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NYSBA

Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association

'Video Killed the Radio Star' – and AI Brought It Back to Life: Addressing Challenges to the Right of Publicity in the 21st Century

Entertainment, Arts and Sports Law Section Annual Meeting 2023

Is There Room for Descendants of Enslaved Peoples in the Domestic Legal Framework for Restitution and Repatriation of Cultural and Familial Property?

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NYSBA

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Entertainment, Arts and Sports Law Journal

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Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted with biographical information via e-mail in Microsoft Word format. Please submit articles to:

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Remarks From the Chair

By Ethan Bordman

I hope everyone had a good first quarter of 2023.

EASL had a great year in 2022 and we look forward to continuing that in 2023, which started in January at our Annual Meeting. Below is a brief overview of what transpired at the end of 2022 and the start of this year.

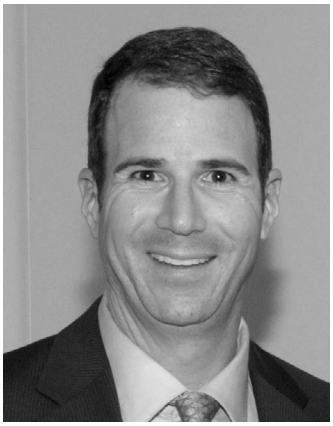
Art Law

We finished the year with a discussion on "Appraising Fine Art," which addressed the hiring of qualified appraisers of fine and decorative art. The panel discussed such considerations as the qualifications of an individual to appraise art, the requirements for a qualified appraisal report, and what happens if the appraiser hired is not qualified as legally competent or qualified as an expert. Thank you to Michael McCullough from Cardozo Law School for moderating and to speakers Charles T. Rosoff from Appraisal Services Associates and Lisa Desmarais from The Appraisal Foundation for sharing their insights on this fascinating topic. Thank you to Judith Prowda, former EASL chair, Carol Steinberg, and Paul Cossu for producing this great event.

Music Business Law Conference

Last fall, our annual Music Business Law Conference (MBLC) was held in four sessions, covering a wide range of subjects in the music industry. The conference began with the "Washington D.C. Update" discussing current and proposed legislation on the music business. It was moderated by Bill Werde, director of the Bandier Program for Recording and Entertainment Industries, the Newhouse School at Syracuse University. Thank you to Bill for moderating and to speakers Mitch Glazier, chairman and CEO of the Recording Industry Association of America, David M. Israelite, president and CEO of the National Music Publishers' Association, and Bart Herbison, executive director of the Nashville Songwriters Association International. The second panel, also moderated by Bill Werde, on "Key Trends in the Music Business," discussed key developments in the business of music. Thank you again to Bill for moderating and to speakers Karen Allen, CEO/co-Founder of Infinite Album, Angie Rho, from CAA, Peter Sinclair, CEO/co-Founder of beatBread, and Nick Breen, partner at Reed Smith.

Session two of the program, "Ethics – How Many Hats – Lawyer and Manager and Other Potential Conflicts" discussed the many roles that attorneys may have, aside from legal advisor, and the ethical considerations in each of those roles. Thank you to Diane Krausz, Law Offices of Diane Krausz & former EASL chair, for moderating and to speakers Joseph L. Serling, from Serlings Rooks Hunter McKoy Worob & Averill LLP and Nicole Hyland, from Frankfurt Kurnit Klein and Selz PC. The second panel, led by Barry Skidelsky, former EASL chair, "That's The Ticket! Ticket Pricing (and Issues) for Concerts and Broadway" addressed event ticketing including general structure, dynamic pricing, and debacles from various perspectives. Thank you to Barry and to speakers Gregg Arst, CEO/founder of Tanna, Inc. and Josh Baron from Relix Magazine.



The next session, "Music Licensing in the Metaverse," took a close look at how music is licensed in the Metaverse and what the future holds in licensing models for virtual worlds. Thank you to moderator Imraan Farukhi from Syracuse University and to speakers Deborah Mannis-Gardner from DMG Clearances, Inc., Stacey Haber from Web3 Music Rights Group, and David Fritz, partner at Boyranski Fritz LLP and co-founder of Creative Intell, Inc. The second panel, "Won't You Be My Neighbor – The Right That Is So Important to United States Artists and the Effort to Get Them Paid," discussed legislative, policy, business, and economic changes across the globe affecting master performance and neighboring rights income streams. Thank you to moderator Chris Hull, CPA from Citrin Cooperman, and to speakers Kendall A. Minster, from Greenspoon Marder LLP, Dan Millington from PPL UK, Ltd. in London, and Wade Matzler from Sound Exchange.

We finished the conference with an in-person session at Citrin Cooperman. Our first panel on "Litigation Update on the Music Front" discussed developments in copyright and entertainment litigation. It was great to have our first in-person event in some time. The panel discussed timely cases, including *Thaler v Perlmutter* on protecting Artificial Intelligence works under the Copyright Act, *Gray v. Hudson PKA Katy Pery*, on infringement of the singer's "Dark Horse" song, and the *Andy Warhol Foundation v. Goldstein* case, which is currently before the United States Supreme Court regarding fair use and transformative purpose. Thank you to Paul LiCalsi, from Reitler Kailas & Rosenblatt LLC for moderating

and to speakers Ryan Abbott from Brown Neri Smith and Khan LLP, Robert W. Clarida from Reitler Kailas & Rosenblatt, David Leichtman from Leichtman Law PLLC, and Hillel I. Parness from Parness Law Firm PLLC. The second panel, "The Value of a Good Song – Trends and Developments in Music Catalog Transactions," addressed the status of catalog sales and valuations, including deal types, legal due diligence, and important deal points. Thank you to moderator Brian Richards, managing partner at Artisan Media, and to speakers Nari Matsuura, Partner from Citrin Cooperman, Lisa Alter from Alter, Kendrick & Baron LLP, Andy Moats from Pinnacle Financial Partners, and John Rudolph from 1.618 Industries.

Thank you to the Music Business Law Conference Committee Rosemarie Tully, Marc Jacobson, Jared Leibowitz, Stephen Rodner, Paul LiCalsi, Joyce Dollinger, Diane Krausz, Christopher Hull, Judah Shapiro, Imraan Faruki, Isaro Carter, and Bill Werde for the great work they did in producing this outstanding event. Thank you as well to Citrin Cooperman. We greatly appreciated the numerous ways they have helped support this event. Thank you also to sponsors Zanoise, Bill Werde/Full Rate-No Cap, and our Reception Sponsor, Vydia. Their generosity is much appreciated. We greatly look forward to next year's MBLC.

EASL Journal

Elissa Hecker continues to an amazing job as editor of the *EASL Journal*. She is always on the lookout for submissions. Please feel free to reach out to Elissa with any ideas or contributions to future issues of the *Journal*. I am already working on my next submission.

New Chairs and EASL Liaison

Welcome to Roxy Menhaji, the new chair of the Fashion Law Committee, and to Nibras Islam, the new chair of the Publicity, Privacy and Media Committee. Welcome to Ezra Doner, the new co-chair of the Digital Entertainment, Television and Radio Committee. Glad to have them join us and I know they will do a great job.

Thank you to Sharmin Woodall, EASL's Liaison from the NYSBA. She has done an incredible work for the Section and outstanding work for EASL's annual meeting. So much goes on behind the scenes and Sharmin is doing a great job.

Thank you to Aniqa Chowdhury and Kajon Pompey, co-chairs of the Cowan-Bresler Scholarship Committee for all their great work. Kajon, Aniqa, and the Cowan-Bresler Committee members have done a great job getting the word out to law students about this opportunity. The winning papers appear in this issue of the EASL Journal.

Thank you to the EASL Executive Committee for their great work in their respective committees, the Annual Meeting, and overall assistance with EASL. We greatly appreciate their time and input in making EASL a great section.

Annual Meeting

EASL started 2023 with a great Annual Meeting. We welcomed new EASL Section members and enjoyed seeing many of you at the Hilton or on Zoom. I hope to see you at future events, especially as we will be offering more in-person and hybrid events this year.

Thank you to Annual Meeting Committee members Pam Lester, Jill Pilgrim, and Barry Skidelsky. They worked with wonderful panelists who spoke about interesting and timely subjects. Thank you also to our generous sponsors, Herrick Feinstein and Dorsey & Whitney, whose support of EASL is greatly appreciated.

EASL was glad to offer a hybrid option, giving members the option to attend in person or virtually. The EASL Executive Committee strongly believes that in offering options, we are acting on our commitment to diversity and inclusion, namely, making the meeting available to members located geographically all over New York State (and the world), to those who have medical issues and could not attend (including those who are avoiding public places due to COVID), to those who may have disabilities that make it easier to attend remotely, and for those who did not wish to incur travel related expenses. This hybrid approach allowed both in person and virtual attendees to interact with the panels, making the Annual Meeting even more informative and enjoyable.

The Annual Meeting opened with our Phil Cowan/Judith Bresler Memorial Scholarship (PCJBMS) winners. The PCJBMS was founded in 2005 and originally named after Phil Cowan, a former chair of the EASL Section. The scholarship offers up to two awards of $2,500 on an annual basis to law students who are interested in entertainment, art, and/or sports law. The award was renamed in 2019 to commemorate the memory of Judith Bresler, another former EASL Section chair, who had made tremendous contributions to the scholarship's success. The competition is open to law students in all accredited law schools throughout New York State, along with Rutgers and Seton Hall, as well as a number of other law schools, at the committee's discretion, on a rotating basis throughout the United States. Two winning papers are chosen annually. The authors of the winning papers are each awarded the scholarship and their papers are published in this edition of the Journal.

Congratulations to this year's winners: Josephine Luck, a 2L student at Fordham Law School, who authored "Is There Room for Descendants of Enslaved Peoples in the Domestic

Legal Framework for Restitution and Repatriation of Cultural and Familial Property?" and Jessica Caso, a 3L student at St. John's School of Law, who authored "'Video Killed The Radio Star' – and AI Brought It Back to Life: Addressing Challenges to the Right of Publicity in the 21st Century."

Our first Annual Meeting panel, "Approaches to Negotiation in Sports, Entertainment and Other Universes," was chaired and moderated by Pam Lester, co-chair of EASL's Sports Law Committee. Thank you to speakers Daniel Etna, partner and co-chair of the Sport Law Group at Herrick, Arthur McAfee III, senior vice president of football operations at the National Football League, Gary Noesner, retired FBI chief hostage negotiator, and Maggie Ntim, founder of and international sports agent at Trinity 3 Agency, for sharing their insights about successful negotiating tactics.

I organized and moderated the second panel, "Ethics in Negotiating in Sports, Entertainment and Other Universes." Ethics are at the core of negotiations, and as attorneys, we are obligated to follow rules (The Rules of Professional Conduct) and other ethics considerations. The panel addressed these and other considerations for attorneys who work in other areas of entertainment and sports, such as managers and agents. Thank you to speakers Devika Kewalramani, partner, Moses Singer and Carla Varriale-Barker, partner, Segal McCambridge and professor of Sports Law and Ethics at Columbia University Sports Management Program, for sharing their knowledge.

Our meeting concluded with "Regulation of Social Media and Online Content," moderated by Barry Skidelsky, former EASL chair. Recent efforts by the federal government and various state legislatures, including New York, to regulate social media and online content have faced First Amendment and other challenges. The panel addressed this, along with relevant federal court litigation en route to the United States Supreme Court, that will likely have an impact on content creation and distribution. Thank you to speakers Carl Szabo, vice president and general counsel, Net Choice, Scott Wilkens, senior counsel, Knight First Amendment Institute at Columbia University, and Ronnie London, general counsel, Foundation for Individual Rights and Expression, for sharing their knowledge on this timely topic.

The day ended with a reception at Dorsey & Whitney, where we enjoyed food catered by Bill's Bar and Burgers. We thank Dorsey and its wonderful staff for its conference room that hosted our Annual Meeting reception, and for helping us coordinate the event. A special thank you goes to EASL member and Dorsey partner, Sarah Robertson, for her help in coordinating this event.

We look forward to seeing you at more events in the coming year.

Editor's Note

By Elissa D. Hecker

Happy Spring! It was wonderful to see so many people at the Annual Meeting and, whether in person or virtually, in many of our EASL committee meetings and Zooms. For those of you who were unable to attend, or who were and want to revisit, this issue contains the Annual Meeting transcript. It also has the two papers that won the Phil Cowan/Judith Bresler Memorial Scholarship. This year's submissions were some of the highest quality in the history of the scholarship, and you will find that these two, written by Jessica A. Caso (St. John's University School of Law) and Josephine Luck (Fordham University School of Law), are both interesting and timely.

In addition to our regular outstanding columnists, we also have an excellent piece about the history and transformation of Article 12 of New York Arts and Cultural Affairs Law, which was passed in 1966 and updated 2012.

Please feel free to reach out about any article or theme ideas that you may have for the *Journal* or Blog at eheckeresq@eheckeresq.com.

The next deadline is April 28, 2023.

DO PRO BONO! DO PRO BONO!

Pro Bono Update

Welcome to Jake Dore, our newest Pro Bono Committee co-chair.

Programs

The CASE ACT

In December 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act), which directed the Copyright Office to establish the Copyright Claims Board (CCB). The CCB is a three-member tribunal within the office that provides an efficient and user-friendly option to resolve certain copyright disputes that involve up to $30,000 (called "small claims").

Carol Steinberg, Pro Bono Steering Committee member, Adrienne Fields, EASL member, and Judy Bass and Joan Fair, co-chairs of the Literary Property Committee, are collaborating to present an update of the CASE Act, including current experiences of those who have utilized the process. The program will include a review of the basics of the CASE Act as well as best practices and recommendations for those going through the process.

If you would like to help plan the program and/or have had experience or know artists who have had experience with the tribunal, please contact Carol at elizabethcjs@gmail.com or carolsteinbergesq.com.

Clinics

If you are involved with an organization that would like to host a clinic, please email Elissa at eheckeresq@eheckeresq.com. We are always looking for good clinic partners so that we can help the many potential pro bono clients who need us. We are working with the Huntington Arts Council on an upcoming Clinic. Stay tuned for details.

We encourage EASL members to volunteer as pro bono attorneys, panel, and webinar speakers for other topics that are relevant to the creative communities. Please contact any of us if you are interested in doing so.

Elissa D. Hecker, eheckeresq@eheckeresq.com

Carol Steinberg, elizabethcjs@gmail.com

Jake Dore, dorej@gmail.com

DO PRO BONO! DO PRO BONO!

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

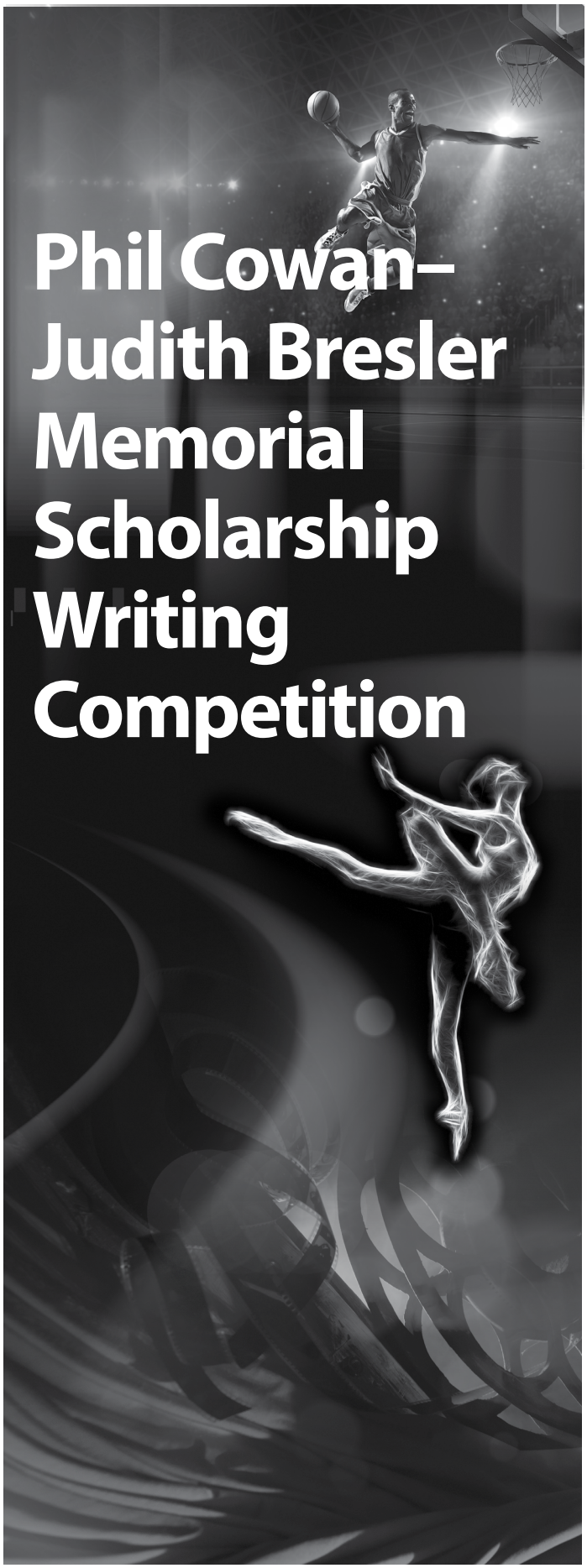
Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the

New York State Continuing Legal Education Board
25 Beaver St, Fl 8
New York, NY 10004

A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's website at www.courts.state.ny.us/mcle.htm. Click on"Publication Credit Application" near the bottom of the page). After review of the application and materials, the board will notify the applicant by first-class mail of its decision and the number of credits earned.



Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL)'s Phil Cowan-Judith Bresler Memorial Scholarship, named after two esteemed former EASL chairs, offers *up to two awards of $2,500 each on an annual basis* in Phil Cowan's and Judith Bresler's memories to law students who are committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The Phil Cowan Cowan-Judith Bresler Memorial Scholarship has been in effect since 2005. It is awarded each year at EASL's Annual Meeting in January in New York City.

The Competition

Each scholarship candidate must write an original paper on any legal issue of current interest in the area of entertainment, art or sports law.

The paper should be 12 to 15 pages in length (including *Bluebook* form endnotes), double-spaced and submitted in Microsoft Word format.

PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (not part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. The name of the author or any other identifying information must not appear anywhere other than on the cover page.

All papers should be submitted to designated faculty members of each respective law school. Each designated faculty member shall forward all submissions to his/her/their Scholarship Committee liaison. The liaison, in turn, shall forward all papers received by him/her/they to the committee co-chairs for distribution. The committee will read the papers submitted and will select the scholarship recipient(s).

Eligibility

The competition is open to all students—*both candidates and L.L.M. candidates*—attending eligible law schools. "Eligible" law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seton Hall Law School in New Jersey, and up to 10 other accredited law schools throughout the country to be selected, at the committee's discretion, on a rotating basis.

Free Membership to EASL

All students submitting a paper for consideration, who are NYSBA members, will immediately and automatically be offered a free membership in EASL (with all the benefits of an EASL member) for a one-year period, commencing January 1st of the submission year of the paper.

Submission Deadline

First week in January. Law School Faculty liaison submits all papers she/he/they receive to the EASL Scholarship Committee, via email **to Sharmin Woodall at swoodall@nysba.org**.

The winner(s) will be announced, and the scholarship(s) awarded at EASL's January Annual Meeting.

Prerogatives of EASL Scholarship Committee

The Scholarship Committee is composed of the current chair of EASL and, on a rotating basis, former EASL chairs who are still active in the Section, Section District Representatives, and any other interested member of the EASL Executive Committee. *Each winning paper will be published in the* EASL Journal *and will be made available to EASL members on the EASL website.*

The Scholarship Committee is willing to waive the right of first publication so that students may simultaneously submit their papers to law journals or other school publications. *In addition, papers previously submitted and published in law journals or other school publications are also eligible for submission to the Scholarship Committee.*

The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and the EASL website. The Scholarship Committee also reserves the right to award only one scholarship or no scholarship if it determines, in any given year that, respectively, only one paper, or no paper is sufficiently meritorious. All rights of dissemination of the papers by EASL are non-exclusive.

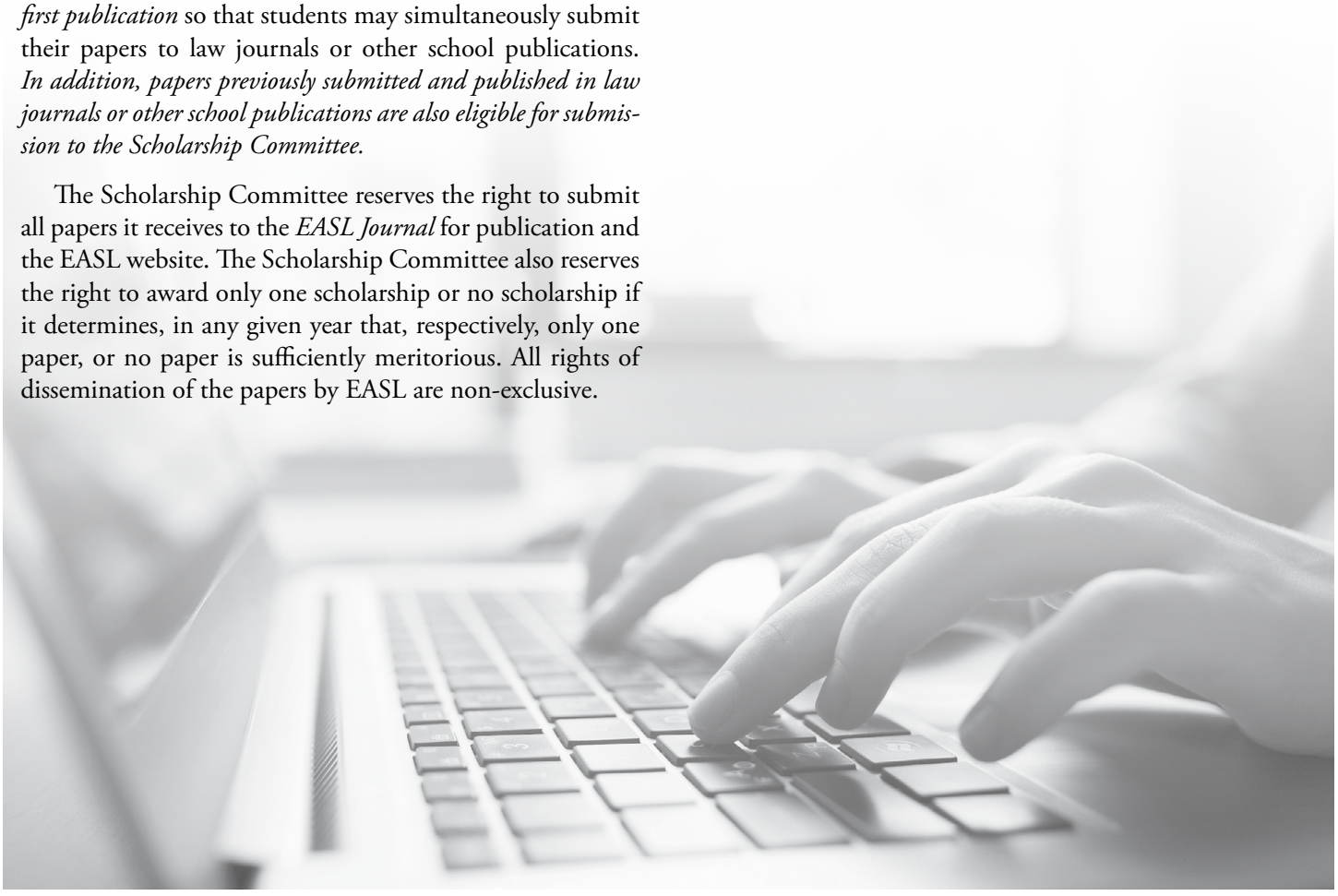
Payment of Monies

Payment of scholarship funds will be made by EASL directly to the law school of the winner(s), to be credited against the winner's(') account(s).

About the New York State Bar Association/ EASL

The New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 140 years.

The more than 1,500 members of the Entertainment, Arts and Sports Law Section of NYSBA represent varied interests, including headline stories, matters debated in Congress, and issues ruled upon by the courts today. The EASL Section provides substantive case law, forums for discussion, debate and information-sharing, pro bono opportunities, and access to unique resources including its popular publication, the *EASL Journal*.



THE NEW YORK STATE BAR ASSOCIATION

ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

Law Student Initiative Writing Contest

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association offers an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL website. The Initiative is designed to bridge the gap between students and the entertainment, arts and sports law communities and shed light on students' diverse perspectives in areas of practice of mutual interest to students and Section member practitioners.

Law school students who are interested in entertainment, art and/or sports law and who are members of the EASL Section are invited to submit articles. This Initiative is unique, as it grants students the opportunity to be ***published and gain exposure*** in these highly competitive areas of practice. The *EASL Journal* is among the profession's foremost law journals. Both it and the web site have wide national distribution.

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the *EASL Journal* must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form**: Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **April 28, 2023.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

Topics

Each student may write on the subject matter of his/her choice, so long as it is unique to the entertainment, art and sports law fields.

Judging

Submissions will be judged on the basis of quality of writing, originality and thoroughness.

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *EASL Journal* and on our website.

10 and 56 Years Later: New York Arts and Cultural Affairs Law 12.01

By Atreya Mathur, Dean Nicyper, and Irina Tarsis

Since 1966, Article 12 of New York Arts and Cultural Affairs Law (NYACAL or the statute) has, in theory, protected the rights of artists, their estates, and their heirs in their dealings with art merchants. The law changed over the decades and most recently was strengthened in 2012 after a major art gallery, Salander O'Reilly Galleries, was found to have sold many consigned works without paying consignors (artists and collectors), spent the sale proceeds, and ended up in bankruptcy. Today, under the Statute, art merchants are required to act as fiduciaries regarding art consigned to them by artists. Dean Nicyper, one of the attorneys instrumental in drafting and lobbying to pass the 2012 amendments to the law and a co-author of this article, has been quoted as saying: "What we found in New York was that the galleries were not respecting [the law]…Galleries sold paintings and they did not separate the sale proceeds as trust funds, but the legislation did not include any penalties. It said, 'galleries may not use artist's sale proceeds for the gallery's operations,' but it did not say what would happen if they did."[1]

Legislative History

The legislature's intention in enacting Article 12 was to provide a measure of protection to artists in their relationships with dealers who sell their artwork. This included safeguarding artists against misappropriation of art or of the proceeds from the sale of that art.

Article 12 creates standards and obligations that govern certain aspects of the business relationships between artists and dealers. Whereas the artist and their dealer are free to determine the specifics of their relationship, such as the amount of the dealer's commission, the duration of consignment, nature of the representation − exclusive or not, or how specific production, insurance and shipping expenses might be shared, Article 12 focuses on terms designed to ensure that unsold works of art are returned to the artist and that proceeds from the sale of the consigned art are paid to the artist. Most of these statutory provisions cannot be waived, even by a written agreement. Since artists and/or dealers may be unaware of this law, certain enforceable terms of a consignment agreement may be different from negotiated terms that parties unaware of the Statute believe to be in place. Whereas most relationships between artists and dealers are mutually beneficial and devoid of conflicts, multiple instances of violations of the law have been recorded and even litigated. The negotiation powers of artists and dealers (historically) have varied depending on reputation, name brand recognition, and many other factors. A valid and enforceable contract between the two parties, however, is the solution for protecting the interest of the artists who need galleries to show and sell their works and the interests of galleries that invest in cultivation and study of artists' works. It is essential for both artists and galleries to understand their rights established by the laws, and for dealers to be aware of the legal obligations imposed on them by these laws that are not subject to negotiation.

When enacting Article 12, the New York Legislature recognized the inevitable imbalance of power between artists and their galleries. Developing artists often have little bargaining power in negotiating terms with their dealers and enforcing those terms through the close of that relationship. While the vast majority of these relationships proceed without serious problems, there have been many publicized and non-publicized instances in which galleries have used their on-average superior bargaining position to the detriment of certain artists. Worse yet, there are ample examples of galleries that have failed to return consigned works to their creators or failed to pay artists their share of sale proceeds.[2]

Before NYACAL, consignments in N.Y. were governed by New York's General Business Law. Prior to Article 12 of the General Business Law, sales on consignment between an artist and a dealer were regulated largely by the Uniform Commercial Code (UCC). Under the UCC, as a general rule, all types of goods held on consignment (not just art) are subject to claims of the consignee-dealer's creditors while in the consignee's possession unless the consignor has complied with the UCC's requirements of publicly filing a notice stating that the consignor holds a security interest in the consigned work of art. For example, many dealers rely on a revolving line of credit with a bank to balance the inconsistencies in cash flow in the dealers' business. To protect itself from a dealer's default on the line of credit, the banks commonly require that the dealer give the bank a security interest in all of the dealer's inventory as collateral for the loan. Under the UCC, that inventory includes not only the goods the dealer owns, but also includes goods that are on consignment to the dealer.[3] The UCC therefore provides that where a consignor delivered goods to a dealer on consignment, and the dealer subsequently becomes bankrupt, the dealer's creditors are entitled to sell goods that the dealer owns as well as goods on consignment with the dealer to cover any amounts remaining on outstanding debts. In certain instances, consignors may

file UCC-1 notices to demonstrate their perfected interest in the consigned property in order to protect themselves from having their property included in the bankruptcy proceeding. In other instances, consignors need to negotiate with the gallery's bank to exclude the art they consign from the bank's loan collateral.

In 1966, the New York Legislature enacted Article 12, which was originally part of the General Business Law of New York. At that time, the Legislature strived to protect artists from dealers' misappropriating artists' consigned works of art. In the initial statute, a violation of its provisions guarding against misappropriation by the dealer constituted larceny under N.Y.'s penal laws. Initially, Article 12 did not focus on the fact that under the UCC, works of art consigned by artists were subject to banks creditor claims. In 1969, however, the statute was amended to protect an artist's interest in the proceeds from the sale of the artist's art in addition to the artist's interests in the art itself. The amendments at that time deemed the art to be trust property and the sales proceeds to be trust funds in the hands of the gallery for the sole benefit of the artist. In 1975, the New York Legislature clarified that an art gallery's creditors do not hold an interest in works of art consigned by artists or the proceeds from sale of those works, which they otherwise would have held under the UCC's consignment laws. Article 12 therefore made art consigned by artists an exception to the UCC rule regarding consigned goods.

Since 1975 and through today, Article 12 has granted a special status to artists, as compared with other consignors (e.g., art consigned by collectors is not excluded from the rights given to banks under the UCC), and imposes greater responsibilities on dealers with respect to artist-consigned works of art. However, while the statute in the early 2000s set forth clear obligations and standards, it contained no enforcement mechanisms. The statute's original 1966 criminal provisions were removed from the statute decades ago and no penalties or enforcement provisions were put in place to replace them. The closure of the Salander O'Reilly Galleries and its subsequent bankruptcy proceedings between 2007 to 2010 brought into clear focus the fact that the statute lacked penalties and enforcement procedures to deter dealers from absconding with artists' works of art or their sale proceeds.

The Closure of the Salander O'Reilly Gallery

In 2007, Salander O'Reilly Galleries (the Gallery) was a high-profile gallery that had been in operation for over 20 years in N.Y. It built relationships with several artists, artists' heirs, and artists' estates and had possession or control of hundreds of works of art consigned by them all. The Gallery sold many of those works of art and co-mingled the sales proceeds that belonged to the artists, artists' heirs and estates with the Gallery's own funds.

In the early to mid-2000s, the Gallery had the appearance of being enormously successful. However, at an increasing frequency at that time, when the Gallery sold art pieces, it spent the sale proceeds on its own operating expenses, even though the gallery had been required by § 12.01 to keep those artist sale proceeds as "trust funds." By spending the sale proceeds elsewhere, the gallery was unable to pay its artists and other consignors the sales proceeds owed to them. These facts came to light through the many lawsuits filed against the Gallery and in the Gallery's bankruptcy proceedings.

Lawsuits were filed against the gallery in 2006 and 2007. An involuntary bankruptcy petition was filed in October in 2007, which the Gallery subsequently converted into a voluntary bankruptcy petition under Chapter 11 of the U.S. bankruptcy laws. The Gallery's principal, Lawrence Salander, was indicted and pleaded guilty to fraud and larceny charges.[4] The Gallery's director, Leigh Morse, was convicted on April 6, 2011 of defrauding artists' estates.[5] The Gallery itself, however, was not charged with co-mingling or misuse of funds belonging to artists, their heirs, or estates. "Millions of dollars owed to artists, their heirs or estates went unpaid. Since the gallery's debts far exceeded its assets, creditors attempted to claim the consigned works of art in the gallery's possession or control as assets of the estate."[6] The gallery's bank also argued that artists' estates had no standing to assert the artists' right to art as trust property and to sales proceeds as trust funds.

The Gallery debacle highlighted the fact that valuable substantive provisions of § 12.01 were not accompanied by any penalties or enforcement mechanisms if galleries failed to comply with its substantive provisions. It was this irreversible loss of many artists' art and sales proceeds that led the New York Legislature to amend § 12.01 of the NYACAL in 2012 to strengthen protections for artists, and to reintroduce criminal penalties for art merchants that failed to meet their fiduciary obligations that were recognized under the statute's provisions.

- First, the Legislature addressed who has standing to enforce the law governing consignments, clarifying that those who are successors to the artist's interests through the administration of the artist's estate could pursue claims against breaching galleries. It expressly provided that the terms "heirs" and "personal representatives" as used in § 12.01 referred to those same terms as they are defined in N.Y.'s Estates, Powers and Trust Law.
- Second, the 2012 Amendments strengthened the fact that works of art consigned by artists, crafts persons, or their heirs or personal representatives to art merchants are property held in "statutory trust" that shall not become the property of the consignee or become subject to the claims or security interests "of the consignee's creditors." It provided the same clarification regard-

ing the proceeds from sales of art consigned by artists, specifying that those sales proceeds were "trust funds" not subject to claims, liens or security interests "of the consignee's creditors."

- Third, the Amendments provided that galleries and artists could not agree to waive the trust fund provisions of the statute.
- Fourth, the Amendments provided that if a gallery failed to comply with the trust property and trust fund provisions of the statute, the failure to comply would constitute a violation of both Article 12 and also of § 11-1.6 of the Estates, Powers and Trusts Law, which clarifies obligations of fiduciaries and includes criminal misdemeanor penalties.
- Fifth, the 2012 Amendments clarified that persons injured by violations of the statute had a private right of action.
- Sixth, the Amendments provided that if an artist established a prima facie case that the artist had delivered art to a gallery and demanded return of the art or sale proceeds, the gallery would have the burden of proving its defenses to that claim.
- Seventh, and maybe most importantly, the 2012 Amendments provided that artists who prevailed in bringing claims against breaching galleries could recover the legal fees they incurred in bringing such claims.

The Amendment did not alter the Statute's specification that it expressly overrides contrary provisions of other law, including N.Y.'s Uniform Commercial Code, but it added a specification that the statutory trust property/trust funds are not subordinate to claims, liens or security interests of an art dealer's (or other consignee's) "creditors." The Amendments thereby reinforced and clarified the statute's trust property and trust fund provisions.

An important feature of Article 12 of the NYACAL is that it creates a strong fiduciary relationship between artists and art merchants, which gives rise to a heightened duty of loyalty and care by the art merchant to the artist. The law sets basic terms that govern the relationship, even if the parties never enter into any oral or written agreement. Both artist-consigned art and any proceeds from its sale are trust funds for the benefit of the artists. "Traditionally, most deals between artists and dealers are sealed with a handshake. The NYACAL protects artists even in the absence of a consignment agreement."[7] The imbalance of power and the need to adequately protect the artist were key factors in strengthening the provisions of NYACAL.

Impact of Legislation on Case Law

Since the 2012 Amendments, several courts have ruled on Article 12's § 12.01 provisions, developing a body of case law that further clarifies the extent of the law. For example, several courts have held in favor of artists who have taken advantage of the 2012 Amendments' attorneys' fees shifting provisions. Recently, in *Miriam Dougenis v. Peter Marcelle Project* (Judge Andrew Borrock), the court granted the plaintiff's motion for attorney's fees pursuant to NYACAL 12.01[3] and transferred the case to a special master to determine the amount. The parties then agreed by stipulation to set the amount of attorney fees at $56,345.21.[8] The award for attorney fees was an amount in addition to the award for damages for the missing art that plaintiff Dougenis, now a nonagenarian artist, consigned to her gallerist years earlier.

Another court, in *Stacy Leigh v. Castor and Pollux Ltd* (Judge Arlene Bluth), awarded damages, including $78,000 in attorneys' fees and expenses in an inquest after a default judgment was granted against the defendant. The court also found punitive damages in the amount of $100,000 was appropriate because of the "defendants' egregious conduct in taking artwork on consignment and then ignoring all duties and statutes pertaining to said relationship."[9]

Courts construing the statute after 2012 have also emphasized the strength of the trust property and trust funds provisions. For example, in *Paula Scher v. Stendhal Gallery, Inc.*, an artist consigned paintings to the gallery and licensed the gallery to publish prints of the artist's "Maps" works.[10] The artist terminated the contract and retrieved some original works, but the gallery refused to return unsold prints and two signed artist proofs. The artist contended that she owned all prints and that the gallery held all prints and sale proceeds as trust property under the NYACAL. The gallery refused to return the prints on the grounds that the artist had allegedly breached obligations to the gallery and that the gallery was in perpetuity entitled to 90% of the sale proceeds of any prints. The court held that case law construing § 12.01 confirms that "the artist is the owner of artwork consigned for sale with an art gallery and is entitled to possession after the parties terminate their relationship."[11] The court explained that the defendants, just like the defendants in *Wesselman v. International Images, Inc.*, could not be successful in arguing that their financial investments in publishing prints rendered the consignment and trust provisions of § 12.01 inapplicable. [12] Nor could the defendants succeed with their argument that there had been no "delivery" of the prints to the gallery as required by § 12.01. Contrary to the gallery's arguments, the court found that an artist's approval and signing of finished prints before they were sold constituted delivery under § 12.01 and that the gallery's financial investment in publishing the prints did not render the consignment and trust provisions of

§ 12.01 inapplicable.[13] The court held that the appellate court's decision in *Wesselman* compelled a ruling that the artist was the owner of the prints.

Since the last set of NYACAL Amendments 10 years ago, courts have also made clear that the § 12.01 law applies not only to artists while they are alive, but also to their estates and beneficiaries after their death, applying the 2012 Amendment's broader scope of parties having standing to pursue claims against art merchants.

For example, in *Mesbahi v Blood*, a case brought by the executor of an artist's estate, the Third Department referred to § 12.01 and its trust property and trust funds provisions to hold that provisions in a consignment agreement that specified that the agreement continued after the death of the artist and that all of the artist's works were to be transferred to the dealer after the artist's death did not transform the consignment agreement into an agreement creating a trust, as the dealer had argued. Instead, the court emphasized the statute's clause providing that "no such trust property or trust funds shall become the property of the consignee" and ruled that the estate executor could terminate the agreement and retake possession of the art.[14]

In *Khaldei v Kaspiev*, the heir of a deceased photographer sued the photographer's agent for possession of photographic prints and negatives. The agent argued that he had paid $7,500 for a half interest in all 261 photographs consigned by the photographer, as well as 3,031 negatives, and therefore was a co-owner of all of them. The court explained that "under the [NYACAL], an art merchant's financial investment in an artist's work does not transform an otherwise valid consignment into an outright sale unless and 'until the price [of such work] is paid in full.'"[15] The court also quoted the statute's provision that any waiver of the statutory protections is absolutely void. When the agent argued that some prints were missing, the court ruled that where "'a Bailee fails to return a bailor's properly, there is a presumption of liability, and if the property cannot be found, a prima facie case of negligence exists.'"[16] The plaintiff alleged that the agent wrongfully withheld the negatives until 2011, years after her 1999 demand for them, and that during that period, the agent tried to sell them to obtain 50% of the sale proceeds. Although the agent argued that he was entitled to withhold the negatives until he was paid his $7,500 investment, the court explained that "[u]nder the [NYACAL], artwork held by an art merchant as trust property is not subject 'to any claims, liens or security interest of any kind or nature whatsoever.'"[17] In addition, under the faithless servant doctrine, the court dismissed the agent's counterclaim for a share of the royalties from sales of negatives that had occurred during the period when the agent had refused to return the negatives to the artist's heir.

Conclusion

The sampling of court decisions above issued since the 2012 Amendments demonstrates that artists are indeed taking advantage of § 12.01 to protect their rights and reduce legal costs. Additional cases brought under NYACAL § 12.01

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MIRIAM DOUGENIS,
Plaintiff,
-against-
PETER MARCELLE, PETER MARCELLE PROJECT A/K/A PETER MARCELLE ART, LLC, AND HAMPTON ROAD GALLERY, INC.,
Defendant(s).

Index No. 652133/2018
(Borrok, J.S.C.)

SATISFACTION OF JUDGMENT

WHEREAS, in an action in the Supreme Court of the State of New York, County of New York, between Miriam Dougenis, as the plaintiff, and Peter Marcelle, Peter Marcelle Project a/k/a Peter Marcelle Art, LLC, and Hampton Road Gallery, Inc., as the defendants, who are all the parties named in the action, a JUDGMENT FOR ATTORNEYS' FEES was entered on November 30, 2021 in favor of the plaintiff, Miriam Dougenis, as Judgment-Creditor, and against the defendant Peter Marcelle, as Judgment-Debtor, in the amount of $56,345.21 [NYSCEF DOC. NO. 253];

WHEREAS said judgment has been paid in full pursuant to the So-Ordered Stipulation entered November 29, 2022 [NYSCEF DOC. NO. 292];

Excerpt from the Satisfaction of Judgment in *Dougenis v. Marcelle, et al.*, Index No. 652133/2018, which was filed in May of 2018 and resolved in December of 2022.

also show that some artists who do not neatly fit within the Statute's provisions have asserted creative arguments to try to come within the protections of § 12.01. Artists entering into consignment agreements with dealers will benefit from specifying that the agreement is governed by New York law. Where the artist and dealer reside in New York and the consignment is in New York, the NYACAL provisions should automatically apply. Even if the artist and dealer do not reside in New York, if their consignment agreement specifies that New York law applies and that New York courts are the exclusive forum for resolving disputes, the artist still should be able to benefit from the application of the NYACAL provisions. Litigation is an expensive dispute resolution mechanism and plaintiffs who rely on litigation often have to wait years to get justice and to recover their art or sale proceeds under § 12.01, together with any attorney fees. Nonetheless, the NYACAL statute offers much needed protection for artists whose comments on our human condition enhance so many people's lives in so many ways. *Caveat venditor*.

Endnotes

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3. *See, e.g.*, Nicyper, Dean and Gipson, Lissa, Rights of Lenders Accepting Works of Art as Collateral, N.Y. STATE BAR ASSOC. ENTM'T, ARTS, AND SPORTS L. J., Vol. 17, No. 1 (Spring 2006).
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7. *Id.*
8. *Miriam Dougenis v. Peter Marcelle Project*, Index No. 652133/2018, NYSCEF Docket No. 225, https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=9DiwP1o7Gybm14IUDGTATw==.
9. *Stacy Leigh v. Castor and Pollux Ltd.*, 654923/2017, NYSCEF Docket No. 78, *available at* https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=pAIU5Ct8Pjyvk95VKMieZg==.
10. *Paula Scher v. Stendhal Gallery, Inc.*, 2011 N.Y. Slip Op. 34078 (Sup. Ct. N.Y. County 2011).
11. *Id.*
12. *Wesselman v. International Images, Inc.*, 172 Misc.2d 247 (Sup. Ct. N.Y. County 1996), *aff'd* 259 A.D.2d 448 (1st Dep't 1999).
13. *Scher*, 117 A.D.3d at 146.
14. *Mesbahi v Blood*, 172 A.D.3d 1580 (3rd Dept 2019).
15. *Khaldei v Kaspiev*, 135 F. Supp. 3d 70 (S.D.N.Y. 2015).
16. *Id.*
17. *Id.*

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Irina Tarsis is the founder and managing director of the Center for Art Law. Born in Kyiv, Ukraine, Irina is an art historian and a practicing attorney admitted to the bar in New York State. She represented multiple artists in court in connection with violations of NYACAL § 12.01. She earned her master's degree in Art History from Harvard University and her J.D. from the Benjamin N. Cardozo School of Law.

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Name, Image, and Likeness Visa Denials and The Vilcek Foundation: Good, Bad, Great, All in That Order

By Michael Cataliotti

In this installment of *Sports and Entertainment Immigration*, we will be looking at a possible way for collegiate athletes to earn from their names, images, and likenesses (NILs), shift to looking at some visa denials and what their impacts have been, I will include a particular case study from my practice, as well as a publicized instance from *The New York Times*, then slide on over to naming the Vilcek Foundation's recent awards to immigrant scientists and musicians.

NIL, NFT, Fun for You, Fun for Me!

Name, image, and likeness (NIL) is a topic of significant importance to many of us and our clients, and many of those NIL deals are focused around non-fungible tokens (NFTs) as a key aspect of the advertising and marketing campaigns. I have written about this before, in a previous installment of *Sports and Entertainment Immigration*, but now we have some clarity around how collegiate athletes—specifically, those foreign-born collegiate athletes in the U.S. under an F-1 or other student-based visa—can benefit from their NIL as advertising revenues are ever increasing.

From *Bloomberg Law*, "Hansel Enmanuel, a Dominican guard on Northwestern State University's men's basketball team, has yet to play his first NCAA game, but he's already scored a work visa allowing him to sign endorsement deals in the seven figures."[1] What, pray tell, is that work visa? None other than the O-1, for which we have advocated.

Unfortunately, the article does not square away exactly how the O-1 was pursued, and how that coincides with Enmanuel's studies, as it is only possible to hold *one* status while in the U.S. As the F-1 is limited to study with work that is related to the course of study (either Optional Practical Training (OPT) or Curricular Practical Training (CPT)), perhaps, in this instance, Enmanuel obtained an O-1 visa on a part-time basis, presenting that he would be working—i.e., practicing, training, competing, appearing in advertisements—for a certain number of hours (say, 25 or so), per week, while studying on a part-time basis, as well, which would be permissible under the rules and regulations for an O visa. It is not clear what was done, *but*, what is most important here, is that it *was done*, and so, Enmanuel may benefit from his NIL while also playing the sport he (presumably) loves, and obtaining a fantastic education from a pre-eminent institution.

There is one aspect of the article that is worth pointing out, and not because it is a positive: The author, Andrew Kreighbaum, spoke with multiple immigration attorneys, two of whom are quoted, as well as Enmanuel's sports agent and Jason Montgomery, who is described as "a higher education attorney." According to Montgomery, "[m]ost individu-

als—your typical international athletes in sports like tennis, track, swimming—aren't going to qualify for an O-1 visa." I'm not sure exactly from where, what, or how Montgomery has developed this opinion, but I would disagree with the assertion and say that we need to evaluate it on a case-by-case basis. Moreover, if an international athlete is strong enough to be accepted into a collegiate athletics program, it is more likely than not that they have outperformed a host of their colleagues from around the world, which I would argue, puts them in a stronger position to qualify for an O-1 than not.

In any event, the moral here is that we must keep our options open and consider all possibilities: Be a strategic adviser, channel your in-house or outside general counsel juices, and do not simply be a clerk pushing rote ideas without much creativity. Why? Just look at the potential outcome!

Two Visa Denials Go 'Round the Outside, 'Round the Outside, 'Round the Outside[2]

The Independent Publisher Who Was Denied an Extension

In a *New York Times* article by Lora Kelley, the author writes about "Phil O'Brien, a Briton who has lived in New York City for a decade, [who] received some disappointing news: His visa renewal application had been rejected."[3]

Apparently, "Immigration officials had deemed his news business, W42ST, which covers Hell's Kitchen in Midtown Manhattan, 'marginal.'" This would denote that O'Brien held an E-2 visa, as one of the fundamental questions there, is whether the business venture or its investment is marginal, or nominal. So, the question becomes, *was* O'Brien's business truly meager?

This fall, as part of his recent application for his visa renewal, O'Brien submitted extensive financial documents. Those documents, some of which were viewed by *The New York Times*, reflect a business facing many challenges. O'Brien had to inject his own money to keep it running.

In most recent years, O'Brien generated well over $100,000 in advertising revenue. In 2017, KOB publishing, the parent company of W42ST, received more than $400,000 from advertisers. In 2021, however, that number was just over $60,000.

The U.S. Citizenship and Immigration Services stipulates that recipients of E-2 visas cannot be running "marginal enterprises," which it defines as "one that does not have the present or future capacity to generate more than enough income to provide a minimal living." O'Brien draws his income from the profits of the business, which he acknowledged had fluctuated in recent years. "In 2020 and 2021, that was meager," he said, referring to his own paycheck. "It's been a good wage this year" of around $72,000, he added.[4]

Well, this seems quite foolish, does it not? Local news and local publishers are the lifeblood of our individual communities. Look at the current debacle around George Santos and how those stories were covered by local news back in September.

To emphasize this need for local news, one of the interviewees quoted in *The New York Times'* article states: "'No other publication fills this need,' said Lu Han, 36, a Hell's Kitchen resident who reads W42ST's newsletters every day. 'They're looking at numbers, but not looking at the story behind the numbers,' she said of the immigration official evaluating O'Brien's case." Moreover, "Robert Guarino, a partner in Manhattan restaurants, including Five Napkin Burger, Marseille and Nizza [stated], 'He did an incredible amount to build community.' Guarino said he had met other small business owners through events that O'Brien hosted and had become a patron at shops highlighted in W42ST. His restaurants have also been featured in the publication." Beyond this, Senator Brad Hoylman, a Manhattan Democrat, stated that "Phil and his publication represent a new model for local journalism. In Manhattan, we've seen newspapers close and consolidate. Phil's online newspaper is essential and is anything but marginal."

So, ultimately, and unfortunately, what we have here is a failure to communicate[5] and that is exactly what happened: the Consular Officer who interviewed O'Brien did not appreciate the practical impact that his business has had on the community and the fact that it has generated a significant sum, particularly for a local paper, nor that his lower figures were the result of pandemic-related issues that have since changed with showing that "the business [is starting] to turn around in 2022." While O'Brien continues running the local N.Y.-based paper from London, in his own words, "It's certainly a scrap because I'm here. Usually, I would walk the streets every day."

The impact here is that the hyperlocal aspect of O'Brien's reportage is certainly harmed by his distance, despite his ability to continue running operations and develop newsworthy stories. This will obviously have a detrimental impact on the local constituents and community members who rely on him, but how do we address this? The hope is that through better training, consular officers will be more attuned to making flexible decisions about a flexible visa class, rather than treat each box as simply meeting a numerical figure or not.

The Award-Winning Tattoo Artist Whose Works Were Not Distinguished Enough

In a separate matter that has not been reported about, because this is one of my cases that is ongoing, I will recount the tale of a tattoo artist who was recently denied. This gives a glimpse into the uniqueness of an individual officer's decision making and how that can impact the outcome.

This particular tattoo artist is someone who has won dozens of first-place awards from conventions and expos around the world, as well as having been ranked as the number one tattoo artist in his home country, as per a global ranking website, who has also been on multiple television channels as a featured artist who was tattooing live, and is someone who is endorsed by large-scale entities within the tattoo industry. Moreover, he has somewhere in excess of 40,000 followers on Instagram.

Now, based on this, it would seem that this is someone who certainly qualifies for a visa as someone with an international reputation who is at the top of his field. To emphasize this, we explained to United States Citizenship and Immigration Services (USCIS) the nature of his awards, had testimonials from the event organizers, and also presented comparable winners of those awards, as well as his colleagues who were judges at the competitions, along with him. Likewise, we thought to emphasize the impact and distinction of the television channels with their followers—as one is an online, web-based program—and also showed the international circulation of the global ranking website. Lastly, we figured if this were not enough, well, statistically, showing proof that his number of followers on Instagram placed him in the top 10–20% of all Instagram users would certainly demonstrate his significance (not to mention the array of testimonials from major tattoo artists and industry experts, attesting to all of this).

Unfortunately, the officer felt that this was all bunk, and as such, denied the petition. The result being that the artist could not come to the U.S. when expected, the studio with which he was going to be a resident artist is losing out on money from bookings that needed to be canceled or postponed indefinitely, and U.S. citizens lose out on a world-class artist's work. This does not even consider the impact to the individual artist and his family.

So, the next question becomes, what to do?

Well, we could appeal, but that would take months and likely will not yield a positive outcome, because in a case like this, the position, despite being glaringly apparent to most individuals, could still be deemed subjective enough that it is within the purview of the adjudicating officer's authority. That will not do.

What about, refiling? That is the ticket! The best thing to do in this scenario is repackage the materials, attempt to address whatever supposed deficiencies existed, and hope for the best, as you get the paperwork in the hands of a new officer. That is the position that we are in. I will provide an update when we have it, but for now, the petition is under review.

The Vilcek Foundation Awards

In some great news, the good folks at the Vilcek Foundation announced their awards totaling $600,000 "to outstanding immigrant professionals in the U.S.

> The Vilcek Foundation raises awareness of immigrant contributions in the United States and fosters appreciation for the arts and sciences. The foundation was established in 2000 by Jan and Marica Vilcek, immigrants from the former Czechoslovakia. The mission of the foundation was inspired by the couple's respective careers in biomedical science and art history. Since 2000, the foundation has awarded over $7 million in prizes to foreign-born individuals and has supported organizations with over $5.8 million in grants.[6]

Noble? Absolutely. There are two central prizes in music that were awarded to Du Yun and Angélique Kidjo:

> Du Yun receives the Vilcek Prize in Music for her open approach to composition, which subverts the boundaries of traditional classical music by incorporating influences from punk, electronic, experimental music, and for the virtuosity of her Pulitzer Prize–winning opera, Angel's Bone. Born in

> Shanghai, China, Du Yun began studying piano at the age of 4 and began attending the Preparatory Divisions of the Shanghai Conservatory of Music at age 6. She came to the United States to pursue higher education in music, earning her bachelor's at Oberlin Conservatory and her PhD in Music Composition at Harvard University. In 2001, Du Yun co-founded the International Contemporary Ensemble with the goal of advancing the genre of experimental music through collaborations, commissions, and performances.
>
> Angélique Kidjo receives the Vilcek Prize in Music in recognition of her exceptional range as a singer-songwriter, and for her artistic leadership through her performances, albums, and collaborations. Born in Ouidah, Benin, Kidjo had her musical debut with the album Pretty in 1981. She rose to international fame in the 1990s with albums like Logozo, Ayé, and Fifa. In 1997, Kidjo immigrated to the United States, moving to Brooklyn, N.Y. Since then, she has continued to write, record, and tour extensively, while undertaking humanitarian work as an international Goodwill Ambassador for UNICEF and with the Batonga Foundation, which she founded in 2006.[7]

These are quite significant individuals with fantastic achievements. In addition, there are three other awardees for "creative promise in music." Those individuals are Arooj Aftab, Juan Pablo Contreras, and Ruby Ibarra, respectively described as:

> Arooj Aftab receives the Vilcek Prize for Creative Promise in Music for her evocative songs and compositions that incorporate a range of influences from semi-classical Pakistani music and Urdu poetry, to jazz harmonies and experimental music.
>
> Juan Pablo Contreras receives the Vilcek Prize for Creative Promise in Music for his work as a composer and conductor of orchestral music that draws on his Mexican heritage, and for his leadership in founding the Orquesta Latino Mexicana.
>
> Ruby Ibarra receives the Vilcek Prize for Creative Promise in Music for her hip-hop and spoken word performances that center her experience as a Filipina American woman, and for her powerful lyrics that address colonialism, immigration, colorism, and misogyny.[8]

In the midst of all of the craziness, there are people fighting the good fight, trying to help individuals achieve their goals by obtaining visas and other classifications, and those who are working with those immigrant artists to invest in them and their goals, in order to achieve greatness within the U.S.

Closing Thoughts

For now and until our next installment, practice strategically, remain crafty and nimble, and always be shrewd; our clients depend on it, and in the world of immigration, basic simply does not cut it. All you have to do is look at those amazing artists who have achieved greatness.

Endnotes

1. https://news.bloomberglaw.com/daily-labor-report/stars-visa-is-rare-win-for-foreign-athletes-banking-on-likeness.
2. This is taken from the flow of Eminem's "Without Me." I'll spare you the actual lyrics, but, well, I'm going to go listen to it now.
3. https://www.nytimes.com/2022/12/18/business/media/nyc-local-news-immigration-visa.html.
4. *Id.*
5. For those who do not know, that is from *Cool Hand Luke*, but in reality, yes, that is precisely what happened.
6. *Id.*
7. *Id.*
8. *Id.*

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Waite v. UMG: An Ongoing Masterclass for Musical Copyright Recapture

By Neville L. Johnson, Douglas L. Johnson, and Daniel B. Lifschitz

On February 5, 2019, musicians John Waite and Joe Ely filed a headline-grabbing class action lawsuit against UMG Recordings, Inc., the largest record label in the world, seeking to recapture a multitude of copyrighted sound recordings that had been transferred to UMG by its artists over the years. Waite and Ely's goal was to challenge certain of UMG's stock justifications for refusing to honor artists' requests that their copyrights be returned by operation of law. In doing so, their litigation has served as an ongoing masterclass for those interested in the law of copyright termination.

The seeds of this lawsuit were planted on October 19, 1976, when a wholesale revision to Title 17 of the United States Code granted artists a powerful statutory right to recapture their alienated works after a certain number of years had passed. However, these "termination rights" came with a laundry list of procedural and substantive requirements that prolific copyright purchasers, such as UMG, were only too happy to weaponize in pursuit of keeping their highly valuable back catalogs intact.

The first major skirmish in the litigation was UMG's attempt to prove that the plaintiffs were time-barred from even asserting authorship over their recordings, as their agreements with UMG had labeled the recordings "work made for hire."[1] This refers to a class of works categorically exempted from recapture under the Copyright Act's termination scheme, and while UMG's odds of successfully categorizing the recordings as made "for hire" were tenuous,[2] they had a creative back-up plan.

According to UMG, the mere contractual designation of a work as "made for hire," whether accurate or not, started a three-year clock for an artist to contest the designation in court or be time-barred from asserting their authorship.[3] The district court immediately recognized the perniciousness of UMG's position, which would present young artists with three choices: Not work with any label that insists on work-for-hire language, sue any such label within three years of signing to them, or quietly accede to the label's superior market position and thereby relinquish any termination rights.[4]

As the district court explained, the Copyright Act's termination provisions were intended to "safeguard" authors who were made to sign away copyrights during the infancy of their careers or otherwise prior to their work's true commercial value being realized by the market.[5] Therefore, "[t]o restrict the termination right based on the artist's failure to bring a claim within three years of signing a recording agreement - a time during which the artist and recording company may still have disparate levels of bargaining power - would thwart Congress's intent and eviscerate the right itself."[6]

While the district court was keen to protect artists against UMG's choices vis-a-vis work-for-hire language, it found itself less capable to protect them against their own choices – more specifically, the choice to contract with UMG through loan-out companies rather than in their personal capacities.[7] This is because "[o]nly grants 'executed by the [work's] author' (or the statutorily designated successor) may be terminated," and the plaintiffs (who had sued in their personal capacities) failed to establish that these companies were their statutorily-designated successors.[8] Accordingly, to the extent a copyright transfer was made by a loan-out company, the plaintiffs could not effectuate their termination.[9]

The district court also had occasion to address the curious case of "gap grants," which are transfers of copyright made *prior* to 1978 for prospective works created *on or after* January 1, 1978. Thanks to inartful drafting by Congress, these grants do not meet the express criteria for termination under any section of the Copyright Act, which required the Copyright Office to propose that they be treated akin to a post-1978 transfer under § 203.[10] After initially finding ways to avoid addressing the issue,[11] the district court eventually agreed with and adopted the Copyright Office's position.[12]

The next major issue tackled by the district court was whether it could not only enforce proper subsisting terminations, but advise as to validity of prospective terminations as well. After first resisting requests to address the latter category of notices, the district court was eventually persuaded by the plaintiffs that a declaratory judgment regarding the propriety of pending terminations "would reduce uncertainty in a meaningful way, even though it would not offer complete relief from it."[13]

Most recently, the district court was called to determine whether a grantee's contesting of a copyright termination notice could itself constitute copyright infringement.[14] The district court rejected such a theory, noting that while the prospect of termination disputes was "entirely foreseeable" at the time when Congress passed the 1976 Copyright Act, the sections defining infringement included no language that could conceivably cover such disputes.[15] In fact, the district court flagged constitutional concerns in doing so, given the established high bar for rendering the assertion of legal rights actionable.[16]

2023 promises to be an auspicious year for the litigation, as the district court is poised to rule on both class certification and summary judgment motions that were briefed in 2022 and argued before the district court in November of that year. These decisions are poised to reveal the common threads that bind UMG's in-house strategy for holding onto its most critical assets, as well as provide the most thorough legal examination to date regarding work for hire's place in the recorded music industry. All music attorneys are thus advised to keep an eye on Judge Lewis A. Kaplan's courtroom this year.

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Endnotes

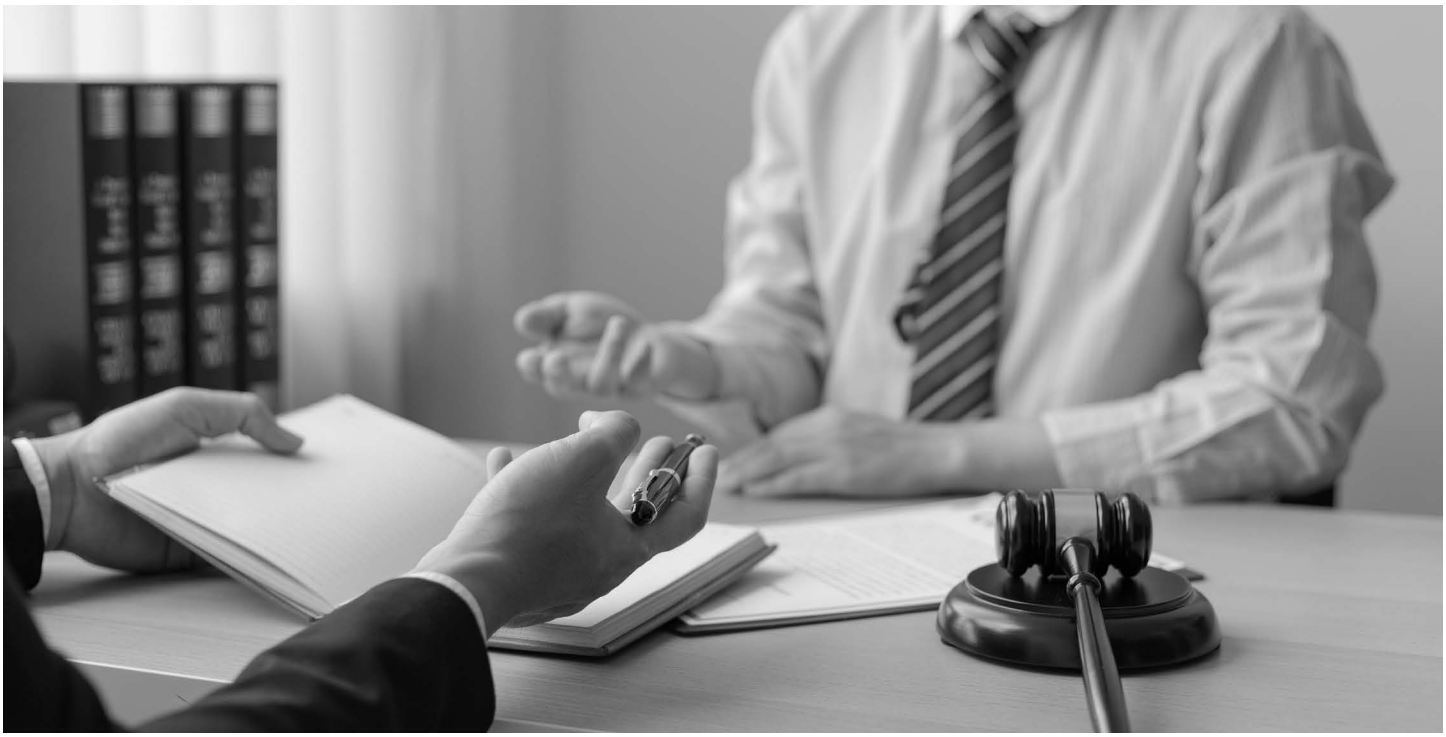
1. See generally *Waite v. UMG Recordings, Inc.*, 450 F. Supp. 3d 430 (S.D.N.Y. 2020) (Waite I).
2. Works for hire can be created by either employing an artist (in which case anything created within the scope of their employment qualifies) or by independently contracting with them (in which case the work must fit within one of nine specifically-enumerated categories under § 101 of the Copyright Act. Labels typically do not employ their artists and sound recordings are not one of the nine types of works that can be commissioned for hire.
3. *Waite I,* 450 F. Supp. 3d at 436.
4. *Id.*
5. *Id.* at 438.
6. *Id.*
7. *Id.* at 441. The court explains that these entities, "which 'loan' out an artist's services to employers and enter into contracts on behalf of the artist," "are commonly used in the entertainment industry to limit personal liability and secure tax treatment." *Id.* at 441 & n.69.
8. *Id.* at 441 ("[Plaintiffs] contend that Waite and Ely issued a grant to [their loan-out corporations], which then transferred the rights to UMG's predecessors. The FAC does not support this allegation."). The plaintiffs attempted to amend their complaint to rectify this issue, but the Court found their evidence unavailing and denied the proposed amendment. *Waite v. UMG Recordings, Inc.*, 477 F. Supp. 3d 265, 271-73 (S.D.N.Y. 2020) (*Waite II*).
9. For those wondering why the loan-out companies did not simply send termination notices in their own names, a corporate entity cannot be the author of a work in any capacity other than as the owner of a work made for hire, and as already discussed, works made for hire lack termination rights. *See* 17 U.S.C. §§ 203(a), 304(c)-(d).
10. *Waite I,* 450 F. Supp. 3d at 442.
11. *See id.* at 442-43 (holding that a particular transfer did not constitute a gap grant where evidence indicated the work transferred was created prior to 1978).
12. *Waite II*, 477 F. Supp. 3d at 274-75.
13. *Id.* at 278.
14. *Waite v. UMG Recordings, Inc.*, No. 19-cv-1091 (LAK), 2022 U.S. Dist. LEXIS 165370, at *7-10 (S.D.N.Y. Sep. 13, 2022) (*Waite III*).
15. *Id.* at *9.
16. *Id.* at *9 & n.22.

Resolution Alley

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

A Reminder About Ethics in Negotiation

By Theo Cheng



Negotiation is a fundamental life and legal skill. To "negotiate" means "[t]o confer with another or others in order to come to terms or reach an agreement," and "negotiating" means "[t]he act or process of negotiating."[1] We negotiate on any number of everyday matters, ranging from family and home-related issues and concerns, to haggling when buying a new car or engaging a contractor for a renovation project. We also engage in negotiations in pursuit of our professional endeavors as lawyers when we interact with adversaries to consummate a transaction or seek a resolution on a disputed legal issue, claim, or matter. However, we are oftentimes faced with an ethical quandary: How to remain fair and truthful, while, at the same time, in some ways, be misleading. As Professor James White of the University of Michigan Law School has written, "the negotiator's role is at least passively to mislead his opponent about his settling point while at the same time to engage in ethical behavior."[2]

One might think that the applicable professional responsibility rules would help alleviate this quandary, especially for newer practitioners. Yet those rules are surprisingly laconic and unhelpful. In fact, the New York Rules of Professional Conduct only contain a single, seemingly relevant rule – Rule 4.1 – which is titled "Truthfulness in Statements to Others" and simply states that, "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."[3] What exactly does this rule proscribe?

- Does the lawyer have to ensure that the adversary has all the relevant facts or knows the relevant law?
- What if it was not the lawyer herself who made the false statement in the first instance?
- Can the lawyer avoid making a false statement by omission?
- What if the lawyer's statements are really opinions? Does he have to warn his adversary that they are opinions?

The New York rule is also accompanied by official commentary, which provides some helpful contours. For example, comment [1] addresses the concept of "misrepresentation" and advises that "[a] lawyer is required to be truthful

when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." This comment answers part of the first question above, namely, that a lawyer has no obligation to apprise an adversary of the relevant facts. However, notwithstanding that Rule 4.1 expressly refers to false statements of material fact or law, the comment is silent as to any affirmative duty on the part of the lawyer to apprise an adversary of the relevant law.

In any event, in eschewing any such obligation (presumably with respect to both relevant facts and law), the lawyer nonetheless needs to ensure that they are being truthful in interacting with their adversary on their client's behalf. On that score, comment [1] goes on to say that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false," and that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." This comment answers the next two questions insofar as being truthful means ensuring that a lawyer is not blindly repeating false statements made by someone else or omitting information such that the resulting utterance could be deemed a false statement.[4]

As to what exactly are "statements of fact," comment [2] purports to address that issue, but leaves much to be desired. This comment begins by stating that Rule 4.1 "refers to statements of fact," but then provides that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances." It attempts to offer some context by noting that, "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact." However, the comment does not then provide any other information as to what these so-called "generally accepted conventions in negotiation" are, where a practitioner is supposed to find them, or if it matters whether all counterparties to a negotiation are operating under the same generally accepted conventions.

Lest the lawyer be left without any guidance at all, comment [2] then sets forth some examples, specifically, that "[e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud." Although the examples of "estimates of price or value" hint at a lawyer's opinion regarding those two subjects, nowhere in comment [2] is the distinction between fact and opinion explicitly discussed. Nor is there any guidance provided as to how a lawyer is to distinguish between them, or even whether an affirmative duty arises to apprise an adversary that certain statements may actually be statements of opinion, and not statements of fact – the subject of the fourth question above. More importantly, the examples provided in this comment – which, presumably, are part of the "generally accepted conventions in negotiation" – are hardly exhaustive of the "circumstances" a lawyer might find herself in during any particular negotiation setting. They merely beg the question of what else falls within those conventions.

Comment [2] concludes with the reminder that "[l]awyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation."[5] To that end, comment [3] addresses illegal or fraudulent conduct by the lawyer's client and also reminds that "a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent," and that "a lawyer can avoid assisting a client's illegality or fraud by withdrawing from the representation," sometimes having "to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like."[6] While the guidance provided in this comment is relatively clear, it sheds little additional light on the parameters for engaging in the core conduct that renders negotiations ethical and in compliance with Rule 4.1.

Therefore, in the end, what does Rule 4.1 teach us? As Professor Art Hinshaw of Arizona State University Sandra Day O'Connor College of Law has written, on some level, the rule teaches that deceit, misdirection, dissembling, and lying can be "ethical" under certain circumstances. For example, if a lawyer persuades herself that all she is doing is communicating statements of opinion, and not statements of fact, then deceitful conduct is arguably permissible. Yet if puffing or bluffing about price or value is part of the "generally accepted conventions in negotiation," the lawyer is left rudderless as to the limits of such puffing and bluffing. To be blunt, where does a practitioner cross the line from acceptable puffery to outright misrepresentation?

Many practitioners also easily fall into the gray areas surrounding ethical negotiations because they often lack an understanding that personal relationships and reputations are an important aspect of the legal profession. Many lawyers are willing, particularly early in their careers, to sacrifice both for the sake of "winning" the negotiation. All of the foregoing is likely compounded by an insufficient focus on fraud in the law school curriculum and the hypercompetitive environment of law school and legal practice in general. These phenomena leave many practitioners woefully unprepared to conduct negotiations ethically when they are faced with real-world situations in private practice. Thus, it is conceivable that many practitioners engage in what might be construed as patently fraudulent conduct and yet have very little conception that what they are doing is wrong in the least.

Take, for example, a client who has told his lawyer that she is authorized to pay $750,000 to settle a pre-litigation accusation from a record company of copyright infringement. During the settlement negotiations, after the lawyer offers $650,000, the record company's lawyer asks the defendant's lawyer, "Are you authorized to settle for $750,000?" Can the lawyer say, "No, I am not"? Although the clever response here is to have the lawyer avoid saying something so stark in the first instance, it seems likely that simply saying "no" is a misrepresentation of a relevant fact told by the client to his lawyer. Yet a crafty lawyer might also answer "no" while taking refuge in the fact that her client's prior authorization may arguably not still be valid in the light of the communications exchange that just took place between the lawyers, and, thus, a re-authorization would be needed before a more "truthful" answer to the record company lawyer's question can be delivered.

Any number of other tricky situations could arise. For example, can lawyers representing a baseball player who claims to have suffered a serious knee injury say in settlement negotiations that their client is "disabled" when they know that their client is out skiing? Or, in settlement talks over a dispute concerning the leasehold held by an art gallery, the landlord's lawyers make it clear that they think the gallery has gone out of business, although the gallery's lawyers did not say that; in fact, the gallery is an ongoing concern and several important sales are imminent. Can the gallery's lawyers go ahead and settle without correcting the other side's misimpression?

Ethical issues in negotiations undoubtedly do arise. While Rule 4.1 provides little in the way of robust guidance, it still serves as a reminder that truthfulness in making statements to others is a value we uphold in our legal system. It also reinforces the notion that the bedrock of durable agreements reached through the negotiation process rests on lawyers not knowingly making false statements of material fact or law.

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Endnotes

1. Am. Heritage Dictionary of the English Language https://www.ahdictionary.com/word/search.html?q=negotiate, https://www.ahdictionary.com/ word/search.html?q=negotiation; *accord* Cambridge Dictionary ("negotiation" means "the process of discussing something with someone in order to reach an agreement with them or the discussions themselves"), https://dictionary.cambridge.org/us/dictionary/english/ negotiation; Merriam-Webster Dictionary ("negotiate" means "to confer with another so as to arrive at the settlement of some matter"), https://www.merriam-webster.com/dictionary/negotiate.
2. James J. White, "The Pros and Cons of Getting to YES," 34 J. Legal Educ. 115, 118 (1984), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj5lI74xJz8AhXjnnIEHSdECP0QFnoECAwQAQ&url=https%3A%2F%2Fcore.ac.uk%2Fdownload%2Fpdf%2F232683734.pdf&usg=AOvVaw1dALbjQB0jMa89CklT0mUn.
3. *Cf.* ABA Model Rules of Professional Conduct, Rule 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.").
4. Comment [1] concludes with a passing reference to Rule 8.4, to wit, "As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4." Comment [1] to Rule 4.1 of the ABA Model Rules of Professional Conduct is verbatim to the N.Y. comment.
5. Comment [2] to Rule 4.1 of the ABA Model Rules of Professional Conduct is verbatim to the N.Y. comment.
6. Comment [3] to Rule 4.1 of the ABA Model Rules of Professional Conduct is substantively similar in scope and guidance.

WT…FTX

By Amber Melville-Brown

Crypto-tation Management

I say Nespresso – you say, George Clooney. Whose smile is synonymous with Lancôme? Julia Roberts'. Johnny Depp: libel litigator, Dior endorser. Love and marriage, horse and carriage, celebrities and brands all go together; but when the brand hits the skids or the celebrity strays off the path of righteousness, reputations on both sides of the symbiotic relationship can crash.

Billions of dollars have been spent and reaped across a plethora of endorsed industries with the sweet smell of success emanating from deals for coffee, to scent, and everything in between. The new "crypto kid" on the block - embracing disruptors including the blockchain, digital currencies, crypto exchanges, and non-fungible tokens (NFTs) - is no different. Evidenced by spectacular gains and losses and similarly soaring celebrity successes and fantastic falls from grace, the crypto sphere has had its share of celebrity endorsers. However, as with any endorsement partnership, when prospective partners, both promoter and product, can find that they are in fact doing a dance that they had not anticipated.

Is the endorsement dance still worth the entry price? Brands seek the backing of celebrities to enhance their sales. As the celebrated Compare the Market spokes-meerkat Aleksandr Orlov would say, "Simples!" Slightly more academically, research has been undertaken on the "transfer effect," which considers "the strategic advantages of celebrity co-branding to capitalize on celebrities' influence." Research from Miami University[1] and the online experiment undertaken "confirmed the transfer of celebrity traits to brands; changes in brand belief and attitude were consistent with the valence of the celebrity's traits." Or, as Orlov the meerkat might put it, it appears that consumers who idolize celebrities and emulate their styles and behaviors buy the relevant brand to seek to buy into the lifestyle. Alice ate a magic cake in *Through the Looking Glass* and grew to enormous proportions; meanwhile, we, the consumer – subconsciously if not consciously – consume products to grow in stature and to become like the idols who endorse them.

The hero-effect puts zeros on the bottom line for brands. Celebrities, meanwhile, engage in the potentially Faustian pact of endorsement for their paychecks and because an association with a high-profile, highly valued and respected brand is seen to gild their already golden lilies.

As we have seen, both sides of the crypto-promotion Faustian pact can be damaged by an unfortunate endorsement choice if the brand bubble bursts. Celebrities may fall from their pedestals and tarnish the brands they have been paid to shine. Or they may themselves get trod upon by choosing a clumsy dance partner. Each partner may see their glittering prize of success tarnished with the debasing of their erstwhile treasured crypto companion, while many others may become the victims of both of them.

A spectacular example of a crypto catastrophe reads like an ABC of what not to do, featuring FTX and Sam Bankman-Fried (SBF). FTX is the cryptocurrency exchange rarely known by its other name, Futures Exchange, and SBF is its boss.

WT… FTX?

What happened with FTX? In this fast-moving world, events had moved at a pace between when I first put fingers to the keyboard and about word 2,000, let alone when I added "period" and hit "send" to my editor. Thus, even what was presumed "now" may prove to be out of date by the time of publication, while more accurate information is likely to be discovered.

FTX, once a Bahamas-based cryptocurrency exchange, is now a bankrupt company. FTX is an ex-exchange that provided a platform for selling and purchasing digital currencies, such as Bitcoin and Ethereum. It had been valued at $32 billion on a good day, but as good days are somewhat in the past, it is reported now to owe its creditors $3.1 billion.[2]

What of SBF? He was a new kid on the block of the also new crypto industry on the block. A tousle-haired baby-faced (former) billionaire, he was once a math and physics geek at the Massachusetts Institute of Technology. He became "…a major donor to Democratic Party candidates.[15][16] He was the second-largest individual donor to Joe Biden in the 2020 presidential election, personally donating $5.2 million,[17] [18] and he donated $40 million to Democratic candidates during the 2022 U.S. midterm elections.[19]"[3]

SBF also owned Alameda Research, an investment fund trading in digital currencies that traded on FTX. It was thought that the two entities were distinct from and independent of each other.

FTX and Friends

Somewhat of a modern messiah in the crypto world then, SBF drew attention and emulation. The softly glowing star quality attracted others, while those already spinning in their own celebrated orbit rushed to hitch their celebrity status to his crypto star.

Much of the alure for crypto happened during and post the COVID pandemic,[4] when the world seemed like an episode of "Stranger Things,"[5] turned upside down such that trying new-fangled things and buying new-fangled currencies did not seem quite so odd or risky to some as it might otherwise have done previously. If crypto was the latest new fad, then bet your bottom dollar – perhaps quite literally – that others were looking to cash in.

Famous figures, including the actor Larry David and National Football League quarterback Tom Brady, endorsed the FTX exchange. An advertisement featuring the distinctively sardonic actor saw Larry David's dismissive character failing to see the merit in the wheel, the lightbulb or crypto.[6] The commercial appealed to the persuasive fear of missing out (FOMO) and ended with the line, "Don't be like Larry. Don't miss out on the next big thing." The next big thing for the actor, however, is likely the class action lawsuit brought against FTX, in which in which David is personally named for helping to nudge[7] investors to engage with the exchange. One expects that the "Curb Your Enthusiasm"[8] star will have had his own enthusiasm for crypto somewhat curbed.

Tom Brady is also named in the suit. His life has been in somewhat of a state of F(TX)luX. In February 2022, he announced his retirement from football. Not two months later, he "un-retired," reportedly citing "unfinished business" with the sport.[9] Later that same year came the announcement of a new partnership with the FTX exchange for an undisclosed amount in cryptocurrency.[10] Glossy advertisements with Brady and his supermodel wife Gisele Bundchen followed, with snappy earworms encouraging viewers that they were "in" to crypto; punning on a potential "trade" across football teams, Brady proudly showed that he was keen to trade in crypto, and the millionaire heartthrob baller with the supermodel wife, quipped in the third advert that even he could "do better."[11]

Yet while the ad coaxed that "the best are never done getting better," encouraging fans to do better themselves and trade on FTX, things were about to get much worse for Brady. First came news of the end of his 13-year marriage. While the couple "lawyered up" consciously to uncouple, they were reported ultimately to have settled their separation amicably. However, whether or not the Bradys are lucky in love, they will need to be lucky, and skilled, in litigation, as they take their places as defendants in the FTX lawsuit.

Brands as well as individuals were happy to be seen in the fast-lane to success with FTX. In a press release in September 2021,[12] Formula One racing team Mercedes-AMG Petronas was "delighted to announce a new long-term partnership with FTX." The announcement served as an exchange of love letters, with SBF offering that FTX was "thrilled to partner with the reigning Formula One World Champions and current team point leaders, Mercedes-AMG Petronas, to continue amplifying our position as the leading global cryptocurrency exchange." Meanwhile, team principal and CEO of Mercedes-AMG Petronas F1 Team, Toto Wolff, responded that it was "very excited to welcome FTX," extolling their "innovative spirit and creative energy in such a rapidly developing global industry." This, the announcement said, makes them "a well-matched partner in our own relentless pursuit of performance."

However, in its relentless pursuit of performance, it appears that FTX suffered a severe engine fail and has crashed and burned, leaving casualties along the track. What exactly happened?

It all started in early November 2022 with a leaked balance sheet that revealed that the value of FTX CEO Sam Bankman-Fried's trading company, Alameda Research, was bolstered heavily by a token created by its sister company, FTX, and not by independent assets such as fiat currency or other cryptocurrencies.The ensuing surge in withdrawals from FTX caused a liquidity crunch for the third-largest crypto exchange by trading volume, with US$6 billion of withdrawals made in just three.[13]

Still a little perplexed? Try this rather cleverly dumbed-down explanation by *New York Magazine* from its "Explain it to me like I'm… 5 years old" column: "A silly-haired wizard sold magic beans. The villagers loved it! Until they stopped believing in magic and demanded their money back, only to find that the wizard had already spent it."[14]

In other words, in the brave new world of cryptocurrency, there was a good old-fashioned run on the bank. Once plucky depositors investing in the FTX exchange began to feel a little nervy; they turned from bullish to chicken and sought to withdraw their digital currencies. Chicken Little's fear that the sky would fall as misplaced: but the fear of the spooked FTX depositors realized their very own fears as the bottom, and the top, fell out of FTX.

In the story's next chapter, competing exchange Binance appeared to offer a lifeline with initial proposals by its CEO, Changpeng Zhao, to rescue FTX. However, following its due diligence, the deal was off. Binance sealed the deal for FTX's reputational death when it tweeted about reports of "mishandled customer funds and alleged US agency investigations," adding that "the issues are beyond our control or ability to help".

With no bailout in sight, FTX was sunk. On November 11, 2022 FTX Trading Ltd and more than 100 related entities in the group filed for Chapter 11 bankruptcy protection. "This means that Alameda, FTX's hedge fund, Singapore subsidiary Quoine, and other entities such as FTX (Gibraltar) Ltd, FTX Digital Assets LLC, FTX Europe AG, FTX Exchange FZE and many others are protected from claims. As a result, any court suit or arbitration claims made by investors against these FTX entities would likely be suspended in favour of the insolvency framework. Even if investors have a judgment sum or arbitration award against FTX, that could at best be a ticket to queue up in the insolvency process."[15]

F(TX)alling From Grace

As FTX failed, SBF went from crypto messiah to pariah, and as he and FTX fell, the stars who had circled in his crypto orbit fell too. As a result, those who were keen to embrace the shiny new thing in the crypto sphere have had to take the rough with the smooth. A *Washington Post* article commented on the demise of FTX, citing the proposition in the class action brought against FTX that the celebrity status of its erstwhile endorsers "made them culpable for promoting the firm's failed business model." [16]

CBS News reported further, citing Adam Moskowitz, the attorney leading the FTX class action, as he set out his take on the celebrity phenomena: "FTX were geniuses at public relations and marketing, and knew that such a massive Ponzi scheme — larger than the Madoff scheme — could only be successful with the help and promotion of the most famous, respected, and beloved celebrities and influencers in the world," he said." The article went on to confirm that "FTX did not reply to a request for comment." [17]

An endorsement relationship – like any other relationship – may begin with the sound of whispered sweet nothings, but it may end in raised voices and accusations, even if not immediately in a divorce petition. After the FTX fail, for example, Mercedes did not file for divorce straight away, but it did initiate somewhat of a trial separation. "As a first step, we have suspended our partnership agreement with FTX," read its statement as reported by Reuters on November, 11 2022.[18] "This means the company will no longer appear on our race car and other branded assets from this weekend. We will continue to monitor closely the situation as it evolves." When one spouse mucks up and brings opprobrium on the family name, the other may want to disassociate themselves, quickly.

Queen of Christmas? King of Crypto?

Mariah Carey may be synonymous with Christmas, but she was never formally crowned the Queen of Christmas, having in December 2022 failed in her petition to trademark the phrase.[19] Likewise, SBF may have made himself a high-profile figure in the world of crypto, with significant and widely publicised donations to political campaigns and committees,[20] but his virtual crown as the King of Crypto was unceremoniously knocked off his head on December 12, 2022, as officers from the Bahamas Financial Crimes Investigation Unit arrested him at the request of the U.S. government.[21] Far from facing a fun and festive season, SBF has been sent a hamper chock-full of less than tasty fayre. As reported in Coinbase,[22] they included: charges from the United States Securities and Exchange Commission (SEC) of violations of the anti-fraud provisions of the 1993 Securities Act and the 1934 Securities Exchange Act; legal action by the Commodity Futures Trading Commission (CFTC) for violations of the Commodity Exchange Act; and indictments for alleged wire, commodities and financial fraud filed by the United States Attorney for the Southern District of New York.[23] Important to remember that while he has expressed his regret for the fall of FTX,[24] he has admitted that he had a "bad month," and is embarrassed by the exchange's failure on risk,[25] he denies wrongdoing.

SBF, like anyone in the public eye, had a brand to build and a reputation to protect. He may have been trying some reputation rehabilitation in his attempts to manage the messaging of this catastrophe in the court of public opinion.[26] According to Vermont Public Radio and its David Gura, while SBF's lawyers have "have told him to keep quiet," SBF – at the center of a massive corporate collapse – "is doing the opposite. He's been trying to shape the public's understanding of how his crypto empire imploded so quickly."[27] Appearing at the *New York Times* DealBook Summit at the beginning of December, he said, "I think I have a duty to explain what happened, and I think I have a duty to do everything I can to try and do what's right."[28] That may work out for his reputa-

tional future in the long term, but his fate more generally and urgently, however, will be decided in the actual courtroom.

Rocking the Celebrity Relationship

A charismatic character can significantly bolster brands and it is important to find the right partners. The omnipresence of the internet and the rise of the influencer and brand ambassador has led to meaningful relationships between celebrities and offerings.

The *New York Times* reported the blurring of the lines from the days of yore when a celebrity was merely the "face" of the product to the modern phenomenon where the two are synonymous. Citing Andrea McDonnell, an associate professor of communication at Providence College, the newspaper reported on the tighter relationships between the product and the promoter: "It's a two-way validation system…. The star becomes a stand-in for the brand, and the qualities of the brand mirror or enhance the qualities we associate with the star."[29]

In many endorsement situations, we may wish to emulate our icons by clothing ourselves in their clothes, wearing their lipsticks, or watches, or using their golf clubs. Yet the *New York Times* article also reported on partnerships, which, by their nomenclature, moved the endorsement dial from celebrities as mere faces to being much more fundamentally involved: "Dakota Johnson, co-creative director and investor at Maude (sexual health and wellness products); Prince Harry, chief impact officer at BetterUp (employee coaching);… [and] Jennifer Aniston, chief creative officer at Vital Proteins (supplement)."[30] If we love Jennifer Aniston's clear skin and youthful looks, we might slather ourselves in a cream or a lotion to try be like her, and we may be more likely to invest in a jar of her product when we learn that she is not only the face of the brand, but also the brain behind it. Its Creative Officer is represented as "all in" with Vital Proteins and thus we are much more likely to have a crack at emulating our idol.

There is an additional issue with promoting crypto versus creams, tokens, and lotions. If you buy a hat because your fashion guru endorsed it but it turns out that it is just not you, so what? You have splashed a bit of cash, but if the cap does not fit, do not wear it. However, you invest in currency on the advice not of a professional financial adviser but your favorite influencer, you may be set to lose significantly more than your street cred.

Bringing Home the Bacon

An article in B2 – The Business of Business, noted an article written by actor Ben MacKenzie from "The O.C.," urging his fellow thespians not to boost crypto in which he called "The Hollywoodization of crypto" a "moral disaster."[31] MacKenzie's article accepts that, to a certain extent, the endorsement business is just another way to bring home the bacon. "So look, I get it. Everybody's gotta make a living, even in showbiz. I've been in it for two decades now, and sometimes you find yourself doing weird things for money. I'm not a snob about that stuff. There's honor in all honest work." However, he points out the dangers given the lofty positions from which celebrities speak, tweet, and post. "While the notion that famous people are role models might be quaint now, our privileged lifestyles and conspicuous consumption can still seem aspirational to some. In short, what we talk about, and what we post about, can move units… what Kim Kardashian or Snoop Dogg posts about—that's real estate that every marketing executive in the world would like a piece of, and they're willing to pay enormously for it."[32]

Mackenzie goes on, "And that's fine by me, as long as they aren't promoting the financial equivalent of Russian roulette."[33] But aye, there's the rub – and certainly as far as the SEC is concerned, because if you invest in cryptocurrency hunting for fortune simply on the say-so of your dearest online boo, you may indeed be playing Russian roulette. You may face potential gains, but equally have to face down the potential of significant losses.

One other important issue, beyond either gentle encouragement or hard sell, is the extent to which the celebrities are backward in coming forwards about their relationships. Some celebrities appear friendly on screen – i.e., Rachel and Monica in "Friends". Some actors are just as genuinely friendly off set, i.e., Jen and Courtney, and they are upfront about it, while others are pals onstage, i.e., "Sex and the City's" Carrie and Samantha, but the "noises off" are much less friendly between actors Sarah J. Parker and Kim Cattrall. However, friends or foes, we know all about it.

Yet some celebrities and promoters are not so up front about their relationships with their endorsed products, or certainly not as up front about any payments that they may receive in exchange. In those cases, we the public may be being played. When emulating these stars involves cold hard cash rather than cold cream, the stakes are infinitely higher, and the SEC may have something to say about it.

The ABC of the SEC

A security is a fungible, negotiable financial instrument that holds some type of monetary value.[34] Securities must be registered with the SEC. What amounts in the crypto space to a security and what does not is a minefield to tread with extreme caution. However, when the brave new world was first declared open, many rushed in.

The SEC issued guidance back in 2017, warning about the dangers of promoting securities, and reliance on those

promotions.[35] On its website – which admittedly may not be the usual reading of many an influencer, rapper or actor – it warned:

> "Celebrities and others are using social media networks to encourage the public to purchase stocks and other investments. These endorsements may be unlawful if they do not disclose the nature, source, and amount of any compensation paid, directly or indirectly, by the company in exchange for the endorsement." It went on in a warning to the public, "The SEC's Enforcement Division and Office of Compliance Inspections and Examinations encourage investors to be wary of investment opportunities that sound too good to be true. We encourage investors to research potential investments rather than rely on paid endorsements from artists, sports figures, or other icons."[36]

As a warning to those doing the promoting, it stated specifically:

> Celebrities and others have recently promoted investments in Initial Coin Offerings (ICOs). In the SEC's Report of Investigation concerning The DAO, the Commission warned that virtual tokens or coins sold in ICOs may be securities, and those who offer and sell securities in the U.S. must comply with the federal securities laws. Any celebrity or other individual who promotes a virtual token or coin that is a security must disclose the nature, scope, and amount of compensation received in exchange for the promotion. A failure to disclose this information is a violation of the anti-touting provisions of the federal securities laws. Persons making these endorsements may also be liable for potential violations of the anti-fraud provisions of the federal securities laws, for participating in an unregistered offer and sale of securities, and for acting as unregistered brokers. The SEC will continue to focus on these types of promotions to protect investors and to ensure compliance with the securities laws.[37]

Concluding with a further warning to would-be buyers, the SEC statement warned:

> Investors should note that celebrity endorsements may appear unbiased, but instead may be part of a paid promotion. Investment decisions should not be based solely on an endorsement by a promoter or other individual. Celebrities who endorse an investment often do not have sufficient expertise to ensure that the investment is appropriate and in compliance with federal securities laws. Conduct research before making investments, including in ICOs. If you are relying on a particular endorsement or recommendation, learn more regarding the relationship between the promoter and the company and consider whether the recommendation is truly independent or a paid promotion.[38]

Hitting Reputation Bottom

Despite the SEC's best efforts, it seems that these anti-touting provisions were not completely clear to all. In 2020, actor Steven Seagal settled a claim brought by the SEC over his alleged failure to inform followers on social media that he was being paid – in cash and in Bitcoin - to promote Bitcoin2Gen's initial coin offering. While he was reported initially to have believed in the offering's legitimacy, he later distanced himself from what the SEC considered to be a security. In a statement referring to the scheme, the SEC said,

> These investors were entitled to know about payments Seagal received or was promised to endorse this investment so they could decide whether he may be biased. Celebrities are not allowed to use their social media influence to tout securities without disclosing their compensation.[39]

Without admission of liability, Seagal agreed not to promote any securities for three years and to pay more than $300,000 to the SEC. Seagal's attorney Ivan Knauer noted the purely commercial nature of the relationship, saying that: "To him, it was simply a case of someone paying a celebrity for the use of his image to promote a product."[40] Knauer clarified that the "Above the Law" actor was not above the law. This example of the sensitivities in endorsing products from which individuals can lose significant sums shows the problem with crypto endorsement. Knauer told Law360 at the time of the settlement that "Mr. Seagal cooperated fully with the SEC's investigation, and this matter is now behind him….He looks forward to continuing his life's work as an actor, musician, martial artist and diplomat."[41]

Kim Kardashian also hopes that her dealings with cryptocurrency are truly behind her. In October 2022, she was charged by the SEC for "touting on social media a crypto asset security offered and sold by EthereumMax without disclosing the payment she received for the promotion."[42] The

SEC's press release of October 3rd announced that she had "failed to disclose that she was paid $250,000 to publish a post on her Instagram account about EMAX tokens" which post "contained a link to the EthereumMax website, which provided instructions for potential investors to purchase EMAX tokens."

$250,000 is not at all bad for a day's work, especially considering that the post likely only took a matter of minutes to prepare and share; but in fact, the fee was not to be. The SEC statement confirmed that in agreeing to settle the charges without admission of liability "Kardashian agreed to settle the charges, pay $1.26 million in penalties, disgorgement [the approximate $260,000 promotional payment], and interest, and cooperate with the Commission's ongoing investigation." Whether this will ultimately cause damage to the bottom line of the Kardashian brand seems unlikely – it was a slight hit to her reputation.

That said, catching Kardashian certainly was a coup for the SEC. It used its press release as a warning to Joe Public. According to SEC Chair Gary Gensler:

> This case is a reminder that, when celebrities or influencers endorse investment opportunities, including crypto asset securities, it doesn't mean that those investment products are right for all investors. We encourage investors to consider an investment's potential risks and opportunities in light of their own financial goals.[43]

The SEC statement also served as a caution to celebrities who might want to follow Kardashian's lead: "Ms. Kardashian's case also serves as a reminder to celebrities and others that the law requires them to disclose to the public when and how much they are paid to promote investing in securities."[44] Meanwhile, Gurbir S. Grewal, Director of the SEC's Division of Enforcement, noted that:

> The federal securities laws are clear that any celebrity or other individual who promotes a crypto asset security must disclose the nature, source, and amount of compensation they received in exchange for the promotion. Investors are entitled to know whether the publicity of a security is unbiased, and Ms. Kardashian failed to disclose this information.[45]

The SEC may have felt that it needed to burst out of the black and white words of an online statement[46] and into the Technicolor of the screen. In its video available on Youtube,[47] it reiterated its warning of the dangers of making investment decisions based solely on celebrity or influencer recommendations.[48]

The SEC may be hoping that its warnings will bring about a decline in celebrity endorsements similar to that which ensued back in 2017. Bloomberg had then reported that the SEC had seen a "pretty immediate drop-off" in celebrity endorsements following its caution. That warning followed the activities of celebrities who had promoted various initial coin offerings used to fund cryptocurrency projects.[49] Boxer Floyd Mayweather had "talked up" Ethereum Max, with him and his team wearing promotional t-shirts for the currency. He, alongside former disc jockey DJ Khaled, was fined by the SEC for failing to let followers know that they were paid promoters for coin offerings.[50] Neither admitted liability, but agreed to pay fines. Mayweather had tweeted, "You can call me Floyd Crypto Mayweather from now on." The 2018 settlement with the SEC included his agreement "not to promote any securities, digital or otherwise, for three years."[51]

When regular folk like us see our sports stars dripping in money due to activities in the crypto world, it is little wonder that we may want to drink from the same well. Yet we need to take proper, professional advice to avoid a severe financial malfunction. "Pump and dump" is the process whereby the value of a cryptocurrency is said to be significantly raised via celebrity endorsement and then dramatically dropped, leaving others out of pocket when demand is high. Mayweather, alongside Kardashian, former professional basketball player John Pierce, and EMAX executives Steve Gentile, Giovanni Perone, and Justin French are defendants in a California federal court class action claiming just this.[52] In a statement to CBS News, EMAX has denied the claims, retorting that "This project has prided itself on being one of the most transparent and communicative projects in the cryptocurrency space."[53]

Are SEC Warnings Good Enough?

Will the SEC's warnings be heeded? Will the various class actions that are beginning to fill the courts and the media give us pause for thought before we dip our hands in our pockets? Or are too many of us unable to resist the temptation of buying into something endorsed, or seemingly endorsed, by our idols, whether we know that they have themselves, been bought or not? Are we at risk of simply being bored by the warnings…?

The defendants listed in a class action lawsuit in the United States Central District Court of California, Western Division[54] reads like the cast list of the best Netflix show: Madonna, Paris Hilton, Jimmy Fallon, Justin Bieber, Gwyneth Paltrow, Serena Williams, Kevin Hart… as well as the Hollywood talent agent Guy Oseary, and the blockchain

start-up company, Yuga Labs, Inc., famous for bringing us its Bored Ape Yacht Club NFT collection. The defendants are sued by plaintiffs bringing an action "on behalf of all investors who purchased Yuga's non-fungible tokens ("NFTs") or ApeCoin tokens ("ApeCoin") between April 23, 2021 and the present (the "Relevant Period"), and were damaged thereby."[55]

> The complaint includes with a statement from the SEC, itself quoting an article in The Atlantic,
>
> Celebrity endorsements – of a product, a brand, an idea, a haircut – have been around for ages, but they've become especially thick on the ground in recent years, as stars have developed their own direct-advertising channels on social media. For people with something to sell, a celebrity's fan base provides an easy, responsible audience.[56]

The accusation in the suit is that:

> The executives at Yuga and Oseary together devised a plan to leverage their vast network of A-list musicians, athletes, and celebrity clients and associates to misleadingly promote and sell the Yuga Financial Products…. Defendants' promotional campaign was wildly successful, generating billions of dollars in sales and re-sales. The manufactured celebrity endorsements and misleading promotions regarding the launch of an entire BAYC ecosystem (the so-called Otherside metaverse) were able to artificially increase the interest in and price of the BAYC NFTs during the Relevant Period, causing investors to purchase these losing investments at drastically inflated prices.[57]

The celebrities, it is said, acted as promoters and solicited sales for Yuga securities to the public. Eager to follow in the glamorous footsteps of their heroes and heroines, consumers sought to snap up the tokens, sending their price sky-rocketing.

As reported in The Hollywood Reporter at the beginning of December 2022, "Trading volume of BAYC NFTs has dropped 93 percent from its height at launch. Similarly, the value of ApeCoin tokens has dropped 90 percent from its all time high."[58] Whether the brand value of those included in the complaint will similarly drop as a result of their association – whether the complaint is successful or not – remains to be seen.

Out of the Ashes…

The collapse of FTX has left bodies in its wake. The Yuga saga will likely do so as well. Individual investors have lost money. Endorsers have lost face. Yet has the crypto sphere lost its charm? With significant amounts of seemingly easy money to be made, that is unlikely. When the post-FTX, post-YUGA, post-current crypto catastrophe dust settles, new talent will emerge as pretenders to take the crown of the erstwhile crypto king, and others will no doubt genuflect to gain their own glittering pieces of crypto jewels.

Prostitution is referred to as the oldest profession. It can denote the offering of sexual services for a fee, or the offering of other talents for personal gain. Is crypto endorsement then, in fact, the newest profession? In this brave new world, there are products to be endorsed, money to be made, and brands to be bolstered − and thus high-profile figures will continue to engage, legitimately or otherwise, knowingly or unwittingly being used, in the high-stakes game of promotion. While kings and subjects, celebrities and civilians alike may have had their fingers burnt in the crypto flame, there will inevitably be others willing to take the risk and try their hands at endorsements. Whether they will survive may depend on the hand that they are dealt in the crypto gambling game, as well as how they handle their own reputations as they sit down at the table.

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It's Great That You're Giving Cash To Your Favorite Charities – Here's Why You Shouldn't

By Jacques E. Boubli

"We make a living by what we get, but we make a life by what we give." – Winston Churchill

According to Philanthropy Roundtable, six out of 10 households in the U.S. give to charity. People are motivated to give for many reasons, including improving their communities, continuing a family tradition, or just plain gratitude.

Choosing which charities to support is a deeply personal issue, and not the focus of this column (CharityNavigator.org can help you discover, research, and analyze nearly 200,000 charities). Nor is how much to give (people sometimes use a percentage of income, percentage of wealth, or percentage of a recent windfall as a guideline) or when to give (if you can afford to give during your lifetime, you get to see your impact first-hand, receive a potential deduction on your income tax return, and reduce the size of your estate for those concerned about being subject to federal and/or state estate taxes).

This article is about *what* to give.

Giving takes many forms, from donating time and sharing expertise to writing checks and giving cash. Many people choose to donate cash to their favorite charities, but they could be making their gifts more efficiently by giving appreciated assets instead.

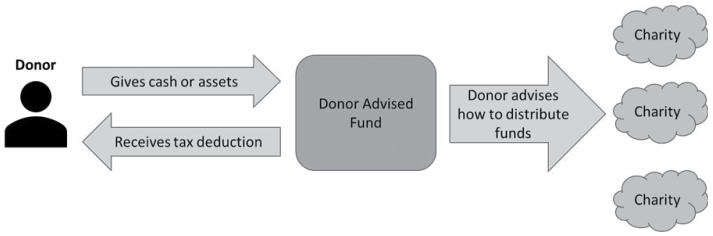
Take Liliana, for example, who wants to make a $10,000 donation to her favorite public charity this year. She has a choice to make. She can gift $10,000 cash or she can gift stock in XYZ company worth $10,000. The stock, which she bought more than one year ago, has an $8,000 unrealized gain. What should Liliana do?

The charity is indifferent. It is going to receive a gift worth $10,000. In Liliana's case, she is entitled to the same $10,000 income tax deduction either way. However, by gifting the stock, Liliana has permanently removed the embedded tax liability from her balance sheet. Keeping the cash is more valuable than keeping the stock with its unrealized gain.

	Donate $10,000 cash	Donate appreciated security outright
Charitable deduction	$10,000	**$10,000**
Ordinary Income Tax Savings *(assumes 35% bracket)*	$3,500	**$3,500**
Capital Gains tax saved *(assumes 15% tax rate on $8,000 gain)*	$ -	**$1,200**
Net tax savings	$3,500	**$4,700**

What if Liliana really liked the stock and wanted to keep it for a long time? She would still be better off gifting the stock and using her cash to buy it again. By doing so, she would reset her cost basis, reducing her tax liability in the future. If the stock Liliana held had an unrealized loss instead of a gain, she would have been better off selling the stock, taking the loss, and gifting cash.

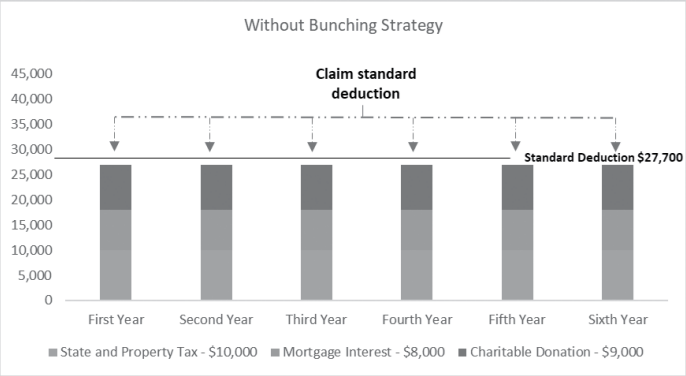
Setting up a donor advised fund (DAF) can be a helpful vehicle for those charitably inclined. Administered by a non-profit organization such as Schwab Charitable, Fidelity Charitable, and the Jewish Communal Fund, a DAF allows the *donor* to make a charitable contribution to the fund and receive an immediate tax deduction, then *advises* the fund to make grants to public charities. DAFs separate the timing of funding and tax deduction from the distribution to charities, which can take place in different years. DAFs also simplify the otherwise cumbersome and time-consuming process of gifting appreciated stock in kind, and facilitates "bunching," which we will get to in a minute.



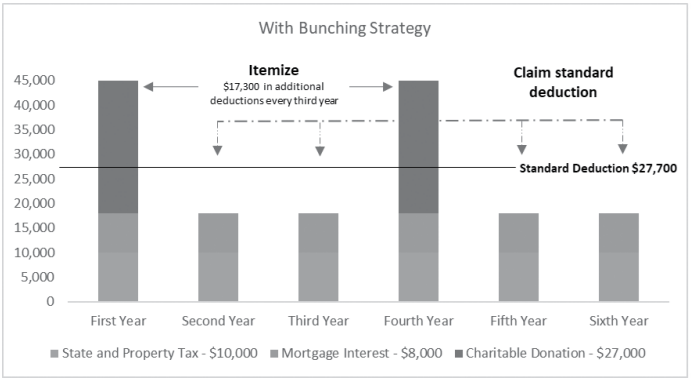
The IRS sets the annual tax deduction limits for donations to public charities as a percentage of one's income. In 2023, the deduction limit for cash contributions is 60% of a person's adjusted gross income (AGI) and the limit for appreciated assets held over one year is 30%. Contributions above these limits can be carried over for up to five years. These limits apply to contributions to a DAF as well. To take the charitable tax deductions, one's *total* deductions must be greater than the standard deduction for their tax filing status. The Tax Cut and Jobs Act of 2017 scaled back or eliminated key commonly claimed deductions, but it also nearly doubled the standard deduction. As a result, more and more people claim the standard deduction, although wealthier people remain more likely to itemize.

For those who take the standard deduction but give to charity regularly, "bunching" donations might make sense. Bunching involves gifting enough funds to charity in a year to be able to itemize the deductions, then taking the standard deduction in the other years. Bunching, combined with utilizing a DAF, allows a person to give regularly to their favorite charities, but time the funding of those gifts so that the donor can take advantage of the higher itemized deduction in certain years.

Take Mike, for example. Mike donates $9,000 each year to charity. He does not benefit from a charitable deduction because the sum of his deductions is less than the standard deduction for his filing status.



By "bunching" three years of donations into one year, Mike can itemize his deductions in bunching years and claim the standard deduction in others.



In this example, Mike is able to deduct $34,600 more of his income.

	Without Bunching	With Bunching
Total Itemized	0	90,000
Total Standard	166,200	110,800
Total Deductions	166,200	200,800
Difference		**34,600**

Depending on one's situation, giving appreciated assets to charity may be more efficient than giving cash. If giving stock, give those lots with the highest percentage unrealized gain to get the most "bang for the buck." Stock awards, such as vested RSUs or shares from an exercise of non-qualified stock options, may provide the greatest tax benefits when donated. As always, you should check with your advisors to get guidance based on your specific goals and circumstances.

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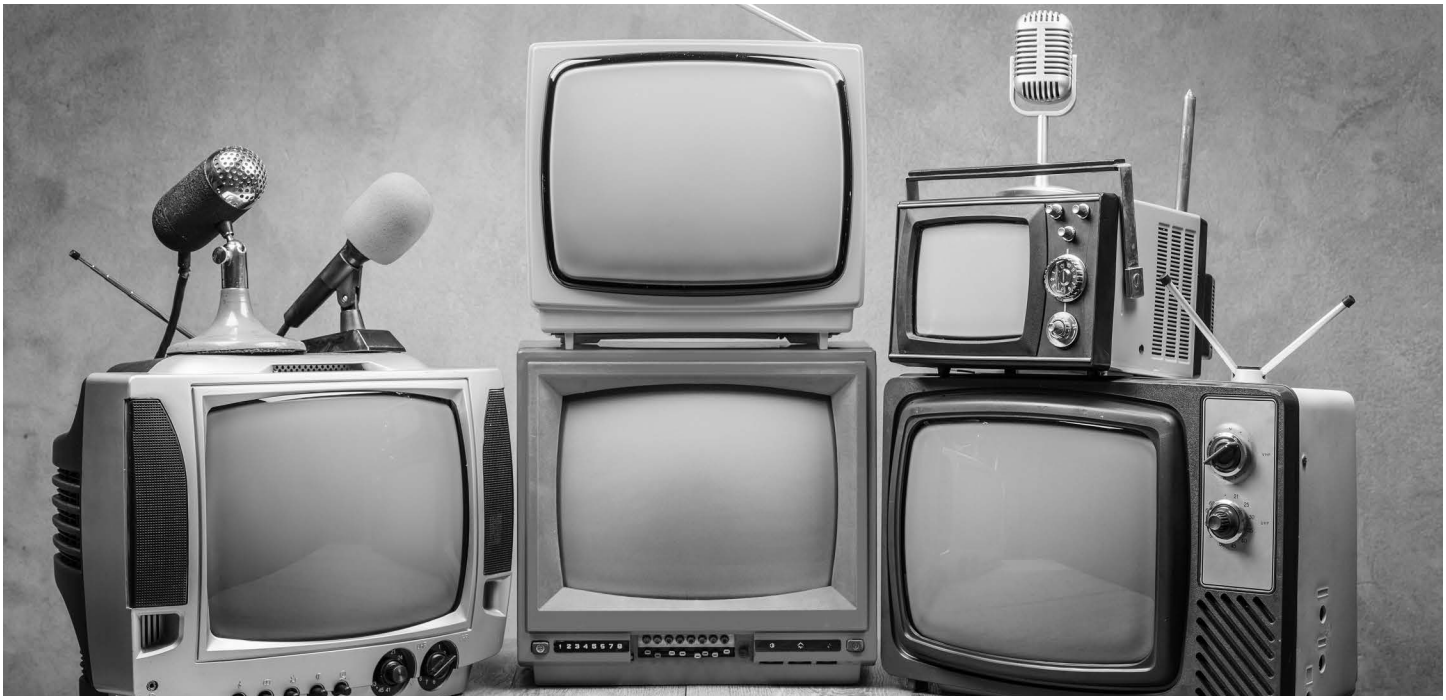
'Video Killed the Radio Star' – and AI Brought It Back to Life:
Addressing Challenges to the Right of Publicity in the 21st Century

By Jessica A. Caso



Introduction

It was a glamorous Sunday evening at the 2014 Billboard Music Awards: Everyone was dressed to the nines, enjoying the lavish entertainment within the posh confines of the Vegas MGM Grand.[1] Midway through the show, the lights abruptly dimmed, and the crowd hushed in anticipation.[2] Suddenly, the curtains dropped to the floor, revealing Michael Jackson clad in a gold jacket and brick red trousers.[3] Descending the stairs, Jackson performed his famous moonwalk to "Slave to the Rhythm" as the crowd watched in awe.[4] From the golden backdrop to the stellar vocals, it was musical genius. There was only one problem: The King of Pop died in 2009.

In the wake of vast technological advancements, the entertainment industry has capitalized on novel methods of artistic creation, including digital replicas, such as holograms and deepfakes.[5] However, when utilizing these techniques on performers that cannot consent – as employed in the hologram of Michael Jackson – the legal implications become murky. In general, performers in the U.S. have a recognized right of publicity, including protection of their name, image, and likeness.[6] However, due to a lack of explicit, federal legislation, the system is severely lacking in guidance.[7] With the recent proliferation of replicas in music and film, the courts have been left to tackle unprecedented, post-mortem publicity rights with variable results.[8] Without definitive protections, the system could effectively chill valuable innovation and technological progress.

This article argues that there should be federalized right of publicity, which can be accomplished through tools within the legal system's existing framework. Part I provides the legal landscape of publicity rights. Part II considers contemporary challenges to the enactment of publicity rights. Part III examines New York's Right of Publicity under Civil Rights Act § 50-f. Part IV delivers approaches for federal reform.

I. The Legal Landscape

A. The Right of Publicity—a Historical Overview

"The intense intellectual and emotional life, and...the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things."[9] Modern technology has advanced to inconceivable levels of sophistication, and the U.S. legal system has endeavored to transform with it.[10] Now, it faces a 21st-century challenge: the right of publicity.

The right of publicity has origins in the traditional right of privacy.[11] An article by Warren and Brandeis from 1890, entitled "The Right to Privacy," proposed a general right "to be let alone."[12] The article famously posited that a person's likeness should further be protected by "fix[ing] the limits of the publicity" given to them.[13] Thus, in addition to privacy,

individuals deserved control over the dissemination of their "thoughts, sentiments, and emotions."[14] A short 13 years later, New York became the pioneer of "likeness" rights, enacting a statute that prohibited the nonconsensual use of a person's name, portrait, or picture "for advertising purposes."[15] However, a distinct publicity right was not acknowledged for another five decades.

B. Common Law's Greatest Hits—Shaping the Contours of the Right of Publicity

The right of publicity continued to develop through the courts. In the 1953 case of *Haelan Laboratories*, the Second Circuit held that an athlete's image contained assignable publicity rights, including "the right to grant the exclusive privilege of publishing his picture" and the right to profit therefrom.[16] In 1954, Melville Nimmer recognized the right of publicity in his illustrious article "The Right of Publicity" as a property right that protected profitable facets of one's name, image, and likeness.[17] Many scholars tend to agree with Nimmer: The value of a performer's likeness is, after all, partially derived from their sole ability to replicate it. Replication has major commercial value when applied to profitable ventures, such as performances and brand endorsements.[18]

Two decades later, the Supreme Court finally addressed publicity rights in *Zacchini v. Scripps-Howard Broadcasting Co.*[19] Balancing the interests of free speech and commercial profit, the court vowed to compensate performers and incentivize their works: By allowing viewers to watch a performer's act for free on a nonconsensual broadcast, they were less likely to buy tickets, "pos[ing] a substantial threat to [the performer's] economic value."[20] This value was "the product of [their] own talents and energy [including] much time, effort, and expense."[21] Thus, unlike privacy, the right of publicity protects the commercial value of a performance, which can only be accomplished through exclusive control over publicity.[22]

Following the *Zacchini* ruling, the right of publicity gained steam. As claims rolled in, state courts attempted to unearth the contours of this right. Notoriously, the "impersonator" cases of *Midler* and *Waits* held liability for nonconsensual imitation of an actor's vocal styling with wide-reaching implications.[23] Over the years, an expansive definition of publicity rights was shaped, protecting subject matter including game show hosts, catchphrases, and even personal race cars.[24]

C. The Modern View—a Patchwork of Problems

While patent, trademark, and copyright laws are federally codified, the right of publicity is state generated. Beginning in 1972, various states enacted right of publicity laws, including California, Ohio, Texas, Nevada, and Washington.[25] At present, approximately half of the U.S. has codified publicity rights.[26] The modern right of publicity is an assorted patchwork of common law, tort law, and intellectual property law. In his seminal treatise, Professor McCarthy described publicity rights as intellectual property rights afforded to an individual to "control the commercial use of his or her identity," the infringement of which constitutes unfair competition.[27]

In general, a cause of action requires (1) a valid right of publicity and (2) infringement of this right by a defendant.[28] The first element requires a state-specific analysis to determine domicile, as protections may vary in length, assignability, and inheritability.[29] The second element, i.e., infringement, requires nonconsensual use that is likely to commercially damage a plaintiff.[30] Courts evaluate infringement through the lens of tests shaped by common laws, which seek to balance the right of publicity against the First Amendment.[31] Due to the dichotomies of these tests, however, the courts have created an amalgamation of inconsistent rulings.[32] To achieve uniformity, Congress must acknowledge the latest proliferation of modern challenges, which are creating new, daunting scenarios unchartered by federal or common laws.

II. Contemporary Challenges

The rapid advance of technology has created a new wrinkle for the right of publicity: digital replicas. Using machine learning and artificial intelligence (AI), the entertainment industry has entered the realm of digital doubles in music and films. Generally, digital replicas come in two flavors, digital clones and digital personas. Each poses new trials for the U.S. legal system.

A. Digital Clones and Personas—"A Clone of My Own"

The first concept, digital clones, entails the use of physical replicas in performances without visible screens. Through an immaculate fusion of software and lighting, artists have elevated impersonations to new heights.[33] Present cloning techniques, such as Computer-Generated Imagery (CGI) and hologram technology, have become virtually omnipresent in the entertainment industry.[34] These feats are typically accomplished through a process known as "retroactive recreation."[35] By exploiting CGI systems like performance capture, software can connect digital "dots" to create fluid, three-dimensional models of characters and environments.[36] As actor Woody Schultz aptly stated, CGI is merely "digital hair, makeup, and wardrobe."[37] Consequently, actors can play multiple characters or new roles when their physical presence is impossible.[38] A prominent example was seen in *Furious 7*, where CGI shots were used to film Paul Walker's scenes after his tragic death.[39] In recent years, retroactive recreation has evolved into live "holograms": Tupac's Coachella performance, Elvis Presley's American Idol routine, and Whitney Houston's Vegas residency all used digital clones to bring the famed artists back to life.[40]

The second concept, digital persona replication (i.e., imitation), has existed as long as photographs.[41] In contrast with

digital clones, digital personas are generally employed in pre-recorded works. "Deepfakes" are considered the latest development in digital persona replication. The visual trickery employs neural networks termed "autoencoders" to encode a person into the latent space of an image.[42] Put simply, deepfakes employ machine learning and artificial intelligence to superimpose a performer's likeness onto another individual, deceiving viewers into believing that they are executing the depicted acts.[43] This technology has become "hyper-realistic," mimicking features, such as an individual's image, expression, and voice.[44] In practice, deepfakes have produced beneficial, commercial results, such as musical parodies, "megapixel resolution" film content, and new personas from recycled footage.[45]

B. The Issue of Post-Mortem Rights

Traditionally, property rights are relinquished upon death and inherited by an estate.[46] However, there is no federal right–in life or death–of publicity.[47] Consequently, in post-mortem publicity cases, courts typically focus on property rights rather than character ownership.[48] As a result, after death, a musician's publicity rights could cease entirely, permitting unfettered use in the public domain. Naturally, this fear has created a heap of estate planning issues.[49]

Conceivably, the closest statute applicable to publicity rights is the Lanham Act, which addresses false advertising and trademark infringement.[50] Similar to publicity protections, the Lanham Act is concerned with incentivizing the commercialization of an individual's likeness.[51] Like an "identifiable use" creating a publicity right, § 43(a)(1) of the Lanham Act creates a civil action for a false designation or statement.[52] However, due to its roots in trademark law, the Lanham Act requires misappropriation of a *trademark* itself, a high threshold for publicity rights.[53] Other federal laws fall short, as well: they are either too strict or contain inadequately narrow protections, such as copyright law's fixation requirements and fair use exceptions.[54]

Several states have attempted to address this conundrum. As California Supreme Court Chief Justice Bird once stated, advertisers should not attain "a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status."[55] Bird posited that post-mortem estate protections would incentivize the "investment of resources in one's profession."[56] Tennessee's Personal Rights of Protection—driven by Elvis Presley's estate—paved the way by creating "freely assignable and licensable" property rights which offered protection against nonconsensual, commercial uses of one's "name, photograph, or likeness."[57] Other states, including California, Texas, Nevada, and Florida, later enacted similar legislation.[58] Although conceptually similar, these state-devised laws vary in licensing, transferability, and length of protection.[59] Thus, without federal legislation, state-made laws may conflict on numerous grounds, such as domicile and choice-of-law issues.[60]

III. New York's Right of Publicity

Despite its pioneering role in 1903, New York was the twenty-fourth state to codify post-mortem publicity rights. In 2020, the New York State Senate and Assembly overwhelmingly passed the Right of Publicity bill.[61] Effective as of May 29, 2021, the legislation was appended to the existing New York Civil Rights Law, leaving the original Right of Privacy laws intact.[62]

A. New York Civil Rights Law § 50-f—a Post-Mortem Right of Privacy

Section 50-f addresses the right of publicity for "deceased performers," "deceased personalities," and "digital replicas."[63] The provision applies a 40-year term of protection to persons who died on or after May 29, 2021, while domiciled in New York State.[64]

1. § 50-f(1)—The "Deceased Performer" and "Deceased Personality"

Under § 50-f(1)(a), a deceased performer is defined as an individual "who, for *gain or livelihood*, was *regularly engaged* in acting, singing, dancing, or playing a musical instrument."[65] Here, two issues are apparent. First, "for gain or livelihood" is overly inclusive, encompassing more than just professionals: Would college students in a local cover band be protected? What about online influencers that sing? Second, "regularly engaged" is rather vague, lacking a defined frequency; engagement can certainly vary based on a performer's line of work.[66]

Section 50-f(1)(b) defines a deceased personality as an individual "whose name, voice, signature, photograph, or likeness has *commercial value* at the time of his or her death."[67] Perhaps to cover the ambiguities of § 50-f(1)(a), this definition is even more expansive. The qualifier of "commercial gain," unfortunately, is correspondingly vague, skirting away from a defined threshold. How much value is considered commercial—one dollar, or one million? When is protection equitable? Furthermore, does protection encompass amateur and retired performers? Unfortunately, the courts may be left to clarify these uncertainties.

2. § 50-f(1)(c)—"Digital Replicas"

Section 50-f(1)(c) defines a digital replica as an "original, computer-generated, electronic performance of an individual within an "original expressive sound recording or audiovisual work in which the individual *did not actually perform*," which must be "so realistic that a *reasonable observer* would believe it is a performance by the individual being portrayed," subject to exclusions for remastering or duplications "entirely of

the independent fixation of *other sounds*."[68] SAG-AFTRA's website offers examples of misappropriation, including use of musician holograms, deceased performers in ads, and deepfake algorithms.[69] Here, a "reasonable observer" standard is prone to a subjective interpretation, which can vary based on a performer's work.[70] The law's exclusions complicate this uncertainty, as "other sounds" may conceivably include AI voice cloning and other potentially nefarious techniques that should be thwarted.[71]

3. § 50-f(2)—Establishing Liability and Exceptions

Section 50-f(2)(b) provides a private right of action for a deceased performer, wherein "us[ing] a deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work shall be liable . . . if the use is likely to *deceive the public* into thinking it was authorized by the person or persons."[72] Now, not only must a replica be believable to a "reasonable observer," but one must also assume that it was authorized.

Liability for a deceased personality is established under the expansive definition of § 50-f(2)(a), which provides that "[a]ny person who uses a deceased personality's name, voice, signature, photograph, or likeness, *in any manner*, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases" without consent "shall be liable . . ."[73] Given the wide breadth of performers under § 50-f(1)(b), a plethora of individuals would have the right to sue for infringement; the law lacks a concrete standard to limit undue claimants.

Various exceptions–similarly vague–are provided under § 50-f(d). For example, the statute excludes expressive works, including satires, works of newsworthy value, and commercial sponsorships.[74] While carving out commendable First Amendment protections, the digital avatar newsworthy exception complicates matters, excluding any "representation of a deceased performer *as himself or herself*...except in a *live performance* of a musical work...or an advertisement or commercial."[75] This has the potential for abuse: An infringer could evade liability in myriad ways through a pre-recorded performance.[76] Overall, while a monumental step, the law and its vague exceptions can frustrate lawmakers' intentions.

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IV. The Sequel—Potential Reforms

A. The Need for Reform—"Help!"

Legislation addressing the right of publicity is anything but consistent. While state efforts offer promise, they are often riddled with ambiguities.[77] As a result, enforcement regularly leads to overly broad or narrow constructions. Thus, a proper balance of thresholds is needed.

First, if legislation is construed too narrowly, artists may lack adequate protections and lose faith in the system; this is exemplified in New York's statute, which only safeguards specific digital misappropriations for the deceased.[78] Without proper protections, performers may discontinue their creative efforts in fear of costly litigation. Even worse, narrowly tailored legislation could stifle innovation valuable to the entertainment industry, including CGI and holographic effects that provide pioneering visuals and budget reductions.[79] Thus, it is paramount to create a legal landscape that promotes "the Progress of Science and useful Arts," as fervently sought by the Founding Fathers.[80]

On the contrary, broadly construed legislation would open the legal floodgates. For example, if "commercial gain" for deceased personalities comprises *any* amount of monetization, estates could overburden the courts with frivolous claims.[81] Moreover, with the rapid progression of technology, it is practical to foresee a time when replicas will all appear realistic to a "reasonable observer," creating further inconsistencies within the courts.

B. A Proposal for Federalized Publicity Rights

Now, more than ever, the U.S. needs a federal right of publicity. Legislation must reflect the potential implications of modern technology with clear guidelines and definitions.

1. Publicity Rights May Be Grounded in the Commerce Clause

Under Article I, § 8, Clause 3 of the Constitution, Congress is granted the power to "regulate Commerce with foreign Nations, and among the several States."[82] Scholars have theorized that, due to the proliferation of music, film, and social media distribution, Congress may regulate the right of publicity under the Commerce Clause: The tickets, music, and t-shirts sold at concerts alone significantly impact interstate commerce.[83] This approach has various advantages

over the use of the Lanham Act, the Copyright Act, and the patchwork of state laws.

Foremost, the right of publicity may achieve robust coverage under the guidance of the Commerce Clause. As the Supreme Court held, Congress's power "over interstate commerce is plenary and complete in itself, [and] may be exercised to its utmost extent."[84] Thus, legislation may extend beyond the realm of trademark and copyright laws. In addition, legislation would offer uniform protections that prevent jurisdictional gamesmanship. For example, in *Experience Hendrix*, the Washington District Court ruled Washington's Personality Rights Act (WPRA) unconstitutional, only for the Ninth Circuit to reverse based on commerce within state borders.[85] The ruling squarely contradicted prior Ninth Circuit cases, creating a bifurcation of logic among the federal circuit.[86] Therefore, estates of individuals domiciled in unfavorable states could bring claims within Washington for preferential treatment.[87] Under a uniform federal statute, rulings would apply consistently in all states, preventing unnecessary hurdles and forum shopping.

2. Equality, Clarity and Uniformity—Balancing Publicity and First Amendment Rights

When drafting federal legislation, Congress must ensure to comport rights with commercial use; in doing so, they will maintain a proper balance with First Amendment rights.[88] Second, any statute must be drafted with clarity, containing well-defined thresholds. Finally, an organization such as the Uniform Law Commission may be employed to draft the legislation, which would ensure a uniform application among the 50 states.

First, laws must include proper, descriptive definitions of a "performer" and a "personality" carefully tailored to equitable criteria. For example, a qualifier of "for gain or livelihood" must explicitly address nuances—for public figures and private individuals–regarding commercial gain to avoid infringement of First Amendment rights.[89] Second, when establishing liability, Congress must avoid vague thresholds, such as acts "regularly engaged in." This can be accomplished through explicit, minimum standards and clear registration requirements; by determining eligibility accurately in advance, courts can avoid a stream of superfluous claims, saving time and resources. In addition, legislation may explicitly list certain prohibited uses within distribution and solicitation means.[90] However, Congress should avoid a comprehensive list to prevent issues of interpretation.[91] As seen in New York's legislation, sloppy exceptions, such as "any representation, except for a live performance", could be prone to abuse.[92]

3. Flexibility—Adopting a Nuanced Approach to Technologic Advances

Finally, Congress must adopt a nuanced approach that accommodates current and future technologies. In doing so, they can look to the history of *sui generis* laws, wherein tailored laws were enacted to fill gaps in intellectual property laws. For example, in 1984, Congress enacted the Semiconductor Chip Protection Act to protect integrated circuits, whose ownership, protection, and remedies were not addressed under the Copyright Act.[93] For publicity rights, *sui generis* laws can address nuances in rights as technology advances, such as new AI and deepfakes. For example, the standard of a "reasonable observer" may differ depending on the type of technology used. In addition, legislation could explicitly forbid certain known or potential sources of malicious replicas.[94]

Overall, a federal right of publicity law is achievable through a comprehensive, flexible approach with careful attention to language and competing rights.

V. Conclusion

The entertainment industry has consistently developed new and exciting ways to dazzle spectators. As the line between deception and reality blurs, we find ourselves asking: What *is* real? Recently, an uncanny deepfake video by Dutch filmmaker Bob de Jong garnered over 6.5 million views.[95] The clip, which portrayed an extremely convincing impression of Morgan Freeman, asked us to question our perception of reality—at least, in the modern sense–by stating:

> What if I were to tell you that I'm not even a human being—Would you believe me? What is your perception of reality? Is it the ability to capture, process, and make sense of the information our senses receive? If you can see, hear, taste, or smell something, does that make it real? Or, is it simply the ability to *feel*?[96]

Using holographic effects and CGI, filmmakers have entered a new era of "storytelling without limitations."[97] As scholars Warren and Brandis recognized over a century ago, Congress and the courts are tasked with enacting publicity legislation that accommodates ever-changing "political, social, and economic changes . . . to meet the demands of society."[98] At present, the immiscible blend of federal and common law publicity rights is wholly inadequate. While many states have ratified local statutes, they are ill-equipped against the "onslaught of legal questions" caused by holographic reincarnations of performers and destructive deepfakes.[99] This is exemplified in New York's Right of Publicity laws, which have created overinclusive rights for deceased

personalities while limiting posthumous rights of performers in digital replicas.[100]

A federalized right of publicity must be enacted to counter the issues plagued by state legislation and common law. In doing so, Congress must carefully scrutinize statutory language to ensure a healthy balance of considerations including appropriate thresholds, uniformities, and flexibilities to accommodate technological advancement.[101] Overall, a federalized right of publicity will ensure the protection of an artist's likeness for many decades after their passing.

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30. *Id.* In some cases, commercial advantage is also required. *Id.*
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46. Laney, *supra* note 10 at 365.
47. *Id.* at 368.
48. *Id.* (discussing the California Supreme Court case of *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979)).
49. *Id.*
50. 15 U.S.C. § 1125
51. *See id*.
52. 15 U.S.C. § 1125 (a)(1)(B)
53. Laney, *supra* note 10, at 369-70.
54. Kocsis*, supra* note 41, at 640-42.
55. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 846 (1979).
56. *Id.*
57. Laney, *supra* note 10, at 367.
58. *Id*. at 365-68.

59. *Id.* For example, California's protections last 70 years, versus Tennessee's 10 without subsequent estate use. *Id.*
60. *Id.* at 370.
61. Judith B. Bass, *New York's New Right Of Publicity Law: Protecting Performers And Producers*, 93 N.Y. St. B.J. 33 (2021); N.Y. Civ. Rights Law § 50-f.
62. Bass, *supra* note 61.
63. *See* N.Y. Civ. Rights Law§ 50-f(1).
64. N.Y. Civ. Rights Law § 50-f(8).
65. N.Y. Civ. Rights Law§ 50-f(1)(a) (emphasis added).
66. Roesler & Hutchinson, *supra* note 18.
67. N.Y. Civ. Rights Law§ 50-f(1)(b) (emphasis added).
68. N.Y. Civ. Rights Law § 50-f(1)(c) (emphasis added).
69. *Digital Image Rights & Right of Publicity*, SAG-AFTRA https://www.sagaftra.org/get-involved/government-affairs-public-policy/digital-image-rights-right-publicity.
70. Roesler & Hutchinson, *supra* note 18.
71. *Id.*
72. N.Y. Civ. Rights Law§ 50-f(2)(b) (emphasis added).
73. N.Y. Civ. Rights Law § 50-f(2)(a) (emphasis added).
74. *See* N.Y. Civ. Rights Law § 50-f(2)(d).
75. N.Y. Civ. Rights Law § 50-f(2)(d)(ii) (emphasis added).
76. Roesler & Hutchinson, *supra* note 18.
77. *See* Dhruva Krishna, *Deepfakes, Online Platforms, And A Novel Proposal For Transparency, Collaboration, And Education*, 27 Rich. J.L. & Tech. 4, 8 (2021).
78. N.Y. Civ. Rights Law § 50-f(2)(b).
79. Krishna, *supra* note 77.
80. *See* U.S. Const. art. I, § 8, cl. 8.
81. Krishna, *supra* note 77.
82. U.S. Const. Art. I, § 8, cl. 3.
83. Loren C. Shokes, *Life After Death: How To Protect Artists' Post-Mortem Rights*, 9 Harv. J. Sports & Ent. L. 27, 38 (2018).
84. *Id.* (citing *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942)).
85. *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011) *rev'd*, 762 F.3d 829 (9th Cir. 2014).
86. *See* Milton H. Greene, 692 F.3d, 983, 1000 (declining to apply California's right of publicity to Marilyn Monroe).
87. *Experience Hendrix*, 762 F.3d at 837.
88. Shokes, *supra* note 83 at 40.
89. *See id*.
90. Kocsis, *supra* note 41 at 646.
91. *Id.* ("[A] comprehensive ban of illicit deepfakes would almost certainly be unconstitutional").
92. N.Y. Civ. Rights Law § 50-f(2)(d).
93. *See* U.S. Copyright Office 100, 1-2 (2012), https://www.copyright.gov/circs/circ100.pdf.
94. Kocsis, *supra* note 41 at 647.
95. Daniel Piper, *This Scarily Realistic Deepfake Is Terrifying Twitter*, Creative Bloq (Dec. 19, 2021), https://www.creativebloq.com/news/morgan-freeman-deepfake.
96. *This Is Not Morgan Freeman–A Deepfake Singularity*, YouTube (July 7, 2021), https://www.youtube.com/watch?v=oxXpB9pSETo (emphasis added).
97. Laney, *supra* note 10.
98. Warren & Brandeis, *supra* note 9.
99. Anthony McCartney, *Holograms Present Celebs With New Afterlife Issues*, MPR News (Aug. 21, 2012), https://perma.cc/KCN7-45R5.
100. *See generally* N.Y. Civ. Rights Law § 50-f (McKinney 2021).
101. Infra § IV.

NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

ANNUAL MEETING

January 19, 2023

Entertainment, Arts and Sports Law Section Chair

Ethan Bordman, Esq.
Ethan Y. Bordman, PLLC
Ridgewood, N.J.

Program Chairs

Jill Pilgrim, Pilgrim & Associates Arbitration, Law & Mediation LLC, New York, N.Y.
Pam Lester, Lester Sports and Entertainment, Inc., Skillman, N.J.
Barry Skidelsky, New York, N.Y.

Speakers
Ethan Bordman, Esq. | Section Chair; Attorney & Counselor
Ethan Y. Bordman, PLLC, Ridgewood, N.J.

Approaches to Negotiation in Sports, Entertainment, and Other Universes
Daniel A. Etna | Partner, Co-Chair, Sports Law Group, Herrick, New York, N.Y.
Arthur McAfee, III | Senior Vice President, Football Operations, NFL, New York, N.Y.
Gary Noesner | FBI Chief Hostage Negotiator, Retired, Consultant and Public Speaker, Virginia
Maggie Ntim | Founder and International Sports Agent, Trinity 3 Agency, New York, N.Y.

Ethics in Negotiating in Sports, Entertainment, and Other Universes
Devika Kewalramani | Partner, Moses Singer, New York, N.Y.
Carla Varriale-Barker | Partner, Segal McCambridge
Professor of Sports Law and Ethics, Columbia University Sports Management, New York, N.Y.

Regulation of Social Media and Online Content
Carl Szabo | Vice President & General Counsel, Net Choice
Scott Wilkens | Senior Counsel, Knight 1st Amendment Institute at Columbia University, New York, N.Y.
Ronnie London | General Counsel, Foundation for Individual Rights and Expression, Washington, D.C.

Ethan Bordman: Good afternoon, everyone. We're going to call the meeting to order. My name is Ethan Bordman. I'm chair of the Entertainment, Arts and Sports Law Section. Thank you everyone for being here today in person and virtually. We're so glad that you're attending the meeting. We've got a great event today. It's been three years since we had our live meeting back in 2020 and it's great to see everyone here and great to see the attendance. So thank you so much. We've got a little bit of business here we're going to take care of before we start our meeting. First thing we're going to start with here today is the presentation of the EASL Cowan/Bresler Scholarship Awards. I want to thank the co-chairs of the Phil Cowan/Judith Bresler Memorial Scholarship Committee, Aniqa Chowdhury and Kajon Pompey.

They did an amazing job. I know they're out there virtually attending. This was their first time chairing and it was great, and I look forward to having them on for next year as well. The Phil Cowan/Judith Bresler Memorial Scholarship was started in 2005 and was named after Phil Cowan, a former chair of the EASL Section. The scholarship offers up to two awards for $2,500 each on an annual basis to students interested in the areas of entertainment, arts, and sports law. The award was renamed in 2019 to commemorate Judith Bresler as well, who was also a former EASL chair who did a tremendous job and made a tremendous contribution to

the success of this opportunity. The competition is open to all students of accredited law schools throughout New York State, Seton Hall and Rutgers in New Jersey, as well as a number of other law schools throughout the U.S. at the Committee's discretion.

Two papers are chosen annually and the authors of the winning papers are each awarded the scholarship and the winning papers are published in the *Entertainment, Arts and Sports Law Journal*.[1] The winners are also given a free year's membership to the Entertainment, Arts and Sports Law Section, so I hope you take advantage of that. I'm going to ask our two winners to come up. Josephine Luck, a second year student at Fordham Law School, who wrote, "*Lanier v. President and Fellows of Harvard College*: Is There Room for Descendants of Enslaved Peoples in the Domestic Legal Framework for Restitution and Repatriation of Individual, National, and Communally Owned Property?" And Jessica A. Caso, who is a third year at St. John's, "'Video Killed the Radio Star' – and AI Brought it Back to Life Addressing the Challenges to the Right of Publicity in the 21st Century".

So, we're going to congratulate these students. We wish them the best. So to Jessica, Josephine, thank you. I also have your certificates. Here you go. We're so glad to have them participate. We had a really great turnout this year for Cowan/Bresler, a number of really great papers. I get a copy of all the papers and read them, and they were very, very good this year. So congratulations to those winners, we wish them the best and also to Jessica who is a third year, taking the Bar Exam.

So, the next thing we have to do is review our bylaws. Earlier this month, the Executive Committee of the Entertainment, Arts and Sports Law Section approved this copy of EASL bylaws, which were sent out last week for all EASL members to review and make any comments. I'd like to make a motion for the membership of the Entertainment, Arts and Sports Law Section to accept the bylaws and engagement Guidelines that were sent last week. Second by Jill Pilgrim. Thank you. All in favor, please raise your hands in your favor of accepting the EASL bylaws that were sent out last week. Any opposed? No? It's unanimous in person. I know virtually, I believe there's a poll going out from Sharmin. There's a poll going out to you in just a minute or so.

The Executive Committee also needs to elect certain members. The EASL Nominating Committee has asked Barry Skidelsky to be the Section's Representative to the House of Delegates to the New York State Bar Association. Barry's term is going to start June 1, 2023 and the Alternate in the House of Delegates will be Barry Werbin; they are both former chairs of the Section. So all in favor of, I'll make a motion to accept Barry Skidelsky as the House of Delegates Representative beginning June 1, 2023 and Barry Werbin to be the Alternate. Second, thank you Jill. All in favor, please raise your hands. Any opposed? Any abstained? Great, we're going to have the people who are virtually going to be voting very soon too.

I want to thank everybody here for attending. It's been three years since we've had our event in person. It's great to see everybody. It's great to see such a turnout and I really do appreciate it. Thank you to Pam Lester, Jill Pilgrim, and Barry Skidelsky, who are on the Program Committee for today. We have great panels of speakers. I'm really excited about it. I want to thank the members for giving me the opportunity to be the chair of the Section. Thank you for your trust. Thank you to all of the EASL members for the great work that you guys do, and I look forward to more great events in the coming year. I want to also thank Herrick Feinstein and Dorsey & Whitney, two of our sponsors for today's events and our reception.

Thank you so much for all your support and I ask the attendees here to please get involved. For those of you who are watching virtually as well as for those of you that are here in person, if you'd like to get involved with the EASL Section, we always find an opportunity for you in something that would interest you. Please just come up to me while the event is happening or at the reception to introduce yourself and we're glad to get you involved with the Section. With that, I think we're going to check on the results of the Nominating Committee and the revisions. If there's any other business, please, if anybody wants to bring up anything. Okay, great. So we're going to start in about 10 minutes with our first panel on negotiating entertainment and sports and other universities.

Sharmin Woodall: For those who are attending virtually, good afternoon and welcome to the Entertainment, Arts and Sports Law Section's Annual Meeting 2023, sponsored by the Entertainment, Arts and Sports Law Section and the Committee on Continuing Legal Education of the New York State Bar Association. Please note that you must remain online for the duration of the program. [Instructions for CLE followed.]

Approaches to Negotiation in Sports, Entertainment and Other Universes

Jill Pilgrim: Okay, good afternoon everyone. We would like to thank the New York State Bar Association for hosting the Annual Meeting and this Entertainment, Arts and Sports Law Section program as part of the Annual Meeting. This particular program on negotiation is a program of the Sports Law Committee. I am Jill Pilgrim, co-chair with Pam Lester of the Sports Law Committee of EASL. We encourage all of you who are present in person or remotely and all your friends and family who have an interest in sports law to please consider joining EASL and becoming a part of the Sports Law Committee.

I'm here to introduce the moderator of the program today, my colleague and friend of many decades, Pam Lester, and as I mentioned, co-chair of the Sports Law Committee of EASL. Pam has spent her career in legal and business positions in pro sports and the entertainment industries. She is the former chair of the ABA Forum on the Entertainment and Sports Industries and the former president of the Sports Lawyers Association. She has spent most of her time lately speaking on the topic of negotiation, the topic of this particular panel. I give you the moderator of this excellent program today to introduce the panelists and to move forward with the program, my co-chair, Pam Lester.

Pam Lester: Thanks so much, Jill, and welcome everybody. For those of you who don't know Jill, she has extensive experience in the sports world and she doesn't want to be introduced. So I'll leave it at that, but she's awesome. All right, well welcome. With bar associations now really focusing on skills, we thought that having a program of negotiation skills would be helpful for all of us, in addition to our two credits for CLE. We negotiate every day both in our personal and professional lives and we have an amazing panel of speakers here. And I'm going to do brief introductions of them and then give them each a chance to make their introductory comments, add anything they want to about what they do, and we will have questions at the end. We want this just to be an informal discussion and hopefully you will all stay very well engaged.

So to my immediate right is Arthur McAfee. And Arthur currently works for the NFL as senior vice president, football operations policy, education and relationship management. He was also an SVP of player engagement for the NFL. And Arthur has a unique experience in negotiation, because he has been on both sides of the table. He also worked with the NFL Players Association and was part of the collective bargaining team on the CBA. So, clearly he has extensive negotiation experience, and he's also a board member of the Sports Lawyers Association. So welcome, Arthur.

Next to Arthur is Maggie Ntim. I met Maggie, knowing her background as a soccer agent, she has her own company, which is Trinity 3 Agency, but she connects the dots between music, sports, events, technology, and brands. She specializes in active representation, talent management, sponsorships, partnerships, NIL, and all sorts of experiential marketing activities. And I'm particularly happy to say that Maggie, despite her years in the profession, and also I want to mention that she has, which I found very interesting, a number of degrees, including certification from the Fashion Institute of Technology on sneaker design. But most importantly for us, she is a 1L at Northeastern Law School. So welcome to Maggie.

And then to my far right, Dan Etna and thank you, Barry Werbin, for helping me get Dan on the panel. Dan is the co-chair of the sports practice at Herrick Feinstein. Again, amazing list of clients: New York Yankees, Chicago Cubs, Brooklyn Nets, Tampa Bay Lightning, Swansea City A.F.C., DC United, NYC Football Club. So we do have soccer represented and he has repeatedly been named as top sports lawyer in Best Lawyers of America, and he also contributes frequently to broadcast and print media and negotiates all sorts of rights, from franchise acquisitions and sponsorships, and even a memorabilia agreement.

So if you look, and everyone here has submitted bios and I suggested you read them, it's very impressive. Now on the far right, I've already been asked, what is Gary Noesner doing here? Gary has unique experience. He served 30 years with the FBI as an investigator, instructor, and negotiator. He retired in 2003. He was the first FBI hostage negotiator to serve as chief of the FBI's Crisis Negotiation Unit, Critical Incident Response Group. He has served as a consultant helping assist those who have experienced international kidnappings and [is] a consultant...on the Netflix show...*Waco*. He has a book that I recommend to all of you called, "Stalling for Time: My Life as an FBI Hostage Negotiator." And I've heard Gary speak many times and his experience is so helpful to all of us who sit in our rooms with negotiations. And also Gary, when you introduce yourself, maybe you'll talk about the shows that you're working on that are coming up with Showtime and Netflix.

So with that, just want to get started. For me, I think that negotiation as lawyers, we all know that what we learned in law school is two words, which are, "it depends." There's no one way, it's not prescriptive. When I speak about negotiation, I'm often asked not by lawyers, "What's the one thing I can say in this situation? What advice can I follow?" And to me, I think that negotiation is really about concepts. It's about certainly interpersonal skills and communication, and I refer you to Gary's articles that he submitted on crisis negotiation. Also, Dan had submitted on a great outline of topics in negotiation and I think as you often say, it's always situation specific. So, take the advice that works for you, aligns with your personality.

I know that women are often told that you have to behave in certain ways in negotiations and I'm not a believer in that. And even if there's truth to the research, I think men can be empathic as well as women. And I'm always the silent protest of one, in terms of not perpetuating stereotypes. So, again, the idea is to hear from others. I think we learn from each other and then figure out in situations what might be beneficial to you as we go forward. So, with that, why don't we start out, and Gary, why don't we start with you in terms of introductory comments and in terms of your background

and what you emphasize in negotiation skills. And we'll go through the panel and then I have a number of questions.

Gary Noesner: Well, thanks Pam, and appreciate being here with the other panelists. My background is in law enforcement, hostage crisis negotiations. As Pam said, I spent a good bit of my 30-year FBI career as a negotiator working a wide range of cases: prison riots and hijackings, two rounds in Peru when the Japanese ambassador's residence was taken. And worked about 120 kidnappings involving American citizens abroad, right wing militia groups, religious standoffs. A lot of the big events that occurred in the last several decades– my unit was involved in helping try to resolve those.

So what we learned through that process is really effective communication skills and the lessons we learned, if one understands that they work in extremely tense life and death situations, but surely they'll be helpful to us in our normal work and family life. And it really revolves around being a good listener. So that's some of the things I'll talk about when we have the opportunity. But by way of introduction of, I've written a book, "Stalling for Time," I've been involved in some TV projects, as Pam suggested, there's some more coming up on the horizon and I'll mention those later. Thank you.

Pam Lester: Oh, thank you, Gary. And from Gary we'll move on to Dan, and then we'll go to Maggie and Arthur.

Dan Etna: Well, before I begin, I must say that I feel very inadequate and overwhelmed on this panel, but Gary, you're trying to convince people in AK-47s down and I'm talking about negotiating a media rights deal. But nonetheless, I'll do my best, pardon the pun of the soldier around here. As was said in my introduction, I'm a co-chair of the Sports Law Group at Herrick Feinstein. And we are generally very team centric in terms of representation. I used to have a rather robust roster of individual athletes, but I ended up firing most of them because they just wouldn't listen to me after signing contracts that they just thought were just another piece of paper. But I digress. Essentially, like I said, we are very team centric and also involved in anything on or about the stadium, whether it's media rights, concession services, premium seating, etc., that's really where we're at, as well as team acquisition in this position and acquisition of minority interest, etc. along the way. Thank you.

Pam Lester: Maggie?

Maggie Ntim: Hello everyone. Thank you, Pam. Thank you, Jill. Thank you everyone for being here. I'm truly honored to be on this stage. Usually this happens a lot. I'm always the only woman on the stage, but I'm here. And like Pam said, I have years of experience within the music business, sports, tech events, partnerships, mainly my day-to-day consists of representing players within the National Women's Soccer League, Major League Soccer, as well as some teams in Europe like VFA, English Premier League. And so I spent a lot of time negotiating contracts and all the different aspects that come with that, as well as endorsements. And I run a boutique agency and am fairly small, but we have about 20 clients and also have retainers and relationships with other brands—Pepsi is a client. So we do a lot and I'm excited to talk about all the negotiations.

Arthur McAfee: I have one client, that's the National Football League. And I would say that I have had the good fortune to work in the sports space for a long time. I started my career in the NCAA in enforcement, and moved from there to work on the player negotiation side at IMG, on the team sports side, particularly in football, player negotiation space. And then as Pam mentioned, I spent a long 17 years at the National Football Players Association, working on CBA negotiations and player compensation, working conditions, some benefits. From there also I said would say, the great fortune or the best fortune involved to have the opportunity to work on the Olympics side, work with the U.S. Men and Women's Track and Field teams to assist in their negotiations with the Federation about their compensation going into the Brazil games. And then at the same time having, I guess the better fortune, of working with the U.S. Women's National Soccer team and their CBA negotiations for equal pay, also going into the Rio Games.

And most recently working the settlement, having the settlement with the Federation. Currently, I work in football operations and we sort of manage everything that happens around the game on game day. Now it's not just one game day, it's Sunday, Monday, and Thursdays, and during postseason, Saturdays. And we operate inside the stadium, all the procedures and protocols that operate within the game, from grass height, care with fields, to sound within the stadium–if it's a dome stadium, whether it's open or closed during the game. We also hire the officials, so we get lots of conversations about that. We also review them, assign them to postseason play. We are in operation of player care. And so we work a lot with the Players Association and in collaboration with our players' health and safety. And then we work in the technology space with our broadcast partners, television and being able to deliver the games so that it's done within three hours and everybody can watch the game and then go do something else. So that's sort of the quick gist of moving forward.

Pam Lester: Thank you, Arthur. I want to point out that I submitted some materials that include a lot. To me, I think negotiation, I basically see it in maybe three stages: there's a preparation research phase, the actual negotiation, and focusing on communication skills, as Gary emphasized. And clearly as far as I'm concerned, critical thinking, problem-

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Ethan Bordman presents Josephine Luck and Jessica Caso with awards for their winning articles

Pam Lester and Jill Pilgrim

Jason Baruch with members of the Theater and Performing Arts Committee

Dan Etna, Maggie Ntim, Arthur McAfee, Pam Lester

Scott Wilkens, Carl Szabo, Ronnie London, Barry Skidelsky

Entertainment, Arts and Sports Law Section reception

solving, and then the post negotiation. Maintaining relationships, sports, entertainment, it's all about relationships and thinking.

And when I talk about negotiation, I would say basically three things: Focus on your objectives, think long term, and choose your battles wisely. And it's interesting to me to hear from Maggie that she's often the only woman on the panel. In 2023, when Jill and I, two of the first women lawyers in pro sports, we were always the only woman because there weren't really many of us. So I would like to see that continue to change. So I guess that first question for the panel, let's start talking about preparation and anything unique that is the preparation–we're not only talking about research on what our deal terms are, and as Dan mentioned earlier, I really related to this in his presentation about a pre-negotiations negotiation or negotiating with your own team.

I always sort of joke, but not really, that my toughest negotiations were all internal. Trying to get the team aligned before I went into negotiations because people had their own opinions or were afraid to voice their opinions. So let's start with Arthur and go through in terms of what you do to prepare for negotiation? And clearly there's mental preparation included as well. I don't think that Gary had the luxury of being able to research what the deal terms might be in a hostage or crisis situation or who it is. Although I've learned that there are a lot of repeat customers for hostage negotiators, which was news to me. Arthur submitted a uniform player contract and then the materials I submitted, I had links to the various CBAs in professional sports and that might be helpful. So, Arthur, anything particularly since you've sat on in so many positions in a negotiation, anything helpful in terms of preparation that you think you'd like to share?

Arthur McAfee: Well, certainly. So I think from my position, I think what we do is quickly, since we're representing groups of athletes for collective interest of the league, our first thing is to try to establish what those goals are: What is it that we're trying to achieve on behalf of the player or the ownership group? And it's generally required that there is, generally what we get to have is some history with all the previous CBAs. And throughout the year we have communications with both sides, both have the opportunity to identify their issues that they would like to negotiate or be willing to trade off to achieve their goals. And on the player side, it was quickly a list of compensation was always one of those things that there was at the top of their list. On the football side, it was guaranteed contracts, working conditions, which are practice sessions that occurred during the off-season between what the off-season schedule would be between April and July and then from August throughout through the season.

So we confer with our clients to determine what will be the appropriate practice or working conditions for them, ideally around compensation, ideally around how we go. We will work on contracts for them, the list of benefits and medical care that will be appropriate for their time of service. And then on the flip side, that just so happens that management is also interested in those things, that those are costs of employment for them. And so on that side...is...our full cost of compensation...on the business side; the total player cost being compensation and salary. And then what is the system and how players being compensated, how they would assist the teams in acquiring players in the draft system or free agency system. Manage the day-to-day activities in terms of the, again, working conditions. And so once we were able to quickly identify what those are, we began to assign teams to work on each of those specific areas. So that's quite sort of what we do in terms of on the league side.

Pam Lester: Thank you, Arthur. Maggie, as you talked about preparation too, I'd like to know, and since you represent professional athletes and entertainers, how you keep them informed, whether you even have a client present in negotiation, and why or why not?

Maggie Ntim: Yeah. I mean it takes a lot of preparation and I think mainly it's similar to the points that Arthur touched on, but it's more of the other side because I'm more so the advocate for the athlete. And so there's a lot of preparation that goes into it, especially when I'm dealing with the women within the National Women's Soccer and looking at some tools and ways to help them come out just a little bit more, better, because on the men's side, those contracts are very different. And so I usually tend to consider a lot of the different things from the health benefits.

Some contracts I've seen didn't even mention anything about 401k. Only recently with the new CBA, you're now looking at opportunities for women in terms of maternity leave. And, believe it or not, these women have been playing for years and that was never an option. And it also, certain players I've spoken to, it made them feel like, well I don't know if I want to start a family because that's not covered. And when you think about it, it's like, no, this isn't an employer. And if you're working anywhere else, that would be a part of it. So it's looking at those opportunities also, as well as image rights, and kind of looking at those areas where how can players come out on top. So it's mainly within that area.

Pam Lester: Yeah, thank you. And Dan, in your materials you talk about, I remember there was one mention they have about if you're representing someone who wants to buy a club, then they have to get approval of the league and so you deal with a lot of parties at once in a negotiation. So you're juggling a lot of balls at once with your clients and advice in terms of how you're doing simultaneous negotiations. You had mentioned, too, that you need to have a pre-negotiation internally before you go to the outside.

Dan Etna: Yes, that's right. Oftentimes you'll have a client that is not as nuanced in the whole, if they're, for instance, looking to acquire a sports team, not nuanced in the whole process in terms of league approval, which is a very important check-the-box item. And nowadays, it merits careful consideration when you're advising somebody as to whether or not they're going to pass muster in terms of being approved by the league. Whether it's not just being of fine moral fiber or a background, but it's also your financial wherewithal, given the cost in the sports industry today.

So that's definitely one thing that you're going to want to assess initially before going down the path of reaching out and saying, "Hey, I'm interested in buying, I have a client interested in buying this team and let's talk." So there's always some predicate work that needs to be done. And also you always have to just be following what's going on in the technology in sports. If I could just switch gears, if you were doing a media rights agreement years ago, "What's the internet? What is that? That's something that some people in Stanford or UPenn are developing, but what's that all about?"

Nowadays, when you're doing a media rights deal, are you only granting rights to distribute via a multi-platform video distributor, like a Time Warner Cable or Spectrum? Or are you also granting streaming rights with respect to that programming and you want to get more granular on streaming? Who owns the KPI–the key performance indicators? Who gets to mine the data, etc.? So, it is a process that is ongoing and over the course of my career, technology really has come to the forefront of making sure that we understand what the current state of the market is and how the environment is with technological innovations.

Pam Lester: Thank you, Dan. And great points. I remember when I was at Time Warner Sports and I helped negotiate one of the Wimbledon deals and IMG at the time had the rights and we paid a lot of money to televise Wimbledon on cable. And then that was just when the internet was starting up and then IMG came back and said, oh, by the way, we're going to give all these internet rights to so and so. I'm like, I'm sorry, we had exclusive territory, and I hope we'll have time to talk about negotiation for all of us transactional lawyers about drafting and being precise and trying to figure out what might happen. I would say anticipate the anticipated, and also just expect the unexpected, and how you can protect and negotiate flexibility into your contract. And try and anticipate what might happen via technology.

And if we have time, I hope that we also talk about AI and negotiation and I actually put into ChatGPT. I drafted a contract, an endorsement agreement between a professional tennis player and a racket manufacturer. And spit out a contract in like 10 seconds, but left out contract territory, among other things. So it's an interesting thing. So we talked about in our industry how to prepare, but I really want to hear from Gary in terms of, oftentimes we as lawyers and business people have surprise negotiations, whether you're called into someone's office or something's happened. And I think a lot of that also goes to mental preparation and emotional preparation, and trying to deal with a situation where you come in without having the benefit of major research. So, Gary, I'd love to hear your views on preparing for a negotiation.

Gary Noesner: Well, there's a good bit more preparation in my formal business than you might appreciate. For example, if we know we're going to a siege with the right wing militia folks, we know basically the ideology and some of the driving philosophy behind their behavior. Same thing in the mental health realm. We're dealing with a paranoid schizophrenic. We have certain expectations about some of the behavior we'll see, but when we start out, I start out at the basic level, and that's the negotiator himself or herself. I think the first thing I always taught in my negotiation course is self-control. If you cannot control your own emotions, how you can begin to influence those of others? So, you have to go into this process kind of squared away in terms of what you're trying to achieve and what is going to advance that and what might be an impediment to that.

Then you expand out a bit to your team and whether or not we negotiate as a team, even in law enforcement, the team has to be on the same sheet of music, and how are we going to work and support each other in this process. And then perhaps the most difficult hurdle, and I think you mentioned it before, Pam, is the management apparatus for whom you're working. Those can be, in my experience, the most complex negotiations, so, you may have these capabilities and skills, but in the pecking order of a bureaucracy like I was in, sometimes those aren't appreciated by the ultimate decision maker. So you have to have a negotiation in that context to make sure that you are moving forward with their approval, support, and so forth. And then of course, then you get with the people we're dealing with and how we come across and can we avoid acrimonious interactions? Can we be patient? Be good listeners to gather information?

I think it's not unique to the U.S., but we do have a tendency to want to get down to business with them too quickly, quite often in my experience. And we don't pay any sufficient attention to relationship building, which is really the key to everything. Interestingly, I saw just a few days ago in the press, it was some social science project and they said the greatest key to happiness is relationships, having good solid relationships in your life. Well that's certainly true in negotiations. In my former life, this might be the first time we're seeing somebody and it's not exactly a pleasant experience, but if we can craft a relationship where this individual comes to believe that we're genuine, we're sincere, we're not there to make

a bad day worse, we're believable, we're reliable, dependable, I don't know that you can place enough value on those things.

And they come across not just in the words we use, but our demeanor in our approach. And I'll let you move on to another question, but I'll just leave this for consideration: In every situation we resolved peacefully, we always asked the perpetrators or perpetrator, what was it that we said that made you put your gun down and surrender peacefully? And the answer was almost always the same in one form or another, and it was, "I don't remember what you said, but I liked the way you said it."

And this speaks kind of volumes into challenging, difficult negotiations. We have to really work hard on not just the facts and the information that we present to further our argument. How do we come across? Are we likable? Are we someone that others want to work with? Are they comfortable that we're not just so focused on our own needs that we have no interest whatsoever in theirs?

So just some of the things we think about, and a lot of this is it's preparation, training, role playing. And if you can ahead of time address the knowns and things that you can expect, then you can now devote your time and energy to the unexpected things that arise and the team can focus on those. In my former of life, and it's probably true with everyone on the panel, in every situation you're negotiating, there's a whole series of things that probably are common to each situation. Well, you should really be pretty effective in expecting those and having some strategies to deal with it so that you have more of your energy and your reserves to focus on, ooh, here's the curve ball that I didn't expect, and how do I adapt to that?

Pam Lester: Thank you Gary, this perfect segue into our next topic. Well, Gary, you mentioned so many great things. As we all know, sports is a relationship business, I think there's a difference between reputation and brand. I think that how we act, who we are, how we act in negotiation, are we known as someone who plays so-called hardball?

I mean, I believe that you can be assertive without being aggressive, but again, we all have our own personalities. And I think, too, when we talk about negotiation skills, and all of you are seasoned negotiators, and we can't sugarcoat it.

So, I think how we conduct ourselves is so important and how we conduct ourselves in negotiations. Let's sort of turn to these communication skills. And then one thing that you had in your outline that I found very interesting was the difference between feigned anger and real anger. And just more comments on, is that a tactic or is how do you deal with it? How do you find out if it's real and what does it mean either way? Is there a difference?

Dan Etna: Well, I'm happy to address that in a minute, but the one thing I just wanted to make sure we have a little bit of a launch point on is that part of the reason that this panel intrigued me was that it does recognize that sports transaction negotiation really is its own separate type of negotiation. Oftentimes you'll see a sale of the business transaction seller and buyer come together, seller takes the cash off the table, buyer takes the business, and hopefully you never have to worry about an indemnification claim if you're the seller. With a joint venture, you have a continuing business relationship ongoing, and in the sports–related realm, there are different elements that are part of that landscape that just need to be appreciated. I'll just take a minute to run through some. One is that there's a limited number of sports franchises teams available. So it is a unique aspect.

We have a client who owned the team and would say, "I walk into this five star French restaurant and I know I'm not the richest person in there, but what I do know is that I'm the only one who owns this team." And there's something to be said for that in terms of your mental state of assessing the deal and what your client is looking to get out of it and where the client is willing to go and not go. As I touched upon just a moment ago, there's a limited quantity of teams. Oftentimes these decisions are not purely economically driven. I had the opportunity several years ago to have dinner with the then-CFO of Major League Baseball and he's scratching his head at the time and said, "The only way I can figure this business out is under the greater fool theory that I'll buy at this price, have some fun, wear all the team garb and whatever, and have an owner's box and this and that and hopefully when it comes time to sell, someone will pay more for it."

There are emotional considerations. Some clients have deep attachments to a particular team or geographic area. We have a client who also become a good friend of mine that lost in a final round bid for a pro sports team and it still burns into his core today. When he starts to annoy me, I like to bring it up to kind of put him in his place. But indeed, that's a consideration. Publicity values, sometimes it's a way for someone that is doing good in the community, etc., to raise more attention for that cause or just to create more publicity from a commercial point of view that people now know that that business is owned by this owner. Also, community visibility. We've represented clients that have really wanted to do things like construct the stadium in an undeveloped area and give back, because that's where he is and where he grew up–they grew up in this impoverished area and they felt that was a way to improve the community.

You're also entering into a very exclusive membership group when you acquire a team. And it used to be, I'd talk to some of my sports investment banking friends and they'd say, oh yeah, the old days was someone wanted to buy an interest

in a team. We'd go into our Rolodex and say, okay, well he needs to fill this much more of purchase price. Let's see who we can match him up with. Nowadays, if you've been following what's been going on in the last three, four years, what happened to a friend of mine who's also a client was that he was part of a group that was bidding for the team and the winning bidder was able to write a single check.

And that's becoming more and more part of the prerequisites to acquiring a team, is that you have the ability to just by yourself write the check. Look at Terry Pegula, for example, on the Buffalo Bills, Steve Tepper who bought the Carolina Panthers. So that that's something else that merits consideration. And I think the last item I'd like to touch upon is you also have to include in this calculus, what's the future work? The sports industry still has a lot of upward momentum and factors out there on the landscape that continue to blossom. I've heard it said that perhaps Thursday night football was initially developed as a hedge if the NFL had a very bad result in the players' concussion litigation. And indeed, the NFL kept the rights to itself for the first two or three years because they didn't even know what it was worth.

And now they've sold those rights to Amazon and it's a whole other revenue stream coming into the ownership of the NFL. The NFL has also recently announced that they're going to Europe. I think they announced today the two scheduled games, I think being played in Europe. You take a look at the NBA, they're continuing to make inroads into Africa, the assistant commissioner in the NBA is leading the charge into Africa, and that's continuing to grow. There's technology improvements going on out there. For example, virtual reality. Can you imagine a few years from now when they make those virtual reality headsets something much more manageable and you're watching a football or a baseball game with a virtual reality device on and also media rights? There's continued ascension of that and I think that a large part of that is because it's really the last bastion of appointment TV.

Nobody wants to watch the Super Bowl on tape because they recorded it. People still want to consume their sports live. And that's something that I think buoys the media rights from ever decreasing in value, but rather continuing to ascend. And I'd like to, just in terms of what's the future worth, just point out what I consider to be the greatest sports deal ever, ever, ever, ever. And it involves two brothers named the Silnas. Does anybody know the Silnas?

Dan Etna: No, no close. They were at one time the owners of the St. Louis Spears of the American Basketball Association and that was a rival to the National Basketball Association. And there was a merger and the NBA said, Okay, we're going to take on four of the ABA teams, one of which is now the Oakland Nets, San Antonio Spurs, Indiana Pacers, and the Denver Nuggets. That left three teams in the mix.

One of them folded and that left two teams. One was the Kentucky Colonels, which was offered $3 million to wind up operations. The owner of the Colonels took the deal, John Brown, he was then the president or the owner of Kentucky Fried Chicken and he'd go on to be a governor of Kentucky. Meanwhile, the Silnas, who owned the St. Louis Spirit said, no, we don't want $3 million. Instead they negotiated their own deal and essentially they acquired the right to receive a portion of the media rights revenues from the teams that were absorbed into the NBA in perpetuity and every year they would come to New York, go to the NBA offices, pick up their check, go to Smith and Wollensky or wherever they fancied to go and just celebrate and laugh like fools all the way to the bank.

And they recently, I believe, settled up with the NBA, but this was not more than, I think they took, I'm just trying to see here, essentially they took about $300 million for doing nothing. So as I say, what's the future worth in sports? Be very careful.

Pam Lester: Yes, thank you Dan. Clearly for all of us, we need to know the industry and we need to know who we're dealing with. And oftentimes, as Gary said too, there's a track record and we already know when we step in. And I do think that different industries have different personalities and we need to be aware of that. And actually, I guess based on what Dan just said too, I mean as Maggie and Arthur who work with pro sports teams and team negotiations in terms of how you decide what's negotiable, and of course that's subject to the collective bargaining agreement. And also in terms of relationships. I know when I started in sports agency back in the early 1980s, 1983, the clients were not involved in negotiations because a lot of them, the GM would talk about how in certain circumstances, the athlete wasn't good enough and that could affect the psyche. So Arthur and Maggie, anything that you want to add in terms of knowing industry and the types of deals you negotiate?

Maggie Ntim: Yeah, I mean, well for me, I can speak to a recent renegotiation assignment of a client of mine that plays with Angel City. So, if anyone is familiar with the new woman's soccer team in Los Angeles, which has a star-studded celebrity ownership from Serena Williams, Mia Hamm, Natalie Portman, and so many others. And when my client first joined the club, people questioned why did she get to go there? Because every player wanted to play for that team. And once she stepped on the pitch and just really contributed and unfortunately she was injured mid-season, the team felt it and they saw how valuable she was, and so when it was time to go back to the negotiation table and we signed her, we had so much leverage, including one of the things I'm very big on, is giving back to the community that you come from, the community that you played for.

And so my client and the team, we negotiated a clause in which she would get a nice percentage of the marketing revenue as well as anything based within community relations and that was a little bit different. And especially like I said, that's a huge team. They've only played one season and are now valued at $150 million. And their goal is wanting to obviously become a billion dollar club and they do have the potential to get there. And I'm just happy that they were very, very, very open to making sure that everything that my client wanted, she would get it.

And so that's by far probably one of my best negotiations. And Pam, you kind of touched on about relationships and having a good relationship with the club, having a good relationship with some of the owners, it made it a lot easier, but also too because of the type of player that she is on and off the pitch. So it made it just a lot easier to renegotiate.

Arthur McAfee: So, I would say that on the labor side, given the general tensions that exist between management and labor, the key to success is really about the relationships. And as they say in labor relations, the key word is "relations," because it's an ongoing contact and communication with the other side. So it is not your one-off transactional negotiations where you walk away with the best deal, the money. And so one person's happy, another person isn't.

Our situations are such that the system has to be fair and people may be generally uncomfortable with where they are, but generally satisfied that they all walked away with something that they wanted as part of their negotiations. It's one of the things we talked about, being able to identify what your goals are in your negotiations so that when you get the media coverage about what side won the deal or not, you're in a better position to say to your side, "Here are the things that we decided that we wanted. These are the things that we were able to get."

And the other side got those things that they wanted, but not everything for both sides. So those things are pretty good. It's almost like a surrender, I would imagine, that we all decided that what's more important is that the games go forward and that the people who are engaged in that space are happy with the content of their agreement. And we look at our relationships not only between, and I would say this, so we have subsets of groups. So, we have the players on one side and the owners on the other side. Both of those two sides have to be happy with where they are in terms of how much they're paying, how much they're receiving, how they're going to play the game, and then internally there are personalities among the negotiators.

And so you have personality on the management counsel side and personality on the labor, the players association side, and trying to match those up so that you can move the issues forward is really, really critical. Again, as I said before, those relationships ultimately get into what Gary talked about–is developing trust. And so when someone says, "This is our final deal, this is our final offer," you have to understand that that person is really at that point and you got to be able then to communicate that to the other side and tell them why you trust that person is that that's their final number. And so we have to work within those contexts the whole time. And even though we come to an agreement on one deal, that there may be adjustments made three days later to whatever we had already agreed to.

So, for example, if there's a search in our system, the television revenue and the media revenue that comes into the league is part of the overall system that goes into play, that goes into what we call cap system, is one of the revenue streams along with sponsorship dollars and all those leads. But when new things come about, we figure out ways to capture that. How do we capture that when we didn't have it before? Do we have to reopen the CBA to talk about that or is that just a continuation? Can we talk and extend or reopen that, just that specific issue without having to reopen everything, right? And so those are taken into consideration as part of the relationship on both sides.

Pam Lester: Thank you, Arthur. And I think that emphasizes the fact that negotiations aren't just about the money. There could be other reasons. I mean, for a young athlete it might be about getting promotion and that I think that if you're not getting what you want, the question is what are your real objectives and how can you go about it? And I remember when I first started my job representing professional tennis players, I was told not to cheer for our clients, we can cheer for good points, but you never know down the line that you might be representing the other player and they could remember.

So that long term, I think, is so important. But Arthur, you happened to mention one of Gary's favorite words, and that's trust. And we talk about building trust in negotiation. And Gary, I quote you so often on that comment about it's not what you said, it's how you said it, that's so important. And maybe you can talk a little bit more about how to build trust in negotiation. And we all deal with people who try all sorts of tactics. And as Dan pointed out, whether it's feigned anger or real anger or threats or conscious or overt bias, I mean there are all sorts of things we deal with and how do you negotiate in those types of situations? So Gary, over to you on your trust and communication skills.

Gary Noesner: Well, there's a lot there, but I think you have to be careful about how you resolve the situation. I mean, we can always fool people and trick people. And particularly in my former life, you can get away with a lot of manipulation and you may not see that client again, but you

also might see them again and word may get out to others the news media report, "well, the FBI resolved this by tricking these people" and then the next scenario you go up against now you've created a real obstacle for yourself because say, well, you're not going to do what you said you did. So we really try to follow through. Another point I wanted to make, and I think Arthur touched on it, I think it's really important to try to distinguish between wants and needs.

The other side will typically want something and they'll have a list of not necessarily demands, but certainly goals they'd like to have. But sometimes by creating that relationship and taking the time to dig deeper into the situation they're in, they may need something slightly different than what they've asked for. And maybe it's respect, maybe it's dignity, maybe it's public attention–could be a lot of different things. And I think a good negotiator really, really looks out for those things. And when you've kind of identified what the driving factors to this behavior that the other person's demonstrating, it really gives you a good pathway to try to find a solution that comes across as fair and equitable. And that's the approach. I just don't believe in trickery. I don't believe in manipulation. I believe in honest, straightforward demonstrations of empathy and understanding. Doesn't mean acquiescence. You can certainly say I've listened to the things that you want, we simply can't do that, that's fine. But you don't turn around and say, that's bullshit. We'll never do that. That goes way too far and it's going to create problems.

You can always be respectful, even when you disagree. When I talk to corporate people in sales and so forth, I said, don't burn that bridge–you may lose this particular effort to get a contract, but that client may end up being unsatisfied with the other vendor that they went with. And when they do, they may come back to you and say, "That really didn't work out so well." And you say, "Yeah, well we're very much open to working with you again and seeing if we can make this deal happen." So much of it is likability, is what it is. As a negotiator, I've identified, I don't know, 15 or so attributes that I talk about with classes.

And the number one attribute is likability, believe it or not. It's just plain old unsophisticated, but powerful likability. Just be a good person, come across as honestly and sincere and genuine. And even when you deliver bad news or you respond in a way that they don't want, they tend not to hold it against you on a personal level. And that keeps the negotiations going. You know what didn't work in yesterday's negotiation may work two weeks down the road when we're still at it. And as long as you haven't burned the bridge, you have an opportunity to make it happen. I don't know, I'm bouncing around a little bit here, Pam, I don't know if I addressed really what you wanted, but there you have it.

Pam Lester: No, I agree. And I think that sometimes in negotiation something might happen that we regret and there's nothing wrong with apologizing, stepping back and coming at things from a different angle. And I think that you're right about all of your comments about knowing who you're dealing with, I think that fits very well with what Dan was talking about in terms of the personalities that you deal with no matter what your practice is, that people have their own wants and needs, and yet I think it's also important that we be ourselves. And actually, because this is the Entertainment, Arts and Sports Law Section, and with Gary here too, a lot of negotiations that we've all worked on are a great interest to the public and the press. And I think that's something that's unique to our general practices. So I'd love to ask all of you how you deal with the press and all that intense interest on what really are private matters. So Arthur, you're smiling, we'll start again.

Arthur McAfee: So, I would say that in our space, whatever we do has great public interest from the fan standpoint as well as the media. And oftentimes they will create the negotiation session for you. They identify what the issues are, and then try to address those issues in the article and tell you what you should be working on. But I would say that in our space trust comes because anything you say is easily verifiable. If I put a number out there and attributed it to a player, they can go look that number up right away. The set player salaries are shared and clubs know what they're paying their players. They kind of know what the areas are in terms of what the landscape is in terms of compensation. They all have limited amounts of money to spend as it relates to the cap, so they know what you're spending.

So whatever's happening is very private. We know what the television numbers are going to be. They kind of figure out how much, if it's a 10-year deal or five-year deal, they kind of know how much it's going to be averaged over that time period. So everybody in the system already knows what the numbers are. And then it becomes a question of whatever you say to the person that you're working with on the other side, if they trust you to give them accurate information so they can fairly evaluate you as a person in terms of your liability of the trustworthiness in order to want to continue to deal with you, or if there have to work some kind of trickeration to get you to move. I think we've taken the space with the media that is better for them to be informed than not.

I think we consider ourselves to also be a media business within networks that we have that are out here. So it's about trying to be open and share the information that's out there as soon as we verify, as soon as we know that it is accurate, and share accurate information. So, we try to get that out quickly. On this, in terms of if we promise the other side and we're not going to share that information publicly, I think we

keep that to ourselves and hope that that there are no leaks, which we are all concerned about. And then once the leak happens it becomes a crisis management circumstance where they have to control the damage, not only publicly, but also to the person that we promised that we weren't going to share that information.

Pam Lester: Yeah, very helpful. Arthur, you mentioned the word trickeration. I had a number of negotiations with Don King and he was a master of going to the press without the HBO suits, which I guess, I was one of the HBO suits, and getting what he wanted by putting intense public pressure, including all sorts of allegations, which may or may not have been true. And Maggie, your comments on dealing with negotiations, wherein which there's such great public interest in what you're doing.

Maggie Ntim: Yeah, I think from the previous client that I mentioned, we were signing with Angel City, I mean just on social media, I had so many people telling me, "Oh, congratulations, she re-signed." And I'm like, how do you even know that? I never even had a conversation with the club about re-signing yet, but everyone just kind of paints this picture. And then you have all these articles kind of like always saying, they'll tell you, yeah, it's smart if they re-sign her because she did this and these were her stats and this and that. I'm like, well, actually that's probably a good tactic to take to the negotiation table. And sometimes dealing with the press is very...it can be very interesting. I'll just say that much. And so for me, I use social media a lot. So a lot of the media folks will reach out and send me a DM and I'm like, wait, wait, wait, I can't answer this because anything I say, they are going to quote me on this.

So I just read it and then just leave them on read, as you said. So when it comes to negotiations for clients and just dealing with the press, I try to wait after everything is done, especially because of that relationship and that respect for the club, the club will then communicate with me and my team to say, okay, well we're going to release this publicly to this press, this press, so it'll be okay to do that. Because within the NWSL now, something that they've started to do and say, okay, well we know Angel City's the popular club, but when they start saying, oh yeah, this player resigned, or this player just resigned, but the league hasn't approved it, they end up getting a fine, and to many people, it's like, oh, that's crap. But it's true if it's not approved from the league and there's a process in place. And so it's better to just follow the protocol and follow the process. So that's how I deal with the press.

Pam Lester: Thank you. I'm interested in the same question to both Dan and Gary in terms of how to respond to media pressure, media inquiries on ongoing negotiations.

Dan Etna: Well, in our experience, we're just very black and white. We just typically just say we have no comment or we just refer it to the client. The key is to make sure that as a representative of the client, you're not putting something out there that they haven't blessed, but also at the same time making sure that they're informed, real time, what's going on because just the speed at which things may be happening may affect their decision-making process. It's just a part of being a good partner with your client.

Pam Lester: Yeah, thank you. Absolutely. Communication. Gary, you want to make any comments on dealing with the press on negotiation?

Gary Noesner: In my profession... my former profession, I should say, I was often very skeptical about the press and had very negative feelings about the press. But I found the press to be both a good and potentially positive and helpful element and sometimes an impediment and an obstacle. And again, we were talking earlier about pre-event planning. We used to advise police departments to open up a channel of communication with those media representatives that cover these crisis events and let them know how some of the things they might do at the scene, such as speculating or calling into the crisis site, could be very harmful and counterproductive. And when you have that outreach and maybe even do some training, they're less likely to create those problems.

On other occasions, we would use the media or an incentive of being able to speak with the media as a reward for good behavior. "You have something very important you want to say to the media, well we can make that happen, but here's what that's going to require first: you need to put your gun down and let those people out." And then we follow through when we can and let them do that. I mean the press is not inherently the enemy. Again, I've used them very effectively in a number of situations.

It's funny, I was just communicating the other day with a fellow I helped get released from a kidnapping in the Philippines many years ago. At one point in time the kidnappers, the terrorist group, was going to kill him on a certain date and we engaged in a very significant effort to have his mother go to the Philippines and do a real media blitz about that he was a really good person and he liked the Philippines. He came over to marry a Philippine girl who converted to the Muslim faith. And all of those things we feel pretty certain forestalled his being killed.

So there's times where we can use the media to our benefit and have certainly done that a number of times, and I'm sure it comes up in the kind of negotiations that the others on the panel do as well. But again, not one size fits all. Sometimes it's good, sometimes it's not. That's why you've got to be flexible in negotiation.

Arthur McAfee: Oftentimes you use media, as you say, you had the opportunity to shape public opinion through the media. Oftentimes it happens through op-eds on particular issues of concern that often draw conclusions to the public on both sides for both parties. And you can be in the position where you have learned people explain those specific issues and they're targeted to news outlets to educate certain targeted populations so that they have a better understanding of the issues that you're dealing with internally inside the negotiations. For us, most of the media are our media partners. So, they broadcast the game, the news, and they do sports news. And so being in the space again where we quickly give them accurate information to share with public is service in our best interest.

Gary Noesner: And –

Pam Lester: Oh, go ahead, Gary.

Gary Noesner: I was going to say that there's a lot of examples that we see of corporations, for example, that have handled crisis events very effectively through the statements they make and the projection of responding for appropriately and in a caring manner. And there, of course, are other examples where they've totally failed. You might remember the BP Oil situation in the Gulf and the CEO was kind of upset because it interfered with his vacation and that was not a very positive message. There's been other cases, like the Johnson & Johnson case from Thailand all those years ago, where they just responded very decisively, very quickly to take ownership of a problem and to get the product off the shelves, and they rebounded very quickly. If we can use the media effectively and I'm sure it comes into play with the sports issues that the panelists are involved in, there's times where it can be a real tool for us to use in a positive way.

Pam Lester: Oh, thank you. I definitely agree with you. I think about the most recent example of a corporate misstep... Well, there're plenty in sports, but Peloton–children were killed, being sucked under the big treadmill, and Consumer Product Safety Commission reached out and said, "You need to recall." And they said, "There's nothing wrong." And they fought it for a while. Ultimately, of course, there was a recall and now I think they had to pay, I think like an $18 million fine. But recognizing, and also Arthur, your comments, it's to be able to step back and see what are the real issues here, what's the long-term thinking? It's more than just this one deal I'm working on, there's a bigger picture here that I think Maggie and Dan and Gary have all touched on that to have that flexible mindset, have going into an open mind.

And so I guess my next question for the panel is we go in, and I think everyone's mentioned this, you go in anticipating, you've done your homework, you're prepared, you think you know what the issues are, and you think you're putting yourself in their shoes, what their issues are, what they might object to and something happens and you're just not getting anywhere in the agreement. How do you find out what the real issue is? Because what someone might be saying in a negotiation might not be true. Dan even mentioned in his outline that someone could be feigning anger.

I know that I did a talk once and someone was very proud that he came in...He shared this with me, with a deal point and the whole point is it was completely bogus and within the first 10 minutes he's like, "Oh, you're so great." He just ripped it–he made a big show of ripping it up and threw it in the trash, and that destroys authenticity. I mean, people can find that out.

So what are things that we can do as negotiators to find out what the real issue is, why we're not getting an agreement? Because it's not always what it seems. Does anyone want to jump in? Go ahead.

Dan Etna: Well, I think just a few things is that sometimes people like to feign anger, whether it's the attorney or the client or sometimes people just get pissed off. For example, you may have spent a day negotiating and reached agreement on a certain set of rights, and then the next day the other side comes in and wants to start retreading after you've agreed to make some concessions. So we're all human, sometimes the anger will be real. But I think you have to be, as I said, be very judicious in playing that card. It's often best to check your emotions and ego at the door because no matter what the circumstances, how horrible the other side was, is that all the client will remember is that you killed the deal. So again, it's worth repeating, check your emotions and ego at the door. Realize that sometimes you have to negotiate first with your own internal group to make sure that you have a unified voice and understand where we're going.

Also, as part of being judicious with anger, feigned or real, that the sports industry is often a very small world. Everybody knows each other and in fact that's a key consideration that's sometimes overlooked. And I think the best way to break a logjam or some sort of impasse is to take a step back and assess the bargaining position of each party. And that inner reflection oftentimes will allow you to prioritize your key objectives and focus on what's core, core center, to your transaction.

Just one thing I'd like to just say about dealing with anger and getting to the real issues is be careful not to let nonstarters linger on the table for very long. For example, we had a transaction where it was a long-term sponsorship and the sponsor wanted the team to agree to have a minimum payroll covenant and that it was just a total grab, inappropriate ask.

We came right back and said, "Look, we're not even interested in going forward until you just understand that that covenant is not market. It needs to go and it's not a concession by us because it's just totally inappropriate."

A concession is something that you want or need that's within the realm of prior transactions or market, but sometimes you will confront that and that's one way also of breaking a logjam and getting on the same page about something.

And just one thing I just wanted to share, and I haven't read Gary's book yet, but one of the things I had in my outline was to listen and respond but don't interfere when someone's talking. People, all of us like to hear themselves speak and they may believe they're winning by spouting out more words. Let them do it. Don't interfere. Take notes on important points that reveal the other side's position and interest and try to use any extraneous information against them in their bargaining position. But this can lead to valuable concessions that get you where you want to be.

One of the best things you could do to in negotiation is to demonstrate you're listening. Recall statements made by the other side and mention as close as to how they were stated. This will subconsciously impress the other party. So, those are just a few things I wanted to pass on, and perhaps also learn to become comfortable with silence. If suddenly the room goes silent, it's silent.

Pam Lester: It's silent.

Gary Noesner: Learn to love it. Pam, if I can –

Pam Lester: Please, go ahead. This is definitely your area.

Gary Noesner: One of the things we found out is, and it's a very good point that Dan just made, when there is silence, people are uncomfortable with it and they tend to fill it. So, if you take an opportunity to use silence strategically, you're as likely as not to get them to provide you additional information. And the advice about listening and being patient is just spot on. I mean active listening, by the way...Now it's a little different. It's not just a total being quiet, it's when the opportunity arises, repeating back in your words what you've heard and also labeling any emotion behind it. So you might say, "Extending this contract a year beyond what we're talking about now seems to be very important for you and you feel as though it's like the number one issue for you. Is it that right? And you feel very strongly about that." I'm not telling him I agree with him or that I think we're going to do that, but I'm just saying I've heard you and I appreciate what you have to say.

So listening is active. We respond, we acknowledge, we use facial gestures, body language. We're letting that person know that we genuinely are interested in trying to understand what it is that you are trying to say so that we can work together to come to an agreement.

And something I think when we started off this little section, if we are not sure what the person is saying, the number one rule is ask. There's nothing wrong with saying, "I'm confused. I don't understand. Could you tell me a little bit more about why that's important to you or what it is that you're trying to achieve with this particular clause? Because I really want to know before we can comment on it." Nothing wrong with that. That's perfectly fine.

Pam Lester: Thank you. Such excellent points. I often joke that I think my role model for negotiation is Peter Falk in "Columbo" in the rumpled raincoat where he would just say, "I don't know what you're saying." And the guy would say, "Oh, I put the stolen art in the vent."

And we know in job interviews you have that silence and say, "Oh, I want $125,000 a year." And there's just silence. "Oh, I'll take $100,000." We never want to negotiate against ourselves. But for young negotiators, there's that discomfort and fear. I think that's really important. So I'd love to hear from Maggie and Arthur, and also as we talk about dealing with uncomfortable situations, I know that I've experienced this in terms of being underestimated or biased, particularly when I started out as a young woman in the industry, even though I was a better athlete than most of the people I worked with. Didn't matter. I didn't know sports because I was a woman. To me, I found that being underestimated is actually leverage in a negotiation, because I knew I was well prepared. And even though I was absolutely petrified in some circumstances, by not letting that on, like everyone's saying, let your action speak for itself. And I always say, choose your battles wisely because lots of things have happened and I have to decide–is this going to help the deal and my client, is this going to be about me and about my ego? So again, trying to figure out what's underlying the resistance you're finding in negotiation, and how do you deal with these difficult situations? So I'd love to hear from Maggie and Arthur as well.

Arthur McAfee: I think when we talked about getting to the main issue, one of the things we try to work on quickly are the peripheral issues. Those are things that we can get off the table right away. And some of those peripheral issues are tied to the main issue. Often in our industry, that's about operational expense. So you can go through a list of what we call side issues that you can set up and they sit there and everybody comes to an agreement on how they're going to operate, grievance procedures, list of benefits that you want to have. And they just sit until you get the compensation part figured out. That may take the longest to work through because you have all the other issues, the ego, the amount, the posturing on both sides. But you have your core peripheral

issues already set up, they're going to make up most of your collective bargaining agreement.

But then once you get those things set and you can get to your main core issue quickly or get to the core issue, things fall into place right away. And that's how those things can come together so quickly because now you figured out what the allocation is going to be for the cost of all the things that you already negotiated. So that's what I was saying, to quickly identify some of those issues. Maggie?

Maggie Ntim: I don't have anything.

Pam Lester: Okay. Not a problem. Also we're going to be taking questions from all of you, so feel free. Obviously with this panel we could go on all day, but there are other panels to follow. All right. So, we've talked a little bit about... I guess along the same lines, how can you tell if the other party is bluffing or if an ultimatum is real or fake? All things that all of us deal with in a negotiation. I open up to the panel, whoever wants to answer.

Dan Etna: Well, I think just some of the obvious things that should come to mind is what the body language cues, facial expressions, changes in voice tones, that's often, if you will, some tells as to what the other side is really thinking about and what's important, what's not to them.

Arthur McAfee: And for us, I think in our space we deal with the same people every day. So, if it's something that you see as typically out of character, of course, the people that you're working with in your space, then you quickly see that there's something because it's out of character that this could be the bluff. It could be the distraction, and you begin to ask questions about what's the motivation behind that? And you could talk to the person about the relationship that you have with them and you can bring that issue up and then oftentimes that settles that down too. We don't often know what pressures they're receiving on the other side.

So they could have instructions on the other side to be an obstructionist in terms of getting the deal done. They may not like the person that we're representing or a player may not like the team that we're representing. And we have to work through those issues past the point of the passion that they have, their dislike or their anger or their dissatisfaction with the other side. And then once we're able to work through that piece, then the negotiators could be in space where they understand who they're representing and then begin to work with that relationship, their personal relationship to try to then move the issue forward. Sometimes you can't and that's when we, fortunately, have a system that can help us resolve those disputes. But if not, if we don't go that far, we typically work through the issues to resolve them most times.

Pam Lester: So clearly having these relationships, I can't stress enough that relationships in our business are so important. Maggie, is there anything you want to add on trying to figure out what whether you're hearing is really what the issue is in order to achieve your negotiation goals?

Maggie Ntim: I've had some instances where because I represent both men and women, especially representing a male player–like Pam, who touched on being underestimated and having the team tell me, "Oh yeah, I know your client is never going to go to the West Coast." And I'm like, "Then you don't know my client as well as you think you do." Dan touched on this about how do you know when they're calling the bluff, from their body language, and for me at least, it's standing firm.

And so if there was a number that we negotiated on and they're like, "Oh, let's go a little lower." And I'm just like, "If you're telling me that my player's not going to go to California, then at some point we have to figure this out because there may be offers from those teams." And he's like, "Well, I just know your player. He's not going." And I was like, "Okay, this is my number, this is what he wants. If it doesn't work for you, it's fine. We'll entertain other offers."

As a woman and staying firm, it has helped me along the way because in the end the team ended up meeting us at that same number and we were able to negotiate. And then of course the next contract we declined, and my player is now in California. And even though that team just kept doubting and doubting. He's like, "Yeah, there's no way." I'm like, "Yeah, no. He's in California and he loves it." He's like, "Why didn't I do this all along?"

Like I said, especially being a woman in this space and with soccer being probably one of the only women, especially African American to represent these players, a lot of times the men will kind of doubt and say, "Oh, do I go get me a male agent?" But then he's like, "Wait, if you're able to negotiate that, that's the best I've ever seen. How'd you do it?" And once again, it just goes back to standing firm on what you want, knowing your client, having with your client's best interest at heart, and also knowing a lot about the team.

I went in knowing a lot about the team and knowing that my client was such a huge asset, especially because of his influence with other players. So certain players were waiting to see whether he would re-sign with his team before they decided they would re-sign. And so that Club, even to this day, says, "Hey, does he want to come back or maybe do you have any other guys that want to come here?" And I'm just like, "At the moment, no. He's enjoying California and yeah. We're loving it. We're happy."

So, it's just staying firm and really knowing the other party and knowing who your client is and what they want and just really fighting for that.

Pam Lester: I think your best leverage is certainly to be able to walk away. And I'll just say briefly that my one story is when I was at the sports agency as a young lawyer, we were sued by a client who was signed when she was 12 from another country and she had a big firm coming in, and my company was sort of cheap and so they were going to have me defend my boss's deposition. I was just out of law school, clutching the Federal Rules of Evidence, absolutely petrified. I did moot court and that was it. And then in law school I was a squash and racquetball pro at The Vertical Club. I didn't work at a firm and I walked in and saw the senior partner and the associate; of course the partner comes in with a newspaper and a legal pad and assumes I'm an executive assistant or secretary and says, "Can you get me a cup of coffee?"

And my mom raised me to be polite and I said, "Of course. Do you want milk and sugar?" And I got the associate coffee and I sat down across from them, still absolutely petrified and trying not to show it. And then they realized that I was opposing counsel and it just set them off their game. I didn't say, "Oh wait, I'm a lawyer." But honestly I didn't really feel like one at the time and we ended up settling at that.

But something Dan, you had mentioned that I would love to hear from Gary because I hear this when I've spoken on negotiation, people talk about what they call "tells" and then there's body language. Arthur, you mentioned, of course, we know each other and so we know if something's wrong, we can observe notes being frantically scribbled during negotiation or of eyes being rolled and very obvious body language. But in terms of the big question that I'm always asked is how can you tell if someone's lying? I don't think it's so easy. So Gary, with your experience, you've clearly been trained and I'd love to know what you say about that.

Gary Noesner: Well, there's a lot of people out there who claim that they can tell you that with some level of accuracy and I'm not so sure that that's true. I think the longer you're around someone and the more you have an opportunity to engage with them and kind of see their patterns and behavior, then you can begin to discern, to see. I mean, there's some people that are extraordinarily good liars. Hopefully you're not confronting too many of those in your business transactions. But there are some.

I think the best way when somebody makes something, an outrageous comment, you've got to think to yourself, why are they doing this? And they're doing it to put pressure on you to try to get you to comply, to acquiesce, to lower your position, whatever it might be.

And I think there's kind of two ways to deal with that. Either let it be water off the duck's back and don't even respond to it or ask them to explain it further in a very non-emotional way. Don't let them get a rise out of you. Just say, "Okay, well that's sounds like you feel pretty strongly about that. Could you tell me more about that?" And after a while it tends to diffuse people or smokes them out to some extent for you to determine if they're being truthful or not. But I think you should try to display what it is you want to see from the other person. I think if you maintain your ethical integrity, you're more likely to get that back from someone else. And if you don't, then maybe it's one of these deals we walk away from.

Pam Lester: And thank you for emphasizing ethics, which is our next panel, which will moderated by Ethan. And we love to have questions. I have plenty of questions, but we do have one from the audience, which is about intuition. Do you use intuition in your negotiation? And I think, Arthur, you sort of hinted at that based on experience with people that you're used to dealing with. Is intuition different based on time, age, and experience? We have a difference in age level on the panel and experience. How do you develop the ability to utilize, if you do, intuition in negotiation?

Arthur McAfee: Well, I think that the advantage for us in this space is that it's so very confined. So, you start with proposition that the people that you're working with know the business. And in that space now it becomes intuitive in terms of what to expect from the other side based upon your role, the role you play, participation, and just trying to understand. If you flipped the roles, how would you react, and what would you negotiate? And I think that's how we work through and anticipate those kind of things and be intuitive. What is the next thing that they're going to ask for? What is the next thing they're going to do? And then how do we adjust to that? So it's almost like a scouting report to figure out, hey, this is the landscape and we anticipate these are the issues that they're going to address on one particular side or the other. And sometimes you just have to lie in wait for those things to arise so that you can then appropriately address those issues as they come.

Pam Lester: Thank you. And Maggie, not to pick on you, but as the younger member here, I'd love to ask...We had no practical courses in law school other than in moot court and when I met all these incredible hostage negotiators, all of that formal training, and us as lawyers, most of us we just learn on the job. So Maggie, I'd love to know how you developed your negotiation skills and what we might be able to do for ourselves based on your experience.

Maggie Ntim: If you guys remember when I first got up here and told you I started in music, that's how I actually developed real negotiation skills. My former boss was...Well, his name is Curtis Jackson, for anyone who doesn't know,

that's a/k/a 50 Cent. So I spent about three years working with him and he kind of took me under his wing and I would just shadow and watch him in a lot of business dealings. And then one day he's like, "I need you to negotiate a deal for me." And I'm just like, "I'm not a lawyer. I've only been watching you, so I don't..." "No. I think you're a pretty good negotiator." And he didn't budge and he was like, "No, we're going to go in and you're going to present." And I was just like, "Me? Are you sure you want to do this?" And he's like, "Yeah." And of course a lot of my colleagues at the time were like, "How come she gets to go? She's the newbie. Why does she get to go in that room?"

And we sat in the room. And so that deal was my first major deal, which was negotiating his partnership with Beam Suntory and with a company called Effen Vodka. And I'm like, "You don't even drink, so this is so weird. This is going to be a weird negotiation." But I thought a lot about the marketing side and what he brings to the table with that. And those were great tactics. I was very nervous, but he told me, he's like, "Just be you and talk to the other side about me, who I am as an artist, as an entrepreneur, all the things that you know." And somehow it just flowed naturally. And when they agreed to the deal, I was like, "Okay, so do I get a commission?" You know what I mean? But he's like, "Yeah, you get to keep your job working with me."

And I'm just like...I went, "Whatever." And so in the end I asked him, I said, I was like, "5-O," that's what we'd call him. "I was like, "5-O, why did you bring me into that deal? I really want to know." And he said, "I did that because you're such a strong woman and I wanted you to know that in life and in business you need to not be afraid and you need to be able to go to the table with everything and also make sure that we come out as the winner." And when I went in and thought about everything and I was like, "Yeah, it made a lot of sense." He's like, "For you to talk to that company, they would've never known that you were an employee of mine because you were more of a fan and you were speaking to so many different assets and things that were able to contribute to it." So yeah, with that and with him that made me the negotiator I am today. So I thank him for that.

Pam Lester: And kudos for being a strong woman, and on the job training, which I think we've all had.

Maggie Ntim: Yup, yup.

Pam Lester: Dan, anything you want to add on developing intuition for negotiation skills? Just how do we all get better?

Dan Etna: Well, I think part of it is that oftentimes you need to stand ready to improvise. For example, you may be negotiating, let's say, a sponsorship relationship and the sponsor is only willing to pay X and your client is looking for something more. So rather than just staring back there and lobbying figures at each other, oftentimes it's very helpful to improvise. What I mean by that is find a way to create something that is perceived as having value to both sides.

So, for example, if you want the sponsor to come up in the sponsorship price, maybe the client is able to make certain accommodations that don't really cost too much, but have tremendous value to the sponsor. And oftentimes it's ways of unlocking value and deals, but by improvising.

To give you an example, let's just say if you have a baseball team that you're negotiating a sponsorship for it, suddenly you can tell the sponsor, "Hey, we can give you 10 first pitch opportunities." And suddenly the sponsor is thinking, "Wow, this is great. Imagine that I can have some of my major clients walk out onto the field to throw out the first pitch. That has a lot of value to me. That's a real value add in terms of getting my brand out there and showing that what kind of wherewithal we have."

Player appearances. Oftentimes teams will host luncheons or whatever and arrange for a player to come and tell stories, take pictures, sign autographs, etc. That also could be a key driver to a sponsor saying, "Wow, I can get my key customers in front of some of these players. That's a real unique opportunity."

So I think in terms of intuition, part of it is it ties in with improvising and of course, being an attorney, you may have your intuition, etc., but of course you want to first run that by the client out of earshot of the other side so that you're not negotiating a deal that the client's not totally on board with.

Pam Lester: Thanks. I have one quick question for Gary. Gary, you mentioned role play and I know that in your former field, there are lots of training opportunities. And in law firms, of course, there's moot court, practice before trial, and deposition prep. And I guess the question is for negotiation practice, how do you do that, and how do you know that when you practice before a negotiation that you're getting good advice in terms of the role play?

Gary Noesner: Well, I think that the better you know the other party and how they're likely to behave and what position they're likely to take, it enables someone to try to affect that in your role play and your preparation. And like you say, it's like moot court, you throw some tough questions at your negotiator and see how they respond to it. And the more we anticipate and the more we've seen something before, the less surprised we are, the better we're likely to perform. There's really no secret to that whatsoever. I think just practicing, responding to people, and using your listening skills enables you to be a much more effective negotiator.

Pam Lester: Yeah, thank you. One of the questions we have from the virtual audience, and this is appropriate, with negotiations virtually, is it harder to read the other party and to be "likable"? Do you have any tips for virtual negotiations? And honestly, as lawyers, we also negotiate often by email when we're drafting agreements. And for some people, particularly with younger clients, you might be negotiating by text. And so I think there are a couple of issues about how what we are writing is interpreted by the other party and how we come across.

And before I go to the panel, my number one advice on email that we probably all learned by experience is when you're replying or replying all and you're drafting something, take out the address, the "to," so that you don't send it prematurely by accident before you're ready, particularly if there's something that's emotional. We talk about, you know, step back.

So, in today's world, let's just open the panel, we only have a few minutes left, but quick response on how to be likable when you're negotiating in a virtual environment.

Maggie Ntim: I can speak to that. Especially within the soccer space, soccer, football, depending on which part of the world you're in. A lot of the deals are happening sometimes even on WhatsApp. That was new to me, especially during the pandemic, where I'm like, "Oh, why couldn't we just email? Why don't they just want to do Zoom?" But it was simple. I mean, teams knew what they wanted. "Okay, we want your client, here are the terms." And I'm just like, "But this is so weird. It's not normal because we're sending you this offer." And I'm a person that loves to really dig through, and so I was like, okay, now I got client fee, paste this, print this, do all of this just to really go through it.

But when I did my first deal for a client that plays in England, it was actually simple because I knew the terms, knew the party, they knew what they wanted. They were very, very determined to sign for my client and ended up going back within WhatsApp and was like, "Hey, check your email because this is what these terms are, and if this works, then yes." Obviously she couldn't sign the contract through WhatsApp, but it was pretty interesting. And the club had told me, the GM had said, "Well, yeah. This is how we usually get most of our deals done." And I was like, "Oh, okay." So I started to get adapted to it and went into the next situation as if I was a pro, but it was my second time and I was like, "Oh yeah, I got this." So yeah, that's a very different form of negotiating because you really don't know.

It's like you're just typing back and it's like, I'm just watching, okay, he's typing, he's typing, what is he going to say? And you can't see. And I accidentally pressed video call and I'm like, "Maybe he'll answer." Decline. It's like he's just typing, typing. I'm just fingers crossed that this goes well. And then he started using emojis and things like that. So I was like, "Okay, this is a new way."

Then, when I started talking to other fellow agents, I'm like, "You guys do deals on WhatsApp?" They're like, "All the time." And I was like, "Oh yeah, I've had about two. So I'm learning." And yeah, it's hard to tell, but I think just even, I'm a very attentive person, so I pay attention to even, like I said, when they're typing, what they're typing, the emojis that they're using, whether it's the heart emojis, I'm like, "Okay, he's really excited."

Just last week I had two clients get drafted into the National Women's Soccer League and as I'm sitting there, I'm like, I can see the team, I can see the GM. He's just looking at me. Then he sends me a WhatsApp message and was like, "We got it. We got your client." And he puts all these thumbs up and I'm like, "Okay, I guess that's how this is done now." So it's getting used to that, which is another form. And yeah, it's a bit tough to tell but it's working out. I'm getting used to it.

Pam Lester: Well, I think the answer is we shouldn't be afraid of technology and learn how to use it. And I'm just going to skip through because we only have two minutes. I'm going to answer one question myself. And then the last question I think is a great segue to the next panel and I think a great way to close our panel.

So the one question is, "How can someone knowledgeable in sports but no experience working the field get into it later in life?" And as we've all talked here, those of us in the sports world, it's about relationships, it's about getting yourself out there and educating yourself. And also, sports is all about recognizing opportunity and you just never know when that opportunity is going to be next to you on a plane or, based on your experiences that one thing segues to the next, there's so many examples of that and so on. I mean, Dave Winfield's lawyer was his tax lawyer, then his agent. It's always keeping your eyes open.

So here's a question to close the panel, and I think it's a great question and particularly too, since our next section is on ethics. Here's a question. "Do you deal differently in a litigation settlement negotiation for what has been discussed so far by the panel, and when this situation you know is a one-off and probably will never deal with this attorney who is being too aggressive on the other side again. So do you act differently when you're never going to see the other person again no matter what?" So with that, well, Arthur's looking at Gary, we'll start with Gary and we'll move through the panel.

Gary Noesner: I don't think so. I don't think you can assume you'll never interact with someone again. I think you

have to be true to yourself and demonstrate a consistent, ethical, professional demeanor whether you see this person again or not. We all have interactions in life every day with people that we know we're not going to see again, shouldn't stop you from being polite and professional.

Pam Lester: Thank you. What if that the other person is behaving really poorly, would you act any differently?

Dan Etna: Well, I echo in large part where what was just said; I think that part of something that separates the sports industry a little bit from some of the other areas of the law is that things, oftentimes the transactions you're working on all have a very long-term component to it. So I know we're out of time but just briefly, if you have a 20-, 30-year sponsorship agreement with the premier sponsor and, let's say because of some league restriction, you suddenly can't deliver certain benefits to the sponsor, neither the team nor the sponsor wants to be involved in litigation. So you should build into your contract, "Hey, let's work it out," provisions if you don't get the full bushel of benefits that you are looking for, "then we'll make it up and here's how we'll make it up, and if we can't agree on it, we'll go to arbitration," etc., etc.

So I think it's very hard to say, in the sports world, it's really more very long term relationship and you should expect to see people on the other side. And final point, as I said earlier, remember the sports industry at the end of the day is a very small world.

Pam Lester: Thank you. Maggie?

Maggie Ntim: Yeah, everything that Dan and Gary said, once again, the sports industry is such a small world and to think that you're not going to run into that person again, you just never know. So you should always remain professional and remain respectful, because at the end of the day, too, your image is everything and your reputation in the business and regardless, you just always want to remain true to who you are.

Pam Lester: Thank you. Over to you Arthur, for any closing comments?

Arthur McAfee: I think so. So, litigation as a threat, in terms of your relationship to negotiation in our space, everyone knows that's out there, so that's the last place everybody wants to be. So, if that's the first thing they lead with, we know that you love working around that. A professor at Wharton, Mori Taheripour, wrote a book on bringing yourself, called "Bring Yourself: How to Harness the Power of Connection to Negotiate Fearlessly." It's about negotiation and empathy, empathetic negotiations. And I think that's what you have to do as people. So if you show up in the negotiations trying to be something other than who you are, that becomes problematic hopefully, ultimately for you and for the person you're negotiating against, or with. Not against, you negotiate with them. And so that's very important that you can't get too far out of character in terms of your approach. So, we would say that the threat of litigation, we're all lawyers mostly, we know that that's out there, we know that we are here to resolve issues, and so that's what we really focus on.

Pam Lester: Well, thank you. I also wanted to thank Gary, Dan, Maggie, and Arthur for all their time. Stay tuned for the next panel.

Ethics in Negotiating in Sports, Entertainment and Other Universes

Ethan Bordman: All right, everyone, thanks so much for the first panel. We had great speakers, very informative, and we're ready to start the second panel right now, which is 'Ethics and Negotiating in Sports, Entertainment, and Other Universes."

So, we have two great speakers here, Devika Kewalramani, who is a partner in Moses Singer in New York She's a partner and leader of the firm's Industry Practice Group, which advises firms, lawyers, and legal departments on ethical and legal aspects in practice. She also currently serves as the firm's general counsel. She represents attorneys and law firms in legal ethics, professional responsibility, law firm risk management, lawyer licensing and admissions matters, including escrow issues, conflicts of interest, structuring arrangements with non-lawyers, multijurisdictional practice, which we're going to talk about today, disqualification, lateral transition, law firm mergers and breakups, and partner disputes. She chairs the board of directors for the New York City Bar Association, she was appointed by the New York State Supreme Court, Appellate Division, as a member of the Attorney Grievance Commission for the First Judicial District, and is a frequent lecturer, panelist, and author on legal ethics. Devika speaks to law firms, corporate legal departments, bar associations, and professional groups on a variety of ethical issues.

Carla Varriale-Barker of Segal McCambridge is an accomplished litigator who is at home in the court, boardroom, or classroom. She represents a portfolio of clients in the sports, recreation, amusement, and hospitality industries with a client-centered practice focusing on tort, discrimination, contract, insurance, and premises liability matters, including the defense of claims arising from alcohol service, security lapses, discrimination in places of a public accommodation, sexual abuse, and molestation. She chairs the firm's Sports, Recreation, and Entertainment Practice Group. She also counsels clients involved in the U.S. Center for SafeSport, which is an organization established by Congress to address sexual abuse, bullying, and other misconduct in the U.S. Olympic and Paralympic movements. She's an adjunct professor to Columbia University's School of Professional Studies, where she has

taught Sports Management since 2008. So, we're so glad to have her here to talk about ethics in entertainment, arts, and sports law, and other universes.

I know we spoke the other day and I've come up with a number of situations here that we're going to discuss, and Devika's going to take some, Carla's going to take some. We're going to cover issues in negotiating with more than one client at a time, considerations in other industries, agents, managers, and such, fee arrangements, and then the multi-jurisdictional, where a client moves from one state to another, can you still represent them? So we're going to start off here with the pros and cons of being a lawyer in a negotiation. And this question is for Devika: As attorneys, what do we have to do, or we can't do, that the other side, if they're not lawyers, can get away with, can do or can't do? That's the thing. What are our obligations that they don't have to follow?

Devika Kewalramani: Thank you and welcome everybody. If I can just flip that, but it's the same thing, I think I'd like to address this as: "What can lawyers not do that non-lawyers can do?" And there are a number of things. So, we are talking about the New York Rules of Professional Conduct, which are largely based on the ABA Model Rules, but we have some unique variations. When it comes to transactional work, the rules apply equally whether you're doing litigation or transactional work. And in the area of sports and entertainment, it's again the same rules, although there are some fairly unique issues that arise that, of course, we are going to be talking about today.

So what can a lawyer not do that non-lawyers can do? Well, first of all, knowingly revealing or using client confidential information, and that's not just in ongoing deals that the lawyer is working on. Remember, the duty of confidentiality is continuing even after a representation ends.

What else can they not do? They cannot speak to the other side in a transaction without the prior consent of the opposing party's lawyer. They cannot advise an unrepresented party on matters where they think that their client may have a conflict or potential conflict with the unrepresented party. And the only advice that a lawyer can give an unrepresented person, could be anyone involved in that transaction, is to seek separate counsel if they have issues.

The other issue that comes up in transactional matters is sometimes, before the transaction, you might meet with people. They may come to your office, they may call you, and they're thinking about forming an attorney-client relationship, but it doesn't really happen. And then you kind of learn things or you get documents and what happens there? They're sort of a prospect who never hired you and you get stuck with their confidential information. And while you don't owe the same level of confidentiality duties or loyalty duties, you still have to avoid conflicts and there's still some confidentiality duties that are owed.

The other big one that comes up sometimes is that lawyers cannot knowingly make false statements of fact or law. Now this can be interesting, because you may say, "Well, what if I just don't say anything?" The opposite of loose lips? So silence. Well, silence is not always golden. It could be a misrepresentation, and there's a problem if you know that the disclosure would correct a mistake, especially if that would involve the other side, or if the non-disclosure could be a failure to act in good faith.

Now puffery, we kind of know what that is, that's not necessarily a statement of fact, and that might involve estimates of price, and those kinds of things are generally okay.

The other big issue that may come up in the area of sports and entertainment is that there are other people involved doing other things and sometimes the lawyer is doing those things also; serving as an agent or as a manager. Lawyers cannot practice with non-lawyers and engage in the practice of law. There are some very strict rules separating legal services and non-legal services, splitting fees with non-lawyers is a no-no, giving referral fees or seeking recommendations for legal work is a problem, and soliciting potential clients directly. Now, if they are former clients, current clients, close friends or family, those kinds of exceptions are okay, but direct, online, interactive, real-time communications, digitally or in person or by telephone, those are problematic.

And then we have some of these rather odd rules, many of you know them, that involve words that are dangerous, that are clearly going to be an ethical violation. Like saying that you are "specialized" as a sports lawyer or as an entertainment lawyer, that's a problem. And in your promotional activities and marketing activities, the other thing to keep in mind is certain kinds of statements that you are going to make should not be false, deceptive or misleading. So you cannot say that you are "the hardest working" entertainment or sports lawyer. You can say that you are a hard-working sports or entertainment lawyer, cannot say you are "the best" entertainment lawyer or "the most experienced" sports lawyer. These issues of comparing yourself to other lawyers or the quality of your services or statements that create an expectation about the results that you might be able to achieve have to all be factually supported with various labeling and disclosure requirements.

Carla Varriale-Barker: I was just going to say, what about Super Lawyers®? What about designating yourself as a "Super Lawyer"?

Devika Kewalramani: And there's been a fair amount of, out in the legal commentary and discussion and ethics opinions about those kinds of listings and to the extent that

they meet various qualifications and disclosures, those things, of course, work. But again, those are closely scrutinized and they've been subject to a variety of ethics opinions.

Carla Varriale-Barker: And I just wanted to add, hearing your description of what a lawyer can and cannot do in the transactional world–I'm a litigation attorney and we intersect on many levels, but for me, these questions come up when somebody wants to represent both the artist and the venue. If there is a dispute and they say, "Oh, well our interests are aligned," or, "what if I just fully disclose any potential conflict?" And what I thought was interesting in reading your excellent materials was this ongoing, are you really able to have a cold, hard discussion with yourself and say, "In this matter, I will exercise the utmost independent judgment on behalf of both"? And can you really represent, let's say, the venue and the artist in the context of a dispute, which comes up a lot in my practice? Some people might also say you can't represent, let's say, a landlord and a tenant in a dispute. And even though they think at present their interests are aligned in a certain matter, it is better to exercise your judgment and step back or pick one and not the other.

And I love what you said about, just because you've ceased representation, and I need to bring this up with my associates all the way, those client confidences go with you to the grave. You don't talk about them at cocktail parties. Those are continuing obligations and they are, you have a lot of experience with the disciplinary committee, I'm so happy that I don't practice in that area, but they are scrutinized and lawyers are held accountable, and rightly so.

Ethan Bordman: Great. Thank you. So, the second thing that we wanted to move on to were ethical considerations when representing more than one client in a negotiation. Some examples I wrote down were, what if you have a band where there's four or five people? Or, what if you have a band and one of them leaves? Can you represent the person if they go solo? Can you represent maybe later when one day you're representing the band, the next day you're representing the label on a different deal, and then the label comes back for a deal with your first client?

Devika Kewalramani: Conflicts issues are always thorny. It's never simple. And you going to have to think about it in terms of, well first of all, what is the identity of the clients? Who are the clients? Let's look at who the clients are. Are they all the band members? Are their interests all aligned? Are they aligned right now? Will they be aligned tomorrow? So really, that's kind of one of the first questions. But to take a step back, what are we really concerned about when it comes to conflicts? Because a lot of people say, "Oh, we can get a waiver or we can set up a wall." But the most important part of this is that you've got two or maybe more clients, and the risks here are that one of the clients is going to feel betrayed. The other is going to feel like you are being deferential to the other client.

So, differing interests is the standard that we have under our rules, and it's extremely broad. It involves a variety of different, inconsistent, divergent interests that the client may have. And it affects the ability of the lawyer to essentially exercise independent, professional judgment despite that and represent the clients. But with concurrent representations, the rules are much stricter than with former clients. So if there are two clients where the lawyers representing one client in one matter completely unrelated to another matter where the lawyer is adverse even in a transactional sense to that first client, so these are two unrelated matters, but client A is a client in matter A and client A is the adverse party in the transaction in matter B, well, a lot of people will say, "But they're unrelated. What's the conflict?" And we have ethics opinions that say even in those situations, you need to get a conflicts waiver, you need both affected client's consent.

So, a lot of these discussions come around, are these consentable or non-consentable? And while the rules are very clear that the types of conflicts that are completely prohibited are being on the opposite sides, well, this–we are not talking about litigation, so we are talking about transactions - so you're really on the opposite side of the table, not in a litigation, but the question becomes, "Do you feel comfortable seeking a waiver from the client?" And the other question is, "Even if you get the waiver from the client, do you feel that you can competently and diligently represent the client," as Carla, you were mentioning? And if those are true, then the consent is effective and it will be enforceable. But ultimately, the most important part of this is the disclosure to the client and the discussion about the risks and the advantages and the implications and the disadvantages of taking on that representation that is burdened by a conflict. And that's sort of the informed consent piece before you get the confirmed in writing piece to satisfy the conflict curing process.

But in your example, Ethan, jointly representing the band members is okay to the extent that three things have been discussed with the clients: issues of conflict, issues of confidentiality, and issues relating to privilege. So, at the time that you would be considering representing them jointly, if their interests are completely aligned, at least as to what your representation is all about, that may work.

Confidentiality is interesting because it's confidentiality that's joint, that's owed equally to each of the band members. So if one of the band members comes and tells you that, "Look, I have a secret that I don't want you to share with members B and C," that creates a dilemma for the lawyer, because on the one hand, the lawyer wants to protect the confidential information of band member A, but at the same time, in a joint representation, that information needs to be shared

with all band members. So the lawyer may be in a position where they may have to withdraw, not just from representing band member A, but probably all band members.

And the third piece of this is privilege. So, the prevailing rule is that in a joint representation, privilege doesn't attach to communications among the band members, but it would if there was a third party litigation involving these band members with someone else and the production there, those kinds of issues, privilege would be involved, but not among them if there was litigation or a dispute among the band members.

So that's the sort of current client scenario where joint representation could work with all of these risk issues discussed and with that put in, memorializing a writing in the engagement letter or some other document, and all the band members would consent to it. If some of them are former clients of the lawyer, whereas some of the band members continue on with the lawyer, that creates another set of issues with regard to former clients.

And the rules there are slightly more relaxed than the deferring interest standard that's applied for current clients, but there you have to see if you can actually represent the ongoing band members to the extent that there's no adversity to the former band members who the lawyer represented. And if there is adversity, that doesn't end the potential for representation. It's just that if there are confidences that you learn from the former band member that would hurt that band member but help the ongoing band member clients, well that would be a problem, especially if these were substantially related matters where what you did for all the band members together, and then one of them is now a former client, but then the rest remain, and there's some issue that you're representing these band members with which is clearly related to or is the same issue, same facts, as what you did for them all together, that would only be allowed if that former band member who left consents. So, you only need the consent of the former band member there.

Carla Varriale-Barker: So, I'd just like to add that I object to your hypothetical because I wanted more information, and of course you drilled right down into that. So after noting my objection, I will just share with the group, I'm fortunate enough to have an ethics manager who I work with at my firm, lovely lady, I avoid her like the plague in the lunchroom. But her question to me when I bring these thorny issues to her is, she will look me right in the eye and say, "Would you be holding back anything in your representation? Is there something where you would be checking yourself because you are navigating a line?" And sometimes she is straight on. And that is such a good holistic check-in for a lawyer. Could I really go full guns on this representation? Again, this might also be in the transactional world as well, but if I would be checking myself in this representation, or even if I have a hesitation about whether I would be able to navigate everybody's interests, I can't do it. I can't do it, and I hate that answer, but it's the right answer.

Ethan Bordman: No, I think that's a great point. But the point being is, if the band breaks up and one of the members wants to stay, or the band continues on and somebody goes solo, the goal of both of them is the same, which is to get a record contract. So, is there a conflict as to the things you knew previously that will hurt or help the solo artist? That's one of the considerations.

Carla Varriale-Barker: It's possible. But yes, wanted more detail there.

Ethan Bordman: So, the next thing that we wanted to discuss were considerations for attorneys who act in other roles in entertainment and sports. They are agents, they are managers, they are sports executives, or entertainment executives. So, they are licensed to practice. I've got a couple of scenarios here, but let's assume first that they're all licensed, they maintain their license, they maintain their CLE, but do they still have to follow those? Do they still have to follow those Rules of Professional Responsibility as an agent? They're not a lawyer. They're not their lawyer. They make it clear to the client, "I'm not the lawyer. I do have a legal background, but I'm your agent, I'm your manager." What are the considerations in that case of representation?

Devika Kewalramani: Well, when lawyers are wearing more than one hat, it can always be issues. Right? So whether it's dual hats, multiple hats, there are other roles and responsibilities that they are talking about. And then the question becomes, are those roles distinguishable in any way from the legal role, and is there some overlap? And the reason we are concerned about that is because lawyers really cannot switch roles or merge the lawyer role with a non-lawyer role so easily.

And as long as a lawyer is acting as a lawyer and is admitted as a lawyer, they're still subject to the Rules of Professional Conduct. And violation of any of the rules could subject a lawyer to professional discipline.

So there are these lawyer/non-lawyer distinctions that, of course, come into play. And there are a variety of rules that lay out what kind of steps the lawyer has to take if they're taking on other roles, to make it very clear to their clients what role they're playing, and what role they're not playing.

And there are disclaimers that protect the client that the lawyer should make sure are shared, essentially, that if they're acting in a non-legal role, then that is a provision of non-legal services that is not protected by the attorney-client relationship.

In other words, all the duties, such as competence, confidentiality, communication with clients, avoiding conflicts, and a variety of others don't kick in in those other roles.

And as we discussed before, there is that clear separation of lawyers not practicing with non-lawyers. And having said that though, the rules do not prohibit lawyers from having a completely separate and independent and distinct ancillary business, which could be anything, as long as it does not channel legal work to the lawyer.

I think those are some of the key considerations when lawyers are either playing a different role, but also dealing with others where they may be still acting as a lawyer.

Ethan Bordman: Yeah. So I have a couple of situations here that I know that I've been asked over the years, so we'll just sort of go through those.

First is, if an individual is a law school graduate but never takes the Bar, and I know there's a big sports agent who's done this, graduated and just never took the Bar, do they have to follow the Rules of Professional Responsibility? Are they a lawyer?

Devika Kewalramani: That's a great question. What does everybody think?

Carla Varriale-Barker: And nothing we say here should be construed as legal advice.

Devika Kewalramani: Yes. Yes.

Carla Varriale-Barker: Just as a disclaimer. I'm going to say no, because they're not admitted to the Bar.

Ethan Bordman: Right. Never took the test.

Carla Varriale-Barker: And I went to law school with perhaps many unethical people, but they never intended to practice. They went into real estate.

Ethan Bordman: Right.

Carla Varriale-Barker: They went into...Any number, they became entrepreneurs.

Devika Kewalramani: We're getting there. Yes.

Ethan Bordman: Please.

Devika Kewalramani: This person has legal training and legal education, but is not admitted, so does not require to be compliant with the New York Rules of Professional Conduct. And not being admitted means that person can really not practice law and represent clients.

And here's the thing, and there's this dark side to this, so I'll preface it with that. If this individual negotiates deals, then they are engaged in the unauthorized practice of law.

And it's worse, because the New York Judiciary Law back, I think in 2013, amended certain provisions to provide that non-lawyers who may be holding themselves out, to your point, as lawyers, can be charged with a Class E felony.

Carla Varriale-Barker: So don't do that.

Devika Kewalramani: Yes. And if an admitted lawyer in New York were to work with such a person who is not admitted and is trying to engage in the unauthorized practice of law, then that lawyer could be in ethics violation of Rule 5.5, which is that the lawyer is aiding and abetting a non-lawyer in the unauthorized practice of law.

Now, there are non-lawyers who are supervised by lawyers. And that kind of proper supervision is of course a different scenario. But we're talking about a person who never got admitted who was trying to negotiate deals.

Carla Varriale-Barker: This gentleman asked about someone, so you're saying not legal advice. That somebody goes to law school, doesn't take the Bar, doesn't get admitted to the Bar, opens an office that does maybe business consulting and as part of their business consulting, may negotiate things. They don't put up a law sign. They simply say, "I have a law degree," which is a fact.

Ethan Bordman: They're a J.D.

Devika Kewalramani: J.D.

Ethan Bordman: Right. They're a J.D, which is fine.

Carla Varriale-Barker: And they tell their clients, I'm not admitted as a lawyer, but I'm going to negotiate on your behalf. I have a J.D. You have the option to have a lawyer, but I'm not a lawyer.

Ethan Bordman: Great question.

Carla Varriale-Barker: That could get them a class E felony?

Devika Kewalramani: No, that's not what I'm saying. I'm saying that if you negotiate deals as a lawyer, when you are not admitted to practice and you're not making it clear that you are doing business deals as opposed to providing legal advice. So if there are clear disclaimers; so in other words, lawyers can do other things.

So, if they're not providing...And the example we were looking at involved a person who was negotiating legal, doing legal work, I think that that's your hypothetical, right?

Ethan Bordman: Right. And yeah, my question was do they have to follow the Rules of Professional Conduct? That's the first part of the question.

Devika Kewalramani: Yeah, if they do not if they're not admitted to practice, but that doesn't mean that they get away scot-free, because if they're practicing law without a license to practice, then they're subject to the New York Judiciary Law.

However, your question is, if I understand it right, is that they're not engaging in the practice of law, they're not giving legal advice, but they're doing business work. Maybe they're consulting and they're making it abundantly clear that while there may be a law graduate or they're a J.D., they've not passed the Bar, they are not admitted to practice, and they're not giving legal advice.

With that, and making that disclosure and those disclaimers very clear to clients on websites, on anyone who's visiting websites or their promotional material, whatever, and they're not holding themselves out in any way with that; if they're just doing business consulting or negotiation, that may be okay. But again, I'm not giving advice here.

Carla Varriale-Barker: So are you saying that they can negotiate the business points, but they can't negotiate the force majeure clause? Who decides if they're practicing law? Right? If you negotiate that, if you say, "I'm a J.D., I'm not a lawyer. I'm negotiating this." So when you say "engaging in the practice of law," is the act of negotiating something that is a legal provision requiring legal interpretation of practice?

Devika Kewalramani: That's right, that is. And if you look at the New York Judiciary Law, there is a definition of, it's a lengthy definition of what the practice of law involves.

However, that definition is not uniform around the country. It's similar, but not identical. But are you giving business advice or are you giving legal advice? And I think that's a very big distinction.

So there are consultants who look at term sheets and some consultants are J.D.s, but they're not holding themselves out as a lawyer. They're not giving legal advice, they're not practicing law, and they're not representing clients in legal matters.

So as long as they're making it abundantly clear that they're not acting as a lawyer or trying to protect the client's interests as a lawyer and they're doing business-related activities, that kind of situation is different from what we were talking about before.

Ethan Bordman: I think that's an interesting point, and I know we have some questions we'll get to in a moment. I think an interesting point is that maybe the public at large doesn't understand. "Oh, my grandson graduated from law school. He's a lawyer." Well, he's not until he passes the Bar Exam and gets through the Character and Fitness, things like that. I think that's one thing that a lot of people misunderstand.

Devika Kewalramani: That's right.

Ethan Bordman: They just say, "Oh." Like because when you graduate from medical school, you get the title of doctor, but you're not a doctor. You need to do your residency, and that sort of thing. So I think that's what some of the public may be understanding.

Devika Kewalramani: That's why the New York Judiciary Law, the public policy behind it is to protect the public from people who are holding themselves out as a lawyer when they have not been sworn in. They have not gone through the screening process and others who have never even gone to law school. So, the abuse that can happen.

And if you've never been...If you're not subject to the Rules of Professional Conduct, then you fall under a completely different jurisdiction, which is the AG's office. And that's what the Judiciary Law is really directing. The enforcement part of that is with the-

Carla Varriale-Barker: Legal Zoom are not lawyers, I assume they're not.

Devika Kewalramani: Legal Zoom and Rocket Lawyer. And yes, there's a lot of litigation about that.

Carla Varriale-Barker: Yeah, yeah, yeah.

Ethan Bordman: We have a question over here.

Audience: Well, I just wanted to clarify the difference between business and legal services. So, because something in my world is, say you have a general manager for a production, a movie or a theater, and they're managing all the contracts for the production, all the employment agreements, all of the location agreements and everything, they're dealing the deal points.

Or the producer even is working with them and they've been doing this for years and years. Say a general manager goes and gets a J.D. or has a J.D., they've got some background in it. But they're very clearly, they're the general manager of the production, but they're the ones who the actors are going to negotiate their deals with.

The production will say, the business is dealing with all these location agreements, dealing with all these agreements, dealing with all these different things that we might say, "Well, that's legal obviously. These are legal considerations for employment, legal considerations for property." But they would be like, "We need to get this done." So if I had to jump in right now, they be like, "Oh."

Devika Kewalramani: Are they in this room?

Audience: Oh, am I going to get this class E felony because I've been negotiating these deals on behalf of production because they've been doing it for 10 years and they happen to have a background and then they know what's going on in the business world? Because business points, I know what royalties are.

But they also know other things, they're like, "Oh, we should have that in there because they know that..." So can we clarify that?

Ethan Bordman: So, the question is: if the production company is the contact person and they're doing agreements, not necessarily the lawyer, there's concerns there.

Devika Kewalramani: Yes.

Ethan Bordman: General manager.

Devika Kewalramani: Yes.

Ethan Bordman: It's about general managers handling contracts.

Devika Kewalramani: Or their administration.

Audience: They're the only ones with their fingerprints on those.

Devika Kewalramani: Yeah, you know what? I think what we are really trying to do is spot these issues for you to see where the hazards are, because these things blend in, they kind of bleed into each other. And to your point, somebody's been doing this for many years and they have a lot of precedent. But again, there's a huge risk, we would agree.

Carla Varriale-Barker: Yeah. We all negotiate every day. When I go to buy a sofa, I am a knowledgeable furniture shopper and I am negotiating. We all do that. I think the point that Davika is trying to make and what is within the rules and the materials is, where do you cross the line?

Somebody is relying on your expertise and you are crossing a line from being a knowledgeable industry professional to like, "Oh, here, let me put my expertise on this and guide you," and potentially mislead you. Right? Isn't that the spirit behind the rule, is that you don't want people to be misled by somebody who is really not qualified?

Devika Kewalramani: Well, as we were saying earlier, it is, that is the danger and knowledge is one thing. Having experience looking at it as a business person is one thing. But what does a lawyer really provide? The professional judgment on that, the legal analysis.

And there are many companies who do things in many different ways, and what we are really talking about here is that here are the risks. Here's where one thing can bleed into another and what to watch for so that you avoid trouble, both legal trouble and ethical trouble.

Carla Varriale-Barker: And I have no doubt that the people in your business office or production office are eminently qualified, maybe more so than a junior lawyer that might be putting together...Yeah, I know. I see you nodding. I understand exactly what you're about.

Ethan Bordman: We had a question from our virtual audience.

Carla Varriale-Barker: To be aware of. And there's no confidentiality. There's none of the good bells and whistles that go along with the lawyer. If they're an agent, are you still a lawyer? Are you still maintaining your license?

Ethan Bordman: Yeah, go ahead. By the way, that's my third question here, is if an individual is an attorney, but doesn't hold themselves out as a lawyer, and the only thing they do is act as an agent or a manager, they don't do anything legal. They don't draw up the contracts, they leave that to the lawyer, they hand it to somebody else. Are they still bound by the Rules of Professional Conduct?

Devika Kewalramani: They are bound by the rules.

Ethan Bordman: Yeah, they're still a lawyer. Right?

Devika Kewalramani: Again, I'm not giving legal advice. Neither of us are. They are bound by the Rules of Professional Conduct in New York because they are admitted lawyers who are practicing law. However, if they are concealing their status, not putting it on the website to your hypothetical, Ethan.

Ethan Bordman: Yes. Yeah.

Devika Kewalramani: Not putting Esq. by their name, not putting it on their business card, then they may be having trouble with another set of our ethics rules and commentary that speak to how a lawyer must be scrupulous in the representation of their professional status.

So if you're a lawyer, we must say we are lawyers. We must say where we are admitted. And if it's important to say where we are not admitted, to the extent there may be others in the office, and you might be the only one admitted in a certain state, and you may want to make certain disclosures about jurisdictional limitations.

But it kind of goes to the rules on 8.4 that talk about lawyers not engaging in misleading conduct or conduct that might be deceptive. Because again, the idea here is to make it abundantly clear to the public, to the clients, to opposing counsel, to opposing parties, as to what exactly your professional status is in terms of the representation you are providing to your client. Is this in a legal capacity or in some other role?

Now, if it's in another role, like an agent or manager, so if the lawyer is concealing his or her lawyer status because they're an agent or a manager, that's clearly deceptive. But if they're really engaging in a non-legal role, then they need to make that clear as to what that non-legal role is and that they're not acting as lawyers. They're only acting in that non-legal role and saying that the protections of the lawyer-client relationship do not really attach. So those disclaimers and disclosures become really, really important in that scenario.

Ethan Bordman: We have a question from somebody virtually. And the question is this. It says: "If you are a lawyer for a film production and you are offered a producer credit on the film, or you're asked to be both a lawyer and act as a producer, is that unethical?"

Carla Varriale-Barker: So you're a lawyer who –

Ethan Bordman: It says you're a lawyer for a movie and they offer to give you a producer credit. They'll say, "We're going to make you an executive producer, just give you the title." Or can you be both the lawyer and act as a producer? Producer is the manager of the project that helps raise the money-

Carla Varriale-Barker: As well as the lawyer?

Ethan Bordman: Sign the talent, get the director, things like that. Right.

Carla Varriale-Barker: Does it interfere with your independent professional judgment, Ethan? Then you can do it if you are clear of those things. But I can think of a few scenarios where that might get messy and complicated.

So I love the answer "it depends." But I mean, is it going to interfere with your independent professional judgment? I think more so getting the credit is easier, but then if you're going to act as producer and advising as a lawyer, it might get messy.

Ethan Bordman: Because the credit could be just be a credit, like a thank you.

Carla Varriale-Barker: Yeah.

Ethan Bordman: But you're doing a producer part then yeah, you're being involved in the management and consulting, so are you the lawyer or the producer was the question, or can you be both?

Devika Kewalramani: I think it also might raise issues of attorney-client privilege in terms of which role are you in? And making that clear because if you are in a non-lawyer role, then the client must know that those communications are not privileged, but in the legal role they are. So I think that that would need a lot of clarifications and more facts around it.

Carla Varriale-Barker: So please tell the lawyer that he, she or they should take the credit and forgo being both lawyer and producer.

Ethan Bordman: One or the other. That's interesting. Yeah. So we've got two more things to touch base on. I do want to leave some time for questions. Ethical fee arrangements. So we talk about, as we just mentioned producer.

Carla Varriale-Barker: Hold on, we've got to –

Devika Kewalramani: Oh, did you want to address the inactive status? We were having such a robust conversation. Only if you want to.

Ethan Bordman: One more question, and this question was about status was, if you're a lawyer and you completely give away your law license, you go inactive, you give up the law license. Again, are you bound by the Rules of Professional Responsibility? If you're not a lawyer, you say, "I'm gone." The state bar website says inactive. You don't tell people you're an attorney. You surrender your license, so to speak.

Devika Kewalramani: Yeah. In New York, there is no such thing as inactive status. I think in states like California and others, there may be. So we don't have that. And surrendering raises the issue of, "Well, what exactly do we call it?" It could fall into two buckets, I think. Either it's a retirement or it's a resignation and they have very different implications.

Ethan Bordman: Oh, I see.

Devika Kewalramani: So, I don't want to take away from the other part of our presentation, but I can really quickly tell you that if you retire, then the lawyer is not practicing, cannot practice, but they can practice without compensation, so they can do pro bono work as a retired lawyer.

If they're retiring, they cannot be practicing in any other state, though. They have to be retired or not practicing anywhere. And they also they cannot share in fees with other lawyers.

Resignation, and by the way, both retirement and resignation are all products of our court rules and other regulations in New York, resignation is a little bit different, because the lawyer cannot practice in New York, but they might be able to practice in other states where they're already licensed.

But in any event, they cannot practice law unless they're doing it without compensation as a retired lawyer.

Ethan Bordman: I see. Okay. So, ethical fee arrangements. We've got, of course, an hourly fee. We have a contingent fee. What about other considerations in entertainment, like backend profit participation? So we'll take a little share of the profits of the deal.

Carla Varriale-Barker: And then you also have some flat fee arrangements, which have been –

Ethan Bordman: Well, I think we understand. A contingent fee, is that allowed in entertainment? Usually that's associated with personal injury or something like that, I'll get a third of what I collect.

Could you do that for what you negotiate as a deal? I get 5% of the salary or I get a certain percent of your backend participation. The movie's a hit and it makes a billion dollars. The client's entitled to 10%. You're going to give me 2% of that 10% or something like that. Is that allowed?

Carla Varriale-Barker: Again, the guiding principles are, put it in writing, full disclosure. Of course as a requirement, you could do hourly, you could do a percentage backend, you just can't be in a position where you have an interest that's going to cloud your professional judgment and the considerations.

I hope that you'll use the hypothetical that you gave to us because I think that what is really interesting is whether it is reasonable under the circumstances, a 40% contingency might get struck down. And then I think...Do you want to do your hypothetical about some certain, a specific –

Ethan Bordman: Yeah, that was something different.

Carla Varriale-Barker: Okay. Do you think that parties are...You're just not allowed to have a financial interest in your client's business, especially whereby it is going to impact your ability to render impartial and fair legal counsel.

Ethan Bordman: So you could take a percentage of what you negotiate because your interests are aligned. The more the client makes, the more you make.

Carla Varriale-Barker: I think that's right.

Ethan Bordman: 10% like that and back.

Carla Varriale-Barker: I think that's right.

Ethan Bordman: All right. Very, very good. Okay. And also the multi-jurisdictional practice of moving of clients. Because I know that that's one thing that always comes up. Many attorneys are licensed in both New York and California. Some are only licensed in New York.

If the client is your client in New York and moves to California, can you do that? Or if a client is in California but calls you and says, "I want you to be my lawyer," and your license is in New York, what are the rules on that in terms of a multi-jurisdictional license?

Carla Varriale-Barker: So, my gosh, isn't this coming up so much as a result of COVID and Zoom? Yes, of course. Correct me if I'm wrong or if you disagree, but I think that with your negotiation, where are you practicing? Where are you negotiating? Are you advising? Are you negotiating? The client, you have a question here about a former client.

So clients who move, where are you engaged in the practice of law? Are you doing it here in New York? Is it now really more of a California or other state negotiation? I think that would dictate.

And your question about a former client that has moved and is now retaining you again is sort of the same question, but I'm going to guess if the former client has moved and is in a different state, you might need to affiliate or partner with an attorney in that state in order to address the client's needs.

Ethan Bordman: So, it's where the legal work happens, not necessarily the location of the client. The client is a citizen of California, it has a California driver's license. It's where the legal work is; it's where the representation is taking place.

Devika Kewalramani: Yeah, well, I'll address that. I don't know that there's a very clear, consistent answer that's available on this question because I think the factors that courts tend to look at are many, but the three main, I think, are: location of the client, where are the services being performed, and what is the law governing the transaction, as you just pointed out.

But I will also add that it's a bit of a patchwork of rules and I think you really have to look at the rules state by state. So when we are talking about New York, but there are temporary practice rules around the country, New York also has adopted those. So it's sort of important to look at that because there are lots of moving parts to these types of hypotheticals.

Ethan Bordman: Interesting. We do have to finish up, but we have a few minutes for questions. So, Jason Baruch.

Jason Baruch: Seems like the rules are sort of a little bit more geared towards litigation than transactional.

Ethan Bordman: Yeah.

Jason Baruch: I mean, the practical matter is, if a client lives in Los Angeles and is getting job in Las Vegas, I think it's safe to say that we all do that.

Ethan Bordman: I just want to repeat the question for those virtually. The question was that if you are in New York, that's multi-jurisdictional, often people will have the lawyers in New York, the client lives in LA, and the deal is being done in Vegas, but it's transactional, not litigation. And so that was the point that was made.

Devika Kewalramani: Yeah. I mean one of the rules that's coming out of multi-jurisdictional practice today, given that a lot of people are not necessarily practicing...They're hopefully practicing the law of the state they're licensed in, but

they may not be located there while they're practicing and their clients may be all over the place.

But to the extent that the lawyer is advising the client on map... If it's an extension, rather, let's say the lawyer is representing the client in New York and then there's some work that's only incidental and related to that work, but it's in another state; to the extent it's reasonably related to the work that the lawyer is doing in the state that the lawyer is licensed, that's generally permitted.

But it's really important to look at exactly what your facts are and then go back to the rules and see whether there's compliance.

Ethan Bordman: Any other questions? Yeah. Oh, Carol.

Carol Steinberg: You said earlier, you can't say "specialize," but what can you say?

Ethan Bordman: You can't use the word "expert," that I definitely know.

Devika Kewalramani: There are some ethics opinions that speak to that. The rules specifically speak to not being able to use the word "specialized." So, a lot of lawyers use words like they "concentrate on," they "focus on," they have "experience in." I get asked that question a lot, too.

Carol Steinberg: You can't also not say "expertise."

Devika Kewalramani: Well, as an extension, as lawyers, we would want to not risk that. Yes.

Audience: What about reciprocity?

Ethan Bordman: So the question was about reciprocity with New York?

Carla Varriale-Barker: Meaning that you could be admitted or pro hac into that state or am I okay because, like for example, I know that New Mexico has reciprocity with New York? Doesn't mean I can, again, I'm a litigator, I'm not a transactional person, but I'm not about to go over to New Mexico and start negotiating things as a lawyer. I would either pro hac myself in or affiliate with a lawyer who I could work with in New Mexico. But the fact that they have reciprocity doesn't mean I can go and be a lawyer there without being –

Audience: As I sit here, I represent a client who is from there.

Carla Varriale-Barke: Okay. Same questions. As a litigator, I would say no. As a transactional person, it may be different.

Devika Kewalramani: I will tell you that with the increase in remote practice, which started even before COVID, and then it grew during COVID, there came about a number of ethics opinions from different states, including I think the ABA, that have spoken about remote practice.

One of these opinions stood out for me. I think it's a Florida opinion, where the lawyer was in Florida. It was sunny, it was beautiful. They were sitting in their home on the computer and advising clients in the state where they are admitted. They were just not in the state that they were admitted in while they were giving this advice. So, they were on a computer in a vacation home, let's say, or a second home. They're not admitted in that state. What's the ethical implication there? This opinion, along with a number of others are, basically, saying the same thing: that as long as you are practicing the law of the state that you're admitted in, and you're not setting up an office in a state that you're not licensed in, and you're not holding yourself out as a lawyer there, and you're not advertising or handing out business cards that you can practice in that state that you're not licensed in, that is okay. There are these safe harbors that have started to develop, because of how lawyers today are practicing law.

Ethan Bordman: All right. Thank you. We've got to finish up getting ready for the next panel. Thank you guys. This was great.

Carla Varriale-Barke: Thank you.

Devika Kewalramani: Thank you.

Regulation of Social Media and Online Content

Barry Skidelsky: Thank you all for coming. I'm Barry Skidelsky, former EASL chair and moderator of this panel today. I am pleased to have with me three distinguished gentlemen who are involved with litigation currently cooking at the Supreme Court, or en route. In the interest of brevity, I'll announce very briefly, it's Carl Szabo, general counsel of NetChoice, which is one of the lead plaintiffs in two of the cases involving Florida and Texas social media law. Scott Wilkins, who is from the Knight First Amendment Institute at Columbia University, here in New York, which was an amicus in that case, among others, that they worked on together, I believe. And Ronnie London, who is general counsel of FIRE, the Foundation for Individual Rights and Expression out of Washington, D.C. I feel like we have big tech coalition, individual rights, and friends. Friends may agree in part or if not in whole of positions they were espousing or advocating for.

With that, I'm going to urge you to check out the written materials, which are pretty comprehensive, not only for bios of three speakers and myself, but also there's an article I wrote for the *EASL Journal* that was written in the fall, thanks to Elissa Hecker, our *EASL Journal* editor. This is probably the most timely topic here at the whole State Bar week, because we're talking about, as you'll hear, stuff is going to hap-

pen maybe next week, and I'm going to shut up and let me start with you, Carl. Carl worked for NetChoice as a plaintiff against the Florida and Texas laws. If you could give us a brief intro about what those laws were, and what they're all about, and why do we care.

Carl Szabo: Thanks for having me. I like to describe this event like, "Well, you ate your vegetables, now this is the dessert." This is the fun issue of the day, because as I tell my employees and people I work with, this is the esoteric stuff that you talk about in law school, but never actually get to apply. Like Constitutional Law, First Amendment Law, stuff like that. That's exactly what is at the heart of all the issues we're talking to, talking about, today.

Now, you're also asking yourselves, why the heck are these guys up here? This is supposed to be the entertainment bar. What does this have to do...? Well, probably a lot of your clients use a number of the services that we are going to talk about today, whether they're on Facebook, or Twitter, or TikTok, or if they're selling stuff on Etsy, because this is a far -reaching issue. Okay, cool. That's a level set.

Let's roll back the clock a couple of years and you don't really have to go back that far, but a lot of Republicans are really hopping angry, because they perceive either real or made-up bias against them by tech companies. In particular, several of the NetChoice members, which include the large tech guys, like Amazon, and Facebook, and Google, but also include the small ones, like Pinterest, and Etsy, and Pindrop. You can see all about them at netchoice.org, as well as more information about these suits.

Back to the cases, what's going on? Down in Florida you've got Governor Ron DeSantis, he decides, "I'm going to stand up against this wokeism." That's his main drumbeat today. He, himself, pushes through a piece of legislation that has one singular purpose: to make it illegal for a social media site to remove content based on the contents of that stuff. Included in that, there's a prohibition on removal of content regarding somebody who is running for office. Many trips to Tallahassee later, the bill gets passed, despite my best efforts. In the 11th hour of it getting passed, an amendment is added in. The only reason I bring it up is, because it's comical and it's one of these things that you don't believe actually happens until it does–at the 11th hour, an amendment gets added in that this legislation shall not apply to somebody who operates a theme park that is more than 20 acres large.

Barry Skidelsky: And has a mouse in its logo, which by the way, is losing copyright protection.

Carl Szabo: Yeah. Exactly. Mickey Mouse from Steamboat Willie. Somebody asks this sponsor of this amendment on the floor of the Florida House, why are you introducing this amendment? His statement, I wish I could have made this up, but I'm glad I don't have to, because it made our case even stronger. "Says it's the only way I could exempt Disney." I'm like, "Great, perfect." Some of my members did consider opening theme parks to exempt themselves from the legislation. We could have had the YouTube, and the Google Wave pool, and similar other jokes that I have made in the past.

What happens? The law goes into effect. NetChoice, along with a co-plaintiff CCIA,[2] decides to file for a preliminary injunction on the law. What is our basis? Well, it is the First Amendment. A lot of people throw around the term "§ 230," it's a red herring. It gets all of one paragraph in our complaint. Almost the entire case is centered around First Amendment. We'll jump into the details of it. I want to level set the cases and then we can talk about the legal stuff. To give you an idea of the timeline, which is also available in netchoice.org, we secured our preliminary injunction on June 4th. It was granted on the 30th. Then, of course, the state appeals, it goes up to the Eleventh Circuit. Basically, a year goes by, we get a decision from the Eleventh Circuit that had upheld the decision and then we have filed for petition to the Supreme Court. The reason that it was mentioned that this is timely, is that the Court is sitting for the first time tomorrow to decide whether they're going to take up our petition for cert.[3]

Not to be outdone by Governor DeSantis, Governor Abbott has to get in the fight, of Texas, for those of you who don't play along at home. Governor Abbott steps up and says, "I want that law too, but you know what? They made a mistake, Florida, they made a mistake. They had that Disney exemption that made it unconstitutional, so we're going to fix that problem. Also, they made it about content discrimination. We're going to make it about viewpoint discrimination. Therefore, we'll solve that problem. We won't give special protections to somebody running for office, because that seems to be a little bit of a First Amendment problem too, so we're going to put that to the side." Well, lo and behold, they get that one passed–we had many trips to Austin and it still gets signed.

The timeline on that gets a lot more interesting, because in December we get our preliminary injunction. Basically, same decision, same facts. They're like, "Yeah, this is the First Amendment. No duh." But, the Fifth Circuit, a squirrely circuit, for those of you who are familiar with it, in a 2-1 decision says, "No, we are not going to uphold the preliminary injunction." They didn't rule on the rule. They said, "We're not going to uphold the injunction." Of course we're freaking out. My members are freaking out. "Oh my gosh, this law is going into effect. How are we going to do this?" We make an emergency appeal to the U.S. Supreme Court. We get a 5-4 decision in our favor restoring the preliminary injunction. Now, most people are like, "Wow, 5-4. That's pretty close."

Well, Sotomayor voted against it mostly because she doesn't like these emergency petitions. It's really 6-3, but okay.

Preliminary injunction stays and now we're waiting for the Fifth Circuit to come back with a decision. We're like, "Did we win the case?" We still don't know. Well, several months go by and almost five months after we get the original injunction lifted we get a decision from the Fifth Circuit, 2-1 split. Again, we lose. We make an emergency appeal to the U.S. Supreme Court to hear on the merits. Now we're hearing on the merits and that is also before the court tomorrow. Two cases, *Net Choice and CCIA v. Paxton,* which is the Texas case. *NetChoice and CCIA v. Moody*, which is the Florida case. Both are going and are before the Supreme Court right now.

As a quick little addendum to this–we are not all about suing conservatives. In fact, most of the people at my company, we are right of center. Don't hold that against me.

California enacted something called The Age Appropriate Design law. Sounds good–we must protect the children. Well, if anybody knows that's oftentimes the battle cry for somebody who's going to take away your free speech. They enact the flip side of what we saw in Florida and Texas, which is, Florida and Texas says: you must host speech even if you don't want to. California's doing the opposite. They're saying: you must remove constitutionally protected speech even if you don't want it. This means not allowing 17-year-olds to see content that they are by law allowed to see. Likewise, we do have another lawsuit that's just getting off the ground called *NetChoice v. Bonta*, and that's over in California.

I think that's a good level set and I'll turn it over back to you, Mr. Moderator.

Barry Skidelsky: Thank you. I'd like to ask, very quickly, what is, Scott, the point of distinction or difference that the Knight Institute had with NetChoice's position? How do they differ?

Scott Wilkins: Sure. I think we are in agreement. On what I think we would agree is the critical point of both the Florida and Texas laws. The most objectionable part of those laws, which are the sections that try to tell platforms, NetChoice members, what they may or may not publish. That's at the very heart of the First Amendment right to editorial judgment. We very clearly agree with NetChoice on that.

Where we, I think, depart company, although it's debatable whether we would on actual statutory provisions, but question of whether transparency requirements in both the Texas and the Florida laws that would mandate various disclosures, for example, about community standards that the various platforms have, whether those can withstand Constitutional scrutiny under the First Amendment and what the correct legal standards should be.

What Supreme Court case, the main one we all talk about, is *Zauderer,*[4] whether that should govern those disclosures. Our position at the Institute is that there could be disclosure requirements that are consistent with *Zauderer,*, which is the governing framework. We have not said whether any of those in the two statutes are, because I think under *Zauderer,* there has to be a careful weighing of the evidence and showing of undue burden on speech.

That is something that is not very well developed on the records, but we think the framework is there under *Zauderer*. It's just the question of whether the disclosure requirements would unduly burden speech. We would agree that in that circumstance, in general, those would fail the *Zauderer* test. That's the one area where I would say we have disagreement, but I think we would probably agree that there are a lot of transparency requirements that would be too burdensome and that would be struck down even under the *Zauderer* standard, because they are unduly burdensome on the speech that the platforms are trying to exercise. Which they clearly have a right to and which, I think, it's fair to say the governors didn't fully appreciate. Or if they did, they didn't care.

Carl Szabo: One of the things that I often find myself doing when I talk to my colleagues and sometimes my employees who are about to go testify, I had one actually in New Hampshire today testifying on a very similar bill, is at the end of the day lawmakers don't really care if it's unconstitutional. That's the AGs money that gets spent defending it. They get to go out. DeSantis had a huge conference when he was going to sign this law. He is like, "Finally we're going to fight back against these woke corporate companies" and they get to cut the ribbon. Then it's *Paxton* and *Moody's* problem afterwards.

To add just a little bit of context for the transparency requirements, one of the provisions that I skipped over is the idea of, and it's an attractive idea, "when you take down my content, tell me why you took it down. What law did I break?" The classic example is if you get pulled over on the side of the road, the cop asked, "How fast were you going?" "Oh, I was going 10 miles per hour." "Well, speed limit is 55." They tell you the speed limits, you know how not to go. That's all well and good and I think you made a really good point about that.

The transparency requirements are trying to do the same thing. They're trying to say what is or is not allowed. That's a good idea. You tell me 55 miles per hour, that's clear. The problem is speech. Speech is not clear. Speech is context dependent. It's context dependent, it's timing dependent. Good example is, I'm sure we've all sent text messages that come across really aggressively and you didn't mean it. You get home and my wife yells at me, "Why were you yelling at me?" I was like, "No, I was just sending a text. Can you pick up the milk? Not, can you pick up the milk." When it comes to

speech, it's not black and white and the Supreme Court says, "I know when I see it." That's what makes the transparency requirements a catch-22 for a lot of us and a problem with compelled speech.

Barry Skidelsky: This I think ties very well into what I'm about to ask Ronnie. We're talking about speech and First Amendment, but I hear Constitutional rights of due process involved about fair notice. What's the law? Many New York lawyers are not aware that a law was passed that was supposed to take effect in December...

Ronnie London: It did.

Barry Skidelsky: ...codified not in the Criminal Law, but in the General Business Law. Do you care to go look it up. It's NY GBL 394-ccc, a new law that tries to ban hate speech, but they don't talk about it in speech, do they Ronnie?

Ronnie London: Yeah. I would say not so fast on mandatory disclosures, in general, and, in particular, with our cases down south in Texas and Florida, they tell you what you have to host, whether the social media provider agrees with it or not. Up here in New York, they tell you what you've got to single out for special treatment based on whether the state likes it or not.

Barry Skidelsky: That's right.

Ronnie London: As Barry said, there's a new law, it's Business Law § 3394-ccc–it's called: Social media networks; hateful conduct prohibited. So far so good, where's the speech? Well, this is how they define hateful conduct using social media: to vilify, humiliate, or incite violence against a group based on essentially protected categories. Basically anything that would make you different from anyone else. Race, color, ethnicity, national origin, disability, sex, sexual orientation, gender, gender identity, gender expression.

Barry Skidelsky: And residents in Texas.

Ronnie London: And residents of Texas. Yeah. The law took effect December 3rd of last year, very recently. Any social media entity that is conducting business in New York for a profit, the law requires three things of them. One is they have to have a clear, concise, and readily available statement of what the social media network does in response to hateful conduct as defined by the state as those things. Two, you've got to provide and maintain a clear and accessible button or mechanism for users to report hateful conduct as defined by the state, as viewed by the user who thinks it satisfies that definition, which we will come back to in a minute. Third, you've got to directly respond to the complainant about how you are going to handle the matter. There are fines associated with this, up to $1,000 a day per violation.

Professor Eugene Volokh, who's the author of the Volokh Conspiracy Legal Blog and the editor of it, along with Rumble, which is a YouTube competitor, and Locals, which allows creators of content to communicate and share content with other members of the service, they all sued with FIRE representing them to enjoin the statute. That makes sense, because it has all kinds of First Amendment problems.

First of all, we know that it applies to speech, because any ordinance, or regulation, or law that's going to apply to social media is by definition regulating speech. I guess, if we sat here long enough we could conceive of some ways where you could regulate social media in a way that doesn't regulate speech. Maybe, I don't know, something about air cooling the towers where the storage of the memory is all held, so that nobody's data is lost or something ridiculous like that. But, you really have to stretch, if you're regulating social media, regulating speech.

It clearly applies to protected speech, because contrary to what you'll sometimes see in popular media or even on social media by the users, "hate speech," which really doesn't have a definition, and is not a legal category, and certainly is not one of the narrow categories that the Supreme Court has said is unprotected, is fully protected speech, because it regulates speech based on the subject matter speech that vilifies, or humiliates, or incites violence. It's a content-based regulation and, because it only applies to vilifying or humiliating on those bases, but if you say nice things about people falling into those categories, you're aces. It's a viewpoint based regulation as well.

It burdens speech based on its content and its viewpoint. It doesn't impose any obligations on social media companies to do anything else as to any other speech that anyone else might think is problematic. It singles out this hateful conduct translated into essentially hate speech. We can discuss this in more details as we get further into these cases, but it creates burdens that the social media companies wouldn't face. It has a significant compelled speech problem, because maybe a social media company doesn't want to say anything about hate speech. Maybe, it doesn't think that hate speech should be singled out. Maybe, they want to be viewed as a wide open platform for speech where basically anything goes except for truly unprotected speech, but by forcing them to say, "Well, here's how I deal with this speech in particular, "you're almost endorsing the state's view that that speech is more problematic or problematic in ways that warrant special attention.

The other problem is, arguably it actually requires social media platforms to do something about the speech. As I read the provisions, you have to have something in your policy, you have to have a button or some other mechanism, and you've got to respond to someone who's reporting alleged hateful conduct, i.e. hate speech. You don't have to do anything to

the speech, maybe. The title of the statute is Hateful Conduct Prohibited. I think the state was trying to accomplish something. Certainly, if the state was saying: "We want this type of speech to be burdened, because we disagree with the message," we all know that's not going to work. If the state is saying: "Oh, you just have to do those things and disclose those things, but otherwise you don't have to do anything with the speech." Well, what is the state's government interest in having this speech regulating new law and how does it directly advance that interest in the least restrictive way?

Those are just some of the problems with the law. It's also vague and overbroad. It's also preempted by § 230. We can get into all that as we explore all of these laws.

Barry Skidelsky: Being an ex-broadcaster and having FCC expertise as a lawyer, I'm acutely aware of the parallels between regulation of broadcasting, which is done by the FCC, Federal Communications Commission, who has been pressured or even from within suggesting 230 reform is in order–let alone should we grant more authority to the FCC to regulate those online, which is generally perceived as a bad idea. We don't have a federal newspaper commission. We do have disparate laws being passed by various states, as we're talking about, frankly, in the absence of any cohesive national policy about privacy, for that matter.

230, as some of you know, is the Communications Decency Act–what we're talking about when we're talking about online harms as a matter of public policy to prevent. It's the children, let's start with the children. Forget about deceptive trade practices, FCC, sponsorship regulations. There are rules at the FCC about political candidates. You can't censor a political candidate and federal candidates have mandatory rights of access. State candidates have an equal opportunity. We do have rules about children's television reports that are required, limits on commercials, indecency.

The only thing that I thought about when I tried to prepare for this about where does the FCC really impact online communications now is apart from the licenses you might need for wired or wireless communications means, and that's what 230 was sort of about in a way that it was what was left over after we knocked out pieces that were unconstitutional. That if you're a conduit, if you're a pipe, and I'm not saying common carrier, because that's another thing you guys can talk about, generally, you were immune for content posted by third parties, user generated content, UGC.

Everybody's struggling to try and figure it out worldwide. I know we're focused here on the state cases and to the extent I just mentioned federal, but I'll just throw out in passing, the EU and the UK have been very active in this field. There's something called the Digital Services Act, some of you may be familiar with. There's a code against disinformation. There's a works in the progress to become law in the UK called OSB, the Online Safety Bill, and the idea is that it starts with "let's protect children, then consumers, and we're all worried about disinformation, about coronavirus vaccines or whatever it is you worried about," but it started with here Florida and Texas going, "You can't bump Trump."

Carl Szabo: Yeah, a lot to really discuss. I'm going to go and reverse order on that.

This is where I kind of become, "Yay America." We have the First Amendment and Europe doesn't. That's the open and shut case there where we do have these amazing groups sitting next to me that will stand up and defend that First Amendment, regardless of the government that sits in power. One of the big things that sets us apart in the bad way, though and our colleagues down the hallway at the tort meeting will not like what I'm about to say, but the rest of the world has the English rule system for Tort Law. What that is, it's a loser pays model for torts. We, for some reason, have this opinion that if I sue Ronnie and I win, he pays my legal fees, if I sue Ronnie and he wins, he pays his legal fees, so they don't have that in the rest of the world. That's where §230 of the Communications Decency Act started to evolve from.

This is one of those things that you will hear a lot about. In fact, once again, going back to the you are at the forefront of Supreme Court cases. There is a case where we were talking about, amicus briefs just went in today. Knight Foundation filed one, NetChoice filed one, many other people filed on behalf of Google. It's called...

Barry Skidelsky: *Gonzalez*.

Carl Szabo: *Gonzalez v. Google*.[5] There's a similar, but different case called *Twitter v. Taanmeh,*[6] both of which are before the Court today. Both of which have oral arguments midway through February, both of which are the first time the Supreme Court will look at the issue of § 230 of the Communications Decency Act. This is the word that gets thrown around all the time.

What is § 230 of the Communications Decency Act? Well, if I am...

Barry Skidelsky: Can I just interrupt one second?

Carl Szabo: Yeah.

Barry Skidelsky: Focus first on children, protect them from online harms. These cases that you mentioned, *Gonzalez*, it seems to me are about terrorism. If you remember, there were attacks by ISIS in three different locations coordinated in Paris and I forget where else. Estates, families of victims suing Google or YouTube for having...I don't know, aided and abetted.

Carl Szabo: Yeah, the argument is that they radicalized.

Barry Skidelsky: Right. Back to 230.

Carl Szabo: If I am walking down Broadway over here and somebody is on the ground gasping for air and I perform CPR and in the process of saving their lives I break their ribs, we have decided as a society that they should not be able to sue me for battery, because we want to encourage people to, what? Be a good Samaritan. § 230 of the Communications Decency Act is literally called the Good Samaritan Clause for the internet, or if you're a book seller, if you're a wire line carrier, if you do absolutely no content moderation whatsoever, courts have decided since the 1950s you assume zero liability. No content moderation. No liability. "Hey, I'm just a conduit. You can't blame me."

That's what we were talking about–defunct companies like Radio Shack, previously, that's what a former company called CompuServe used to do. They were an internet service provider and they said, "Post whatever you want, go hog wild." They got sued. Somebody posted something that offended somebody else and they sued the deep pockets. They sued CompuServe. The court here in New York said, "You know what CompuServe? You do nothing, so you are much more like a book seller, or you are more like the library, or you are more like the phone company. We are not going to hold you liable, because you don't do anything. You're just a conduit. Conduit immunity, no liability."

Fast forward two years. Prodigy decides it wants to provide the family friendly service. For those of you not familiar with Prodigy, it's another defunct internet service provider.

Barry Skidelsky: By the way, the original general counsel is sitting right there. Marc Jacobson.

Carl Szabo: I love it. Okay, so you'll appreciate this. You know the story better than I ever will.

CompuServe was trying to provide the family friendly internet. They do some content moderation. Similar facts is actually the "Wolf of Wall Street"–they get sued by one of the guys from that firm. Somebody posted something defamatory about them or truthful, actually, on the CompuServe board. They don't sue the guy who posted, they sue CompuServe's deep pockets. The Court actually has the opposite interpretation of what it had in *Prodigy*: It said CompuServe, because you do engage in content moderation, we are going to hold you liable. Former congressman Chris Cox and now Senator Ron Widen of Oregon decide that is perverse. That is not what we want to encourage people to do. They create the Good Samaritan clause in § 230.

Okay, so what does that mean for anything? Okay, what does it do? It is basically a 12(b)(6) motion to dismiss vehicle.

Going to the *Gonzalez* case that is before the Court today, Google is being sued for somebody getting radicalized and engaging in terrorist behavior. The argument is they're radicalized by YouTube and then did a car bomb in France that killed the victim of the family who is the plaintiff. Now, what does YouTube do? They say § 230, 12(b)(6) motion dismiss. We are merely a platform. Yes, we do engage in content moderation, but we are not held liable, because of § 230, which says, "One, you are not liable for the content created by others and two, you don't suddenly become liable if you are trying to clean that stuff up." Typically, that's a 12(b)(6) motion to dismiss gets thrown out of court at the pleading stage. Very cheap and easy to dismiss.

Without § 230, which is why this being argued before the Supreme Court, let's assume it goes to the merits. Let's assume it goes to final conclusion. It's a pretty hard stretch to show *mens rea* and a "but for" cause in that tort suit. Google's probably going to win on the merits, anyways.

Why does 230 matter? If you're going to win anyways why does it matter? Because, that's a multi-million dollar lawsuit with reputational harm versus a 12(b)(6) motion to dismiss. That's what § 230 is. That's what it does and that's its importance. It empowers frivolous lawsuits to be thrown out at the pleading stage. When Donald Trump goes and sues Facebook for removing him, that's a breach of contract case when it comes to final resolution, but you don't have to go through discovery, you don't have to hire a bunch of attorneys. I'm sorry for all the attorneys in the room.

Ronnie London: I was a *Backpage* attorney. We did lots of work.

Carl Szabo: There you go. That's what 230 is. That's what's before the Court right now. For those of you not paying attention, we have described it as the most important case. If the Court gets it wrong it will absolutely decimate the internet as we know and use today.

Barry Skidelsky: The implications are huge, not just, I think, for what we're talking about, but for the online ecosystem, in general. I'm struck by the difference between the Florida, Texas, and the New York–in one case, it seems to me you're saying, I understand the cure for bad speech is more speech, but in one set of circumstances it looks like you're saying we want more content moderation and another set you want less. Does that sound right?

Ronnie London: Yeah. Well, and frankly, like you said, legislators don't care about the First Amendment. Legislators also don't think about consequences of their legislation, because I really don't think for a minute that the governors or the legislatures in Texas or Florida really are excited about hate speech having to be required on social media platforms,

because as we know from *Matal v. Tam*, giving offense on the basis of race or color or whatever else is protected speech. I don't think they're excited about all the pro-sex speech that's going or sex-positive speech that's going to come in because holding it back is a viewpoint discrimination. I don't think they've stopped to think about anything about that. All they care about is, "Hey. Our friends are being kicked off social media. What can we do about it?" And they picked what was probably the bluntest possible tool to try and go after it.

If I can just make a comment about the *Gonzalez* case, because I mean, it's very important in the context of the facts of *Gonzalez* and the terrorist acts in that case. But as we try to point out, and I'll plug our amicus brief, but many other amicus briefs do the same thing, as does Google's brief, of course, is that the role of what we would refer to as recommendation algorithms is hugely important on the internet. It's the reason why search engines can exist. Google's search is entirely dependent on recommending results to search queries, and that's done through a recommendation algorithm. The same is true of most social media platforms. They rely on recommendation algorithms to do all kinds of things. Maybe the most well-known one is Facebook's Newsfeed. And so they're the ways that that platforms are able to recommend content, suggest content that you might want to look at, suggest people that you might want to be friends with. It's a really important way that we're able to make sense of the enormous amount of information on the internet.

And the *Gonzalez* case challenges those recommendation algorithms, whether they're used by search engines or used by social media platforms. And it's a dangerous case, because to have the Court deal with very complex technology that can vary in different contexts, it just creates a possible area for going down the wrong path and reaching a result that really will harm the development of technology and the internet going forward. And § 230 though, and this is the first time the Court will address it in 25 years, but also it's important to just emphasize it actually immunizes internet platforms not just from frivolous suits but from a lot of suits that would have merit if they were not on the internet but were print publishers.

And that's important. It's important for the development of the internet that they are immune from all kinds of suits. And there are many, many different types of torts, all kinds of statutory claims that have been brought against platforms over the last 25 years that courts have held can be struck down on a 12(b)(6) motion. And that's hugely important. So the Court is not only going to be dealing with these recommendation algorithms, but it will also have its first chance to actually talk about the scope of § 230. And that could have huge impact beyond just the recommendation algorithms, but on the scope of this protection more broadly. And so it really can't be emphasized enough how important *Gonzalez* is to the future of the digital ecosystem.

Scott Wilkens: Yeah. That's a really important point. And on some levels, I really wish that this wasn't the first 230 case, but rather at some point in its 25-year history, the Court had dealt with a meat and potatoes § 230 case, because this case is about how far can an online service provider, OSP, in 230-terms go in terms of arranging, recommending, prioritizing content before...Not that the content itself causes the problem, but that very action of doing those steps necessary to make the content available to the users is the source of the tortious liability. And the thing is, like you say, I would've preferred § 230 to have come up in the Seven Dirty Words case or one of the other cases, where it was very clear that the service provider was just hosting content by third parties. The third party posted something that caused harm to somebody else. That plaintiff, instead of suing perhaps the judgment-proof party who posted it, they sued the social media provider or the website and they were out of luck because of § 230.

The naive optimist in me on all of the 230 cases that came before this, that came out the right way that the Court denied *cert* on, I hope they read those *cert* petitions and the briefing on them very carefully and have developed an understanding on the meat and potatoes 230 stuff before they weigh into this. But I've got the same concern you do, that I'm not sure whether they did or they didn't. And this is their first time opining on it. And already you've had a couple of justices in separate statements from those dissents suggesting, and particularly Justice Thomas, suggesting that § 230 couldn't have been intended to be as broad as the courts have construed it. I think that's probably wrong. But nonetheless, you're already at 20% of the way to five votes, so we'll see what happens.

Carl Szabo: Yeah. Oftentimes you get bad facts, and this is a case that is really bad facts for the entire internet. And once again, this goes back to the availability of services for many of your clients to reach new and potential buyers of their jerseys and their songs. This could result in the destruction of services like YouTube, like Twitter, like TikTok. And the facts in this case are based...I mean, it's a terrorism case. Who wants to be on the other side of that? Nobody. Simultaneously, and Scott and Ronnie alluded to this, the issue before the Court is not the underlying content even. It is, was Google's YouTube search algorithm responsible? Was the algorithm responsible? And that's where it gets legally...I think it's crystal clear. The people on the other side argue that it's legally dicey because one thing § 230 does not protect you against is content that you create in whole or in part. And so the arguments are, "Well, they created the search algorithm and it served up these videos."

Now, fortunately you have one of the authors here. One of the other authors sits on my board, Chris Cox. He and

Ron Wyden filed an amicus brief and they point out back in 1996 when they wrote this law, they had search engines. They had algorithms, CompuServe did. You could go and search the forums, Prodigy did. You can go and search the forums. And so, this was considered as part of § 230 when they were creating it. They were considering the search algorithms to be covered by this. In fact, there's a hidden definition. One of the things that I often find really fun is as attorneys, we often get absolutely buried in case law, and going and shepardizing everything and doing that. And if you actually just pause for a minute and read the law...And fortunately we're talking textualism, then we're back to Justice Thomas, who sometimes is a bit mercurial on this.

In the actual text of § 230, there is a really teeny tiny definition, it's actually the last line in the code, that is a special definition about software. And it puts software in the definition of interactive computer service, which is protected and separate from content that is created. So we are expecting to have a good result. But once again, these are the issues that are absolutely at the forefront, whether it's FIRE's case, whether it's the three NetChoice cases, whether it's the *Gonzalez* and *Taanmeh* cases. These are really interesting cases and they're definitely ones that you should go home, look at, research, if you're an insomniac. And I would absolutely encourage you to go and visit all of our websites and learn, follow and subscribe, and leave your comments down below.

Barry Skidelsky: When I heard you say 5-4, I was thinking back to the FCC for a second, to those of us experienced working at that administrative agency, we just see not only is law shifting sands, but every time there's a new President or a change in control of Congress, those laws get changed. Net neutrality? "Yeah. That's good." "No. That's bad." And so right now, you have FCC[7] with two Republicans, two Democrats, with an agency that always votes along party lines, no matter what. And Gigi Sohn has been renominated by President Biden, and she was previously nominated but had a fight.[8] So who knows what that'll mean for tipping the balance on that side of the equation.

Scott Wilkens: If I could just on § 230, and Carl will know more about this than I do, I think, given what he focuses on, but the reason why the Supreme Court has the role it has right now in the *Gonzalez* case is because Congress has been unable to agree to anything on § 230. I mean, there have been many, many proposals.

Ronnie London: One thing they agreed on-

Scott Wilkens: That's true. There was one amendment.

Carl Szabo: I got the scars on that.

Scott Wilkens: Yeah.

Ronnie London: It was just argued last week.

Scott Wilkens: There was, yes, one amendment. But in terms of the governing clause of the statute, the overall immunity, there have been lots of proposals ranging from, let's do away with 230 entirely to various exceptions under 230. And it's because there hasn't been agreement in Congress on how it should be potentially amended that the Supreme Court now has more or less the original language in § 230(c)(1) before it. And it is being asked to interpret that 25-year-old language as to whether it covers these recommendation algorithms. So, it leaves an enormous amount up to the Supreme Court in the *Gonzalez* case.

Ronnie London: And for what it's worth, that one exception that they did make, which is an, in my opinion, unfortunate camel's nose under the tent, has been an abject disaster because it was ostensibly needed to stop sex trafficking on the internet. And that's what they claim the purpose of the law was, to exempt from § 230 immunity state criminal acts and federal civil liability for sex trafficking. Never mind that there had always been a federal criminal exception to the immunity that you get.

And the minute that FOSTA and SESTA was passed,[9] a couple of things happened. One, is websites like Craigslist eliminated their dating and social meetup sections. They eliminated legitimate massage businesses from being able to advertise. Advocacy sites for sex workers disappeared for fear that they would be accused of promoting or facilitating sex work. At the same time, law enforcement has come out and said in the wake of FOSTA and SESTA, the websites that they would ordinarily go to and the services they would ordinarily go to with subpoenas and ask for help for locating people at risk have now all disappeared.

And so meantime, what do they need it for? Well, the one company that Congress was targeting, was bringing in for hearings and issued a report on was *Backpage*. The feds had already moved on them by the time FOSTA and SESTA... and that criminal case is ongoing. They didn't need those amendments. But what it did do is it set a precedent that, "Hey. You can amend § 230 for specific purposes. And that is a permissible thing to do."

I've often wondered whether there isn't some kind of alternative history where § 230 never gets passed and we wind up at the same place where we are now through the development of jurisprudence, through the bookstore cases like you were talking about, and saying, "Well, you have to have knowledge of the content that is harmful before the First Amendment allows you to suffer liability for it." But it probably would've taken these saved 25 years to get to that jurisprudence. And there have been a lot of bumps and starts along the way, and

a lot of companies would've paid a lot of money to find out where those lines are drawn.

Cal Szabo: I mean, you're not going to get perfect legislation. It just doesn't exist. § 230 of the Communications Decency Act is the most good with the least bad. And at the end of the day, what it's saying is if you are the bad actor, you are responsible, not the platform that hosts it. And one of the briefs that's getting filed or is actively being filed is actually coming in support of Google, by the way, they are defending §230. It's coming from former U.S. Senator Rick Santorum and a couple of other Republicans. Not exactly the type of people you would expect to come in favor of Google or in favor of § 230. Once again, you guys are all attorneys. Put on your in-house GC hat. Would you assume the liability for every video that gets posted on YouTube if you could be sued for that content? Of course not.

Barry Skidelsky: Do I have to explain my reason for every decision?

Carl Szabo: Exactly. And so the nice thing about 230 is it does allow for a myriad of speech. Now, is there going to be speech that people are going to dislike? 100%. Is there going to be speech that people do like? 100%. Is there going to be speech that some people like some of the time and some people hate all the time? Yes. Absolutely. But that is also the First Amendment. That is our right as a country. And at the end of the day, 230 is doing the most good with the least amount of harm.

And to your point about Congress is too slow, I would just hope that conservative judges on the court recognize that it is not their job to write the law. If they want to write the law, they need to go across the street into that big building with the dome on it, and that's where you write the law. When you are a judge, you look at the text, and the text is pretty crystal clear that § 230 allows for these algorithmic decisions.

Finally, on the NetChoice cases, one of the things that I love about my job, I've been doing it for over a decade now, and I wake up every day fighting these fights, is I remember working as an associate in a law firm. And you'd be looking for the perfect on-point cases, and you would never find them. Well, we are so fortunate in our cases in Florida and Texas, there are Supreme Court decisions that are right on point. One is called *Miami Herald v. Tornillo*,[10] which is all about the state trying to force newspapers to host an op-ed that they don't want to host.

Barry Skidelsky: Compelled speech.

Carl Szabo: Compelled speech. And then when it comes to California, the California law basically says you may not show something to somebody who's under 18 content that might be inappropriate for them. It goes on for a couple of pages, but that's the gist.

Barry Skidelsky: What's inappropriate or negative to me is very subjective and not easily defined in any law. And I'll just point out that what's reasonable in one culture can bring a death sentence in another.

Carl Szabo: Yeah. Well, it's even better. Back in the early 2000s, Governor Schwarzenegger, The Arnold, signed a law when we had a similar moral panic, and this time, it was over video games. Video games were destroying our children. And so they passed the same law basically, except it only applied to video games. Stores could not sell something to a 17-year-old that was deemed inappropriate for them. Went all the way to the Supreme Court, *Brown v. Entertainment Merchants Association*,[11] 2011 case. And guess what? 17-year-olds have First Amendment rights. We all know that. And guess what? You can't use these arbitrary and capricious terms, as they violate the First Amendment. So once again, it's one of those wonderful things where lawmakers are going to make laws. They don't necessarily follow the rules or restrictions the way that we all do. But some days, you get groups like the ones at the table who will stand up, and I remind them of the decisions that have been made and the basis for which they have been made.

Barry Skidelsky: I just want to say I am sorry we didn't arrange for more time, because I feel like we touched on so many topics that could be delved into deeper, let alone other topics to raise the thought I had about precedence. You hope that they go back and look at their other cases. I'm not encouraged, given the fact that *Roe v. Wade* as precedent seems to be...What do we care about precedents? Or it's "we want to interpret now." And I think since we're in overtime, and our next stop is a networking reception, I'd like to open it up for anybody who might have any questions for the people here.

Audience: I heard some First Amendment scholars say they are upset that the freedom of speech community is going way too far. People in the *Times* have written articles about how freedom of speech is killing democracy, in their articles about how the algorithms create divisiveness. If I'm a climate hater, I Google climate change and I get...None of this is probably addressing it, but I think that really is a big issue and everybody believes in the First Amendment. But I think it's being abused in a lot of ways too.

Ronnie London: I mean, in the rough and tumble of political and social discourse, to say that the First Amendment is being abused because people are espousing views that other people disagree with or they are convincing people of things that some people might think are incorrect or misinformation or anything else, that's the way this is supposed to work. It's supposed to be a system of more speech, not

a system of cutting off speech in order to get to the truth. I mean, you get to the truth by testing everything. And that's what the first amendments were. And the First Amendment also is for protecting not the majority view of what's correct or what's acceptable, it's designed specifically to be counter-majoritarian and protect the voices of the dissenters of the people who might see things or think of things in a different way from everybody else. The majority view, we've got the ballot box to protect that. The First Amendment protects the people that the majority would silence, shout down, or push to the margins.

Carl Szabo: And at the end of the day, the networks, the platforms, they are going to decide what's best for their users and their advertisers. And we have seen such a robust growth of speech. One of the things that does concern me is we hear some of the stuff coming out of Davos, for example, where they're talking about concerns about disinformation. Define disinformation for me. Disinformation is what I don't want you to say.

Barry Skidelsky: Disinformation is the ones I don't agree with.

Carl Szabo: And so that scares me. And we do have a nation that is predicated on the First Amendment, which our founders knew what they were getting into. And when they had conflicts, they had the tendency to literally murder people on the Capitol floor. We have somewhat evolved past that, and we just need to trust each other to be discriminating on what we want to see.

Barry Skidelsky: We have another question from the floor.

Audience: Well, sort of in that vein, we were talking about disinformation, but what about speech that could be interpreted as inciting violence or illegal action?

Barry Skidelsky: You can't holler fire in a crowded theater.

Ronnie London: Yeah. That's the worst canard there is out there in the First Amendment dictionary. Without coming back to all the reasons why you can't shout fire in a crowded theater, but I mentioned earlier, there are categories of unprotected speech. They are specifically and narrowly defined, and one of them is incitement. But for incitement to be unprotected, there has to be an imminence of unlawful activity that is likely to occur as a result. If you can satisfy that high legal bar for something being incitement, then the government can regulate it or punish it. But short of that, the court has decided, what, 1969 is *Brandenburg*?[12] I mean, the court decided 50-plus years ago that we are going to allow intemperate speech and we're going to allow people to even advocate for things that might be unlawful so long as there isn't that imminent danger of unlawful activity resulting.

Audience: Yeah. But on that note, we have seen in recent years, for example, January 6th, that social media posts can lead to imminently violent and illegal actions. So how do we toe that line?

Ronnie London: Well, actually, "imminent" actually has a meaning. It means it has to happen almost immediately. There are First Amendment lawyers who will disagree, and I'm a member of First Amendment lawyers at an organization where members do disagree about whether January 6th constitutes incitement, and therefore is actionable. That case is still going on in the District of Columbia district court. But with social media, it's hard to get to the incitement level, in my opinion, partly because you don't have any control of who is going to see it and you don't have any control of when they're going to see it, in particular. So satisfying the imminence requirement is going to be particularly difficult. I'm not saying it can't happen. I'm not saying that there can't be a group or a cell or whatever that is using social media to communicate and use it to coordinate and move as a result, and that that speech could be part of incitement or carry people along with it. But it's a very high bar.

Scott Wilkens: Earlier, when I was talking about recommendation algorithms, I wasn't trying to just sing their praises. They can definitely result in polarization. There's a lot of research which shows that there are harms that can come from what the algorithms do. However, that is not a reason to subject the algorithms to liability across the board, and then potentially force platforms either not to use them, which they really can't do, and that would then mean forcing them to take down huge amounts of speech, which might render them liable in the absence of 230. And one thing that I will just note, again, plugging our amicus brief, is we suggest there are ways to try to convince the platforms to change the algorithm in some ways, try to address polarization that's documented that aren't based on a lawsuit, that aren't based on interpreting § 230. I know many of us in here are litigators. We think that's the best way to resolve most things. But there are other ways to try to get at the problem here, which is a genuine problem, in some cases.

Ronnie London: I think on some levels, suggesting a path other than "that is a fundamental repudiation of the marketplace of ideas and market forces in general," I mean, if social media, and you said this previously, social media are going to do ultimately what's best for their users, and to the extent that they are publicly traded companies, what's best for their shareholders. I mean, they have to operate in a market. And if a social media platform becomes too narrow in what it allows on, or if it becomes too broad and it gets loaded up with content that a lot of the users object to, trust me, another social media platform will come along. I know we've grown accustomed to the major players, but I'm old enough

to remember social media platforms, like MySpace, that don't exist anymore.

This problem that social media are allowing things or not allowing things, in the sweep of time, and even in the sweep of internet time, it's a relatively recent problem that I don't think that we should rush to solve through legislation. I think there are lots of things that we can do, as you suggested, and some forces that will naturally act on it that will address some of the problems.

Barry Skidelsky: We have one more question and I think we're out of time.

Audience: I just have one quick comment, or two. First, this has been an excellent panel, so congratulations to all of you. The second thing is, as a representative of the art lovers faction, I might say there's a lot more complexity to this discussion that's creeping up. And I go back to the history of the cultural wars and the concept of decency and government defining decency. But fast-forward to now, which I think is related to your line of cases, but in a very strange way, not dealing with social media is the whole doctrine that's now developed to protect government speech, which again, is a carve out to First Amendment protection, and in some ways that idea that when government speaks and cases are winning their way in Florida now dealing with art and government passing regulations or censoring art because of police commentary. I just think that this panel is really on the cusp of a whole exciting development that we really need to stay tuned to. Thank you.

Ronnie London: You raise a very important point, because government speech could be its own separate panel. All I would say about that to close here is, we just need to make sure…There's a big difference between the government speaking and the government exercising government power, and that's a line that we have to make sure gets drawn very clearly and is held where it is. And I think that Justice Alito's concurring opinion in the Boston City Hall flag case[13] was probably the best definition for government speech that we've gotten thus far. And hopefully, the other justices will follow that if and when the issue comes back up.

Barry Skidelsky: I was thinking about how freedom of expression writ large for arts, entertainment, let alone public discourse, has implications, large implications from these cases. Camel's noses under the tent? Yeah. Okay. Today it's, big tech is the problem. Then the next step is easily jumped to anybody who puts anything online or in an app or in a website. And I think about Alito's dissent and the rise up for preliminary injunction. How we're going to deal with all this is far from certain. So with that, I'm going to say thanks to Ronnie London, GC from FIRE, Carl Szabo, GC from NetChoice, Scott Wilkens, from the Knight First Amendment Institute at Columbia. You guys were fabulous. The content, the what and how it was said was just great. And you're all invited now to move on over to our networking reception, which will be at Dorsey & Whitney, 51 West 52nd. Hope to see you there.

Endnotes

1. *See* p. 35 and 80 herein.
2. Computer and Communications Industry Association.
3. The court ended up asking the Department of Justice to formulate an official position on Internet speech, thereby delaying its decision.
4. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985).
5. *Gonzalez v. Google*, 2 F.4th 871 (9th Cir Panel 2021).
6. *Twitter v. Taanmeh*, companion case to *Gonzalez*, conditional Cert. Petition to U.S. Supreme Court.
7. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
8. Since then, Gigi Sohn has withdrawn.
9. "SESTA/FOSTA refers to a set of laws passed under the Trump administration: The Stop Enabling Sex Traffickers Act (SESTA) and the Fight Online Sex Trafficking Act (FOSTA). The laws effectively suspend § 230 of the Communications Decency Act of 1996. Rather than preventing the online exploitation of trafficked persons, these laws have hurt the people they intended to help, pushing sex workers and trafficking victims into more dangerous and exploitative situations." https://decriminalizesex.work/advocacy/sesta-fosta/what-is-sesta-fosta/.
10. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
11. *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).
12. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
13. *Shurtleff v. City of Boston*, 596 U.S. _ (2022).

Addendum to the Transcript of the Regulation of Social Media and Online Content Panel

By Barry Skidelsky

At the time of EASL's 2023 Annual Meeting on January 19, the United States Supreme Court was poised to soon thereafter decide Petitions for Certiorari filed in both the *Paxton* and *Moody* cases, which were among the cases discussed during our section's CLE program.

However, rather than decide to grant or deny those *cert* petitions, on January 23, the Court instead invited the U.S. Solicitor General to file a brief that expressed the views of the federal government (which will hopefully be helpful to the Court in its decision-making). As of March 15, that government brief was still a work-in-progress.

This side step allowed the Court to first move forward on *cert* petitions already granted in both the *Gonzalez* and *Taanmeh* cases, by hearing oral arguments on February 21 and February 23, respectively. Written transcripts and audio files of oral arguments held in both of those cases are available at https://www.supremecourt.gov/oral_arguments/argument_audio/2022.

To the dismay of some observers of the Supreme Court oral arguments, questions asked by the justices seemed to focus more on economic rather than free speech issues. Decisions in both *Gonzalez* and *Taanmeh* are not expected until early summer. It is also expected that the Solicitor General will wait for the release of those decisions before filing its brief re *Paxton* and *Moody*.

These oral argument transcripts indicate that even Supreme Court justices do not know where to draw the line here, saying that Congress is better equipped to make calls about the safe harbor in 47 USC § 230 (a/k/a the Communications Decency Act), among other critical digital policy issues.

Unfortunately, Congress has been talking for years about § 230 reform but has largely been grid-locked by partisan politics (e.g., with Republicans arguing that social media takes down too much speech and Democrats arguing that they could do more to limit harmful content), despite an apparent wide-spread consensus that lawmakers, rather than judges, should set such policies.[1]

However, unless and until Congress does act to help the law try to catch-up with ever-evolving technological innovations (and changes in the law always seem to lag those in technology), the courts will have to take the lead. However, like with the legislative process, the judicial process is also not immune to delay.

Even if the Supreme Court ultimately decides to grant review in *Paxton* and *Moody* (which seems likely, given the underlying split between the Firth and Eleventh Circuits, respectively), it almost certainly would not hear oral arguments in those cases until next term, with a decision to follow sometime in 2024. Until then, both the subject Texas and Florida state laws, respectively, will remain on hold.

Further down the litigation food chain, the related *Bonta* case discussed during our Annual Meeting panel remains pending in the Northern District of California federal court; and, it too is likewise moving slowly after the filing of the Complaint on December 14, 2022 by NetChoice. On February 17, 2023, NetChoice filed a Motion for a Preliminary Injunction (a copy of which is available at https://netchoice.org/wp-content/uploads/2023/02/Mot.-for-Prelim.-Inj.-NetChoice-v.-Bonta.pdf), to which the defendant State of California has not yet responded. Moreover, the parties have stipulated that the defendant's time to respond to the Complaint will be extended to 30 days after a final and non-appealable order resolving the PI motion is released.

Meanwhile, closer to home, the *Volokh* case we also discussed has seen some recent movement. On February 14 (Valentine's Day!), the Southern District of New York federal court granted a Motion for a Preliminary Injunction filed by the plaintiff. A copy of the court's Opinion and Order is available at https://www.thefire.org/research-learn/opinion-and-order-granting-preliminary-injunction-volokh-v-james.

Essentially, the judge here blocked enforcement of a New York State law (GBL § 394-ccc) requiring social media platforms to create and disclose a mechanism for receiving complaints about "hateful conduct" online, saying it could have a "profound chilling effect" on speech that was not justified by a compelling government interest.

The SDNY judge rejected New York State's argument that the statute regulated conduct, not speech; and he rejected arguments based on § 230 because the New York law does not impose liability for anything other than failing to create and disclose a complaint mechanism. This week, the defendant New York State filed a Notice of Appeal with the Second Circuit, as well as a Motion to Stay proceedings at the SDNY until after the PI appeal has been resolved.

Lastly, a related and intriguing new case was commenced in the Northern District of California federal court after EASL's annual meeting. On February 14 (Valentine's Day again!), a so-called Master Complaint was filed in an action with a somewhat unwieldy title of *In Re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*. A copy of that Complaint is at https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3760&context=historical.

This is a consolidated multi-district litigation involving attorneys representing almost 100 plaintiffs in products liability actions against certain social media companies, based on allegations that their "addictive and dangerous social media products" cause various mental health related harms as well as contribute to the sexual exploitation and abuse of children.

In an attempt to avoid § 230's immunity shield, the 15-count Complaint instead primarily relies on strict liability and negligence arguments related to design defects and failure to warn, unfair trade practices and consumer protection laws, negligent and fraudulent concealment and misrepresentation, wrongful death, and a perennial favorite: loss of consortium.

The judge overseeing this case has stated that, while the defendants can file a motion to dismiss based on Section 230, she will not make any ruling on that issue until after the U.S. Supreme Court has weighed in on (and given the pendency of) *Gonzalez* and *Taanmeh*. Like much of life in New York City, let's all hurry up and wait.

Endnotes

1. On March 8, the U.S. Senate Judiciary Committee Subcommittee on Privacy, Technology and the Law hosted a hearing titled *Platform Accountability: Gonzalez and Reform*, which was chaired by Senator Richard Blumenthal (D-CT); https://techpolicy.press/transcript-senate-subcommittee-hearing-on-platform-accountability-gonzalez-and-reform/.

Barry Skidelsky, a former EASL Chair who organized and moderated this CLE panel on the Regulation of Social Media and Online Content, is a NYC based attorney and consultant with a business background and expertise in entertainment, media, communications and technology. Barry can be reached at bskidelsky@mindspring.com or 212-832-4800.

Is There Room for Descendants of Enslaved Peoples in the Domestic Legal Framework for Restitution and Repatriation of Cultural and Familial Property?

By Josephine Luck

I. Introduction

In 1850, seven enslaved men and women–Alfred, Fassena, Jack, Jem, Drana, Renty, and Delia–were stripped of their clothes and photographed at the request of Harvard professor Louis Agassiz. More than a century later, Tamara Lanier, a fifth-generation descendant of Renty and his daughter, Delia, filed a suit against Harvard, claiming ownership and seeking restitution of the daguerreotypes. The U.S. recognizes ownership claims brought by individuals, foreign nations, and certain Native American and Indian tribal groups pursuing the restitution or repatriation of works of art or cultural property that have been unlawfully removed from their ownership. However, it has never recognized that the descendants of enslaved peoples, either individually or as a distinct cultural group, possess a similar kind of ownership interest in these kinds of objects. Though the Massachusetts Appeals Court dismissed Lanier's ownership claims, Lanier's case raises an important question: Can the descendants of enslaved peoples in the U.S. seek the return of objects and personal property with familial or cultural significance within the confines of existent U.S. law?

II. A Series of 15 Daguerreotypes

In 2011, Tamara Lanier discovered that Harvard University owned several daguerreotypes depicting an enslaved individual named Renty Taylor and his daughter, Delia.[1] Lanier grew up hearing stories of the "Black African" Papa Renty, her strong and defiant great-great-great grandfather.[2] Through generations of Lanier's family, the story of Renty was crucial in understanding not only where they came from, but in defining who they were.[3] After six generations of oral history, Lanier and her family had a concrete piece of property that represented them and their past, the daguerreotypes of Renty and Delia.

The daguerreotypes depicting Renty and Delia were part of a series of 15 taken in 1850 at the request of Louis Agassiz, a Harvard University professor.[4] Agassiz advocated for polygenism, a theory of human evolution that believed racial groups were not only characteristically and anatomically distinct from one another, but that these different races were derived from different species altogether.[5] In the U.S., polygenism and its evolutionary hierarchy of racial groups was used to lend scientific support and legitimize white supremacy and the institution of slavery.

Agassiz sought to document the distinct "phrenological and physiognomic features" of African-born enslaved individuals as a means of gaining proof to support polygenism. He selected seven enslaved individuals with African origins living on plantations near Columbia, South Carolina to be photographed. The daguerreotypes are of two types. Several depict the individuals standing, stripped or partially stripped of their clothes, and photographed from a variety of perspectives, including the front, side, and rear views.[6] The remaining show the individuals sitting, stripped to their torsos, staring directly into the camera.[7]

In 1976, after being discarded for more than a century, a researcher discovered the 15 daguerreotypes in a dust-covered storage cabinet in the attic of Harvard's Peabody Museum of Archaeology and Ethnology.[8] In March 2011, after Lanier discovered the existence of the daguerreotypes depicting Renty and Delia, she sent a letter to Harvard's then-president, Drew Gilpin Faust, providing evidence of her familial relation to Renty and Delia and asking for more information about Harvard's intended uses of daguerreotypes.[9] Faust thanked Lanier for sharing her story and informed her that the Peabody Museum would contact her further.[10] Lanier never heard from the Peabody.[11] In October 2017, Lanier sent a demand letter to Faust, insisting that the daguerreotypes depicting Renty and Delia be "immediately relinquished" into her possession.[12] With no response from Harvard, Lanier filed a lawsuit against Harvard University in 2019 for "its wrongful seizure, possession and expropriation" of the daguerreotypes depicting Renty and Delia. [13] Lanier sought restitution of the daguerreotypes to her possession.[14]

III. The Existent Legal Framework for Restitution and Repatriation in the United States

While restitution or repatriation claims from the descendants of enslaved peoples are largely unheard of in the U.S., other individuals, foreign nations, and community groups use the U.S. legal system to seek the return of personal or

cultural property that has been unlawfully seized or stolen from them.

A. Individual Ownership

During the Holocaust, the Nazis conducted systematic thefts and forced sales of approximately 600,000 works of art owned by Jewish families and individuals.[15] After World War II, Nazi-looted works began to appear on the auction block, museum walls, and in private collections in the U.S. Their original owners, or their descendants, turned to U.S. courts to seek their return through legal means. In the U.S., there is no federal or state legislation that creates a private right of action specifically for the restitution of Nazi-looted works of art; rather, Nazi-looted claims are often brought by plaintiffs under the state causes of action for replevin, conversion, or similar actions. However, there are procedural, such as the statute of limitations and act of state doctrine, and evidentiary hurdles, that individual owners face in asserting these kinds of claims in the U.S.

Under an action for replevin or a similar kind of claim, a plaintiff must demonstrate ownership through evidence of possession, proper title, or records that establish an individual's prior ownership of the work.[16] These claims arise out of a time of severe conflict, violence, and persecution which fragmented or degraded the historical picture of an individual's ownership.[17] With nearly a century since the looting and thefts, witnesses, documents, or personal records critical to the verification of past ownership continue to fade away, only heightening the evidentiary difficulties for plaintiffs.[18]

B. National Ownership

Unlike the ownership claims asserted in Nazi-looted cases, national ownership is commonly the result of a foreign nation's patrimony laws. Patrimony laws are a form of legislation under which ownership of a particular class of objects, generally culturally significant archeological objects and antiquities, are discovered within its territorial boundaries after a particular date, is vested immediately in the government.[19] The U.S. has continued to recognize the validity of foreign patrimony laws in conferring absolute ownership into a foreign government or nation.[20]

However, the existence of an applicable patrimony law does not necessitate the return of cultural property. Despite the validity of a patrimony law, a foreign nation must provide particularized information to prove that the object in dispute falls under the scope of the patrimony law in order to successfully appeal to the U.S. to enforce its rights or to bring a claim against a particular defendant in U.S. courts.[21] For cultural property, particularly archaeological objects that often lack definitive or conclusive provenance records, providing concrete evidence that the object falls under the temporal scope of a nation's patrimony law can be challenging.[22]

The U.S. government has increasingly responded to ownership assertions made by foreign nations under their patrimony laws and employed domestic legislative measures to enforce the repatriation of cultural objects to foreign nations. The U.S. seizes and returns cultural property commonly under violations of either the National Stolen Property Act (NPSA) or the Convention on Cultural Property Implementation Act (CPIA). Foreign nations can also act as individual plaintiffs to assert their ownership rights in civil actions brought under state causes of action, like replevin or conversion, and as such are beholden to similar procedural and evidentiary limitations seen in claims brought by individual ownership cases.

C. Communal Ownership

In 1990, the U.S. enacted the Native American Graves and Repatriation Act (NAGPRA), federal legislation that provides mechanisms for the repatriation of human remains and cultural objects, including funerary and sacred objects, to Native American lineal descendants, Native American tribes, and Native Hawaiian organizations.[23] Under NAGPRA's repatriation scheme, federally funded museums, universities, and other institutions are required to inventory their collections and undertake processes to facilitate the return of objects.[24] NAGPRA allows for the repatriation of these objects if the group seeking return of an object can demonstrate a cultural affiliation between the object in dispute and the tribal group.[25] A cultural affiliation requires a showing of "[a] relationship of shared group identity which can be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group."[26]

NAGPRA alleviates the evidentiary and procedural hurdles that assertions of ownership under existent U.S. state law causes of action impose on plaintiffs. By abandoning "the language of property" and shifting to a framework that "emphasizes personal relations and interrelations with regard to an object," NAGPRA shifts away from the traditional kind of ownership required in repatriation cases by acknowledging that Native American groups have had significantly different conceptual understandings of property than those perpetuated by the U.S. legal system.[27] Conscious of the cultural differences regarding native or indigenous property, NAGPRA elevates the evidentiary value of non-traditional kinds of evidence, such as oral history and folklore, in the establishment of a cultural affiliation.[28] A cultural affiliation can be established through evidence including "geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion," that proves, beyond a preponderance of the evidence, that a reasonable person would conclude that this kind of relationship of identity exists.[29] NAGPRA also does not contain the

inherent procedural hurdles posed by the statute of limitations, because the system for establishing a cultural affiliation does not contain any specific temporal limitations.[30]

While NAGPRA is considered a "watershed" in encouraging a system of cooperation between these kinds of institutions and native communities and groups,[31] the legislation has also been criticized for failing to achieve its primary goal of repatriation.[32] Nearly 95% of the remaining tribal remains and cultural objects in museums and other institutions have not been returned because they are culturally unidentifiable.[33] NAGPRA does not establish any standards over an institution's process for determining whether a cultural affiliation exists.[34] NAGPRA is also criticized for its limited scope, as it is only applicable to a distinct group of federally recognized Native American, Hawaiian, and Indian tribes.[35] More than 400 non-federally recognized Native American tribal groups and communities do not have access to NAGPRA's repatriation scheme and thus, these groups can only resort to state causes of action like replevin to acquire their tribal and community property. [36]

IV. How Do Lanier's Claims Fit Within This Framework?

In *Lanier v. President and Fellows of Harvard College*, Lanier brought several state causes of action under which she asserted her individual ownership of the daguerreotypes, an object with familial significance.[37] Lanier's primary claim for ownership is brought under an action for replevin as well as other state property-related claims, such as conversion, intentional harm to a property interest, and equitable restitution.[38] As such, Lanier's cause of action is subject to the Massachusetts three-year statute of limitations.[39]

Lanier argued that Renty and Delia obtained a cognizable ownership interest in the daguerreotypes at the time when they were taken. However, unlike the kinds of evidence or ownership theory seen in the recovery of Nazi-looted works of art, Lanier's ownership argument is not centered on Renty or Delia's possession or valid title over the daguerreotypes. Rather, Lanier's ownership claim is based upon ethical and moral notions of justice and fairness. Lanier argues that Renty and Delia inherited an ownership and possessory right in the daguerreotypes at the time of their creation because of the "multiple tortious and criminal violations" of Renty and Delia's rights committed in their creation.[40] Since Renty and Delia lacked the legal capacity to consent to be photographed, the resulting daguerreotypes are the "spoils of theft," and as such, ownership rights never properly vested in Agassiz, and subsequently in Harvard University.[41] Harvard's continued ownership and possession of the daguerreotypes, in disregard of Lanier's familial connection to them, only serves to perpetuate the legacy of slavery, racism, and the systematic oppression of Black Americans by preventing descendants of enslaved people from "holding, conveying, or inheriting personal property" from their enslaved ancestors.[42]

The Massachusetts Superior Court dismissed Lanier's complaint in 2021.[43] The following year, the Massachusetts Appeals Court affirmed the Superior Court's dismissal of Lanier's property-related claims for possession of the daguerreotypes.[44] The Appeals Court held that Lanier's property-related claims were both time-barred under the applicable Massachusetts statute of limitations[45] and that the claims failed on the merits because Lanier failed to demonstrate a cognizable ownership interest in the daguerreotypes.[46] The court found that applicable law in Massachusetts did not recognize the kind of ownership interest that Lanier asserted in the daguerreotypes.[47] The majority opinion focused on the legal principle that ownership of a photograph, under most U.S. law, vests in the individual who took the photograph and that "those whose likenesses are reproduced in a photograph do not … [obtain] a property interest in it."[48] Since Renty and Delia were the subjects of the daguerreotypes, the title of ownership of the daguerreotypes lawfully passed to Agassiz and then to Harvard University. While Justice Kafker recognized that Massachusetts enacted legislation to penalize a narrow genre of photographic images, including nonconsensual nude photography of individuals, a violation of this legislation resulted in the forfeiture of the offending photograph to the state and "does not provide for the conferral of ownership rights … in [the subject of the photograph] or their descendants."[49] Thus, citing the confines of Massachusetts law, the court rejected Lanier's ownership in the daguerreotypes of her ancestors.[50]

In a concurring opinion, Justice Cypher rejected the majority opinion's narrow approach to their consideration of Lanier's ownership claim and instead argued for the creation of a new common law right that confers an ownership right to descendants of enslaved peoples seeking the return of property with familial significance.[51] Citing the court's inherent ability to make common law to equitably repair harm, Justice Cypher offered an alternative common law cause of action that would allow redress for the descendants of enslaved individuals in Lanier's position:

> A plaintiff must show that (1) she is a direct lineal descendant of a specific individual … enslaved in the United States; (2) the defendant has possession of an artifact, which was created or obtained as a consequence of the enslavement of the plaintiff's ancestors; (3) the defendant participated, either directly or indirectly, in the wrongful creation or attainment of such artifact; (4) the artifact provides a meaningful connection between

> the plaintiff and her ancestors; and (5) the plaintiff has made a request or demand to the defendant to relinquish the artifact to the plaintiff, which the defendant has refused or ignored.[52]

Under this new common law cause of action, Justice Cypher would have found that Lanier pleaded sufficient facts to satisfy the elements of the claim.[53]

Both the majority opinion and a separate concurrence, authored by Chief Justice Budd, hold that Justice Cypher's proposed cause of action is not anchored in existing law or precedent.[54] However, Chief Justice Budd, like Justice Cypher, recognizes that the confines of Massachusetts law do not offer the means for Lanier to achieve sufficient relief for her harm.[55] Pointing to a variety of museum ethical standards, Chief Justice Budd suggests the important ethical duties that museums have in analyzing their collections, understanding the impact that possession of cultural property has on the community that it represents, and in certain circumstances, to respectfully work towards equitable solutions, which include repatriation or restitution of objects to the individuals, nations, or cultural groups that they represent.[56] However, regardless of the ethical duties owed to Lanier, her argument for ownership of the daguerreotypes is not recognized under the existent law.[57]

V. Is There Room for Descendants of Enslaved Peoples?

Lanier brought her claim for restitution under an individual theory of ownership, seeking to demonstrate that her ancestors had an ownership interest in the daguerreotypes, and as such, Lanier, as their descendant, could seek to enforce their right to own and possess them. Without legislation, like NAGPRA, that mandates an extra-legal process for the repatriation of certain culturally significant objects, the descendants of enslaved peoples will be required to bring individual claims for the recovery of their familial through state causes of action like replevin. As such, these claims will face the same, if not heightened, procedural and evidentiary challenges faced by both individual and national plaintiffs.

To overcome the evidentiary hurdles and show legally recognized ownership, a descendant would need to demonstrate particularized evidence to prove that their enslaved ancestor had an ownership right in a particular object, through means of proper title or evidence of possession. Proving that an enslaved individual had an ownership interest in a particular object poses a challenge for the restitution of familial objects. Enslaved individuals in the U.S. were stripped of their legal personhood, including the right to own personal property.[58] This degradation of legal personhood continued after the abolishment of slavery in the U.S., as legislation and courts continued to restrict, limit, or deny the rights of Black Americans.[59] As a result, there has been a significant biographical erasure of enslaved identities, possessions, and culture from U.S. history.[60] This erasure of identity also poses a difficulty in the individual recovery of personal property and also for the works of art created by enslaved individuals.[61] Enslaved labor was used to create a variety of functional objects, such as pottery and furniture; however, many of the objects created by enslaved hands, similar to the possessions and belongings of enslaved individuals, remain nameless and faceless.[62]

While the Appeals Court made the legally correct determination in *Lanier* under applicable Massachusetts law, the court in *Lanier* left open the possibility that a similarly aligned case with a different set of facts that overcome the evidentiary hurdles could find success on the merits.[63] However, as Justice Cypher's proposed common law cause of action highlights, the current confines of U.S. law and concepts of ownership can be shifted and expanded to allow for the recovery of objects with familial significance to individual descendants.

While a new private right of action would need to be created through legislation, Justice Cypher's proposed cause of action demonstrates how a different cause of action could better redress these harms. The proposed cause of action lessens the burden on descendants to demonstrate ownership by their enslaved ancestors by removing a demonstration of prior ownership from the claim altogether. Like the repatriation scheme set up by NAGPRA, which shifts away from ownership to cultural affiliation, Justice Cypher's proposed cause of action takes into consideration the realities of the historical and cultural obstacles descendants of enslaved peoples face. The fourth element of the cause of action, which focuses on the meaningful connection between a descendant and their familial objects, would allow the descendants of enslaved individuals to demonstrate their familial connection, likely through their family's oral history and stories of their past, rather than tangible documentation and records. The cause of action would also lessen the burden on descendants of enslaved individuals by applying a demand and refusal rule to determine when their cause of action accrues under the statute of limitations, thus further protecting of the rights of descendants.

The issue of repatriation could also be considered, like repatriation to Native American tribes or foreign nations, under a framework that emphasizes communal or group-based ownership. As *Lanier* demonstrates, the burdens of history have restricted the ability for the descendants of enslaved peoples to present evidence sufficient to show a legally cognizable ownership claim over familial property. However, if a legislative scheme recognized that the descendants of enslaved peoples, collectively rather than individually, have a

right to property culturally significant to the history of enslaved individuals in the U.S., some of the hurdles faced by Lanier could be alleviated.

Both Native and indigenous groups and the descendants of enslaved peoples struggle to demonstrate ownership of cultural property in a way that satisfies the U.S.' narrow and rigid legal understanding of ownership. As seen with NAGPRA, by legislatively altering the standard from ownership to cultural affiliation, repatriation can be successfully achieved by the demonstration of other evidence. For the descendants of enslaved individuals, who were restricted from owning personal property, the creation of an alternative definition of ownership would ease the burdens faced in individual ownership cases. This could also broaden the scope of available objects from individual familial property to allow for the recovery of a repository of cultural property that is rich, unique, and particularized to enslaved peoples, such as utilitarian works of art, clothes, and other possessions.

However, unlike federally recognized Native American and Indian tribes, the U.S. has been reticent to recognize the descendants of enslaved peoples as a legally distinct, vulnerable cultural group warranting extra levels of protection of their interests. Even under NAGPRA, the U.S. has continued to take a narrow, and relatively restrictive, position on what kinds of indigenous groups and communities are permitted under the statute to seek repatriation. However, as both concurring opinions in *Lanier* make clear, the descendants of enslaved peoples are a distinct cultural group with a shared, ongoing history of trauma and oppression.[64]

VI. Conclusion

The Massachusetts Appeals Court's varied approaches to Lanier's claims for restitution of the daguerreotypes highlight that the descendants of enslaved peoples do not neatly fit into the existent framework for restitution or repatriation of personal and cultural property. However, while Lanier was unsuccessful in gaining possession of the daguerreotypes, *Lanier* is a step forward in recognizing that claims from descendants of enslaved peoples can and should have a place in the domestic framework for the return of familial or cultural property. Descendants of enslaved peoples in the U.S. should not be erased from restitution or repatriation simply because their claims do not fit neatly into current law.

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Endnotes

1. *Lanier v. President and Fellows of Harvard*, 490 Mass. 37, 42 (June 23, 2002); *see also* Hrag Vartanian, *Tamara Lanier's Fight for the Photographs of Her Enslaved Ancestors at Harvard*, Hyperallergic (Apr. 21, 2022), https://podcast.hyperallergic.com/episodes/tamara-laniers-fight-for-the-photographs-of-her-enslaved-ancestors-at-harvard.
2. Vartanian, *supra* note 1; Gillian Brockell, *In 1850, a Racist Harvard Scientist Took Photos of Enslaved People. A Purported Descendant is Suing,* Seattle Times (Nov. 5, 2021, 7:00 A.M.), https://www.seattletimes.com/nation-world/in-1850-a-racist-harvard-scientist-took-photos-of-enslaved-people-a-purported-descendant-is-suing/; Anemona Hartocollis, *Who Should Own Photos of Slaves? The Descendants, not Harvard, a Lawsuit Says,* The N.Y. Times (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/us/slave-photographs-harvard.html.
3. Sons, uncles, and brothers in Lanier's family all bore the name of Renty, an ode to who he was and a reminder from where they came. Lanier's mother consistently reminded her that she was a Taylor, an acknowledgment of her familial connection to Renty. Vartanian, *supra* note 1.
4. Brian Wallis, *Black Bodies, White Science: Louis Agassiz's Slave Daguerreotypes*, 9 Am. Art 38, 39 (1995); *see also Lanier*, 490 Mass. at 40.
5. Saima S. Iqbal, *Louis Agassiz, Under a Microscope*, Harv. Crimson (Mar. 18, 2021), https://www.thecrimson.com/article/2021/3/18/louis-agassiz-scrut/.
6. While there is historical evidence that Agassiz was not a proponent of the institution of slavery, he was a staunch advocate of polygenism and supported segregation after the Civil War. See Iqbal, *supra* note 5; Wallis, *supra* note 4, at 44 ("Despite his personal repugnance for the blacks he encountered, Agassiz later claimed that his beliefs on racial typologies were without political motivation.").
7. Wallis, *supra* note 4, at 40; Iqbal, *supra* note 5; *see also* Lanier, 490 Mass. at 42.
8. Two of the individuals, Delia and Drana, were not African-born enslaved individuals, but rather the American-born daughters of two of other African-born enslaved men, Renty and Jack. *See* Iqbal, *supra* note 5.

9. Wallis, *supra* note 4, at 45-46.
10. *Id.*
11. *Id.*
12. *Lanier*, 490 Mass. at 40; *see also* Boyce Rensberger, *Earliest Pictures of Slaves Found in Harvard Attic*, The N.Y. Times (May 31, 1977), https://www.nytimes.com/1977/05/31/archives/earliest-pictures-of-slaves-found-in-harvard-attic.html.
13. *Lanier*, 490 Mass. at 42.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 43.
18. *Id.* at 42.
19. Ella Feldman, *Was That Painting Stolen by Nazis? New York Museums Are Now Required to Tell You*, Smithsonian Mag. (Aug. 16, 2022), https://www.smithsonianmag.com/smart-news/nazi-looted-paintings-new-york-museums-180980587/; *see also* Michelle I. Tumer, *The Innocent Buyer of Art Looted During World War II,* 32 Vand. J. Transactional L. 1511, 1512 (1999) ("Hundreds of thousands, perhaps millions, of paintings, sculptures, drawings, pieces of furniture, religious objects, and other works of art were looted by the Nazi government from Jews throughout Europe.").
20. *See* Holocaust Expropriated Art Recovery Act of 2016 § 5.
21. *See* Tumer, *supra* note 19, at 1526, 1540 ("[Original owners] may have no documentation, photos, or witnesses to prove their ownership."); *see also* Holocaust Expropriated Art Recovery Act of 2016 § 2(6) ("Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide.").
22. See Tumer, *supra* note 19, at 1526.
23. *See* William R. Ognibene, *Lost to the Ages: International Patrimony and the Problems Faced by Foreign States in Establishing Ownership of Looted Antiquities,* 84 Brook. L. Rev. 605, 616 (2019) ("Patrimony laws...vest ownership of certain objects under certain conditions in the government of the home state, thereby claiming such objects as part of the nation's cultural heritage.").
24. *See generally United States v. McClain,* 545 F.2d 988 (5th Cir. 1977), *United States v. Schultz,* 333 F.3d 393 (2d Cir. 2003); *see also* Ognibene, *supra* note 36, at 617.
25. *See* Ognibene, *supra* note 23, at 618.
26. Turkey's ownership claim on the Guennol Stargazer was rejected due to Turkey's inability to demonstrate definitive proof that it was excavated in Turkey after 1906 and thus subjected to an Ottoman-era patrimony law. *See generally Republic of Turkey v. Christie's,* 2021 WL 4060357 (S.D.N.Y. Sept. 7, 2019).
27. *See generally* 25 U.S.C. §§ 3001-3013.
28. *See* 43 C.F.R. § 10.2(a)(3).
29. 25 U.S.C. § 3001(2); *see also* 43 C.F.R. § 10.2(e).
30. 25 U.S.C. § 3001(2); *see also* 43 C.F.R. § 10.2(e)(1).
31. Karolina Kuprecht, *The Concept of Cultural Affiliation in NAGPRA: It's Potential and Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 IJCP 33, 39 (2012).
32. Kuprecht, *supra* note 31, at 39.
33. *See* 43 C.F.R. § 10.2(e)(1).
34. While there are temporal limitations on establishing a cultural affiliation under NAGPRA, the Ninth Circuit in 2004 affirmed that the 9,000-year-old remains of The Ancient One, also known as the Kennewick Man, were too old to fall under the scope of NAGPRA. However, after DNA evidence confirmed that The Ancient One was closely related to modern Native American tribes, Congress enacted specific legislation to facilitate the return of the remains for proper burial by the Native American tribes. *See* The Ancient One, Kennewick Man, Burke Museum (Feb. 20, 2017), https://www.burkemuseum.org/news/ancient-one-kennewick-man#:~:text=The%20results%20indicated%20an%20age,between%208%2C400%E2%80%938%2C690%20years%20old.
35. See Kathleen S. Fine-Dare, Grave Injustice: The American Indian Repatriation Movement and NAGPRA 6 (2002).
36. *See* Zachary Small, *Push to Return 116,000 Native American is Long-Awaited*, The N.Y. Times (Aug. 6, 2021), https://www.nytimes.com/2021/08/06/arts/design/native-american-remains-museums-nagpra.html.
37. For example, Harvard University's Peabody Museum has more than 6,400 Native American remains and 13,600 funerary objects that have not been culturally affiliated with a Native American tribe, despite more than 96 percent of the objects being traced to specific geographic regions. *See* Small, *supra* note 36.
38. Michael A. Schillaci & Wendy J. Bustard, Controversy and Conflict: NAGPRA and the Role of Biological Anthropology in Determining Cultural Affiliation, 33 POLAR 352, 354 (2010) ("Because NAGPRA only requires museums and federal agencies to use information at hand, determination of cultural affiliation vary from agency to agency and museum to museum."; *see also* Small, *supra* note 36.
39. *See* 43 C.F.R. § 10.2(b).
40. See Gabriella Angeleti, *Three Decades Ago, US Museums were Told to Report All Native Remains in their Collections – So Why are They Still There?*, Art Newspaper (Nov. 8, 2022), https://www.theartnewspaper.com/2022/11/08/three-decades-ago-us-museums-reported-all-the-native-remains-intheir-collectionsso-why-are-they-still-there.
41. *Lanier*, 490 Mass. at 43.
42. *Id.* at 44, 54.
43. *Id.* at 54.
44. *Id.*
45. Hartocollis, *supra* note 2.
46. Hartocollis, *supra* note 2; *see also* Ariella Aïsha Azoulay, *The Captive Photograph*, Boston Review (Sept. 23, 2021), https://www.bostonreview.net/articles/the-captive-photograph/.
47. *Lanier*, 490 Mass. at 43.
48. *Id.* at 44.
49. *Id.* at 55.
50. *Id.*
51. *Id.*
52. *Id.* at 56.
53. *Id.*
54. *Id.* at 54.
55. *See id*. at 83-84 (Cypher, J., concurring).
56. *Id.* at 82-83 (Cypher, J., concurring).

57. *Id.* at 86 (Cypher, J., concurring).

58. *See* Lanier, 490 Mass. at 58 ("[T]he new right proposed in Justice Cypher's concurrence does not derive from common-law reasoning … Rather a right and remedy, without precedent, would be created anew."); *Lanier,* 490 Mass. at 66-67 (Budd, C.J., concurring) ("[A]lthough I fully support Justice Cypher's effort to create a new common-law cause of action, I am not persuaded that the one she proposes is anchored sufficiently in legal precedent.").

59. *Id.* at 60 (Budd, C.J., concurring).

60. *Id.* at 63-64 (Budd, C.J., concurring) ("These various ethical codes show that museums and research institutions … realize their special ethical obligations to the communities from whom their collections have too frequently been wrongfully extracted.").

61. *Id.* at 66 (Budd, C.J., concurring).

62. *Slave Code for the District of Columbia*, Library of Congress, https://www.loc.gov/collections/slaves-and-the-courts-from-1740-to-1860/articles-and-essays/slave-code-for-the-district-of-columbia/#:~:text=All%20slave%20codes%20made%20slavery,a%20party%20to%20a%20contract.

63. *See* Meilan Solly, *Who Were America's Enslaved? A New Database Humanizes the Names Behind the Numbers,* Smithsonian Mag. (Dec. 11, 2020), https://www.smithsonianmag.com/history/sweeping-new-digital-database-emphasizes-enslaved-peoples-individuality-180976513/; Nicole Ellis, *Lost Lineage: The Quest to Identify Black Americans' Roots*, Washington Post (Oct. 19, 2021, 4:06 P.M.), https://www.washingtonpost.com/nation/2020/02/25/lost-lineage-quest-identify-black-americans-roots/.

64. *See* Solly, *supra* note 63.

65. Jori Finkel, *The Enslaved Artist Whose Pottery Was an Act of Resistance*, The N.Y. Times (June 18, 2021), https://www.nytimes.com/2021/06/17/arts/design/-enslaved-potter-david-drake-museum.html ("This biographical erasure is one of the biggest challenges facing museums that seek to exhibit work by enslaved artists.").

66. *Id.*

67. *Lanier*, 490 Mass. at 66 (Budd, C.J., concurring) ("I am open to the possibility that a viable legal theory could be advanced that would permit this court to provide a plaintiff similarly situated to Lanier with an adequate remedy for a harm such as which Lanier here alleges.").

68. *Id.* at 71-72 (Cypher, J., concurring).

Krell's Korner

Krell's Korner is a column about the people, events, and deals that shape the entertainment, arts, and sports industries.

The NBA-ABA Merger

By David Krell

It was not exactly a slam dunk.

In 1976, the merger joining the National Basketball Association (NBA) and the American Basketball Association (ABA) blended the latter's New York Nets, Indiana Pacers, San Antonio Spurs, and Denver Nuggets into the senior league and left behind the Virginia Squires, Kentucky Colonels, and Spirits of St. Louis.

The ABA Players Association attorney focused on financial well-being. "First, the ABA players who have contracts are guaranteed full compensation, no matter what," said Prentiss Yancey. "Second, the pensions of all ABA players from 1972 to the present are improved."[1]

For the quartet of ABA teams about to be NBA teams, each had to pay the NBA a fee of $3.2 million. As the Knickerbockers had territorial rights to the New York City area, the Nets had an additional burden: $6 million within a 20-year term to the team that called Madison Square Garden home.[2]

There was an agreement providing for the St. Louis and Kentucky teams to be compensated if the NBA refused to bring them into the merger, thereby leading to them closing operations. Kentucky reportedly got $3 million; St. Louis's fee was "expected" to be in that neighborhood.[3]

However, the attorney for the owners of the Spirits negotiated an additional payment that set a new standard for the word "visionary." Don Schupak saw television as the future, even though the championship games were not yet in prime time yet, so he negotiated for Dan and Ozzie Silna to get one-seventh of the television money involving the ABA teams in this new paradigm. There was no time limit in the agreement.

A 2003 article in *Sports Illustrated* claimed that the deal provided $100 million to the fraternal duo so far. They also received a flat $2.2 million payout. By this time, the NBA became a television phenomenon, thanks to Magic Johnson and Larry Bird at the center of the rivalry between the Los Angeles Lakers and Boston Celtics in the 1980s, followed by the Chicago Bulls dynasty led by Michael Jordan in the 1990s.[4] A buyout in 2014 ended the perpetuity of the original agreement with a reported figure of more than $500 million, plus "a small stake in the revenue the former ABA teams will earn from the new TV contract."[5]

The ABA had begun in 1967. The NBA was originally called the Basketball Association of America at its 1946 inception, then changed its name to the NBA three years later when it joined with the National Basketball League. Several teams had already folded by the time of the NBA-ABA merger in 1976.

The Minnesota Muskies spent one season in the land of 10,000 lakes before moving southward to the Sunshine State, becoming the Miami Floridians—eventually known simply as Floridians—and disbanding after the 1972 season.

Pittsburgh's entry was the Pipers. With the distinction of being the first ABA champions, the team moved to Minnesota and replaced the Muskies after the 1967-68 season only to return a year later. The team's name changed to Pioneers in 1970; it got a pink slip from the ABA in 1972 and joined the Floridians in the league's graveyard.

Three ABA teams had closed in 1975.

The San Diego Sails, né Conquistadors, ceased operations in November, largely because of poor attendance. It was the second time that the city lost a pro hoops team—the Rockets debuted in the NBA in 1967 and moved to Houston four years later. The Sails were an expansion team in 1972.

The Baltimore Claws had a lifespan of three preseason games before the 1975-76 season. Originally known as the New Orleans Buccaneers, the team left The Big Easy in 1970 for Memphis and brandished three names during its Tennessee tenure—Pros, Tams, and Sounds. A group of Marylanders bought the team and moved it to Baltimore in 1975, but financial pressures led to the Claws' demise. "They (Claw owners) were constantly haggling among themselves," explained ABA President John Y. Brown. "They could have sold 2,500 season tickets by getting a little bit of talent. But you got to give the businessman, the fan, evidence of a team!"[6]

In early December, the Utah Stars flatlined when the ABA dissolved the franchise because of a weak financial standing and failure to meet payroll obligations. *Salt Lake Tribune* sportswriter Steve Rudman pointed to mismanagement dating back a few years, including a lengthy, debilitating breach of contract lawsuit involving Coach Bill Sharman leaving for the Los Angeles Lakers after the Stars won the 1970-71 ABA title. Sharman and the Lakers had been ordered to pay

$250,000 and $175,000, respectively; the Tenth Circuit Court of Appeals reversed the lower court's decision.[7]

Suffering, the Stars operation dimmed into oblivion. "But their demise was inevitable and not the result of lagging attendance, negative press or lack of community support," opined Rudman. "It was suicide pure and simple."[8]

Before its 1970-76 stint in Utah, where it brought home an ABA championship and four Western Division titles, the team began as the Anaheim Amigos but only lasted in Orange County for the initial season: 1967-68. It moved to Los Angeles, changed the moniker to Stars, and played home games in the Los Angeles Memorial Sports Arena until 1970, when Bill Daniels, a cable television mogul, bought the team and planted his flag in Utah.[9]

The merger might have happened sooner, but a lawsuit by NBA star Oscar Robertson posed a formidable obstacle. Robertson, a keystone of the Cincinnati Royals and later the Milwaukee Bucks, wanted to remove the NBA's power over players and filed his suit in 1970 after a merger idea was first publicized. As it stood, the NBA could keep a player on his team with no recourse for going to another team. Free agency was not an option. Robertson based his suit on antitrust grounds and won a preliminary injunction in 1970, preventing a merger except in the case of arguing to Congress for exemption from antitrust laws.

It was moot.

The United States District Court for the Southern District of New York explained that no legislation went forward because the NBA did not want the condition. Further, the district court noted that a 1973 order by the lower court gave a green light to a merger as long as Robertson or the NBA Players Association's attorneys were present.[10]

In 1976, the suit was settled.

Terry Pluto's 1990 oral history *Loose Balls: The Short, Wild Life of the American Basketball Association* covers the ABA's genesis, influence, and demise in terrific detail. Mike Goldberg, the ABA counsel, is a prominent contributor, offering a no-holds-barred analysis of the leagues joining forces. "First of all, the NBA never called this a merger," said Goldberg. "The four ABA teams in essence bought their way into the NBA and the NBA considered it in an expansion."

Both entities had been worn down, forcing them to link together or suffer indefinitely and perhaps fatally. "To most ABA people, it was impossible to imagine playing another season," revealed the attorney. "On the NBA side, fatigue also was a factor. The ABA had turned their world upside down. Guys were jumping leagues, guys were leaving college early, guys were getting paid astronomical salaries. Both sides just said, 'Enough already. Let's end the madness.'"[11]

Decades have passed since the ABA folded. Basketball fans may remember the signature red-white-and-blue basketball; innovation of the three-point shot; financial challenges leading to the termination of certain teams; and excitement of stars Julius Erving, Artis Gilmore, Dan Issel, plus others competing against their high-level NBA peers after the merger

Sports lawyers look at it as a legacy of legal importance, thanks to merger complications, Oscar Robertson's lawsuit, and the Silnas' television deal. To use a basketball term, it is necessary to use a full-court press for being innovative in negotiations, technology, and contract language.

David Krell is the author of Do You Believe in Magic? Baseball and America in the Groundbreaking Year of 1966 and 1962: Baseball and America in the Time of JFK.

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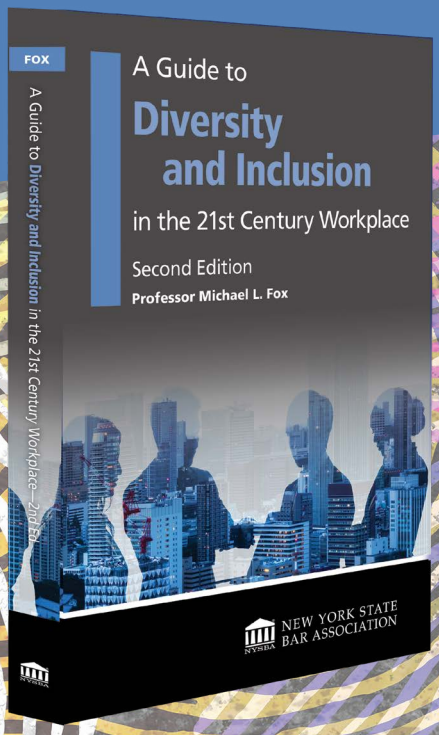

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