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THE 2012 SETON HALL JOURNAL OF SPORTS & ENTERTAINMENT LAW SYMPOSIUM

March 1, 2012

PANEL 1: INTERNET GAMBLING LEGISLATION

MODERATOR: SAL ANDERTON, ESQ.

PANELISTS:
JENNIFER WEBB, ESQ.
SENATOR RAYMOND J. LESNIAK
JOHN HINDMAN, ESQ.
FRANK CATANIA, ESQ.

PANEL 2: TWENTY-FIRST CENTURY CONCERNS IN REALITY TELEVISION

MODERATOR: JOHN R. KETTLE, ESQ.

PANELISTS:
THOMAS CROWELL, ESQ.
MATTHEW SAVARE, ESQ.
LAURA MAGEDOFF, ESQ.

KEYNOTE SPEAKER

BILL HELLER, ESQ.

PANEL 1: INTERNET GAMBLING LEGISLATION

DEAN LILLQUIST: Good afternoon. I'm Erik Lillquist. I'm the Vice Dean here at Seton Hall. And it's my great pleasure to welcome you to the 2012 Symposium of the Seton Hall Journal of Sports & Entertainment Law.

I'm very happy that while I cannot report that it's a beautiful day here in Newark, that nonetheless there is no snow. I will be able to go out on a pretty balmy day. My fear at this time of year is always that we're going to have a massive snowstorm and have to and lose a great panel. But that's not happening year. For those of you who are coming here to the law for the first time or returning to us after an absence, I certainly encourage you and welcome you to during the breaks walk around the law school and look at both our beautiful facility and to engage with our wonderful students and outstanding faculty. I also want to welcome all of you to one of the events we're having here in our newly renovated Larson Auditorium which has been completely remade over the last few months through the generous donation of Peter and Lee Larson.

Today's program will touch on two cutting edge issues in sports and entertainment law, internet gambling legislation and recent trends surrounding reality television. We've got two great panels for you, including Senator Lesniak here on our first panel. The day is going to conclude with a presentation from William Heller, the Vice President and General Counsel for our Super Bowl Champions, the New York Giants. Congratulations.

Any event like this is the result of a lot of hard work on the part of many people and I want to take this opportunity to thank the people who have put the time and effort into bringing this program together. First, Jillian Zadie, the symposium editor, along with Wolfgang Robinson, who is the Editor in Chief of the Sports & Entertainment Journal, who have over the last few months spent endless hours getting together this program. And as a former student editor of a law review, I completely appreciate the sacrifices they have had to make in order to put this program together. Second, I want to thank my colleagues, Charles Sullivan and Brenda Saunders, for their generous support of the students in bringing these panels together. Finally, I want to thank all

the administrators who helped bring everything to fruition to today: Rosa Alves, Maria Polimeni, Janet Lemmonier, Ana Santos, and Terry DeAlmeida. I would be remiss if I did not thank the various organizations who have been good enough to sponsor today's symposium. McCarter & English; Lowenstein Sandler; Porzio Bromberg & Newman, Porzio Governmental Affairs; LexisNexis; and the Sports Agent Blog. Thank you all for your support of the symposium.

It's now my honor to welcome up to the podium Jillian Zadie who will introduce the first panel. Thank you.

MS. ZADIE: Thank you, Dean Lillquist. Good afternoon everyone. My name is Jillian Zadie. I'm the current symposium editor for the Seton Hall Journal of Sports & Entertainment Law. I would like to thank each and every one of you for coming out today to support the Journal. I would also like to the take this opportunity to reiterate our gratitude for our sponsors. We have Porzio, Bromberg & Newman; Porzio Governmental Affairs; LexisNexis; Sports Agents Blog; Lowenstein Sandler and McCarter & English. I would also like to take this opportunity to thank the New Jersey State Bar Association, as they have generously committed to be the sponsor of our second panel, the reality television panel.

We have a really distinguished group of panelists here for you tonight so I don't want to cut into any more of their time. I want to bring up our first moderator, Sal Anderton. He's from Porzio Governmental Affairs. I would like to personally thank Mr. Anderton as he's been extremely helpful to me in setting up this panel. I couldn't have done it without him. So without any further delay, I'd like to bring up Mr. Anderton.

MR. ANDERTON: Thank you, Jillian. That's very kind. Good afternoon, everybody, and welcome. It's my pleasure to be here for this very exciting panel. It's an extraordinarily timely and very exciting topic that we're going to be discussing today. Internet wagering certainly is going to change the way Americans entertain themselves. And I say "will," because it's really not a question of if it happens and becomes permanent, but when. I think we're all relatively confident that Internet wagering will create tremendous new business opportunities, in addition to entertainment opportunities, but tremendous new business opportunities for your traditional wagering providers and traditional casinos, Indian tribes, state lotteries. You're also going to find

tremendous business opportunities for technology companies, for a whole generation of young attorneys and entrepreneurs. That's without question. And then I'm sure we'll hear from Senator Lesniak that there are tremendous revenue opportunities for cash-strapped states and local governments as well. So it's an extremely exciting opportunity, and it's extremely and perhaps very lucrative and life-changing for many parts of our economy. For our purposes, there are tremendous, profound, and far-reaching legal implications of internet gaming, issues that are really going to push our interpretation and understanding of states' rights, federal issues and Tenth Amendment issues, interstate commerce issues. So there's quite a bit to be discussed. We have a panel here of four national experts in this field, and I'm not sure if we totally yet understand some of the implications of the potential of the advent for internet gambling.

Our panelists join us with a national and international expertise in this subject matter and they are going to tell us a little bit about how they are ahead of the curve nationally and internationally with internet gambling, but how New Jersey potentially is ahead of the curve in this matter. We're going to start with our first speaker, Jennifer Webb. Jennifer is the senior legal analyst for GamblingCompliance, which is an industry research and information service. Jennifer is an attorney admitted to practice law in the State of Maryland, a graduate from Catholic University School of Law, and a frequent lecturer on how gaming trends impact the legal implications of gambling issues across the country and even internationally. So, Jennifer, I'd like you to get us started on this panel.

MS. WEBB: Hi everyone. As Sal said, my name is Jennifer. I just want to thank Seton Hall for having me here. I'm really excited to sit on the panel. What I'm going to do is just start off with a general overview kind of the state of play as far as federal and state law. We had some interesting developments in the last month: the Department of Justice issued an opinion revising their previous stand on internet gambling.[1] I'm also going to talk a little bit about possible

1. Whether Proposals by Illinois and New York to Use the Internet and Out-Of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 2011 OLC LEXIS 8 (Dep't of Justice Sept. 20, 2011).

changes we might see coming up at the federal and state level. To start, gambling generally and internet gambling are regulated by and large by the states, at the state level. There are some federal laws that oversee everything.[2]

As far as internet gambling goes, the main law now is Unlawful Internet Gambling Enforcement Act ("UIGEA").[3] That's the only law at the federal level that was actually passed after widespread use of the internet and internet gambling came around. The UIGEA basically blocks financial transactions. So it makes it illegal to process payments on unlawful internet gambling. It defines unlawful internet gambling as any gambling that's unlawful under another law. So you need another federal or state law to actually violate the UIGEA.

There is also a slew of other laws, state and federal, that aren't Internet specific for gambling generally which have been and will continue to apply to internet gambling. These include the Legal Gambling Business Act, The Wire Act.[4] There are also laws that deal specifically with lotteries and racing, but I'm not going to touch on those. So essentially the way that the federal law is structured under the UIGEA and other laws is to help states enforce their laws. So with the exception of the Wire Act, you need a violation of another law. It needs to be illegal in the state and then the federal, obviously interstate commerce.

The Wire Act is a little different. It's really the only law that's a law unto itself. It is an illegal act. The Department of Justice for years had said that The Wire Act prohibited all forms of internet gambling. On December 23rd, 2011, they issued an opinion.[5] It was actually issued in September and made public in December. They revised the previous stance, and what the DOJ says now is that The Wire Act only applies to the interstate transmission of information dealing with sports betting. So this is a significant departure from their previous stance.

What this means is that states now are free to enact

2. *See, e.g,* Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5631 *et. seq.* (2006); Wire Act, 18 U.S.C. § 1084 (2006); Illegal Gambling Business Act, 18 U.S.C. § 1955 (2006).

3. 31 U.S.C. §§ 5631, *et seq.* (2006).

4. *See*, *supra*, note 2

5. *See*, *supra*, note 1

intrastate gambling. So internet gambling within a state's borders won't violate The Wire Act. This could be basically any sort of gambling, state lotteries or sports betting, which I'm sure Senator Lesniak will talk about later. So casino games can be through lotteries. It can be through tribes. It's a compliance barrier that kind of prohibited states in a way from doing it before.

The implications of the letter remain to be seen. But initially it's thought that it will prompt more states to pass internet gaming laws and look at internet gaming laws. It also might prompt the federal government to look at internet gaming laws and change that, be it prohibitions or allowing some sort of gaming.

As far as what specifically is happening in states, there are currently eight states[6] that have an express prohibition against internet gambling through various statutes. Every state has some sort of anti-gambling laws on their books. So in those states that don't have an express prohibition against gambling, you're still probably violating the general gambling prohibition. For example, in New York State, the federal prosecutor's program is predicated on a New York law that's just an anti-gambling law.

Those are the states prohibitions. Utah is also looking to pass a new law.[7] I don't think we'll see gambling in Utah anytime soon, internet or otherwise. So don't worry about that. As far as states that are looking to permit it, see what they can do, Nevada is really on the forefront with this one. Nevada passed a law last year allowing for intrastate internet

6. Illinois: 70 ILL. COMP. STAT. 5/28-1(a)(12); Indiana: IND. CODE § 35-45-5-2(c); Louisiana: LA. REV. STAT. ANN. § 14:90.3(B); Montana: MONT. CODE ANN. §§ 23-5-112(19)(e), (21)(a), 23-5-151, 23-5-802 (application to fantasy sports leagues), 23-5-413(3)(b) (application to raffle tickets), *but see* MONT. CODE ANN. § 23-5-112(21)(b) ("The term does not include the operation of a simulcast facility or advance deposit wagering with a licensed advance deposit wagering hub operator allowed by Title 23, chapter 4, or the state lottery provided for in Title 23, chapter 7. If all aspects of the gaming are conducted on Indian lands in conformity with federal statutes and with administrative regulations of the national Indian gaming commission, the term does not include class II gaming or class III gaming as defined by 25 U.S.C. 2703."); Nevada: NEV. REV. STAT. §§ 465.091-465.092; Oregon: OR. REV. STAT. § 167.109; South Dakota: S.D. CODIFIED LAWS § 22-25A-8, *but see* S.D. CODIFIED LAWS § 22-25A-15 (state lottery and gaming commission exemption); Washington: WASH. REV. CODE § 9.46.240, WASH. ADMIN. CODE § 206-49.

7. 2012 Ut. H.B. 108, amending UT. CODE ANN. §§ 76-10-1101-1102.

poker.[8] Nevada is currently in the process of accepting licenses to operate intrastate poker. So the last I spoke with the Nevada Gaming Commission, they thought that maybe it was still alive probably in early 2013. Who knows if things will pop up, if that will be the case, or federal or state changes will affect that. But Nevada is going full force ahead with that.

New Jersey, Senator Lesniak will talk about, is also on the forefront of this. California, Iowa, Mississippi and Hawaii also have seen bills this year.[9] Florida had a bill last year.[10] California is an interesting state to watch as well, because it's a really large state, so it has a really big market for gambling. Its population is something like 33 million, which is the size of Canada. So business opportunity-wise California is a really interesting state to watch.

There are two models that have been emerging. The vast majority of states are following the commercial model. For example, California, New Jersey, and Nevada. DC tried to or they did enact a law that would allow the lottery to offer internet gambling. So it's just a monopoly through the lottery. However, that law was recently repealed. Also, Hawaii[11] is another state that's kind of looked at doing it as a monopoly type model as opposed to a commercial licensing. There is a lot of regulatory uncertainty about what's going to happen. It's kind of a broad overview of things. And right now it's on a national basis. There's two competing theories for how some of the market will emerge. One is if legislation happens on a state by state basis, that states can enter contracts with each other so you can have gambling going across state lines that way.

Under federal law given the new opinion on the Wire Act, that would be legal as long it's legal in State A and B. The

8. NEV. REV. STAT. ANN. § 463.016425.

9. *See*, *2012 Legislation Regarding Internet Gambling or Lotteries*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/econ/2012-online-gambling-legislation.aspx (last visited Dec. 18, 2012). California is still considering Senate Bill 1463; Since the presentation of this symposium, Iowa, Mississippi, and Hawaii's bills have all expired without action.

10. *See* Nick Sortal, *Florida's internet poker legislation won't pass this session*, SUN SENTINEL (Apr. 13, 2011), http://articles.sun-sentinel.com/2011-04-13/news/sfl-internet-poker-bill-dies-link-041311_1_internet-poker-online-poker-poker-sites

11. This bill was never enacted. *See*, *supra*, note 9.

other potential is pending federal legislation, which I know will be talked about a little bit more. As far as general thoughts on it, I don't know what will happen. I don't want to guess. It could be states. It could be federal. I know there's a lot of opinions on it different ways. So it will be interesting to see what happens in the next couple years because it's definitely a law that's in a major state of flux right now.

MR. ANDERTON: Thank you, Jennifer. We're going to hold the question and answer session until after each of the speakers have had a chance to present. But Jennifer raises a number of good points. As we're going to see, I think, in the coming months, there's going to be a trend towards states approving different types of internet gambling laws, particularly laws that might be relevant or specific to their own states. Here in New Jersey, we have with us today Senator Raymond Lesniak, who, I think I can fairly say, is probably the only legislator in the state who has gotten an internet gaming bill to his governor's desk for signature. And I know that Senator Lesniak is eager to do it again in the next weeks or months.

Our next speaker, Senator Raymond Lesniak, has been in the New Jersey State Senate since 1983. He's the Chair of the Economic Growth Committee in the Senate. He's a member of the Senate Commerce Committee and has become certainly one of the leading figures not only here in New Jersey, but also across the nation on a state's ability not only to regulate to authorize intrastate internet wagering. I'm sure we're going to hear a little bit about his efforts in meeting the challenge to the federal prohibition on the sports wagering as well, the Professional Amateur Sports Protection Act ("PASPA"),[12] which Senator Lesniak has championed a lawsuit against. So I will now introduce Senator Raymond Lesniak.

SENATOR LESNIAK: Thank you for that loud applause. I want to first thank Seton Hall Law School for giving me the opportunity to get some ICLE credits. Why else would I be here? Hey. But that's a good question. Why are we here? Isn't that a good question? Why in the world are we here? I mean, ten years from now we're going to look back at this and say what was this all about. I mean, to stop people from

12. Bradley Act, 28 U.S.C §§ 3701, *et seq.*

either gambling on sports or gambling over the internet—I mean Egypt tried to shut down the internet, right? Did that work? That didn't work. I mean, people want to gamble. And it's so insane. That's how I got involved in this issue in the first place.

About four or five years ago there was a big bust. There's always a bust in New Jersey right around Super Bowl time, you know. And I'm saying what a waste of governmental resources when people can just get on a plane, go to Nevada and bet legally, and yet they can't do it right here in the state. How insane is that? And how insane, quite frankly, and how hypocritical is the NFL on this very issue? They're the biggest opponent of legalizing sports betting. And yet last year the San Francisco 49ers played the Denver Broncos. Where? Wembley Stadium, London. What were they doing right across the street? Betting on that game. They do it all the time.

So the NFL has absolutely no moral standing to oppose sports betting the way they do. And anyone with any knowledge of technology will tell you that the way to detect illegal fixes on sports is to have it regulated so that you can detect irregular betting patterns. All the fixes that have been discovered have been discovered mostly through regulated gambling activities leading to the apprehension of any fixes. So if you want to protect the integrity of the sport, what you do is you legalize it and you regulate it. The reason why the NFL doesn't want to legalize sports betting is because they don't get a piece of the action. I mean, they actually tried to shut down fantasy football leagues. And they lost that case.

I'm getting a little bit far afield from internet gambling. But I took—we challenged the PASPA of misuse of interstate commerce and Tenth Amendment, states' rights, Fourth Amendment, Fifth Amendment, Fourteenth Amendment. We got bounced because Judge Brown said that New Jersey doesn't allow it. You've got to amend your constitution first.[13] It's not right. My argument was, quite frankly, we're going to ask the voters to approve something that the federal government says you can't do. As a matter of fact I got it

13. N.J. CONST. art. IV, § 7, para. 2. The lawsuit is Interactive Media Entm't & Gaming Ass'n v. Holder, No. 09-1301, 2011 U.S. Dist. LEXIS 23383 (D.N.J. Mar. 7, 2011).

thrown in my face by Senator [Richard] Codey. You know, hey, knock out the law first. You want to pass a law to legalize it first and then—you know, knock it out. So we had to go both ways. So we got knocked out. We put it on the ballot. We did not need Governor Christie's approval to put it on the ballot. You don't need the governor's approval for a referendum if you have enough votes. We had enough votes. Governor Christie at the very end supported it. It won overwhelmingly. And now we're waiting for the Attorney General to do something about it.

By the way, the reason why it had to be on a ballot is that the original gaming constitutional amendment that passed under Governor Byrne when we started casinos in New Jersey required that any new gaming be approved by voters.[14] As a matter of fact, by the way, we have internet gaming already in New Jersey. There's internet gaming on the horses.[15] So that was approved by the voters. So it got approved by the voters. Then of course we have to have enabling legislation to get it started; we did. It was signed by Governor Christie early January, around January 5th, somewhere around there. It was still waiting for Attorney General [Jeffrey] Chiesa, the new Attorney General, to give declaratory judgment and get the ball rolling and have the feds try to shut it down. I spoke with the Attorney General today.

I said "I'm going to be talking to these folks about where are we and they're going to want to know. What can I say? What are you doing?" He said "We're meeting March 8th, aren't we?" I said "Yeah." He said "Well, you'll find out on March 8th."

So I can't tell you. But I just reminded him look, the voters have spoken. The legislature implemented it. The governor signed it. As Attorney General, it is your responsibility to uphold the statutes of the State of New Jersey. So that's where we are legally on that. In terms of interstate gaming, we've mentioned in terms of its importance to the State of New Jersey. I will tell you that without a new source of revenue, sports betting and internet gaming, two to four casinos will close in two years in the State of New Jersey. It's a dying industry in New Jersey. A lot of it is its own

14. N.J. STAT. ANN. § 5:12-1, *et seq.*
15. N.J. STAT. ANN. § 5:5-22, *et seq*

doing because it never really took advantage of the entertainment aspects of Atlantic City. It didn't grow and develop beyond the casino strip. That's where we are now. And when competition came into play from Pennsylvania, Delaware, now New York, it keeps losing revenues. And casinos will continue to close. Revel is opening thanks to a tax credit, quite frankly, that I sponsored.[16] But they already put a billion dollars into that business before the industry started. Without the revenue from internet gambling, our casinos will close. And the state will continue to decline.

Now, where are we on internet gambling? Here's where we are. We passed legislation. And primarily [Governor Christie] vetoed it. There were other issues. We took care of them. The hidden factor was . . . political. The original legislation that they expected to pass, supported by [U.S. Senator] Harry Reid in the Senate, would have the internet gaming operation in the country based in the state of Nevada. They would have gotten all the revenue. New Jersey casinos have been struggling and they are trying to convince Governor Christie to hold off since we're going to get federal legislation.

I'll tell you why it's not going to happen. Their lobbyists are saying they're playing with money. They said how much money? Billions of dollars, billions of dollars for the federal treasury with federal internet gaming. But they've got to get a bill through the House of Representatives, which means they have to satisfy the people. The Tea Party doesn't care about additional revenues. They don't care about the debt. They want to shut down government. They want less, less government.

So they don't want more money. This whole thing about debt is bogus. They want less and less federal government interfering in your daily lives, unless it's your personal lives of course. Then they don't mind interfering.

I'm being a little political here. But that's the politics behind the federal legislation. That's why, federally, it's not going anywhere. I will tell you that New Jersey has been the leader. You know, before Nevada passed that law, we had a law on the governor's desk. The governor vetoed. The hang-up that the governor is using besides politics is that he said

16. N.J. Economic Stimulus Act of 2009, 2009 N.J. Laws 90.

that it requires a referendum. Because the original casino law said that you have to have new forms of gaming approved by the voters and that all gaming had to be located in Atlantic City.

So I think we got around the argument that this is not a new form of gaming. Internet casino type games, poker or anything else, is not a new form. We already had it. We already approved it. The other hurdle is it has to be located in Atlantic City. What I argued is that if we had the service located in Atlantic City, the only licenses for internet gambling would be issued to Atlantic City casinos. All the revenue is going to Atlantic City. All the employment is going to be in Atlantic City. The internet wasn't around back when it was approved by the voters. So you have to consider whether this follows the spirit of the law. And it certainly does. That's the hang-up. I will tell you I have a meeting with the governor's chief of staff tomorrow on this very issue.

My guess is that he's going to say you have to put it on a referendum. Which means two things that are very troubling. Number one, we can't do it until next November. By the way, you can't have a special election to amend the constitution to add gaming, because it also said it had to be under a general election.[17] So number one, we have to wait until November. And other states will get in ahead of us. Why is that important? As you mentioned, the first part – the first state in can then grab other states and share the revenue with other states. Not every state – there's only a few states that will be able to implement this. It takes a lot of technology, a lot of investment, a lot of know-how. So there will only be a few states. And the state that gets there first will be able to cherry pick other states and share revenues. It will be a big boon for the state if we could be the first. I think we may have lost out when the governor vetoed the bill. That's number one.

Number two, it could lose. You look at sports betting. It's not universally popular. People say "Oh, people are going to be betting in their bathrobes at home." Look, I don't buy that argument. I live five houses down from a low income housing project. Right across from the low income housing project is a

17. N.J. Const. art. IX, para. 4. This issue was not on the ballot in November 2012.

convenience store. At that convenience store they sell lottery tickets. Nobody is complaining about that. Folks who are betting through the internet are not taking money off of their food. Will there be additional people addicted to gambling? Yes, there will. And we'll have additional revenues for programs for those people. But that horse went out of the barn a long time ago, you know. We are a society that allowed gambling. We want gambling.

But this could lose. If it loses, then what happens? If it loses we're out of luck. Fill in the blank. Out of luck. So that's a big gamble to take. It's a gamble that's not necessary to take. So you'll find out soon enough, just shortly after I find out, whether we're going to be able to take that gamble. I will tell you that if I'm told that the governor is going to veto a bill unless there's a referendum attached to it, I'm going to say go ahead and veto it. Because I think it's a big mistake. It's a big risk to take.

So that's where we are from the public policy standpoint. Look, it means the salvation of Atlantic City, quite frankly. And we need for that happen. Thank you very much.

MR. ANDERTON: Thank you, Senator Lesniak. So on Monday the New Jersey Senate state government committee will be considering your bill. Senator Lesniak also mentioned that there already is internet gambling here in New Jersey and here in the United States. That is in the form of internet wagering on horse racing. Some of you, like I do, have an online account and you can wager on horse racing, you can watch races take place on television, bet on them from your laptop or your home or office computer. That is a form of internet wagering and it's been around for quite a while.

Our next speaker is John Hindman. John is general counsel for TVG. TVG is the largest broadcast network provider of horse racing content in the nation. John is in an interesting position, as general counsel to TVG, because he is advising his client on how to lawfully and responsibly accept internet wagers. John is a graduate of the Southern California School of Law and he's a resident of Los Angeles. We're very happy to have him here with us today.

MR. HINDMAN: Thank you very much. It's a pleasure to be here. It's a very nice facility and obviously great to be part of this esteemed panel.

As Senator Lesniak pointed out, and as Sal pointed out as

well, we can talk a lot about internet gambling like it's some future thing that's getting ready to happen. But it's actually been happening on a legal basis in the United States for quite a while on horse racing. Of all of the hypocritical things, that Senator Lesniak pointed out a few times, why is it okay for internet betting on horse racing but nothing else in the United States?

It really goes back to the 1970s before, obviously, the internet when the City of New York decided that they needed more money and they needed more places to give their friends jobs. So they created the first off track betting ["OTB"] in the United States, the TV shops where you can walk in and place a bet on horse races. They would book the bet and give you a ticket and go from there.

What started happening over time is they started taking all the nationally televised races like the Kentucky Derby and the Belmont Stakes, all those races that are on TV, they started showing them in their parlors and taking bets on them and used the television to get more betting on their races. Finally the creators of those races, the people who put them on said wait a second here, we're spending money to put the race on, we're running the race, we don't want you to use our signal without paying us the money that's being generated from the betting.

So they went to the federal government. They went to Congress. In 1978 they got a law passed called the Interstate Horse Racing Act ("IHRA");[18] They had to go to Congress because obviously it was happening across state lines. So the people in New York were betting on races in Kentucky in the Kentucky Derby. So the people in Kentucky wanted some satisfaction.

So really what you had there was a need for federal intervention really for the first time in a positive way, not a negative way, in gambling issues. The only federal gambling legislation, as Jennifer out, were things that were passed in the 1960s saying what you couldn't do and was criminally offensive to do on a federal level as related to gambling. This law says states could allow this activity to happen provided that they were paying the producers of the product a share and that it was properly regulated by the states.

18. 15 U.S.C. § 3001, *et seq.*

It really branched off from there. Off track became very prevalent in horse racing because for the first time betting had been permitted away from where the event was taking place. So that's the key.

It grew and grew throughout the '80s. Throughout the '90s, it became the majority of betting on horse racing. Kind of as a permissive offshoot of that a lot of OTB companies started taking bets over the telephone. And when we got to the 90s it was a very large part of the business and people started saying wait a minute, this whole taking bets over the telephone part of it and now there's this thing called the internet and we're also intermingling our pools across state lines. Nobody ever tried to see if we could do that either. So they went back to Congress in 2000 and got the IHRA amended to specifically permit off track betting, including bets done across state lines with commingled pools, get bets taken by telephone or other electronic media, the internet. That's what really spawned the industr that I'm in, which is called the Advanced Positive Wagering Industry.

I started with TVG in 1999 when the company started. It currently takes bets from residents of 17 states. It will probably be up to 19 or 20 by year's end. Last year we did $650 million in gross wagering. This year we'll do about $700 million in gross wagering. Also, as Sal mentioned, to augment or promote our service we'll have a cable and satellite network which shows nothing but horse racing and is available in over 36 million homes nationwide on every major cable and satellite provider. So, for instance, here in New Jersey DirecTV carries it. Dish Network carries it. And almost every Comcast home has it available to the users of their services as well.

So that's basically the business of what we do. I do think we were talking about kind of looking forward obviously. Our company is interested in expanding forms of gaming. We obviously need more people like Senator Lesniak pushing the envelope and leading the way. There have been a number of developments that Jennifer talked about, gave a brief perspective on them.

The first is federal legislation for poker and other sorts of games. Will it happen on a federal level or will expansion happen on a state by state level? Obviously I'm in an industry that has federal legislation that requires state by

state approval. So I'm in an internet business that has 17 different sets of rules, 17 different sets of regulators, 17 different sets of guidelines on how you have to operate. That keeps me very busy, which is great. It keeps me on an airplane a lot. But it's not the best way to have an internet gambling business.

Do I see that changing or do I see states giving that up very lightly? I really don't. I don't think you're going to snap a finger and see a national platform as much as people would like to see it for gambling.

Another question was do we think states will enter into contracts to join together and pool their gambling together to create bigger and better for their customers. I think it obviously depends on the state. I live in California. The feeling out there is we are the size of Canada. We don't need anybody else. And God forbid anybody else comes in here. So if you look at the way the bill is written, the only people to get an internet license in California would be people who have already been licensed by the State of California to do other forms of gambling for at least three years. Now, I think you'll see a lot of that happen in other states, rightly or wrongly. But I think in a lot of other states, they will have to cooperate with other states in order to have a viable product at all. So I think you'll see some variation in how that comes together over time.

And so that was really in terms of where it goes, I think that one thing that horse racing has shown is obviously it's popularity is waning some in recent years. But the one thing that has grown almost every year for horse racing is the internet component of the wagering aspect of it. I think Senator Lesniak's point is the only thing it's proven is a lot of the scare tactics that people betting in their home, betting in their bedroom, it's going to cause all these social ills, it hasn't. And we have now a decade to look back and see if it does or doesn't. It hasn't. There's plenty of track record to back that up.

MR. ANDERTON: The more I hear our panel the more I hear that it seems like internet wagering and different types of internet wagering, whether horse racing wagering or sports wagering, that it seems to be inevitable perhaps. I guess you always say perhaps.

Our next speaker brings a wealth of gaming experience to

our panel. Frank Catania is a former New Jersey Assemblyman. He is a senior partner at Catania Gaming Consultants where he is a national and international regulatory and licensing consultant for gaming interests across the globe. He has a law practice here in North Haledon, New Jersey, where he specializes, no surprise, in gaming issues. Frank was a former director of the New Jersey Division of Gaming, which is pretty widely viewed as not only a very successful, but very effective regulator and one that has been modeled across multiple states here in the United States. So, Frank, I'd like to ask you to come up and provide us some of your perspective as you've seen over the course of your career, gaming trends, and where we are today in 2012, on perhaps the next threshold in gaming.

MR. CATANIA: Thank you, Sal. Well, we've heard a lot about internet gambling from everybody involved. I have to tell you, I was the director of the Division of Gaming Enforcement under another Governor Christie, but it was Governor Christie Whitman. Back in 1996 we happened to see the growth of internet gambling. I said to my staff give me a report on it. Let me know what's happening with this. There were some conferences going on in Washington. People were there with regard to sports betting, et cetera. They came back with a report, which I then essentially sent to the governor's office, which basically said you've got two options. You've got to try to prohibit it or you regulate it. If you regulate it, what you do is you're the first one and you're going to make the most money.

When I left in 1999, New Jersey had a great post-employment restriction for four years. So I had no place to go to work in New Jersey. I got a call from the Mohawk Indians just outside of Montreal, the Kahnawake Mohawks. They asked me to come up and talk to them about internet gambling. I had no idea what I was getting involved in. I went up there, and they showed me this old mattress factory and said "We're going to build a data center." Okay, tell me what you mean by a center. They told me. They said "We're going to put together servers. We've got two major trunk lines right here." They're right outside of Montreal. In fact, they're closer to the airport than the City of Montreal.

They were going to have internet service providers. If you were an internet operator and you wanted to operate internet

gambling, you had to get licensed. We went ahead and put together regulations for them. There was only one other place in the world that had any type of regulations and that was Australia. Australia had their regulations in place, so I looked at Australia and wrote the regulations based on the Australian model. The Kahnawake today is probably the most technologically advanced internet gaming site in the world. I have had other customers come in from the United States just to look at it. The regulations are basically the same as what we have in the land-based casinos. You have the mandatory investigation into the company, the individuals involved, making sure that they have the good character, honesty and integrity to be involved in gambling. That scrutiny on these people is very important. That's the one plus for New Jersey: we don't deviate from that at all.

So this is back in 1999. I testified a couple times before Congress and got my brains beaten out, because there were people there that just were against it. There was only one person who was looking to legalize it. That was Congressman Barney Frank. And right now there is one bill in Congress, and that's by Congressman Joe Barton. Again, it only pertains to poker.[19] As Senator Lesniak said, this is the identical bill that Harry Reid put in during the lame duck session, which was a bill that Harrow's wanted because they have the World Series of Poker. They wanted to do have a monopoly on the entire United States market. They also put in that bill that there was a five-year penalty box. Anybody who was coming in from the international play could not do so for five years.

Is Joe Barton's bill going to go anyplace? I doubt it. You know, they've shown very little interest in the bill. So we have to look at where we are going to go with this. My opinion has always been that it is something that we have to look at on a state by state basis. States have three alternatives. Either do nothing, you prohibit it, or you legalize it and you create regulations for it.

I have worked with the International Association of Gambling Regulators and was their chairman when I was the

19. David Saleh Rauf, *Will Congress hold 'em or fold 'em on Net gambling*?, POLITICO (Jan. 6, 2012 12:07 PM), http://www.politico.com/news/stories/0112/71155.html

director of the Commission of Gambling Enforcement. There is no better group of regulators for gaming than the state regulators. If we get the federal government involved, it's just going to cost more money. It's going to be bogged down. For example, the National Indian Gaming Commission has a budget of approximately $11 to $12 million,[20] and they are supposed to overlook the entire country with regard to Indian gaming. New Jersey's Division of Gaming Enforcement – this is back in 1995, my budget was $34 million overlooking 12 casinos. So how can the federal government come in and regulate this? They can't. It's impossible for them to do that.

My opinion is that each state should decide whether or not they want to regulate it and how they want to regulate it. Once it's regulated in that state – Jennifer mentioned the opinion that came on December 23rd from the Department of Justice. That opinion in my opinion has opened the door for each state to not only do intrastate, but also do interstate gambling, and also take players from outside the United States, internationally. There is one jurisdiction – and I had a play in it in 2002 – was the U. S. Virgin Islands. You know that's part of the Third Circuit.[21] They put together internet gambling regulations and basically said you couldn't take a bet from anyplace in the United States.[22] It would only be internationally. The federal government, the Department of Justice came in with a letter and said if you do you're in violation. Now, in 2002, we had *in re MasterCard*.[23] This is a case where there were a number of people who had lost money using their credit card, MasterCard, playing online casino games, not sports betting, casino games. Well, these were all consolidated into one case and eventually ended up in the Fifth Circuit. The Fifth Circuit in 2002 said casino-style games are not a violation of The Wire Act.[24] But what did the Department of Justice do? They said we're not going to take

20. NATIONAL INDIAN GAMING COMMISSION, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION: FISCAL YEAR 2012, at 17, http://www.nigc.gov/LinkClick.aspx?fileticket=ICefkCElX1w%3d&tabid=917 (last visited Dec. 18, 2012)(the NIGC estimated budget for FY 2012 is between 17 and 18 million dollars).

21. *Court Info*, UNITED STATES DISTRICT COURT OF THE VIRGIN ISLANDS, http://www.vid.uscourts.gov/court-info (last visited Dec. 18, 2012).

22. V.I. CODE ANN. tit. 32, §§ 601 *et seq*.

23. In re MasterCard Int'l Inc., 313 F.3d 257 (5th Cir. 2002).

24. *Id.* at 262-63.

any beefs with regard to that. That was a civil action. We're still not concerned. Since 2002 myself and other people have been arguing that The Wire Act has no bearing, nothing to do with casino style poker games. The Department of Justice on November – excuse me – December 23rd came out and said the same thing. I might add that Senator Reid and Senator Kyl—now Senator Kyl has always been an opponent of gambling, any type of gambling. In fact, I believe at one time he said "Internet gambling is the cocaine of gambling." Anyway, Senator Reid and Senator Kyl sent a letter to the Department of Justice asking that they reinforce their position that the Wire Act encompasses all forms of gambling. That was summer. But some other states from the lotteries had said listen, we don't want this to happen. So there was a lot of, you know, in Washington with the Department of Justice. They finally came back and went with the side of the lotteries and said it doesn't violate The Wire Act.

And at this point my opinion is that it should be just as we're doing here in New Jersey, it should be state by state. If you want—if the state doesn't want it, they can prohibit it. You can't do anything about it.

By the way, Washington State has a prohibition against internet gambling.[25] It's the only state in the country that has a prohibition against internet gambling. Also, the player, if he's caught and found guilty, he is charged with a Class C felony, which is comparable to rape.[26] So look at how these states have gone.

My opinion again is I think we have to follow the lead of New Jersey. Nevada has already done it. The U. S. Virgin Islands have done it. There are only two states that don't have any gambling in the United States – Idaho and Hawaii. Hawaii has a bill with regard to internet gambling. Iowa has a bill with regard to online gambling. Mississippi is looking at it. Illinois is looking at it. If we don't do something in New Jersey, the train is going to leave the station and we're going to be standing on the platform.

Thank you.

MR. ANDERTON: Even more suggestions from our final

25. WASH. REV. CODE ANN. § 9.46.240 (West 2012).

26. WASH. REV. CODE ANN. §9A.44.060 (West 2012)(rape in the third degree is a class C felony in Washington).

panelist on the bill of internet wagering. I'd like to start the questions. As many of you know, there has been poker online available to residents of New Jersey for a long time. And perhaps some of us in this room actually engaged in internet gambling already before. I don't know who on the panel wants to speak to that. But how has that happened for so long that we've gotten away with it? What are the implications of that?

SENATOR LESNIAK: Yeah, I'd like to start. I was surprised when I found that out myself. Some of my best friends, my uncle, one of the meekest guys I know, plays poker over the internet. There was just a bust, another big bust on that a few months ago as well. But you can't shut down the internet. Like I said, people are going to do it.

I want to add one other thing on taking bets from foreign nationals. I tried to put that in my bill. I got convinced that not the Justice Department but the Commerce Department were concerned about free trade issues, that they can't take our bets but we're going to be able to take theirs. That isn't going to work.

This is a great area for law, by the way, since it's evolving every day. But there's an additional issue there in terms of taking international bets.

MR. CATANIA: There is a case in Antigua. Antigua started a suit against the United States basically saying you're allowing horse racing and you're not allowing us to come in with our internet gambling.[27] They won that case. And the United States still has not paid any money, and they're just ignoring it.

SENATOR LESNIAK: I don't think Antigua is going to invade us soon.

MR. CATANIA: But what they could do is they could just ignore all our trademarks, et cetera, and just allow that to happen in Antigua. They're not going to do that. They're not interested.

MR. ANDERTON: I open up the floor to any other questions. Please just raise your hand if you have any

27. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004); *see WTO Dispute Settlement – Dispute DS285*, WTO.ORG (June 6, 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

questions for the panel.

AUDIENCE MEMBER: This is a question for Senator Lesniak and Mr. Catania. From a criminal defense perspective, regarding the Wire Act, I'm wondering whether or not a fine or imprisonment for not more than two years is enough of a deterrent. I mean, if you're making millions of dollars for doing this internet gambling, what's two years in jail?

MR. ANDERTON: For violation of The Wire Act?

AUDIENCE MEMBER: Right.

MR. CATANIA: They have had—the Jay Cohen case is probably the most noted case, which happened in New York.[28] I think he spent a total of six months in jail[29] after his sentence, and that was about it. I don't think you're going to put any more of a penalty, leaving a maximum of two years and the fine I think is fine.

MR. ANDERTON: In other words, it would become too much of a deterrent?

MR. CATANIA: A deterrent of what? I mean, a deterrent of gambling? I mean, really, if we were to allow sports betting in this country, you know the number one money maker of organized crime is sports betting. I mean, they've got a great lobbyist in Washington just making sure it's never passed.

MR. HINDMAN: But I think the other point also about deterrents – I have experienced this a lot in the business that I'm in – you do have people that make the decision to say the worst it could be is two years, and I could make a lot of money, I'll take that chance. The people who are regulated, who do play by the rules, and can't afford to engage in that activity, because they would lose all the things that they have invested in onshore, they can't make that same decision. So what you do is you sit there for five years like all of us did and watch two companies – basically two companies have a monopoly on the internet poker business in the United States – on an unregulated basis, which was good for nobody. So I think that that is something that actually creates an

28. United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

29. *Id.* at 70. Jay Cohen was in prison for approximately seventeen months. *'Net Gaming Operator Cohen Freed From Prison*, LAS VEGAS SUN (Mar. 23, 2004), http://www.lasvegassun.com/news/2004/mar/23/net-gaming-operator-cohen-freed-from-prison/.

improper advantage kind of sometimes for people who have less at stake than people who are actually here on shore and regulated.

MR. ANDERTON: So unregulated and untaxed.

MR. CATANIA: I disagree. Having been involved in this, I mean, these companies are regulated overseas. I mean, do we say that if they're not regulated in the United States they're not regulated? But they're regulated in the UK.

MR. HINDMAN: So I'm sorry. The point I was making is if Caesar's woke up and said I'm going to do the same thing tomorrow, Caesar's could lose their Nevada gaming license. Right? We're going to do 50 states internet poker from the Isle of Man.

MR. CATANIA: MGM has a license in the Isle of Man.

MR. HINDMAN: Right. But they weren't taking 50 states.

MR. CATANIA: With respect to taking from the United States.

MR. HINDMAN: Exactly. I'm saying the reason they weren't was because they were regulated in the United States.

MR. CATANIA: Absolutely. But the legitimate companies actually as soon as the regulations were passed from the Unlawful Internet Gambling Enforcement Act, in June of 2007, those companies stopped taking play from the United States. It's easy enough to put geolocators on to stop play from the United States. The major companies did. Then there was a big issue with regard to the poker, whether or not it really is illegal in a lot of states.

MR. ANDERTON: Yes, sir.

AUDIENCE MEMBER: I have a question for Senator Lesniak. Actually two. One, why is the internet gambling issue critical for survival of the casinos? And secondarily, what does it matter to the State of New Jersey whether the casinos succeed or not?

SENATOR LESNIAK: Well, it certainly matters to the people that work in the casinos. They have lost over 5,000 employees over the last few years. So it means a lot to them. It means hundreds of millions of dollars of revenue and tens of millions of dollars of revenues to the state. That's just on the wagering itself. And then of course every job generates additional revenue, you know, the multipliers effect they talk about in economics. And it's an activity that we're losing out

on because people are engaging in it.

There are 400,000 people on the internet now in New Jersey playing poker. I couldn't believe that but it's true. I mean, they're doing it. So that revenue is going offshore. Why shouldn't we capture it here?

MR. ANDERTON: Senator Lesniak mentioned the NFL games in Europe. John's company is an English company. How long have you been offering online gaming in England?

MR. HINDMAN: Since 2000.

MR. ANDERTON: Since 2000. A pretty similar economy to ours.

AUDIENCE MEMBER: If the online gaming is passed, would that prevent those companies from partnering with the New Jersey casinos, those casinos using their software?

MR. CATANIA: Those companies at this point have no chance of getting licensed in New Jersey. If the company was sold, all the people who are involved in it, and the company was completely cleansed it could happen. I don't know if you recall, there was a big poker scandal a number of years back with Absolute Poker and Ultimate Bet where some of the people inside were able to see the hands of other people.[30] They were licensed through the Kahnawake. And KPMG and I had to do the investigation on that. Our judgment at the end was that everyone in that company at that time had to be out. Anybody who had any decision making had to be out. That's the same that's going to happen here. They don't have a chance.

AUDIENCE MEMBER: I think Jennifer mentioned the difference between Utah and Nevada. The question I had was for Senator Lesniak and some of the panel in general. In regard to New Jersey I know we're locked into the gambling. But in the future do we really want a Las Vegas-type orientation for New Jersey if it is the future, or more like a Salt Lake City, Utah orientation? I know it's a style of life. One, encourages smoking, gambling and alcohol. The other doesn't. But I'll leave that up to the senator.

SENATOR LESNIAK: Well, I've been to Utah and I live in New Jersey. I choose New Jersey. But we made that decision

30. Mike Brunker, *Poker Site Cheating Plot a High-Stakes Whodunit*, NBCNEWS.COM (Sept. 18, 2008), http://www.msnbc.msn.com/id/26563848/ns/us_news-crime_and_courts/t/poker-site-cheating-plot-high-stakes-whodunit/#.UGcxRI5b7zM.

a long time ago. And I don't think there's any way to go back. We're never going to be Utah. We're New Jersey. Our people want to bet on sports and they want to bet online. As far as I'm concerned, more power to them.

AUDIENCE MEMBER: Is betting, wagering defined? And second, is there any kind of exception for securities? So, for instance, if I want to place a bet in New York on an ultimate football game or whether or not GE is going to pay its bills, you know, where is that defined?

MR. ANDERTON: It's clearly a form of wagering.

MR. HINDMAN: We don't call the latter gambling. That's how we get around that one.

AUDIENCE MEMBER: How is it defined? How do we make that distinction?

MR. CATANIA: Consideration, chance, and prize. Those are the three elements of gambling.[31] The argument with regard to poker is whether or not it really is a game of chance or do you need a certain skill. There's also issues in law that states if there's a small bit of chance, does chance or skill predominate?

Then the other part about securities, that's defined by the Securities Exchange Commission, that's allowed.

MR. HINDMAN: But most securities industry items are expressly permitted from most gambling prohibition bills. So they're expressly excluded where they say nothing in here will prohibit anything regulated by the SEC or states securities laws. I think to Frank's point on what is a federal wager, it is what is skilled versus what is chance. Then the states are kind of all over the map as to different games and whether they are involving predominantly skill or chance.

AUDIENCE MEMBER: The Wire Act doesn't make a distinction?

MR. CATANIA: The Wire Act only says that anything to do with sports betting is illegal. That was enacted in 1961 when nobody had any idea about the internet. Basically it was Robert F. Kennedy who was after organized crime. That's what he focused on, because that's where they make their money.

31. Affiliated Enterprises v. Gruber, 86 F.2d 958, 959 (5th Cir. 1936); *Broadcasting Contests, Lotteries, and Solicitation of Funds*, FCC.GOV (May 19, 2011), http://www.fcc.gov/guides/broadcasting-contests-lotteries-and-solicitation-funds.

AUDIENCE MEMBER: Will there be another challenge to PAPSA and will it succeed?

SENATOR LESNIAK: Yes, it will succeed. And as I mentioned, I think there has to be. Again, I was really a little surprised at the Attorney General not giving me a definitive answer. It was March 1st. Governor Christie signed enabling legislation around January 15th. I know there's real doubt within the Department of Law and Public Safety about the viability of it. But a lot of folks believe that it is a good challenge. So I suspect that – well, I don't know.

Tune in. We'll find out.

MR. ANDERTON: Yeah. I guess we'll find out in the next weeks. That's all the time we have. I'd like to thank our panelists for taking time out of their day to join us. And thank you all for your attention and questions.

PANEL 2: TWENTY-FIRST CENTURY CONCERNS IN REALITY TELEVISION

MR. KETTLE: I'm John Kettle. I'm a Clinical Professor of Law at Rutgers Law School. I'm pleased to be here this evening. Jillian Zadie, I thank you for inviting me to monitor this panel.

I actually started my teaching career here at Seton Hall as an adjunct professor, and I'm thrilled to be back, especially to monitor the panel with three esteemed colleagues of mine. I look forward to what they have to say about reality television.

When Jillian asked me about moderating and I thought about reality television, it isn't something that I particularly cover in my courses, although we do talk about television. A gentleman over here had asked earlier about a definition about internet gambling. So I though let me start at least with finding a definition for reality TV. Because when I think about the different shows, whether it be our most popular shows these days like Jersey Shore and Real Housewives of New Jersey, and I think back to when I was growing up what might have been qualified for a reality show like Candid Camera.

So I looked at Wikipedia, we were talking about the internet earlier, and reality television is a genre of television programming that presents purportedly unscripted dramatic or humorous situations, documents actual events, and usually

features ordinary people instead of professional actors, sometimes in a contest or other situation where prizes are awarded. It went on further to talk about frequently it portrays life in a modified and sensational manner with exotic locations and normal situations, perhaps even using off-screen story editors and speech manipulators to give the illusion of reality. So is reality television really reality? We're going to be of course talking a little bit more about that. But first I want to introduce our panel.

To my immediate right is Thomas Crowell. He is a founding partner at Saperstein & Crowell in New York City. He is also Executive Director Emeritus of the New Jersey Volunteer Lawyers for the Arts. He's counseled clients on a wide variety of entertainment and intellectual property law matters. He is actually currently the Director of the Indie Film Clinic at Cardozo Law School, where he also teaches a course in filmmaking. He's also the author of – if I might pick this up and give you a little bit of plug—the second edition is out, the current one is copyright 2011, The Pocket Lawyer for Filmmaking.[32] It's an excellent book. It's becoming standard in the industry for those who are in film making. I would also like to mention that you had taught a course here at Seton Hall Law School, and had graduated from Cardozo with honors, and admitted to the Order of the Coif. So I welcome you.

Next to Tom is Matt Savare. Matt is a graduate of Seton Hall Law School, and is counsel at Lowenstein Sandler, one of the sponsors of today's event. He is in the firm's media and entertainment group, the tech group, the intellectual property group. The work that he does at Lowenstein runs the gamut through transactional, litigation and entertainment, prosecutorial work. He also practiced before the US Patent and Trademark Office, doing a lot of trademark opposition litigation. He brings a wealth of experience here to the panel in dealing with transactional matters in entertainment, including of course reality TV.

Next to Matt is Laura Magedoff. Laura is a principal of the Nissenbaum Law Group here in New Jersey, although they have offices in other locations. And her focus is in the firm's transactional area as well as entertainment and sports

32. THOMAS A. CROWELL, THE POCKET LAWYER FOR FILMMAKERS (2d ed. 2011).

law. She has worked on contractual issues dealing with both sports and entertainment matters, talent agreements, production agreements, the network distribution agreements, the licensing of various deals. And I look forward to your focus on a lot of the issues that we'll be talking about given that background. She received her J.D. from Fordham University Law School, and is the current chair of the New Jersey State Bar Entertainment, Arts, and Sports Law section.

Now, as to format, the way we're going to approach today's program is I'm going to ask the panel some questions in basically three distinct areas. The conception stage or phase of reality television when someone comes up with the idea for a program. Then we'll move on to the production phase, then the post-production. So we can talk about the issues and concerns, especially those facing practitioners who want to work either on the talent side or the production side in reality television. With regard to the conception stage, what is the advice and counsel that you would give to your client who comes in who has a concept or an idea for a new TV reality show? So, Tom, I'd like to start perhaps with you. Ideas copyrightability, trademarkability, contract issues. What is it that you would advise and do for your client with regard to the concept for a new reality TV show?

MR. CROWELL: By and large, the most common question I get when somebody walks into my office and they have a new unscripted reality television show is they say "Look, I want to get a copyright on my idea." So the first thing I have to do is to disabuse them of the notion that you can copyright an idea at all. For those of you IP practitioners here in the audience, you know that protecting ideas can be extremely hard. First of all, the copyright statute itself says that there's no copyrightability for a concept.[33]

So I have to talk them down from the ledge. Because their fear is that they're going to go into a production office, go into the office of a network and they're going to pitch their idea, and the network execs are going to say "Great, thank you very much," and go off and do the idea and take you out of the deal. So the question is really how you protect that concept. Unfortunately for the would-be producers, there is really a

33. 17 U.S.C.A. § 102(b) (West 2012).

very limited narrow window for protecting a concept at all, if indeed that particular concept is novel enough to be protected. We only have five minutes per speaker so I'm going to kind of cut to the chase and give you the black bullet point for it, is that ideas of this nature can really only be protected if they are at least novel to the person that is hearing the idea, and they're not so general that it's just a mere variation on common themes that are out there. So if I came in and I pitched an idea to a studio exec that was essentially hey, how about a bunch of people who work in a restaurant and they fight a lot. I think that it would be very hard for a court to uphold any sort of contract, implied or not, between the producer and the network because that's merely a variation on what we've heard before. But if it's fairly novel to the buyer, that is fairly novel—an idea that is novel to the person who is hearing the idea, you may be able to get some sort of contractual protection over that.

As for nondisclosure agreements, which is something that clients often ask me, "Well, how can I get the studio to sign a nondisclosure agreement." There's no faster way out the door in a pitch meeting than if you try and get somebody to sign a nondisclosure agreement. What is, I think, a better way to counsel your client is to say look, the first thing you want to do is avoid signing the opposite document which is called a submission release form. A submission release form is basically a release, a waiver of your right to sue for misappropriation. And specifically most submission reforms will say that there is no implied contract. "There is no contract between those parties until such time as there is a written contract in effect." So it sort of takes away your client's right to claim there was some kind of contract in place for the protection of that idea.

So the big bullet point to take away here is that in order to protect the idea, if it can be protected, it must be novel, it must be novel to the person hearing that idea, and there must be some sort of contract in place for its exploitation between the parties.

MR. KETTLE: Matt, I believe you had actually worked on a case not too long ago dealing with the Sopranos.

MR. SAVARE: Exactly. Actually, I was going to talk about that. Thank you.

One of the things I would advise in addition to having a

great concept is to try to attach talent, which I put in quotes, and/or a location. If you come to a production company and all you're pitching is the idea and you have nothing else, it's very easy for that production company – because as Thomas said, they're not going to sign a nondisclosure agreement. They're going to do everything they can to avoid any kind of implied-in-fact contract. So if you can bring something to the table other than just the concept, a very vague general notion of what the show should be, if you can have a treatment with – I know it's called nonscripted or unscripted television, but the dirty little secret is there are a lot of scripts for these episodes. If you can have a treatment or a sizzle reel, which is maybe a 15 or 20-minute presentation that you have taped, if you can bring those to the pitch meeting and have the concept, a treatment – which a treatment, you can copyright a treatment because it is an original work fixed in a tangible medium and expression, which is the definition of a copyright.[34] What that actually protects is really the words that are fixed on the page. So it won't extend to the protection of the idea. However, if you bring just a vague general notion of what the show is, that's always a better bargaining position.

As John alluded to, I was on a litigation team at Lowenstein Sandler involved in litigation as to whether or not the Sopranos, the idea behind the Sopranos was misappropriated. It originally started with maybe an 11 count complaint with copyright infringement, breach of contract, breach of implied contract, misappropriation. You name it, it was in there. Breach of fiduciary duty. I'm not really sure. We got that out on a motion to dismiss, three lines.

But basically the case went through some of the iterations that Thomas described. The copyright claim was thrown out because what the plaintiff was alleging was that he conveyed to David Chase an idea to do a show about the mob in New Jersey. That was it. That was his idea. And he wanted millions of dollars for it. So that doesn't rise to the level of copyright.

The next thing they alleged was that there was an implied-in-fact contract, which is not an oral or an expressly

34. 17 U.S.C.A. § 102(a) (West 2012).

written contract. It's a contract that's implied by the facts of the case, that there was an expectation that when this person pitched the idea that the other side had an expectation that there were going to pay that person for the idea. We got that thrown out. Then we were left with the misappropriation claim. That went to trial. And we won within about 30 minutes. It all came down to what Thomas described, novelty.

Under New Jersey law, which follows New York law, the law for misappropriation claims is whether or not the idea was absolutely novel.[35] The idea of a mob show in New Jersey is not absolutely novel in any sense. So that was thrown out.

I do want to point out, because I know my time is probably out already, that New Jersey and New York follow that law, that for a misappropriation claim it has to be absolutely novel. California, oddly enough, follows that for a claim, it only has to be novel to the individual to whom you're pitching it. So that's the distinction. It's actually surprising because you would think California would be more protective of the production companies, but it's actually inverted.

I will just mention one other thing about the submission releases that Thomas alluded to. I wrote an article about this called "Caveat Scriptor."[36] It gives some suggestions, as I know Thomas has in the materials as well. There was a case that was brought in New Jersey probably seven or eight years ago. It was called *Sternberg v. Disney*.[37] Sternberg is the uncle of one of my best friends who wrote a book, had it copyrighted, had the characters trademarked, had a lot of protections around it. He's a doctor, a very smart individual. He was pitching the idea to Disney. Disney said it's not for us, but we have a company called Pixar, why don't you pitch it to them.

So Sternberg pitched it to the people at Pixar, to the head of Pixar. And five years later he was at the movies watching a trailer for Finding Nemo. And needless to say, it's all public record. You could look at his drawings. You can look at

35. Duffy v. Charles Schwab & Co., 123 F. Supp. 2d 802, 807-08 (D.N.J. 2000); McGhan v. Ebersol, 608 F. Supp. 277, 284 (S.D.N.Y. 1985).

36. Peter L. Skolnik & Matthew Savare, *Caveat Scriptor: Don't Get Burned by Boilerplate Releases*, 24 ENT. & SPORTS LAW 1, at 36-38 (Summer 2006).

37. Sternberg v. Walt Disney Co., No. 05-CV-0825-SRC, 2005 WL 514293 (D.N.J. Feb. 14, 2005).

Disney's drawings. But regardless of whether or not there was a misappropriation claim or even a copyright infringement claim, Sternberg signed a submission release which basically said we can essentially steal your work and we're off the hook. Oh, by the way, if this is void against public policy, your damages are capped at $500.

He sued Disney. His attorneys argued that this was void against public policy. It was thrown out on jurisdictional grounds. He didn't want to appeal because Disney threatened if you go forward with it we're going to go after attorney's fees and costs and all these other things.

So my advice aside from everything we have already discussed is read the submission release form before you sign it, because you could be signing away an awful lot.

MR. KETTLE: Laura, just before I go to you next. Questions and answers will be at the end. So if you have particular questions about what's being discussed, please hold those until the end. Laura.

MS. MAGEDOFF: What I'll add to that is more from a business/operational standpoint because the law really doesn't provided a whole lot of protection in that idea or concept. Part of it is to know who the other side is. Often people come to me and they say, I'm working with this production company. Well, have you looked into them at all? Have you done your due diligence? Are they a viable company? As Matt said, that kind of throws that out the window because Disney abused it. But the more reputable company you're working with the better situation hopefully you'll be in.

The other thing I spend a lot of time doing is disabusing the prospective talent about what these deals are going to look like. People come into the office very excited that this is going to be their five minutes of fame, and hopefully longer. It sounds great in theory, until they realize that these agreements are notoriously extremely one-sided against the talent. And once you break that down and once you understand what these agreements look like from the talent perspective and how you're going to bound and the lack of control you have, it's suddenly not nearly as appealing.

MR. KETTLE: The question I have, of course, with regard to your practices, do any of you actually shop if you have what you believe is a concept for tomorrow's most popular reality

show, do you engage in that service as well?

MS. MAGEDOFF: I do not.

MR. KETTLE: Do not. If not, why not?

MS. MAGEDOFF: Normally people want that on a contingency basis. It just not the model of our law firm. We'd like to get the actual legal work than deal with the shopping.

MR. SAVARE: Sorry to sound like an attorney. But what do you mean by shopping? Because I would certainly define the word. Honestly we don't shop in the sense that an agent would where we're going to shop it around and if someone picks it up we want 10 percent of whatever they get. Some firms do that, especially West Coast firms will take a percentage of whatever the deal is. We're not set up that way. That's not how we do business. However, I will, whenever I can, present materials and make connections for people. You can say that's a form of shopping, maybe a scaled down version. But certainly we'll provide contacts and access whenever we can.

MR. CROWELL: Like Matt, I don't hold myself out as an attorney who shops. But because I do these deals frequently, I'm often in a position of putting two people together or two parties together. Because I do represent companies doing deals with networks, it's very easy for me to bring in a producer to meet a company client that would then have in-house with the networks. But I tend not to; I'm not a packager and it's much more informal.

MR. KETTLE: Have you encountered clients at that stage that also want you to perhaps assist them with trademark work? Perhaps they have what they think will be the title of the program which once it becomes a series becomes trademarkable. Have you worked with clients at that capacity, at that stage, as far as searching the opinion letters, the filing of their intent to use that for that purpose?

MR. CROWELL: Yes, definitely. One of the things you have to be very cognizant of if you're representing a producer client that has a deal with a network is to make sure that you're creating as clean a chain of title with respect to trademark rights. Because in that production services agreement—it's something we haven't talked about, let me introduce the term, if I may. Take a company like Discovery Channel. And they are hiring your client production company to produce a series for Discovery Networks. The type of

agreement they're going to be using is a production services agreement. And the client is going to be representing warranties among others so it's as clean as possible chain of title in trademark. So from the get-go from the minute that client is walking in the door, is trying to protect that trademark, you have to do a trademark – your trademark due diligence. Because if you don't and it gets down the road far enough that Discovery is now plastering that trademark around town and advertising it, then there is a chance that they will get a cease and desist from the lawyer which rolls down the hill to your client because of the indemnification.

MR. SAVARE: This has been a big issue for some of our clients that have existing businesses and a production company or network approaches them and the show is going to revolve around their business. And their business is either their trade name or one of their products is going to be the name of a show or it's going to be integrated within the show. So as Thomas mentioned, there's clearly trademark issues regarding the title separate and apart from this specific issue. But this makes it even more acute when you have an existing business that's successful. There's goodwill associated with it. It's an asset of the company. You want to have some protections in your production services agreement, in your dealings with the network, in your dealings with the production company, to make sure that the trademarks—most deals, everything is going to be subject to network approval. The network owns everything. The network governs everything. That's the one issue I will always draw a line in the sand and say this is an existing business with existing trademarks, and you can have approval rights over everything except for the way in which we use the trademarks.

MR. KETTLE: In that regard, moving onto the production aspects. Laura, if you can obviously continue the discussion about trademarking. But I would also like to know—and I'm pretty sure our audience would also like to know—what do you seek on behalf of your clients, the talent going in? We can talk about the production company side in a moment. But if you have the talent, what key rights or protections are you looking to have in that production agreement?

MS. MAGEDOFF: Well, it's funny that Matt mentioned having talent that is operating a business. That's a huge

trend I'm seeing is that more and more reality shows are trying to focus on the operation of business, the personal lives of the key employees or owners of that business. I think that presents a set of really unique facts to the production deal. For one thing, you're talking about the intellectual property. Generally speaking the production company or the network is going to want all intellectual property and everything that is the subject of the program. So when the program is showing the business, and the subject of the program is really the business, I think there becomes the question of what's the intellectual property of the program and what's the intellectual property of that business? And a part of what I'm negotiating for the talent is really defining that line of demarcation and saying that just because you're filming or creating this packaging, does not mean you suddenly have rights in the trademark we're creating. Or if we're shooting a television show or something out there, just because you're seeing what we are creating doesn't give you the rights to it. So I think to that extent it goes beyond just trademark.

The other thing that's unique when you have a business that's being portrayed is that a lot of times reality shows are focused on showing everything. I mean, part of the crystallization of a reality show is marketing off the drama that's created and the argument.

That being said, there are certainly times in the operation of a business that you may want to close the doors. You may want to turn the cameras off. So part of what I'm negotiating on behalf of my clients is to say "Look, this is a manufacturing company. You can't go in and watch the manufacturing processes. You're not going to be able to see the formula that we're making our products with. You might be listening and taping all of the president's phone conversations, but when he's talking to me, the attorney, that's off limits. I'm not going to waive the attorney-client privilege because you're taping a communication that happens to be between the company and myself as the attorney." You could have all sorts of board meetings, internal politics, that for various reasons, talking about the plans of the company or confidential information, you do not want to be made public by virtue of the show. So within the agreement you need to parse some of those things out.

I also think that given that in these types of shows the

talent is a professional, it's someone who is a little bit different than a 19-year-old who is on a reality television show socializing and having fun. They have a legitimate interest in protecting their reputation and the reputation of their business. So I generally try to negotiate a little bit more in terms of approvals. Oftentimes these are established people within their industry. They already have a book deal, consulting deal. They're already serving as consultants on The Today Show, that sort of thing. I try to carve out the media exclusive as well for things that.

MR. KETTLE: Tom, do you want to add to that especially as might regard merchandising, potential spin-offs? If you were to represent Snookie—I'm not saying you do and whatever you say is obviously not counseling advice to her.

MR. CROWELL: It's interesting you bring that up. It's very much to your point, Laura. While I tend to represent production companies most of the time, I do represent the odd talent—the odder the better. And the talent—I did a deal recently—I'm going to try to speak slowly as to not to give any confidential information away. But a reality deal that I represented a business owner who was approached by a production company to open up the doors of his business and have a production company come in and film the drama therein. One of the things that was extremely overreaching was not just the trademark elements that they wanted a piece of, but they also wanted to reach into the revenues of the business itself and make the claim that they were adding to the goodwill of the company. Now, my rebuttal on that is that they may be destroying his reputation. So we really want to draw a clear line, to use your term, of delineation between what is owned by the business and what is owned by the production company.

I think there's also an intellectual property argument to be made that's very strong on the talent side. Those of you who are familiar with trademark law and know about trademark licensing and the problem of licensing a trademark in gross. In other words, you abandon trademark rights if you license them without any quality control over them.[38] So the argument that I make is that if I'm letting you have all the

38. Barcamerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 595-96 (9th Cir. 2002).

say over the way my client deals with his office and my client doesn't have any approval rights by contract, that's akin to licensing in gross and you run the risk of abandoning those trademark rights which you want to license for different products.

So I think you can get to the Snookie issue, which is Snookie is making more money than anyone around. And I think there's an argument that is very favorable toward your talent client if you phrase it in terms of trademark rights and abandonment.

MR. SAVARE: I think it really all depends on who your client is and what the show is. As Laura already mentioned, if your client is a 19-year-old kid who really doesn't have a care in the world, then have at it. And they may not have very many concerns whatsoever as opposed to our firm has very large clients. Some of their CEOs have been approached. We have negotiated deals on their behalf. They have books and they already have TV deals. So you need to be mindful of what the program is, what the intended audience is, who your client is and what he or she has already done, if there's a company that's involved.

The way I approach almost every reality show deal when we represent talent is defensively. I look at it as the attorney. I have to assume the parade of horribles, which I do. So I always think what can go wrong here? What do we need to prevent against? Some of these participant releases and these talents agreements are really unbelievable. I mean, half of it is probably void against public policy. The releases that they're asked to sign, where the network can shoot the person in the face and there's nothing you can do about it. Clearly no court would enforce that. So we just try to walk it back a little bit. We try to manage the client's expectations and say listen, you're probably not going to make a million dollars off of the first season of this show. But if we can reserve some of your merchandising rights or if – that's usually the first draft you get, the producers will want everything. They'll want the kit and caboodle. We can merchandise you. We can slap your name on a box of Cheerios.

By the way, you have no control over that. You have no say over that. You get no revenue from that. You're going to get $1,000 an episode and that's it. Those are things that we can

generally walk them back from. I actually have – and anyone that does a search on MTV, Real World on Google, it was circulated probably about seven months ago about how egregious these contracts are. We don't have time to read through some of the provisions that are in here. I just wanted to highlight a couple of them. There is a section in here essentially that says we have no responsibilities about who is on the show with you, we don't do any background checks. Oh, and by the way, you're probably going to get an STD. I mean, that's essentially the language that's in there. Walk it back. We can portray you essentially any way we like. Okay. We know what defamation is. For a public figure, it's absolute malice.[39] Again, if it's a 19-year-old who is just a mess, defamatory proof, may not be a problem. But if it's someone who is a respected person with a company and this is a multimillionaire, we want to walk them back from. It says in here, we will portray you in a false light. So you can scale that back a little bit.

There is a very broad grant of rights to enter the person's property, to enter the person's business, to interview their family, their friends, take their photos, do all kinds of things. We try to put some fencing around that.

I should say, we have done some deals for MTV, and I didn't draft this, but it is all public information. Use of the persona for any reason, advertising, non-advertising in connection with the show for no compensation. I thought this was great. This person was getting $1,000 per episode, yet if this person disclosed any confidential information, there was a liquidated damages clause in there for $1 million.

So those are just some of the things. You don't need to be an entertainment attorney to realize something is wrong here. So, we always encourage clients, you know, have us review them. Because there are a lot of clients that say it's a reality show, it's MTV or Discovery or TLC, whatever the case may be, how bad could it be. It could be really bad.

MR. KETTLE: Let me ask you, maybe, Tom, since you had mentioned you represent production companies more so than talent. But what about children? You had "Jon and Kate

39. Gertz v. Robert Welch, Inc., 418 U.S. 323, 327-28 (1974)(defining "absolute malice" as "publication . . . with knowledge that [the defamatory publication] was false or with reckless disregard of whether it was false or not.")

Plus Eight."[40] What about those reality shows that do have minors? How do you deal with those issues from the production company's standpoint? Perhaps they don't want to appear. What do you do contractually in that regard?

MR. CROWELL: Right. Well, it's obviously very state-specific. New Jersey, I think, depending upon which side of the coin you're looking at it, is very good about protecting minors and it's very hard to enforce a very broad waiver of a minor's rights here. In New York, in order to get an entertainment contract bolstered up to avoid disaffirmance by the minor, there is a process that allows you to go into court and ratify the contract with the judge.

But, by and large, the advice I give my clients is try and avoid minors. You know, so you can have a guardian sign, but that's not an ironclad release of a minor's right.

Now, that being said there was a reality show a couple years ago that shot in New Mexico.

MR. SAVARE: Where they dropped the kids off and said "Fend for yourself?"

MS. MAGEDOFF: I remember seeing their agreement also. It was completely overreaching in terms of what they were even imposing upon these children and trying to get the children to be bound to it, that sort of thing. I worked on the case. So I can't speak to necessarily how enforceable that was or not.

But as you say, I strongly urge my clients to avoid involving minors. Because in addition to contractual issues whether or not they can be bound to it, having a guardian sign really doesn't get you there.

Plus I represented a guardian in a case where she signed for her child that was a minor that was a model at the time, and we were able to get the New York Courts to disaffirm the agreement. So I've seen it from that side as well. But you also run into the child labor law.So I think I would just repeat that I would also encourage clients to stay away from including minors.

MR. SAVARE: Talk to someone in our employment group. As Thomas said, it's state by state. It's so specific. There are so many factual issues regarding it. We have an employment group that while they don't focus on that specifically, they are

40. *Jon & Kate Plus 8* (TLC television broadcast 2007-2011).

much more prepared and better equipped to answer something like that than I am because it's just not an area I focus on.

MR. CROWELL: Before we completely leave the talent service agreement and performer release realm, let me turn the tables a little bit. If you're representing a production company and you're doing one of these releases, I think it's critical to insert what I call the Borat Clause after the Borat case, a wonderful series of cases that have arisen out of that documentary.[41] Long story short, if you have wonderfully crafted releases of defamation of intentional infliction of emotional distress, all of that can be undone if the performer or person depicted can claim successfully that they were fraudulently induced to sign the contract. So in practical terms how does this work? It works by the performer claiming "Hey, yeah, I signed this but I was told that I would look really good. I mean, the producers really puffed it up for me that I was going to be the star of the show. Now you've portrayed me as a person with an STD just because it was sweeps week."

So if they can successfully make that claim that they relied on the producer's representation behind the contract, there may be a fraudulent inducement claim. One of the ways Borat's production team won is they said – they were very smart and they put into the release a clause which essentially says "I, performer, agree that I have not relied upon any statements by the producer on how I will be depicted." As you pointed out here, it specifically says that they will be portrayed in a false light. So make sure to take that off the table if you're representing a production company in a potential for fraudulent inducement because that will vitiate the entire contract.

MS. MAGEDOFF: Another thing I have done along those lines is to include a provision that says that the person signing the release has the right to rescind it within a day or two, maybe three business days. That way nine times out of ten it's never going to happen. But it gives you one more tool in your arsenal if they try to say they were forced. By giving them three business days, it gives them the opportunity go

41. Psenicska v. Twentieth Century Fox Film Corp., No. 07 Civ. 10972 (LAP), 2008 WL 4185752 (S.D.N.Y. Sept. 3, 2008), *aff'd*, 409 F. App'x 368 (2d Cir. 2009).

get counsel and have that reviewed.

MR. SAVARE: Just dovetailing with that. Right at the beginning when you are representing a production company, in bold letters we say "no reliance." We say you have the opportunity to retain counsel. If they have retained counsel, we put the counsel's name in there. Everything that we can do. Because it is uneven bargaining power. So anything that you can do for the production company to say you have the opportunity to review this. That's a great idea. We have never done that before, the three day review period. Take that away.

But we put that front and center in all caps, bold, right at the beginning of the participation agreement.

MR. KETTLE: Now, admittedly we took a quick look at the issues and concerns that you would often encounter in the production phase of the reality show. What about post-production issues that you may have encountered? We do know that some of our reality TV stars do things. And I was thinking of a moral rights clause when you were talking before about what one of the performers might do that you might have some recourse for. But what have you encountered on behalf of your clients in that regard? Once something is there what has the client or its production company, what have they encountered that you felt perhaps back in the production phase you should have dealt with but now you have to dealt with?

MR. CROWELL: Sure. One of the often neglected areas by production company that get them into the biggest trouble – and Matt and I talk about this all the time —is in the areas of deliverables. And this is the last thing the production companies tend to think about. When I talk about deliverables I'm talking about those contractually obligated materials that the production company must deliver to the network. They really take two forms. They take the form of the legal deliverables, your chain of title, your agreement, et cetera, and the technical deliverables. You have to have your master. You have to have photographs. You have to have this, that and the other thing, a whole bunch of clearances on the legal deliverable side.

Typically the producers are so gung ho in getting the show and meeting the deadline that things tend to get sloppy as the deadline approaches. And they can literally lose out on the

last payment from the network, and even harsher penalties if they don't make an absolute perfect tender of the deliverables at the end of the day. Make no mistake about it, it will be drafted in the production services agreement that there is a perfect tender of these deliverables or else there is a trigger effect happening and the production company, the network can either bring suit and/or withhold the last payment.

When you are negotiating this production services agreement, one, be sure to not just look over the legal deliverables but look over the technical deliverables too. I know most of us here who are attorneys may not have a production background, so our eyes may glaze over at a recitation of what kinds of tape format or digital format may be required. But you need to check this with your client. I've seen still requirements for deliverables which say 35 millimeter negative for production. I don't know a single person who shot in film recently, other than high-end fashion photography. But that can still hold up the deal. Part of that, as I alluded to, is clearances. This is something that really as attorneys we have to be issue spotting all the way through, especially with reality television where products may not always be displayed in a favorable environment but were used in a manner in which they were intended. So the take-away here is make sure that you're riding shotgun, if you will, along with the client all the way along in making sure that the deliverables are in place, the clearances are in place, especially with respect to music. I'm going to stop there. Mentioning music opens up a whole other can of worms. But music clearance is critical. Because at the end of the day if the network is not 100 percent happy with their client's work, they're going to be looking for ways where they can withhold that last payment. And deliverables is the first place they look.

MR. KETTLE: Matt, you made me think of product placement. When Abercrombie wanted to pay to have their clothes not worn on the Jersey shore.

MR. SAVARE: The Situation. Product placements are not done at the post-production phase. They're done really early in the process. As people are coming up with the concepts, one of the things they're thinking about at that early stage is what can we integrate with the show? It's not just a matter of what can we integrate with the show in the show, a lot of the

deals and trends I'm seeing, we're doing a lot more with social media. We're doing a lot more with the internet. So the product integration is no longer just the can of Coke or whatever it is on American Idol. There's all the ancillary marketing that's associated with it.

So product placement is a huge element of reality shows deals. We've been able to get some of the revenue on the talent side. So the talent will typically get a per episode fee. There might be some other things you'll be able to negotiate. In certain instances we've been able to negotiate a percentage of what the production company gets from the integration deals. So that's something that people should be mindful of.

Just to expand upon what Thomas said. It's great for the attorney to review the deliverables. And Thomas comes from a production background, so he understands what all of that stuff is. I understand 90 percent of it maybe. The other 10 percent, I always encourage the client to really read that. Because that's an area where they can really give input. To make sure that it's accurate, because we're not shooting 35 millimeter film anymore, but that it's not overreaching.

There are instances—and all of us do films as well, and this is an issue with films—where the studio or the network or whoever is paying the bills can withhold a large percentage of the front end compensation because there weren't 100 still photographs. We only delivered 50 or something like that. So I try to always carve out the essential deliverables. Here are the really important deliverables. And here are the ones where it's nice to have, but you can't withhold payment on the nice to have. Oh, by the way, if you air the program on television, if you put it on in the theaters, that's deemed acceptance and you're going to give us all the money that's remaining. So those are some of the things that we need to monitor.

MS. MAGEDOFF: I think a part of it too is educating your client. As much as we would like for them to include us throughout the production of the program, the reality is a lot of them won't. We're not going to be on the set every day, especially in reality television. It's not necessarily the intentional product selection or the intentional selection of a song that's going to be in the background. The Jersey Shore they're in clubs. There are songs in the background.

You have to deal with either editing that out or getting a

clearance for it. So you really need someone who is there on, quote, unquote, set who understands the issues to keep an eye out to see how they're looking, how the label is displayed, what they're wearing, what logos are showing up on there, and be looking out for all these other intellectual property issues to obtain the clearances.

MR. SAVARE: Most of the talent agreements will say you're not going to wear anything that's branded. That's tee-shirts, hats, whatever, all of that has to come out. The network or production company will have control over the wardrobe.

MS. MAGEDOFF: But you need to have someone to enforce it.

MR. SAVARE: She's absolutely right. The attorneys are not always involved in the day-to-day shooting of it.

MR. CROWELL: Sort of to that point, you know, those of who practice in IP, we may have some rubric in our head oh, this is fair to use and this is fine because it's a person depicted on a public street. But you almost have to put that aside because what's going to control is not any particular statute or any judicial interpretation of fair use, but what's going to control is the production services agreement or the errors & omissions ("E&O") insurance, errors and omissions insurance, or the standards and practices department of the network that dictates how things are shown and what sorts of clearances are required.

So up front you have to know what the rules are with the network that you're dealing with. And those are almost more important than your well argued, well-reasoned determination that something is or is not fair use.

MR. KETTLE: You had mentioned, Tom, E&O insurance and it made me think of insurance in general, health, life insurance. Do any of these production deals that you work on provide any such coverage for the talent, either health insurance or look to insure their lives?

MR. CROWELL: Well, yes. And there is typically a clause that says you represent, warrant that there are no issues that would stop us from being able to buy coverage for your services. . I've done a lot of shows you might have seen that have to do with people designing your wardrobe for you. So those kinds of shows are going to be less likely to have the producers worry about somebody's life and limb. I would

imagine a show like Jersey Shore is probably heavily insured in those areas. But errors and omissions insurance, I think, is critical for any production company that is involved in doing reality TV.

MR. SAVARE: From a broader perspective, just entertainment in general, film, TV, reality, whatever, there are a bunch of different policies that are out there. There's E&O, as Tom alluded to. There's comprehensive. All those different kinds of insurance. But there's also insurances for tax credits. A lot of states offer tax incentives. New Jersey unfortunately just lost theirs. But if you shoot in a state and you do a certain spend within that state, the state – it depends upon the way in which it's structured—but a lot of states will cut you a check at the end of the production and say okay, here's a million dollars, thanks for shooting in our state and bringing jobs into our area. And what happens if there is a hurricane that precludes you from shooting in the state or making that spend? There is insurance that actually covers that. So if you don't meet your minimum spend within the state—and this applies for TV, it's for film as well—the insurance company will cover that.

There are other kinds of insurance, key person insurance. I have never done it for a reality show. I've done it for movies where it's a well-known actor or actress and they're absolutely essential. The reason why the investor invested in that independent film was for that particular person. If that person breaks his or her leg and they're not around, all hell could break loose. So there's insurance for that. We work with a variety of different insurance brokers and insurance companies. We can advise upon and consider this, but talk to your broker because it's a really nuanced and specialized area.

MR. KETTLE: But if you represent a town and the production company wants to take out a life insurance policy payable to the production company, would you support that? I have a concern. I mean, especially in the music industry. You've got a rap artist. You get a life insurance policy. The albums are tanking. You've got to recoup.

MR. SAVARE: I think you watch too much CSI.

MR. KETTLE: If it's payable to the estate, I'm much more comfortable.

MR. SAVARE: Again, I think it depends upon if it's life

insurance. I believe that—and I'm not being facetious when I say this, I believe that J-Lo's record label took insurance out on certain parts of her anatomy. I'm dead serious. There are different things that you can insure. If this is just a run of the mill role, there's not really one star and they want to take life insurance out, I think I would probably object to that.

MS. MAGEDOFF: Quickly on the insurance issue. You asked whether or not these shows often give health insurance. For the most part I have seen some life insurance policies. I have seen key man insurance. I have not often seen where talent is given health insurance.

From the production company point of view I think one of the reasons you would not want to see that is I have actually represented production companies that have had the state unemployment board come after them trying to claim that these are employees rather than independent contractors. So let's say this is a competition-elimination-type show. Someone is on one show and then they claim unemployment for whatever period of time they believe they're entitled to be getting money. You want to be making every argument you can that they are not actually an employee of the production company. If you're providing them things like benefits and insurance, that's going to go against you.

MR. KETTLE: We're actually are at the point where we take questions from the audience. Does anyone have questions? The gentleman up there.

AUDIENCE MEMBER: Mr. Savare suggested making sizzle reel as a way to help protect against your idea being stolen. What is the ownership in that situation?

MR. SAVARE: If the person that has the concept funds the sizzle reel, it all depends upon the money, at least from my perspective in the deals that I have done.

So if I am the originator of the idea and I want to have a more fulsome pitch to a network or to the production company and I fund that on my own, I absolutely want to own that. And there are different contracts out there. One is called the shopping agreement, where I have the idea and I'm going to go to a production company and I'm going to give you an exclusive right to shop that to networks or the different distributors. Right. And if you don't execute an agreement within six months, eight months, whatever the term is, all rights to the concept revert to me, including the sizzle reel

that I funded.

If the person who originated the idea submits it to the production company and the production company creates the sizzle reel, that's where it becomes a negotiation. And oftentimes the production company, if they haven't shopped the property successfully, there's really limited things that they can do with that sizzle reel. I say what are you going to do with it, just give it back to us and let us use it? Sometimes they say well, we put $50,000 into it, pay us that $50,000. I think that's unreasonable because there's nothing you can do with it. Maybe you can negotiate maybe half of that or some percentage of it. But a lot of it depends upon who's actually funding it.

MS. MAGEDOFF: Even if your client, the talent, has funded it, it's sometimes a point of negotiation. I just had a deal where my client is the one who funded and created the sizzle reel, yet in the first draft of the production agreement that was offered to them, all the presentation materials including the sizzle reel were going to be retained by the production company. We then had to walk them back and make sure that we kept that in the event that nothing happened with the show.

MR. KETTLE: Although that may also be done earlier on work made for hire with independent production companies so that the authorship would vest, let's say, with you and then go to the next stage.

MR. SAVARE: Correct. If the person who has originated the idea goes to an outside production company, not the production company to which you're pitching it, that's absolutely done on a work for hire basis. At least I want it to be as the originator of the idea. I don't want that production company being attached to it.

Actually, one of the things in terms of the shopping agreement, one of the things that is really most important, we want to make sure as the originator of the idea that that person is locked for the production as it goes forward. Because oftentimes you give the idea, and if there is not language in there locking you into the program, they can cut you out of it. So that's something I always want to make sure is in.

AUDIENCE MEMBER: As someone who would want to join a reality talk show and you're handed one of those

contracts with unconscionable terms, can you ask them to change the terms or is there any way to negotiate, or do people just say no and find someone else who is willing to sign away their rights?

MR. KETTLE: Well, on the one hand that's what keeps you in business, the fact you would be willing perhaps to attempt to negotiate. But from your personal experience, perhaps any one of you can answer.

MR. CROWELL: Look, it comes down to leverage. If you're approached to be one of an ensemble cast and you're one of many 19-year-olds who will do crazy stuff on TV, then you have very little leverage. But if you're the owner of a store, an owner of a business, and that's the key idea, you're the guy who makes these widgets, then you have more leverage to negotiate.

But there are certain absolutes that you're not going to get. Most of things that we talked about, we talked about the variations and how we would approach them. You can negotiate. But something where you have absolutely approval, you're not going to get that. If you try and push too hard in those areas, I think it just signals that you are very green or you are not working with an attorney who knows the industry well enough, so that they don't take your other asks as seriously as perhaps you would want them to.

MR. SAVARE: I was just going to add to that. Laura brought it up earlier that a lot of the way in which the negotiations will come about is dependent on the production company that you're up against. There are some deals that you're better walking away from, honestly. I mean, there are a lot of production companies out there that are absolute scoundrels that will do everything they can to get the show aired and they don't really even care what the agreement says. So you might even be able to negotiate it. But if you're not with a reputable production company, sometimes the best deal is the one that you walk away from.

Another one of the things Thomas just mentioned that you'll never negotiate out of a contract is the ability to get injunctive relief. No matter what they do, no matter what they say, you'll never be able to stop the production and the distribution of the show. The best you can hope for is money damages.

MS. MAGEDOFF: One other item I always tell people,

even if they are not in a position to negotiate this, even if they don't want to be the bad guy. Number one, feel free to make me the bad guy. I'll be happy to make that phone call on your behalf.

But number two, even if you're going to sign it, even if you don't want to negotiate a thing, know what you're signing. Sit down with me for an hour so you at least are making an informed decision. And that's really my biggest thing is educating the participant.

AUDIENCE MEMBER: You talked about insurance. Have you run into any Workers' Compensation problems? I know different states have statutes that say employees, even a contractor, if somebody is still an employee, if they're under the control of another person. I was just wondering just in terms of people who commit suicide or whether or not you run into those problems?

MR. SAVARE: I have run into it. Not in a reality show context and not regarding suicide. But I have run into it with some of our clients in the entertainment industry who have been audited by various states for misclassifying employees as independent contractors. A lot of the states, with their shrinking budgets and the budget gaps, are cracking down on that. The state loses money when people are classified as independent contractors. We have clients that have been audited. Fortunately, we've been successful in either winning those disputes or negotiating down some of the penalties. But that is an area that's a hot one in terms of the classification of employees versus independent contractors.

MR. KETTLE: You talked about the production deal and the red flags that we need to be looking for and perhaps how we may address those. But I'm curious, and I imagine some in our audience would be too, as to what is the typical compensation that talent receives in a TV reality show? There was a mention of $1,000 an episode. Is that the common number? They can negotiate perhaps the various provisions. But what about the money? What about the royalties? What is the economics from the talent's standpoint? And what is the budget on a show per episode?

MR. CROWELL: Well, it ranges so widely. If you're repping the artist, the performer, you'll want to take a close

look at the SAG,[42] rate card for unscripted television and use that as the jumping off point for your beginning negotiations, even if your client isn't union. Many reality TV shows are not shot under union guidelines, but it at least gives you a jumping off point. I'm also a firm believe that if you're going to use my client's likeness, then my client should absolutely get a piece of that. That's even if it's not a client that owns a business that is being used. But if you're putting Snookie, who is not my client, if you're putting Snookie's face on a cereal box, then at least you get a piece of that revenue.

MR. SAVARE: As Thomas said, it varies widely. It also varies depending upon if it's network or if it's cable. It varies depending upon if you are the key person in it or just a bit player. I've seen them $1,000 an episode, $5,000 an episode, $10,000 an episode. We had a client that was on Secret Millionaire, and she didn't get anything. You have to actually pay money because there are certain contractual provisions. So it really runs the gamut.

In terms of royalties, you can typically negotiate. If the show does well and it's picked up for additional episodes, you can get bumps. They're going to start off really low; they're going to lowball you. And you can at least make an equitable argument that if it gets picked up for an additional 13 episodes or whatever, we want some kind of escalation maybe tied to the escalation in the fee the production company is getting, make it commensurate to the royalties. It's really difficult to get any kind of back-end stuff. Although, as Thomas said, to the extent you have to give up licensing of your image, likeness, and voice or things like that, you should be able to share in that. We've been able to get some participation in the product immigration. So it really depends on the leverage.

MR. CROWELL: If I can dovetail with that. If you want to get a sense of how much in terms of royalties, there is a great book out there. I think it's called The Licensing and Royalty Guide,[43] something very generic like that. But it breaks down what a typical percentage is, 8 to 12 percent for soaps and

42. Screen Actor's Guild, now SAG/AFTRA after a recent merger with the American Federation of Radio and Television Artists.

43. RUSSEL PARR, ROYALTY RATES FOR LICENSING INTELLECTUAL PROPERTY (Wiley, 1st ed., 2007).

cosmetics. And it breaks it down by USPTO trademark class and gives you a sense of what you can get for your clients in terms of percentage of merchandise. But it won't give you an actual dollar amount.

MR. KETTLE: I want to thank our panelists for joining us this evening.

KEYNOTE ADDRESS

MS. SAUNDERS-HAMPDEN: I'm Brenda Saunders-Hampden. I'm on the faculty here at Seton Hall. I teach entertainment law, and I co-teach sports-related law.

I'm delighted to introduce our keynote speaker who in many ways, as his bio reveals, not only does Bill have significant achievement in sports law and sports related issues, but he also has extensive experience in entertainment and IP-related transactions and litigation. What a combination of credentials for our speaker. In addition to his professional qualifications, Bill has graciously and unselfishly given of his time to speak with and mentor students, having guest lectured at many educational institutions, including Seton Hall Law School.

On a more personal note, Bill and his wife celebrate 35 years of marriage today. Congratulations on that, too. They have two sons. One of whom is in the entertainment industry as a comedy writer; the other one has successfully avoided entertainment and sports law by going to medical school.

Please join me in welcoming to the podium Mr. Bill Heller.

MR. HELLER: Thank you, Professor Hampden. Thank you all. It's a pleasure to be back at Seton Hall Law School. I notice there's a court reporter here, and you all applauded when Professor Hampden talked about the fact that I'm celebrating a 35th wedding anniversary today. Please print that page of the transcript. I want to bring that home to Mrs. Heller. I enjoyed meeting a lot of you before today's event. By the way, great panelists. I learned a lot. Thank you very much. I'll steal it and I'll pay you for it. I notice there's a lot of Patriots fans in the audience. I don't know if you knew that. Indeed there are. I just want to tell you that it's okay, you can start reading newspapers again.

Which reminds me, I heard a wonderful story that I want to relate to you. After a period of years, [Patriots quarterback

Tom] Brady who has a very successful career, successful life, passed away and goes to heaven. He meets his maker. God says to him "You've been wonderful, let me show you where you'll be for eternity. He shows him this wonderful house, a very nice house, a modest split level. Very nice place. Nice neighborhood. Tom Brady says "Wow, this is great." The Lord says "Yes, not everybody gets a house like this." And as he's walking up the walk to his new house, he turns around to wave good-bye and he sees across the street a massive mansion, three stories with all blue, white and red on it, and a swimming pool shaped with a Giants helmet, and a Giants flag on a flag pole blowing in the heavenly breezes. And he turns around he says "Lord, I'm not trying to be ungrateful, but I'm an all-pro quarterback, three Super Bowls. I'm in the Hall of Fame." I forgot to tell you, there's a big number ten jersey on the door of this mansion. So Tom says "How come Eli gets a better house than I do?" The Lord chuckled and said "Tom, that's my house."

So I'm sorry to the Patriots fans who are here. We really love the Patriots for letting us beat them twice. Oh, did I say that? Honestly, it's a great organization. And it was a close game. And I'm just very happy for my job that we won.

The topic of my little keynote address tonight – by the way, I'm going to catch up time, because you don't want to be the last speaker between your audience and drinks. So I'll be on time. If all my former colleagues who are sitting in the back will help me just start doing this when you get thirsty, okay. What I want to talk about is sports law demystified. I am now a sports lawyer full-fledged.

The question is what is sports law? I'm often asked that. And I came to a realization soon after I joined the Giants about what sports law is. I thought I'd tell you about what I do. This is what I do on a daily basis. I get in early. Tom Coughlin is here by 5 a.m. talking about the game plays for the next game. After we set the game plays I go talk to Jerry Reese about the drafts. Then spend some time with John Mara talking about NFL issues. Then start coaching the players. Now, that's what people think I do. A lot of people say you have a dream job. This really must be exciting. Yeah, in many respects it is. But what I really do is quite different. Sports law really it's the application of time tested laws to new technologies and situations. In my case, sports law is the

same thing applied to the sports field.

What I really do is practice law as a generalist responding to issues and questions using a mixture of practical business judgments advised by legal experience. That's what I do on a day-to-day basis for my company. Because we are a company. And the biggest difference between outside practice and in-house practice is that I live with my clients. One of the things I miss is when you're an outside counsel and your client sends you an e-mail or the phone rings, you just let it go to voice mail. You can say I was in court. You could say I've got a brief due. You can't do that in-house. If any of you are in-house lawyers, you know exactly what I mean. When you live with your clients, you have got to have that instantaneous response that makes you a value to the corporation.

That I do it for a sports team and particularly for the Giants, is often a lot of fun. But there are challenges. I'll give you one of the biggest challenges. It's actually an ethical challenge. I have been a Giants fan since I was yay high and skinny. That was a long time ago. I would love to be Eli Manning's best friend and to hang out with him and have breakfast, lunch, and dinner with him and talk about how he made a brilliant throw on the fourth and ten. But ethically, think about it, I'm the lawyer for the corporation and he is an employee. I can't get too close to Eli Manning or Justin Tuck or Brandon Jacobs or Ahmad Bradshaw. And that is often a very difficult experience. I do meet some of them. I do help some of them on occasion, but never on anything related to their employment.

A great example came up. You may have heard and read that a few players went out to celebrate Victor Cruz's birthday last fall, and they went to a club in New York at which there was a shooting which actually was a homicide. The New York City Police wanted to speak with Victor Cruz and Chris Canty and Antrel Rolle and a few others. The team asked me to make sure that I coached the players in how to deal with the New York City Police. "Coach" was the wrong word. But prepare them for the interviews. All right. The fact of the matter is that I had to give them an *Upjohn* warning before I met with them.[44] I had to say look, I'm representing the team, and the team is concerned about what

44. Upjohn Co. v. United States, 449 U.S. 383 (1981).

happened over there in New York. And if you want, you can have your own lawyer. They said no, no need. They actually had no need. You'll see why in a second. And I had to begin that meeting with the New York City Police Department interviewing each of those players as a representative of the company. And Victor Cruz is the sensation of the Giants this year. But I couldn't be his best friend. I had to keep my distance. That sometimes is very difficult to do.

Interestingly enough, the New York City Police had a videotape. They knew that our guys were far away from the incident and ducked under the table when they heard the shots. They really just wanted to come out to meet the players. And they admitted that after the interview.

So my theme today is this. I'm somewhat old-fashioned about the law, as some of my former colleagues from McCarter & English who are here know, I take the law very seriously. It's an old-fashioned and traditional thought. One which I emphasize repeatedly to everyone who says wow, you have a great job, it must be great, it must be really cool, sports law. What I say is that real lawyers, we didn't go to trade school. We trained to be thinking professionals, people who learn some basics to apply in any discipline at all. A trial lawyer with whom I was once associated said "Being a trial lawyer is like your brain is like a bathtub. It fills up when you learn all those facts and technologies and things you need to know for that case. Then the jury comes back and you move on to the next case, pull the plug, and it all goes down the drain and you've got to learn something else."

As thinking professionals, we have to deal with various situations requiring real intellect and judgment. And I dare say there's no such thing as a sports lawyer or a computer lawyer or a cyberspace lawyer or with politics or an entertainment lawyer. We are lawyers who require a specialty in which we apply the basics in many cases of first year law school: contracts, torts, and the like. And on any given day – you remember the movie Any Given Sunday – on any given day in my life I'm touching upon any or all of those topics. It literally could move that quickly.

I started life as a generalist because of the development of law firms, the evolution of law firms. I started specializing in later years. And I'm now a generalist again dealing with all of these issues on a day-to-day basis.

You know, it ranges from the sublime to the ridiculous. Someone trips and falls at the stadium. Suddenly we're getting a claim, a premises liability we designed the stadium badly. I get that phone call from the irate fan. And I ask the question "Well, would you like us to tear down the stadium and redesign it?" The answer is "No." Of course what they want is money, free tickets, an autographed football and the like. So part of my job is also customer relations, which can be fun. I don't want to digress too much there.

What I want to do is talk about five representative matters that will make the point that I hope I have already made and will try to drive home with you that sports law is the application of basic principles applied by thinking professionals to a sports context.

So let's talk about one of the things about which I'm asked very often, the lock-out last year. It was almost exactly a year ago as we stand here today that the lock-out occurred. And the first thing that happened was the NFL issued so many rules that we had to follow; well, it was great.

One story I like to tell is that one of the rules was that active players couldn't appear at the charity golf tournament. So I was nominated to go tell Tom Coughlin that active players couldn't appear at his charity golf tournament next spring. And I had been at the team only a couple months. I walked into the coach's office and we had met, but we really hadn't dealt with each other. And the Tom Coughlin you read about is the real Tom Coughlin. So I sat down. He kind of grumbled. I said "We've got some rules for the NFL. You're unable to have active players at your golf tournament."

I didn't know what a nanosecond was until this time. It took him about a nanosecond to say "Bleep them. You go tell the NFL that this is charity, and I'm having my players at my charity tournament." There was not anything else to discuss.

P.S., I did tell the NFL three weeks later to change the rule. That's not really the practice of law except for the exercise of good judgment on my part to keep quiet and go out and leave the office as fast as possible.

But one of the big challenges in the lock-out, it all surrounded labor law, a course I took in my first year of law school. It revolved around the rights of the players who might be picketed. What do we have to do to prepare for picketing at our facility? One thing about which we were very

concerned was secondary picketing at the stadium during concerts scheduled during the spring. And what we had to do was be prepared with the NFL labor counsel and our own labor counsel in order to prepare the grounds to go in for a preliminary injunction if we needed it to enjoin picketing that might interfere with enjoyment of fans at concerts and the like.

When you remember, or you might remember that the district court enjoined the lock-out and entered an order saying to the NFL teams you can't lock out the players anymore.[45] On that morning I actually was in a room with John Mara, Jerry Reese, Tom Coughlin and Kevin Abrams, the assistant general manager. The question was what do we do, Bill? And the answer was an injunction has been issued in a party to which we are a case. The court has jurisdiction over us. We have no choice but to open our facility if players want to come in.

We were the only NFL team that decided that we would not be held in contempt. The funny postscript of that is that Chris Canty was the only player who decided he would come in. He walked in and went to the weight room and started working out. He decided he's going to tweet and say wow, the Giants are great people. I'm here in the weight room. This went like wild fire and 31 teams called Commissioner [Roger] Goodell to complain about the Giants because the Giants were letting their players in. Well, the answer was we were enjoined from locking them out. We weren't going to be in contempt. Which, by the way, says something about the Giants organization. One of the things I love about the Giants organization is they like to do things the right way. It was only one day because the Eighth Circuit stated everything went back into effect.[46] All the other teams stopped calling us names, and we went back to the lock-out.

But that was an application of what? Basic litigation experience. Equity jurisprudence. Was it sports law? Sure. It was in the context of an NFL lock-out. But at its base it was that litigation experience that took hold. When the lock-out settled, we had had it. We had contract issues, free agencies, players contracts, coaches contracts. We had

45. Brady v. Nat'l Football League, 779 F. Supp. 2d 992 (D. Minn. Apr. 25, 2011).
46. Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011).

contract issues because the University of Albany where we traditionally hold training camp was in a jam because of time frames. Were we going to breach that contract by having the training camp at the performance center. We had vendors with whom we needed to enter into contracts because we decided to have training camp at our center. We had sponsors who had withheld payments or prospective sponsors who had put a hold on their deals who wanted to be in place in time for the season. We had to do essentially four months work in six weeks. All of that was contract law in its in various forms.

So my next example is when we negotiated to outsource the Giants online store. When you go to the Giants website and you decide you want to buy a hat or a jersey, which I encourage you to do, when you click on the area where you buy stuff, you think you're still on the Giants site, you're not. We outsource that to a company called Team Fan Shop. And we have an extensive agreement with Team Fan Shop which involves again another example of applying basic legal principles to a sports law situation, this time merchandising. The contract is a trademark license. It's also a copyright license since they're using copyrightable content. And there are rights of publicity issues because players' images are also appearing, which also, by the way, implicates the collective bargaining agreement. We had computer law issues that were at their bottom UCC issues. Because what this company did was they said we will build their website in all its functionality. We had to engage in a process by which they provided us with a prototype of the website. We had to test it out and put it through its paces before we would accept it and accept its payments. And all of these are typical of UCC concepts with which you are all familiar.

We had to deal with the domain name issues, we were allowing them to register a domain name that had the Giants name in it. But we had to retain ownership of that name for trademark law purposes. We had to deal with an interesting force majeure issue. A lot of people see force majeure issues in contracts every day. They kind of skip over them. But at the time we were negotiating this contract, the labor stoppage, the work stoppage, the lock-out was ahead of us. We had to do some unique things. What happens to merchandising during a lock-out? Sales are going to plummet. The question is what happens to the deal then? Is

it terminated? Does it depend on time? So we had to deal with something that most contract lawyers skip over. And if any practicing lawyers here have not skipped over the force majeure clause, you're not telling the truth.

And we had to deal with data privacy because the company who is running the site is accepting credit cards and a lot of other personally identifiable information. We had to make sure that they were compliant with the Personal Card Industry Data Security Standards[47] and that their data stores were compliant with which was then SAS Level 2, SAS 70 Level 2, which now has another name.[48] I think it's SOC or SAE or something like that.[49]

The third example is the MetLife Stadium naming rights deal. You all see MetLife Stadium now. Right? I can tell you that that was a lengthy, drawn out negotiation. The contract is 120 pages single spaced before exhibits. And MetLife is assuredly an insurance company. We negotiated every detail with them. In essence this was a mutual trademark license because each of us was entrusting trademark rights to the other for a very long period of time. But there is not—this contract, I think, is an example of every legal issue there is. I'll just go through some.

There were real estate issues. What would happen if our ground lease to the stadium was terminated or was affected somehow? We lease the land on which we built the stadium, for those of you who don't know that. What would happen if there was a casualty, if an airplane flew into the building and the stadium was partially or totally destroyed? What would be the insurance issues that would attend to a casualty of that sort? What are the regulatory issues? We are so close to Teterboro Airport that we have to be concerned with FAA issues. We're also on the approach to Newark Airport.

47. *Payment Card Industry Security Standards*, PCISECURITYSTANDARDS.ORG, https://www.pcisecuritystandards.org/pdfs/pcissc_overview.pdf (last visited Sept. 29, 2012).

48. Statement on Auditing Standards (SAS) 70 is an auditing standard developed by the American Institute of Certified Public Accountants. *SAS 70 Overview*, SAS70.COM, http://sas70.com/sas70_overview.html (last visited Sept. 29, 2012).

49. Statement on Standards for Attestation Engagements (SSAE) No. 16 replaced SAS 70 as "the authoritative guidance for reporting on service organizations" on June 15, 2011. *SSAE 16 Overview*, SSAE16.COM, http://ssae16.com/SSAE16_overview.html (last visited Sept. 29, 2012).

There's stuff on the top of our building that is required by the FAA. We had signage issues. There are a tremendous number of local, state and federal sign laws. I don't know if any of you have ever dealt with this, but depending upon whether your highway is a federally funded highway, you have to do the federal signage laws. The Borough of East Rutherford gets their dibs in there and they regulate the size, shape, color. It's amazing. It's a whole cottage industry. If any of you are looking to find a side light, go into signage.

There were construction law issues, because the erection of the sign on the side of the building indicated all sorts of issues for what were the standards or what were the building code standards, how would it be constructed, what were the safety issues and the like.

There were corporate issues because MetLife assuredly is a public company and has reporting requirements. So what could they tell their shareholders and what could we legitimately ask them to withhold from their shareholders in the case of certain confidential information?

Perhaps the most interesting issue in the entire negotiation actually had First Amendment implications. There came a time when MetLife said we want – essentially they said we want the right to veto any event at the stadium that we don't like, because, you know, we're MetLife. I mean, think about it, we couldn't have a MetLife Snoopy, the Peanuts characters, I mean, you couldn't ask for better. They have a squeaky clean image. They were legitimately concerned about this issue.

What's our concern as a stadium owner? Well, we borrowed 60 gazillion dollars to build this thing. When we're not playing football we want there to be soccer games and concerts and high school football games and the like. Concerts are where we focused. And what did we hear? We don't want to hear hip hop artists saying bleep this, bleep that, et cetera. That's not our image. By the way, we even got into political issues. They said you can't let a political party use the stadium that might not fit with our political views or our economic views or business views. We said look, we own the stadium, and we are not in the business of censoring anybody, of determining whether the Democrats should have MetLife Stadium but the Republicans shouldn't or vice-versa, whether this hip hop artist could come because

he doesn't use foul language, but this one can't, whether we risk acts with wardrobe malfunctions and the like, it all came up.

And we actually were talking about the First Amendment in our negotiations of this contract and free speech and the like. We came to a compromise after a lot of serious negotiation. And basically it was that they don't get a prior right of censorship. They get the right to get a schedule in advance. They get the right to disassociate themselves from any event occurring at the stadium. And if it's really bad, we have an alternative dispute resolution mechanism that starts with senior execs, then CEOs, then mediation in order to avoid litigation.

I'm actually pretty proud of the way we resolved that issue. It was hotly contested. It took a lot of time. A lot of you have been in negotiating rooms and you've been negotiating something for months and you're getting close. And you know that issue where somebody says something and there's silence in the room and everybody is looking at each other. And somebody finally says time for a break. And that was this kind of an issue. But it was really interesting because I hadn't dealt with First Amendment issues in a very long time.

We recently completed a green energy project at the stadium. I led a team of lawyers from the Jets and the stadium. I was representing the Giants but also all the entities. We entered into an agreement contract which had a lot in common with the MetLife agreement because it's so extensive. Essentially what we agreed to do was to buy electricity from a different energy company that also is going to provide solar energy to the stadium. And remember what I said before, that bathtub metaphor. We had to learn all about the solar energy field, how solar energy is generated and delivered, what are the tax incentives, what are the economics of the deal. That was a highly regulatory environment. Again, not really that specialized. It was regulatory law. And through a detailed negotiation we came to a deal under which NRG will be putting solar panels around the top of our stadium. By the way, a key part of the negotiation was an LED ring that would turn blue on a Giants game day and green on a Jets game day. If anybody repeats this, I will kill them. When the owners came to look at the prototypes, the

solar panels, what did they focus on? The color of the light. John Mara said "That looks purple." Not the solar panel looks good. Not how much kilowatt hours. Purple light. So we learned about regulatory principles in that case. And I now know a lot about how electricity is priced and how solar energy is priced and how the energy companies are making a lot of money.

Again, my theme is that all of these things fall under the rubric of sports law only because I work for a sports team and provide services to that team. And there is nothing that any of you couldn't do as practicing lawyers or lawyers to be. And the final example that I'm going to give you is the refinancing of the Timex Center which is our office building within the training center, which was being refinanced as I joined the Giants. Now, of all the broad experience that I had in my legal career of 32 years before I joined the Giants, this was where I had the least experience in corporate finance. I knew enough to get involved and learn the concepts, but we assuredly had outside counsel about which I'll talk in a minute. The question then became with my limited experience or lack of experience, what could I do to help the transaction? And the answer was I had written and read and litigated many, many contracts. So what I did was read these financing documents. Which if you are corporate lawyers, I respect – I now know why you sleep at night, because you read one of those documents. You're out cold. But using litigation experience, using drafting experience, I was able to contribute to the effort. And my contribution was to try to revise and make sense of some of these documents which were written by lawyers who had never stepped into a courtroom to explain what a four-page sentence meant to a bored judge or a sleeping jury. And in that way I found a way to contribute to that particular effort. Which as you see from the examples that I have used.

From the examples I have used, I've started from areas where I had some grounding and strength and increasingly to areas where I had little or none. And that leads to the next point, which is that part of being a good in-house counsel for any corporation, sports law, entertainment law, manufacturing or otherwise, is knowing what you don't know. And although my former colleagues from McCarter & English who are here might laugh at this, I never faked it and I don't

think it's a good idea to fake it. So I use outside counsel when I need to. I think it's valuable for those of you who are now outside counsel, or may be shortly, to know some things. My former partners said wow, did you change quickly. Because when I start getting their bills, you know, I was looking at those bills. Two of them would call and why does this receipt say five hours, not four hours? You convert really fast. All of these things I heard for years and years and years. I tried to follow them. When I made that transition, man, I knew it was true. In-house lawyers want people with proven expertise to give them answers. Don't fake it. And don't say I've got to have an associate do 20 hours of research and I'll write a memo. That is death to an in-house lawyer. Say something with confidence.

I always used this example when I was teaching young associates about practicing law. Picture yourself, you're in the office one day, and you have a horrible toothache and you have to get dental help right away. You go to the dentist down the street here in Newark. And you meet an elderly dentist who says "Nice to meet you, Mr. Heller; I'd like to introduce you to my young associate, Mr. Smith, who hasn't done much in dental practice but he's going to help you." And the young doctor goes "Hi, Mr. Heller, I'll be happy to help you, I just have to read the manual first." You're out of there like a flash. The idea is that your outside counsel has to exude confidence based on proven expertise, because if you don't get a confident answer, you're going to go somewhere else.

Responsiveness and a sense of urgency are critical. I'll give you two examples. I made a call to an outside lawyer three weeks into my tenure on that refinance project where I have little experience. I really needed help. I got a call back three days later. Three days later. I haven't spoken to that lawyer since. I will never speak to that lawyer again.

Let me contrast that. There are some lawyers whom I call who get back to me instantly and say "Is it urgent? Do you need something now? I'm tied up." Or they say "How can I help you?" That's service. And it might be an emotional reaction, but that's service. And when you're in house, especially when you're doing lawyering in house and you're dealing with a lot of crazy football people, you need responses. You need people who can achieve results.

Look, I know that not every case can be won. I had a great conversation with one of our outside counsel yesterday. We want to challenge something on an administrative basis in the State of New Jersey. I really can't for lots of reasons be very specific. He had told me months ago that it's a loser. And I said that may be so, but do we pass the Rule 11 test?[50] And he said clearly you have grounds to challenge this. Then I said we need to challenge this because we have a legitimate reason to do so. You can achieve results without winning every damn negotiation or case you handle. And that's a perfect example.

The ultimate goal of course is don't cough up the ball to the other side. So my job at the Giants sounds very sexy. There are a couple days when it really is. I've done some pretty cool stuff. But you strip away the pixie dust and what I am is a practicing lawyer in a closely-held family business. The Giants are held by the Tisch and Mara families. And I face the same issues that every one of you faces whether you work in entertainment, sports, or anything else. And I really and truly believe that sports law is simply the application of what we as lawyers do every day and put it in context. We just learn what we have to do in the sports field to apply contracts and labor and tort or other principles. Because we are thinking professionals.

And it is my hope that those of you who aspire to be sports lawyers—you have no idea how many young people call me and say "I want to become a sports lawyer." And say "How do you be a sports lawyer?" I say "First learn how to be a lawyer, and then be a sports lawyer." I am thrilled to be at Seton Hall Law School. I've been here many, many times. It's a wonderful institution. I thank you all for listening to me. I hope you enjoyed some of this. I hope you learned a little bit.

I am here for questions. Let me just answer one question. The Giants do not have an intern program. We are not hiring. I would love to have an intern program. I would love to hire. But I want to put that question aside. I always get that question. And I would love to hire all of you. So please. Yes, sir.

AUDIENCE MEMBER: Tell us a little bit about your career path and how you got into your current position?

50. FED. R. CIV. P. 11(b); N.J. CT. R. 1:4-8.

MR. HELLER: I get that question a lot. Hard work and dumb luck. A true answer. It really is. I was really, really lucky. I joined McCarter & English in 1999, the law firm. The guy who made that happen is sitting right behind you. And I joined the firm. He had already represented the Giants. McCarter was my third law firm. The chairman of the firm, now deceased, may he rest in peace, was a wonderful guy. You've heard of cross-selling. This guy lived for cross-selling. He represented the Giants. He said "Let me introduce you to the Giants." I started doing work for them. Because I'm a big Giants fan it was like holy sh. . . So I started doing work for the Giants. Whenever I had a Giants assignment, I have to admit, it went to the top of the pile. I worked really hard at it.

I probably had represented them for about six or seven years when I did the Timex naming right deal, the Timex Center. It went really smoothly. And as we're signing the deal, one of the other senior officers in the Giants said "Gee, I wish I had you around here more often." I didn't say anything.

A couple more successful deals like that, I heard that twice, three times. And then I said "So what are you talking about?" When I said what are you talking about they said "Oh, come on, you're a partner in McCarter & English. You're never going to come to the Giants."

I had some conversations. Then I had another piece of dumb luck. John Mara was the general counsel of the Giants from 1991. And he worked under his father Wellington. Wellington passed in 2005 and John succeeded him to the position of CEO and president. You got that right? It's on the record that I said it right, his title. He's my boss.

And he kept the title general counsel, but he stopped doing general counsel stuff. People who worked for him said "John, you've got to take care of this. The legal bills are going up." So you had a confluence of these events. And I'm in the middle of it. Suddenly I'm having lunch with John Mara on April Fools Day 2010. So we have a talk. I'm the first person with whom he's talking. I said "John, look, I'm the first person you're talking to. Why don't we get some resumes. If you still want to talk with me after that, you know, we'll do that." And he said "No, we want you."

Now, I'm in the restaurant with my lawyer costume on,

right. And I go "Thank you, John." And I get into my car. I call my wife and I started screaming. I couldn't believe it. That's my story. I called my kids too, my boys. They said "Get out of here. It's April Fools Day." That's really my story. I got lucky. I'm the luckiest man you ever saw, period.

AUDIENCE MEMBER: How do you handle your intellectual property managing, besides very carefully? You know, NFL enterprises do have lawyers on staff. Do you outsource it to law firms?

MR. HELLER: One of my biggest disappointments is how the NFL deals with that. Can we go off the record? I'm kidding. No. The NFL controls all that. I can't even write a cease and desist letter. I spent the last ten, fifteen years of my life doing a lot of intellectual property. And I love it.

I mean, we don't have cheerleaders. Do you all know that? We don't have cheerleaders. And we never will. As we started winning toward the end of the season, this group of unofficial Giants cheerleaders pops up. They're doing like performances in our parking lot. And at the parade in New York City at the Super Bowl, they hopped on one of the floats. had to go to the NFL to take care of it.

The NFL lawyers are really good lawyers, but they don't have my experience. I'm not the smartest lawyer in the world. They're good young kids, really good kids. But it's like "Could we write the letter?" "Could we get a preliminary injunction?" They're so busy.

So the answer to your question is the NFL handles it. And it drives me berserk, truly. They talk to me a lot. They have outside counsel whom I know. People of my generation. People whom I know. And we have a good time with it. We commiserate with each other. If you could do it, then I wouldn't have any billable hours, you know, that kind of thing. Sorry for the long rambling answer. But the NFL really handles all of that.

The interesting thing is I own trademarks. If you go on the federal register it says "New York Football Giants, Inc." That's us.

AUDIENCE MEMBER: How did you get into the First Amendment right? Is the land leased from the government that the Giants has to. . .

MR. HELLER: Yeah. The State of New Jersey owns the land on which we built the stadium. I think the lease is 40

years, something like that. I don't know. But yes.

AUDIENCE MEMBER: Were you involved in the 2014 Super Bowl negotiations?

MR. HELLER: No. That happened before I got to the team. And it was awarded before I got to the team. It's now being handled by a separate entity. That is I don't want to say divorced from the teams. There is a 2014 Super Bowl committee. It has its own CEO. It has its own offices. I give them advice from time to time.

I know that there are 17 binders constituting the bid. More than that, I don't know. That's going to be interesting for the team. Interesting and oddly enough, that's an AFC home game year. The Super Bowl alternates AFC and NFC. Well, this year was AFC. Next year is NFC. 2014 at MetLife Stadium is AFC. So our friends at the Jets, our partners, might have a little bit more of a burden. No, I can't get you tickets.

AUDIENCE MEMBER: When you mentioned that the Giants have no cheerleaders, you were very definite in saying they never will. Why is that?

MR. HELLER: Because Wellington Mara – I never met Wellington. But he is like the second coming of the Lord. I mean, this man is revered. And for Wellington Mara it's about the football game on the field. And Wellington would roll in his grave if he knew about all the video chatting and texting that was going on in the stands these days. Which, in my estimation, we do because we have to, not because we want to. Truly. And I believe that's part of the Giants culture. I think it's a great thing. Yes, sir.

AUDIENCE MEMBER: Are you involved with any of the negotiations of long-term players disability? Like when they're ten years out of the NFL and they're getting written into contracts what happens when they get concussions that lead to physical problems?

MR. HELLER: Partially yes. One of the things that takes up a lot of our time is Workers' Compensation. Because every time one of these players gets injured, they file a Workers' Comp claim. P. S., I did Workers' Comp – the first trial I tried was a Workers' Compensation trial.

California has this really odd law with almost no statute of

limitations,[51] as a result of which we are defending cases from players who played with us in the '60s, '70s, '80s and '90s. It's ridiculous. So that's a long-term disability issue. So I'm heavily involved in that.

The long-term disability issue, which has manifested itself in the new litigation on concussions, is all being handled at the NFL level. I think there is a class action filed. One was New Jersey. I think – I forgot the drug, the painkiller that the players allege caused or hid concussions.[52]

One of the things – just while I'm on talking about this. You know, the new Collective Bargaining Agreement is in some respects a very good agreement. One of the things it did was improved care for players; they get more doctors on the sideline, more specialists. If there's any risk of a concussion, a team doctor can't certify the player to re-enter. It has to be an independent. All the information that the team doctor tells us has to go to the player. It's much more open than it used to be. That's as it should be.

AUDIENCE MEMBER: Do you get involved with contract negotiations at all, including Umenyiora's contract?

MR. HELLER: I did Tom Coughlin's contract extension. We extended one year a year ago. When the Osi stuff was going on I was involved. I was in the room as to what was going on. But Osi's situation was unique. Ninety-five percent of a player's contract is standard prewritten language based on the Collective Bargaining Agreement. I really mean 95 percent. There is another 3 percent that is a rider that I prepared. It's kind of a local rider. I mean, it just talks about Workers' Compensation. It says you've got to file here, not in California. A choice of law type of provision.

No one pays attention to those things. It's the agents with the general manager, the assistant general manager saying I want $3 million a day, and I want bonuses for every time I lift my foot over the five yard line or whatever. That's where all the negotiations – that's done by the general manager's staff. I'd like to do more of that, but I don't have a lot to say about

51. CAL. LAB. CODE § 3500.5(b) (West 2012).

52. Complaint, Finn v. National Football League, No. 2:11-CV-07067, 2011 WL 6034621 (D. N.J. Dec. 5, 2011)(plaintiffs allege that they were repeatedly administered the anti-inflammatory drug Toradol, which can mask the symptoms of a concussion and puts players at a higher risk of internal bleeding. The suit alleges that Toradol is not to be used "if the recipient has a closed head injury or bleeding in the brain." *Id.* at 27).

that. I'd like to be in the room while they're doing the draft picks. But they don't really care what I say. Thank you. This young woman here has been very helpful.

AUDIENCE MEMBER: Do you get involved at all the next time around when the CBA gets negotiated, or is that just the NFL level?

MR. HELLER: It's at the NFL level. But I couldn't work for a better owner. John Mara was at the center of the universe on CBA negotiations. And I had many private conversations with him about what was going on and what should be done. I mean, I thought I was at the center of the universe. I mean, this man, he's revered in the NFL. As a result of that, he's now the head of the management council, which is our highest thing you can be as an owner in the NFL. So he consulted me and informed me.

Going once. Going twice. Sold. Let's get a drink. Thank you.

MS. ZADIE: Thank you for coming everyone. There a cocktail reception downstairs.

(Wherein the symposium is concluded.)