

MARKETS, MERGERS, AND MIXED MARTIAL ARTS

*Tracey Lesetar-Smith**

Nate Otto: Your experience as in-house counsel spans a number of professional sports. Starting with NASCAR, how has the U.S. motorsport giant dealt with the seemingly meteoric rise in popularity of a competitor like Formula 1 racing?

Tracey Lesetar-Smith:

I think that all sports right now are at this beautiful spot, where there is a lot of competition in each and every market. You are even seeing it with the National Football League (NFL); another would-be competitor is rising, and I think it really is a great time to be in sports for that reason. You will notice that competition often gives rise to better, more creative, and more innovative ways of engaging and building a fanbase. And so, during the years that I was fortunate enough to be at NASCAR,¹ decisions were made to really make an effort to continue expanding the group of people that stockcar racing appeals to.

For example, you see things like the involvement of more diverse drivers both from an ethnic and a gender perspective. This expansion truly develops—even more than they already had—the pipeline of drivers and talent that was going to come into the sport. I think you saw a lot of that during those years.

And, as we are looking at the way NASCAR pivoted during the pandemic, NASCAR took advantage of some of the momentum that was created by, unfortunately at times, not having other sports on the field of play. And they used that momentum to recraft some aspects of the sport into the image that we believed it would need to take over the next decades. They were able to innovate the annual race schedule by incorporating new venues and new markets, even hosting events in markets that they had already gone to, but doing so in a new way. For example, NASCAR hosted a dirt race at Bristol Motor Speedway in Tennessee. It was fun. It felt good to do something that still had the ring of a traditional venue but with a new twist for fan engagement. Another example was the Busch Light Clash, held at the Los Angeles Coliseum in 2022—how exciting was that? Being able to bring out a huge swath of fans who admittedly had never seen a live NASCAR race before.

That is how you compete. That is how you build. You do things that have not yet been tried by your organization and you take some swings.

* The opinions articulated in this Commentary interview are not the official opinions of NASCAR, Viacom, or Bellator, but are Ms. Lesetar-Smith's own opinions.

1. Because I am no longer with NASCAR, I certainly cannot speak fully to everything that they are doing right now.

If you get a hit, fantastic. And luckily for NASCAR, in the past five years or so, they have had a lot of hits, including getting new race team ownership into the sport.

Ultimately, NASCAR did not just diversify the fan base and the drivers, they also actively worked to diversify one of the best revenue generators that fans can attach themselves to—a team, along with the people who own that team, what that team owner’s agenda is, and their priorities. That becomes integral in how the sport grows into its greatest aspirations.

Nate Otto: During your time with NASCAR, being the largest professional organization across multiple racing platforms, did you face competition law challenges?

Tracey Lesetar-Smith:

Anytime you are widely considered the market leader, you want to be mindful of how you navigate the market while also creating a good return for the ownership of the business and a good overall experience and growth trajectory for fans of the sport. One thing I think NASCAR has always been very good at is stewardship. NASCAR and the France family have viewed stockcar racing as something that they are stewarding for the generations to come, and if you look around the world at some of the greatest and most well-attended and viewed sports globally, you will notice a continuing theme of stewardship, with clubs, franchises, and leagues gravitating more towards trying their best to really take care of and move the sport in the right direction for those future generations. So, I do think that when you are fortunate enough to be the market leader (and I have been in both positions—working for both a league that was a market leader and a client that was close but not necessarily the market leader), you always need to balance the desire to prevail over the competition with good style and a mindfulness of what, overall, is good for the sport. And I do think that the France family and NASCAR at large have always borne stewardship in mind, to make decisions that create a rising tide that actually does lift all boats.

Every time you have a sport that has multiple stakeholders in the market, you are always going to have some debate about what is best for the sport or what is best even for competition itself? Is it better to have a leading steward? You’re going to have debate all around that, but as the market leader, you always have to be mindful of what is the most stewarding thing you can do for the sport while also making a good return on all the resources you are investing.

Nate Otto: During the COVID-19 pandemic, did you see the government ease off the throttle regarding competition law enforcement due to the desire to get live sports back on track?

Tracey Lesetar-Smith:

During COVID, especially in the early years, we were lucky enough to work with states, the federal government, and even some international authorities to get back to racing. Let me tell you, they were all focused on two major things: (1) people's health and (2) people's livelihood. So, although one might hypothesize that competition law must have been somewhere in their mind when considering all the different variables that they were juggling during that time, those two priorities were paramount. And every time that we would talk to either a local state agency, a governor, a county, or folks in the federal government, we always really made sure to keep those two things top-of-mind.

NASCAR is incredibly lucky to have a very talented group of people, not only in its senior leadership, but especially in its government affairs department. These are people who are not only extraordinarily experienced but very thoughtful about ensuring that NASCAR's interests are being aligned with the government's interests in a way that serves the priority of public service. Sports really can be a great asset to the public because you can create economies around sports. You can create jobs, excitement, and a sense of community and belonging, which is why sports coming back was so important during the pandemic. In a time when our priorities felt like they were flipped upside down on their heads, sports returning felt like a retreat back into normality—like finding again some of the things that gave us joy and delight before all of this tragedy happened.

Although I am sure that, on some level, the government and its agencies were being mindful of competition, their focus appeared to be on sports leagues' and sports clubs' ability to cater to that joy while also protecting people's health and livelihood. I think that those interests aligned nicely and allowed sports, like NASCAR, to put something joyful back on the field of play and on the television screen, so that people were able to feel a little bit normal again.

Nate Otto: In a blockbuster deal, NASCAR purchased International Speedway Corporation back in 2019. What sort of due diligence is required leading up to an acquisition of that magnitude, both between the separate corporations and the surviving entity with regulators?

Tracey Lesetar-Smith:

Well, let me tell you, any merger takes a village, it truly does. There are so many different aspects of putting together a merger or an acquisition. And we're not even necessarily talking about the regulatory aspects. Just the blocking and tackling of ensuring that two companies are better together than they are apart, making a business case for that, and proving it out—that is something that can get lost in the wash when we are talking about mergers and acquisitions.

Based on the magnitude of any deal, a due diligence checklist can end up looking like a long and convoluted scroll of parchment paper. It takes so many people. So many documents. So much review. I was incredibly fortunate because when I came to NASCAR, so much work had already been done.

You have to have patience for a long runway. Some people don't understand the amount of time these things take. And in this case, we were going to be bringing together two companies that were historically owned by the same family—and one of them was a public company. Taking that company private involves a certain number of hurdles that you have to clear and boxes that you have to check in order to put all your ducks in a row.

With a long list of things that must be done pre-merger, if you are consummating a fairly large deal and you are fortunate enough to have the resources, you can lean on some outside advisors. This group usually includes seasoned experts in the fundamentals of the respective fields that it takes to get deals like this done. We were incredibly fortunate to have such advisors.

Once you close, then you have to implement. After all the plans you have made, now it's action time. Importantly, you have real human beings in these equations. So, it wasn't just about the complexities of what the corporate architecture looks like, how things will work best, and what should be where—now we also had to ask ourselves, “how, culturally, are we going to take these companies and make them live and work together in a way that is productive and that will move the sport and the business forward?”

Nate Otto: Before your career led you to NASCAR, you spent several years serving as General Counsel and Chief of Business Affairs at Bellator MMA (Bellator). What difficulties did you find trying to capture market share and increase viewership in a professional sport with so many promotions/leagues? And what methods did you employ to overcome them?

Tracey Lesetar-Smith:

It is never easy, but can often be fun not being the eighteen-hundred-pound gorilla in the market. I think that being second is usually an exercise in creativity, guerrilla tactics, deal-making that can ratchet up your position in the market, and forming good relationships.

The fight industry, as with any sport, can be very insular. Having a good team at Bellator was critical. The Ultimate Fighting Championship (UFC) had a head start on most MMA promotions, and the UFC acquired many of the promotions that pre-dated or started around the same time as the UFC.² Pride and Strikeforce are two examples of promotions that were ultimately gobbled up, and following the Strikeforce acquisition, news broke that the Federal Trade Commission (FTC) was investigating this transaction.³

What I will say is, when you have such a dominant market leader, sometimes it is easier to understand where you can be different because the leader has already honed their business and built their model, so you can really look at them and find avenues to provide different value. Sometimes, finding new ways to provide value includes asking, “where is it that we can do something different or better?” because, at the end of the day, business and successful entrepreneurship is about finding a problem that needs to be solved or a question that needs to be answered.

In sports, the question to be answered is never just, “should we have more competitors in the space?” Competition can be good because it brings out the best in sports. But the more important question is, “what do we have that is additive?” Bellator started out as one thing and evolved into several others. I think that is ok. I think that is something that one would expect. Frankly, the UFC started as one thing and evolved into many things.

2. See *Zuffa Buys Strikeforce*, UFC (Mar. 14, 2011), https://www.ufc.com/news/zuffa-buys-strikeforce-0?language_content_entity=en [<https://perma.cc/4REE-SBJ4>]; see also *UFC Acquires Pride Fighting In Multimillion-Dollar Deal*, SPORTS BUS. J. (Mar. 27, 2007), <https://www.sportsbusinessjournal.com/Daily/Issues/2007/03/27/Leagues-Governing-Bodies/UFC-Acquires-Pride-Fighting-In-Multimillion-Dollar-Deal.aspx> [<https://perma.cc/7D7H-933A>].

3. Josh Gross, *FTC Ends Probe of UFC/Strikeforce Deal*, ESPN (Jan. 31, 2012, 7:07 PM), https://www.espn.com/mma/story/_/id/7525483/ftc-closes-probe-ufc-strikeforce-purchase-take-further-action [<https://perma.cc/8A8J-QZ4J>].

If you are a competitor to a large company like the UFC or anybody who is a market leader in a particular sport, you really have to figure out what is going to differentiate you. Over time, once you have figured out what that differentiator is, the next thing you have to do is tackle brand awareness. If you are doing something different, that's wonderful. Maybe the fighters love what you are doing, maybe the hardcore fans love it, but if nobody knows who you are, it can be difficult to make it resonate, and therefore difficult to make your business scale and grow.

Bellator started out as an MMA tournament-based fight promotion. It was putting on events every single week, with a break in the summer. So, the schedule was aggressive, but it revolved around tournaments which was something that the UFC wasn't doing, and therefore was a way for Bellator to differentiate itself. Ultimately, when the leadership at the top of Bellator changed, a new era of innovation was ushered in because Bellator had achieved brand awareness.

Once Bellator established brand awareness, now it was time to scale. It was time to bring in more of the legendary fighters and to create something that was novel and different than what the UFC was producing. Bellator had periodic big tentpole events, brought back tournaments every once in a while, and ushered in Bellator kickboxing. This truly pivoted the promotion into a more multifaceted live events business with multiple television products.

Those kinds of seasons in your career are fun because they force organizations with fewer resources than the market leader to be very creative. It makes them much better at prioritizing the things that are going to give them the most bang for their buck. When you don't have unlimited resources, you really have to focus your efforts. This means asking yourself, "what are our true priorities that are going to move this business to the next level?"

I was so fortunate to start with Bellator during its startup era and end at a point when its valuation had grown so exponentially that it had really created the first truly competitive free agency market for MMA athletes in decades. That was very satisfying because I love the sport and I love professional martial arts at large. I am a martial artist. My family is filled with martial artists. So, for us, moving the sport in the right direction is something that is actually quite important regardless of what role I may be playing in the fight industry at any given time. Being able to serve martial artists and professional fighting at large for my lifetime is very important to me.

Nate Otto: In November 2023, the upstart Professional Fighters League (PFL) acquired Bellator, creating what has been touted an industry co-leader. This deal saw, arguably, the number two and number three promotions combine forces. How is the scrutiny from regulators different in PFL's case versus the NASCAR deal, where you see the industry leader acting?

Tracey Lesetar-Smith:

That's an interesting question because NASCAR is much more broadly, and by a larger margin, viewed as an industry leader. But one of the questions that this starts to beg is what the definition of market actually is?

So, if we are talking about competition, we fundamentally have to understand how the regulators are looking at "markets." Regulators may not often parse deeply into the granularity of different sports. I think they tend to look at sports and sports media a little bit more broadly than the average person would.

Regardless, it is a terribly interesting transaction between Bellator and PFL. I think the PFL looked at some of the things that Bellator had and, understanding their own position, found where they could get something additive, which was probably the genesis of the transaction. We will see how it ultimately pans out: this is a bit of an experiment. If nothing else, the PFL was able to more or less purchase its way into the number two spot.

Whether you are a purist who believes that more promotions are good for the sport or you think it's actually better to have fewer, bigger leagues that can bring on more fighters and pay bigger purses, there's a case to be made that it was certainly a shrewd strategic move by the PFL folks to make this acquisition and to make it when they did.

Nate Otto: The UFC recently settled two separate antitrust class-action lawsuits brought by former fighters for a reported \$335 million.⁴ What are your thoughts on the lawsuits ending in a settlement, and what effect it will likely have on how MMA promotions conduct business going forward?

Tracey Lesetar-Smith:

I think that the lawsuits emboldened many fighters to be more forthright about what they think they deserve and to not feel bad about wanting to make an honest and well-paid living off of prize fighting. In some ways, it was a symbolic victory to have it even go to class certification and to defeat Zuffa in summary judgment.⁵ Many of the plaintiffs are athletes who had many, many years in the combat sports industry and came out on the other side feeling that we should all do better. I think that was really the genesis of this lawsuit.

In terms of what this means going forward, I actually think that it made up some ground in terms of getting the industry to pay more attention to the reality that these are litigable claims. In fact, I believe that the UFC actually changed some of its contract terms along the way. Depending on who you ask, some of the changes are for the better while others may be worse for the athletes.

So, what do I think about the settlement? I think that the fighters will be glad to get *something* after many years of battling. On the other hand, I think that the UFC has gotten a victory in that they didn't have to take this to trial.

In terms of progress, I do think that there are some in the industry, especially from the athletes' side, that were truly hoping that this type of litigation, if it had gone all the way to trial, ultimately could result in behavioral, contractual, and business model modification across the industry. With the settlement, I think that the UFC perhaps scored a bit of a victory in terms of maintaining their business model, and I think that it's very probable that they continue doing what has already worked for them quite well.

4. Mark Anderson, *UFC Agrees to \$335 Million Settlement with Former Fighters Who Filed Antitrust Lawsuits*, AP NEWS (Mar. 20, 2024, 7:25 PM), <https://apnews.com/article/ufc-settlement-tko-d74b1189e1d484a914db32ec709fb6a8#:~:text=UFC%20agrees%20to%20%24335%20million,filed%20antitrust%20lawsuits%20%7C%20AP%20News> [https://perma.cc/T8LR-BR72].

5. *Id.*

Nate Otto: Do you believe that organizations like the Mixed Martial Arts Fighters Association (MMAFA) and/or others will ever succeed in forming a powerful fighters union to negotiate with these top-tier promotions?

Tracey Lesetar-Smith:

So, let's back up a second and talk about where the fight industry is in the course of its own history. This is a fairly new sport; it's young compared to a lot of the historic institutionally established clubs, leagues, and teams. Collective bargaining and collective action are often functions of individuals coming together and feeling like they are willing to sacrifice, at times, their individual voice in order to set a bar for the greater good. In combat sports, we are finally starting to see them age to a point where you have a lot of retired fighters coming out the back end now. This took a while because, again, unlike traditional boxing and kickboxing, MMA got its start in the eighties and nineties. To effect change, athletes will undoubtedly be the tip of the spear and they will need to come together if there will be some meaningful collective action.

The problem that we have seen is fundamentally because of the business model and because of the nature of combat sports. These are individuals, not team athletes. Fighters are not employees of the promoters or the media companies that distribute the content. They're not necessarily employees of their managers or their sponsors either. So, you have these floating but interconnected pieces in the industry. And fundamentally, many might say fighting lends itself to being a selfish sport, with each athlete feeling the need to truly look out for themselves as a priority. Therefore, it is very challenging to get all of these individuals to come together and unite around not only a core purpose, but around a core vision for what the benchmarks might look like regarding a collectively bargained-for agreement of some kind with the major leagues or promoters. I do think, however, the more fighters that come out on the back end of combat sports careers, the more likely it is that we may start seeing more movement towards some sort of a collective bargaining unit.

This probably goes to martial arts at large, but everyone who is a martial artist must come to a point in their martial arts journey where they must decide whether they are going to "give back" and how. Some don't necessarily want to or feel the need to. Perhaps they love the game, and the game didn't love them back. But with more fighters entering into the retirement season of their careers, I think it's more likely that you will have more individuals as a sheer percentage of that group that are going to feel the need to unite around a purpose and give back. Perhaps building

collective action is a way in which some of these athletes are going to feel good that they can leave a legacy and give back to the sport.

Nate Otto: You serve as a Legal Committee Member for the Association of Boxing Commissions and Combative Sports (Association). Some of the Association’s missions are “to build a bridge between fighters and regulators and to provide fighters a meaningful opportunity to have a voice in their sport.” What progress has the Association made during your tenure toward accomplishing its mission and how are cross-commission collaborations employed to benefit fighters?

Tracey Lesetar-Smith:

First of all, talk about the unsung heroes of sports and combat sports in particular—these commissioners and their staff are tasked with the health and safety of the fighters. And let me tell you, it is no small job. And it is not a lucrative job. Those who are doing it are doing it for the love of martial arts, combat sports, and based on principle. The commissioners generally don’t get enough credit for all of the work that they do and all of the sweat equity that they put in to making these sports what they are. You can’t do it without them. But we also need to have regulators of some kind for the sake of fairness in these unique sports.

Regulation in combat sports is in some small measure a science and in some small measure an art of consensus. Let me explain what that means. As we learn more about the science of the human body, of how substances can enhance or detract from performance, and more about what the lack of hydration does to the body and how we could prevent that for example, we have the opportunity to make people safer. We have seen an evolution in regulating combat sports using this type of science. Some examples include coming up with more efficient and cost-effective ways of testing for performance enhancing drugs, or hydrostat testing for hydration metrics when fighters might be cutting a large amount of weight. And on the other hand, regulation is also a bit of an art, as is evident in the level of debate over the past ten years concerning the definition of a “grounded fighter,” vis-à-vis whether head kicks or knees would be allowed to the head of a grounded fighter, for example.⁶

I feel like there is a whole new iteration of the conversation about safety measures every couple of years and whether commissioners will adopt proposed changes or keep the status quo. Some of these debates can get extremely heated at the annual convention. It is by no means

6. Fouls - Rule 12, Unified Rules of Mixed Martial Arts (2019), <https://www.abcboxing.com/wp-content/uploads/2020/02/unified-rules-mma-2019.pdf> [<https://perma.cc/7DJ8-BPPT>].

decided—when everybody gathers together every summer—what they’re going to do. The Association of Boxing Commissions is just that, an association. It is not a federal body that makes iron clad, binding laws. It is really a confederation bringing together the commissions, including tribal and even some international commissions. The dialogue is incredibly productive usually. You have so many hard-working people who are there for the betterment of combat sports. That’s a beautiful thing.

The Association has guided a lot of the regulation over the years and served as both a North Star and a reflection pool. It tries to actively listen to what the referees, fighters, coaches, and judges are seeing and feeling and doing in the field in real time. So that when some feel that a certain way of doing things—the definition of a “grounded fighter” for example—stops making sense, the Association can make moves to debate and try to bring it into better focus. The regulatory bodies, the commissions in particular, serve as an avenue through which fighters can really give back and have a post-fight career that is truly meaningful and benefits the sport. For example, Frank Trigg is refereeing. Chris Leben is a great judge. And there are a lot of ex-fighters starting to go more into the regulatory side, which I think frankly is fantastic. I love to see it.

Nate Otto: In your current role as Principal and Chief Executive Officer at TLSK Advisory, what sorts of clientele do you serve, and how often does your professional background navigating competition law challenges influence the legal advice you provide?

Tracey Lesetar-Smith:

My clientele tends to be early to mid-stage sports, entertainment, and tech organizations that are not yet contemplating crushing the competition on a daily basis. They have a need that they’ve identified in the consumer base and a solution—a question that needs answering and an answer for what people need, in their view. They are developing strategy, determining their capitalization, and deciding how to draw the best plan to compete in the space they want to be in.

For some clients, they might be on the cusp of their first set of big deals, for example. We’re there to work with them by employing creative deal making. There is a benefit to having experienced hands in the room who can point out the places where we can go in and get value.

On the other hand, we also have organizations who are so early in their idea that we’re there to help them to draw a map towards the first two to three years of growth. That is a lot of fun because we can really use aspects of deal-making, government affairs, risk, operations, media rights, go-to-market strategy, and branding background like a Swiss

Army knife, which can be extremely helpful to a client. It can also be helpful to have somebody who's sat in all of the different chairs that I've been lucky enough to sit in, who can lend a hand and say, hey, let's not go down that road, let's take a detour and try a different tactic.

Nate Otto: One final question. You have had the opportunity to guest lecture at several colleges and universities across the country. If there was one piece of advice that you could give to law students, what would it be?

Tracey Lesetar-Smith:

Well, first of all, you guys should tune in to Survival Guide Esquire,⁷ which is the ABA column that I write for the ABA journal with an amazing firm partner and friend, Erin Rhinehart. There's lots of good advice in there, but here's what I'd say to you here:

There are three big career seasons for lawyers. The purpose of your first three years of practice or so are for acquiring and building skills. Build them well. These are basic skills that will then be in your toolbox for years to come.

The next three to four years of your practice are about honing those skills and developing instincts; not just legal instincts, but also business instincts that will serve you well as you continue to pick up more skills and knowledge. You never stop learning, but this middle season is the time when you are really starting to be able to apply everything, sharpen your viewpoints, and then grow the skills that are so important to being in management and leadership. Whether it's with a legal or business organization, you're going to need to have good instincts to make quality, informed decisions. Most decisions are made against the backdrop of significant ambiguity, and having good instincts coupled with your experience allows you to navigate that ambiguity. If you wait for perfect information to make decisions as a businessperson, you will never ever make a decision. That will kill your business, and it will kill the business of the people who employ you.

After the first six to seven years, then everything after that is about people; managing up, managing down, managing laterally, and building relationships. You're learning how people work and how to work with them in order to get business done.

As advice goes, I also always encourage patience. You must be patient. We live in a world depicted through a lens of social media where it looks like everybody's got their own company, but they just graduated college, and now they are suddenly a millionaire, right? Chase that if you

7. *Survival Guide, Esq.*, ABA J., <https://www.abajournal.com/topic/survival-guide-esq> [<https://perma.cc/9PJR-QYJH>].

like, that's amazing. But I also invite you to value the fact that truly organic knowledge, skills, and instincts that will serve you and your business or the businesses you work for are built on the back of patience, not rushing to achieving some high level of managerial responsibility that you may not be ready for yet. So, the joy of being a beginner in your initial years of practice is beautiful because hopefully you can be in an environment conducive to building these skills without it being a life or death, make or break consequences all the time. That is not a comfortable position to be in as an early career lawyer, so seek out opportunities to work under or with people who can allow your growth in all three of these career seasons.