Oral History of George Cohen, Esq.

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Roger Pollak, and the interviewee is George Cohen. The interview took place at the home of George Cohen on Thursday, April 21, 2022. This is the fourth interview.

MR. POLLAK: Today I'm talking with George about his experiences working with the various sports unions that he worked with and his background leading up to those efforts in the law.

MR. COHEN: Hi Roger. Pleasure to see you again.

MR. POLLAK: Thank you. Why don't we start today with you telling a little bit about your background that led up to and created the kind of foundation for your practice of law with the various sports unions.

MR. COHEN: I'll be delighted to do that. When I reminisced on this whole situation, it dawned on me that it wasn't until 1980 or 1981 that I did my first labor lawyering involving a sports union. I had joined Elliot and Mike in 1966, so for those initial fifteen years, my labor law practice didn't include anything involving the world of sports. So I thought it might be fun just to quickly share with you all the background events, some of which I've already covered: my dad's experience as sports editor with the *New York Post* and what I did with him. I also made a minor reference to the fact that I played high school basketball myself. And certainly the most important thing of all in that period was my incredible, good fortune to be at Brooklyn Dodger training camp in 1946 and 1947 and witnessed the start of the Jackie Robinson "legend" taking place. I was 12 or 13 years old. I can't say I fully understood the whole situation, but I did know

enough to know that this was monumental, that he was going to be the first black athlete ever to play major league baseball, starting first with the Montreal Royals.

Additionally, I did have quite another potentially extraordinary experience. In my junior year of high school, my dad, who was then having a very exciting life as the sports editor of the *New York Post*, walked into the house one day and said, you know, I'd like you to come to New York with me next week because there's a radio program that's thinking of using a father-son sports talk, and they called me and they were aware that I had a son who is a sports fan, so we're going to have a couple of dry runs interviewing some high-level professional athletes. My best recollection is he interviewed with me as his son, Joe DiMaggio, and probably some other major league players. We were under consideration with another father-son team. There was a very famous football player at NYU named Ken Strong, and his son was my age. It turned out that neither of us got the job because the potential sponsor, Old Gold Cigarettes, decided not to go forward with that particular initiative. So that, I think, is my prelude to 1981.

MR. POLLAK: But you also did have a little run as a journalist at Cornell?

MR. COHEN: Yes. Thank you. I went to Cornell in 1951. The *Cornell Daily Sun* was viewed as one of the really fine daily college newspapers. There was a "competition" system. In my freshman year, I decided I would compete for the sports department. I showed up and basically was told this was a

35- to 45-hour a week trial period doing the miscellaneous things that a "newbie" does, which is proofreading at night, et cetera. I was of the view at that point, since I had not gone to one class at Cornell, that maybe I ought to give myself a rest and see what I can handle scholastically. So I dropped out, but I came back in my sophomore years. And I then served on the sports board my sophomore and junior years. Because I waived my senior year in college to attend law school, I lost the opportunity to maybe be the sports editor my senior year. A very, very successful gentleman named Dick Schaap was the sports editor and became a world-class journalist. I'd say there were at least five writers in my class who went on to have major journalism careers. I did not, of course, and that was just another interesting little facet of my life.

MR. POLLAK: Did Schaap end up doing TV broadcasting?

MR. COHEN: Well, he was a feature writer. Yes. He was a renowned encyclopedia of sports, sort of a pre-Bob Costas type. And now his son Jeremy is also a television sportscaster.

MR. POLLAK: That's great. Let's turn to talking about the sports unions and your work with them. I think you wanted to start with baseball and the Major League Baseball Players Association.

MR. COHEN: Yes. I did. So, you know, I think the theme of this whole series of interviews has been relationships and coincidences. The coincidence is that I joined Bredhoff and Kaiser in early September 1966. Almost that

exact day, a gentleman named Marvin Miller was named the first Executive Director of the Major League Baseball Players Association.

Marvin Miller had devoted probably 15 or 20 years before as the leading economist and collective bargaining strategist for the United Steelworkers of America at its Pittsburgh, Pennsylvania, headquarters. In those days, we're talking about the 1960s, the UAW and the Steelworkers, along with the Teamsters, were the pinnacle of the Trade Union movement and the leaders in collective bargaining. Marvin was noted for his incredible ingenuity. Some of the vital worker protection initiatives and concepts were his ideas. He was uniformly regarded as one of the top union negotiators in America. He was part of what the Steelworkers and Steel Industry called the "top five" committee – individuals who met to negotiate and decide the big economic issues involving the major steel companies. Local issues were negotiated at a lower level, but he was on that top committee, along with Elliot Bredhoff, my senior partner at that time. Elliot and Marvin had developed quite a substantial working and personal relationship, and in 1966, when he became the Executive Director, he brought with him as the only other staff professional a gentleman named Dick Moss, who was then the young head of the Arbitration Department at Steelworkers headquarters.

MR. POLLAK: Any idea how the PA found him?

MR. COHEN: I do not know the answer to that, but it was a very fortunate find. Before leaving this, I'd like to say the following: Marvin Miller was regarded,

and is today, as the single most important person in the history of the economic relationships between the baseball players and baseball industry. He was not voted into the Baseball Hall of Fame because of industry's inexcusable lobbying efforts, but posthumously, he was made a member of the Baseball Hall of Fame. He's the ultimate example of a legend in his time.

I should quickly add two things, Roger. Number one, we still have the same time gap. Nothing happened between Marvin and me until about 1980. Marvin had two basic principles in life. I know more about union organizing than any lawyer could possibly know. Correct. And I know more about negotiating a collective bargaining agreement than any union lawyer that I've ever met knew. Correct. Thus his view about lawyers was "stay out of my way." Not negatively, not with hostility, but just intellectually and objectively, and everyone knew that.

Now during that same fifteen-year time, Dick Moss and I had established quite a warm relationship about arbitrations and miscellaneous legal issues, so periodically, we would have a conversion. He would make it clear this was an off-the-record conversation, that they were not retaining my services, and I knew that. Finally in 1980, I was retained to represent the MLBPA.

MR. POLLAK: What happened?

MR. COHEN: In August 1980, the baseball players went out on strike. Now, you should also know that Marvin was keenly aware of how many big-time stars had

no relationship with unions and were being treated quite well in their minds by ownership. So Marvin shared with me later in life his basic theme: until the Mickey Mantles of this world are prepared to go out on strike with their brothers, we're not going to have a successful strike because we need a united team effort. Brilliantly, he worked in that fifteen-year period just to achieve that uniformity.

Now I can't leave this without telling you in 1975 one of the all-time historical events took place when Peter Seitz, the arbitrator, ruled that the language of a player's traditional one-year contract with each team allowed a player to say if I do not have an agreement for one year after that year, I then become a free agent. I can leave my team lawfully and negotiate in the free market with any team I choose. As you can understand, this was a highly controversial ruling – according players a freedom they had never enjoyed. Arbitrator Seitz was dismissed by the league about four seconds after the ink was dry on that "award." And then the possibility of chaos was rampant because literally every single major league baseball player could choose, after their first year of an employment contract, to work without an agreement for one year and then become a free agent. Even Marvin was at the forefront of recognizing that something more rational had to be negotiated than that, and he participated actively in negotiating what became the model system, which I won't talk about now, but that happened after 1975, which brings us to the collective bargaining in 1980.

MR. POLLAK: Alright, so tell us what happened leading up to the dispute with the League involving the NLRB.

MR. COHEN: Right. Well, the dispute, which unfortunately never resulted in a NLRB decision arose because the league, and at least a significant number of teams, appeared to have serious financial problems. The chief negotiator for the Major League Player Relations Committee, that's what it was called, was a gentleman named Ray Grebey. He was a renowned negotiator who came from General Electric, which was the home of the famous "take it or leave it" approach to collective bargaining. That diabolical approach was attributed to a gentleman named General Boulware, which triggered the question whether or not a company engaged in "good faith" bargaining required by the National Labor Relations Act if it used those words and that type of conduct at the bargaining table.

In any event, Mr. Grebey was aware, quite painfully aware, without letting the union know at the bargaining table, of all the financial concerns and difficulties of individual teams and the league collectively. But he also knew there was a well-known settled principle of Supreme Court law holding that if an employer claims an "inability to pay" or uses words closely resembling an inability to pay (i.e., a serious financial plight), the union acquires the right to demand to see your books and records to determine whether or not "inability to pay" is a legitimate

claim. And it appeared in retrospect that Mr. Grebey knew his owners had zero interest in opening their books to union scrutiny.

Now this is quite fascinating, Roger, because fast forward thirty years later, many employers have changed their tune – i.e., happily offering to open their books and records to claim they're going out of business. I'm going bankrupt. Here's the books. Get your accountant to conduct an audit. Not so in 1981.

So the MLBPA called and asked me to advise whether an unfair labor charge could be sustained. After detailed conversations and investigation into the facts, we concluded that it was a legitimate "refusal to bargain" charge if you could demonstrate that the agent who was the spokesperson was not at the bargaining table telling it the way it is, but he was saying it in the public domain, and we had newspaper quotes of him saying it in the public domain, and equally important, a number of his principals, the owners, were out in the public domain also lamenting the fact that they were in deep financial trouble. So that led us to file an unfair labor practice charge before the New York regional office. The regional director was a gentleman named Daniel Silverman, who was a well-known public servant. The Board investigated our charge, concluded there was merit, and they therefore issued a complaint. And under the NLRB's procedure, as you know, if a complaint issues, an evidentiary hearing is scheduled. It was set down in New York City shortly after the complaint was filed.

MR. POLLAK: What happened next? This was a very unique case.

MR. COHEN: You have to know the cast of characters because that also was a bit of history. The cast of characters begins with me saying to you that those hearings in those days and this day are conducted by an individual that used to be called a Trial Examiner and now called an Administrative Law Judge. The NLRB and most government agencies have assigned permanent administrative law judges who become expert in the subject area, and the NLRB was no exception. Probably at that point maybe 50 or more administrative law judges all working under the leadership of the chief administrative law judge – enter Mel Welles.

Mel Welles was another legendary character for two well-known reasons. First, his brilliance as a labor lawyer. He had been an appellate court lawyer in his early days at the NLRB. Second, he was also known as a genius bridge player, and with that intellectual capacity came an encyclopedic knowledge of major league baseball – every player, every historic statistic. And lo' and behold, he assigned himself that hearing. So when he walked into the hearing room, everyone understood this was a man who is going to be a force to be reckoned with in terms of his intellect, his experience, and his interest in baseball.

Now on the other side of the counsel table was the Respondent, Major League Baseball Player Relations Committee, represented by a number, not one, but a number, of top-flight lawyers. Their principal was a gentleman named Lou Hoynes who was a very senior partner at Baker &

Hostetler, and he brought with him a well-known public figure in the management-labor world – Betty Southard Murphy. At some point in her career, she was a member of the National Labor Relations Board, and she purported to have a very close relationship with AFL-CIO President George Meany, which she flouted wherever she went when she was doing her legal work. Betty had a major presence throughout the proceeding.

The NLRB's lead trial counsel was Ian Penny, and the charging party, the Major League Baseball Players Association, was represented by yours truly, and I brought with me one of our then-young, very talented associates David Silverman. The evidentiary hearing took place in New York City. It lasted, I'd say, about five days. From our perspective, without a doubt, the most important day took place when Mr. Grebey took the stand. I think you know this about me, but I want to get my disclaimer out quickly for this interview. I am not, never have been, never held myself out to be a trial lawyer. You do know that Bredhoff & Kaiser has had some monumentally talented trial lawyers, but for this trial, I was the lawyer, and I probably could have been a second-year law student and done as well as I did as a fifteen-year experienced NLRB lawyer who didn't try many cases. Why? Because major league baseball offered me Mr. Grebey on a silver platter.

For the reasons I have explained, throughout his direct testimony, he continuously disclaimed any club's "inability to pay." On my cross-examination, however, I was able to call to his attention that he, as well as

a number of the owners, in public statements appearing in major newspapers, announced a polar opposite position!

The most startling was his quote in the *Boston Herald* bemoaning the fact that "baseball is a sick cow." Of course, that provided me the simple opportunity to inquire of him, "Did you say that?" "I don't recall." "Think carefully, Mr. Grebey. You are testifying under oath. Do you deny that you said that?" Eventually he admitted it was an accurate quote. Those words came from his mouth.

Beyond that, my colleague David Silverman had obtained a number of other newspaper quotes from individual club owners all pointing directly to their alleged financial crises. And to complete the picture, we called as witnesses the writers involved, each of whom confirmed that they had taped the interviews with the owners and the "quotes" could not be challenged.

One aside, I had the ultimate dream come true because Murray Chass, the leading baseball reporter for *The New York Times*, in his article the day after my cross-examination, referred to me four times as "Mr. Cohen," and four times he referred to Mr. Grebey as "Grebey." It didn't strike my fancy when I read it, but my friends assured me that was designed to let the world know that this is a guy you could not believe.

So in a nutshell, the case presented a novel issue of labor law. Is an employer breaching its duty to bargain in good faith when its principals (the owners) claim an inability to pay away from the bargaining table

while their agent (Mr. Grebey) says the opposite both in public and in bargaining, while also refusing to allow the union to audit their books and records.

MR. POLLAK: Wonderful story.

MR. COHEN: So, the hearing ended. I had one other experience of note, which proved to be yet another dream come true. Bowie Kuhn, the Commissioner, took the witness stand. The Commissioner tried to make it appear that he was "neutral," that he was there to represent the "public interest," not to support either party. Of course, I went through with him the week before, where he was meeting and planning strategy with the owners, with sleeves rolled up and a pad in front of him taking notes and exchanging views and ideas as to what bargaining proposals might work from management's perspective to end this horrible strike. Then, of course, I had the opportunity to ask the simple question when did he join the union meeting, and, of course, he never talked to the union. But he claimed that had he ever been invited, he might have come as well. To which Marvin Miller the next day was quoted as saying this man is not worthy of being called a liar. And at that moment, my relationship with Marvin Miller changed. He respected me a lot more after that day in the hearing.

The MLBPA, however, was successful in settling the case. David Silverman had already drafted a powerful 50-page brief, which I had reviewed and edited, et cetera. We were ready to go, but we got the

great news that the dispute had been settled through collective bargaining. So no NLRB decision ever issued.

MR. POLLAK: Was there anything that happened in that particular resolution that is historically interesting?

MR. COHEN: Great question. An agreement was reached over what the improvements were going to be. If you ask whether the improvements satisfied the union's concern, I believe Marvin Miller felt it did, as did I.

MR. POLLAK: But it wasn't a major agreement changing the way free agency worked?

MR. COHEN: No. That's the next story.

MR. POLLAK: Alright. Good segue then. That brings us forward to the 1990s, I think.

MR. COHEN: Yes. It brings us to the 1990s.

MR. POLLAK: Another players strike.

MR. COHEN: Another long players strike. And then we're getting close to the question of whether there's going to be a baseball season with spring training beginning in April 1995. I believe this was like an eight-month strike, and this one was way more serious than the one in 1980-81 because what the clubs had decided to do was to unilaterally impose a new radically different collective bargaining system than that in place. And quickly I'll say the system which was in place was quite an ingenious one the two sides had negotiated years before. In the simplest terms, what it meant for purposes of player compensation was for the first three years of your career, you have no rights as a player. You either accept the offer you've received from your team, or you leave major league baseball. And there

were occasions where players actually left major league baseball and went to play in Mexico. But the bottom line was Marvin Miller was saying we'll give owners a chance to determine how good they think their individual player is by having basically this three-year period where you have control over their economic destiny.

Next came phase two, which was for the next three years any time the player was dissatisfied about the compensation being offered to the player, he had an absolute right to invoke something called "salary arbitration," which was conducted on an annualized basis. There were a group of arbitrators who were called in. It was a very fascinating "Russian roulette" procedure. Each side gave a number. For example, the team owner is offering $800,000. The player demands $1.2 million. The arbitrator has one choice, $800,000 or $1.2 million. No negotiation. No midpoint. The arbitrator either accepts the union's position or the team's position.

MR. POLLAK: Such a unique system, George, that it became known as the baseball system, right, and showed up in my experience as a potential way of setting up an interest arbitration. Very high risk.

MR. COHEN: Absolutely. And even more interesting was the model of what the actual arbitration hearing was. It was a three- or four-hour proceeding. Each side offered its evidence and arguments. In the old days, the data was very unsophisticated. Now when it goes to salary arbitration, you sit there, and you are amazed at what these salary research people have done. I'll give

you just one fascinating example. They'd look at the player's batting average. Then the team would note but in September when the pennant race was on, he hit only .242, or if it's the player, I hit .327. In the old days, the key criteria were RBIs, men on base, singles, doubles, home runs. That's now almost passe. It's what the time of the year was, how many times with a man on second did you bring him in, were you the best defensive player at your position, what other coaches said about you, what your manager said about you.

In any event, that was a monumental step forward, and, of course, as you might expect, there were some early situations in which Chuck Finley of the Oakland baseball team was always "low balling," and he lost every one, so the players began after a while figuring out he's so low balling that I can go way beyond what I'd usually be willing to accept, and I'm going to get this from the arbitration. There was this one year he lost a number of the major cases, and then there was a major change of their mindset when that happened.

So that there then would be phase three. After six years, a player has paid his dues. Those were the words that we used, and you then became a free agent eligible to test the marketplace and receive offers based on whatever the market would bear, including staying with your own team. One nuance: what most teams would do if they had some player they wanted to keep, they didn't wait until the sixth year. They tried to negotiate in the fifth year to get a longer-term commitment so they

wouldn't have to face the competition from a free market a year hence. So that was part of the dynamic.

MR. POLLAK: Was that structure in place coming up to the 1994 strike?

MR. COHEN: Yes.

MR. POLLAK: Because that's the structure that's still in place.

MR. COHEN: Yes. Exactly. That was the structure that essentially was created in the wake of the Peter Seitz award in 1975. Now there was a nuance, there was a sort of a category of certain number of top-flight players could get to salary arbitration after two years and six months, but the answer is yes. And that's the precise system that Major League Baseball tried to destroy in 1994, which led to the strike and then eventually the federal district court case.

MR. POLLAK: You're about to describe it, but I just noted in the lockout that just happened, this is still what they're fighting over, right?

MR. COHEN: Yes. It's sort of an interesting reality, right? So we all understand that after a contract expires by its terms, parties have legal rights to exercise economic power. The employer can lock out, the union can go on strike. There's also another phase in which the contract has expired, but the parties are still negotiating, and the question arises whether an impasse has been reached between the two. What is an impasse. It's a fact question. Everybody comes up with their own words. "Deadlock." We're deadlocked, we're at impasse, we can't move, we can't reach an agreement on anything. One would expect it's not too easy to have a

legitimate impasse if there's some minimal amount of movement in the negotiations taking place. And what happened in this particular situation, which makes no sense in retrospect from an industry standpoint. The league declared an impasse two days or so after the union had made a significant economic counterproposal. Nonetheless, the league called an impasse and said that means that they can now unilaterally impose what our "last best offer" was to the union – and their last best offer was a diabolical destruction of the model I've just described. Things such as no longer will individual teams be negotiating with their own players. The league is going to stand in the place of the individual teams, and it's going to control the destiny of every one of the many hundreds of major league baseball players.

Now, how that could have worked? How the owners really could have really wanted it makes no sense, but that is what the league announced it was imposing. The MLBPA response was to file a refusal to bargain charge under the very simple theory that you can't unilaterally impose anything, let alone this diabolical system, if you haven't reached a legitimate impasse, and you surely haven't because two days before, the union had made a comprehensive counterproposal. It's now March 1995. The players all want to go to spring training. They've been on strike since August, so the union tried to invoke the extraordinary procedure pursuant to Section 10(j) of the National Labor Relations Act, whereby a union-charging party has to persuade the General Counsel of the NLRB to issue

a complaint and also to recommend going into federal district court to get an immediate injunction against the unilateral imposition that had taken place. The MLBPA succeeded in getting the complaint issued and succeeded in having the General Counsel recommend applying for a 10(j) injunction, but the law requires the five-member NLRB to authorize their agency to go into federal district court to enjoin what we called the illegal action of the Major League Baseball.

The NLRB was then a Clinton Board. There was a 3-2 majority of Democratic appointments. That was also the vote. Bill Gould, who went on to become a professor of labor law at Stanford and a colleague of mine from the day I started working at the NLRB in the 1960s, was the Chairman of the NLRB. A short memorandum decision issued, and the case was then assigned to the Southern District of New York federal court in early March 1995. At that time, the federal district court had a neutral procedure: they put all the little ping pong balls into the cage with each judge's name and circulate it around until one judge's name appears. Judge Sonia Sotomayor's name appeared, and she was assigned the case. The first thing we did was to file a motion to participate as an "amicus." I helped make the judgment that rather than asking for "intervenor" status, the MLBPA would be better served just asking to be an amicus. The court granted that motion and set a hearing for March 31, 1995.

MR. POLLAK: Just a historical note. She must have been quite youthful at that point in her career.

MR. COHEN: Correct. So that, of course, everything you ask me is the entrée to what I want to tell you. Not only was she youthful, but here was the line on Sonia Sotomayor. She had only been a federal district court judge for a year or two. Previously, she had a government job and then was in private practice, but the most notable thing was from all the research we had done. Judge Sotomayor had never handled anything remotely resembling a labor law case. Nothing. And so here was this neophyte on the bench. And what a courtroom. Because this was a high-profile case, we were not in the usual courtroom. We were in the Ceremonial Courtroom, usually reserved for ceremonies when hundreds of people are getting admitted to the bar or immigrants being sworn in as citizens. When you walked into that courtroom, the first thing you noticed was that there were literally hundreds of media, not only from the United States – every newspaper in America was covering baseball – but wherever baseball was played around the world, including Japan and many Caribbean countries. It was a circus. There was no doubt about that.

My young colleague Virginia Seitz was with me that day on behalf of the Players Association. Virginia had worked with Andy Roth on the brief with me. Dan Silverman, the NLRB Regional Director, was representing the prosecuting government, and Morgan Lewis & Bockius was representing Major League Baseball Player Relations Committee. It was interesting to me that Chuck O'Connor, who I viewed as the most knowledgeable and constructive of the management-labor lawyers I had

dealt with at that firm, was not arguing. Instead, it was Frank Casey. He proceeded to do a very unsatisfactory job, but the difficulty that existed in my mind was what happened in the exchanges that took place with Dan Silverman and Judge Sotomayor. She had come incredibly well-prepared. In retrospect, she proved to be an amazing, quick learner of all the legal nuances. She had found a few NLRB cases that raised the question whether salary arbitration standing alone was really a mandatory subject of collective bargaining. If she was going to decide "no,", that was the end of the whole ballgame for MLBPA because salary arbitration was an integral part of the entire player compensation system.

Mike Weiner was there at counsel table with Don Fehr, Executive Director, on behalf of Major League Baseball. I should quickly say Mike Weiner spent the night before with me as a young lawyer helping me prep for the argument. I vividly recall what my strategy would be. Look, I'm going last, so there's no sense having a prepared argument. I've got to see how things are going, what is the dynamic that's taking place in court, what issues concerned the judge most. I had been allocated just fifteen minutes. And it was painfully clear to me that when my turn came, I knew I've got to try to save salary arbitration.

I had one of those wonderful days as an advocate where whatever the judge asked me, I appeared to be allaying her concerns both with that specific subject and more generally the need for the injunction. My fifteen minutes went to twenty minutes or more, and I felt that we were back in

the ballgame. You're never confident you succeeded, but it was very clear to myself and I think virtually everybody in courtroom that Judge Sotomayor was now turning her mindset in the right direction for us about the breadth and scope of an injunction.

The argument lasted about 1 ½ to 2 hours. She then announced that nobody leave the courtroom because she was going back into chambers and would return to give her opinion in the next thirty minutes or so.

As I surmised, she had already prepared a thirty-page memorandum opinion, but it seemed likely that she rewrote the two pages about salary arbitration in chambers and came out and read it. In doing so, I am honored to say she gave me several accolades from the bench about the quality of my argument. Bottom line, she ruled for the NLRB and MLBPA in all respects, including an injunction that required the league to restore the entire pre-existing player compensation system.

So that was it. Judge Sotomayor advised that a formal memorandum opinion would issue the next day.

Immediately, Mr. Casey moved for a stay. Stay denied. The league then proceeded expeditiously to the Clerk's office of the Second Circuit Court of Appeals in the same building.

An emergency panel considered the motion and denied the stay but did agree to set an expedited schedule for briefing and oral argument. The expedited proceedings took place, culminating in a unanimous three-judge

ruling in September affirming all aspects of the district court decision and order.

One aside. In the Second Circuit, we had a premier panel led by Judge Winter, a former Yale labor law professor. Judge Winter praised the opinion. He ruled it was all correct. I had my own little vignette with him which was also quite wonderful. I got up as the amicus to give my ten-minute argument, and he asked, Mr. Cohen, aren't you satisfied with how the argument is going? So I, of course, said Your Honor, I'm totally satisfied, but I do want to remind the court it's because every single basic principle of labor law was in Judge Sotomayor's decision, and that's what's at stake here. And he said that's right, we realize that. And we received a beautiful "per curiam" affirmance a few months later.

MR. POLLAK: That's Ralph Winter?

MR. COHEN: Ralph Winter. That's right.

MR. POLLAK: He was my corporate law professor at Yale. An interesting man. Well, that's a great story, George.

MR. COHEN: That's for sure.

MR. POLLAK: Well now we're going to turn to the second of your sports, basketball and the National Basketball Players Association.

MR. COHEN: Yes. So, it's a completely different world. Marvin Miller is the ultimate union guy, and Larry Fleischer, a young Harvard Law graduate with the Boston Celtic clientele as an agent, a man who knew very little about labor law or particularly cared about it because his initial focus was on antitrust

law. He was brilliant in his own right. Marvin had a difficult time understanding how the national basketball players could have a leader who wasn't from a union background. You could not have asked for two different human beings, except for one characteristic. Both of them were brilliant. Unfortunately, Larry died a very young man of a heart attack after a great, albeit relatively short, career.

So, again, relationships. Marvin and Don Fehr told Larry Fleischer in 1981 after the NLRB first hearing that he ought to retain the services of a labor lawyer, and they recommended me. He interviewed me and retained me, but it was a much different situation because I walked into a totally unexpected world. At that time, the National Basketball Players Association was completely focused on using the antitrust laws, and why was that? Because by 1981 or 1982, the Weil Gotshal antitrust lawyers, led by Jim Quinn and Jeff Kessler, his right-hand man, had pulled off several miracles. They had persuaded several federal district court judges around the country that the labor exemption to the antitrust law ends the day that the collective bargaining agreement expired. That meant that once the collective bargaining agreement expired, the players could then transform themselves from union members to individual plaintiffs and succeed in suing individual clubs and the league under the antitrust laws. Success meant injunctive relief plus treble damages! And of course the league had imposed all sorts of constraints on player movement, which were basically "per se" violations of the antitrust laws if the labor

exemption did not apply. After two or three very favorable district court opinions for the players, the clubs folded and gave the players, through the union, an array of very desirable benefits. The only question was if and when was this "dream" going to explode and come to an end. And here I was. How am I going to tell a new client that, based upon my detailed legal analysis, it appeared that basic labor law principles, not antitrust concepts, should be the governing rules of the road. Specifically, myself and my brilliant colleague Bob Weinberg were placed in the unenviable position of trying to explain to our client "quietly" that this dream result may not last too long. And, of course, it didn't last too long. First, Judge Harry Edwards in the D.C. Circuit wrote a monumental decision basically holding not only does the labor law exemption continue after contract expiration, it also continues after an impasse is reached because there are still labor law components to the relationship between the league and NBPA even if you're at an impasse. And he pointed out brilliantly the reality that if the antitrust laws kick in upon impasse and bargaining continues, the parties may reach an agreement and the labor laws would apply again. Thus the notion that antitrust applies upon impasse was totally unworkable, infeasible, and incorrect as a matter of law.

And that led to the famous case in the United States Supreme Court, *Brown v. Pro Football Inc.* (1996), which, for the same reasons, the NFLPA lost eight to one. So that was an interesting experience in my life.

MR. POLLAK: Were there any other noteworthy aspects of your representing the NBPA?

MR. COHEN: Yes. Early on in my sports lawyer career, which began in the early 1980s, I had the pleasure of meeting a group of incredibly talented union officers, Isaiah Thomas, the President, Buck Williams, Quinn Buckner, Paul Silas, Bob Lanier, Alex English, Mark Eaton, Rolando Blackman, to name just a few people who were interested in representing the players around the league. They told me that one of the outstanding, unacceptable situations was the number of player agents who were engaging in unacceptable behavior and making a lot of money without putting much effort into it.

So, I was assigned by Larry Fleischer the role of union counsel to what was called the Agent Registration and Regulation Committee. That came about as follows.

Larry told me in private that he had a conflict of interest. He represented about 80 of the leading individual basketball players (almost the whole Boston Celtic team from his Harvard days), and many of the other superstars, and was therefore going to be subject understandably to whatever agent rules and regulations this committee established. So he asked me to take on this assignment as an independent person with the understanding that he was not going to play any role unless and until the formal scheme, the rules, the regulations, were in place. And, of course, I'm wondering is this going to work out. In retrospect, he was true to his word. He periodically would ask me or the committee members how are you doing, and I would give him a brief overview of how much cooperation I was getting. As you'd fully expect, I sat down with the

committee members collectively around a table literally for hours and said guys, what are the agent abuses that you've encountered yourself and you've heard about from your fellow players. And boy, I had pages and pages with examples of abuses. And I said to myself, wow.

Now at that precise time, the NFL Players Association was engaged in a similar activity. The complaints about their agents were similar. So what we did was basically two-fold. First, we put together a comprehensive form to be submitted by all those seeking to become "certified" agents just as if they were applying to a bar association. We wanted everyone on record to tell us who they were, where they lived, what was their educational background (degrees), who they represented, what clients they had, what financial arrangements they had with the players they represented. Also, anything that could possibly be a conflict. Did they represent any teams, did they have any financial interest in a team, et cetera. And at the end of the application, you signed off and said, I understand that I am telling you this truthfully, and, incidentally, I am aware that unless I now become a "certified" agent of the National Basketball Players Association, I am not allowed to represent any basketball player in negotiating any compensation agreement with their clubs. So this was a big hammer. The regulations also prohibited a number of activities that agents could engage in and provided the Association the authority to "decertify" an agent.

Okay, and that was the leverage the Association had. On the one hand, an amazing amount of leverage. On the other hand, it required players to file complaints to enforce all of this. So this was the basis of the regulations which I drafted with major input from Mike Gottesman, my law partner. This was a monumental task that took about a year.

MR. POLLAK: George, how did the union have jurisdiction to limit the behavior of the agent?

MR. COHEN: As the exclusive bargaining agent under the national labor laws, we could negotiate every single player's compensation and terms and conditions of employment. We decided to delegate to agents in a very limited way that authority, but we wanted to make sure whoever we delegate this authority to was responsible both to the players and the Association.

MR. POLLAK: Did you have agents say we're going to lead a de-cert campaign if you do this?

MR. COHEN: What we had was, well you'd appreciate this. There were many meetings with agents, but I did not preside alone. I was the professional spokesperson, but I had with me on the podium Paul Silas. I had Bob Linear, 6' 8" and 240 pounds of muscle. And that was exactly how I started out my talks. There were a hundred or more agents in the room. They were not happy campers. They did not like the idea of having their conduct regulated or scrutinized. So my talk began very simply. I am not here for any reason other than these eight player members of the NBPA Agent Regulations Committee have asked me to speak on their behalf. So

any questions or concerns you have, you should direct to any one of the committee members, and if any one of them thinks I am not saying anything consistent with what they've asked me to say, I want them to come forward and tell you that.

I'll give you one quick example. We prohibited agents from representing coaches of teams. What do you mean? I already represented a coach. I'm his representative. I've negotiated three contracts for him. Well, here's the situation. The coach has disciplinary authority over every player on his team, so how can you be on the one hand representing the coach's interests and on the other hand players are concerned the coach may impose discipline on them pursuant to the language of the collective bargaining agreement. So there was an obvious conflict in an agent representing both a player and his coach.

So where we started was ground level. The regulations required that every agreement had to be in writing. Previously, many of them were based on handshakes. The player-agent agreement also had to be in a language that the player could understand. The agent had an obligation when he was negotiating terms and conditions of employment with the team to keep the player informed of what was happening. No agreement with a team could be executed unless and until the player co-signed that agreement. You could not do certain things that you were doing all your life in order to get business such as giving money to the player's family or free trips to All-Star weekend, et cetera or to his college coach or trainer,

i.e., payments intended to have these third parties urge the player to hire the particular agent. All those things were described as prohibited conduct.

So the program went into effect. I handled the lead case, the challenge to the Regulations. Still today, the only major case. We had an agent named Tom Collins. The actual regulatory system went into effect in 1986. Several years later, Kareem Abdul-Jabbar, the LA Lakers superstar center, advised some members of our committee about his agent Tom Collins's conduct. Upon being told about this, I'm in a state of disbelief. Tom Collins had befriended a number of NBA players, telling them his basic principle: You are needlessly overpaying your taxes. We investigated and found out that in 1987, Kareem Abdul-Jabbar's W2 salary was about $750,000 or $800,000, and Collins counseled him to pay an estimated income tax of only $5,000. Okay. That was just the beginning. So it turned out, thanks to Collins's advice, Kareem didn't pay any income tax for three years. The interest and the penalties, federal and state, were about $400,000 by the time the matter got called to our attention. That's item one.

Item two is we established this understandable principle: A player-agent owes a fiduciary duty to the player he's representing. An agent cannot have divided loyalty. His loyalty can only be to his player for the rest of his career. Consistent with that duty, the agent must keep that player informed of everything you're doing for him.

So among other little tricks of Mr. Collins was he represented another group of players of lesser caliber and less earning power than Kareem Abdul-Jabbar. He was having financial problems with their investments, so he "commingled" the funds he was holding for Kareem Abdul-Jabbar. He periodically would take some of those funds and transferred them to other clients of his with the thought in mind that someday he would arrange for them to repay Kareem. But unfortunately, since some of his investments went "South," there came in time when Kareem actually found out that several hundred thousand dollars of his monies were no longer in his account because, as Mr. Collins "explained" it, these were a bunch of friends, and friends commingle assets all the time. Then there was the investment aspect. I have to say I met Kareem several times in that timeframe, and he impressed me as being a very smart person. How he got himself into this fix is a great mystery to me.

MR. POLLAK: It sounds like criminal fraud.

MR. COHEN: And then one of the things that happened was we discovered that Collins started investing in very speculative second mortgages, horses and thoroughbred racing, new housing projects, et cetera, all of which failed, and Kareem was essentially bankrupt at the time we represented him.

The way the procedure worked pursuant to the Regulations, Kareem filed a complaint against Mr. Collins with the Committee. It contained ten pages of factual allegations of prohibited misconduct. Collins could have requested an evidentiary hearing before an Impartial

Arbitrator who was empowered to issue a final and binding decision. The complaint recommended decertification, which would have meant the end of his career as a professional basketball player agent. Collins chose instead to file an antitrust action in federal district court in Colorado claiming that all his alleged misconduct related to investment, tax, and general financial advice concerning which the NBPA had no jurisdiction or authority over him. The union's response was that the National Labor Relations Act empowered a union, once it attained majority support within a proper bargaining unit, to serve as the exclusive representation with respect to the player's wages, hours, and conditions of employment. And, in carrying out that function, the union could grant to an agent the limited delegated right to perform that function but subject to the union's rights to impose reasonable rules on the agent. In that regard, the union could require an agent to meet the standard of a fiduciary in all the services he/she provided to the player, not just when negotiating a plyer compensation agreement.

The district court judge agreed completely with that position and dismissed Mr. Collins's complaint. On appeal, the Eighth Circuit Court of Appeals issued a brief "per curium" approval.

FYI, to the best of my knowledge, this is still the only court case addressing a sports union regulation of agent conduct.

I also participated actively as a lecturer at the annual education programs for all certified agents that were required to maintain their

certified status. On those occasions, the NBPA provided a wide array of substantive information covering collective bargaining, tax issues, immigration rules, and general guidance especially to the new corps of agents.

MR. POLLAK: Amazing. That's another amazing story. The agent abuses are hair-raising. You have one more touching basketball story that you'd like to talk about.

MR. COHEN: Yes. I shared that with you in advance because I wanted you to be aware of that. This is only the second time in my life that I'm telling this story. I told it when I had the high honor of being named the "Michael Weiner Excellence Award" for the Sports Lawyers Association four years ago, at which 800 agents were present because they were attending the NBPA and NFLPA annual agent training seminar. They weren't there to hear me, but I did have an audience that was quite extraordinary. I told this story for two reasons. One, I get tired of speaking about collective bargaining and litigation. And two, I wanted the vast majority of those who came from management firms or manager-oriented businesses that I was tired of hearing the line, "Wait until you have to join the union. You pay dues and get nothing in return." This story I think reflects the most fundamentally positive contribution a union could make in support of its members. It went something like this.

It was November 1991. I'm in my rec room in my lovely home in Virginia, and I'm watching television. All of a sudden there's an

announcement, “We’re interrupting this program to bring you this press briefing.” And I look up and there’s Magic Johnson with Commissioner David Stern, and Magic announcing to the world that he is retiring from professional basketball because he has been diagnosed with HIV, often the precursor to AIDS. He feels fine now, but he has such respect for his fellow players, and he recognizes that he could infect other players. Johnson explains that he has no interest in ever being associated with that and that he’s retiring from the LA Lakers effective tonight. I’m sitting there watching, and I call Phyllis, my wife, and say you’ve got to come watch too!

So then my mind starts to wonder: as labor counsel to the NBPA, is there anything I can do?

MR. POLLAK: Just pausing you for a second. Magic was literally the most beloved player in the league, just for context.

MR. COHEN: Yes. The most important, beloved, the most successful. Every TV station in America is showing this press conference right on the spot with no real advance notice.

So I know David Stern quite well by then, and I know from experience one preeminent thing about David Stern – he is going to immediately swing into action. To me, that meant he was going to contact the most prominent doctor or doctors in the world concerning HIV/AIDS, and he was going to retain them to assist the National Basketball Association in addressing this difficult, high-profile situation. You’ve got

to remember in 1991, there was very little public knowledge about HIV/AIDS outside San Francisco and a few other cities that were having gay-related health problems. My immediate thought was the last thing in the world I could ever envision is any NBPA player wanting to have a doctor-patient relationship with a doctor employed by and working for the League. I wasn't thinking that was evil. Rather, I was sure players would not be willing to reveal their most intimate information regarding health and lifestyle to a management representative. This led me to focus on the fact that I had the great fortune of being on the Advisory Council of the prestigious Johns Hopkins School of Public Health and Hygiene. Parenthetically, my membership had nothing to do with basketball. It had everything to do with my OSHA activities , i.e., their interest in having someone who gave them entrée to performing cohort studies of working men and women exposed to numerous toxic chemicals causing serious health issues and often death.

At 9:00 that night, I picked up the phone, and I called Dr. Alan Goldberg, one of the three faculty members of that school who had befriended me as part of their new team of outside advisory consultants. The Advisory Council met a few times each year, and I attended those sessions. I also went to lectures and made presentations describing some of my Appellate and Supreme Court arguments representing workers exposed to cotton dust, benzene, lead, coke oven emissions, et cetera. I asked Alan what if I could get my client tomorrow to say they want to

retain the Johns Hopkins School of Public Health, what would you say? He replied enthusiastically "within 48 hours I'll have the best team of epidemiologists, doctors, researchers ready to go." I then told him I'm calling Charlie Grantham, the NBPA Executive Director, right now, and I'm going to meet with him tomorrow to arrange to meet with your team as soon as possible. He says, "We're ready. I know exactly who I want to lead my team, Dr. Michael Johnson." I called Charlie Grantham, who had been watching and in a state of disbelief. So he said George, I know about Johns Hopkins' reputation, and amen, we don't want anybody that David's going to retain. The upshot was that 48 hours later, we were at Johns Hopkins offices in Baltimore. Charlie and I and their team of five or more individuals knowledgeable about HIV/AIDS.

They were prepared to recommend a proactive comprehensive program. First, to put together a confidential five-page fact sheet to tell every single player what this disease is, what you have to be aware of, how you can be infected, and what cannot infect you. They advised, for example, taking a shower in the same locker room is not going to infect you. Whereas, you can be infected if blood is coming out of a player's nose and that touches you or you have mouth-to-mouth contact. And they later distributed the fact sheet.

Alex English was appointed the liaison to communicate with the Johns Hopkins team. He was then on the NBPA staff working for Charlie Grantham's team. Alex was a brilliant, wonderful guy from South

Carolina. A great former basketball player. A wonderful human being. I loved Alex. He was just an amazing person. I told him I was going to do whatever I can to help.

MR. POLLAK: Just to be clear, Grantham is the Executive Director of the Players Association?

MR. COHEN: Yes. At that point. Larry Fleischer had died in the late 1980s. The second phase of the program, the Johns Hopkins team was going to go into the locker room of every single team and conduct players-only meetings to discuss the five-page fact sheet and to answer whatever questions any player asks, all in total confidence. Then, they offered their services to anyone who wanted to get tested for HIV, with the guarantee that the test results would be confidential. All this took place on an expedited basis. I then, as their labor lawyer, got to do two things. I contacted David Stern, and he assigned Russ Granik his deputy to deal with me on the labor relations aspects of the situation. He was fabulous. I told Russ, we have put together our own team of Johns Hopkins consultants. It's not going to be a secret. It's going to be made public because we're signing an agreement with them tomorrow to retain their services. He said John Hopkins, how could anybody question their expertise?

Secondly, the NBPA needs to make sure that we address the costs that are going to now be incurred because this is going to be costly and last for a long time. We have a collective bargaining agreement that has very broad health care provisions. I want an agreement in writing to

amend the collective bargaining agreement to cover these services on behalf of the League, i.e., all the fees associated with this program would be included as part and parcel of our health coverage provisions. After checking with David, it was agreed to.

Finally, I made clear to Russ if your doctor at any time wants to talk to our Johns Hopkins team, I will arrange that because it would be wonderful if everything we're telling players, your experts are giving you the same advice.

So go back to the program. It went into effect. It was an immediate, incredible success from all the feedback I received. Alex advised that the players were asking for their wives or their significant others to meet with our medical team. Absolutely. Next, how about retired players? Absolutely. Meetings with them also took place. In retrospect, I think the program stayed in effect two-and-a-half or three years, and every six months or nine months, each team was offered a follow-up meeting. Supplemental fact sheets were prepared and distributed as new data was collected and experiences documented.

Overall, the program was a total success with the players. A few voiced their opposition. The one I remember the most was Karl Malone. His stated concern was that he could contract HIV merely by being in Magic's presence on the court, but a concern that had been expressly rejected by all the expert medical advisers.

Let's get back to Magic. As noted, he retired as a professional basketball player in November. As we approached March, we were getting the word back from David and Russ that they actually believed both parties had done an excellent job in educating the players and the public allaying fears and concerns. And I believe in a very informal way, Charles and I asked David what if Magic wanted to play in the All-Star game? I don't want to be on record as saying it was my idea, but I know there was a discussion with him in which he came back and said I think we should allow that. And so it's Orlando, I think I'm saying it right, March, whenever the All-Star game.

Incidentally, as an aside, Magic didn't really know anything about this because Magic had his own little group of medical advisors in LA assisting him. Magic was not an integral part of the Players Association, and I never had any direct communication with him at that point. I certainly didn't want to make it seem like either I or the Players Association was trying to get credit for what his team was doing.

Fast forward to the All-Star game. Keep in mind that for the prior four months, Magic had not played in any NBA game or even practiced with his team. In any event, before the game started, every single player hugged him and shook hands with him. I attended with Phyllis and my 88-year-old mom. Of course I wanted her to be there. This was truly historic. And Magic, of course, was still Magic. Unbelievable performance.

To make a long story very long, it's two minutes to go in the game. He had already scored 30 points. They're shouting "MVP." Every basket he makes, standing ovation. Okay. That's great enough. Now there's a minute to go in the game. He points to Isaiah Thomas on the other team. Every other player steps aside. Isaiah comes out on the court to defend him. Nobody else on the court. He and Isaiah. Whoosh. Goes around Isaiah. Scores a layup. Bedlam. So, he looks at Michael Jordan. Points to "the" Michael Jordan. Michael Jordan comes out. Same gosh darn thing. Magic fakes him out, under his leg, over his leg, slam dunk. That's it. Total bedlam. Nothing like this probably has happened in the history of sports, right? Nothing. So, then the hugs and kisses. Okay. Naturally he's the unanimous choice to be MVP. But that's not yet the end of this saga. The U.S. team has to be selected for the summer Olympics in Barcelona. David agrees to let him play. Magic was a critically important member. So here it is for the first of what properly became known as "the Dream Team." Larry Bird, Magic Johnson, and Michael Jordan were the top three. But let's not forget Patrick Ewing, David Robinson, Clyde Drexler, Charles Barkley, John Stockton, Chris Mullin, Karl Malone, Scottie Pippen, and Christian Laettner, the one college guy from Duke who made the famous shot at the buzzer at the March Madness tournament. No team in the history of basketball in my judgment has or ever will rival that dream team. Of course they went to Barcelona, and

they brought home the "gold." I could tell this story every day of my life without ever becoming bored.

MR. POLLAK: Tour de force. That's basketball. I know it will be impossible to match. So we actually have hockey, which I think is a coda, we'll call it a coda.

MR. COHEN: Okay. Only one incident to share with you, and it was memorable from a humorous standpoint. Jim Quinn wrote about it recently in his book, "Don't Be Afraid To Win." Jim Quinn, the antitrust lawyer, and George Cohen, the labor lawyer, were both retained together by Bob Goodnough, a newly named Executive Director of the National Hockey Players Association. Bob Goodenough was quite a character. He told Jim Quinn and me, we're about to have this monumental collective bargaining session with a group of owners who he described as some of the meanest characters you've ever seen in your life. John Ziegler, the Commissioner, but he's not really in charge. He's referring to Ed Snyder of the Philadelphia Flyers, Bill Wertz of the Chicago Blackhawks, and Mike Illich of the Detroit Redwings, the famous pizza owner. So Bob says I think Jim, you and George ought to give them an overview of how some of the other sports unions collective bargaining agreements work with their respective leagues and owners. And I'm looking at Bob Goodenough with misgivings. I don't think you're making the right judgment here. They don't know me. I'm a little guy from Washington. I don't have the ethnicity what they might identify with. I don't think this is going to be

successful. But Bob says, George, I've got total confidence in your ability. And on the Bible, this is what happens.

The beautiful Toronto hotel room is filled with all these gentlemen and their staff. On the NHLPA side of the table, several dozen player representatives and the union's key staff members. Bob introduces me and says the following in essence. George is here, and he's going to start by giving you an insight into how successfully the Major League Baseball Players Association has worked with its owners. And I said, Gentlemen, good afternoon. It's an honor and a pleasure to be here. And I completed about a sentence and a half into my introductory remarks, which was, as you'd imagine, diplomatic and respectful, when across the table literally five or six feet from me, Mike Illich leaned forward and then stands up and raised his right arm with the fist and proclaimed, "Mr. Cohen, I would rather stick an ice pick through my heart than agree to the Major League Baseball Players deal." Now words like that had never been said to me, but I was, as you know, an experienced negotiator, so I pulled myself together and said, Bob, I think we should have a caucus. And we caucused! And that was basically the end of my presentation. Jim Quinn later also endeavored to make an antitrust presentation, and Ed Snyder, evidently an even more excitable gentleman, shouted that the parties would be better served if the two of them went outside and settled the antitrust issue with fisticuffs!

So that's a day you would remember. But that doesn't end the story because I wouldn't bother you if it was. Seventeen days later, on the Bible, Mike Illich, the pizza king, the owner of the Detroit Redwings, one of the most respected entrepreneurs in Detroit, bought the Detroit Tigers, and with it he bought the Major League Baseball Players agreement. And that day I received something in the neighborhood of 25 emails from every single player who was at the bargaining table the day I told you about joking that this is a new one. Amnesia has come to life! Amnesia has come to light! Okay. That's it.

MR. POLLAK: Wow.

MR. COHEN: I'll save for a later interview what recognition and awards I received for my career as a sports union lawyer.

MR. POLLAK: That sounds good.