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PANEL 1: NAME, IMAGE, AND LIKENESS OF  
THE MODERN ATHLETE

*Presented by: Fenwick & West LLP*

Ty Lai: Good morning everyone. Thanks for making it here today despite the cold. My name is Ty Lai and I’m the president of the NYU Law Sports Law Association. I want to welcome everyone to today’s Ninth Annual Sports Law Colloquium. We are very lucky to have

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

such esteemed panelists joining us today.

Ty Lai:

Our first panel, "Name, Image, and Likeness of the Modern Athlete," is graciously sponsored by our friends at Fenwick & West. Moderating the panel is Professor Jodi Balsam. Professor Balsam is a treasured alum of our law school, where she currently teaches sports law and is a coauthor of our casebook, *Sports and the Law*. She also leads the externship program at Brooklyn Law School.

Ty Lai:

Before joining academia, Professor Balsam was the NFL's counsel for operations and litigation. Professor Balsam, I'll let you take it from here. Thank you.

Jodi Balsam:

Thanks, Ty. Welcome everybody. We're here today to talk about the name, image, and likeness of the modern athlete and we have convened a really star-studded panel. I'm going to spend a couple of minutes introducing them, talking a little bit about the law in this area, and then leading you through the story of the modern athlete, from high school through veteran years. I will then discuss what opportunities are presented to them for their name, image, and likeness exploitation.

Jodi Balsam:

We have on the panel, Jill Bodensteiner. She is the athletic director at Saint Joseph's University in Philadelphia, which has 20 NCAA Division I men's and women's varsity sports. She started her career in the world of college athletics at Notre Dame, when she was in the

- Office of the General Counsel, and progressed through the athletic department, culminating in her current role as senior associate athletics director.
- Jodi Balsam: She's had strong NCAA leadership experience. She's on the Committee on Women's Athletics, Division I Women's Basketball Committee. And now, most significantly, she's on the Legislative Solutions Working Group of the NCAA, charged with crafting appropriate name, image, and likeness rules for membership consideration. She'll tell us some interesting developments that the Committee is about to release.
- Jodi Balsam: Marques Colston—folks might recognize him as the New Orleans Saints Super Bowl 44 Champion. During his 10-year career with the Saints, he was the all-time leader in receptions, receiving yards, and total touchdowns. He has had an equally impressive career post-NFL, with seven plus years of ownership experience in pro sports, including the Harrisburg Stampede, a pro indoor football league. He is the founder of Dynasty Innovation, a corporate consulting firm, which, among other things, operates in the world of sports marketing and events and strategic partnerships.
- Jodi Balsam: We have Xavier James here as well. He is the chief operating officer of the Major League Baseball Players Association. He previously served as the deputy chief operating officer and business

and legal advisor for, among other things, brand marketing and commercial revenue opportunities for the Players. Prior to joining the MLBPA, he was the founder and president of the sports agency, the James Group, where he represented several professional athletes. Prior to that, he had roles at MasterCard Worldwide, Weil, Gotshal & Manges, Viacom, and HBO. Overall, he has had a really a robust legal career as befits somebody who is also an NYU Law alum.

Jodi Balsam:

Vejay Lalla comes to us from Fenwick & West where he is a partner in their technology transactions group. His practice focuses on beyond technology, intellectual property, digital media and commerce transactions. He has clients across various industries: media tech, marketing tech, Blockchain, FinTech, and property tech. He has drafted and negotiated many complex strategic technology and licensing agreements and content distribution and licensing arrangements both in traditional media and in digital distribution.

Jodi Balsam:

Tim Nevius is also with us today. He is the founder and executive director of the College Athlete Advocacy Initiative. He is a former college baseball player himself, and also had a career as an NCAA investigator and sports attorney with over a decade of experience in college sports. While at the NCAA, Tim led high profile investigations into top football and bas-

ketball programs for violations of NCAA rules. After attending Columbia Law School, he went to Winston & Strawn for a while, where he was a member of the litigating team of the landmark anti-trust case against the NCAA over athlete compensation restrictions. He later founded a sports law practice and now represents college athletes on NCAA eligibility matters and is a leading voice for NCAA reform.

Jodi Balsam:

It is a big panel so obviously this panel comes to these issues from a variety of perspectives. This is an area of law that is the right of publicity. That's somewhat muddled because it's determined on a state-by-state basis and even within particular jurisdictions, there are conflicting approaches to how a personality can exploit those publicity rights. Today we're going to talk about how publicity rights operate in the world of athletics and how to counsel a client at a time of evolving standards and media disruption, whether it is an individual athlete or an institutional client that deals with athletes. We are in a period of new approaches being developed to handle the licensing of the right of publicity of athletes from high school and up.

Jodi Balsam:

I want to define what we mean by the right of publicity. It's the individual's right to control and profit from his name, or her name, image, and likeness—their identity.

Jodi Balsam:

I want to distinguish it, for the purpose of our conversation today, from the right of privacy. The right of privacy protects an individual from emotional anguish resulting from the publication of private facts or embarrassing or intimate portrayals. To make out a publicity rights claim under common law, and in most states, a plaintiff has to plead and prove that a defendant used the plaintiff's identity with intent to gain a commercial advantage without their consent that resulted in injury.

Jodi Balsam:

This is the right that we're talking about exploiting. I want to ask our panelists to start the conversation. Your clients all operate in the world of sports, whether they're athletes, players unions, universities, media companies, or leagues. They're all interested in incorporating athlete name, image, and likeness, (NIL) rights in some product, some promotion, or some project. What is the most important right of publicity issue that you are concerned about right now for your clients? Let's start with Tim and work our way down.

Tim Nevius:

The most important issue is to give them rights because we will, right now, prevent athletes from profiting off of using your name and likeness in virtually any capacity to some extent. The same is true at the high school level where NCAA rules restrict what high school prospects can do to

preserve their eligibility when they get to college. So, the most important thing to me is really giving college athletes the right to their own name and likeness.

Tim Nevius:

Fundamentally, my claim is an economic claim. That is, for everyone else in this country, including other college students on campus, even those that receive a full scholarship or some scholarship. This has been an issue that's come up, obviously, recently with the California bill in September which has sprung a really significant and important reaction across the country, which is great for me and for kids that have wanted to see this change, but it's been an issue for decades. The NCAA has been on notice at least as long as 11 years when Ed O'Bannon, a former UCLA basketball player, filed a lawsuit after he saw his likeness represented in a video game made by EA Sports, without any compensation provided to him or his fellow athletes. The NCAA ended up losing that case, in part, on the antitrust basis and settled part of it too and EA Sports settled as well. They stopped making the video games. Instead of actually affording their economic rights, they simply stopped making the video game, which I don't think is a reasonable response.

Jodi Balsam:

Xavier, what is the Major League Baseball Players Union thinking about on NIL issues?

Xavier James:

My answer is more removed from a business perspective since obviously I operate in the world of baseball. Our concern is more with monetizing baseball players. . . We have a series of partnerships with various brands, but again, we lag behind football and basketball. What keeps me up at night is convincing baseball players to be more out there, if you will, and leverage their name, image, and likeness and generate more revenue for themselves individually and for the Players Association generally.

Jodi Balsam:  
Vejay Lalla:

Vejay.

I tend to sit on multiple sides of the issue. I'm wearing a hat when I represent either startups or brands. We think about both the business issues as well as the contractual legal issues. So we think about, from a contractual standpoint, making sure we actually obtain the rights that we need. That obviously has a lot of different implications with respect to— have those rights been granted to anyone else? Are there league issues that we have to deal with from a restriction standpoint? What does name, image, and likeness really mean anymore? Is it also stats? Is it also with respect to fantasy? Is it biometric data, which I know we'll get into a little bit later? There're a lot of different pieces to that puzzle, both from a name, image, and likeness perspective, and from the perspective of how you define that contractu-



ally and how you monetize that. But also, what are the other pieces of it from a marketing standpoint that we have to deal with?

Vejay Lalla:

If I'm on the brand side, and I want to have an athlete go out and do social media marketing, what do I have to think about from a regulatory standpoint, outside of name, image, and likeness? If I'm representing a game developer, which we often do at our firm, are we using characters or even virtual versions of the athletes that may be so transformative that maybe we don't really need the rights to use that? Virtual athlete and influencer marketing is an area that's expanding in terms of—who are those rights really owned by? Those are issues that we grapple with on occasion.

Vejay Lalla:

Then, when I've represented athletes, it's more on what we just heard, which is, how do we make sure that we're protecting the rights appropriately? How do we make sure that any data rights are protected from a contractual standpoint? A lot of it for me is how do we manage that contractual relationship between the parties and incentivize the parties properly? I know Marques will talk a little bit about that. But how do you deal with a split between what they need in terms of fees? Maybe there're also equity incentives or relationships now, where athletes are becoming savvier to taking a stake in a business as well. What are the implications of that? I am

curious to hear from some of our panelists on some of those issues as well. But those are some of the things that I think about on a day-to-day basis.

Jodi Balsam:

Jill Bodensteiner:

Jill.

I share a lot in common with Tim. I'm in the university space. The NCAA's approval ratings might be the lowest in the nation right now, of any entity. But, at the end of the day, the NCAA is a voluntary membership association and the members set the rules, so it's the institutions that make up the NCAA. So we'll shoulder a little of the blame for the mess that we're in right now, instead of just blaming it on Indianapolis. I agree with Tim that student athletes should have the right to profit from use of their name, image, and likeness. The reluctance and why, as member institutions, why we're just dealing with it now is: is this the first step for pay for play? That would make student athletes employees, which I'm not in favor of for all sorts of reasons I could pontificate on for hours.

Jill Bodensteiner:

That was, I think, the reluctance to jump into this space. Now that we're in it, I firmly believe that student athletes will soon be able to profit from third parties for use of their name, image, and likeness. It's been fun to listen to the pundits and the general public say how easy this is and, "I can't believe the NCAA is not getting this done." And, "Where are the rules they're writing?" But I'm

here to tell you, it is incredibly complex. One example on group license is EA sports. They'll be all over the, "We don't have unions, so who's going to represent the student athletes?" So you've got to figure that out. That's a whole different look than the pro space, where there's MLBPA's and NFLPA's and so on and so forth.

Jill Bodensteiner: Professional representation—if you're going to allow them into this space, you've got to let them have agents and lawyers. I'm here to tell you—and I don't know if this is going to shock anyone—there are a lot of bad actors out there waiting to take advantage of our student athletes. Are the institutions and I going to vet and make sure my young men and women sign with good lawyers, good insurance brokers, good financial advisors, and good tax accountants? I don't have that time to do that. They're going to get preyed upon. We've tried to certify agents and that didn't go over well with the agents. So, there are so many layers to making this happen and to do it right and I think we're committed to doing that and hoping for a little patience and a little help from the federal government. Because I think that everybody agrees that what shouldn't happen is to have 50 different rules in 50 different states that apply to student athletes in a competitive league.

Jill Bodensteiner: One last thing: California S.B. 206—great bill—why can't the

NCAA just take their law? Well, that has a gigantic antitrust violation in it, right? The bill says student athletes can't sign with a conflict of a university sponsor. Do they know that in California some universities have a thousand sponsors? So, if you can't engage in any name, image, and likeness with anybody who conflicts with a thousand sponsors, that sounds to me like an antitrust issue. This isn't easy and we're working really, really hard. In fact, my part time job probably right now is trying to try to solve this, and we're committed to doing so.

Jodi Balsam:  
Marques Colston:

Marques.  
I'll speak from the athlete perspective. I'm someone that's kind of been on the amateur side all the way through the pro side. For me, it's a relatively simple stance that I take, but I understand the complexities that come along with execution. As an amateur athlete, as a high school athlete, collegiate athlete, you understand that you're one of the largest economic engines in this ecosystem. I think the ability to participate economically and participate in the commerce—the ability to explore those pathways and explore how to make that happen, to me, is a must for a lot of different reasons—the ability to have athletes and people in the ecosystem that don't get paid to play.

Marques Colston:

You don't want them to be professionals. You don't want them to be employees. But, at the same

time, they are creating massive amounts of economic value for everyone else in the ecosystem—coaches, organizations, and associations included. At some point, there is an inflection point. Hopefully it starts with California, but as a player, you're always one injury away from everything being taken away from you. The ability to maximize the work that you put in, the tireless hours, and dedication to actually put yourself in position to be able to monetize your likeness—I would love to see us continue to explore ways to make that happen.

Jodi Balsam:  
Xavier James:

Jumping in again.  
Can I just add one footnote? You raise a question as to who's going to represent these college athletes? The players associations are looking into that, and in fact, the MLBPA and the NFLPA teamed up with a private equity firm. We closed the deal at the end of last year and part of the business model is to potentially represent college athletes. So, in effect, they'll have a union representation if we can implement it well.

Jodi Balsam:

So, you know, I'm a law professor, and what I'm going to do now is to launch into a series of hypotheticals. It'll all sound familiar to you, because I want to situate these issues in, as close as possible, real life situations of athletes coming up right now. I'm going to start out with the top high school basketball prospect out of Fresno, California, Jalen

Green. He's deciding now whether to go pro right out of high school, or spend a year in college. He hasn't yet decided. He's a senior and he hasn't yet committed to any college. He's interested in how his NIL rights figure into this decision and how to maximize their value over the long run. What do you tell Jalen about the right of publicity? What do you tell him about where he might prefer to go to college, if he does choose to go, because perhaps they have already reinstated athlete NIL rights, as Florida seems poised to do any minute now? I'm going to ask Tim to address this.

Tim Nevius:

If he called me today, I would say, "Make a decision based on the traditional factors." You're not going to have NIL rights for a while, probably. The most advanced bill right now looks like it's in Florida. Just for background purposes, after California passed its bill, twenty-some different states proposed similar bills with some variations. Florida's bill right now has a potential effective date of July 2020.

Jodi Balsam:

California's bill, by the way, is effective. Although it's enacted, it's not effective until 2023.

Tim Nevius:

That's right, and there are no other states that have, that I'm aware of, an effective date as early as Florida's. Now, there was an amendment, just last week or the week before, in the Senate which has sort of a bill that's running

alongside the House bill, with an effective date of July 2021. So, there's no guarantee that that would happen. I would expect that if it did come into effect this year, that the NCAA would immediately file a lawsuit and ask for an injunction. If I was advising a high school athlete now, I would say, "You're probably not going to have name, image, and likeness rights. Perhaps during your career." He's likely a one and done player potentially, in which case he has one year to capitalize on that.

Tim Nevius:

I think this goes to the decision that all athletes have to make, both men and women, and we've seen it in a number of different sports, where you have to decide whether you are going to be a college athlete or a professional. That doesn't seem like a very good decision, when it comes to the focus on education, because, ideally, we would want people to obviously go to college, have a good experience, and get an education. That's what the member institutions and the NCAA have said that they prioritize. I don't think that they have done a very good job of doing that. But, if that is the ideal, then we shouldn't impose these restrictions in a way that would prevent athletes from going to college and getting an education.

Tim Nevius:

I think that if you are able to afford them name, image, and likeness rights, that would sort of

relieve this decision-making problem in some respects. Katie Ledecy is someone who continued to go to college at Stanford, but she withdrew from the team because she wanted to train for the Olympics this year, represent her country, and actually be able to profit off of her name, image, and likeness. She had to withdraw from the team. I don't think that's a fair choice for her to make. But especially then, for the tennis athlete, the golf athlete, basketball, and all the way down the line, as to whether or not they're going to turn pro or not. I think that's important when it comes to education and how that fits into this piece.

Jodi Balsam:

Jill, you're working on the legislative solution to this on behalf of the NCAA. The NCAA wants students to come, to choose college, and to stay in college. What is the legislative solution with respect to NIL rights that creates those incentives?

Jill Bodensteiner:

Legislative meaning the NCAA legislation? First of all, I don't think we need a bill to pass for Jalen to have an opportunity to get NIL rights. We need the NCAA to publish their rules. That's what the bills say. The state bills say, "No institution can prohibit," in violation of current NCAA rules. So, I'm more optimistic than my colleague to the right that we will have a solution, and it's not going to be perfect. But I would probably tell him,



“Don’t go to college if you want to get your name, image, and likeness, and start your pro career right now.” I agree with Tim on that front. I mean, people talk about exploiting, but what we’ve got to think about is that these are the “one and done,”—if that’s what Jalen is—they have to pass six academic credits to be eligible for that one year.

Jill Bodensteiner:

Oh, “what a terrible system one and done.” That’s not our fault. The NBA and the NBA Players Association have collectively bargained a rule that says you cannot enter the NBA until you’ve played just one year in college. Who’s being exploited in that situation, where we’re stuck with young men, many of whom want to pass six credits so they can play a year, help their stock, and go on to make millions? They have to pass six credits because those are NCAA progress toward degree requirements for one year in college. They don’t go to class the spring semester, so if you don’t want to be there, don’t. The G League is opening up their international opportunities so I would certainly encourage Jalen to explore those.

Jill Bodensteiner:

I do believe that the NCAA will have a really comprehensive NIL package up to vote for the membership within the next year. That’s the goal and the timeline we’ve set. There are a lot of details here that we’re working through. Once we get it to the member-

ship, I'm not sure how quickly that will go and become effective, but it's happening and it's going to happen sooner than people think.

Jodi Balsam:

I understand you're allowed to tip your hand a little bit today and tell us the headline news here, which is that the NCAA's committee, at least, is likely to recommend that athletes be allowed to exploit their NIL while in college and contemporaneously receive economic benefit from it. Earn money from NIL while in college. That's the recommendation?

Jill Bodensteiner:

Yeah, the original group that I served on made that recommendation to the NCAA Board of Governors in October and the Board accepted it that day on October 30th. That was a very general recommendation and now it's a devil's in the details situation. We are working through exactly what this would look like. But, here's a query for those who are college sports fans: would you tell Jalen, "Go to the school with a booster who will offer you a \$30 million deal?" Are we all cool with that? If your boosters are just allowed—if it's just one big inducement race, to see which booster can pay the most to an incoming prospect? If we're cool with that, this is pretty easy. But I think a lot of us would say, "Ooh, I don't know if that's a space we want to be in."

Jill Bodensteiner:

We have to figure out whether we are going to limit boosters. If so, how? That's another one of these

issues. If unfettered, I would tell Jalen, “If you’re only there for a year, go to the school that’s going to pay you the most.” That’s not the school, but the boosters associated with the school. There’s a lot to work through here, and that’s obviously the cynic in me. But that’s, again, one of the things that, for people who love college sports and love your team, is going to be a game changer. In some ways, really good, and really cool and in some ways it’s a different world. It’s going to be a very different world.

Jodi Balsam:

We do have an example of an elite basketball athlete who chose not to go to college: LaMelo Ball. People might be aware that he opted out of college. He’s spending this year playing basketball in Australia. I wanted to ask you, Marques, what should he be doing, without having the college platform, to develop his image? Has he made a good choice from what you’ve observed, in laying the groundwork for future celebrity?

Marques Colston:

I think the jury is still out, but I believe his decision to go and become a professional fresh out of high school is going to give him an education in what it really means to be a professional that you probably won’t get on a college campus. It looks like, just from the outside looking in, that his team is doing a really good job of keeping the visibility around his brand and his play pretty high. I would say, from the outside look-

ing in, he's probably one of the more developed, young prospects that I've seen come out in a long time.

Marques Colston:

Again, I think what it takes to be a professional athlete, just on a daily basis, and really being devoted to your craft—I think him being able to get a jump on that, and really understand what it means for this to be a job—I think you can't understate that. You can't understate that experience. Again, the jury is still out. I think he's going to be a really high draft pick. I think he's going to come in ready to step into an NBA setting probably at a level that's a little further along than his contemporaries.

Jodi Balsam:

So, perhaps it's worth sacrificing the college platform that provides greater visibility for higher draft stock.

Marques Colston:

Well, I think it's an opportunity cost that you have to factor in. On a college campus, it might not go over well, but the ability to go back to school and earn your degree is always going to be there. The ability to be a number one pick in NBA draft is a very fleeting thing, and it's something that you've worked 10, 15, years to make a reality. The opportunity to capitalize on that, that timing, and that window is out of your hands. You have to maximize the opportunities when you get them, and if school and education is really important to you, there will be opportunities to circle back

and make sure that box is checked as well.

Jodi Balsam:

Let's talk about a number one draft pick item. Still hypothetical, still set in basketball. Let's talk about Zion Williamson. Xavier, I was going to ask you: what role do professional players associations have in the use and monetization of athletes, name, image, and likeness and how has that been evolving? For example, people might be aware that the NBA's collective bargaining agreement as of 2017 actually took back a number of group licensing rights from the league and vested them back in the player's association. As Xavier described, they are trying to expand their footprint in brand marketing for their players. So here you have Zion Williamson, who is now in the league—what should he expect from his players association?

Xavier James:

First, obviously he's a high profile athlete. He can leverage his name, image, and likeness individually and he has, and he's generating millions of dollars in connection with those deals. People don't realize that they also sign what's called commercial authorization agreements with the players associations. That means that the associations can aggregate the rights of athletes they represent, and sell those rights, license those rights, to various parties. What he can expect is to sign those commercial authorization agreements and get a distribution from the

players associations from leveraging those rights and then part of the proceeds of those deals are retained by the players associations to operate. So, he gets to leverage his individual rights and he also gets a distribution from the players associations.

Jodi Balsam:

Is there still some component of use that the leagues retain in the collective bargaining agreements? What's the deal with Major League Baseball? What group licensing rights do they get to retain as part of the CBA?

Xavier James:

Well, it's a bit nebulous, and that's subject to a lot of conversations and conflicts. The short answer is that they don't really have the right to leverage the name, image, and likeness. What they do is try to do it implicitly. The players associations are charged with enforcing or protecting the individual rights of the athletes. They will leverage it as part of the marketing of the game, but individually those rights are retained by the athletes and by the players associations.

Jodi Balsam:

Some of the standard plan contracts in leagues allow the league to use NIL for certain limited purposes, as you described, to promote the game itself, in media surrounding the game, but also for some philanthropic efforts and some limited group licensing. You're saying Major League Baseball has not achieved that level of rights from its players?

Xavier James:

Well, yeah, implicitly they try to do it, and the league tries to make the idea of marketing the game very amorphous. When I represented individual athletes, my clients would be approached by their teams, who, in effect, would say, “Can you do me a favor and make this appearance for Pepsi?” They’ll give them a nominal fee or they’ll encourage the athletes to do it for free. In that way, they’re trying to leverage the athlete’s name, image, and likeness to generate revenue without paying the athletes. It’s a subject of a lot of conflict between the players associations and the leagues.

Jodi Balsam:

Now, among the things that leagues are doing to expand fan engagement is using wearable technology on their athletes in practice or even in games. These are sensors, and other forms of technology that collect the athlete’s biometric data: heartbeat, workflow, and pitch speed. So Vejay, I wanted to ask you what right of publicity concerns emerge from the collection of biometric information?

Vejay Lalla:

I think that could be this entire panel. I’ll try to break it down into a couple buckets of things that people can think about. I think it’s well beyond name, image, and likeness rights. Biometric data can be protected by state statute, as Illinois has a law. As with California, you’re seeing privacy laws become stricter about the type of information that can be sold. Bio-

metric data is one of those categories that essentially is protected on the individual basis, and then gives that individual, including an athlete, a right, a private action. When you're doing an analysis of this issue, you have to think about many different buckets, and, from an athlete's perspective, where they can potentially protect themselves and where they may struggle.

Vejay Lalla:

On the privacy side it's a little bit easier because those laws essentially give them that right. There's also HIPAA regulations that can be implicated there as well. But then as you think about other categories, like right of publicity—can you protect those rights because they are identifiable to the athlete?

Vejay Lalla:

There are some arguments to be made on both sides of that. If you are using certain next gen stats in broadcast, for example, copyright may preempt that claim. If you are essentially using those stats in other manners, which may or may not be protected by copyright, maybe the right of publicity claim could be implicated there where you can protect yourself, saying essentially because those biometric stats are identifiable and personal, they essentially are protected by right of publicity statutes.

Vejay Lalla:

When you gave the definition of right for publicity at the beginning, you talked about consent. Consent is—if I'm wearing some-



thing in a game and I have allowed, maybe, the players association to have those rights, maybe I've already consented to give away those rights. There are multiple layers of different analysis here. You can also maybe protect yourself by trademark and a Lanham Act claim saying that you have some rights there with respect to that type of data.

Vejay Lalla:

At the other side of it, you can claim that some of this data is really factual and there might be a legitimate public purpose in being able to use this data as a marketer or a broadcaster, et cetera and maybe it's protected by the First Amendment. There have been some cases both historically with respect to broadcast use of data in like name and likeness, but also cases specifically in sort of the fantasy sports world and the gambling world where these issues are going to come up more and more.

Vejay Lalla:

I think it's a pretty complicated area from a legal perspective for an athlete. They're going to really have to get sophisticated counsel to kind of help them sort of parse through that. But those are some of the main legal issues. On the business side, the data is really a contractual issue too. Who really is sharing in those rights? Has the athlete given rights to the player's association?

Vejay Lalla:

Who has sort of the push and pull of the "ownership" of those rights from a contractual standpoint?

- Jodi Balsam: Those are sort of the two buckets. What does the contract say and what are the different legal buckets at this that may implicate such data? That's sort of the shortest version of that whole area. But, again, there's a number of different areas of legal theories that are going to come up in that context. All of the leagues are now grappling with that in their collective bargaining negotiations. You may be aware that the Alliance of American Football—that very short-lived now defunct football league—had planned to put wearable technology on all their players to collect data for wagering purposes. Let me hear from Marques. What would your view as a player be in terms of the league's use of wearable technology and collection of it and how you would feel comfortable having them use it? Because there are a lot of issues there with using it for commercial purposes and using it for roster purposes.
- Marques Colston: Those are really the two areas where I would have the most concern. From the commercial standpoint, it feels like a lot of those opportunities to commercialize that data will fall back into those group licensing rights. Once it gets back into the pool, whether it's the group licensing pool or the individual pool, I think that there's somewhat of a framework there to work around that.
- Marques Colston: My bigger concern would be around the ownership of that data

and there's always going to be this contentious relationship between player and ownership. Once you have that kind of high-level data around performance, around biometric data, what is that going to be used for? Can that be used against me in a contract negotiation? Can that be used against me to determine the status of my next contract bonuses? Can it wean its way into a contract negotiation?

Marques Colston:

If that side has access to data, can I also have access to my own data so that I can use it as the same marketing tool to go out and negotiate my own contracts? Can you open up the data towards the two-way street? That's really the crux of the ownership conversation. If it's only owned and accessible by one side, it feels like there's a disadvantage baked into it.

Jodi Balsam:

Xavier, please, I know MLB is negotiating this now.

Xavier James:

Our players are vehemently opposed in many situations to the use of their biometric data for the reasons you just outlined. Could that information be used against them during the course of contract negotiation? They are very reticent to explore that avenue. Having said that, on the commercial side, there's keen interest in this data. You mentioned sports, books, and casinos. We're in discussions with various casinos and they're interested in leveraging that data and will pay millions of dollars for it. So there's a push

and pull here and we'll see how it nets out.

Jodi Balsam:

Jill, I wanted to ask you, has the issue of wearable technology come up in the college front? I can imagine that a college player would feel they have very little leverage to oppose a coach's request to use wearables. Has that emerged?

Jill Bodensteiner:

Certainly. There are fewer restrictions because there's no union. I know when I was at Notre Dame, our football guys were all wearing the catapult system, which, on the one hand they love because it kind of tells them when they reach their maximum speed so it helps them determine what routes to run. For the most part they love it, but they also called it the Slack-O-Meter because the coaches have what's called player load, and you can kind of see how hard they worked in a certain drill. So they kind of roll their eyes about the Slack-O-Meter.

Jill Bodensteiner:

But it's becoming that everyone's got to have the latest and greatest to get a competitive advantage. So there are definitely issues with it. I just met with my student athletes steering committee last week because we just adopted a system called Sparta Science, which is an injury reduction prevention system but it gives us unique data on them.

Jill Bodensteiner:

Most of them are like, "This is awesome," but what happens when one person records a teammate and posts it and then now

they want to be drafted? Now everybody sees they're at risk for an ACL injury because of their biometric data? So, there are all sorts of issues with it and it's definitely hit colleges.

Jodi Balsam:

Tim, has the athlete advocacy initiative done any work in this area?

Tim Nevius:

Not precisely, but with respect to representation, it's interesting because usually I'm the one that has to bring up the notion that the college athletes have no representation whatsoever. It's important not just for negotiating likeness rights, but it's important for a host of other reasons too. When you don't have a voice or representation and you're in an industry where you're not compensated and there's a variety of conflicts of interest, particularly because this is a multibillion dollar industry, there are so many things that can come up and affect the athlete's wellbeing, particularly when it comes to health and safety.

Tim Nevius:

Some of the same considerations would apply in college as they do in the professional leagues. Although, instead of negotiating a contract, you're worried about the coach using that data against you to eliminate your scholarship or drive you off the team, or hinder a transfer opportunity, which we've seen before where coaches will call other people and let them know, "No, you don't want this player—they're damaged goods."

Tim Nevius:

But, in fact, with respect to the player load tracking, theoretically, if you exceed a particular limit of player load, you're supposed to cut off activity, at least with respect to certain drills. I've had many, many calls from parents and athletes to say that that doesn't happen, that they're pushed beyond their limits. Those are the kinds of things that you need representation to push back on because we've seen deaths on the field before, including very recently.

Tim Nevius:

We've seen some pretty serious injuries and health consequences that have happened, not just in football and basketball which we like to talk about because that's what we often see. These are issues that extend to both men's and women's sports in all sports, across all three divisions. In my opinion, their representation is vital and has to happen, not just with respect to the group licensing and the economic rights of these athletes, but on a whole host of other issues including health and safety.

Jill Bodensteiner:

I do have to note the irony that, in Indianapolis right now, there's an NFL combine going on where they're basically, through the NFL, put through the cattle call and they're running a 40, they're bench pressing, they're doing all sorts of things voluntarily that are going to affect the amount of money that they receive in their first year. This is whether it's bio-

metrics or whether it's what they put them through out in the open.

Jill Bodensteiner:

Many of these football guys have the opportunity to put themselves in that situation thanks to college, because other than playing college football, right now the NFL has not offered a minor league alternative, which would take a whole lot of this away. If you want to get an education, go to college. If you want to go play football, go to the minor leagues.

Jodi Balsam:

XFL, right?

Jill Bodensteiner:

Yeah. The exploitation I believe goes both ways—if you're going to use that word. There are a lot of people who have no interest in a college education who are there to boost their draft stock. Again, they're in Indianapolis right now showing off everything that they've learned in college and hoping to get the big payday. So, it's happening. People are getting paid or not paid based on their physical attributes. That's what it's all about and it's what the NFL and MLB and NBA are based on.

Jodi Balsam:

Let's move forward with our hypothetical to an athlete who's now in his prime, Giannis Antetokounmpo, the "Greek Freak." He's got a very memorable nickname and he has had to aggressively protect that name, and his image and likeness, and his Euro step. He's sent a number of cease and desist orders, filed lawsuits against clothing companies, merchandisers, and most recently a

- phone case manufacturer, who have all used the “Greek Freak” name without his permission.
- Jodi Balsam: For an athlete in that position, where do you draw the line? You want fan engagement, but you don’t want somebody to exploit your hard earned image. What should the athlete be concerned about? For example, there were a series of congratulatory messages from Milwaukee companies when he won the 2019 MVP and they incorporated it into their PR promotional statements and materials.
- Jodi Balsam: Should he be offended that they’re trying, by associating with him, to somehow gain a commercial advantage? What about the fan who posts something on social media or then the image of him wearing, say, an Old Navy t-shirt that goes viral and is exploited by Old Navy? What should an athlete prioritize, especially somebody at the elite and celebrity level of Giannis, in terms of their name, image, and likeness? Anyone, feel free to jump in on this one. Veejay?
- Vejay Lalla: I’ve done a lot of work in the social media marketing and real time marketing world, including Super Bowl campaigns and especially from the marketer’s side. But, it sort of depends. It’s a little bit of a decision in terms of monetization and the ability to monetize your name and likeness and all of the different areas where it



- could really impact you as an athlete from a dollar standpoint.
- Vejay Lalla: Then there's sort of this brand engagement and fan engagement aspect of it. I've seen, and not just athletes, but celebrities, take very different approaches to this. There's a Michael Jordan case where someone, I think a grocery store, had said, "Congratulations on the Hall of Fame," and I think that case settled for \$12 million. He sued immediately.
- Jodi Balsam: Well, first there was a jury verdict against one of the defendants for \$9 million and then the other defendant settled.
- Vejay Lalla: So, any use of name likeness in that regard when I'm advising a marketer is sort of like strict liability from some perspective, which is if you're just going to use it in that instance you really are using the name and likeness and you could potentially get sued. Now, at the same time, when an athlete starts to engage with a brand and that brand is engaging back or retweeting or doing things that are sort of, in a way, not public interest but interesting to the public from an entertainment value perspective, I tend to be a little bit more aggressive on the marketer side to say, "I think you can do this because the athlete is really engaging with you and I think there's sort of an implied ability to use their name and likeness in that instance."
- Vejay Lalla: There's a couple of examples that I use that are none-athletes in my

social media deck. You have one where Duane Reade retweeted a picture of Katherine Heigl in front of Duane Reade and said, "Do a quick Duane Reade run," and she sued immediately for that. That was a pretty obvious case of where Duane Reade should not have done that. If you're going to go after sort of an actress who's not that successful yet, you're probably going to get sued for that reason too.

Vejay Lalla:

But then there's an example of an interaction between Arby's and Pharell that I was involved with, where he tweeted back about his hat at the Grammy's and that was huge engagement for the marketer and he sort of played along with it. Going back to athletes, it depends on their desire to sort of open themselves up to that engagement and whether they think that will ultimately make them more popular, and therefore increase the value of their brand,

Vejay Lalla:

or do they think they need to be more legal-oriented about it and really protective. Now, on the example you gave, is a trademark right a little bit different in terms of, if you're not going to protect that trademark, you're essentially going to lose rights in that mark? If a lot of people are using it for various contexts and you haven't really protected it in the right way, you may not have the same ability to enforce it later.

- Vejay Lalla: If you own a trademark and a nickname or something that's really developed secondary meaning in the market as a trademark or a brand identifier, that's an area where you need to be more protective, or a copyright where you may have a statutory damages claim. When I'm thinking about it from the marketer side, I think, okay, right of publicity, you got to be pretty careful with copyrights, you have to be pretty careful with trademarks. You might get a "knock it off" kind of letter initially as people tend not to sue with respect to that.
- Vejay Lalla: Those are sort of the different considerations for both sides that come up. There are also endorsement issues. If I'm working with Gatorade and I have exclusive contract with them and one of their competitors references me, that's a problem. Or if I've engaged in that way, that's a problem. So there are contractual considerations as well.
- Jodi Balsam: There's been a lot of noise in the intellectual property field about whether you can trademark movements or dance steps. It's come up most frequently in e-sports and games that use emotes. A situation came up where Sharp Electronics used an image of a player with a similar physique, hairstyle, and posture as Giannis doing the Euro step to advertise its latest flat screen TV. What do you do there? It's not Giannis, but it looks like Giannis. He's doing that dance

- move. What are the players' rights in that situation?
- Vejay Lalla: Is it me again?
- Jodi Balsam: Yep. Go for it.
- Vejay Lalla: I think the Vanna White case is a good case to kind of think back to, in terms of right of publicity and name and likeness image rights, and, again, some of the things you described like a dance, there might be some copyright issues there as well. But essentially, if you're using something that is identifying to that person, you can be implicated in the right of publicity claim.
- Vejay Lalla: I think, in certain states, because it's a state-by-state analysis that the statutes are stricter in certain instances where it would be tough to get away with sort of certain rights. Now, when you get into the game context or other transformative type uses, there are other defenses that could potentially come into play. But you have to be careful if you're going to use an athlete's image or implicate an athlete in some way with respect to your marketing because there are multiple claims they can make, including Lanham Act claims for false advertising, in addition to a right of publicity claim.
- Jodi Balsam: James, jump in please.
- Xavier James: Part of the analysis is you can't sue everybody. The athlete will look at how commercial and how prominent the exploitation is. I'll give you an obvious example. I represented Gary Sheffield who played

for the Yankees and the Marlins. The Marlins had a marketing campaign built around “Gary Sheffield Bobblehead Day” and never called me or Gary. So, there was a visceral reaction to that kind of exploitation and was very prominent. Again, you can’t sue everybody, so you kind of pick and choose your battles.

PANEL 2: EQUAL PLAY, EQUAL PAY: INEQUALITY IN SPORTS

*Presented by: Winston & Strawn LLP*

Francis McDonald:

Hello everyone. My name is Francis McDonald and I’m the VP of events at NYU Law’s Sports Law Association. Our second panel, “Equal Play, Equal Pay, Inequality in Sports,” is sponsored by a long-time supporter, Winston & Strawn. Moderating the panel is Professor Cameron Myler. Professor Myler is a graduate of Boston College Law School and is currently a sports law professor at the Tisch Institute for Global Sport. Professor Myler is also an arbitrator for the Court of Arbitration for Sports and, before joining the legal profession, Professor Myler was a member of the U.S. National Luge Team for 14 years and is a four-time Olympian. Professor Myler, I’ll let you take it from here.

Cameron Myler:

Thank you. Welcome everyone. It is a pleasure to be here again at the Annual Sports Law Colloquium. I’m really excited to have a fantastic panel today to talk with you all about equal play, equal

pay. As I was preparing for today, I happened upon the 2020 annual letter that Bill and Melinda Gates send to people who pay attention to what the Foundation is doing. In this year's letter, Melinda mentioned that this is the 25th anniversary of the Beijing World Conference on Women, where Hillary Clinton famously said that human rights are women's rights and women's rights are human rights and then goes on to say that the data is unequivocal no matter where in the world you are born, your life will be harder if you are born a girl. And in high income countries like ours, and many others around the world, gender inequality tends to be most visible in the workplace.

Cameron Myler:

Today, the workplace that we'll be talking about is sports. You will hear from the panelists about inequalities and inequities in pay and other compensation, sponsorship, media coverage, insurance, just as a few examples. So without further ado, I'm going to introduce our panel and we will get started. To my immediate left is Jeff Kessler, the co-executive chairman of Winston & Strawn and co-chair of the antitrust competition and sports law practices. You probably all know that Jeff is the lead attorney representing the class of Women's National Team Soccer Players in an equal pay litigation against the U.S. Soccer Federation. But Jeff has had many very high-profile cases in sports and

otherwise, including *McNeal v. NFL*, the landmark antitrust jury trial, which led to the establishment of free agency in the NFL, and *Brady v. NFL*. Those are just a couple of examples but I'm going to let Jeff talk more about himself in a few minutes.

Cameron Myler:

To Jeff's left is Michael Goldsholl, the director of operations for business and legal affairs at the Women's National Basketball Players Association. Most recently Michael was part of the group representing the WNBA players in their negotiations with the WNBA for a new collective bargaining agreement. We're looking forward to hearing about that and, Michael, I'll also let you talk a little bit more about yourself. To Michael's left is Christina Simanca-Proctor, a partner in the litigation department of Belkin Burden & Goldman, where she mostly focuses on real estate law. However, Christina has also done a lot of work with hockey players and was retained by the National Women's Hockey League Players Association to represent the athletes in contract negotiations with the National Women's Hockey League in 2017. Last year, she was involved with further negotiations that resulted in benefits for the players.

Cameron Myler:

To Christina's left, that is not Jennifer O'Sullivan as might be reflected on your program. Jennifer unfortunately got a stomach bug and couldn't join us. But a

big thanks to Brendan Schwab who is filling in. Brendan is the executive director of the World Players Association, after being appointed in 2015. He's united the world's leading players associations who collectively represent 85,000 athletes around the world in championing the dignity of the player and the humanity of sport among other things. Brendan also worked with FIFPro, the world footballers association, serving as vice president and a board member. With that, Jeff, we'll just start right here with you if you want to talk a little bit about how you got to this point on this panel and tell us a little bit about what your sports law experience has been.

Jeffrey Kessler:

Well, I assume I got to this panel because I'm proudly representing the Women's National Team in their equal pay case. In terms of my background, I have been practicing in the sports area since I started in 1977 as a first-year associate, purely by accident. I joined Weil Gotshal at the time to be an antitrust lawyer, and it turned out that Weil Gotshal had one sports antitrust case that was just settling called the Oscar Robertson case. That was the first successful player use of antitrust against the leagues. Curt Flood and others preceded that but were not successful in doing that with baseball. That really just led to a series of events where sports clients approached us after that success.



Jeffrey Kessler:

I developed on two paths. One was the antitrust and one was sports, and that has continued throughout my career. I have been mostly on the player side of disputes. I represented almost all the players associations in the United States—in basketball, football and baseball, and in hockey and soccer. I do a variety of other sports representations as well, everything from e-sports to volleyball—I've had a broad array including track and field.

Cameron Myler:

Michael.

Michael Goldsholl:

Hi, I'm Michael Goldsholl. I started interning with the WNBPA while I was in law school. I knew I wanted to work in sports. My athletics career ended very early and I had found a passion with the WNBPA right at a perfect time. We were just beginning to prepare for the collective bargaining negotiations that we recently concluded. Obviously, it's been much shorter and earlier in my career than some of my co-panelists here. I'm just very excited for what the future holds and what we've been able to accomplish already in a short time.

Cameron Myler:

Christina?

Christina Simanca-Proctor:

Hi, I'm Christina Simanca-Proctor. I am a litigator in a boutique real estate law firm. I've been practicing in real estate for about 13 years now. I got involved with the NWHLPA almost by accident. I was reading an article on Deadspin about the league and about how the players were being

treated, and how mid-season, the league essentially canceled their contracts. It made me angry and I'm a hockey fan. This was, full disclosure, a few months into Trump's presidency and I was angry about that. I said, "This is a perfect opportunity to help women and to expand my interest in hockey." So I Googled the name of the executive director of the Player's Association. I reached out to her, I was very honest, and I said, "My expertise is real estate, but I like hockey. I'd like to help you guys. What happened is unfair. Maybe I could help you find a labor and employment attorney to help you." She said, "Great, you can do that, but you're the only one who's only offered to help us, so please, we'd like you to stay on."

Christina Simanca-Proctor: She and I had a good rapport, so I stayed involved and, for the issues that I don't have expertise in, like some labor and employment issues, I reached out to someone I know at a labor and employment firm and he's assisted us. But, I negotiated their contract for the 2018 to 2019 season and the 2019 to 2020 season. I've drafted their bylaws and so, it's been an unusual path, but a great one. I share that story especially because of all the law students in the room who sometimes might feel overwhelmed by not being able to practice in the area that they find most interesting. Feeling stuck is a great lesson to follow-up on the

areas of law that interest you and take the initiative and just reach out and see if you can help, even if you can't get paid for it. My work that I do for the NWHLPA is pro bono, but it's fabulous and I love it and I'm grateful to be on this panel.

Cameron Myler:  
Brendan Schwab:

Brendan.

Well, I'm going start with an apology, Cameron, for putting the gender balance of the panel out of kilter. My background is as a labor lawyer from Australia, coinciding with the mid-90s at a time when there was a dramatic increase in full-time professionalism in many sports and, as a consequence of that, players wanting to get organized. I was involved in the development of the player association movement in Australia, first as a labor lawyer, then as a union leader. I'm very passionate about soccer, so then we took that cause globally and, a few years ago, the player associations across sport felt that we needed a strong voice at the global multi-sport level. We united as the World Players Association and we have a significant number of affiliates, of course from here in North America, including several of Jeffery's clients.

Cameron Myler:

All right, thanks everyone. So, Jeff, I'd like to start with you. Folks might be aware that last week both the U.S. Women's National Team and U.S. Soccer filed motions for summary judgment in the litigation. I know

- you'll be arguing your motion on March 30th and have a trial date set for March 5th.
- Jeffrey Kessler: May 5th.
- Cameron Myler: Sorry, May 5th. Before we talk about some of the latest developments in the case, maybe you could give us a little context and talk about why last March, when the lawsuit was filed, why was that the right time to go forward with this issue and the litigation?
- Jeffrey Kessler: Well, it happened to be International Women's Day, so that was a pretty good reason to file on that day. But the genesis of this case has been going on for quite some time. As I think most people in this room know, the Women's National Team is the dominant number one women's soccer team, or football team, as the rest of the world calls it, for now over 20 years. It has won more World Cups. It has been number one longer. It really could not achieve any higher. It has a single employer in the United States Soccer Federation, as the Men's National Team does. Now, this is no knock on the Men's National Team, but they are not remotely as successful as the Women's National Team. In fact, they did not even make the last World Cup. So, one would think same employer, same job, equal work. Where is the equal pay?
- Jeffrey Kessler: And instead the U.S. Soccer Federation has stubbornly persisted in a pattern of gender discrimination that goes back to the very

founding of the Women's National Team. The women have tried to remedy that over the years through collective bargaining. They have tried to remedy that through filing an EEOC complaint in 2016, but none of that came to any avail and, particularly after the same administration alluded to took over, the chances of getting the EEOC to take action became remote. They decided last March on International Women's Day that it was time to go to court. They asked me and my colleagues on the case, including Cadel Spangler, who was my co-lead on the case for Winston, to bring this action.

Jeffrey Kessler:

We have a trial date of May 5th. It has been on a very, very aggressive schedule and it's for violations of both the Equal Pay Act, which is gender specific, and Title VII, which is not gender specific, as it applies to all forms of workplace discrimination. The case is about both pay disparities and working condition disparities under Title VII, which is broader than pay. We are looking forward to our time before the California jury and I am inspired by the women who I represent and they are confident we are going to win, and so am I.

Cameron Myler:

Now, Michael, you have had a very different experience in the context of basketball and have just concluded a groundbreaking eight-year CBA. Could you talk to us a little bit about that process?

- Michael Goldsholl: Yes, absolutely. Now when we say it's groundbreaking, it is. It is truly groundbreaking, and it is truly a new CBA in every way. Terry Jackson, the executive director at the WNBPA, and I would talk and say we just wanted to tear up the previous CBA—it was so awful. But we went in, and we have such a strong executive committee and a very engaged membership. We went in and surveyed them and got such incredible feedback. It really led to the culmination of getting the CBA that was just recently signed. It is practically that every point in the CBA is a key point.
- Michael Goldsholl: We increased the per team salary cap by 30% last season in 2019. Each team could only spend up to \$996,000 per team. In this coming season, it's up to \$1.3 million per team. The average salary's increased—now players can make up to \$215,000 in 2020 in base salary as well as in the form of prize pools and marketing agreements and increase compensation through that. One area that I'm very passionate about is greater player freedoms and free agency. When I came into the role, I was so frustrated about the lack of freedom and the absence of the player empowerment era that we're seeing in the NBA right now in terms of freedom of movement.
- Michael Goldsholl: It was just such a missing component. Now we saw that what came out of that was probably the big-

gest and most exciting off-season in WNBA history with smart key players moving teams having the ability to do that and that was very exciting. On different notes, up until this new agreement, players with five or fewer years of service had to share hotel rooms when on the road. Share hotel rooms. Now, in the new CBA, every player will have her own hotel room and that right there restores their dignity. Traveling, and air travel obviously, I'm sure many of you have heard, was another big issue. Players have been traveling in coach and not just coach, but economy, middle rows, we're talking about 6'5 athletes, 6'8, sitting in the middle seat, D boarding group on Southwest Airlines. It's just horrendous. There's still a lot more room to grow, but we improved their flying conditions and benefits of that.

Michael Goldsholl:

Players who are moms, that again was another major, major point for the players going into this that they wanted to see improve, especially, for our professional women's sports league. Our previous CBA was so far behind the times. If a player missed a time or a season due to pregnancy, she would only get 50% of her salary and that was the only benefit that the team offered. Honestly, it was clearly so substandard. Now, in the new CBA, not only will the players who are pregnant receive their full salary 100%, players with children will receive a childcare stipend for up to \$5,000 per year,

which is the IRS limit. They will be able to receive from teams a second bedroom and team housing if they have children under 13 so that the mom and her child can get the sleep that they both need and the privacy and the space. And providing all of that made sense.

Michael Goldsholl:

We also implemented a new revenue sharing plan that is tied to league revenues, which have actually always been the profitable side of the house. In that lead growth, the players in the league will share 50-50 once certain revenue targets are hit. We also have provisions that we believe will begin to build a more robust coaching and front office pipeline for WNBA players. Not only in the WNBA but the NBA, the G League, the 2K league, and this is something we had been seeking for the two years leading up to this as well. Finally, by requesting the league to work with its partners to identify internships and associate programs for our members, we have a more meaningful off-season employment program as well. That was something we tried to work with previously on the league before the CBA and it didn't work out. Having our group licensing rights and working through a rep worldwide with the NFL Players Inc., we started securing those positions on our own. I know I'm missing so many things just because this is truly a



new CBA, but those are the key points.

Cameron Myler:

Great. Well, I think turning from a very, very positive outcome in your situation and in basketball to hockey. So Christina, maybe you can give us a little context as far as what's been happening in the past year in the world of women's professional hockey.

Christina Simanca-Proctor:

Yes, thank you. I just want to give everyone just a brief history of the NWHL because, generally, when I tell people that I represent the players, their response is, "I didn't even know that there was a professional women's league." The league started in 2015 with four teams based in the Northeast. Now it's five teams. There's one team in Minnesota, so there's Minnesota, Boston, Buffalo, Connecticut, and the metro area here in New York City. The league was started by a woman named Dani Rylan, who's the current commissioner, and she played in college. After graduating and having a small business venture that didn't work out for her, she decided to start this league and give college players essentially a place to play professionally and try and earn some money and promote the sport.

Christina Simanca-Proctor:

There was a serious injury to one of the players in the first year of the league's existence that the league said really hindered their revenue and caused their insurance to skyrocket. And so, in 2017 when I got involved, the commis-

sioner said, “Really there’s no money, we’re struggling here and so the players are going to have to take a hit financially.”

Cameron Myler:

What was the range that players were being paid at?

Christina Simanca-Proctor:

The lowest paid player was being paid \$2,500 for the season and the highest \$7,000. All of the players still have full-time jobs. Their participation in this league is in the evenings for practice and on the weekends for games. It’s not where we want to be, but it’s where we are right now. Maybe I’ll talk about this later, but just briefly—before this current season started, a group of players that were in the league decided to opt out, boycott, if you will, and start their own association. They were unhappy with the progress that the league was making revenue-wise. They decided to create their own association, participate in a showcase, travel the country, play games, participate in the NHL all-star game. They did that as a means to promote women’s hockey, but also to try and force the hand of the NWHL and the NHL to find a solution. Because we all agree that this is untenable in the future.

Christina Simanca-Proctor:

That really now is as much progress as we’ve made. Now the minimum salary is \$10,000 flat and there is a revenue share that I negotiated this year. But even that’s not enough. So, unfortunately, we’re a bit bifurcated. The players that have chosen to opt

out and start their own association are what we call our “star players.” These are our Hilary Knights and the Amanda Castles and a lot of them are on the national team. A lot of them won gold in PyeongChang. So, it would be a lie to say that it didn’t hurt when they left, but we understood why they did. But that’s kind of the situation now. We’re at five teams, but let me backtrack a little bit. With the exception of Buffalo, which is now owned by the league, all the teams were owned by the league, which made it difficult. Buffalo was owned by the Pegulas, who own the Sabers and the Buffalo Bills. We had a situation where Buffalo was being treated very well because they had a lot of money. They were getting catered meals, great equipment, great facilities, and great ice time. The other teams weren’t because they’re owned by the league, which was struggling. But now we’re seeing hopefully a continued shift forward because the Boston Pride has been purchased by a private equity fund. That’s where we’re going now.

Cameron Myler:

So it’s the Professional Women’s Hockey Players Association and Billy Jean King has actually been. . .

Christina Simanca-Proctor: Yes.

Cameron Myler:

. . .a really big supporter and what they’re calling the dream gap tour. . .

Christina Simanca-Proctor: Yes.

- Cameron Myler: which is the tour that you mentioned. So you have an icon and women's sports supporting their efforts.
- Christina Simanca-Proctor: Sorry, just to piggyback on that. I had reached out to the NHLPA, which is based in Toronto, when I got involved and asked them for help saying that the men's union maybe can do something for the women's union. At first they were very excited about that, and one of their attorneys played hockey at Yale and she was very interested in helping, but they decided to support the PWHPA.
- Christina Simanca-Proctor: So, the men's union is essentially behind them, which hurts also, but it is what it is and we're trying our best to try and work together again in the future. And I'll speak to—maybe a little bit later—how we're going to try and do that.
- Cameron Myler: Great, thank you. Brendan, maybe for a little more global perspective, you can talk about how global is this sort of movement of women in sports toward more equal pay compensation and other opportunities?
- Brendan Schwab: I think it's very significant. But, what I would say is that the struggle that has just been mentioned, in both hockey and basketball, are universal struggles. The incomes that were quoted, I heard some people smile about that and smirk about that, but there are many elite athletes around the world who are world champions and are struggling for basic recognition as an employee and the entitlement

Brendan Schwab:

that flows. But there have been two very powerful forces at play. The first has been an increasing awareness on the part of sport, that women's sport is legitimate and something that can be very significant both in terms of the development of sport and commercially. In preparing, I've noticed that in the recent years, football, rugby, cricket, hockey, rugby league, netball, which is a women's sport that has grown enormously, professional basketball, the Gaelic sports, and Australian rules football are among the many that have transformed their competitions in order to recognize the opportunities that exist. That's been the first powerful force. The second has been the incredible activism globally, on the part of so many women athletes. Particularly in the sport of football. In 2015, the U.S. women's team launched what became a global class action over the decision of FIFA to hold the World Cup in Canada on artificial pitches. That action pretty much ran out of time, but there was a commitment on the part of FIFA to play further World Cups on natural grass. But the players—and this is a really significant issue of the challenge of the global reform—were subject to quite a deal of harassment and threats for being associated with litigation against the world governing body. Since then, there's been very significant collective actions taken by

women footballers in Ireland, Denmark, the Netherlands, Finland, Chile, Argentina, Brazil, the United States of course, Norway, and Australia.

Brendan Schwab:

One of the biggest issues we see at the global level is this incredible economic disparity. For example, one of the issues which really has motivated players and particularly from my country, Australia, is the disparity in the FIFA Women's World Cup prize money. Now, whilst this money is paid to the member federations, and not the players directly, for many of these countries it becomes the primary source of income through which the players could be remunerated. The total prize money for the World Cup for the women, which the United States won, was \$30 million. \$400 million was paid for the FIFA Men's World Cup. The winners, France and Russia, received \$38 million. The U.S. Women's Team, the Federation, received \$4 million, which was 50% less than what the male teams received for simply qualifying for the tournament. What is becoming significant is that the capacity to be recognized as an employee, to form a union, to take legal action, like that which Jeffery is involved in, is a lot more complex at the global level. I won't go into the reasons.

Brendan Schwab:

But the big reformation that we're seeing is increased pressure on the part of the sports governing bodies to adopt fundamental

human rights standards into their regulations. These include, of course, non-discrimination and, in fact, FIFA's statutory commitments include the advancement of gender equality. One of the key challenges now for players is how do we hold these international sports governing bodies to account for these constitutional commitments, notwithstanding the gross and discriminatory nature of the decisions that are still being made.

Cameron Myler:

Right. It's one thing to have the rules and another to actually enforce them. Right?

Brendan Schwab:

Yeah.

Cameron Myler:

Jeff, I want to come back to you to hear a little bit more about the motions for summary judgment that were filed last week. The Women's National Team is arguing that there's no issue of material fact and that U.S. Soccer has in fact violated the Equal Pay Act by discriminating against the players in their rate of pay for substantially similar work. Could you talk a little bit about the women's position and what are some of the defenses or arguments that U.S. Soccer has raised?

Jeffrey Kessler:

Sure. This, in U.S. labor, is a very unusual equal pay discrimination case because the amount of the discrimination is really not subject to any dispute. There are two collective bargaining agreements that spell out exactly what the different compensation standards are. Normally, in a pay discrimina-

tion case, employers in the U.S. aren't discriminating data blatantly and you have to show the discrimination has been in individual salary negotiation, disparate impact, promotion, advancement, or support. We don't have any of those issues. Each of the men get compensated according to a certain formula and the women get compensated according to a different formula, which offers less. We actually have moved for summary judgment, which is very unusual for an equal pay plaintiff on liability for paid discrimination and said the only issue that should be tried on the pay issue is the amount of the damages and whether or not we get punitive damages.

Jeffrey Kessler:

So, what has the USSF said? Well, they said a lot of things. They can't dispute the facts about the different agreements. So, they argue a variety of defenses to this. Their first defense—that you have probably heard about—is that this discrimination is not based on gender; it's based on the fact that the men's team can generate more revenues. That's an economic justification based on the productivity of the employees and it's not really gender, so therefore that's defense. Now, the problem with that defense is that's not true. Their own data shows, and this again is undisputed, that since 2015, which is the relevant date because our class goes back to 2015, the women have earned



more revenue than the men's team. The women's team has generated a profit of about \$20 million during that time period for the USSF and the men's team has generated a loss.

Jeffrey Kessler:

So, what could be their possible argument? Their argument is not to look at 2015 through 2020, but to look back to 2009. If you go back to 2009 and you go forward for 10 years, stopping in 2019, it turns out the men made a little more. But we're concerned about discrimination today, not in 2009 or 2010 or 2011 or 2012. That's one of the defenses. The next defense they have is that none of this should matter because there were two different unions and it was two different collective bargaining agreements and therefore it's not our fault. The problem with that is that there is no collective bargaining exemption to the Equal Pay Act or Title VII. And you can easily understand why. A union, for example, can't agree to pay less than a minimum wage.

Jeffrey Kessler:

It's not a defense. A union can agree to discriminate against people on the basis of race or gender or disability or anything else that's there. It's not a defense. This idea that while you agree to it, every employee agrees to a discrimination. Unless you have slavery, you agreed to what you're paid. The history here is that the women asked for equal pay and were denied equal pay and so we don't think the collective bargaining

makes a difference there. The third defense, which is really the most offensive defense in my view, is that you really don't have equal work. You know men are stronger and faster, they actually say that, their opponents are tougher, it's harder for the men to win and therefore it's really not the same job because, after all, FIFA doesn't allow women to be on the men's team and therefore, you're not entitled to equal pay.

Jeffrey Kessler:

We are very comfortable that we meet the standards of the Act, which is substantially equal work, not identical work. We'll let the jury decide whether or not it's substantially equal. But all the witnesses testified, the women are just as skilled, in fact, they're more skilled on a skill basis. They are far more successful, they play under the same rules on the same field, and that sounds like equal work to us. In fact, we think we could get summary judgment on that. But they argue it's not the same job in terms of that. Finally they say, "Well it's all FIFA's fault. FIFA gives different prize money." Our point about this is that this case has nothing to do with FIFA. FIFA decides the prize money, which is paid to the federations—it has nothing to do with the athletes directly.

Jeffrey Kessler:

Yes, we would like FIFA to get more prize money, that'd be great for women's sports in general, but it doesn't justify discrimination. There was just yesterday a very

Jeffrey Kessler:

important case in the 9th circuit, the *Rizo* case, which was a redo of a case that had previously been decided, but one of the panel members died so the of Supreme Court said it had to be reconsidered. The new decision that came out yesterday makes it very, very clear that the only non-gender justification for discrimination under the Equal Pay Act is something that has to do with the performance of the job, something that's within control of the employees. There the issue was previous pay history, which they said cannot be considered in the 9th Circuit because it has nothing to do with the performance of your job now, it just perpetuates discrimination. Well, what FIFA pays to the federations has nothing to do with the job of these women or these men. In fact there's no pass to have that money. All there is a negotiated agreement of what the bonuses will be if you win. Their final argument, which is even more offensive, is that the women will actually win the bonuses and the men won't, so we shouldn't have to offer the same opportunity to the women to do that. That's like the reverse of a justification for discrimination. The women are better, they deserve to earn more. That's our case.

Cameron Myler:

And hasn't even the current president of U.S. Soccer, Carlos Cordeiro, admitted that the women have not been treated equally?

Jeffrey Kessler:

Yeah. This came out in our summary judgment papers. He ran for president in 2018 on a platform that women deserve equal pay for equal work, that there was lots of discrimination against the women, that he and other board members knew about it, and that he was going to do something about it immediately if he became president. Well, he became president and he's done nothing about it and his justifications for why were, let's say, unpersuasive. That's all part of our summary judgment papers as well.

Cameron Myler:

Well, now to Michael again, I think there's an interesting contrast between soccer and what's happening in basketball. The WNBA commissioner, Cathy Engelbert, said with respect to the negotiations for the CBA, that the league approached the negotiations with a player-first agenda, which seems to have influenced the dynamic and perhaps the outcome of the negotiations as well. Why do you think there is such a different dynamic in basketball than hockey or soccer at this point?

Michael Goldsholl:

I would attribute it to a few things. The first is our executive committee president, Nneka Ogwumike, the piece that she authored for *The Player's Tribune*, "Bet on Women," set the tone early as to what the fight was going to be about, what the issues were, and, not just that, but what this means for young girls and women in

sports everywhere. Second, our executive director, Terry Jackson, and Cathy, the commissioner, met before she was announced as commissioner. We had that opportunity and, during that meeting, Terry described our approach for the CBA specifically. We really framed it up into three buckets: player salary and compensation; the player experience, which is largely working conditions and environment and non-salary compensation benefits; and then third, which is just as important and critical, is player health, safety and wellness. We really laid out and discussed the wins and the opportunities for both sides in these negotiations. We have a commissioner who is not just a former CEO, but is also a former student athlete and I think the concepts in a lot of our proposals to her—and there were a lot—were not completely foreign to her, especially not a lot of the programs and policies that she implemented, spearheaded, and led during her tenure at Deloitte. I would say those three things would be largely attributed to her.

Michael Goldsholl:

Cameron Myler:

Thank you. Well, these may be some lessons for other women's professional leagues. So, Christina, back to hockey. This new players association that essentially has been created in the last year and the 200 players that are boycotting—do you think that will have some impact on what the

WNHL does going forward, with respect to compensation and how they treat their athletes?

Christina Simanca-Proctor: I'm not sure. I think what they're doing is admirable, important, and has the potential to maybe pressure the commissioner of the NWHL to find more funding and generate more revenue but, as it was explained to us, these players decided to sit out the season because they thought it would force the NHL to step in and provide more financial assistance to the NWHL. Now, until last year, there was also a professional Canadian Women's League and the NHL gave a stipend to the Canadian league and it gave a stipend to our league and the NHL was very clear with us that that's all they were going to do. "We don't want to come in. We don't want to seem like the men saving the women and take over the leagues and create our own league. We don't want to be the bully, but also we just don't agree with the business model of the NWHL so we're going to stay out of it."

Christina Simanca-Proctor: That's been frustrating because the players who decided to boycott thought, "Well if we as the star players remove ourselves, we think the NHL will step in." But we've always asked the NHL for something concrete. If we all decide, if the PWHL and the NWHLPA—both player's associations—decide to boycott so that the league folds, we might do

that, but we need something concrete. We don't want to take this chance and the NHL has never been able to give us a concrete plan. That's why the players I represent want it to continue. Like all athletes, they have a small window of time with which to play professionally. They don't want to miss it and so they said, "Look, let's just go forward."

Cameron Myler:

I just want to follow up on the strike issue. Because Jeff, I understand in the CBA, Article 26 prohibits the women from going on strike. Is that correct?

Jeffrey Kessler:

Oh, you mean the Women's National Team?

Cameron Myler:

Yeah.

Jeffrey Kessler:

Sure. Like most collective bargaining agreements in all sports that I'm aware of and actually in non-sports as well, there's usually a no strike, no lockout clause during the term of the collective bargaining agreement so that would apply.

Christina Simanca-Proctor:

We don't have a CBA, we have just a standard player contract and again it's a young league and we have the added kind of complication that the commissioner of the league played in college with a lot of the players now. So, there's this relationship friendship among all of them and a real effort for the players to try and make the league work and vice versa, not only because it benefits all of us, but because they all know each other and they're all friends and some of them are roommates. The frus-

tration has been that we haven't been able to get a commitment from the NHL on having them start a league for women and really commit to that. Also, I've met with executives at ESPN and executives at the NHL and everyone says, "We love women's hockey, we support women's hockey. Oh my God, that shootout in the Olympics—seven rounds, that was amazing. It was the today show." Ok, great, but where's the follow up? It's not there. So, there was a lot of lip service and really not a lot of cash.

Cameron Myler:

Brendan, on the issue of a follow-up. You mentioned that FIFA has committed itself to human rights principles including gender equity, which I understand actually puts them a little ahead of the game with respect to some international sport organizations, which I find quite shocking for FIFA.

Brendan Schwab:

Yup.

Cameron Myler:

How is FIFA actually held accountable and made to comply with their own goals?

Brendan Schwab:

The rules are now part of the contractual framework that applies to the World Cup so there is certainly a possible avenue to the court of arbitration for sport for relevantly affected players and others to pursue that. That's something quite a number of the players are seriously looking at. There is a gross discrimination. We're not talking a close comparison here. We're talking 7.5%



being paid for women's football in circumstances where the economic argument is simply not relevant for reasons we don't have time to go into. FIFA needs to be able to justify its discrimination. It would have to be able to say, look, this is in pursuit of a legitimate interest and is necessary and proportionate and effective. But of course there is no such legitimate interest. In fact, it's contrary to its stated constitutional commitments to advance gender equality. We'll get quickly to the question of accountability. Interestingly though, the International Olympic Committee this year will develop a human rights strategy. It's issued a report called the "Gender Equality Review Project" and it wants every international federation and the national Olympic committees to have a plan in place by the end of this year to deliver equal prize money and equal pay. It's very much a live issue. When I listened to the struggles though at this table, the question is very interesting as to what players can do. I've been involved in representing both men and women national teams and sequencing is very, very important. The U.S. Women's Team is quite unique in that there are separate unions between the men and the women, but the common example is that the players belong to the same union.

Brendan Schwab: The Australian union, for example, had to transform its govern-

ance to embed gender equality in the governance of the union so that it was well positioned to represent the players, develop a vision for the sport, and then bargain that vision so that the business case wouldn't get in the way. They've recently negotiated an equal pay deal for both national teams, one of the first, and that was about elevating the women to the standard of the men. There are some lessons there at the domestic and global levels that suggest we should be optimistic that this will be a year of profound progress.

Cameron Myler:

Hopefully, including on May 5th. Jeff, what's the ideal outcome for the players in your litigation?

Jeffrey Kessler:

The ideal outcome will be that we'll go to trial or win summary judgment. But we'll be content to go to trial and have the jury find that there was equal work and not equal pay and find the violation of both the Equal Pay Act and Title VII. The way that works is the jury decides the equal pay damages and actually the judge decides the Title VII damages, which I find somewhat unique. It's not my normal area of practice, but that's how it works. And the jury decides punitive damages. We also hope to get an injunction going forward which would require for our class, that will continue to be equal pay and equal working conditions. So for example, the men's deal is up, they'll eventually get another one and if they get an

increase, as they should get, based on how long they haven't had a deal and the next deal that that would then be a minimum standard for the women as well going forward, under our injunctions.

Jeffrey Kessler:

That's what we're hoping to achieve. One other thing I would note, but this applies both on the FIFA level and the U.S. level, is that all of these football organizations have done an inadequate job in promoting and marketing the very popular women's sports that they have. For example, there was, for a while, floating around this false information about how the Women's World Cup earned so much less than the Men's World Cup. Actually, nobody knows what the answer to that is because they don't break out the data or do the broadcast rights separately, so that was basically all the canard about that. In the U.S., they market it together. So, if you want to sponsor and give money just to the Women's National Team, as Coca-Cola wanted to do and Visa wanted to do, this last year through the USSF, you couldn't do that. They tried to do that.

Jeffrey Kessler:

That'll be part of our trial because they were much more interested frankly in associating those brands with the Women's Team than with the Men's Team. And yet, USSF said, no, that's not an option. Your option is you just get to be a sponsor of the USSF and you don't get to devote money there.

Part of the discrimination is in the lack of will and resources to actually realize the great potential that these sports have. That's a global problem as well. In the U.K it now it looks like the premier league has the potential to independently get behind women's football in that country, which I guarantee was going to lead to much more significant revenues for that sport than has previously been the case. In fact, remarkably, it was only a few years ago that women were not allowed to play professional football in the U.K. If you all remember "Bend it Like Beckham"—I mean, the discrimination was incredible. So they've come a long way. I do think there's reason to be encouraged about what's happening around the world on this issue at least in the world of soccer or football.

PANEL 3: THE "RICH PAUL RULE" AND THE EVOLVING ROLE OF  
THE SPORTS AGENT

Garrett Mealey:

Ladies and gentlemen, we're going to start our third panel right now. Good afternoon. My name is Garrett Mealey. I am one of the representatives for the Sports Law Association. This next panel is titled The "Rich Paul Rule" and the Evolving Role of Sports Agents, sponsored by the Journal of Law and Business. Moderating the panel will be Professor Daniel Kelly. Professor Kelly is the Academic Director of graduate programs and Clinical

Assistant Professor at the Preston Robert Tich Institute for Global Sport at the NYU School of Professional Studies. In addition to his academic pursuits, Kelly has consulted on strategic leadership and global business initiatives with FC Barcelona's, Barça Innovation Hub, River Plate University Institute, and the Superliga in Argentina. Also, Kelly served as the Academic Lead for the Josoor Institute's Football and Sports Management Diploma Program in preparation for the 2022 FIFA World Cup. Kelly holds a PhD in sports management from the Ohio State University in Columbus, Ohio and an MS in Sports Studies and a BS in Business Management from the Richard T. Farmer School of Business at Miami University in Oxford, Ohio.

Daniel G. Kelly:

Good afternoon, everyone. As mentioned, I'm Dr. Daniel Kelly. Today's panel, "The Rich Paul Rule" and the Evolving Role of the Sports Agent" is sponsored by the NYU Journal of Law and Business. This panel will discuss the regulatory environment of sports agents and how their roles have evolved over the years. The discussion will focus on how player associations, professional leagues, and the NCAA have attempted to regulate agents specifically as it pertains to the prerequisites to certification imposed by these various entities and most recently highlighted by the Rich Paul Rule.

Please join me in welcoming our esteemed panel. First we have Jason Glushon, from Los Angeles, California. He's the president and founder Glushon Sports Management. At the age of 34, Jason has negotiated for professional basketball NBA contracts, each worth over a hundred million dollars. Some of Jason's clients include Al Horford, Jrue Holiday, Duncan Robinson and Jaylen Brown. Jason's professional philosophy is, "If all of my clients are happy, then I get to be happy."

Daniel G. Kelly:

Next we have Robert Guerra. Robert Guerra from New York City is the Assistant General Counsel for the Major League Baseball Players Association and is responsible for overseeing the certification and regulations of agents. Robert spearheads the MLBPA's Clerkship Program in conjunction with the Peggy Browning Fellowship Program. Robert has also been instrumental in the evolution of the MLBPA's regulations governing player agents with regard to background checks and the addition of a bilingual written exam in English and Spanish for player agent certification.

Daniel G. Kelly:

Next, we have Charles Grantham. Charles Grantham is the Director of the Center for Sport Management at Seton Hall University. Charles has had an illustrious career in sport business as he has represented and or advised NBA players including Charles Oakley, Amar'e Stoudemire and Tobias

Harris. Also, Charles was a consultant to the plaintiffs in the Ed O'Bannon versus NCAA lawsuit and its counsel Michael Hausfeld. Charles was formally a Union Executive for the National Basketball Players Association where he served as the first Executive Director from 1988 to 1995. As a principal negotiator for the NBPA, Charles established the leagues for historic legal battle agreements between 1980 and 1995 and was the architect of the industry's first revenue sharing salary cap business model.

Daniel G. Kelly:

Last but not least, Dr. Paul Haagen, from Durham, North Carolina, is the Co-director of the Center for Sports Law and Policy at Duke University. Dr Haagen is a Road Scholar and was the Editor of the Yale Studies in World Public Order and Editor in Chief of Yale Law and Policy Review. Since coming to Duke, Dr Haagen has led the charge when it comes to transitioning athletes from college to professional sports. Dr Haagen's work with Duke University Student Athlete Advisory Committee distinguishes itself by an expensive advising system that educates and informs student athletes about their rights in the age of business. Please join me in welcoming this amazing panel. To get us started, our first topic to each of the panelists. What are your thoughts on the recent NCAA policies on agent regulation and their purview in relation-

ship with the pro unions and agents?

Robert Guerra:

Well, I guess I'll jump in first. Obviously I represent the Major League Baseball Player Association, and I tend to agree that these sports unions are best suited to vet and certify the agents and not this third party NCAA. I can speak for what we do and the other unions do similar things. As Daniel Kelly mentioned, we do background investigations. We are a third-party company vetting these guys going through conflicts of interest, criminal, civil matters just going in and out of what's going on in this person's background. Only after they've passed that step they can then take a competency exam, which we test in English and Spanish. It's a rigorous process, and not just anyone can just walk in and become a certified agent.

Robert Guerra:

Once you've cleared those steps to have to clear another step doesn't make much sense.

Charles Grantham:

Well, I'll step in from there. I established the Agent Regulation and Registration Program for the NBA players in 1986. I think the NCAA is totally out of bounds and I think the respect of unions in the NFL and the NBPA should file a legal action against them. As a matter of fact, I think they should, on behalf of all the agents in basketball, make sure the NCAA understands that it's the representational authority that they lack. As the exclusive bargaining unit



of all the players, we also control that relationship between management and the player. That duty is specifically designed for the exclusive bargaining unit—not the NCAA. I’m a little disappointed that the unions up to this point have not taken an official stand against the NCAA on this very basis.

Charles Grantham:

Because it appears to me then that they very carefully, by remaining silent or complicit in the exploitation of the student athlete.

Jason Glushon:

The NCAA’s goal here, in their opinion, is to protect the players or what they like to refer to as “student athletes.” But what they’re doing specifically for basketball is targeting the players and the agents. Especially when started requiring that you needed to have an undergrad degree. And as Robert mentioned, these unions are pretty good at doing their background checks, and there’s a rigorous exam to get there that Charles helped create on the mouse-ball side. So the fact that is that they are targeting basketball players and agents. Do you have this in baseball yet? Do you have to be NCAA certified in baseball?

Robert Guerra:

I don’t believe for baseball you do. I’ll probably jump on that.

Jason Glushon:

I’m sure there are other problems, but you don’t have to do it in baseball. Who actually can test and go back to college if they want. I think hockey is the same

way. So if we're actually trying to help the players, I'm a big believer in "you say what you mean and mean what you say." But the facts are the facts is that they actually don't help the players at all. They hinder them. It's a money grab by the NCAA and there's a lot of other fine print that the NCAA has involved. And for at least some of those reasons, I'm one of the many agents that did not get NCAA certified. For me it's based on principle. I could be NCAA certified. I have an undergrad degree. I went to law school as well. But it's a wrong thing to do. They haven't done many right moves over the years. And frankly, that's why I flew out here to talk about this today. I feel so passionately about this one topic because it's principle at the end of the day.

Robert Guerra:

Yeah. I mean the justification I've heard is that it's to protect the student athletes. But if you want to protect student athletes, allow them to have agents. Currently baseball players, amateur baseball players, can only get an agent after they'd been drafted. If they're a high school student and then thereafter, if decide to go back to school, they can't have an agent again until they've graduated. I mean, that's crazy to have this large period of time where you don't have legal or other representation making these large, life-changing decisions.

- Charles Grantham: Let me add a little bit of historical perspective here. In 1983, I testified before the Judiciary and Congress in support of a guy named Herschel Walker. Anybody remember him? Herschel Walker. I was there to defend his right to leave school and sign a lucrative contract with the USFL. And at that time, the bill was called the Student Athlete Protection Act of 1983. At that time, student athletes were not allowed council. 2019, after all of the dispute we've had over these last 25–35 years about whether or not student athletes should be compensated or whether they are indeed employees, we've now reached a point where the NCAA would like to provide them counsel—only to continue to control the output. I'm sure you heard the panel earlier. This is all about names, images, and likenesses. And by the way, in 1983 the standard rule was—and this is what the NBA and the NFL were there to protect—name, images, and likeness.
- Charles Grantham: They were there to protect content. They were there to mandate or continue the rule that you were ineligible to be a professional athlete until your four years of college eligibility had expired. Now think about that.
- Daniel G. Kelly: At this time I'd like to give the mic to Dr. Paul Haagen. Because he's experienced with Duke University and student athletes, I think he has a very strong opinion about this.

Paul Haagen:

Well, I'm not sure I have a strong opinion—and this may come out as a defense of the NCAA, which is not really what it's intended to be—but I think we need to look at where this regulation is coming in. It's coming in as an enabling piece of regulation as opposed to a restriction. The previous situation was you couldn't be represented at all. And so, they're facing now a situation in which there's the possibility of the NIL matters. There has been for a long time concern about getting information about the transition, from being a college athlete to a professional athlete. And I think what this is is an effort to accommodate a series of changes that that were in play rather than a renewed restriction because the thing that was proceeding it was none. If you came as an agent and were attempting to enter into an agent relationship with a Duke player, you would violate the North Carolina. . .

Jason Glushon:

But that's why you have state regulations. If I wanted to recruit a Duke player, I would be certified by my union, which has those background checks and that rigorous exam. And then I don't just pay money to be certified in North Carolina. They'll probably do their own background checks and I have to pay my fee and other things.

Paul Haagen:

They don't do any background checks, but they do collect a fee. They require you to post a bond.

- The point is, essentially, the regulation was dealing with an internal NCAA issue, which is allowing access, and by avoid the problem under the “Uniform Athlete Agent Act” that by entering into a limited representation agreement, you’re not committing a felony.
- Jason Glushon: I know you don’t work for the NCAA, but why basketball? Why are they selectively picking basketball? I think we probably could gauge the reasons why and-
- Paul Haagen: Because that’s where the pressure is on that.
- Charles Grantham: That’s where the money is.
- Jason Glushon: That’s where the money is. Everything goes back to the money.
- Paul Haagen: It’s where their money is.
- Charles Grantham: But I guess the point is that, for 35 or 40 years we’ve always known, ever since Spencer Haywood, 1971 that the judge ruled at 18 years old you have the right to earn a living. So even if I understood that from the NCAA’s perspective, why would it take me this long to respond to such a need? I could have provided counsel in 1990. Why did I have to wait until the NIL and the economics of sport pressured me to do that? What would be the right thing to do if your son was a sophomore in college and had pro basketball or football potential? Would you not like to be able to provide him counsel? Why would it have to be a violation of the rule that would not provide him counsel? It’s about control and it’s about money. I don’t know why we keep

- bouncing around those two points.
- Jason Glushon: Well if you also wait that long, they figured you do a little bit more due diligence and do a good job, instead of coming out and saying that you need to have an undergrad degree. Even the unions like the baseball union do their diligence, and I'm sure there are a few people in this country or the world that have done pretty good things and also haven't ever achieved that.
- Paul Haagen: NBPA regulations have the same rule.
- Jason Glushon: You actually don't have to be completely certified on that. You don't have to have an undergrad degree.
- Paul Haagen: You can have an exception.
- Daniel G. Kelly: Well, it's not required.
- Jason Glushon: It's not required.
- Robert Guerra: Major League Baseball player associations doesn't require an undergraduate degree either. A lot of our players, after they're done playing, become agents. These are skilled professionals who understand the game, how to deal with management, and how to leverage the special talents to get the best contract possible. That's experience. That's valuable and that helps their clients. But some of those players got dropped right out of high school, so they don't have an undergraduate degree or maybe they're still working on it. But they've passed the background investigation.

- Jason Glushon: They passed a competency exam. There are ways to take care of this. With this particular rule, when you look at the NCAA, we often say, "How do you become an agent?" By getting a client. And if you have a client like LeBron James, I doubt very seriously you're going to not meet the requirement of being certified. Whether you have an undergrad degree or not.
- Robert Guerra: Assuming you pass the background investigation and the tests.
- Jason Glushon: Yes, yes. It's true.
- Daniel G. Kelly: So at this time, moving on to the next question: What are your thoughts on the overall evolution of agent regulation in pro sports? As we're seeing from different examples, whether it's basketball or baseball, more requirements are starting to emerge over the years.
- Robert Guerra: I mean, at this point, we are amending our regulations almost yearly. We amended last year. We are amending it this year. It will be coming out probably sometime next month. We're always trying to evolve with the marketplace, with what trends. One of the rules that will be coming out this year is just to provide salary arbitration for eligible players or targeted players for extensions. And more educational information. We work with the agents to provide that information and to discuss the pros and cons of extension. That's in the new amendment. We're

- Jason Glushon: constantly just trying to stay ahead of the curve to make sure we get our clients the best—our players, our unit—the most information to take advantage of their career. I’m in favor of more regulations, if there’s a good rationale behind that or if it helps the players. Frankly we’re all advocates of the players. That’s the most important thing at the end of the day. But going even back to the NCAA, give a good reason and a rationale. Like Robert said, if you’re going into arbitration or free agency, you’re going to educate them. They have to spend time and maybe the agent has to fly to New York to meet with them. That would benefit the players. They’re more educated. They know what the heck is coming up when they’re salary arbitration eligible. But that’s the issue going back to the NCAA regulations. They have all these ideas. They just don’t have the reasons to back it up in my opinion.
- Robert Guerra: Yeah. The goal is: what’s going to help the player. I mean that’s our role as the union, to help our agents help the players. We work together, we kind of serve ourselves, partners in the representation of players.
- Charles Grantham: I think what I’ve seen over the years is a dividing line that I’m not comfortable with. Back in the ‘80s we saw agents as being our partners. They were out doing the hard work. The power of the leagues and those who own teams



is so enormous, and they have such political clout and lobby clout. It was imperative that the agents, the players, and the unions work together and cooperate. Over time, I've seen that relationship change. And perhaps it started with the rookie weight scales and the leaks that have revenue sharing and salary caps, because it flipped the business on its head because agents were not allowed to make money on these rookie contracts. And so over time, however—certainly in basketball—as players began to develop their brands, this role has evolved to become far bigger and greater than it's ever been before because our players had become individual businesses.

Charles Grantham:

And so as an individual agent, you're now doing more than just the standard player contract. You're doing a lot of other things that help in his brand and also expand his business. But the challenge that I see that both unions have today is that I'm not certain if—you probably have some to say about this—from the standpoint of the power relationship between management and labor, that unions haven't to some degree outlived their usefulness. And what I mean by that is that management has become so comfortable with prevailing at the bargaining table. I've looked at this the last 20 years or so, and I felt that we have been more concessionary bargaining than any-

thing else. And maybe it's time they feel some discomfort and that discomfort would come if in fact the agents in football, basketball, and certainly hockey would de-certify their unions, and therefore put more power in the hands of the individual agents and force management to have to deal, on an individual basis, with things like insurance and grievances, et cetera, et cetera.

Charles Grantham:

That balance is no longer there. And to a large degree, it's not there because of this labor exemption to the antitrust law. Most of my time in that union I spent trying to determine "when does that exemption expire?" And we don't know to this day. There's a standard called time and circumstance. All right? Big deal. So I think there's conflict in terms of how this role of an agent is evolving. I think it may be time that they take on more responsibility and not less.

Paul Haagen:

In terms of that—or maybe a couple of numbers—in your unit, 40%, more or less, of the players are making the minimum or close to it, right?

Daniel G. Kelly:

I'll take your word for it.

Paul Haagen:

Yeah. Okay. If we look at basketball, if we deal with very restrictive bargaining, it could be close to 60%. So the role of the union going forward, I absolutely want to endorse. It's going to be matters relating to the creation of a business, out of protecting you in a variety of ways, and furthering it.

But this gets back to the regulatory structure. You regulate out of the fact that you are the exclusive bargaining agent which means you're regulating directly only their dealings with teams, but we're talking about a role that's changing and changing very substantially. So I think we look at how the regulation has changed. There's been an effort to try to get at what matters, like whether you're decent or whether you cheat your clients on a variety of things—your behavior—which is not directly related to the exclusive-bargaining agent position. And frankly we may start to see an evolution in which you said you didn't want to be an NCAA agent. Maybe you don't want to be a NBPA agent either.

Paul Haagen:

You're going to be an investment advisor, a structure of branding. And so, I think it's an awkward position. The unions have taken on greater responsibility. They're trying to get at a variety of matters. By the way, just before we leave it, a lot of NCAA regulation I think is a response to something that's a narrow kind of issue. I don't think they were trying to keep Rich Paul out. They were trying to keep out the kids in the dorm, who were going to harass the players. I think that's really what the goal of that rule was.

Charles Grantham:

Well, I mean we could spend a lot of time talking about the NCAA and its rules, but the bottom line is this: the NCAA, both in football

and basketball, is generating so much revenue today. If they can afford to give the Big Ten commissioner a \$20 million bonus because of his work on establishing a Big Ten television contract or if they could give the Clemson football coach a 10-year, \$94 million contract, I think they're doing pretty well. The question is: the business has taken off, in terms of revenue—and it's interesting because when I did that testimony in 1983, it took me until 1990 to say, "Look, we've come up with something in basketball that works. It's called revenue sharing in a salary cap with certain exceptions. But it does require a mandate that a guaranteed percentage of the revenue go to the players in the form of salaries and benefits." So when we look today at college football and basketball, the championship game, and the final four of both football and basketball, we watched the TV ratings and the revenue generated. The business has grown and become as professional as professional franchises and leagues. The Duke University basketball team has run like the franchise of the New York Knicks. It's no different. They went out and hired professional people to promote, to coach, et cetera, et cetera, in both football and basketball. The only classification left behind is the product. So we've become professionalized in football and basketball at the college level in terms of revenue, in terms

Charles Grantham:

- of TV, and in terms of excitement. But we left a student athlete behind. There's no revenue share with him or her. And one of the things I'm doing now is talking to Chris Murphy in Connecticut who is looking to create a federal bill.
- Charles Grantham: And I'm already saying to him, "Well that's a waste of time. You can come up with language. It's not going to work. College athletes will never be employees. The courts will see to that. The NLRB will see to that. If you can do anything, let's mandate that a guaranteed percentage go to them as student athletes and that that share goes into a trust fund for them that they cannot access until they get their degree, even if that means at 27, at 28, at 30. But it's time. It's time NCAA. Forget about your rules. It's time that you share revenue with the biggest asset you have, your student athlete."
- Daniel G. Kelly: Okay. Professor Grantham, I definitely agree 100% about the revenue disparity between the NCAA and of course the student athletes. I do want to keep the panel on the regulation side of it though. When it comes to the NCAA, I have a question about the spirit of their intentions. The NCAA sought to add regulations in a purview that was probably overstepping. Seeing as they may have been a bit ambitious with their rulings and regulations, what if they had still sought to

- Jason Glushon: have a voice in agent regulation but just weren't as draconian?  
Well, the easiest way to do that is very simple. If I'm the NCAA and I want to voice on agent regulations, then I go to the union and say, "In exchange for me being involved in regulating agents, I will allow for you to set the standards for our student athletes and protect their interests." That would be the exchange if in fact they wanted to negotiate and be involved, as the NCAA wants to be in regulating these agents. Otherwise they have no authority in the representational function.
- Daniel G. Kelly: Okay.
- Paul Haagen: I mean they do have an authority. The authority is over eligibility.
- Jason Glushon: They are not the exclusive bargaining unit of anybody.
- Paul Haagen: No, that's correct.
- Jason Glushon: And they do not and cannot regulate the regulation or better yet the relationship between NBA teams and prospective employees. They have no right to do that.
- Paul Haagen: Right. And that's not what they did.
- Jason Glushon: No, that's not what they did. But they're saying to you, they want you to register and they would like to regulate those who do.
- Paul Haagen: That's correct.
- Jason Glushon: So they are not employers because they don't employ the student athlete but they would like the advantage that the NBA has as an employer. And that's just not acceptable.

Robert Guerra:

I mean it's incredible. At least for baseball there's already so much unequal bargaining power between the players, these teams, and the schools. And now they impose further rules about who can represent them, just making it even more unbalanced. How much farther can they go honestly?

Jason Glushon:

They'll keep trying because they want to protect the product. It's the athletes. I know they refer them to student athletes but they're athletes and why doesn't the NCAA start regulating business negotiations from the top people at Duke that want to go work at Apple? Because why? Those people aren't making Duke a lot of money. Coach K's guys are. And it goes to principle here. I understand maybe their heart is in the right place for some of what they're trying to do, because they say they want to help the players. Parts of the NCAA regulations for basketball do. You can pay for a meal while talking with a family about that type of stuff. But if you ask any NBA team, any agent, any current NBA player that has been through the process, the most important part determine about the draft process is the training. And what does the NCAA say you can't do? You can't pay for any training at all.

Jason Glushon:

So if you're actually trying to help a young player decide "Should I stay in college? Should I go to the pros?" I would do everything pos-

Paul Haagen:

sible to say, “Well, if you go out, here’s likely what’s going to be the process” and to prepare for the training before the combine. But right now due to those rules, you can’t do that. There are other [explicative] things they had all that time to take care of, but they seem to rush through it without talking to agents. They might have talked to our union. They said they heard stuff, but again, it goes to the fact that their heart can be in the right place and they can say all the right things, but, the fact that everything in their literature is empty, that’s why it’s a bunch of [explicative] at the end of the day. Again, I’m not interested in where their heart is. I think their regulatory hook is quite different from the one that each of you is assuming, because all they can do is say, “You will lose your eligibility.” Now, the question that I think you’re raising is a very important question: Should they be doing that? The question isn’t *can* they be doing it, but *should* they be doing it? Baseball presents a really interesting matter. There’s a decision from a district court in Ohio, that the rules related to family advisors—which was the old form of baseball agents—violated the code of professional responsibility. You couldn’t stay out of the room when the kids in there with the team and be a proper lawyer. I think that decision was right. But it is not in fact what the general rule is. The rule is you can’t be



represented. You cannot mone-  
tize your status as an athlete. And  
that's what that they are starting  
from as a principle. It's not what's  
ideal for the athlete. They're not  
operating off exclusive bargain-  
ing. It is: "How we maintain the  
distinction between amateur and  
professional sport?"

Paul Haagen:

And all of the rules are essentially  
trying to move toward protecting  
the athlete while maintaining that  
distinction. So again, we can say  
that was a bad move. We  
shouldn't any longer pretend  
they're not professional athletes  
when they're playing for Duke.  
But I think that's the underlying  
driver.

Jason Glushon:

And I guess the execution in that  
matter is the biggest problem that  
I have.

Paul Haagen:

Substance.

Jason Glushon:

The beauty—We can disagree on  
that—but any player should have  
some sort of person in their cor-  
ner: an agent, a family member, a  
lawyer, whoever the case is. And  
the fact is that we have unions  
that regulate, because you have to  
be part of the union, but it just  
seems empty where it's not pro-  
tecting the player at the end of  
the day. They just had to do some-  
thing quickly because of Con-  
doleeza Rice's report, and they  
threw something together that  
they thought would stick. The first  
time they threw it against the wall  
they missed heavily, I believe. This  
is, obviously, the Rich Paul rule.  
There's still so much more

- improvement they can do. I'd rather take my time and do it right, than just keep on swinging and missing at the plate, and that's what I think they've done.
- Daniel G. Kelly: So, there were many comments earlier about the growth of the sports industry, especially with basketball and football. With this constant growth and new opportunities for revenue, the NCAA may have stepped in too fast to regulate the environment. But the bottom line was that someone needed to do something and the question was: who was the stakeholder that should've stepped in first? Should it have been the agents? Should it have been the leagues? Should it have been the unions? NCAA may have stepped in thinking that there was a vacuum in leadership.
- Jason Glushon: I just don't think the NCAA would have stepped in if it wasn't for the FBI investigation. Do you agree Paul or no?
- Paul Haagen: I think the biggest driver is Jay Bilas. I think his hammering on the issue has swung public opinion. Now, did the Southern District of New York further undermine credibility? Yeah, sure.
- Jason Glushon: Jay Bilas has been talking about this for quite some time prior to the FBI investigation, right? And nothing has happened. Obviously the FBI investigation is the only reason why this happened. If the FBI investigation happened for Duke baseball, there'd be a baseball agent up here and Robert

would be heavily involved. So again, it's a reactionary thing, and going to Daniel's question earlier, I don't know who should have been doing it. The problem is the NCAA is in too deep. They've created a really great opportunity. I was a division three baseball player. No one came to my games at Emory, except for some of my friends. But we didn't make millions of dollars for the university. We didn't make millions of dollars for all the sponsors and have great boosters and everything. And that's perfectly fine. I got that education. But over the past 50, 60, however many years, it's turned from friends and family going to games into billions and billions of dollars.

Jason Glushon:

And like Charles mentioned, there's one person or one group of people that has been left behind and that's the players, at the end of the day, men and women.

Charles Grantham:

Yeah. I think the stakeholders clearly could have met with the MVPA and the NBA. Now, I'm certain some of those meetings occurred, but it's also clear that the outcome of those meetings were not productive. In other words, if in fact you want to protect the student athlete, and these agents are registered by the exclusive bargaining unit, that should have been satisfactory. But the fact that you now have to be certified by me, the NCAA, raises an entirely different set of questions.

Paul Haagen:

It does. The coach at my university said that the USA basketball, the NBA, and the NCAA had to get together to regulate college basketball. And I called him and said, "Could you restate that because that sounds like a core antitrust violation." There had been a series of arguments about the division of revenues, about the impossibility of maintaining inner collegiate sports that are this commercialized. I played sports so long ago, there weren't even divisions then. So I actually was nearly an NCAA lacrosse player, not D-III. But I think that we may be loading on to this question a series of very different conversations about what needs to be going on—recognition of where the athlete is. But it is a very awkward proposition to be cooperating too closely with your competitors when you start drafting these rules.

Jason Glushon:

I think what you hit on—it's a complicated issue because the money drives everything. And I'm just thinking out loud, what happens for all students at any college that want to work in tech?

Jason Glushon:

If anyone who wants to recruit someone to go to Google, Facebook or Twitter, they have to be certified. So, recruiters have to be certified. They'd never do that because A) you don't need to, but B) there's no money involved; it all gets back to all this money.

Paul Haagen:

Just to be careful when we make these quick jumps, we at least

- decertify employers. I'm sure NYU Law decertifies employers. You're not allowed to come here and recruit if you engage in a variety of normative violations. Right?
- Paul Haagen: So, it does happen. But the analogy you're drawing is a false one, in that nobody is worried about their eligibility to be a student. This is an eligibility to compete in a league.
- Robert Guerra: Which is a huge thing.
- Paul Haagen: It is a huge thing. It's an enormous thing.
- Robert Guerra: You lose your eligibility, you've lost your leverage. You lose your leverage, you're not going to be able to negotiate a lucrative deal.
- Robert Guerra: It's a huge hammer that can fall on these kids' heads if they tried to do what anyone else in this room would want to do: get competent representation to negotiate the terms and conditions of your employment.
- Paul Haagen: To make it even worse, you can hire a lawyer to represent you. You simply can't operate on a fee-for-service basis.
- Jason Glushon: It seems to help the players a lot.
- Paul Haagen: What?
- Jason Glushon: It seems to be very helpful for all these athletes.
- Paul Haagen: It is actually helpful for the athletes who are wealthy. It isn't actually a complete bar, but it is a bar that hits in a certain way. The core issue is, can you maintain this bright line between professional and amateur athletics at a time when you have massively commer-

- cialized more or less two sports?  
Hockey, a little bit.
- Daniel G. Kelly: Before I get to my final comments, Jason.
- Jason Glushon: I'm all good.
- Daniel G. Kelly: Okay. At this time—I think Dr. Haagen brought up a very good point—I would like to go down the line for each of the panelists to give me your final comments about balancing that line between amateur and professional athletics. I guess that is the purview that NCAA seem to believe they had the right to speak on, as far as agent regulation, and we'll start here with Robert.
- Robert Guerra: Well, I think the line is more than blurred at this point. The amount of money being made off the backs of student athletes is insane. If they're going to be making some money off of these players, the players should have certain rights, and should be able to share in those rewards.
- Charles Grantham: I don't think there's a big distinction. If you watch the NCAA football championship and you watch our Superbowl, they're both looking to maximize revenue, minimize costs and extend their sponsorships and television viewership as much as they can.
- Charles Grantham: That's the idea. It's to maximize revenue. I think the NCAA has played this game very well for the last 45 years of saying, "We want to distinguish between a professional athlete and an amateur athlete." But the fact remains that the product produces and generates

almost the same kind of revenue, and certainly from the same sources, so I don't see the distinction.

Jason Glushon:

I think most people who are listening know what side I'm on. I try to simplify things. I think there's really three ways going forward.

Jason Glushon:

I think door number one is the NCAA makes a strong adjustment. But I'm not optimistic because if I told anyone here, well whatever money you're making a year, you're probably going to have to give up a big chunk of it willfully, you're probably not going to do that. So that would be door number one. Door number two, which we spoke about earlier, is the players, agents, advisors—however you want to say—are able to take control, if you will. If it's the national championship game and the Clemson players don't take the field, then you're messing with someone's money, and that could maybe get some change going. That's door number two.

Jason Glushon:

And door number three—which I think is probably the best route and the one that I support—is you have the NBA G league for men's, at least, basketball. That has an opportunity to take a big bite out of some money so to the next Zion Williamson, "Don't go to Duke because of how many boosters give money to Duke. Come help build it there, get paid \$1 million or whatever it is, sign that lucrative shoe deal."

- Jason Glushon: “In football, there’re other ways that you can go out of high school and build a minor league system. If you don’t adapt, you die.” Those are kind of the three outcomes. If I had a vote, I’d probably vote for three. I don’t see number one happening even though it should, and it’s long overdue.
- Daniel G. Kelly: All right, Dr. Haagen.  
Paul Haagen: Since this has ranged farther than I thought it would, I will now range even further—the testimony I gave to the North Carolina legislature. I’m not sure it’s going to be possible to maintain any of these reforms to create a sharing system.
- Paul Haagen: The notion of the federal government deciding what is a fair share strikes me as bizarre. It has been. . .
- Charles Grantham.: But wait a minute, it’s only bizarre because the kids can’t have representation.
- Paul Haagen: Ah.  
Charles Grantham: Okay.  
Paul Haagen: Now, you just said they can’t have representation. They can have representation.
- Charles Grantham: Collectively, they cannot have representation. There’s no unionization of college athletes. We saw that in Northwestern. Okay?
- Paul Haagen: Well, no we didn’t.  
Charles Grantham: What did we see?  
Paul Haagen: The decision in Chicago was that they are employees.  
Charles Grantham: No, no that’s Chicago. With federal boards. . .



- Paul Haagen: Federal boards said the NORV would not take jurisdiction.
- Charles Grantham: By not taking a position, you took a position.
- Paul Haagen: No, what I'm saying is that I think we have to seriously think about whether any of the little reforms are going to work or whether the heavily commercialized sports need to be moved out of the operation of the institution.
- Paul Haagen: How would you do that? The Tar Hill Club would run North Carolina's basketball team. It enters into a contract with the University of North Carolina, licensed to use the marks to put on a show. They could enter into a multi-employer bargaining unit with Duke, with the Wolf Pack Club, with the Iptay Club. That would be a possibility. That would give you an opportunity to do it, but what the thought experiment does is raise. . . you've got to have a mechanism for sharing. It's not just NILs. It is genuine revenue and unless you can get it into the same model as professional sports, there aren't very good mechanisms for mediating what those numbers are.

KEY NOTE CONVERSATION: GARY BETTMAN, COMMISSIONER,  
NHL

- Ty Ly: Hello. Good afternoon everyone.
- Ty Ly: Thank you for those that stayed with us throughout the day. I see some familiar faces from this morning. Just again, my name is Ty Ly, and I'm the president of NYU Law's Sports' Law Associa-

tion. For those of us just joining us, we apologize for the limited seating. Please make yourselves comfortable. There are some seats in the middle.

Ty Ly:

And to conclude today's Ninth Annual Sports Law Colloquium is a keynote conversation with commissioner Bettman. The keynote is moderated by professor Arthur R. Miller. Professor Miller is the nation's leading scholar in the field of civil procedure. Since 2007, Professor Miller has been an integral part of NYU law community.

Ty Ly:

Today we are also honored to have a very special alum present the closing remarks and introduce the keynote conversation. Adam Lupion graduated from our law school in 2001. Today, Adam is a partner at Proskauer. His practice focuses on all areas of labor and employment law with a particular expertise in representing professional sports teams and leagues, among which includes the NHL and commissioner Bettman. Adam, the floor is yours.

Adam Lupion:

Thank you, Ty.

Adam Lupion:

Good afternoon students, faculty, alumni, and distinguished guests. My name is Adam Lupion, NYU law class of 2001. As Ty mentioned, I'm currently a partner in the labor and employment department at Proskauer Rose. It is my honor and privilege, to conclude the Ninth Annual Sports Law Colloquium by introducing today's keynote speaker, National Hockey

- Adam Lupion: League Commissioner and Hockey Hall of Famer, Gary Bettman. About five years ago I was on the Sports Law Colloquium' keynote panel in this same room. It also happened to be moderated by Professor Miller. Now, if the caliber of speaker that you're able to attract is a barometer of the law school success and standing in the outside world, I think all of the current NYU students can take great comfort in the fact that given the commissioner's presence here today, you're all doing much, much better than you were five years ago.
- Adam Lupion: That's because our keynote speaker today is an icon in the world of sports generally and especially in the sports business and legal community. An icon is not a word to be tossed around lightly, and I don't just say that because the commissioner and I have quite a bit in common. We were both born in Queens. We both graduated from high school on Long Island from high schools that were actually about five miles apart. We are both graduates of the Cornell University School of Industrial and Labor Relations. We are both alumni of this prestigious law school, and we both started our legal careers at Proskauer, where I still call home.
- Adam Lupion: But that's where all the similarities end because what this man has accomplished since his time at Proskauer is really unparalleled. After Proskauer, Mr. Bettmann

- joined the National Basketball Association where he rose to the rank of Senior Vice President and General Counsel, serving with then commissioner David Stern.
- Adam Lupion: During his tenure there, he was one of the architects of the salary cap system when it became the first professional sports league to operate under a cap based model, which is now a feature of the NHL's economic system.
- Adam Lupion: In 1993, the NHL owners elected Mr. Bettman as the league's very first, and still only, commissioner, a position that he has held for the last 27 years. During that time, he's been the driving force behind the league's extraordinary growth. Under his guidance, the NHL has grown from 24 to 31 teams, with a 32nd set to debut in Seattle during the 2021 season.
- Adam Lupion: League revenue has grown from \$400 million to more than \$5 billion. He has been instrumental in improving the visibility of the sport through long-term, multi-billion-dollar national broadcast rights agreements throughout the U.S. and Canada. And it's not just traditional media, because under his leadership and vision, he was at the forefront of the changing media landscape with a digital rights agreement with MLB advanced media.
- Adam Lupion: Commissioner Bettman also introduced a number of signature events, including outdoor games—the NHL Winter classic, the stadium series, and the heritage

classic—that have driven fan engagement and sponsor participation to unprecedented levels and have brought hockey to some of the most famous venues in all of sports.

Adam Lupion:

But if this law school has taught you anything, it is much more than just dollars, economics, and financial growth that has defined Mr. Bettman's success. Charity, philanthropy, community service, and diversity have also been the hallmarks of his tenure. And by way of example only, because we could be here all day, Hockey Fights Cancer has raised millions in support of cancer research and awareness.

Adam Lupion:

The commissioner has prioritized grassroots initiatives to bring hockey to children through programs such as Hockey is for Everyone, joining the Thurgood Marshall college fund to fund scholarships for outstanding scholar athletes from the inner cities.

Adam Lupion:

In 2013 the NHL entered into a historic partnership with the You Can Play Project, which is dedicated to ensuring equality, respect, and safety for all athletes without regard to sexual orientation. NHL Green, another of the commissioner's initiatives, has been recognized widely for its support of environmental causes, and the league has also been celebrated for the establishment and success of the NHL food recovery program, which takes prepared

- but untouched food from all of the NHL facilities, providing hundreds of thousands of meals to local shelters across the country.
- Adam Lupion: The Commissioner has also been a pioneer on matters of player safety. He created the first department of player safety in professional sports. Among other things, that department is entrusted with the continued consideration of suggesting proposed changes to the leagues rules and equipment in order to make the game safer for players. The league has also been at the forefront on the issue of head trauma, becoming the first sports league to feature mandatory concussion protocols, which the league has carefully developed and refined over the years.
- Adam Lupion: Now, any one of the foregoing accomplishments can be a career defining, the pinnacle of one's career. To have done all of these things is truly the mark of an exceptional, indeed legendary, leader. My own personal experience really reinforces that point, and I would be remiss if I didn't share that with you.
- Adam Lupion: I've been extremely fortunate to have had the opportunity to represent the NHL throughout my career on multiple labor and employment matters, including collective bargaining negotiations with players, matters of player discipline, enforcement of the League's anti-drug program, and a variety of other arbitrations and

litigations. I've worked closely with many executives at the League office, often in intense and high-pressure situations, and I can say unequivocally and without hesitation that the League is populated with incredibly smart, talented, driven, and passionate lawyers who care deeply about the law, the game, the game's place in our community, and have a profound sense of social responsibility. They're just good, decent people.

Adam Lupion:

The NHL is a first-class institution in every respect, and that to me, more than anything, is perhaps the best reflection on today's keynote speaker, as well as the culture and institution that he has built over the last three decades. I know you'd rather hear from the commissioner himself than from me, so without further ado, it is my honor and distinct privilege to introduce NYU Law alumni, Hockey Hall of Fame Class of 2018, and the Commissioner of the National Hockey League, Mr. Gary Bettman.

Gary Bettman:

Before we came into the room, I said to Adam, "Please keep it short." Thank you for doing that. That was overwhelming and thank you. It's great to be here.

Gary Bettman:

I'm not sure how nostalgic I am about coming back, because I will confess that this is the first time I've been in this building and it's spectacular. When I was here in the stone age, we were just across the street and talking about how

- the law school has improved its image over the years, I probably couldn't have gotten in today, although I did get in, in '74.
- Arthur R. Miller: We all say that.
- Gary Bettman: It's true, especially in my case. I can't speak for you.
- Arthur R. Miller: No, I have these inferiority moments which I say, "Oh, I never would have got to Harvard Law School and all that."
- Gary Bettman: Really?
- Arthur R. Miller: Did Adam cover everything? I mean, can we leave now and start the weekend?
- Gary Bettman: I don't know how I can deal with what we're supposed to do next after that introduction. It was overwhelming, but you'll manage.
- Arthur R. Miller: I'll manage. It was overwhelming. But there are a couple of categories with regard to your biography that interest me because you know you're Queens. I'm Brooklyn.
- Gary Bettman: Yes.
- Arthur R. Miller: Different generation, mind you, but Queens and Brooklyn. We're both New York kids, so to speak. And you live over in Jersey now.
- Gary Bettman: I do.
- Arthur R. Miller: And the little birdie told me that you love dogs.
- Gary Bettman: I do.
- Arthur R. Miller: Why is that?
- Gary Bettman: Because they're very predictable and they're there win, lose, or draw.
- Arthur R. Miller: You mean unlike hockey owners who you will have to deal with?
- Gary Bettman: No, no. My hockey owners are terrific. They've never been better.



- They've never been more supportive.
- Gary Bettman: We've always had a bunch of dogs. Most recently we had two golden doodles, one of which we lost about two months ago—15 years for an 85 pound dogs is a long run. The current dog we have is six years old and, like a lot of people in sports, 99% of the time the dog is perfect and 1% of the time it is an absolute lunatic.
- Arthur R. Miller: What breed now?
- Gary Bettman: Golden doodles.
- Arthur R. Miller: Still golden. I have a Welsh terrier, who's tiny in comparison, and I would say my dog is 98 or 99% really aggravating, but I love him. I love him.
- Gary Bettman: That just means you're a little bit of a masochist.
- Arthur R. Miller: Another thing that interested me is that it is said you love cars.
- Gary Bettman: Who told you that? That's true, but. . .
- Arthur R. Miller: You expect me to reveal sources?
- Gary Bettman: Yes. This is supposed to be a candid conversation and we're friends.
- Arthur R. Miller: Candid, that's right. I ask you, you answer. You're candid. I'm just annoying.
- Gary Bettman: Yes.
- Arthur R. Miller: You do like cars.
- Gary Bettman: I do. I like driving faster than I should.
- Arthur R. Miller: So what are you driving now? When you're not being driven?
- Gary Bettman: I have a turbo Porsche.
- Arthur R. Miller: A turbo Porsche. How about that? Kid from Queens with a turbo

- Porsche that can't stay within the speed limits.
- Gary Bettman: Except I commute in an Acura MDX, because Honda, which in addition to making Hondas makes Acura, which is the official automobile of the NHL. And it's a hybrid.
- Arthur R. Miller: So, you feel environmentally sound?
- Gary Bettman: Not quite, but you know a little around the edge.
- Arthur R. Miller: And how about this fetish for movies? You love movies.
- Gary Bettman: Well, only certain kinds.
- Arthur R. Miller: What kinds?
- Gary Bettman: I've always been a fan of *Goodfellas*, *The Godfather*, *Shawshank*.
- Arthur R. Miller: Romantic stuff.
- Gary Bettman: *The Big Lebowski*.
- Arthur R. Miller: *The Big Lebowski*, huh? Did you like the Irishman?
- Gary Bettman: I did like the Irishman.
- Arthur R. Miller: I figured.
- Gary Bettman: It's a little too long, but if we're going to delve back in a little personal, I'll take you to a place that maybe you haven't heard. When I was a senior in the School of Industrial and Labor Relations at Cornell, I took a course in the management of complex organizations. It was a seminar, and this was in the era of the big conglomerates like ITT. They were swallowing up everything. One of the things that we had to do was write a thesis on a conglomerate in terms of how it operated, the power within, and all that. And I chose to do it on organized crime.
- Arthur R. Miller: Organized crime.

- Gary Bettman: I left you speechless. That's unbelievable.
- Arthur R. Miller: Well, I'm trying to go back in history.
- Gary Bettman: You're processing.
- Arthur R. Miller: Yeah. You graduated from here in '77, correct? And you go to Proskauer?
- Gary Bettman: Correct.
- Arthur R. Miller: What is this phenomenon with Proskauer? All you sports moguls seem to come out of Proskauer.
- Gary Bettman: You know, that that was serendipity. Of all the firms that I interviewed—and in those days, I don't think there were a hundred lawyers when I came out of law school. . .
- Arthur R. Miller: When I graduated law school, a century before you, there was no firm in the city of New York with a hundred lawyers. That was thought unthinkable.
- Gary Bettman: I think Proskauer had 80 to be exact. I don't even think my class was even a dozen, and I went there even though I had a degree in industrial and labor relations. I went in as a litigator, and I actually met David Stern there. We worked on a couple of matters together, not sports related. He left, I guess, a year and a half into my being there to become the NBA's first general counsel. If I told the whole story it would take the full hour. I won't do it.
- Gary Bettman: I actually left Proskauer, made a U-turn for a year, decided that was a mistake, and on my way back to Proskauer, David was about to be promoted to deputy commis-

- tioner. By the way, there were all of 25 people at the NBA at the time, not like any of the sports leagues now because this is 1980. He was about to be promoted.
- Gary Bettman: David was 10 years older than me. Russ Granik, who was assistant general counsel, was to become general counsel. Instead of going back to Proskauer, he said, "Why don't you come here for a couple of years. We'll have a good time, and then you can go do whatever you want." That sounded awesome.
- Arthur R. Miller: What went through your mind, with that career choice? We've got a few students here. They like to know how life progresses when they leave here. What motivated you to make that move?
- Gary Bettman: Well, what motivated me to make the move was when I left Proskauer, it was over the strenuous advice to the contrary and objections by a number of people, including the person who was then the head of the litigation department, one of my mentors, a gentleman named George Gallons. By the way, at the time I thought he was ancient, and as I think back, I don't think he was as old then as I am now. So you get a different perspective on life.
- Gary Bettman: I decided I wasn't in love with big firm litigation. I didn't like the motion practice. I wanted it to be more transactional. The move I made, turned out to be, in retrospect, idiotic. I had been thinking at the ripe old age of 29 I had

ruined my career. Woe is me. I went and I confessed to George Gallons that I had made a mistake, and he said, “Do you want to come back?”

Gary Bettman:

And I said, “I think I do. Let me interview, and if I want to come back, you know, I’ll tell you. You’re not obligated to give me an offer, but you’ll know I won’t turn the firm down a second time.” Lo and behold, in the middle of all of this,—this is the serendipity of life—this was the time that David was getting promoted—they were looking for a young lawyer, and there happened to be a meeting with another lawyer who was a partner at the firm named Jeff Mishkin. They told Jeff what was going on. They were looking for a lawyer. Jeff knew that I was looking to do something. He told David. David called me, but before David called me, George Gallons called me and said, “David is getting promoted. They’re looking for young lawyer. Do you think you might be interested?”

Gary Bettman:

George is a lot like you, very precise in language. You have to be careful what you said. Instead of getting too enthusiastic, I said, “I don’t know. I might,” even though I couldn’t believe I had just gotten this phone call. David calls me on a Saturday. We’re on the phone for two hours. I go to meet Larry O’Brien, who was then Commissioner.

- Gary Bettman: I, all of the sudden, get this offer to go work for a professional sports league, and this career that I thought I had ruined at 29—and I was miserable because I really didn't want to go back to a big firm—here it was. I was going to go be the assistant general counsel of the sports league.
- Gary Bettman: The punchline to this story is there were a number of us who were mentored by George Gal- lons, including David Stern, who stayed very close to George for the rest of his life. He lived to the day after his hundredth birthday. We would take him out to lunch, and we would stay in touch.
- Gary Bettman: So the first time I took him out to lunch after I joined the NBA, I was very excited. I wanted to thank him profusely in person for this opportunity. The first thing he says to me is, "I'm really mad at you." And I'm stunned. I said, "Why are you mad at me?" He goes, "Because when I called you about the NBA job, it was to let you think we were taking an inter- est in you. If I knew you were going to take that damn job, I never would have told you about it."
- Gary Bettman: And that is the serendipity of. . .
- Arthur R. Miller: Serendipity of life.
- Arthur R. Miller: Now you're with the NBA, what, 10 years?
- Gary Bettman: 12.
- Speaker 32: 12.
- Gary Bettman: I was the 25th employee, includ- ing support staff. When I left 12 years later, I think there were

- about 700 of us. If you go back to the forties, the fifties, the sixties, even into the seventies, sports leagues were scheduling arms. They'd negotiate TV contracts and collective bargaining agreements, none of which were as big or as complex as they are today.
- Gary Bettman: They were really about hiring officials, doing the schedule, and enforcing rules. They only became marketing machines and major media companies in the '80s. That was the beginning, and that was really something that I think David Stern's legacy will always focus on, because he was at the forefront of having the vision that sports leagues could be more.
- Gary Bettman: He used to always, in those days, say, "We're no different than Disney. They have theme parks. We have arenas. They have TV shows and cartoons. We have games which are put on TV. They license Mickey Mouse. We license jerseys." That was the beginning of evolving as a business matter and giving a higher profile to sports.
- Arthur R. Miller: And that's the decade you were with him over there?
- Gary Bettman: For 12 years, correct.
- Arthur R. Miller: Absorbing all this.
- Gary Bettman: Absorbing. We did some pretty groundbreaking things. We were the first league to have a drug program. We were the first league to have a salary cap. All of which were needed because the NBA in those days didn't look anything like the NBA today. In fact, my first year at the NBA, the—I

- almost said Stanley Cup Finals—the NBA finals were on tape delay on CBS, which was insane.
- Arthur R. Miller: So why did you go to the NHL? What precipitated that shift?
- Gary Bettman: Well, what precipitated that shift was John Ziegler, who was the president, but got fired. He got fired because the NHL had an interesting history with its union. There was a guy named Alan Eagleson. And I'm not going to be judgmental. I'm going to try and be as factual as possible. It was alleged he was too close to the owners, and when it came to the international promotion of the game, that maybe things weren't done the right way.
- Gary Bettman: To make a long story short, he ultimately winds up going to a 24-hour-a-day camp that you can't leave unless your sentence is up. He's replaced, and there's a transition by a gentleman named Bob Goodnow, who actually went to Harvard as an undergrad and played hockey at Harvard and went to Detroit Law School. When he finished law school, I think he worked as an organizer for the teams. So, he was a hockey player and well-educated, but he was kind of rough-and-tumble and came in to try to reset the collective bargaining table between the players and the league. The collective bargaining agreement expired at the end of the '90-'91 season. I may be a year off on this. They had a handshake, not in writing, that they would play the



- entire season without a work stoppage.
- Gary Bettman: With two weeks to go in the regular season, the union pulls the players out on strike, and the owners were aggravated for a number of reasons, including the fact that there wasn't going to be a playoffs, economic implications, and the fact that this wasn't done in writing. There was no level of trust, and there was nothing enforceable to deal with the fact that the players had gone out.
- Gary Bettman: Most of the owners—not all, but those who were leading the league at the time—said, “That’s fine, just cancel the rest of the season. We’re done, and tell the players to let us know when they want to come back and play.” John decided for the good of the game, he would try to make a deal to save the playoffs, and he made a deal. I think they lost two weeks of the regular season so that they could finish the season, and he had a very emotional press conference, talking about the good of the game. And the owners, for his trouble, fired him.
- Gary Bettman: They installed Gill Stein, who was the general counsel of the league, as an interim president. Then, they went about doing a search. As the search kept getting narrowed down, I was the last man standing, and they offered me an opportunity to run one of the four major sports leagues.
- Arthur R. Miller: Under the title, Commissioner.
- Gary Bettman: Well that was my doing.

- Arthur R. Miller:  
Gary Bettman: I had a feeling it was your doing. Because I felt there were a number of things the NHL needed to modernize. Some of them were purely symbolic. Some of it had to do a little bit with my powers. But, in the final analysis, they made me an offer to run the League. I'd been a hockey fan because, as you know from your Harvard days, Cornell and Harvard in particular had an elite level of hockey. I was a season ticket holder at Lynah Rink at Cornell for four years.
- Gary Bettman: Went to see a number of games including your rink in Harvard. So, I was a big hockey fan. When you grow up in New York—you know this from growing up in Brooklyn—you had a baseball team, you had a basketball team, you had a football team, and you had a hockey team. And that was one of the benefits of growing up in a city like this.
- Gary Bettman: So I had been a hockey fan. I'd been to Rangers games and I was given the opportunity to really try, not just to run the league—this was a league that I knew needed work, not unlike the NBA when I got there in '81. I thought this was a great opportunity to make a difference.
- Arthur R. Miller: Now, New York doesn't have a basketball team.
- Arthur R. Miller:  
Gary Bettman: So, only three of the four exist. You probably know this: while I've been involved in litigation with Madison Square Garden and the Rangers over time, Jim Dolan gets a bad rep. He really does.

- Gary Bettman: He's a passionate owner. Look at how well the hockey team is doing. I don't care about the basketball team anymore, but the hockey team's doing great now.
- Arthur R. Miller: As a kid, I remember getting police athletic league tickets for Knicks games and Rangers games.
- Gary Bettman: No, no, it was better than that.
- Gary Bettman: By the way, I got that right on CBS. You were at CBS at the time when you had us on delay tape, and then you lost us to NBC, but that's a different story.
- Gary Bettman: When you went to a New York City school, while Adam's right, I graduated from Half Hallow Hills. The first year and a half I went to Forest Hills high school. My parents thought it would be a really great idea to move a New York City kid from Queens to Dick's Hills in Huntington, which was still farmland, in the middle of his junior year of high school. But that's a different story and years of therapy.
- Gary Bettman: But at the end of the day, when we were in high school in New York, they would give you what's called a "GO card"—general something organization—and you could go to Madison Square Garden and get an unassigned seat for 50 cents.
- Arthur R. Miller: 50 cents.
- Gary Bettman: They didn't have the concession stands. You know you couldn't get exotic food. There was beer (which I was too young to drink), a hot dog, and a bag of chips. So you'd bring a bag lunch. You'd

- get there early because it was first come, first serve. You'd have a sandwich. You'd do your homework, and you'd watch the game.
- Gary Bettman: And that's how I grew up in New York City. I couldn't do that when we went out to the suburbs. But again, that's a different track.
- Arthur R. Miller: Did you do that in the old Garden?
- Gary Bettman: Yes. Well, actually I'd been to the old Garden, but the timing of when I was in high school and I was going by myself, it was a new garden. I think the new garden opened in '64 maybe? Give or take? '60?
- Arthur R. Miller: Yeah.
- Gary Bettman: '68? Yeah, look I still would have been in high school.
- Arthur R. Miller: I did it in the old Garden, which I think was 49th and 8th avenue.
- Gary Bettman: That's correct.
- Arthur R. Miller: Old ramshackle barn.
- Gary Bettman: And they used to play double headers.
- Arthur R. Miller: Double headers, yes.
- Gary Bettman: Which is unbelievable. Let's go one gate. I mean, think of the economics of the sport in those days. But you know, I remember living in Queens and going to Shea stadium, where you could get a box seat on the field for \$3.50.
- Arthur R. Miller: I used to drag my dad from Brighton beach all the way up to Yankee stadium because I was the only Yankee fan in Brooklyn I think. Dodgers were still there. We'd go up to Yankee stadium on a Sunday, watch batting practice

- for two hours, and then watch a true double header.
- Gary Bettman: So speaking of Brooklyn Dodgers, just a little piece of trivia, where Barclays Center sits, in mid 1950s, Walter O'Malley wanted to build a dome stadium for the Dodgers, which for some reason, including the city, he couldn't get done. This resulted in the Dodgers going to Los Angeles.
- Arthur R. Miller: Going West.
- Gary Bettman: But he wanted a dome stadium on that site. A little bit ahead of his time now.
- Arthur R. Miller: And their going West ruined baseball.
- Gary Bettman: I don't care about baseball either. I only care about hockey.
- Arthur R. Miller: You don't? You're not even a Mets fan coming out of Queens?
- Gary Bettman: You know, I follow the Mets.
- Arthur R. Miller: You don't give a fig.
- Gary Bettman: You know, I was friendly with George Steinbrenner. You tend to get a little more objective on your rooting interests. You know, less emotional.
- Arthur R. Miller: When you became commissioner, how many teams were there?
- Gary Bettman: 24.
- Arthur R. Miller: 24. And how many today?
- Gary Bettman: 31, about to be 32 in another year.
- Arthur R. Miller: 32. That's when Seattle comes in.
- Gary Bettman: Correct.
- Arthur R. Miller: You're still going to stiff Quebec.
- Gary Bettman: I didn't know you were French Canadian. It's not about stiffing them.
- Arthur R. Miller: I had a honeymoon in Quebec. That's why it's on my mind.

- Gary Bettman: Really? You want to tell us some of the details?
- Gary Bettman: We left Quebec City because there was no prospect of a big arena, and nobody wanted to own a team there anymore. I mean, it's not like we decided with respect to both Quebec and Winnipeg that we wanted to get out of Canada and move to bigger markets. It was in both of those cases back in the '90s. Nobody wanted to own a team there anymore because the Canadian dollar I think was like at 64 cents, and they were all in old arenas, no prospect of getting new arenas.
- Gary Bettman: Canada seems to be a little less forthcoming on public dollars for what I call infrastructure and they call private enterprise—but somewhere in between. Time passed by. I know there's interest from Quebec City, and they even have a new arena, but it's things that played out. We don't need a team in the East right now. There was no prospect of relocation, but I know there's interest there, and I respect it. I know they have great fans there.
- Gary Bettman: But Seattle is going to kill it in terms of being successful, much like Las Vegas has, anticipating your next question. History gets rewritten all the time, and everybody: "Well the NFL, is going there, it must be good. You know, baseball and basketball, they're going to look at it. It must be good."

- Gary Bettman: When we announced we were going there: “They must be crazy.” But we knew all along that Vegas was going to be good. Vegas at the time was the largest city that didn’t have a major league team. It was one of the fastest growing cities. It had a very diverse fan base. And we came to understand—because we did a fair amount of research, including having the prospective owner do a season ticket campaign just with locals—that there were a lot of people who lived there who wanted things that you didn’t have in other cities.
- Gary Bettman: There were a lot of people who live there who didn’t want to be defined by the strip. They wanted something that made them a major league city, and the response has been incredible. Everything has been sold out.
- Arthur R. Miller: Performance has been extraordinary. They’re topping their division right now.
- Gary Bettman: And in the first year they came within a couple of games of winning the Stanley cup. Now how did that happen? It’s an interesting story.
- Gary Bettman: We gave a lot to get the economic system we have. In fact, we’re the only major sports league to shut down for an entire season as a result of collective bargaining, and we did it because we knew we needed a new economic system to enable all of our teams to be able to compete. Arthur Levitt—a name that you know—was a long

- time head of the SEC, but among the things he was most noted for is integrity in financial reporting.
- Gary Bettman: I had him come in and do a study, and he couldn't believe the shape we were in. In large part because of the disparities between clubs in terms of what they were paying in player salaries. That was literally killing the game, because our cap this year is 81.5. That's millions. In the 1990s, early nineties, we had teams then with \$80 million payrolls. And we had teams with \$20 million payrolls. And I would talk to the coaches of the teams with \$20 million payrolls and ask them, "What's your coaching strategy?" And they said—if you're not a hockey fan, I'll explain what I'm about to say in a second.
- Gary Bettman: They would say, "We would clutch, we would grab, we would hook, we would hold. And we'd try to hold on for the last 10 minutes and steal the game."
- Gary Bettman: "Clutching, grabbing, hooking, and holding" is the euphemism to do everything you can as a tactic to neutralize skill. And if you have a \$20 million payroll against an \$80 million payroll, pretty good bet that the \$80 million team has got more skill. And that was grinding the game down. It was making it boring, uninteresting, and not competitive. Jump ahead 15 years, we have the best competitive balance, not only in our history, but in all the professional sports. If you look at our races for the playoffs now, they are completely



unpredictable. There were four or five teams a point apart, and teams will make or not make the playoffs by a point or two. And this, for most teams, will go down to the wire, and it's all a function of the fact that all of our teams can afford to participate and compete because there's a salary cap and there's revenue sharing, so everybody can do it.

Gary Bettman:

Let me go back to Vegas. So we're going to bring in a new expansion team. The history of expansion, in all sports, has been: You give them a horrible team, charge them a lot of money, and there's initial enthusiasm in the market, whatever the sport is, for three or four years. People get bored and tired of losing. And six or seven years later when the team truly gets competitive, then the interest is back and you're off and running. We decided, and it's a testament to the board, that with the system we have and the incredible competitive balance we have, why would we bring in a weak brother or sister? Why wouldn't we bring in somebody who could be competitive? And as a result, we gave the team the most liberal selection of talent in the history of any other major sports. Meaning, the expansion rules were structured in a way that our existing teams couldn't protect as many of their players as perhaps in any other expansion any other sport had done.

Gary Bettman:

As a result, they got a pretty decent team. And then something else happened, which was extraordinary. Yes, Vegas was excited to get the new team, but I think it was eight days before opening night when the shootings from the concert happened, from the whichever hotel it was that MGM owns. The city was in shock, and here you had a whole new organization and a whole group of players that had just moved there. Hockey players, being hockey players, immediately went into the community. They went to the first responders, they went to the hospitals, and they decided that they needed to be part of the healing process. And, in fact, opening night—the first night for a team—was not about the team. It was about the city of Las Vegas, the first responders, and the victims. It may have been the most emotional night I've ever seen for a sporting event. Keep in mind this was a city that was excited about getting a team, because I had been there about eight months earlier to announce the team name. All we were going to do was announce the team name. 5,000 people showed up just to hear, because they were excited to be birthing this. Anyway, this was a very emotional, cathartic, bonding event. If you talk to the players, they will tell you they played that season—and hockey, maybe more than any other sport, is a game of emotion—they felt that

they were playing for a higher cause, that they were playing to unify and heal the city of Las Vegas. They were an instrumental part of that, and that's one of the reasons I think they were as successful as they were. There were a number of circumstances coming together.

Arthur R. Miller:

Serendipity.

Gary Bettman:

And some timing. Timing, serendipity. But the response wasn't serendipity. This was a group of players and an organization that cared very much about their community, which is typical of hockey teams and hockey players.

Arthur R. Miller:

Any notion of future expansion? 32 is a nice number. It fits.

Gary Bettman:

Very symmetrical.

Arthur R. Miller:

It's very symmetrical and all that. So are you on hold now?

Gary Bettman:

You know, we continue to get expressions of interest, whether it's Quebec city, Kansas city, San Diego, or Houston. But, I think we're going to be good where we are. We clearly believe we have the talent. All you have to do is watch the game now. The skill is extraordinary, the speed is extraordinary, and our skilled players have never been younger—I think six out of our top 10 scorers are under the age of 24 right now.

Gary Bettman:

We're blessed with an abundance of great talent. But, you know, expansion gets misinterpreted, particularly by the media, because they they say, "Oh, you're going to charge all this money for an expansion team." But when you

do that, you only should be doing it if you think it makes the league stronger. Because if we had 30 teams, which we did when we brought in Las Vegas, instead of dividing national revenues 30 ways, we now have to divide it 31 ways. There's an economic value to that, which is largely what you get paid for in an expansion fee. So, we think we're good.

Arthur R. Miller:

All right. Since you've been in Vegas, what's your current thinking about sports gambling?

Gary Bettman:

Well, if you looked at the clips, I've been accused of being a contortionist on the subject, because I was, in my prior life at the NBA, one of the people very involved in the passage of PASPA. I did a lot of lobbying at the state and federal level. I have a certificate of merit from the compulsive gambling society of someplace. And so, I always believed—as you teach—in the rule of law. And that was the law. I did worry about sports betting. I didn't worry about the integrity of the game per se, at least certainly in hockey, but I did worry about two things: one, what would it do to the atmosphere of our games?

Gary Bettman:

There's nothing wrong with race-tracks or highlight from times, but that's not the same atmosphere that we have for our games. That was something that was on my mind. The second was: we all grew up focusing on athletes, worshipping athletes, as these great skilled competitors, not as betting

devices. I worried about whether or not that would change in the long term to viewer's sports. But then the Supreme Court ruled, much to everybody's surprise, because the case went up and down two or three times where the district court kept ruling PASPA legal.

Gary Bettman:

The Third Circuit kept ruling PASPA legal. Then we all kind of said, "Why would the Supreme court take cert?" And we started getting concerned that it was going to be overturned. Once it got overturned, all bets were off, pun intended. The question was: how were we going to adapt? Also, at the same time we had the experience of being in Las Vegas. So, I got a sense of what the impact might be of having betting on the games. In fact, before the shootings, I was in discussions with the CEO of MGM at the time. MGM is one of the owners of the T-Mobile arena where the team plays, and there are a number of MGM hotels, for those of you not familiar with Las Vegas, that surround the arena. We said maybe those sports books and those casinos shouldn't be taking bets on the home game.

Gary Bettman:

You know, let's keep the atmosphere a little light. Then two things happen. One, the shootings. MGM was a little distracted, and I respected and understood that. Two, they made clear to me, "Well, why does this make a difference? Anybody in Nevada can

place a bet on their phone. So whether or not they can go place a bet at a sports book and get a ticket and go to the game, they can still do it at the game.” And we said, okay. We’re going to try this and see how it works, and it’s been fine. It’s been great. It is another point of connection for hockey fans. If you want to bet you can. If you don’t want to bet, you don’t have to. The atmosphere has been good. Now, about the same time, something else was going on. We have been investing in what we affectionately call Puck and Player Tracking. It’s a technology which basically puts a chip on the players and a chip inside the puck.

Gary Bettman:

For those of you old enough to remember, Fox tried this in the mid-nineties and they were ahead of their time. It was largely ridiculed. They would put the technology in the puck by sewing in a device, digging it out, putting the chips in, and gluing it back together. The puck really didn’t have integrity. Fortunately, we only had to use it in a handful of games. As bad as the technology was for us, and it was very primitive, it actually was the precursor to the first antenna line in the video assertions you see in football. So it was ahead of its time for us. But we decided we were going to have—and coming up in the next year, a major U.S. Media negotiation, and I always believed that, high definition television

- improved the hockey experience on TV.
- Gary Bettman: We needed to do more to bring people inside the game, both in terms of visual and in terms of data. So, we, with the Fraunhofer Institute, affectionately known as the MIT of Germany, spent a lot of money and time developing this technology that chips the players and chips the puck in a one-piece puck that's manufactured with the guts, with the technology, in it. And it throws off, I want to say 200 points of data a second on the players and 2000 points of data on the puck, so that we know how fast the puck is going at any point in time, where it is, how far apart the players are, who's on the ice, who's not on the ice—because you know we make changes on the fly—and time on ice. We did that so that we would have something extra and special for our potential media partners, especially for millennials and gen Zs, who are more data focused, more technology focused, and might want a second screen experience. The visuals on broadcast would be good.
- Gary Bettman: Lo and behold, they legalize sports betting. Now what does that have to do with any of this? There's been a debate, argument, negotiations between the sports leagues and the sports books over data rights, how you can get them, and when you can bet them. Now, most betting is being done on static data. How many shots on

goal? You know. Who's going to score the next goal? Things that you can scrape off a broadcast. You don't have to have a direct feed. Interestingly enough, there's going to be an opportunity to place a boatload of prop bets in real time in our games using Puck and Player Tracking. And the only way you can get that is from us because you've got to have it in real-time or the bets will be meaningless. You'd be front running the market.

Arthur R. Miller:  
Gary Bettman:

What about Fantasy?

Fantasy is good and Esports are good. It just gives people another way to connect with the game. Fantasy isn't quite gambling, and there are free-to-play games that are out there where you just participate, and you can win a prize by participating. Not quite the same as betting, but fantasy sports is yet another way to connect with the game. Moreover, millennials and gen Zs tend to be as, if not more, player focused than they are team focused. I don't know if that's the chicken or the egg from fantasy sports, but that's just what the data is telling us.

Arthur R. Miller:

Yeah. What you just said is something that, being an old fogey, bugs me. I have a very dear friend.

Gary Bettman:

I don't want to bug you.

Arthur R. Miller:

You've already bugged your players.

Gary Bettman:

I'm chipping them, not bugging them.

Arthur R. Miller:

A distinction without a difference.

Gary Bettman:

It's true.



- Arthur R. Miller: A very good friend was an all American football player. Penn state. Played a couple of years with NFL. He says he no longer is interested in teams. He's only interested in players. That to me is completely antithetical, I guess, to be autobiographical, my feelings: I'm for team.
- Gary Bettman: By the way, that's a generational thing. What we've learned—and I actually had an internal presentation on it this morning from the person in my organization who runs social media—millennials and gen Zs want to know more than just the competition. They want to know lifestyle, what music players like, what foods they eat, what cars they drive. They want to know what's important to them. They want a bigger experience than just the game. The other issue is: people who are gen Zs probably have an attention span that's underdeveloped. It's half of ours.
- Arthur R. Miller: Sounds like my students.
- Gary Bettman: Okay. It's because they've been hardwired differently than we have. So pace of play is very important. So, baseball is skewing older. No knock on baseball. We skew the youngest because of the speed of the game. You've got to watch it, and it's hard to do two things at once. This is why the broadcast enhancements may be important going forward. You've got to give people the sports on their terms, and what you have to have is competitive balance, which

- we talked about, speed and skill, and pace of play.
- Gary Bettman: For a 60-minute game, we have the most action in the shortest period of time. NBA plays 48 minutes, but if you prorated it out, we're still faster than they are. What's interesting is we've done things without altering the fiber of the game. Our games this year are running three minutes shorter than last year. One of the reasons for that is, while we introduced more video in terms of reviewing what the officials do on the ice, we installed a penalty. And so, what we found is, if you have a coach's challenge and the coach is wrong, you get a two minute delay game penalty. The result of that has been the number of challenges have gone down by a third, and the accuracy of the challenge went from 42% to 62%. So you use technology to enhance the game and get calls right, but at the same time, you've got to use it in a way that doesn't fundamentally alter the game.
- Arthur R. Miller: Now you referred to the fact that '21-'22 your contracted with NBC. . .
- Gary Bettman: We have one more season after this, yes. NBC is great. We love them.
- Arthur R. Miller: You love them.
- Gary Bettman: They did a great job, but I'm going to charge them a lot more money this time.
- Arthur R. Miller: Why am I not surprised?
- Gary Bettman: Well, actually you're not surprised not because you know me, but

because the marketplace for content has never been more vibrant. Whether it's over the air networks like Fox, ABC, NBC, or CBS, or cable, like Turner or ESPN, or it's digital services like ESPN plus, or the new peacock for Comcast, NBC, Amazon or Apple, the number of players looking for content has never been greater. And there's no better content, no more compelling content, and no content anymore that you can't watch when you want to except sports. So, sports is going to maintain a very vibrant place in the annals of content. People tend to forget this, and I think you're going to see it again. Cable got its penetration in the seventies and eighties because of the regional sports channels. People were signing up to see the local sports teams, and that's how cable got its penetration.

Gary Bettman:

Over time, it's kind of morphed, and you know there's a question as to whether or not regional sports channels belong on basic anymore or on a paid tier. I think you're going to see some of that on the digital platforms and subscriber services as well. That where penetration is going to build because they have live sports.

Arthur R. Miller:

Related question. Just at least. . .

Gary Bettman:

I left out The Zone as one of the digital platforms. I don't want to insult any potential bidder.

Arthur R. Miller:

Just on a timeframe, in '22: the labor contract.

- Gary Bettman: Ah! But we extended labor peace. We both have the option to get out two years early. We signed a ten-year deal with an option to get out after eight. The trigger point was last September 15th, which would take effect after this season for next year and the year after. We and the players' association reasoned together.
- Arthur R. Miller: Reasoned.
- Gary Bettman: Reasoned together. I think Don Fehr, who has a long history at baseball, and his history—not that I'm one to throw stones—has had a lot of work stoppages. . .
- Arthur R. Miller: Look Mr. three lockouts! Three lockouts! You're a terror!
- Gary Bettman: No, actually, I'm okay with doing lockouts. They seem to work.
- Arthur R. Miller: You're spectacular at lockouts. Nobody else has locked out in sports.
- Gary Bettman: No, other sports have had lockouts, but nobody's missed an entire season. I don't like lockouts. Okay. I don't like work stoppages. I don't like what they do to the business. I don't like what they do to the fans. I don't like what they do to the players. But sometimes you got to do what you got to do for the health and well-being of the sport and everybody's benefit long term. If it were not for the system that we had to fight terribly hard to get, we wouldn't be as healthy as we are today. And our sport, hockey, the NHL, would have never been as strong, as healthy as it is today. And I'm not saying it's because of the lock-

- out, but we had to get what we got, and it's working.
- Gary Bettman: But Don and I have a very candid, open relationship. You know we've both been at this a long time. I don't think there's any ego involved by either of us. We can talk to each other on honest terms. We understand each other. And I think part of that is why the players didn't reopen and we didn't reopen. We are considering the possibility of extending before we get to the point in '22 that you were referring to because I think we all agree that if we could agree on terms that make sense for everybody—fans, players, teams—it would be better to do that instead of having the distraction of a confrontation.
- Arthur R. Miller: On another subject in which someone might say you're tougher than most. . .
- Gary Bettman: Have you ever seen me tough?
- Arthur R. Miller: I wouldn't get much closer to you than this. This business about concussions.
- Gary Bettman: Okay.
- Arthur R. Miller: I mean the NFL folded.
- Gary Bettman: What's your point?
- Gary Bettman: In terms of background, there was a class action lawsuit brought against us involving 300 players, and I think there were 19 or 20 lawsuits that were brought that got consolidated. The NFL, I think, had 7,000 plaintiffs and 200 lawsuits, so we weren't dealing with the same thing. Whatever the allegations may have been against the NFL and what they may have

done or not done, and what the allegations were against us, were different. I always believed and said that the lawsuit had no merit. The class never got certified because basically it was a mass tort and mass torts don't get certified as class actions. And we were able to settle on terms that made sense to us and were a fraction of what either the NCAA or the NFL settled for.

Gary Bettman:

Now having said that, there has been this ongoing debate over what causes CTE, and we're not going there. Okay? But I will tell you, player safety has always been a priority of ours. Adam referred to it. We were the first sports league 20 years ago to form a working group with the players association and physicians and trainers to figure out how to deal with concussions. This was before any other sport had done it. We were the first sport to have baseline testing. We were the first sport to have protocols for diagnosing concussions and return to play decisions.

Gary Bettman:

Yes, we were the first sport to have a department of player safety. We've changed rules, we've changed equipment, we've changed the atmosphere in terms of the flexibility of our boards and glass. All as an attempt, in the here and now, to be as safe for the players in a physical-contact sport played in an enclosed environment, and I think our record on that is clear. We've hosted a

number of conferences for hockey organizations all over the world so that they can come to us and we can share best practices. So our record in that regard is quite strong, and I feel strongly that we've been doing the right things. The other parts, in terms of what lawyers allege and can and can't do: we still have four individual lawsuits pending and so I don't want to say anything that might influence those lawsuits.

Gary Bettman:

How did I do John. This okay?

Arthur R. Miller:

Is that advice of counsel?

Gary Bettman:

I give myself my own advice. I just want to make sure there's nothing I need to clean up.

Arthur R. Miller:

So, to close out this session, do you think you have enough power? What else? What more power would you like?

Gary Bettman:

I don't view it as power. I'm in a position where I serve my owners, the 31, about to be 32, people that own their clubs. I report to a board, like a CEO of any company, and to the extent I have power—and I don't know what that word means and I don't like it—I get to do what I do because I lead, and the leadership is to set a course, set a vision, have a vision, and execute on that vision. And if the vision is one that the people I work for share, if the vision is implemented, and we have success, then I get to keep having visions and executing them.

Gary Bettman:

So I think it's more about leadership than it is power, and nobody grants you leadership or power

- you have to earn it on your own. Whether it was going through the lockout for a year, telling the clubs, this is what we have to do and this is how we're going to do it and we're not going to wind up in court or enjoined. We're going to get what we need and then do it.
- Gary Bettman: Or even the concussion litigation where I kept saying this lawsuit has no merit and this is how it's going to come out. If you're doing a decent job, you're going to build credibility, certainly over 27 years. And if you're not doing a decent job, you won't have 27 years, or anything close to it, to do it.
- Arthur R. Miller: And no other commissioner can make that 27-year statement.
- Gary Bettman: Well, actually. What do you mean? Now?
- Arthur R. Miller: Well, there's no one with your longevity.
- Gary Bettman: Oh. Well actually, you're making me feel old. They're going to catch me because it's three to one. But I think I've been serving longer than the other three combined.
- Arthur R. Miller: Combined.
- Gary Bettman: Combined. You just made me feel old. That wasn't nice.
- Arthur R. Miller: Made you feel old? I'm trying to make you feel good.
- Gary Bettman: Thank you. That's very nice.
- Arthur R. Miller: I mean after that recent humble statement by you about leadership, you should feel good.
- Gary Bettman: Well, but it's. . .



- Arthur R. Miller: I mean you've got more tenure than most law professors have.
- Gary Bettman: Present company excluded. But you don't get to stop in these jobs. It doesn't matter what you did yesterday. It's what you're going to do tomorrow. It is about having a vision and executing. I was on a panel with Walter Isaacson, and I don't think this is his quote, but I've adapted it because I think it's really good. I think he stole it from somebody: "Vision without execution is nothing more than a hallucination."
- Arthur R. Miller: That is good. That is good.
- Gary Bettman: You can use it. Don't give me credit for it.
- Arthur R. Miller: A great thought to end with. Our thanks to the commissioner.
- Gary Bettman: Thank you!