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Perspectives

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IN THIS ISSUE

Introducing the
Energy Transition Lab

Supreme Court Justice
Ruth Bader Ginsburg

Center for New
Americans: Success
in Year One

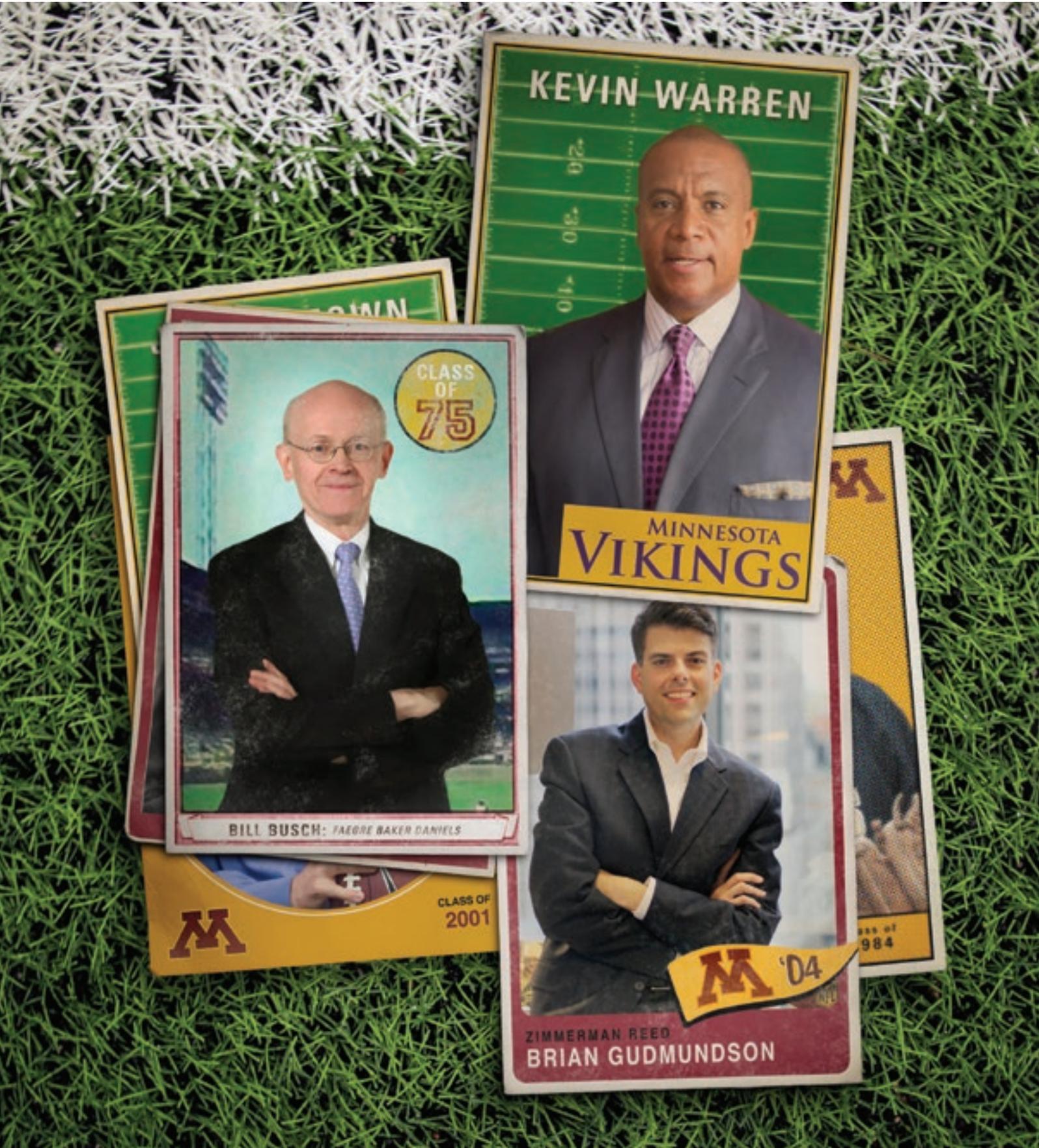
Theory at Work:
Mark Kappelhoff

Faculty Profile:
John H. Matheson



GAME
CHANGERS

TACKLING
SPORTS LAW



KEVIN WARREN

MINNESOTA VIKINGS

CLASS OF 75

BILL BUSCH: FAEGRE BAKER DANIELS

CLASS OF 2001

ZIMMERMAN REED
BRIAN GUDMUNDSON

CLASS OF 1984

GAME CHANGERS

TACKLING SPORTS LAW

By Cathy Madison

CONSIDER THE MINNESOTA VIKINGS. In recent months, the team's attorneys negotiated contracts to play two seasons at the University's TCF Bank Stadium, fielded concerns that its new stadium's glass walls might endanger migratory birds, averted a wrongful dismissal lawsuit by ex-punter Chris Kluwe, and dealt with child abuse allegations involving running back Adrian Peterson. And that's just for starters. In the sports business, lawyers must be as agile as a star quarterback.

"THERE ARE VERY FEW LEGAL DISCIPLINES THAT we're not dealing with right now. My to-do list includes litigation, issues in property, corporate, environmental, employment, tax, and construction law, and estate planning," says Kevin Warren, a member of the Law School's board of advisors and the Vikings' executive vice president for legal affairs and chief administrative officer. Add antitrust, intellectual property, torts, and real estate to the list. Is there any area of law he hasn't touched under the rubric of sports law in his 24-year career? "Riparian rights. I'm highly surprised."

"A sports lawyer is really just a generalist—in a unique

field, with rules and procedures dramatically different from other areas of society—who knows when to call in a specialist," says Bill Robers ('01), who represented pro football players before joining Sparks Willson Borges Brandt & Johnson in Colorado Springs. He currently represents coaches, executives, and sports entities, covering the usual gamut (marketing, finance, contracts, compliance), and teaches sports law at the University of Colorado—Colorado Springs.

"There's really no such thing as sports law. It's a combination of all those legal principles applied in one context,"

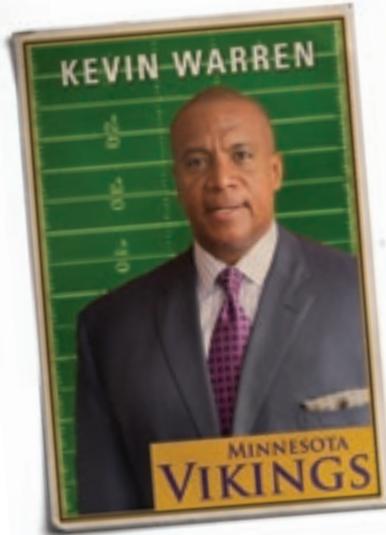
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explains Scott Bukstein ('07), assistant director of the DeVos Sport Business Management Program at the University of Central Florida. He researches and teaches “the intersection of sports and law,” an entity characterized by big money, rapid change, public scrutiny, and universal appeal to lawyers excited by challenge and diversity. Those who’d rather work with their heads down in the back room, quietly honing a specialty, need not apply.

“What makes this area unique is that it touches upon every discipline,” says Warren, whose administrative responsibilities extend beyond legal issues. “Every year is different—also every month, week, and day. And on top of that, it is highly confidential and done in an environment that is very public in nature. You have to be very, very skilled as a lawyer and nimble as a thinker and worker. And you need a thick skin.”

Given the breadth and depth of the legal challenges major league teams face, one might expect them to lawyer up. Yet the Vikings have only four lawyers on staff, and, according to Warren, some teams used to have none. There is no dearth of legal expertise available, however, from formidable outside counsel to law school grads who populate the ranks of sports organizations.

“The leagues are full of very capable lawyers,” says Bill Busch ('75), general counsel at Faegre Baker Daniels, Minneapolis, where he has applied his mergers and acquisitions and corporate governance expertise to sales of the Vikings and Minnesota



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and sold, and have very significant long-term revenue contracts with major players such as Coca-Cola and Burger King. This business attracts lawyers who like to work on large, complicated deals that intersect various parts of the economy.”

“I think it’s a mistake for students to go to law school and say they only want to be a sports lawyer,” says Jim McKeown ('84), an antitrust specialist at Foley & Lardner, Milwaukee, who teaches sports law at Marquette University and counts the *Major League Baseball Properties v. Salvinio* antitrust case and his work for the MLB Web site among his accomplishments. “They need first to become very good lawyers with skills needed by a variety of industries. Sports is just another industry looking for assistance with challenging problems. You need to think about sports as a business, with all the problems other industries have, plus a few more.”

MONEY MATTERS

SPORTS MAY BE JUST ANOTHER BUSINESS, BUT IT does have some unique qualities.

“For one thing, you can’t have the product without some cooperation between the competitors. Competition on the field needs to exist, but you have to have rules that establish that competition,” McKeown points out. The entities must agree not only on the rules on the field, but also on how to split the gate, secure broadcast deals, negotiate league-wide labor agreements, and achieve licensing efficiencies. Prior to centralized league licensing, for example, Topps failed to get rights to one team’s photo one year; it was missing from the baseball card deck.

As Busch points out, the sports industry also operates in a unique environment governed by public demand: the world of broad-based content, which includes publishing, music, movies, and television. There the money stakes are



Timberwolves franchises and properties. He cites layers of J.D.-equipped owners, operators, and commissioners—such as, in the NBA, commissioner Adam Silver and his predecessor, David Stern.

“It’s a game of rules, and lawyers are good at that,” Busch says. “Successful franchises have the ongoing legal needs that all businesses have, and they’re usually well-organized. But they also grow, expand, move, refinance, are bought

high, and as delivery methods expand and traditional lines blur, are rising higher at warp speed.

“Big television and multimedia contracts drive the structure of sports, and you see changes great and small,” Busch says. “There used to be a fairly sharp set of lines—high school football on Friday, college on Saturday, pro on Sunday. It was an effective model. They could scout each other, and everybody could watch everything. But multimedia has changed things quite a bit.”



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—Jim McKeown

No longer must everyone sit in a stadium or before a TV screen to watch the action. At the recent World Cup games, fans in the stands recorded the goals and posted them on Instagram, prompting an advisory memo about violating the league’s intellectual property rights.

“IP rights are huge when it comes to the ability or inability to control content,” says Bukstein. “One of the key revenue streams for college and pro sports is media rights. When ESPN is televising a game, they want to make sure they’re controlling the content and have exclusive rights to highlights. But how does the law apply? It was written when Twitter and Instagram did not exist.”

Bukstein offers some examples of the dollars at stake: ESPN’s nearly \$2 billion annual contract for media rights to Monday Night Football; current NBA negotiations with ESPN and TNT seeking to increase media rights from \$930 million to over \$2 billion per season; and the fact that the NCAA earns approximately 85% of its revenue from one source—its \$10.8 billion, 14-year March Madness tournament contract with CBS and Turner Broadcasting, which runs through 2025.

Team valuation only adds to the financial drama. Warren

points out that the L.A. Clippers just sold for \$2 billion. That means a huge mismatch exists between the size of the organization and its relative value, which puts huge pressure on each player, both to perform and to protect his or her image, likeness, and name. “Most billion-dollar corporations have many more employees than 140,” Warren says.

ISSUES EVOLVE

AS THE STAKES GROW, THE ISSUES CHANGE. “MANY matters that were once heavily litigated have been settled and replaced by other matters. We’re long past free agency on one hand, and just getting into the rights of NCAA players on the other. It’s an evolution,” says Busch.

Brian Gudmundson (’04) has handled sports issues at Zimmerman Reed, Minneapolis, for only five or six years, but he notes significant changes in that time. “Things are getting more complex. Clients are pursuing rights they haven’t pursued in the past, and they need more protection than before. More and bigger cases are being filed today in areas that have gone unresolved for many, many years,” he says.

His first sports case was *Fred Dryer v. NFL Films*, where he helped represent 20,000 retired players who appeared in NFL Films productions without compensation or permission. He has also been involved in class actions regarding concussions; such cases are spreading from football to hockey and other sports. “This type of litigation generally involves firms banding together to pool their resources intellectually and financially. We have to match the resources of some very large defendants,” he says.

Antitrust issues continue to dominate the sports arena; the current brouhaha over whether NCAA athletes should be paid is a big one.

“The public has a very strong thirst for top-level college athletics, which in many ways are pro sports. From an



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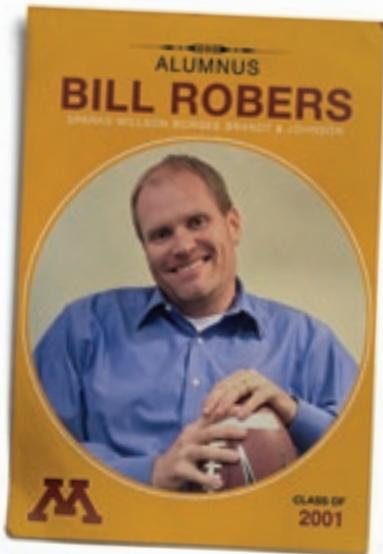
economic standpoint, they are pro sports—from broadcast rights to jersey sales to video games. The only distinction is the notion that the athletes need not be paid,” Gudmundson says. He points to super conferences (such as the Big Ten, with 12 teams), which now have their own broadcast networks and “generate substantial revenue for somebody. No longer do we watch ABC Sports for half an hour on Saturday afternoon. Now anyone can watch sports anytime, anywhere. Faces that used to appear once a year now appear dozens of times a month for a fee. That raises questions never raised before.”

Bill Robers notes other changes. “A lot more money is now going to athletes on the pro side, which is probably correct because they’re driving the revenues,” he says. Advertisers also rely more on athletes for branding, which makes those companies vulnerable when the news media or bloggers expose celebrity athlete missteps or abuse. The heightened risk is “driving longer contracts that include morals clauses, which didn’t used to be the case. And because of injuries, we’re seeing insurance issues rise a lot. Teams don’t want to be on the hook for these huge salaries,” he adds.

Robers handles contracts, licensing, sponsorships, and facility agreements for several nonprofit national governing bodies certified by the U.S. Olympic Committee. Large or small, each has unique challenges. “They’re amateur athletes—fantastic, driven, passionate about sports, not as passionate about making money,” he says. USA Basketball and USA Swimming enjoy considerable media exposure,

while USA Fencing and USA Table Tennis scramble for notice. Yet every sport wants its time in the limelight.

“There are lots of tug-of-war issues,” Robers says. “Each sport has its sponsors, and sponsors want as much of the athlete’s time as possible. The sponsor may want a specific spot on the uniform [for its logo], but the sport doesn’t have the right to that spot because it’s reserved for the athlete’s own sponsors, pursuant to USOC rules. Each sport is different, and which part of the uniform belongs to whom



is always tricky.” He does his best to intervene early, before his clients get into costly legal trouble, when such issues arise.

“When ESPN is televising a game, they want to make sure they’re controlling the content and have exclusive rights to highlights. But how does the law apply? It was written when Twitter and Instagram did not exist.” —Scott Bukstein



Intellectual property is bound to remain a hot topic, he adds, especially as the NCAA athlete compensation issue makes its way through the courts. He points out how thorny that issue could become. For example, how would Title IX affect a compensation agreement? Would male and female athletes be paid the same? What about nonrevenue sports, such as swimming and diving?

Injury liability issues will continue to arise, although sport rules and program bylaws are evolving to protect athlete safety on and off the field—“not just for legal reasons, but because they’re passionate about their sport and want to do the right thing,” Robers says. He is optimistic that safeguards such as a national coach directory and required background checks may help reduce abuse incidents.

CHALLENGES GROW

BY ALL ACCOUNTS, SPORTS—AND THUS THE NICHE area we call sports law—is booming, despite its arbitrary constraints.

“There are only so many teams operating in a pro sports environment, and only so much expansion is allowed. That said, I definitely see the industry growing its fan base, from

both a knowledge and a community perspective,” says Ashley Engels ('11), associate counsel for the Vikings and one of few women working in the field. An avid athlete whose South Dakota family was “held together by sports glue” (and Vikings season tickets), she joined the team staff after her first year of law school.

Need proof of industry growth? Consider the \$1.024 billion Vikings stadium under construction in Minneapolis.

“Stadiums reflect the public popularity of sports,” says Bill Busch. “There are only so many eyeballs, but my sense is that over time, the continued replacement of stadiums to reach optimization for each sport will have the ability to attract big crowds of fans, electronically and otherwise.”

It’s not just the numbers—fans, stadium costs, media revenue, team value—that are growing. Legal complexities are growing, too.

“Many sports organizations, from teams to leagues to other companies, are innovators. They’re moving quicker than the law,” says Scott Bukstein. “It will be a challenge for attorneys to figure out how the law should be applied to the new disruptive technologies.” For example, recent class-action suits have targeted text-message marketing campaigns, claiming they violated the Telephone Consumer Protection Act of 1991. Teams such as the L.A. Clippers and Buffalo Bills have had to craft settlements to compensate fans who enrolled in the programs and received more messages than the maximum allowed.

Social and digital media aren’t the only high-tech stumbling blocks, either. Adidas has sewn RFID chips into football and soccer jerseys, which raises privacy questions. The chips collect data on what is purchased where, and can be used to customize future offerings. How they will proliferate is anybody’s guess.

“Establishing boundaries with respect to what we can do is a key challenge,” Bukstein says. “Sports organizations need advice that is both practical and actionable.”

PERKS ABOUND

LAWYERS WHOSE PRACTICE INCLUDES SPORTS

garner more than free tickets. Unpredictability keeps them on their toes.

“I might come in one day thinking I’ve got five purchase agreements for the next home game to look at, but it turns out that an issue came up in last night’s game and has to be addressed this morning. You never know what you’re going

“There are only so many teams operating in a pro sports environment, and only so much expansion is allowed. That said, I definitely see the industry growing its fan base, from both a knowledge and a community perspective.” —Ashley Engels

to get on any given day,” says Ashley Engels, who found her first glimpse behind the scenes “a shock, really. A lot of people don’t know or understand the workings of an organization outside of what they see on the football field.”

“One of the greatest perks is getting to know how a highly publicized but relatively unknown part of the economy works. It’s a great privilege to see it from the inside,” says Busch. “It’s also an interesting intersection of civics, politics, sports, and finance.” And it’s not always about money, he adds. It’s also about civic-mindedness; Minnesotan Glen Taylor’s purchase of the Timberwolves to keep them in Minnesota is one example. It’s about charity, too. For 25 years, Busch has been pro bono counsel for Taste of the NFL, a pre-Super Bowl food shelf fundraiser that is “maybe the only charity event where the \$500 tickets occasionally get scalped.”

Finally, it’s about people. They’re not all lawyers and not all athletes. They could be Microsoft executives, like new Clippers owner Steve Ballmer, or printing business veterans, like Taylor. Practice in this area is a “combination of hard-core legal work and dealing with characters of all kinds. There are unusual things that happen and matters on which you work that you don’t see in many other industries,” Busch says. “The extraordinary circumstances and extraordinary people are very interesting and rarely tedious.” ■

Cathy Madison is a freelance writer and editor based in the Twin Cities.

