



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: None, as the report is informational.

On February 1, 2023, the Executive Committee approved the establishment of the Working Group on Facial Recognition Technology and Access to Legal Representation. The mission statement of the Working Group is as follows:

The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

Chair Domenick Napoletano will report to the Executive Committee on the work, goals, and composition of the Working Group. Working Group member Thomas J. Maroney will report to the House of Delegates.

The Working Group has provided an interim report for your review. No formal action is requested for this agenda item.

**NYSBA WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY
AND ACCESS TO LEGAL REPRESENTATION**

INTERIM REPORT TO NYSBA HOUSE OF DELEGATES

SATURDAY, JUNE 10, 2023

The NYSBA Working Group on Facial Recognition Technology and Access to Legal Representation, chaired by NYSBA President-Elect Domenick Napolitano, respectfully presents this Interim Report to the NYSBA House of Delegates. This Report, to be presented to the House of Delegates at the Annual Meeting in Cooperstown on June 10, 2023, will describe the events that led to the establishment of the Working Group, the public policy reasons that animate the Working Group's mission, the particular threats that facial recognition software and other biometric technologies create for lawyers and the legal system, and the steps the Working Group has taken since its formation to address those threats.

The Mission Statement of the Working Group is as follows:

The Working Group on Facial Recognition Technology and Access to Legal Representation shall examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer's ability to represent clients without fear of retribution. The Working Group will also consider how the use of technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice. The Working Group shall make any necessary policy recommendations to the NYSBA Executive Committee.

Why the Working Group was Established.

In late November 2022, on the weekend after Thanksgiving, Kelly A. Conlon, an associate at the law firm of Davis, Saperstein & Solomon, P.C. ("DSS"), accompanied her daughter's Girl Scout troop to see the Christmas Spectacular at Radio City Music Hall, a venue owned by Madison Square Garden Enterprises ("MSG"). Although Ms. Conlon had a ticket, the security guards,

identifying her by name and law firm affiliation, refused to let her enter. The security guards showed her that she was on an “attorney exclusion list” that MSGE and its President, James Dolan, had created.¹ Ms. Conlon had to wait outside in the rain while the rest of the troop and chaperones enjoyed the performance.²

The incident soon went viral. MSGE defended itself by citing two notifications it had sent DSS on October 28 and November 14, 2022, informing the firm that “all its attorneys were banned from their venues while the firm was engaged in legal action against one of its restaurants.”³ This did little to quell the rising public disgust that MSGE had used facial recognition technology to create a database that it was using to bar from MSG facilities all employees at law firms who had the temerity to represent clients suing MSGE – and that it was continuing to enforce that policy by barring other lawyers, from other law firms, from its facilities.

Disclosure of the policy itself also outraged the public. In an internal “policy memorandum” dated July 28, 2022, attached as Exhibit A, MSGE and its affiliates explicitly “reserve[d] the right to exclude from the MSGE Venues litigation counsel who represent parties adverse to the Companies, *and other attorneys at their law firms.*” (Emphasis added.) It went on to say that MSGE could prohibit these attorneys even from purchasing tickets to MSGE events – even if the attorneys were buying them for someone else. *Id.* MSGE justified the policy on the ground that adverse counsel might communicate “with employees of the Companies in violation

¹ “Madison Square Garden Uses Facial Recognition Technology to Bar Its Owner’s Enemies”, N.Y. Times, 12/22/22, <https://www.nytimes.com/2022/12/22/nyregion/madison-square-garden-facial-recognition.html>.

² “Teaneck Law Firm to challenge MSG liquor license after associate barred from Rockettes show,” NorthJersey.com, 12/22/22, <https://www.northjersey.com/story/news/bergen/teaneck/2022/12/22/radio-city-facial-recognition-lawyer-banned-from-seeing-rockettes/69747073007/>.

³ *Id.*

of ethical rules, which prohibit any communication with opposing parties and their employees,” and would allow lawyers to seek or attempt to seek “disclosure outside proper litigation discovery channels.” *Id.*

This led to an array of public responses. New York State Attorney General Letitia James wrote a letter to MSGE executives and its legal department on January 24, 2023, attached as Exhibit B, noting that MSGE’s exclusion policy affected “approximately 90 law firms,” involving “thousands of lawyers” and warning that “the Policy may violate the New York Civil Rights Law and other city, state, and federal laws prohibiting discrimination and retaliation for engaging in protected activity.” Other politicians weighed in, with one, State Senator Brad Hoylman, noting: “There’s a pattern of James Dolan punishing those who he views as his corporate adversaries”, and calling the implementation of MSGE’s policy a “frightening prospect for every New Yorker and, frankly, any visitor to New York. . . .”⁴ Still others started lawsuits, one of which, *Hutcher v. Madison Square Garden*,⁵ has since been rejected by the First Department. And the New York State Liquor Authority has started proceedings to revoke MSGE’s liquor licenses for violating applicable laws and regulations.

In the face of all this, on February 5, 2023, MSGE altered its policy slightly, saying it did not apply to attorneys involved in pending litigation “with Tao Group Hospitality, which includes

⁴ “Pols, activists blast James Dolan, MSG owners for tech faceoff with unwanted fans,” AMmetro New York, 1/17/’22.

⁵ *Hutcher v. Madison Square Garden Entm't Corp.*, 2023 N.Y. Slip Op. 1646 (N.Y. App. Div. 2023),

<https://casetext.com/case/hutcher-v-madison-square-garden-entmt-corp-5>.

about three dozen restaurants and clubs in the city,” ostensibly because MSGE was looking to sell the chain.⁶

That same day, NYSBA President Sherry Levin Wallach appointed this Working Group, chaired by then-Treasurer, now President-Elect Napolitano, to “examine the legal and ethical considerations surrounding the use of facial recognition and other technology to restrict individual freedoms, including but not limited to attendance at events or entrance into venues as well as the propriety of the use of this and other technology on a lawyer’s ability to represent clients without fear of retribution.” Since then, the Working Group has met several times, formed subcommittees to address ethical issues and pending legislation, has monitored the ongoing litigation against MSGE, and has reached some preliminary conclusions. We now present those conclusions to the House.

Policy Considerations.

The Working Group had discussed its Mission at length. We have agreed on three fundamental considerations.

First, the proper use of facial recognition and other biometric technology is an issue that far transcends Kelly Conlon, James Dolan and MSGE – or even lawyers or the legal profession. It goes to the very core of our civil liberties, to our ability to freely move about, associate with whom we want, to organize and speak politically and culturally. The examples are legion. The Chinese government has created a massive database containing facial recognition and other biometric information on the Chinese citizenry, allowing the government to monitor all its citizens’ activities, and requiring those who demonstrate against the government to mask themselves to avoid

⁶ “MSG Entertainment Lifts Ban for Some Lawyers Involved in Lawsuits Against the Company,” nbcnewyork.com, 2/6/23, <https://www.nbcnewyork.com/news/local/msg-entertainment-lifts-ban-for-some-lawyers-involved-in-lawsuits-against-company/4089798/>.

recognition and prosecution. Closer to home, many stores are using facial recognition technology to keep out customers previously accused, or even suspected, of shoplifting – even if there has been no adjudication of wrongdoing. Making this worse is that facial recognition technology has been found to be less likely to accurately identify persons of color, thus increasing the risks of misidentification and false arrests. Even if facial recognition and biometric technology improves – and it surely will – it represents a threat to our most fundamental values as a society, a threat that has the potential to alter the lives of every single person living in the United States. This threat – and how to counter it – must be our ultimate mission.

Second, as MSGE’s actions have shown, facial recognition technology represents a special and unique threat to lawyers and the legal system. Our Mission Statement makes this clear, asking us to consider “how the use of [biometric] technology can prohibit the ability of members of the legal profession to provide effective representation of clients and disrupt access to justice.” Ex. A. The ability of large corporations, and the government, to use this technology to zero in on lawyers (and lawyer’s families) who are suing them will inevitably chill the desire of lawyers to take on cases against these institutions and will limit ordinary citizens’ access to the justice to which they are entitled. While it may seem frivolous to some, the inability of a long-time Knick season ticket holder to use those tickets may discourage her from taking on a case against MSGE – especially if she has already paid thousands of dollars in advance for those tickets. The same is true of a regular concertgoer, who will be unable to see shows at Madison Square Garden, Radio City and any other MSGE venues. If MSGE is permitted to throw its corporate weight around in this way – and in a way that impacts not just the lawyer handling a case *but every single lawyer in their firm* -- it will become all the more difficult for potential plaintiffs to retain the lawyers they want or need to bring a lawsuit against it.

Again, this is not just about MSGE. Imagine a larger corporation – a national shopping chain, an airline, a hospital system, an online ride hailing service – that could employ this technology to prevent lawyers who sue them from using their services. In some localities, this would prevent the lawyer or their family from shopping at the only nearby food store, or flying to a particular destination, or using a particular doctor or hospital, or obtaining cab service. The larger and more powerful the corporation, the more powerful this tool can be. And the more the use of facial recognition technology can insulate that corporation from opposing lawyers and lawsuits, the more access to justice for individual citizens is imperiled.

Our mission, in short, is not just to protect our members – though that is part of it. It is to protect the very integrity of our legal system against a new tool that can insulate large, powerful institutions from being sued by targeting lawyers, their colleagues and even their families directly. Lawyers are accustomed to encountering hostility and even attacks from their adversaries, but only within the rules of our legal system and with a judge or other neutral to control them. They do not expect to be denied public accommodation for doing their jobs – nor should they be. This Association must take steps to ensure they are not.

Third, MSGE’s actions have galvanized lawyers and politicians to fight back. We have closely monitored those efforts, and viewed our first task to make appropriate recommendations about legislative proposals regarding biometric technology that are currently before the New York State Senate and Assembly. On May 25, 2023, a memorandum of support of Bill S. 4457 / A.1362, which would establish the New York State Biometric Privacy Act, was submitted to the legislature on behalf of the Working Group. A copy of this memorandum is attached as Exhibit C.

Over the coming months, the Working Group will prepare a final report with recommendations for the review and consideration of the House of Delegates at the November 4,

2023, meeting. The Working Group will continue to advise the Executive Committee and officers of pertinent updates within the mandate of this committee, and will engage, as necessary and permitted, on ongoing legislative activity, including the above-mentioned support of the New York State Biometric Privacy Act.

Working Group on Facial Recognition Technology and Access to Legal Representation

Domenick Napoletano, chair

Orin J. Cohen

Sarah E. Gold

Ronald J. Hedges

LaMarr J. Jackson

Thomas J. Maroney

Michael R. May

Ronald C. Minkoff*

Diana S. Sen

Vivian D. Wesson

Hilary J. Jochmans, advisor

Thomas J. Richards, staff liaison

*Mr. Minkoff abstains from any vote on the report.



Policy Memorandum

Subject: Business Relationships with Counsel to Litigation Plaintiffs

Date: July 28, 2022

This Policy Memorandum outlines the internal policy (the “**Policy**”) of MSG Entertainment Group, LLC (“**MSGE**”) and MSG Sports, LLC (collectively, the “**Companies**”), which seeks to address serious and legitimate concerns related to protecting the Companies’ interests in connection with certain ongoing litigations.

The Companies have become increasingly concerned about counsel that represent plaintiffs in certain ongoing litigation against the Companies attending events at the MSGE Venues (defined below). In addition to the adversarial nature inherent in litigation proceedings, other risks involved in adverse counsel and other attorneys in their law firm attending events at the MSGE venues include, but are not limited to:

- i. Adverse counsel communicating directly with employees of the Companies in violation of ethical rules, which prohibit any communication with opposing parties and their employees;
- ii. Adverse counsel seeking (or attempting to seek) disclosure outside proper litigation discovery channels as a result of their presence at the MSGE Venues, including by communicating directly with employees of the Companies or engaging in other improper evidence-gathering activities on site; and
- iii. Adverse counsel otherwise undermining or harming the Companies’ interests in certain ongoing litigation.

In light of these concerns, the Companies reserve the right to exclude from the MSGE Venues litigation counsel who represent parties adverse to the Companies, and other attorneys at their law firms. Similarly, the Companies may determine to prohibit any such attorney from purchasing from the Companies tickets to events at the MSGE Venues and/or utilizing the special services of dedicated MSG employees, such as the Season Membership, Group Sales or Hospitality Sales groups, to assist with or consummate their purchases.

Under applicable law, tickets to attend events at the MSGE Venues are merely licenses revocable at will. Accordingly, MSGE has discretion to exclude individuals from its premises and may remove visitors to the MSGE Venues for any reason or no reason at all. For the same reasons, the Companies have the right to decline to sell tickets for events held at the MSGE Venues to any person or group of people, except on grounds prohibited by law.

In exercising the rights being reserved under this Policy, the Companies will comply with any laws proscribing retaliation against litigants raising certain types of claims. Before making the determination on behalf of the Companies to exercise the rights reserved under this Policy, the MSGE Legal Department will carefully analyze potential conflicts in making case-by-case determinations as to whether to exercise the rights to exclude, and/or decline to sell tickets to,

adverse counsel and/or other attorneys at their law firms. This includes carefully considering whether any applicable federal, state, or local laws proscribing retaliation against litigants raising certain types of claims would be violated as a consequence of the Companies' exercise of such rights.

In those ongoing litigations where, after such analysis, the Companies exercise their right to exclude adverse counsel and/or other attorneys at their law firms, the MSGE Legal Department will send a letter to adverse counsel in that litigation, and (where applicable) to the named or managing partners at their law firms, informing them that they and the other attorneys at their law firms will not be admitted to the MSGE Venues. This communication will explain the rationale underlying this Policy and include a list of the MSGE Venues.

Subject to providing proof that a ticket purchase was made prior to their or their firms' receipt of the communication referenced above, Any attorney excluded from an MSGE Venue may request a refund of the established price of the tickets for their entire party, or for the attorney only. In the latter case the remainder of the party will be permitted to enter the MSGE Venue but the attorney will not be permitted to enter the MSGE Venue. Refunds will be processed as promptly as feasible.

As of the date of this Policy, "**MSGE Venues**" means Madison Square Garden, Hulu Theater at Madison Square Garden, Beacon Theatre, Radio City Music Hall and The Chicago Theatre. The Companies reserve the right to include in this definition additional premises owned and/or operated by MSGE or its subsidiaries.



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CIVIL RIGHTS BUREAU

January 24, 2023

VIA USPS AND E-MAIL

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Dear Counsels,

The New York State Office of the Attorney General (OAG) has reviewed reports alleging that Madison Square Garden Entertainment Corp. and its affiliates (collectively, the “Company”), have used facial recognition software to forbid all lawyers in all law firms representing clients engaged in any litigation against the Company from entering the Company’s venues in New York, including the use of any season tickets (the “Policy”). Reports indicate that approximately 90 law firms are impacted by the Company’s Policy, constituting thousands of lawyers.

We write to raise concerns that the Policy may violate the New York Civil Rights Law and other city, state, and federal laws prohibiting discrimination and retaliation for engaging in protected activity. Such practices certainly run counter to the spirit and purpose of such laws, and laws promoting equal access to the courts: forbidding entry to lawyers representing clients who have engaged in litigation against the Company may dissuade such lawyers from taking on

legitimate cases, including sexual harassment or employment discrimination claims. *See, e.g.*, N.Y. Civ. Rights Law § 40-b (prohibiting wrongful refusal of admission to and ejection from public entertainment and amusement, such as legitimate theaters, burlesque theatres, music halls, opera houses, concert halls, and circuses, etc.); N.Y. State Exec. Law (“NYSHRL”) § 296(2) (prohibiting public accommodations from engaging in discrimination in New York State); New York City Human Rights Law (“NYCHRL”) § 8-107(4) (prohibiting public accommodations from engaging in discrimination in New York City). And attempts to dissuade individuals from filing discrimination complaints or encouraging those in active litigation to drop their lawsuits so they may access popular entertainment events at the Company’s venues may violate state and city laws prohibiting retaliation. *See* NYSHRL § 296(7) (prohibiting retaliation); NYCHRL § 8-107(7) (prohibiting “retaliatory or discriminatory act or acts [that are] reasonably likely to deter a person from engaging in protected activity”). Lastly, research suggests that the Company’s use of facial recognition software may be plagued with biases and false positives against people of color and women.¹

By February 13, 2023, please respond to this Letter to state the justifications for the Company’s Policy and identify all efforts you are undertaking to ensure compliance with all applicable laws and that the Company’s use of facial recognition technology will not lead to discrimination. Discrimination and retaliation against those who have petitioned the government for redress have no place in New York.

Thank you for your cooperation with this inquiry.

Sincerely,

/s/ Kyle S. Rapiñan, Esq.

Civil Rights Bureau

New York State Office of the Attorney General

Kyle.Rapinan@ag.ny.gov | (212) 416-8618

¹ *See* Davide Castelvechi, Is facial recognition too biased to be let loose? *Nature*. Nov. 18, 2020, <https://www.nature.com/articles/d41586-020-03186-4> (last accessed Jan. 18, 2023); *see also* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, *Proceedings of Machine Learning Research* 81, 1–15, 10 (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> (last accessed Jan. 18, 2023) (finding facial recognition was more accurate for white people and men overall but less accurate for people of color and women).



Memorandum in Support

WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY

Facial Recognition #1

May 25, 2023

S.4457

By: Senator Liu

A.1362

By: M of A Gunther

Senate: Consumer Protection

Assembly: Consumer Affairs and Protection

Effective Date: 90th day after it shall have become a law

AN ACT to amend the General Business Law, in relation to biometric privacy.

LAW AND SECTIONS REFERRED TO: adds new article 32-A of the General Business Law

THE WORKING GROUP ON FACIAL RECOGNITION TECHNOLOGY SUPPORTS THIS LEGISLATION

This bill would add a new article 32-A of the General Business Law titled, “the Biometric Privacy Act.”

Recent events at an entertainment venue in New York State have demonstrated that biometric data about a person can be used to, among other things, deny access to that venue. More broadly, the capture, storage, use, and resale of that data by private entities can invade legitimate privacy interests of persons that are not protected by existing federal or New York State law.

The Biometric Privacy Act would require private entities that have biometric data in their possession to develop written policies that are available to the public and that address retention and destruction of that data. The Act would also require private entities to advise a person that his or her data is being collected or stored, to obtain written consent for collection or storage, bar sale or resale of data, and limit further disclosure. The Act would also allow a private cause of action for violation of its terms.

The capture and use of biometric data by private entities, often without knowledge of that capture or use by an affected person, is ubiquitous. Certainly, biometric data can be used for legitimate purposes by private entities. This bill would not prohibit private entities from doing so. However, it would install “guardrails” to protect the privacy interests of persons and to provide clear guidance to private entities. This will benefit the people of New York State as well as the entities that do business here.

For the above reasons, the NYSBA Working Group on Facial Recognition Technology **SUPPORTS** this legislation.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.