already done those with casinos, and you see some are more progressive than others in the space in terms of how far are they going to go now that sports betting is legal.

I think this new area will open up a new market and for players, specifically. Data, I think, is going to be extremely relevant. It raises a whole lot of questions, and frankly different areas of law, from right of publicity to when you get into personal health information that is now being collected and could be really, really valuable in the space for many of the different players.

Cameron Myler: How do you think that players can control and leverage all of the data that you just spoke of?

Sophie Gage: Data runs everything, like all of our data and anything that we do with Google, Facebook; it's just being sold. But the difference here is my data that Fitbit or whoever collects isn't valuable; nobody wants to buy that. But in this space, athlete data is valuable and it's being collected through technology and just continuing to grow, and that the data set is getting more and more robust. You can see a world where there are prop bets on everything. There are prop bets for the Super Bowl on what color the

Gatorade that they jump on the coach is going to be, or is a player going to take a knee during the National Anthem.

If you think about a world where there's a bunch of data that is biometric information for these players, how that is valuable for this new industry depends on whom you ask. But that would probably be valuable to set lines, right? Injuries certainly are; how rested is a player, etc. Do you want to have a world where there are prop bets available to this information? For example, a kicker, if there's one second left in the game, he has a field goal opportunity, what's his heart rate? Do we want the world betting on what his heart rate is? I think it raises serious questions—that's personal health information—and you have to really navigate and consider this is information owned by these athletes. What are the different applications of the federal laws and statutes that apply to that versus the commercial aspects of it?

Cameron Myler: Any input from other folks on the panel on this topic?

Mark Conrad: I'll just say I think that the leagues and the players associations do have one point, that what exactly is the information for commercial purpose as opposed to a more general journalistic or informational purpose? Arguably, these organizations are using the data to help people place bets or do daily fantasy sports. Because the courts generally have not distinguished or, shall we say, the distinction between commercial and non-commercial speech has gotten hazier. That's in undertow to some of the issues as well. Is this really purely commercial? Is it not? Is it something that you'd read anyway on a news line or newspaper? That's something that you see a lot of difficult undercurrents and a lot of these right-of-publicity cases. We don't know where the solution is going to go regarding the doctrinal issue as opposed to the economic issue.

Marc Edelman: From a broader standpoint and from a public policy standpoint, I feel what the leagues are trying to do here is grossly unfair. Each of the four premier professional sports leagues, and

let's throw in the NCAA and call it the fifth, have a shared monopoly over their respective market, which is a market of producing games. This shared monopoly has turned each of these leagues into upwards of \$10 billion properties. What they are trying to do is now leverage this shared monopoly over the games itself and use that to generate a secondary monopoly over the gaming market.

The leagues themselves are profiting, and substantially as well, from gaming even without this. In fact, they are not just double-dipping, but triple-dipping. The first benefit that the leagues are deriving from sports gambling is, to the extent that sports gambling increases interest in the sport, it naturally will increase the value of their broadcast revenues and the broadcast rights that they sell on to third parties or, in some cases, self-produce. That's a first revenue stream.

The second revenue stream is not the NFL and not the NCAA, but the other three premier professional sports leagues have been or continue to be direct shareholders in companies that are involved in sports gambling. Major League Baseball and the NHL are shareholders in DraftKings, which is not only fantasy sports now, but has a sports gambling application. The NFL is not, but at least two team owners, Jerry Jones and Bob Kraft, are. The NBA has historically been a shareholder in FanDuel which, like DraftKings, now operates a sports book legally in New Jersey. That's the second way in which the leagues are profiting.

But what they're telling us is it's not enough that they're profiting through increased broadcast rights, and it's not enough that they're now shareholders in these gambling companies, but they're trying to grab this additional intellectual property right so they will be able to keep a share of the revenues derived even from the competitors of the gambling companies of which they're shareholders. Call me a bit of a populist, but I don't think this is necessarily a good thing for sports markets. It might be okay that we have shared monopolies in the games

itself, and there might be efficiencies there, but I'm not convinced it's a good thing to let the leagues leverage that shared monopoly in the games to develop a shared monopoly over the gambling markets as well.

Matthew McGill:

I don't really have a strong policy opinion about the way things ought to be, but I have a prediction about the way things will turn out. I don't think that the leagues are likely to get anywhere with the integrity fee concept. It has been rejected in every state in which it's been proposed. I think that the moment at which states come around to rejecting it is when they figure out that Nevada doesn't pay one and never will, so why should I, New York, pay if Nevada isn't? Am I a second-class state or something?

I don't think they're going to get anywhere with the integrity fee. I think where the leagues are going to monetize sports betting is from the real-time data that only they can provide from their events that will enable algorithmically-driven proposition bets to pop up on your cell phone. It's third down, 10 yards to go, is Tom Brady going to get that first down for the Patriots? There's a seven-second, or approximately seven-second, delay between what goes on in the field and when it shows up on your HDTV. That seven seconds is vital for any algorithmically driven prop bet. I think the leagues will harvest monies from selling their real-time data.

Then my last prediction goes to Sophie. I think that the next big dispute as between players and ownership in their collective bargaining negotiations is going to be how players participate in these gambling revenues going forward, because you can be sure that the leagues are going to do what they can to keep it for themselves.

Cameron Myler:

It seems like Kansas has a bill that is considering some integrity fee. It's the Sports Wagering Act. It includes an integrity fee of the 0.25%, I guess, sports betting right and integrity fee. Do you think—?

Matthew McGill:

The leagues have been successful in getting this legislation proposed, because it only takes one legislator to write and propose a bill. They

have not had great success in having it enacted. The closest they got so far was in West Virginia, where the governor of the state was an ardent proponent of the integrity fee. The governor of the state also owns the Greenbrier Resort, which hosts a PGA event and is like the training camp home for an NFL team. So there was some suggestion that maybe the governor had been influenced by his buddies in the professional sports leagues. If the leagues can get it legislated then, obviously, it will come, it will happen. So far there are seven or eight states that have it legalized, and I don't know if any others are considering an integrity fee or adding one. The more states that don't have it, you would think that somebody would say, "Hmm, I don't, I'm not seeing why we should pay something that no one else is."

Marc Edelman:

I thought the model that was proposed by the Pittsburgh Pirates CEO was the most reputable thing I've seen so far, even though Pennsylvania didn't take it. At present, there are a number of municipalities that play a substantial role in publicly funding sports stadiums. Leaving aside whether that's a good idea as a matter of public policy, or even if that would happen but for the leagues shared monopolies, it does, and that will probably continue to be the case. What was suggested by the Pittsburgh Pirates CEO was that a small share of the Pennsylvania revenues be allocated to the side to be used as money that would be raised by the government to use towards repairs and rebuilding of sports facilities in that state, which I think is at least comparably a bit better, because we know that the money will be going towards something that, at least historically, the municipalities have paid for already. Second, at least it would not be giving the money as a pure grab to the teams in the leagues. It would be allocated as the municipality or the state feels fit, for the purpose they feel fit.

Sophie Gage:

I sort of touched on this earlier, but I think there's so much talk of the integrity fee, and I think there are so many big issues when it comes to the states enacting legislation now that are

going to contemplate legal sports betting. What do you do when—if it's really a matter of integrity—there's going to be all sorts of allegations against players, referees, umpires, you name it, on suspect calls, right? We had a big one and I didn't hear any rumblings of any sports betting involvement, but you have a big call where the refs don't throw a flag and it determines the fate of the game, and now if there are anomalies in the betting activity that would indicate, "Hmm, maybe there's something there." I mean, certainly there's going to be cause to deal with those sorts of issues and investigations. And I think figuring that out and what's the process and ensuring that it's fair. Obviously, my primary interest is the athletes. They're already getting hammered on social media, even in this world of fantasy sports that we have. They have a bad game and they're getting death threats and other sort of things, and it's real. It's funny to think, "Does that really happen?" And absolutely, all the time. Especially in tennis, too, it's a big problem over in Europe.

There are costs providing added security for these things. Whether or not that's an integrity fee thing, I don't know. I think that's kind of where it started and it's really morphed into something else, is it an IP rights fee or is it something else?

Cameron Myler:

So while we're talking about athletes, what, as a players association, what are you doing to counsel athletes or deal with this whole new area that they should be aware of?

Sophie Gage:

I can speak for our league and the rules that are in place for our athletes. The league has the gambling policy in place. Players can't bet on their own sports. Owners can't; neither can club staff. There's obviously information that's very sensitive that they can't disclose to other people because that would be an unfair advantage. For us, the policy hasn't changed. The state of the union is essentially the same when it comes to the work rules. Now, if that changes in the future to allow for maybe commercializing athletes' likeness in this space, then that'll be

something that we'll certainly be there to work with our players on.

I think for us, from a public policy standpoint, we're actively involved in making sure that any sort of legislation passed has those protections for players when it comes to safety, when it comes to integrity, and when it comes to their due process rights of any sort of allegations that may come against them. We also have that balance of the labor law and the CBA and how that comes into place. I think there's a lot of moving parts, but for us, the primary concern is, if this is a more accessible sports betting now legalized, more acceptable, more accessible, what are these different types of prop bets? What does that mean? What are going to be the implications for the players and their family and their safety?

Marc Edelman:

Safety's always going to be a concern because there's some people in this world that do bad things, whether gambling's legal or illegal. As far as the concerns about athletes throwing games, I think the greatest protection that every commercial sports league, other than the NCAA, has is it's strongly against the economic interest of an athlete to do so, given that the minimum salaries in these leagues are approaching half a million dollars per year. This is not the era of the 1919 Chicago White Sox, when Eddie Cicotte was making under \$30,000 and denied the opportunity to double his salary when the owner demanded that he not pitch for the last month of the season to not hit a bonus quota.

The one place where I think there is risk would be in college sports. And as far as the risk, I say God bless the risk. This risk is a wonderful thing. Now, the NCAA finally is at risk of college athletes perhaps having more of an incentive like the 1919 White Sox. The reason for that is they don't have the financial incentive the other way. I think it's great that that's a risk for the NCAA because irrespective of what happens in the *Olsen* and *Jenkins* case that was discussed earlier today, if there is a real risk an uncompensated athlete may theoretically be more likely to

throw a game, perhaps maybe it'll finally lead this cartel of education institutions to do the right thing and allow for more some compensation of the athletes.

Matthew McGill:

On that point—

Cameron Myler:

On the cartel point?

Matthew McGill:

On the “God bless the risk.” The risk, I think is overstated. We’ve had legal sports gambling in Nevada since the 1940s. There was an enormous black market of sports betting that persisted for decades in this country, still persists today in states where sports betting is illegal. The risk has not changed. If anything, the legalization of sports betting is going to minimize the risk of manipulation of games to achieve illicit gambling outcomes. It’s going to minimize that risk because the people who are in the sports betting business have, one, a huge economic incentive to ensure that doesn’t happen and, two, they have the data-driven power to make sure that it doesn’t because they can recognize betting anomalies in a nanosecond and shut down a bet, cancel a bet. They can do all kinds of things that the mobsters never could.

Mark Conrad:

I just want to add to that issue. I thought about that, too, and I know Marc made his points. There are a lot of states where it’s still illegal. And in some of the states where it is legal, like Pennsylvania, there is a huge tax imposed on winnings.

Matthew McGill:

36%.

Mark Conrad:

That’s right.

Matthew McGill:

On the revenue.

Mark Conrad:

Right. That’s huge. And I’m wondering: is that going to really eliminate illegal betting? Because you’re taking a pretty big hit in taxes. All the states have imposed certain tax levels. In New Jersey, mobile bets are one level, and I guess bets in the casinos and racetracks are another level. But there’s tax and, of course, an eight-, nine-, or ten-percent tax is not so bad, but 34%, 36%? Hmm. Then, are the bookies going to be out of business? That’s still a question.

Number two is that even if the NCAA is out of business, and we create a model that may

reflect more on the proper economics, you still could bet on the volleyball team which is not a big revenue sport. Nothing to stop that and pay volleyball players under the table if their point spreads. I don't know how it works in volleyball; if anybody does, certainly let me know. But let's say there is something like that, bet and tell the students, "We're not telling you to lose, but we're telling you to not win by that much." It could happen in potentially any college sport. It doesn't have to be just in basketball or football. So, I do see a certain concern that could continue no matter what happens in *Jenkins*, because many of these athletes, even in the ideal situation, are simply not going to be paid. Fordham athletes are not going to be paid. We're not in that level, but could we bet on Fordham games? I don't think I could or would, but one could. Still, the market could still be there, the concerns could be there.

Matthew McGill:

But the concerns haven't changed, right? The concerns were there. I guess, that's the point I would've wanted to make is that the legalization of sports betting, to my way of thinking, has not increased the risk, it's just shifted the risk from a black market where you have no visibility into a regulated legal market where regulators can exercise and monitor things. I think that actually reduces the risk of integrity. So that's another reason why I've always thought this integrity fee concept made no sense. Why not impose the integrity fee on the mobsters, not on the legalized sports betting?

Sophie Gage:

Illegal sports betting has always been around, so what's different now it's legal? And I think the idea is that people who have their bookies are probably going to stay with their bookies. Why would they shift to a legal system unless it was *that* much more convenient for them, or there was some value for them to do that? But if now you have people who were non-bettors before, now have a bigger stake in the game.

Sophie Gage:

And I think if you just look at the way fantasy football has made the fans that much more rabid because they have a bigger stake in the

game. When Odell Beckham misses a pass, they're mad at him. Because of him, they lost their fantasy matchup. And now, you're bringing money on to the table with folks that may otherwise never had been bettors before but now have this available to them. If it grows, as some folks will say the industry will, then I think it has to have an increased risk, at least when it comes specifically to player safety and threats and integrity of the game. And if nothing else, just public perception of them and how their play is impacting these individuals who are now invested on that different level.

Matthew McGill: I don't know that I agree. I think if you look at the experience of states that have, for instance, legalized marijuana, those customers are not still going to their old drug dealers, they're going to the legal dispensaries to get their marijuana now. So I don't think it is true that people will continue to use their illegal bookies when there are legal channels available that are basically at the same cost, unless there's a humongous tax effect that would create an economic incentive to continue to break the law. I think people, probably the vast majority of people, will move over to legal channels.

Matthew McGill: The question about "there are new entrants to the market. It's basically going to cost more volume of sports betting." That undoubtedly is true, right? Just if you legalize something, you're going to get more of it, but who is doing it? I go down and place a bet on the Chiefs-Chargers game in Atlantic City, am I really a threat to the integrity of the game? I think that the new entrants to the marketplace are really not the people you need to be worrying about who are going to be fixing games. Certainly, the last place you would go to fix a game is a casino regulated by the State of New Jersey. It's like the dumbest thing you possibly could do.

Marc Edelman: Could I come back to Sophie's point for a moment? Let's say everything you say is accurate, and I have no reason to take a view, that the proliferation of fantasy sports in gambling is making certain players feel more threatened, that players such as Odell Beckham, Jr. might

enjoy playing in the game less under the current conditions with gambling, and that some players may be, once they make a certain sum of money, more willing to walk away from the sport due to the new conditions. Let's presume all of that's true. The suggestion that I'm still hearing is that a share of the revenues from gambling, which are revenues otherwise that would be given from the state, should be taken away from the state and given to either the league or the players union, the players.

Now, my argument—if everything you say is true, that the playing of professional football becomes less exciting and thus players are more willing to walk away because they don't like the conditions, shouldn't that be something that the players union bargains for in terms of additional compensation or protection from the league in the terms of the collective bargaining negotiations? If you need to pay the players more to get them to want to play under these conditions—and the league is already profiting from sports gambling as owners; some of them in your league own DraftKings—wouldn't it make more sense for the players to negotiate for more money in the CBA and have that taken away from the teams than to take it away from the states?

Sophie Gage:

I think we're talking about some different things here. I mean, for the integrity fee, first the leagues have come out and have really advocated that position. I think if the leagues are going to get an integrity fee and it's actually to maintain the integrity of the game, we'll deal with that split between us and the union from the CBA side. From a player, I don't think we're talking—now that gambling's legal—players aren't going to want to play in the game. Some don't want to be involved with it. We know that. But all of the disciplinary procedures and everything will be dealt with and currently are under the CBA. States could also have their own, which I think is an interesting that we're going to see is if state A, B, and C have all of these different rules when it comes to investigating nefarious

betting activity and then they conflict with one another and they're certainly costly.

The point I was making with regard to the safety of the players is fans know where players live; fans know where their families sit in the stands. They know that they can get in touch with them now via social media. I'm not saying that the integrity of the game is now jeopardized because there's new bettors coming in and going and throwing games or bribes, which of course is an issue. It's more the actual physical safety of these players; they're just more accessible in this day and age, and there are going to be costs to make sure that there are actions taken to make sure that the environments that the players are in are safe. And if there are threats, swift action is taken against these people who are now much more invested.

Matthew McGill:

I couldn't agree more that players need to be protected from crazy fans, and I think that applies whether they're crazy because they lost a bet or they're crazy because they're crazy. They should be protected from crazy people. I think that we can all get behind that.

Cameron Myler:

Sophie, you have a big job.

Matthew McGill:

My brother, particularly.

Cameron Myler:

Maybe a few quick comments and then we'll kind of wrap things up.

Marc Edelman:

I was just going to say, again, I think we all agree that the athletes need protection from crazy people, for lack of a better word, just to continue using what was being said. But we still have two presumptions here. One is that somehow an additional sum of money will make the athletes safer, which may or may not be true. And second, that some of the money, if we're saying it should come from an integrity fee or a tax or anything else, should come from the state or the municipality as opposed to be coming from the league. And it's really that second point where my substantial disagreement comes into play.

Mark Conrad:

One point I just want to add. I think we all agree on the basic point of player safety. But from the point of view of the companies that do business in the state, their profit margins are

very tight. Gambling is a business that, contrary to some popular belief, the money doesn't come rolling in as profits to these companies; they have to pay winners, and the average margin that I've seen is about 4%. So, the companies are saying, "Look, we're paying a licensing fee to operate in the state." And Pennsylvania, in particular, has a humongous licensing fee, like a million dollars—some ridiculous amount—right away to pay for how many years, I don't quite know.

Second, the issue is, you tack on these other fees, is it viable even to run the business in that state? Even in Nevada, which is the mature state and has been in the business of gambling for a long time, the profit margin issue has been one of the concerns that companies have said. While these are all good from their point of view—may not be mine—their point of view is saying, "Look, it's all well and good, integrity fees protecting players, et cetera. But how are we going to end in our business? What's our business going to look like if we're really shaving down what is, even in the best circumstance, a fairly limited profit margin?"

Cameron Myler:

I think we started our discussion about the integrity fee in the context of it being somehow related to intellectual property rights that the leagues may or may not own, which seems like we've all concluded [that they] may not own. I'd be curious to hear from all of you: what are your thoughts as we go forward? Will the law evolve? How do you see IP rights intersecting with sports gambling going forward?

Mark Conrad:

I think that on the right-of-publicity side, we're in the midst of kind of a struggle to get an unwieldy doctrine under some control, but if you asked me ten, eleven years ago, I would have probably said that this information would be protected given the thrust. I think right now it's going to be very difficult because we do have some precedential opinions in different jurisdictions saying that there is more of a free-speech-ish protection. Ultimately, on the law side, I think we have to federalize this particular area, this particular property right, come up with

some kind of more workable standard so we don't have kind of a statewide lottery of what state you sue in and seeing what can go right or wrong in that area. And I think before that happens, we're still going to see a lot of pulling, tugging, straw man drawing in this particular area. I think it's going to be tough on the IP side for the leagues and the athletes on this information, but you never really know if maybe a state or two is going to enact new laws that may decide to protect it or limit exceptions.

Marc Edelman:

I think the leagues will ultimately get control of the data, but I certainly hope it's done in a legal and ethical way as opposed to a money grab. And two ways that I think the league can get ahold of the data in what I would consider to be a legal and ethical way is first, a ticket is a license to attend a sporting event; and that license could be terminated if you do one of several things. So the leagues are certainly within their rights on the back of the ticket to say that you may not come in here for the purposes of retransmitting data for a commercial entity. And they could certainly play the game of whack-a-mole and remove people from the facilities that they find violating that. And that, to me, is a legitimate way.

The second thing is, within the world of intellectual property, we promote innovation. And if the leagues are able to capture their data better than third parties and are able to offer superior data than third parties can, they will win in the marketplace without any additional protection. So one of the many reasons why I am so opposed to giving the leagues a monopoly right or some control of the data is, by not doing so, it's going to force the very intelligent executives at the teams of the leagues to come up with a way of securing data quicker and better, providing more useful and interesting data, and being able to forward and backward integrate in a vertical manner in a positive way such that their adding to the gaming experience, as opposed to just monopolizing it based on a right they already have.

Sophie Gage:

I agree with Marc on that. I do think that this going to be handled probably not in the courts as much as it is on the commercial side. It's supply and demand and who has the more valuable data. From a right-of-publicity standpoint, it's a really interesting world we're in now when you see cases [about] whether or not you have property rights in dance moves. And here, we could go into a world of certain types of personal data. Obviously, we already have—it's not going to be a new area, personal health information is already covered—but this other sort of new sphere of data may not necessarily fall into that landscape. Is that going to be covered under these archaic right-of-publicity laws? Again, you're looking at it state by state, who knows? I think it'll be interesting, but I think that what works out commercially will probably, in most of these scenarios, be more impactful than the state of the law.

Matthew McGill:

I think that is basically right. I think that the leagues' best hope to have an intellectual property right that is protected under federal law, as it now exists, would be to create some work that recaptures and basically re-characterizes the real-time data of the sporting event. You could call that new work, a copyrightable work, maybe? But I think the more fundamental point is maybe intellectual property rights really aren't nearly as important here as just the basic fact that they have the ability to provide something in real-time data that is really, really difficult to put together at the scale necessary to run an algorithmically generated proposition bet business.

That is where sports betting is headed—bets that pop on your phone, “Bet \$5 to win \$10,” and that happens ten times a game. The leagues are the ones that can provide that data stream that powers that betting system. The leagues are going to share in that profit and then the players are going to have to negotiate how they share in that, too, because, obviously, without the players, there ain't no games; then there ain't no bets.

Cameron Myler: I think we're about out of time. So I'd like to ask you all to join me in thanking our panel.

PANEL 3: THE REGULATION AND EVOLVING ROLE
OF THE AGENT

Jodi Balsam: Okay, welcome, everybody. We have a very impressive panel here, today. I want to do just brief introductions of our panelists. We're going to talk today about the regulation involving the role of the sports agent, and we have, in order here, Robbie Guerra, he is the assistant general counsel at Major League Baseball's Players Association since 2011. Before then, he spent seven years with the NLRB, the National Labor Relations Board, as a field attorney. He's our labor law expert of the day.

We've got Bobby Barad, who's an attorney-agent with Excel Sports Management, he represents primarily major league baseball players, including some of the greats, one of my favorites, Robinson Cano, who was on your roster at one point?

Bobby Barad: At one point, yeah.

Jodi Balsam: Yep. Then we have Charles Grantham. He is, currently, runs the sports management program at Seton Hall, but he's the former executive director of the National Basketball Players Association and he's responsible for establishing the league's four historic CBAs, collective bargaining agreements, between the years 1980 and 1995. He was also a creator of the NBA Players Association's agent regulatory system, something we're going to talk about today. And since leaving the union, he's been representing some of the biggest stars in the game and he's negotiated collective bargaining agreements in other sports as well.

And then we have Jim Duquette, who is a baseball analyst at Major League Baseball Network and at Sports Network New York, but you probably know his name from his years as a front office executive at Major League Baseball teams including the Baltimore Orioles and the New York Mets.

So I want to start by asking our panelists, first to explain from their perspective, how their role in the sports industry connects with the role of agents. Obviously you're an agent, that's one thing, but where do you see your perspective, your interaction with sports agents?

Robert Guerra:

So, Robbie Guerra here. Over at the Players Association, we see our role with agents as being partners and jointly representing the players. We are constantly in communication with the agents. They're our eyes and ears and they're on the ground talking to these guys every day. So, our role is sort of to work together in best representing the players, not just in salary matters, but also in protecting and enforcing their rights under the collective bargaining agreement and pushing those rights forward in the future.

Jodi Balsam:
Bobby Barad:

Go ahead, Bobby.

Thanks. I'm Bobby Barad, Excel Sports, and I am one of the agents that is regulated. We work very closely with the union in not only the day-to-day important matters to the players, but we work in a very competitive industry and there are fine lines between competing and potentially crossing the lines that we think do need to be regulated, not only from a competitive balance, but also for the benefit of the players. Because it's a small industry and, I think, even the panelists, it hasn't come up in any of our conversations; it's a small world. Teams know about what's going on. And, if one agent is doing something that potentially could impact a player, and the team wants to use that in conversation with that other agent, these things impact the players and that's our main goal—to make sure that the players are protected for all their best interests. So, I do think it's important, regulation, both from a direct standpoint and from the indirect aspects from the players.

Jodi Balsam:
Charles Grantham:

Professor Grantham.

Charles Grantham. Well, I'm able to look at it from a little different perspective now that I'm, A) not an agent any longer; and B) not affiliated with the players union. When I first started, in order to be an agent, you just needed a client. You didn't have to have any qualifica-

tions, you just had to go get a client. That's changed over time, responsibility of educating agents to best represent their players with the union and over the last, let's say, two decades, unions have lost ground in this whole area of collective bargaining and are losing a fair percentage of gross revenue. And the only way that can improve is if you have the agents and the union working together.

Unfortunately, once these unions, particularly in football and basketball, went to a rookie-wage scale, it really did reverse the opportunities of agents to earn a living and, therefore, that tension between union and agent in football and basketball has changed over the years. So much so, that the last time that I think I read an article in *Sports Business Journal* where the agents in football were going to create their own association, a trade association. Now, it's pretty clear that the unions have the right, if they so choose, to negotiate every single player's contract. It wouldn't be practical. It certainly wouldn't give the players their continued right for individual negotiations. So, some of the things I will share today, I think will be a little different than the gentlemen here because they still work in the field and I get the opportunity, that I don't work in the field, to criticize them.

Jodi Balsam:

Can we hear about the front office perspective?

Jim Duquette:

Yeah, from the front office, the perspective's obviously a little different as well. I'm not in that any longer, so I try to have a little bit more balance than I used to. Bobby and I have negotiated many deals over the years. It's been a while and I've actually, I think, might have helped negotiate a deal when I was in my current role with my contacts.

But, primarily, really my front office days were during the years where Major League Baseball and the Players Association were really most at odds and, during the strike years, it was kind of the start of my front office career. But there still was a lot of distrust there. Then I became really good friends with Michael Weiner, who obviously passed away several years ago, but I

considered him, and still do, a friend of mine, and he was the guy that educated me and gave me the balance. Because it used to be—more from a front-office side—almost confrontational, the tact that you would take when you're negotiating these deals for players. They had player acquisition and talent that we wanted and, so, for the most part, it was a balanced negotiation, but there were times it would become hostile.

But, to this day, there's still, including Bobby, a lot of my friends in baseball that are player-agents. And they've reached out to me in the past, and still do, for advice on certain things. So I'd like to be able to, I think, have a little bit more balance to this as well, like Charles does, in terms of the role of front offices and the agents.

Jodi Balsam:

So, a little bit of background for the audience. Sports agents are regulated under a couple of federal statutes, and there are some state statutes, that regulate sports agents. But in fact those statutes are not the most salient form of regulation of sports agents. The unionized sports entitle the union to be the exclusive bargaining agent for the athletes, for the members of their union, and they, at their option, can delegate that authority to individual sports agents and can choose to regulate those agents in the way that they see fit. So, there's a question for the panel on whether the player union's agent regulatory system is calibrated these days for the right incentives, to incentivize agents who are willing to put in the work for the athletes for a fair return, versus feeling that the regulation might be a little punitive or disincentivizing?

Charles Grantham:

Well, I know these guys will talk baseball, but I will say, again, I go back and point out that if agents were able to make a maximum of four percent on a deal and the union negotiates a rookie wage scale which requires that they sign a contract for five years, can an agent make any money on five years? It starts out as a rookie wage scale; it ends up as a veteran's scale. So in terms of incentivizing agents, that is not going

to incentivize an agent by creating a rookie wage scale. The more scaled, the less money agents are able to earn. That, I think, is really a critical issue for both football and basketball who do have wage scales for rookies.

Jodi Balsam:

A little bit by way of background—in football, currently on the player contracts, agent's commissions are capped at three percent. In basketball they're capped at four percent. But they're not capped in baseball or hockey. Can you explain that for us and what incentives it has created?

Bobby Barad:

I'll talk for a second, Robbie. We don't have the issue that Charles referenced in baseball. From our perspective, agents can charge what they want, up to five percent. And I think, at least from a competitive landscape standpoint, we charge the max and most of our competitors do. So, every once in a while, from a competitive agent standpoint, the fee structure comes up, but it doesn't come up often.

Bobby Barad:

I think the bigger issue that we face as an industry and, fortunately, I'm not and we at my agency were not in that position, is in baseball, you get drafted; you enter the system as a very young player, you might get a little bit of money at the draft and then truthfully it might take five, six, seven, eight, nine, ten years until your agent is going to be able to impact what your earnings are, and, in turn, charge a fee. There's nothing that ties you to that agent and ties your protective rights as an agent so you can, and it happens often, work five, six, seven years, have a close relationship, support them from a tax perspective, from an equipment perspective, from an emotional perspective—whatever it might be—and then, down the road, when they're about to sign a deal, they have the right to go and fire you and hire whoever else it might be. And that other agent doesn't get anything for that.

Bobby Barad:

So, often you'll find agents who could be very good qualified agents and maybe do a great job, they don't get the opportunity to. But they work for seven or eight years, it costs them

money and they get zero when it comes to income.

Bobby Barad:

So I think, from a regulatory perspective, it's been an issue and I'm sure you guys get a million complaints, and there's been changes since I've been an agent. Now, however, if you talk to a non-client, you need to disclose it. So at least they keep track of it a little bit, where it used to be that everybody was out there and the job was to go and take other peoples' clients. They've done a better job, but I'm sure you still get a lot of complaints about that from, usually, smaller agencies.

Robert Guerra:

There's no doubt. I mean, that is a real problem in that you could be representing someone for a number of years and you're not going to get a fee if he leaves you right when he's on the brink of free agency, for instance. An arbitrator of ours who once couched it in a grievance decision that being an agent carries a lot of great risk and great reward, specifically when you're working on a contingency basis. The alternative is choosing an hourly rate, but it's not going to be the same amount of reward.

Robert Guerra:

But we do get a lot of complaints, and we do have this now where agents have to report their communications with clients. We don't share that broadly, but it's something internal that we look at. We also require, if a player's going to change agents during the off-season, they need to communicate with the Players Association and have a consultation so we can discuss why are you changing horses at this point, and the risks inherent in that, including litigation. Because an agent may start negotiating an agreement for you, and you might find yourself in a *quantum meruit* or an unjust enrichment case or a breach of contract case. So we have those consultations. We're constantly trying to think of ways to create incentives for agents to represent those players the best.

Bobby Barad:

Bless you.

Robert Guerra:

And we talk to agents all the time about those ideas and we talk to players as well about that, and how we can amend agent regulations

to create a better situation between agents and the players.

Jim Duquette:

That's important too, from the front office perspective. There used to be a strategy, and I don't know if it's as prevalent now, used when some of the younger, inexperienced agents represented players where the teams would try to take advantage of their inexperience. I know the union spent a lot of time trying to help out in certain cases, but a part of that was the fear that these young, up-and-coming agents would lose their player when it was time for them to get paid—not just with the player getting some life-changing money, but the agent would get the necessary money early on as he's just starting out. So it seems like that's gotten better, but it had been an issue for quite a while from the team side.

Robert Guerra:

Yeah, that's definitely an issue we definitely look at.

Jim Duquette:

Yeah. Right, sure.

Jodi Balsam:

So, with rookie and even more senior player wage scales and some certainty or predictability in what an athlete's going to be paid, I guess the idea is that the value proposition in the agent's offer is not as strong anymore, at least as it concerns the playing contract. But what about all the other things that agents do? Is there a way to sort of make up for these somewhat punitive regulations of agents with respect to negotiating the playing contract by the way they represent them in other areas of their business? What other services can, or should, the agent be providing here?

Bobby Barad:

I think it, again, speaks to the competitive landscape more than ways that agents can monetize those services. I know from our perspective we get paid for negotiating contracts. That's probably one tenth, at most, of what we do, if you look at the time spent in representing athletes. And a lot of that we used in our competitive landscape of saying, "Look what we do for you guys. We really take you in, we act as your CFO, your COO, your CEO, treat you like a business." For a lot of guys, when you're young and you're upcoming, there might not be opportuni-

ties that present themselves; but for a lot of the big stars, there's a lot more to it—concierge services, helping you ship your cars, helping you get a new apartment when you're promoted from one level to another, or getting involved with your family.

Why do we do that? It's part of what we do, and it's an investment we make in the opportunity for down the road to continue to have the opportunity to represent these players, and to bring value. It's not part of the business model to monetize it, we don't charge for any of that. That's, again, an investment of our time and our resources and our dollars for down the road.

Robert Guerra:

Also, some of these agents provide, you took out some of the services you provide. I was thinking myself, who also work of nonprofits like helping agents, players, sub their own nonprofits. We've done a lot of that work. Training, helping out with training during the off-season, hooking them up with the right kind of strength trainer or nutritionist, marketing work, legal help, tax help. Not just Excel, but a lot of the agents will try to set themselves apart from other agents with these sort of services. Excel does a great job of that.

Bobby Barad:

But not as a revenue-generating part of our model.

Robert Guerra:

No, no, not at all.

Bobby Barad:

Strictly a service part of our model.

Jodi Balsam:

Are there other aspects of your model that do generate revenues outside of negotiating the player contract?

Bobby Barad:

We get fees from two areas. We do baseball, basketball, and golf, and we have other parts of our business. From the player representation standpoint, we get paid for negotiating the team deal and for a good portion of marketing revenue that comes in. Typically things that are not completely standard, places where we bring value. That's it.

Jodi Balsam:

So, what is the agent's role during the collective bargaining process? I've heard from Charles about how the collective bargaining results of the last few deals in some of the sports have carved out agent influence. Are agents

influential during that process? How can they be more so? Should they be more so?

Charles Grantham: Well again, it goes back to balance and power and control. Wages, hours, and working conditions, and to negotiate those collective bargaining agreements. I've always believed that you need the agents there in the field. They're actually doing the legwork in the trenches, so to speak, and at one point we had an advisory group of agents which we worked with to create a bargaining strategy and create our wants and needs, etc.

But once you go to wage scales, I can't emphasize that enough, once you create a scale, a super-max contract, a five-year rookie wage scale, for those who represent those young people, they're not able to cash in or get a return on their investment until the second contract. And usually the practical side of what happens, certainly in basketball and football, is that the larger agencies sit back and wait for the second deal and steal the player. The smaller agencies have a cost item. How am I going to hold on to this player until his second contract is due? I got three years that's a cost factor for me.

Jodi Balsam: A number of the players associations have been regulating what I'll call anti-poaching. You've described some of baseball's reg[ulation]s that mostly seem to require disclosure about communications with players who are not your clients. I know in some of the other leagues it's more than disclosure—

Charles Grantham: It's a 30-day notice.

Jodi Balsam: Right. But during the pendency of the contract, until the 30-day notice period, you're not even allowed to communicate or try to poach somebody else. Are these effective?

Charles Grantham: Well, it's pretty interesting. I think I saw a headline this morning, "Was LeBron James Down at Duke Recruiting Zion?" Because his agent is looking to recruit the best player in basketball. And all of sudden LeBron ends up, or, shows up at a Duke game. Are there conversations between the two of them and is he setting up his agency to recruit Zion?

- Jodi Balsam: And, more importantly, will the NBPA investigate and discipline under its agent regulations?
- Charles Grantham: I haven't heard anything yet about that.
- Jodi Balsam: So, that's a question for the whole panel. How effective are these players association agent regulations? We see in some sports there tends to be more activity, more aggressive enforcement in disciplinary measures. The NFL is probably a decent example of that.
- Charles Grantham: Well, unlike the NCAA, we don't really have an investigative staff. That's the first thing. So it's not like you have people who go out and say, "Follow up on this particular instance." So, it's very loosely handled and managed. Is that an issue? Yes, it's an issue.
- Jodi Balsam: Does baseball's Players Association have resources dedicated to investigating and enforcing their regulations?
- Robert Guerra: Well, we raised our fees recently, a year or two ago, and then we took that money and then we hired an outside investigation firm. Quite some people know this firm, but I'm not going to name it because, just in case.
- But we have an outside firm that we use to investigate a variety of different agent regulation matters, including matters involving poaching. And it's been successful, in some cases, to help us catch bad actors, but also in other situations, to ferret out that there is nothing there. We don't announce our discipline, so you'll just have to take my word for that.
- Jodi Balsam: And why not? Why not announce the discipline? What's the theory behind that? Wouldn't it be helpful as a deterrent?
- Robert Guerra: Sure, we've discussed that internally. We've actually discussed that with other agents. We have our own advisory panel, and we sat there and I went down and read a list of recent discipline, and they went from "we should definitely go and announce this" to "this is probably not a good idea to go and announce this information."
- Jim Duquette: It's a small industry though, so whether it's announced to the public, pretty much people within the industry know if someone's been dis-

ciplined or been punished. That usually isn't kept a secret. It does have its way of serving a purpose, I think.

Bobby Barad:

There's another perspective here too, and that's the perspective of the player. And, I know that the union in baseball, they ask the players, "What do you guys want, from the agent perspective?" Because some players hate it; they hate everywhere they go. There are agents in the lobby of the hotel, and they're talking to whoever they get. But there's also an opportunity to educate them. And in an industry where there's much more of a barrier of entry now than there used to be, as Charles referred to and in baseball for sure. But there still is a very big difference between agents that need to get certain deals done to get their bills paid, and agents that can take the big picture view and simply apply the rule of what's best for the client, and educate the client.

Bobby Barad:

I think players, there is maybe a collective thought that they don't want more restrictions on poaching if it allows them to at least hear and educate themselves, as long as it's done the right way.

Jodi Balsam:

Right. More information is good. So, I want to pivot a minute here to something that Charles mentioned, which is another regulatory body beyond what public statutes exist out there and unions regulate, which is the NCAA.

The NCAA and the role of the sports agents have been in the news lately in a couple of ways. People may be aware that there's been an anti-trust lawsuit lodged against the NCAA to have them loosen their amateurism rules to permit college athletes to be compensated in some form, or to have more freedom of movement from university to university during their college careers. And then of course, there's been the recent prosecutions in college basketball of a kickback bribery scheme involving apparel manufacturers, shoe manufacturers, agents, and coaches to steer high school players to certain universities. What's the impact of the NCAA regulatory authority on your businesses and your perceptions of agents of the future now?

- Charles Grantham: I'll kick that off. I read that the NCAA and various committees would like to, in some way, regulate the potential fraud schemes that we see. One of the remedies that they are considering is allowing student athletes to have counsel. It seems to me that if you were really interested in somehow detecting this fraud, and dealing with this misbehavior, then the partnership that they should be looking to create is with the various unions. And the reason I say that is because the NCAA does not have subpoena power, and it's the subpoena power of the unions that can actually enforce the behavior of agents. So, instead of looking to create sort of an open house for counsel, if they really wanted to get to the bottom of this, they would go in with the unions and start subpoenaing agents who would be misbehaving on the college level.
- Jodi Balsam: Just to clarify, your suggestion is that what the NCAA should be doing is partnering proactively with the professional athlete unions.
- Charles Grantham: Yes, because they control the agents.
- Jodi Balsam: What's the union's interest in that sort of partnership?
- Robert Guerra: We don't really have the same level of issues regarding the NCAA that you find in basketball and the NFL, so it's not really an area that we have to deal with very often or one that we can deal with. Obviously, we can't deal with it because we don't represent those players. We're not the exclusive bargaining representative for those players, so legally we can't even get involved in that area.
- Jodi Balsam: We've already heard from the NLRB, at least for the moment, that they don't believe college athletes should have the ability under our federal labor laws to unionize. We know from the Northwestern football team's attempt to do so and that was a nonstarter. So, short of having a collective organization like a union come in and even the playing field in terms of negotiating with the universities for college athletes, should there be a greater role for agents at the college athletic level?
- Jodi Balsam: Right now we know that the NCAA considers it a violation of their amateurism rules for

college athletes to have representation, to have agents, except in some very idiosyncratic exceptions. Are agents interested in being more involved there? Should they be?

Bobby Barad:

Our issues in baseball might be different than the other sports, but I'll tell you that I understand the concept that the NCAA wants to control college sports. And at the highest level, the first thing that pops up is, we bring in so much money to our universities, we should get paid. There are a lot of issues that are simpler that, honestly, they're idiotic. I'm going to give a story and I referenced it, too, in speaking with Jim. Probably 12 years ago I was working with baseball players, and when they're in high school or college, if they're eligible for the draft, they have advisors. That means we're agents without signing contracts, without getting paid until we do our job.

Robert Guerra:

Technically, you can't even talk with a team.

Bobby Barad:

I think in furtherance of a deal—yes. But I went to a high school game in North Rockland, up in Rockland County, of a young guy, great guy, from the Dominican Republic, was living with some aunts and uncles in a home with about fourteen or fifteen people. There were a bunch of scouts there and we had a conversation. After the game, I was going to go back and sit with this young man and just talk about things. So I got in my car after the game, it was a fall night, it was a fall baseball game and it was chilly, and I drove to his home and I waited for him to walk a mile. Because if I drove him home, it would have been equivalent to me giving him taxi fare, and that's because of the NCAA. That can't be their intention. I speak directly with the guy at the NCAA who oversees baseball; they struggle with that too. They don't know how to communicate what they want. They know they don't want the bad things to happen. That's essentially what it comes down to, but what that really means is they don't know, they can't codify it, and because of that, things like this young man having to walk home happen.

Bobby Barad: So, there needs to be a lot of improvement in, I think, the way that they govern. And that's a small level. Charles talks about it at the big level.

Charles Grantham: Again, I go back to the NCAA sham. This is all a sham. The reality is, this is big business. We talk in my classes about the business of professional sports. And the business of college sports, particularly the Power Five conferences. If they can distribute \$41 million to each school in a conference, guess what, this is about making money.

So, should a young person, at eighteen or nineteen, who has this unique talent, should he be allowed to have counsel? And the answer is "yes." I was telling the panel before we came out. In 1983, I testified in the Judiciary Committee for Herschel Walker. Herschel Walker was the best football player in the country at that time in 1983. The question was, the USFL had just started and they were offering him a multimillion-dollar contract. The NCAA was infuriated. And what did they do? They somehow persuaded a few of our Congressmen to have a hearing on the subject of whether or not Herschel Walker should be able to leave school and make a multimillion-dollar contract. It makes no sense.

That was 1983; this is 2019. And we haven't changed that. That's because of the sham of amateurism. I know they had a panel this morning on amateurism. Sorry I wasn't here to talk about that with them because it's a sham. It's as clear as day, a sham. If a college coach can make \$8 million, Coach K can make ten, Lou Saban can make \$10 million, and room, board, books, and tuition is what my star player gets. That's not balance, and I begin to question the integrity of our faculty and administrators at these Power Five conferences. Something has got to give. And I'm the first to say that if I were LeBron James' agent, I would tell him to call up every single player that makes it to the Final Four and tell them not to play, and this whole problem would be resolved.

Jim Duquette: On the baseball side, I'll give you a perspective, what we did and why baseball players, ama-

teur players should have representation. We sit in a room; we rank the players—amateur, high school, college—throughout the country. We rank them one to 500. And by talent. You know what the next question is? Their signability. Our amateur scouts are going out and they're asking, "What can he sign for? What will he sign for?" Guys go up and down on the list based on their signability because, sometimes, the talent level, at least in our room, isn't all that great. If they don't have representation, it's a very difficult situation. Our scouts are trained in negotiating with these families. Families are just making sure they're doing the best thing for their child, making sure they get to college. But a lot of times they're not prepared to have thirty different teams and thirty different scouts come into their house and ask them all these questions and ask for a personality profile test and, by the way, "What would your son play for if we signed him in this round?"

Jim Duquette:

It's gotten better, there's more public information out there. I don't know how much information. I'm sure, Bobby, your group would help give that information. But not to have somebody to help sort out all that information, it's really ridiculous. And there are opportunities from the team. The team, a lot of teams will take that to the nth degree and really try to put the screws to the family and make these one-sided, final offers, take it or leave it. You're talking about a kid whose dream is maybe to play at the Major League level, and there's a lot of money that he's never seen before. And, "by the way, we'll pay your college tuition too." Then they're like, "Okay, yeah, let me sign." Really, without the representation, they're leaving a lot of money on the table.

Robert Guerra:

Wise decisions are made before the draft happens. All these discussions happen before the draft happens. Under the NCAA rules, you cannot have a representative during those negotiations. So these players are making life-changing decisions without any representation.

Bobby Barad:

But they're not. It's just the NCAA.

- Robert Guerra: Or, if they are, they're risking their amateur eligibility by engaging an attorney or an agent to help them out. So, they're risking their livelihood here, because if they don't get drafted or if they don't get the deal, and they don't have the amateur rules, amateur eligibility, they're not going to be able to play next year. It's just absurd.
- Robert Guerra: They're also being asked to do a variety of medical testing, send it to different kinds of testing. They should have representation make those kinds of decisions for them.
- Bobby Barad: I have two points for this. One, how many people here, if you have kids or even if just for yourself, would sign a HIPAA release form when you're a sophomore in high school, saying you can talk to any one of our doctors at any point for now, and by the way, it's indefinite? There are real root privacy regulations that regulate that. But, that's what you have to do, and we step in to try and help that.
- Bobby Barad: When I was just starting representing baseball players, I had the benefit of working with Christina Aguilera, and this is before anyone knew who Christina Aguilera was. I say that, and it makes me think, "How many of these eighteen, nineteen, and twenty-year-olds from the Mickey Mouse Club entered into their record agreements by a record executive walking into their house and talking to mom and dad, and not understanding about royalties, and about future earnings, and so on, without the benefit of having an attorney or somebody who at least was familiar with the industry to help give them true guidance?" That seems obvious to us, right? What's the difference? I don't see one.
- Charles Grantham: None.
- Bobby Barad: Yeah.
- Jodi Balsam: We have three folks on the panel who are very much involved in baseball and can't miss the opportunity to ask about what's happening now in the free agent market. What should agents be doing? Where is their opportunity for each constituency in baseball? What do you see the outcome being of this current round of slow movement in that market?

Robert Guerra: I myself cannot comment on these sorts of matters because, obviously, these are ongoing matters. I will say we work very close to the agents and, as I mentioned earlier, they're our eyes and ears. They clip information. They provide some information about different trends out there. But it's really the extent I can discuss it, just because it is an ongoing matter for the evening.

Bobby Barad: I'm going to say a very similar answer other than—I really enjoyed listening to Jim talk about it on the radio! So, I'll defer to you.

Jim Duquette: Are you going to defer to me too?

Bobby Barad: Yep!

Jim Duquette: Okay! I don't have the limitations that they do. I understand what their limitations, so. A lot of this is based off of more public information, but being in the industry. But there have been some changes over the last couple of years. I'll look at it from a team perspective first.

From the team's perspectives, they're valuing players a little differently, what they project them to be. A lot of times, if you are signing a player, it's what they had done, what they had produced. And then, of course, there's, what they're going to do in the future. Now, it seems that their evaluations have been much more focused and disciplined on what they project moving forward. They're using a lot of different algorithms, including, a big part of it has been, the age, and seeing these regression studies that each team does. There are a lot of similarities in their studies. Therefore, talking to people in and outside of the negotiations, there are a lot of similar offers that are thrown out there for players, and there is a lot of conversation behind the scenes on that type of stuff. It's gone on for the last two seasons it seems, but, they're starting to go in this direction, I feel like, three or four years ago even.

There was a lot of talk on the Major League Baseball side that last year was an aberration, that the conversation was, there was several teams that were trying to bring their payroll below the luxury tax so they didn't have to pay. The Yankees were paying a 50% tax on every

dollar over a certain amount. Same thing with the Dodgers. So, they're trying to get below that, and there's a reset in the CBA. But those teams are, seemingly this year, sitting on the sideline as well and not wanting to go over that tax, as well as other teams. Even though we don't have a luxury tax on our sport, it's kind of serving as one, or seemingly serving as one. So we've had some of that.

Jim Duquette:

We've got, I would say, eleven teams in the Major Leagues right now that are rebuilding. You could use the word "tanking." MLB cringes at tanking. They don't like it when I use it on the air. They don't like it when anyone on our channel uses it on the air. We usually get a phone call if someone's listening. But there are a lot of teams that are tanking right now and not trying to win. The CBA benefits them with certain dollars and amateur draft. The pool of money is larger. The pool of money on the international signings is larger. So there are a lot of benefits for teams to, basically, suck. They're rewarding you to suck!

Jim Duquette:

There's been a lot of conversation, I know, behind the scenes about how to influence that and maybe there's ways to incentivize teams not to be as bad over several periods of time. The problem that you have in the sport right now is teams like the Astros and the Cubs. They were bad for four or five years in a row and, then, they turned things into, you know, they're both powerhouses in the industry now with their teams. People look at that and think, "Okay, well, we're going to do the same thing." When you get a lot of teams doing that, personally, it affects the product on the field. If you're a fan, you're watching the sport, you have some really good high name players that are not playing in the sport, and they are sitting on the sidelines because teams show younger players. It affects the product on the field, and it's not as good. That's about as balanced of a way as I can talk about it. I'm sure I left out a couple things, but those are at least some of the things we've been talking about over the last couple months.

Charles Grantham: Just let me share this, and that is, if you are an owner sitting out there, or you're a player sitting out there, you have two different goals and objectives. These deals are primarily business deals. If there is a tax incentive, or if there is a luxury tax and, given the import of analytics and statistics in all of our sports now, it's about return on investment. At some point, if in fact I'm going to be a constant violator of this tax threshold, and I may have to pay more each time—you are a business person—you sit back and say, "Let me talk to my analytics team over here," and, "Am I willing to spend at a certain level to be taxed, perhaps at \$2.50 for every dollar I'm over the threshold, or \$3.00, or, whatever the number happens to be?" The answer is "no."

So we go back to this concept of "what is a collectively bargained agreement?" That collectively bargained agreement deals with wages, hours, and working conditions. We cannot sit back and think, at some point, there's a tax system in place to incentivize people to spend. It wouldn't work. It's not going to work. The same thing in our salary cap business. If there is a tax and a penalty to pay, how much is it worth winning an NBA title? At a certain point, it may not be worth financially to my team to win three in a row, because I've got to pay a luxury tax, depending on how many of the star players I extend. Same thing's happening in baseball. There's a tax. That tax is a dis-incentive to spend on salaries, not an incentive.

Bobby Barad:

Jodi, can I ask Jim a question, please?

Jodi Balsam:

Absolutely.

Bobby Barad:

I just thought of about it. Years ago, it seemed like teams that didn't think they had a great chance of winning the World Series, there was still a significant incentive to put bodies in stands. And then, a couple of years ago, there seemed to be a big influx of money in baseball to the teams, the owners, and the players, because of all these TV deals that came about and brought in a whole new batch of money into baseball. Do you think that maybe that had an impact, where, because the TV deals were so rich, the incentive to put seats in the stands

wasn't as important to the owners anymore? If you're not going to win the World Series, it's the "Well then, why should we spend? Why should we do that?"

Jim Duquette:

That philosophy used to be prevalent, I think, throughout the game. You used to fear fans wouldn't show up. There was a good proportion of your fan base and your revenues that came from attendance, from people actually showing up. But now, that's not the case nearly as much as larger TV deals and some of the other national deals that are out there. They're not making as much money on attendance as they used to, percentage-wise. It's about the eye-balls on TV. That does get impacted by the product that you're throwing out there and on the field. But, what teams started to do, which was a smart thing, is be transparent about, "Hey, we're going to struggle this year."

A couple years ago, the Milwaukee Brewers owner, Mark Attanasio, came out and wrote a letter to all the season ticket holders and said, "We're going to take a step back and not spend as much money on payroll for a couple years." In actuality, it only took him two years, and then they got back to being competitive. That's the thing I argue all the time when I'm talking about this—there's no reason to be taking five years of crappy baseball and put the revenues in your pocket. You can be more competitive over a shorter period of time. I think there are some teams that have taken advantage of that, and they're under the guise of "Well, we're going to invest it in other areas of their organization."

One of the teams I make fun of—I'm not going to name the team—but their MLB Advanced Media had sold the Disney portion of the business, and every team got \$50 million or \$30 million, a one-time payment. Instead of putting it into the product on the field, the teams were going to buy their facility. They used the reason to buy land and build a facility down in the Dominican Republic. I guess they were going to pay cash. I know it doesn't cost a lot of money to build these facilities. It certainly didn't cost thirty million dollars. But to their fans, that

was one of the reasons why they weren't going to use that money and put it towards their Major League team. That kind of stuff, for me, is a joke.

There are certain things that the union can try to do in that. And I know there have been calls made to Major League Baseball about using some of the revenue-sharing towards their roster and towards trying to win. But that's a tricky slope, and neither one of you guys can really talk to that, and I don't have enough specific facts that I would feel comfortable sharing. That's some of the things that go on in the game that concern me or bother me that are getting addressed, but you're not seeing a real resolution to it.

Jodi Balsam: Thank you. And please join me in thanking our panelists. It was a very important discussion.

KEYNOTE CONVERSATION:

BILL DALY, DEPUTY COMMISSIONER AND CHIEF LEGAL OFFICER OF THE NATIONAL HOCKEY LEAGUE

Brette Trost: Deputy Commissioner Daly is a graduate of the NYU School of Law, and was named the first ever Deputy Commissioner of the NHL by Commissioner Gary Bettman in 2005. In his role as Deputy Commissioner, he works on a number of legal issues, such as negotiating and administering the league's collective bargaining agreement, negotiating media contracts, and overseeing the NHL's relationship with the international hockey community.

Professor Arthur R. Miller will be facilitating today's discussion. Professor Miller is one of the nation's most distinguished legal scholars in the areas of civil litigation, copyright, unfair competition, and privacy. Professor Miller is also the founder and chairman of NYU Sports and Society, Associate Dean and Director of the Tisch Institute for Sports Management Media and Business, and the University Professor at the NYU School of Law.

Arthur Miller: Do you feel at home, Bill?

Bill Daly: I do, although this is the first time I've been in this building. It's pretty impressive.

- Arthur Miller: So, you're showing your age as to when you went here.
- Bill Daly: Yeah, it's not hard to do that for me these days.
- Arthur Miller: Now, Gary is a graduate from here too.
- Bill Daly: He is, yes.
- Arthur Miller: So, does that mean all NYU students get free tickets?
- Bill Daly: I don't think so.
- Arthur Miller: So, what's a Deputy Commissioner? Was it just described adequately?
- Bill Daly: Yeah, I mean, obviously, we had not had a Deputy Commissioner at the National Hockey League before Gary appointed me to that position. I was originally hired as a senior ranking legal officer at the League—that was in 1997—and Senior Vice President of Legal Affairs. We had a legal staff at the legal office at the time of probably about twenty, twenty-five lawyers in various areas of our business, and I was brought in to kind of lead that team of lawyers and to report directly to the Commissioner. At the time, there were only three direct reports to the Commissioner. He had one in legal, he had one in kind of our business, and he had one in hockey. My predecessor was Jeff Pash, who went on, and continues to be, the Executive Vice President for the National Football League.
- Arthur Miller: A former student of mine.
- Bill Daly: A former student of yours. A great guy. I had actually gotten to know Jeff pretty well in private practice. We both had worked on cases together representing the National Football League in various private litigations. But after about three years at the National Hockey League, Paul Tagliabue, also an NYU Law grad, went and asked Jeff whether he wanted to come work at Football, and after struggling with the decision, as I understand it, he ultimately decided to go. So I was hired to be Jeff's replacement. I was only thirty-two years old, and we were at a particularly interesting time in our history and development, particularly from a labor relations' standpoint. And over the next seven or eight years, I took on more and more responsibilities leading into our collective bargaining

negotiation in 2004, 2005, where there was a lockout, and it ended up with a cancellation of a full season for us. Not something we're proud of—[we were] the only professional sports league to have to lose a full season to a work stoppage. It was really coming out of that work stoppage that Gary decided to make me Deputy Commissioner.

Arthur Miller: So you and Gary have been together for some time?

Bill Daly: We have.

Arthur Miller: Is the League in good shape now?

Bill Daly: League's in really good shape.

Arthur Miller: Not always true. Hasn't always been true.

Bill Daly: No, particularly the time period I was talking about. I think we were hurting as a business. We were spending far too much of our revenues on player costs. They weren't controlled well. I think we got up to a point where 73% of the league revenues were being paid to the players, which left a lot of our franchises in a very precarious financial situation. I think we would not have been able to sustain the losses and the number of franchises we had, had we not made significant changes to our financial system at that time.

Arthur Miller: What turned it around?

Bill Daly: Well, I mean, I think we negotiated a system that existed in professional sports. It was a salary cap system, but it was based on sharing overall revenues with the players on a prescribed and negotiated basis. We were, as I said, spending 73% of our revenues on players' salaries. When we came out of that work stoppage, we agreed contractually to spend 57% of our revenues on player salaries. In our last collective bargaining negotiation, we agreed with the Players' Association to make it a fifty-fifty split of revenues. I think the whole system has helped the League grow because I think we are much more aligned with the players, in terms of growing the business and growing revenues, because they benefit fifty-fifty in the revenues. And the more revenues we can generate, the more they get paid.

Arthur Miller: Television helps?

- Bill Daly: Television, of course, helps, and that is one area where we're still behind the other major professional sports leagues. We've made up some ground, but we still have some ground to make up. Gary likes to say it was an unfortunate decision that NHL owners made in late '70s, early '80s. They decided that their fortunes would be made in local television deals, local regional deals, and not in national television, and as a result, we didn't have the same national exposure. A lot of people think of us as a regional sport. Hopefully not so much anymore, but a lot of that had to do with kind of the television policies that our league adopted back in the '70s and '80s.
- Arthur Miller: You're coming up to that collective bargaining agreement phase. So I understand that you both have outs in September?
- Bill Daly: Yes.
- Arthur Miller: And when does it really run out, '22?
- Bill Daly: So, the stated term of the collective agreement runs through September of '22. Both sides have a right to opt out in September of '20, with notice given to the other side in September of '19. So this coming September, we both have decisions to make, but that wouldn't end our agreement. We would have another full season under our existing collective agreement, and the thought process there is that you have an agreement to try to make, or a year to try to make a new agreement.
- Arthur Miller: But without knowing a thing about it, I suspect you guys are talking?
- Bill Daly: We are.
- Arthur Miller: Are you playing nice?
- Bill Daly: I think we are.
- Arthur Miller: You've got a long history of breakdowns of—
- Bill Daly: Well, in fairness, we do.
- Arthur Miller: I don't mean you, but I mean the whole—
- Bill Daly: In fairness, we've had different administrations and the Players' Association. Just in my time there, I think we've had four different executive directors and four different administrations. So our current Executive Director of the National Hockey League Players' Associa-

tion is Don Fehr, who people know from his twenty-some odd years as the Executive Director of Major League Baseball Players Association. He had a lot of strikes during that time period, but he has put together a very professional staff. I think, on a day-to-day basis, our relationship with our Players' Association is as good as it's ever been in my twenty-two years at the league.

Bill Daly:

There are some bigger-type issues that we're talking about now to see if we can avoid a reopener, perhaps even have an extension past '22. It's too early in those talks to give you a sense of whether they'll be successful, but I guess the good part is we are talking about it.

Arthur Miller:

Can you give us a sense of what the issues are likely to be?

Bill Daly:

Well, there are a couple of different aspects to this negotiation that are a different dynamic than I've ever been involved in before, in the sense that the last two collective negotiations were situations where the owners really needed significant financial improvements in the agreement. I think we're past that point. From our standpoint, the agreement isn't perfect. There are certain areas we certainly would like to improve on and could improve on, but, for the most part, I think, as kind of a financial deal, which is what this is, we think it's a fair deal, and I think our owners are fairly satisfied with it. So, unlike the last two negotiations where we were looking to make changes,

I think this negotiation is going to be more about the players looking for some changes, and the change you hear most often about publicly is their dislike of having to pay a portion of their salary into an escrow every year. The escrow was a mechanism that we negotiated to ensure that the fifty-fifty split, that we negotiated as an overall financial structure, can be enforced. So there's a certain amount of players' salary that's put into an escrow, and then, at the end of the year, you do your final accounting. If, in fact, we've overpaid the players more than their 50%, there's a portion of escrow that comes back to us and the rest is released to the players. If, on the other hand, we have exceeded our expectations

on the revenue side and we haven't paid the players 50%, we write them a check.

Arthur Miller:

It sounds like a holdback.

Bill Daly:

It's definitely a holdback.

Arthur Miller:

To make sure it evens out.

Bill Daly:

And in recent years, it's been a significant holdback, and that has to do with a variety of issues, not the least of which is the value of the Canadian dollar, which is a big wild card. All our accounting is in U.S. dollars. When the value of the Canadian dollar goes down, the amount of our overall league revenues go down at year-end, and that impacts the escrow.

Arthur Miller:

What about long term contracts? I hear it there's some pressure on that.

Bill Daly:

Under our 2005 agreement, we had no term limit on contracts, so players and clubs could agree to as long a contract as they saw fit. We had some absurdities arise from that type of system, where we actually had to challenge a contract that was entered into by a club and a player, as a circumvention of our system, because it was not likely that the player would be playing at the end of the contract. So it was a way to lessen the cap charge and, with the player walking away at the end of his contract, those years don't count. So, as part of our last negotiation, we negotiated a new construct where there are term limits on contracts. As a general rule, players can only sign for a maximum of seven years under their contracts.

Bill Daly:

There's an exception made for teams who are re-signing their own free agents. They can sign them to eight years, and that was done intentionally to give kind of a home team advantage in trying to retain players who were becoming free agents. And, is that the right number? Again, in a perfect world, I'd probably like that term limit reduced again into maybe the four to five year range, because certainly we've seen contracts that are longer than players' careers, or likely careers, but it's not as a niggling a problem as it was last time.

Arthur Miller:

Whereas in baseball it seems to be going the other way with longer term contracts, and

there again, somebody like Rodriguez didn't play out his full contract.

Bill Daly: Right, without the cap implication, but yes.

Arthur Miller: How about some of the softer issues, drug testing?

Bill Daly: I would say on areas like drug testing, that's an area where we're in active discussions with the Players' Association throughout the term of the agreement. So we have a committee that I serve on. It's a joint committee that meets several times a year to review our drug program and policies, and when changes are appropriate, I believe we've been able to reach agreement with the Players' Association to make those changes. So I think that's a kind of living and breathing agreement, or area of our agreement. Certainly more dynamic than other system-like areas of our agreement.

Bill Daly: I would say the soft issue that I'd mentioned that is important to the players and less important to the owners, although it'd be important in the other direction, is Olympic participation, which is something that we began doing in the 1998 Olympics in Nagano, Japan. Ours was the first league to kind of shut down its schedule, for a period that year of two and a half weeks in the middle of February, to allow our players to participate in the Olympics. And we proceeded to participate in the Olympics five consecutive times through the 2014 Olympics in Sochi. As I think probably a lot of people in this room know, our owners made a decision not to participate in the Olympics in South Korea. Our players weren't necessarily happy with that decision.

Arthur Miller: They seem to want to play in the Olympics.

Bill Daly: They like to participate. They like to represent their countries in the Olympics, even though it's not any real financial gain for them, but the international participation is important to them, and we certainly recognize that. There are business reasons why Olympic participation can be problematic for our clubs, for our owners, for our business, and we felt, particularly with the Olympics in South Korea, that balance tipped in favor of not participating as opposed to participating. But I have no doubt that as part

of our ongoing discussions with the Players' Association, that will be an issue.

Arthur Miller: If I remember correctly, Gary has indicated that it is unlikely, I forget his exact words, that they'd be playing in Beijing in '22.

Bill Daly: Well, I think what he said, which I would echo, is that, in a vacuum, and if left entirely to the will of our owners, without any other consideration, absolutely, we wouldn't be participating in Beijing in '22. But there are other considerations involved, including what the players want to do and—

Arthur Miller: And the fact that China is a potential market?

Bill Daly: Including that China is a potential growth market for the National Hockey League and for hockey generally. Those are both important considerations that will be taken into account at the appropriate time.

Arthur Miller: Whenever that is.

Bill Daly: Whenever that is.

Arthur Miller: Whenever that is. And what about this semi-crazy, that's my editorializing, notion of trying to switch hockey to Summer Olympics, so there's no scheduling problem.

Bill Daly: Well, Gary deserves a lot of credit for being kind of the first executive leader of the NHL who really thought Olympic participation was important, and at the time of our business evolution, it was important, and it served us very well, the prominence of the Olympic stage. His going in position was we should participate in the Summer Olympics on the same basis that the NBA participates in the Summer Olympics. Juan Antonio Samaranch, at the time, was the Head of the IOC. He didn't necessarily agree with that.

Arthur Miller: And if you do that, why watch them—

Bill Daly: That's a fair point, and the hockey tournament is the anchor of the Winter Olympics. That and figure skating. And to your point, if you move the hockey tournament out of the Winter Olympics, I think you would damage the value of the Winter Olympics for sure.

Arthur Miller: It would be nice to see hockey in the summer if the players were there.

- Bill Daly: Yeah.
- Arthur Miller: I think that would be nice.
- Bill Daly: I mean, it works. You have buildings. We play Stanley Cup Final games in June in markets like Las Vegas, so you can play in the Summer Olympics.
- Arthur Miller: So, we're in a law building. I think it's a law building. I am struck by the remarkable difference in the way the NFL handled the concussion litigation and the way you guys did.
- Bill Daly: Are handling the concussion litigation.
- Arthur Miller: Are handling. Oh, you don't think it's over?
- Bill Daly: It's certainly not over at this point. We obviously have a tentative settlement agreement, which is still being worked on by plaintiffs' counsel. Don't exactly know where that's going to end up, but we're still involved in litigation.
- Arthur Miller: And one has to assume not every one of the players will opt into it?
- Bill Daly: Certainly, there have been some players who have been very vocal that they do not intend to participate, yes.
- Arthur Miller: But the two leagues approached the litigation entirely differently. What was your thinking about it?
- Bill Daly: It's tough for me to know anything other than what I know about our league and our history and what we've done. Certainly, I feel like the major contributor to our position had to do with what we knew to be the facts in our case and what was being alleged. We're simply not guilty or negligent of failure to disclose information, which is just not true, so it was important for us that we've handled that issue. We've been aware of that issue for as long as it's been an issue on the kind of public horizon, and we've handled it in a very responsible way, so we felt strongly about our position on the merits.
- Arthur Miller: And at least some of the public statements seem to demur from the proposition that hits cause concussions, cause CTE. It has seemed to me that the NFL sort of caved on that, whereas I seem to recall Gary, in particular, making some statements. I think he used the word "certainty."
- Bill Daly: I think the science continues to be mixed on that subject. I don't think the science is as

definitive as some would have you believe, and I think even the scientists who believe that repetitive head trauma can lead to CTE will acknowledge that that has not been established scientifically.

Arthur Miller: No, it has not been established, at least in part because you can't do it on live people.

Bill Daly: Maybe.

Arthur Miller: Just in part.

Bill Daly: Maybe.

Arthur Miller: But the litigant—you guys toughed it out. I know you were at Skadden before you went to the NHL. I forget where Gary was. He was with a big firm.

Bill Daly: Gary was at Proskauer.

Arthur Miller: He was with Proskauer.

Bill Daly: We started with Proskauer, and then he ultimately spent some time at the National Basketball Association before he came to the NHL.

Arthur Miller: Right. Right. Whereas the NFL was much softer in their opposition. The NFL, arguably, had a much more significant public relations problem than you guys did.

Bill Daly: Again, I think the sports are, to some extent, apples and oranges. I think the types of head contact that you have in football are significantly different than the types of head contact and trauma you might get in a sport like hockey. So I think from that basis, we are differently positioned. I can't really speak, again, to the NFL situation because I don't know all their facts. I do know all our facts, and we felt, on the basis of all our facts, this was something that we wanted to defend vigorously.

Arthur Miller: Are you content with the settlement, to the extent one is ever content with a settlement?

Bill Daly: That's a difficult question to ask me personally, particularly given where we are. I don't know where we'll end up. As an organization, we wouldn't have entered into the settlement if we weren't, in some respect, content with how that would play out, and we'll see how it plays out.

Arthur Miller: As you know, some of the commentary, the commentary, it just draws a rather sharp contrast between the economics of the NFL settle-

ment and the economics of your proposed settlement.

- Bill Daly: Mm-hmm.
- Arthur Miller: I mean the dollars are really quite different.
- Bill Daly: Yes, they are.
- Arthur Miller: He says with a smile.
- Bill Daly: In the context of our litigation, you have to take into account that our lawsuits were filed within days or months of the NFL announcing their settlement, right? So, that certainly had something to do with the fact that we were sued in the first place. I don't think that plaintiffs' counsel, the class counsel, got the receptivity to the claims not on the basis that NFL plaintiffs' class counsel got. The participation of our former players in our litigation was far different than the participation of former NFL players in the NFL concussion litigation. And, again, that goes through a whole host of things that kind of separate our situation from theirs.
- Arthur Miller: And you were in Minnesota, and they were in Philadelphia.
- Bill Daly: Correct.
- Arthur Miller: They had a, I think you would have to say, a sympathetic judge in terms of the players. Maybe it's because it's warmer in Philadelphia than it is in Minneapolis, but I think they were willing to certify at a certain point, whereas the Minnesota judge would not certify a class.
- Bill Daly: Yeah, but it was a certification of a settlement class, right? Ours was a typical class certification, not of a settlement class. And while the standards probably shouldn't be all that different that are applied, I think, as a practical matter, they tend to be.
- Arthur Miller: It's just interesting, though, from the perspective of a proceduralist, my limited sphere of activity—
- Bill Daly: I think we all know that. Not that it's your limited sphere, but that it might be an expertise of yours.
- Arthur Miller: Knowing the two judges, there is a dramatic difference between the two.
- Bill Daly: Although Judge Nelson, in private practice, was a plaintiffs' class action attorney, so I'm not

sure, necessarily, her proclivities aren't the same as Judge Brody's.

Arthur Miller: Yes, but I'm not sure his willingness to certify, historically, has been the same as hers. Be that as it may, that's boring procedural talk, but just goes to show—

Bill Daly: Well, it was a pretty critical decision in the case for sure.

Arthur Miller: I'm surprised they went to Minnesota.

Bill Daly: We got to Minnesota. We had several lawsuits filed around the country. I think, actually, the first one was here in the Southern District. Then, we also had one in Washington. We had one in California. The multi-district litigation panel ultimately decided it should be in Minnesota and, believe it or not, one of the reasons, I think, that was cited for moving the cases to Minnesota, where also a case had been filed, or one or more cases had been filed, was that it was close to Canada. I didn't know that was a consideration.

Arthur Miller: Well, the logic is there. They're related cases, or tag along cases, I suppose. Let's talk about gambling. Everybody seems to be talking about gambling these days. Now, where are we? What's happening in the country yard? State legislatures are looking at this.

Bill Daly: Yeah.

Arthur Miller: Is there any, any, any movement on the national level to get a federal statute, or is everyone so preoccupied with the wall that there's no time to do any other business?

Bill Daly: No, I think there's activity on the federal level to try to come up with some federal legislation governing sports betting among the states. I'm not sure how much momentum that will pick up over time. I think Senator Schumer is one of the senators interested in having federal legislation. We certainly support the efforts to look at federal legislation because, obviously, kind of having one set of rules that applies in all the jurisdictions is more efficient than having multiple sets of rules. But, as I said, I'm not sure how likely it is that federal legislation will be passed again in the short term. So, we are in a situation where each state is kind of making its

own determinations, whether sports betting is a good thing in their state and, if so, on what terms.

I think everybody seems to largely use Nevada as a model, but there have been variations and there's been lobbying that goes on a state-by-state basis for different aspects, the different laws. I think the issue is very active, but the states, for the most part, haven't acted immediately. There have only been a couple of states that have picked up and instituted the legalization of sports betting and set the rules at this point. I think that number of states will increase over the next several years, but right now it's a relative handful.

Arthur Miller: If the league had its druthers, what would you like to see happen?

Bill Daly: Well, we've said from the start, and I'll start by saying that our league supported the constitutionality of PASPA and, actually, the commissioner, in his former life with the National Basketball Association, had actually been one of the persons responsible for lobbying the passage of PASPA that prohibited states from legalizing sports betting on a prospective basis back in 1992.

Arthur Miller: He was quite outspoken.

Bill Daly: He was. Not surprisingly, we supported the constitutionality of PASPA all the way through until the Supreme Court made its decision. Once the Supreme Court made its decision, our business reality changed. The prospect of an increased number of people betting on our game became a reality, and we needed to deal with that reality.

Unlike some of the other leagues, which spent their time lobbying for federal legislation or even lobbying the states individually for legislation, our initial view of this was "We got to work with the industry." We obviously want to protect the integrity of our games. We want to make sure that is never in question. We want to work with the gaming industry entities to make sure that we're aligned in terms of if there's going to be betting on our game, we should be involved in how all that betting takes place.

Arthur Miller: At the moment, at least, your involvement is with this arrangement with MGM.

Bill Daly: Yeah, we have now entered into a number of corporate sponsorship arrangements, for lack of a better term, with gaming entities. I think we're probably up to four now that we have deals with. Part of our MGM deal does contemplate the provision of proprietary data based on a player and puck tracking data, which they would intend to use as part of their gaming propositions, and that will be something that they license from us and that they pay us for. And no other gaming entity, really, will have the ability to have that information or data in real time. So that's one of the business opportunities that sports gambling, or sports betting, can create.

Arthur Miller: That tracking business, being an old privacy buff, no kickback from the players?

Bill Daly: So, our league is a little bit different than the other leagues. We have negotiated two separate agreements with the Players' Association. One is with respect to what we call, for lack of a better term, wearable technology, which is all about teams wanting to maximize the performance of the players. Tracks heartbeat, workload, force, a lot of different types of things that experts can read and monitor and prescribe to the athlete what's best for him from a performance standpoint. We have an agreement that covers that with Players' Association as to when that can be used, and when it can't be used, and on what basis it can be used, and it's all voluntary by the players. Players wear it. The club can ask the player to wear it, but, with full disclosure and transparency, the player has to sign saying, "I agree to wear it." They can only wear it during practice. They can't wear it during games. So that's kind of the wearable technology side.

The player-puck tracking technology is more about the game and how to convey information about the game to your fans: fans watching on TV, but fans watching on mobile devices, or fans who plug into an app to want to know how fast the player is skating, or what distance he skates over the course of a game, or how fast he shoots the puck. We view those to be kind of

entertainment enhancements for the game, and we have a separate agreement with the Players' Association on that, where we've agreed to, essentially, to be partners on it. They've agreed to kind of mandate that the players participate, and that we will try to maximize revenues, obviously, with respect to what we do with that technology and that data, and they share on a fifty-fifty basis in the context of our overall economic structure that shares on a fifty-fifty basis.

Arthur Miller:

So, that's just folded in?

Bill Daly:

Yeah, we're joint venturers on the success of player and puck tracking technology.

Arthur Miller:

Understanding what the technology can do and the appetite of fans, particularly those who do like to gamble, do you foresee that there will be a fair amount of intra-game betting, that odds will shift?

Bill Daly:

So, I'm a little out of my element on this because I've never done it or seen it, but, yes. My understanding is that the in-game prop betting has become very popular. We did a pilot program with player and puck tracking last month in, with two games in Las Vegas, and I did see the applications where there are prop bets made available based on what's going on in the game and what's happening, and there are probabilities given via algorithms that have been built to happen in real time, and people can, theoretically, place bets on the basis of those odds changing and things changing during the course of the game.

Arthur Miller:

For no apparent reasons, I spent last evening with three Belgians who are hockey fans.

Bill Daly:

That's good.

Arthur Miller:

They come over to the United States, and what is the first thing they do when they hit New York? They go to a Rangers game.

Bill Daly:

We like those Belgians.

Arthur Miller:

I was sure you'd be happy with that.

Bill Daly:

Yes, we like those Belgians.

Arthur Miller:

We got talking about this, and they say that in Brussels, for example, they can lay money on virtually any proposition and any aspect of the game as it moves along, so there's some appeal there.

Bill Daly: It's a much more mature sports betting marketplace in Europe. There's no doubt about that. To some extent, we're all still learning here in North America, although Vegas is pretty expert at it.

Arthur Miller: I wish I were a fly on the wall. Let me be a fly on the wall. We'll hypothesize, you and Gary in a room trying to make, with the owners, the decision, do we bring Vegas into the League or not? What went through your mind?

Bill Daly: Again, this is something that, I think, going back ten years ago, a lot of professional sports leagues shied away from Las Vegas as a market, almost exclusively, because of sports gambling being available in Las Vegas. Again, to Gary's credit, he never shied away from considering Vegas as a potential expansion market. I'm going back probably eight, nine years, that that was a possibility. Our hurdles of considering Vegas seriously were that they didn't have a state of the art arena at the time, and we didn't know whether we had a viable ownership group in Las Vegas.

Once those things materialized, we had to do our due diligence on the Vegas market. It's not a huge market. Population is relatively low in comparison to other of our markets. It's a very unique market in the sense of what the major industry and activities are. As much study as you wanted to do, it was still going to be somewhat of an uncertain proposition as to whether this is a market that could be successful in professional sports. One of the things we needed to satisfy ourselves on was that the professional team in the market would be supported by the locals, the people who live in work in Las Vegas and the Las Vegas region, so we did a lot of our own due diligence on that. We allowed the prospective ownership group, Mr. Foley and his group, to do their own due diligence on that, including the season ticket drive, where people parted with their own hard earned money with no promise of having a sports team, on some basis, to show support, or that they would support the teams.

Bill Daly:

We excluded from that equation any casino interests, any kind of gambling interests. It certainly was a possibility that a team in Vegas could sell out all their games, but selling 70% of their tickets to the casinos and the casinos not being able to fill those seats wouldn't have been a healthy environment for the team. We needed to make sure the people in Las Vegas would support the team. We ultimately made the determination they would, and they were fortunate with how well the team performed. But I can tell you, even having been there this year, there is a strong connection between the people who live and work in Vegas and that hockey team, which is great, and we've been very fortunate and very gratified by the response we've gotten.

Arthur Miller:

It's been amazing to get to the finals in your rookie year. You people must have been laughing up a storm.

Bill Daly:

Not sure laughing was the term I would use, but it was a remarkable story, and it was from the start of the season. They performed well throughout the season. They had a horrible tragedy right before the season started with the shooting off the Mandalay Bay. Unfortunately, it gave the team an ability to bond with the community on almost an immediate basis, and our players and our team did. They spent countless hours out in the community visiting hospitals and first responders and victims, and really bonded with the community in a way that they probably wouldn't have had an opportunity to do absent the tragedy.

That, in some ways, solidified the relationship between the team and the community right up front, and it helps when the team performs as well as it did. I think that was unforeseen, to a certain extent. I think some of the clubs coming through Las Vegas probably took advantage of all the things Las Vegas had to offer, to their competitive detriment. I think that effect will normalize over time. It will become another city in another place where teams have to stop and play games. But we certainly didn't dream, even in our wildest dreams, that the team would

advance to the Stanley Cup Final. It was a remarkable story.

Arthur Miller: Looking at the paper this morning, they're playing fairly well in their sophomore year.

Bill Daly: They started off a little slow. Then they were playing really, really, really well, and then, for the last week to ten days, they've slumped a little bit, but it certainly looks like they're going to make the playoffs again. I think they play a style of hockey that's exciting, and I think they can be competitive again. They have good goaltending. Who knows how far they can go?

Arthur Miller: Do you have gambling kiosks in the arena yet?

Bill Daly: No, we don't.

Arthur Miller: I know Gary refused last year.

Bill Daly: Yes.

Arthur Miller: Even though the team was on the book last year.

Bill Daly: That's correct. In fact, yes, nothing in the arena, and I don't anticipate anything in the arena in the short term.

Arthur Miller: Continuing on with expansion, you have Seattle coming in.

Bill Daly: Yes, it will be our thirty-second franchise. Our board announced, at our December Board of Governors meeting a couple months ago, that we had granted an expansion application for a group in Seattle, Washington. Again, a situation where you need the right arena, you need the right ownership group, and you do your due diligence on the market. I think they passed all three of those hurdles with flying colors. We're very, very optimistic that that team will be an enormous success. Hockey has a longer tradition in the Pacific Northwest than it does in southern Nevada. Going back all the way to the start of our league—which our league is now 101 years old—we've had presence, strong hockey presence, in the Pacific Northwest. We have a built-in rivalry overnight with Vancouver, which is a couple hours north by car. All indications are that this team will be very, very successful, so we're looking forward to it.

Arthur Miller: The city that doesn't seem to be able to get in is Quebec, which has a natural rivalry with Montreal.

Bill Daly: It does. It does, and has had a historic rivalry with Montreal. Quebec participated in the expansion process that resulted in a Las Vegas franchise. Instead of denying their application, our board essentially deferred their application. I think one of the big challenges at the time was that as much as they'd even probably be willing to play out of our Western Conference, Quebec City is not a team that should be playing out in the Western Conference. So we had a geographic imbalance that I think certainly hindered their chances to be successful as an expansion city. That imbalance continued through, and including, us awarding Seattle. Even though we added Las Vegas in the West, we were still sixteen teams in the East and fifteen teams in the West. When Seattle is onboard, in 2021, we'll be balanced geographically with sixteen East and sixteen West. To some extent, I think that probably enhances future prospects of Quebec hosting an NHL team.

I'm not here guaranteeing that will happen. A lot of factors play into that, including the Canadian dollar, and who the ownership is going to be, and the like, so it's a complicated. Expansion and relocation are both complicated matters that are very circumstance specific. I can't tell you what the future of Quebec City is, but I can tell you that it hasn't been ruled out as ever being able to host an NHL franchise again.

Arthur Miller: So, you're not willing to say you're done?

Bill Daly: I'm not, no.

Arthur Miller: You're not. Well, you can move a couple; you could move Arizona, you could move Florida, which, I gather, are underperforming.

Bill Daly: Yeah, I think that's fair to say. We, as a league, perform. Our regular season, we play to 95% of capacity, and in the postseason, we play to over a hundred percent of capacity. Don't ask me how that happens. Attendance is certainly not one of the issues that are holding us back, but the teams that underperform on the ice and

particularly non-traditional markets tend to have bigger attendance issues, and that, over time, has included Florida, Carolina, and Arizona. That's just a reality of professional sports. It's not just our league. I think that's true in any professional sports league.

As a matter of fact, I know people like to pick on the Coyotes. The Coyotes have a higher attendance this season than the Phoenix Suns do. It's something that, I think, once we make a commitment to a market, we do everything within our power to make the franchise successful in the market. We feel loyalty and an obligation to the fan base that we create in those markets before we yank them out of the markets. There are circumstances where it has to be done. Ultimately, becomes the only viable business prospect is to relocate a franchise, but it's a last resort, not anything before that.

Arthur Miller:

And then, I guess, obvious next question is international. So many places in Europe where hockey is basically the national sport.

Bill Daly:

Yeah, I think we're a little unique in terms of our international appeal. 28% of our players this year are born outside of North America, typically from the Nordic countries, Western Europe, and Eastern Europe, including Russia. Hockey is popular internationally. We have historically worked with the existing hockey structure, internationally, both the International Ice Hockey Federation and the individual federations that govern the playing of hockey in all the hockey related countries. We work with them to bring events over there. We work with them on best practices, sharing best practices, making resources available to them, subsidizing them for the ability to kind of sign and transfer players from European countries. Everybody asks the next step, being a logical question, "Are you ever going to put franchises there?"

And I, again, will not rule that out as something that might happen in the future. I don't believe that's happening in the near future or the medium term, in part because unlike the NFL, for instance, where you play one game a week and teams certainly can travel from

London to North America to play games back and forth, in hockey, with an eighty-two game schedule, in order to have a successful expansion to Europe, you need to expand by multiple teams in Europe to make a European experiment work. I don't think we have enough market economies in Europe and facilities in Europe where that's a viable prospect.

Arthur Miller: I have seen that notion of a European division.

Bill Daly: That's the only way I think it could work for us.

Arthur Miller: What about women? You knew that question was going to come sooner or later.

Bill Daly: We have very advanced, elite women hockey players in both the United States and Canada. Unfortunate for hockey, the kind of the history and tradition and the culture of having elite level hockey in Europe for women is not the same reality that it is for men. While we have very competitive international tournaments with Russia competing, and Sweden competing, and Finland competing, and Czech Republic competing on a fairly equal basis with Canada and the United States, that's certainly not the case internationally in women's hockey.

There are really two powerhouses in women's hockey. The United States and Canada. They duke it out every four years at the Olympics and every year at the World Championships. Unfortunate for them, they don't have elite level competition outside of those two countries. The women have now formed two professional leagues: the Canadian Women's Hockey League, which is operated obviously out of Canada, although has franchises in the United States, and the National Women's Hockey League, which is operated out of the United States. In some respects, they're competing leagues. We try to advise, consult with, and support both, but we're trying to avoid a situation where we affect the balance between those two leagues right now. We'll kind of see how that dynamic plays out over time. I think the Commissioner has been very clear that, at the right time, if there's an opportunity and a vac-

uum in women's hockey, that we would be interested in participating in women's hockey on a professional level.

Arthur Miller:

And in other forms of diversity?

Bill Daly:

We're in "Hockey Is for Everyone" Month, this month in particular. Obviously, it is a priority for the League, and has been for quite some time. It is Black History Month in February. We have a big effort promoting inclusion and participation, minorities, women, sexual orientation, and the like. We have next month, in March, for gender equity and women's hockey, and then we have a month in June that will be dedicated to sexual orientation diversity. All big things for the National Hockey League in terms of encouraging inclusion and diversity, both among our fan base, but also in playing the game.

Arthur Miller:

In a related vein, yours is the only league, I think, that has built into the CBA a community contribution fund.

Bill Daly:

We have what we call an industry growth fund, where our owners earmark a certain amount each year. The fund can grow to \$60 million, but it's basically a commitment of \$20 million a year to fund initiatives that a committee determines are worthy of the funding. We and the Players' Association administer that committee, and we are in agreement and aligned that what we wanted to do was focus on grassroots hockey development as our priority. So we have developed a number of community programs, both centrally run. We have a learn-to-play-hockey program that's available in all thirty-one of our markets, which has exposed—this year alone—more than 30,000 kids to the game. They get subsidized equipment and six to eight weeks of free instruction from NHL Alumni in terms of learning to play the game, with the hope that they transition to local youth hockey programs run by, and administered by, either USA Hockey or Hockey Canada, as the case might be.

We have what we call a future goals program, which is a league wide program where we make curriculum available in the local schools, that is hockey themed, but it's STEM based—sci-

ence, technology, engineering and math. We've created a hockey curriculum that is a STEM based curriculum, and we're into the schools in each of our communities and outside of our thirty-one communities doing that.

Then we have, on top of that, a committee that considers applications made by individual clubs for market-driven programs—programs that might be appropriate given the particular market, and we subsidize those programs out of that fund.

It's made a big difference. We negotiated that as part of the 2012–13 collective agreement, and we've spent probably in excess of \$100 million or more during that time period on these types of programs. I think it's making a difference, both in terms of our participation, and the goal, obviously, long-term, is to increase our fandom.

Arthur Miller:
Bill Daly:

And one would hope it survives—

One would hope. I don't think I'm letting any cats out of the bag, but in our ongoing discussions with the Players' Association, one of the things we've both expressed to each other across the table is how pleased we are with how that program has worked. And I would expect it will be continued on some basis, if not an enhanced basis, under our new leader.

Arthur Miller:

I certainly, just me personally, think that STEM notion is a terrific one.

Time has passed. Thank you, Bill, for coming.