NYSBA

FALL 2019 | VOL. 30 | NO. 2

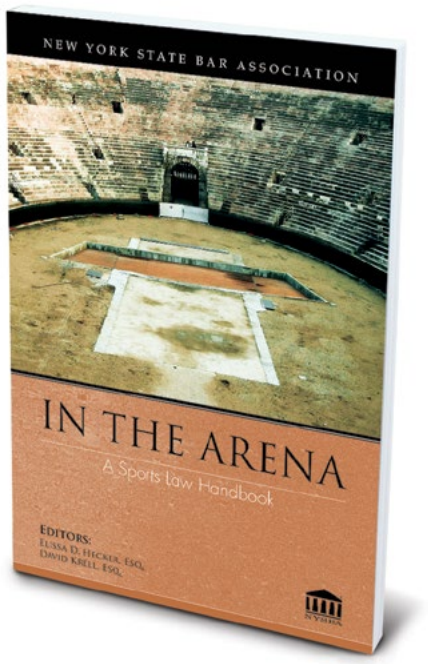
Entertainment, Arts and Sports Law Journal

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

In This Issue

In The Arena:
A Sports Law Handbook

Co-sponsored by the New York State Bar Association and the Entertainment, Arts and Sports Law Section



As the world of professional athletics has become more competitive and the issues more complex, so has the need for more reliable representation in the field of sports law. Written by dozens of sports law attorneys and medical professionals, *In the Arena: A Sports Law Handbook* is a reflection of the multiple issues that face athletes and the attorneys who represent them. Included in this book are chapters on representing professional athletes, NCAA enforcement, advertising, sponsorship, intellectual property rights, doping, concussion-related issues, Title IX and dozens of useful appendices.

Table of Contents

EDITORS
Elissa D. Hecker, Esq.
David Krell, Esq.

PRODUCT INFO AND PRICES
2013 | 539 pages
PN: 4002 (Print)
PN: 4002E (E-Book)

Non-Members $80
NYSBA Members $65

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB9225N

NYSBA

Table of Contents

NEW YORK STATE BAR ASSOCIATION

VOLUNTEER FOR FREE LEGAL ANSWERS™

Free Legal Answers™

- Online version of a pro bono walk-in clinic model where clients request brief advice and counsel about a specific civil legal issue from a volunteer lawyer.
- Lawyers provide information and basic legal advice without any expectation of long-term representation.
- Increase access to advice and information about non-criminal legal matters to those who cannot afford it.
- There is no fee for the use of the system or for the advice and information provided by the lawyer.

Sign up to be a volunteer
Learn more | **www.NY.freelegalanswers.org**

ABA AMERICAN BAR ASSOCIATION FREE LEGAL ANSWERS

NYSBA

Editor's Note/Pro Bono Update

By Elissa D. Hecker

Welcome to the Pro Bono issue!

As many of you know, the EASL Pro Bono Committee has helped its members "do good" by providing easily accessible opportunities since 2002 through Clinics with the Intellectual Property Section, the Speakers Bureau, and by finding volunteer attorneys to help pro bono clients defend or pursue litigation on occasion.

Since the inception of the Pro Bono Committee, EASL has run Pro Bono Legal Clinics with Volunteer Lawyers for the Arts, the Directors Guild, Actor's Equity, New York Foundation for the Arts, and Dance/NYC. We are always seeking good partner organizations for our Clinics. If you have any suggestions, please contact me directly at eheckeresq@eheckeresq.com.

Both by ourselves and together with our partnering organizations, the EASL Section's members help countless New York artists, entertainers, and athletes to do what it is that they do best.

In addition to our wonderful columnists and authors, this issue features several organizations in New York who offer easy pro bono opportunities for EASL Section members. There are volunteer opportunities for every type of lawyer: newly admitted, solo practitioners, members of firms, and in-house lawyers. There are both transactional and litigation options. The organizations included in this issue are:

- NYSBA City Bar Justice Center
- NYSBA Department of Public Interest
- Prisoners' Legal Services of New York
- Pro Bono Partnership
- Volunteer Lawyers for the Arts

Thank you so much for doing your best to help those who cannot afford to pay for counsel. We look forward to working with all of you, and to making pro bono resources available to every EASL member.

For more information about pro bono opportunities within the EASL Section, please email us at:

Clinics

Elissa D. Hecker coordinates legal clinics with various organizations.

- **Elissa D. Hecker,** eheckeresq@eheckeresq.com

Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- **Carol Steinberg,** elizabethcjs@gmail.com **or** www.carolsteinbergesq.com

Elissa D. Hecker practices in the fields of copyright, trademark and business law. Her clients encompass a large spectrum of the entertainment and business worlds.

In addition to her private practice, Elissa is also a Past Chair of the EASL Section, Co-Chair and creator of EASL's Pro Bono Committee, Editor of the EASL Blog, Co-Editor of *Entertainment Litigation, Counseling Content Providers in the Digital Age*, and *In the Arena*, Chair of the Board of Directors for Dance/NYC, a member and former Trustee of the Copyright Society of the U.S.A. (CSUSA), and Assistant Editor and a member of the Board of Editors for the *Journal of the CSUSA*. Elissa is a repeat Super Lawyer, Top 25 Westchester Lawyers, and recipient of the CSUSA's inaugural Excellent Service Award. She can be reached at (914) 478-0457, via email at eheckeresq@eheckeresq.com or through her website at www.eheckeresq.com.

The next *EASL Journal* deadline is October 4th.

Correction

The author bio for Louise Carron was missing from her article in the Spring 2019 issue of the *EASL Journal*. This correction was immediately fixed in the electronic version. Her bio is as follows:

Louise Carron is the Executive Director of the Center for Art Law. A young LL.M graduate from the Benjamin N. Cardozo School of Law (Class of 2018), she holds two French master's degrees in Business Law and Comparative Law from the Université Paris Nanterre, where she recently defended her thesis on the comparative legal approach to Street Art in France and the United States. She recently passed the New York bar exam and intends to keep conducting research in art law.

Message from the President
Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Entertainment, Arts and Sports Law Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.
- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads On Diversity

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. [www.nysba.org/diversitychairs]

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hmgreenberg@nysba.org.

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

Law Student Initiative Writing Contest

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

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

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the *EASL Journal* must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form**: Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **Friday, October 4, 2019.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@ehecker esq.com.

Topics

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

Judging

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

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

Phil Cowan Memorial Scholarship Writing Competition

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL) has established the Phil Cowan Memorial Scholarship! Created in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL, the Phil Cowan Memorial Scholarship fund offers *up to two awards of $2,000 each on an annual basis* in Phil Cowan's memory to a law student who is committed to a practice concentrating in one or more areas of entertainment, art or sports law.

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

The Competition

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

The paper should be twelve to fifteen pages in length (including *Bluebook* form footnotes), double-spaced and submitted in Microsoft Word format. PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (*not* part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. The name of the author or any other identifying information must not appear anywhere other than on the cover page. All papers should be submitted to designated faculty members of each respective law school. Each designated faculty member shall forward all submissions to his/her Scholarship Committee Liaison. The Liaison, in turn, shall forward all papers received by him/her to the three (3) Committee Co-Chairs for distribution. The Committee will read the papers submitted and will select the Scholarship recipient(s).

Eligibility

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

Free Membership to EASL

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

Yearly Deadlines

December 12th: Law School Faculty liaison submits all papers she/he receives to the EASL Scholarship Committee.

January 15th: EASL Scholarship Committee will determine the winner(s).

The winner(s) will be announced, and the Scholarship(s) awarded at EASLs January Annual Meeting.

Submission

All papers should be submitted via email to Kristina Maldonado at kmaldonado@nysba.org no later than December 12th.

Prerogatives of EASL Scholarship Committee

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

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

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

Payment of Monies

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

About the New York State Bar Association/EASL

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

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

NYSBA Guidelines for Obtaining MCLE Credit for Writing

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

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

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

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

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, NY 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on"Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

The Role of the Department of Public Interest

By Thomas J. Richards and Eunice Bencke

The New York State Bar Association's (NYSBA) Department of Public Interest (the Department) advocates for equal access to justice for all New Yorkers through encouraging pro bono service and collaborating with NYSBA sections and committees on advisory and recommendation reports on relevant access to justice issues.

The Department partners with legal service providers, the courts, governmental organizations, and law schools and convenes stakeholder meetings throughout the year, including three days of events at the Annual Meeting. The Department assists in the production of CLE programming and publishes a quarterly newsletter featuring pro bono contributions from around the state.

The Department also serves as a public resource, fielding inquiries and referrals from the public to civil legal service providers and hosts the Pro Bono Opportunities Guide at http://www.nysba.org/probonoopportunities/. This Guide contains information about statewide volunteer opportunities and is searchable by areas of legal interest and location. A prospective volunteer can follow up directly with programs of interest to determine if pro bono opportunities are available.

Departmental Projects and Programs

The Department administers several projects and programs, including:

- The Empire State Counsel® program recognizes active NYSBA members who, during the calendar year, performed 50 hours or more of pro bono legal services, either through direct legal representation of low-income or vulnerable individuals, donation of free legal services to an organization designed primarily to address the needs of persons with limited financial means, or by providing free legal services to an organization dedicated to increasing the availability of legal services to vulnerable and/or low-income populations. The Empire State Counsel® are honored at the Justice for All Luncheon at the Annual Meeting and are featured in the special spring edition of the *Pro Bono Newsletter*.
- Each spring, the Department works with the chairs of the President's Committee on Access to Justice and the Committee on Legal Aid to select winners of the prestigious President's Pro Bono Service Awards. Presented on Law Day, these awards recognize outstanding pro bono service and underscore the importance of helping to provide all New Yorkers, regardless of income, equal access to the civil legal justice system. Up to 23 awards may be given in the following categories: 13 Judicial District awards, young lawyer, senior attorney, law student, law school group, small/medium and large law firm, in-house counsel and government office. The Department also supports several events during October Pro Bono month, including the annual Permanent Commission on Access to Justice Stakeholder Meeting.
- Every two years, the Department and the Committee on Legal Aid plan the Legal Assistance Partnership Conference, the premier networking and training program for attorneys and pro bono coordinators engaged in public interest law. Over 500 attorneys attended the 2018 conference and participated in 45 programs featuring 155 speakers.

President's Pro Bono Service Awards | May 1, 2019

2019 Justice for All Luncheon at Annual Meeting 2019 Left to right: Hank Greenberg, Edwina Frances Martin, Barbara Underwood, Michael Miller.

- The Denison Ray Civil Awards are presented at the bi-annual Partnership Conference Denison Ray dinner. Two awards are given to staff attorneys employed by nonprofit entities that provide free civil legal services to low-income clients. One award is presented to a director of a civil legal services program or a director of a pro bono volunteer program. An award is also presented to a nonprofit organization that provides or facilitates the provision of civil legal services to low-income clients. Much of the advocacy work in civil legal services and pro bono programs is done by advocates who are not attorneys. The Phil Dailey Award was created on 2016 in memory of Phil Dailey, a Paralegal at Legal Assistance of Western New York in Geneva, New York, to acknowledge the vital services of non-attorney staff who demonstrate an excellence and dedication to providing equal access to justice.
- New York Free Legal Answers™ is a virtual legal aid clinic allowing low-income individuals to pose civil legal questions to volunteer attorneys. The website provides brief individualized legal assistance to underserved populations through limited scope representation on specific legal issues. For attorneys in search of short-term volunteer opportunities, this site provides a way to do pro bono work that fits into your schedule and provides legal malpractice insurance for the advice provided within the state.

The Work of NYSBA Committees

The Director of Public Interest serves as the NYSBA liaison to the President's Committee on Access to Justice, the Committee on Legal Aid, and the Committee on Immigration Representation.

The President's Committee on Access to Justice encourages lawyers to provide pro bono service and advocates for adequate funding for civil legal service programs. The Committee examines issues related to access to justice, including the right to counsel movement, cy pres disbursements, limited scope representation, public interest student loan repayments, and government employee pro bono service.

The Committee on Legal Aid studies methods and proposals for rendering legal aid to the poor. This Committee makes recommendations on remedial measures to assist the poor in the protection of their legal rights, encourages the establishment and efficient maintenance of legal aid organizations, and sponsors the biennial Legal Assistance Partnership Conference.

The Committee on Immigration Representation examines issues related to the quality and availability of legal representation in immigration cases. This Committee reviews possible improvements to attorney training and CLE; the expansion of pro bono opportunities; the creation of referral services and legal orientation programs around the state to assist respondents; and the implementation of written standards for representation in immigration matters.

The Committee on Mandated Representation, although not part of the Department, studies and makes recommendations on methods of providing mandated representation to the indigent in criminal matters and advocates on access to justice issues. This Committee identifies ways that indigent defense provider offices in New York can share resources with each other, and works to ensure that the State of New York and local governments guarantee the quality representation of clients, while taking into account the financial requirements imposed upon the State of New York and local governments.

2018 Denison Ray Partnership Conference Dinner Left to right: Edwina Frances Martin, Mary Beth Conway, Barbara Finkelstein, Michael Miller, Jennifer Metzger Kimura, Deborah O'Shea, Honorable Sergio Jimenez.

Thomas Richards is the NSYBA Director of Public Interest and Deputy General Counsel.

Eunice Bencke is the Public Interest Coordinator at NYSBA.

Pro Bono Partnership
A Client Who "Feeds My Soul": Why You, Too, Should Do Transactional Pro Bono

By Nancy Eberhardt

Do you wonder how your colleagues find time for pro bono projects or question if pro bono opportunities for transactional attorneys even exist? Pro Bono Partnership (the Partnership) answers yes to both. The Partnership is a 501(c)(3) organization that was founded 22 years ago with the goal of making it easy and enjoyable for in-house and law firm attorneys to provide valuable pro bono services to nonprofits in their communities.

Making an Impact in Our Communities

The Partnership's clients are charitable organizations that serve the disadvantaged and enhance the quality of life in our tristate-area neighborhoods by feeding the hungry, housing the homeless, promoting the arts, protecting the environment, and providing essential programs to children, the elderly, the disabled, and the unemployed. These nonprofits have the same business legal needs as for-profit entities. However, many choose to forgo legal advice because they are unable to pay for legal services without significantly impacting resources for programs.

One-Stop Resource for Transactional Pro Bono Opportunities

The Partnership addresses the legal needs of almost 900 nonprofit clients each year by partnering with more than 1,400 volunteer attorneys who provide top-notch pro bono business legal services to these organizations. Our in-house legal team, with expertise in nonprofit law, carefully screens each nonprofit client and identifies each organization's legal issues, recruits volunteer attorneys from major corporations, law firms, and solo practitioners to work on the identified projects, and works closely with the volunteer attorneys on the project.

Together, the Partnership and our pool of volunteers help area nonprofits increase their effectiveness and minimize risks. This work has an enormous positive impact for our clients, their constituents, and our communities. It makes quite an impression on volunteers as well. As solo practitioner and volunteer since 2014, the EASL Journal's editor, Elissa D. Hecker, Esq., recently commented:

> Pro Bono Partnership brings volunteering opportunities directly to my inbox. I look forward to the emails detailing what wonderful organizations need assistance that I can provide. The Partnership finds and screens the nonprofits, lists matters by practice area, location, and cause, and makes it incredibly easy for me to take projects that are within my areas of interest and expertise. The nonprofits I've worked with are so appreciative, the work is really gratifying, and often long-term relationships are created. I have also come to know and appreciate the Partnership staff attorneys, who are excellent. The fact that I'm indirectly helping hundreds or even thousands of people served by my nonprofit clients feeds my soul.

Transactional Pro Bono That Is Meaningful and Manageable

Volunteer attorneys are not asked to handle all of a client's legal needs. Rather, a volunteer takes on an individual project that is within his, her, or their existing area of expertise. The Partnership volunteer attorneys typically handle the same types of matters that they deal with in their daily practices: contracts, employment law, intellectual property, and other non-litigation-based projects. Many projects take a few hours or less to complete, and the benefit it has for nonprofit organizations is lasting and immeasurable.

The Partnership's volunteer opportunities are uniquely structured to satisfy not only the volunteer's area of expertise, but also the needs of busy in-house and law firm lawyers:

- Clients and matters are thoroughly screened.
- As we do not handle litigation, most projects are discrete, manageable, and not time-sensitive.
- Projects can be completed remotely, from your desk.

- Every project is coordinated and overseen by a Partnership staff attorney experienced in nonprofit law.
- Model documents, training, and other resources are available as needed.
- Where appropriate, counsel can work together as a team – with colleagues and/or with lawyers from outside firms.
- The Partnership provides liability insurance coverage for our volunteer attorneys as needed.

It's Easy to Get Started

Current volunteer opportunities can be viewed at https://www.probonopartner.org/attorneys-volunteers/volunteer-opportunities/, or email volunteer@probonopartner.org to receive opportunities in your inbox bi-weekly. You can sort opportunities by location, practice area, or type of organization to quickly find what interests you most. Signing up to receive information, or even indicating your interest in an opportunity, does not obligate you to take on a matter.

To learn more about becoming a Pro Bono Partner volunteer, visit https://www.probonopartner.org/attorneys-volunteers/become-volunteer-attorney/.

Spread the Word About Accessible Transactional Pro Bono

I hope you'll help me raise awareness about the much needed, widely available, and easy-to-access transactional pro bono opportunities that will, indeed, make our neighborhoods better places to live. Please pass along the probonopartner.org website to a few colleagues, sign up for our emails, complete the form to become a volunteer attorney, or share our posts on social media. I know from experience that any and all of these things will be a valuable use of your time, so thank you in advance.

Nancy Eberhardt is the Executive Director of Pro Bono Partnership (www.probonopartner.org). She is responsible for advancing the mission of the organization and leading the staff and legal programs. Nancy's bio is available at https://www.probonopartner.org/about/staff/nancy-eberhardt/.

50 Years: New York Volunteer Lawyers for the Arts

By Amy Lehman

Volunteer Lawyers for the Arts (VLA) is the leading not-for-profit legal services and education organization dedicated to serving New York artists and its arts and cultural organizations, founded in New York in 1969. To achieve this mission, VLA provides its members with pro bono legal representation, legal counseling, and innovative educational programs. Over the last 50 years, VLA has served hundreds of thousands of low-income artists and not-for-profit organizations, facilitating an estimated $20 million worth of pro bono legal services annually.

VLA provides crucial legal guidance allowing artists to focus on what they do best — their art. In doing so, VLA has fostered the artistic careers of talented artists, such as Twyla Tharp and Tony Kushner. According to a 2011 National Endowment for the Arts report, New York State was home to 221,297 artists and arts workers. By 2015, the Center for an Urban Future reported that there were more than 56,000 artists and 14,145 creative businesses and nonprofits in New York City alone. These artists and arts organizations often grapple with tight budgets and may not have the funds for legal counsel or advice. However, they still have pressing legal needs, including contracts, corporate formation, employment, will drafting, real estate, immigration, and intellectual property matters. In most cases, legal aid societies do not handle these types of issues.

VLA serves artists from every discipline, with many of our cases involving music, photography, performing arts, visual arts, fashion, and film. For example, we currently have a photographer seeking assistance recovering payment from online publications that are using his photographs without permission. VLA also secured a pro bono attorney for an organization dedicated to improving the social, creative and intellectual lives of teens and young adults on the autism spectrum through theater arts to incorporate as a nonprofit and apply for tax-exempt status. In addition, VLA connected a volunteer attorney with the original vocal arranger of a hit Off-Broadway musical who was able to obtain unpaid royalties on a new production of the musical. Furthermore, VLA helped an artist favorably settle a dispute with a museum regarding lost artwork within a six-month period, securing a substantial cash payment.

VLA also offers an array of substantive legal classes and panels to educate its volunteer lawyers on issues affecting artists, and to empower artists to understand their rights. For attorneys, VLA offers Continuing Legal Education classes on arts-related topics for very reasonable fees, taught by attorneys practicing in these areas. VLA hosts many of these programs at the auditorium in its building at One East 53rd Street, in New York City. VLA also presents to students at local arts organizations and schools, such as School of Visual Arts, Fashion Institute of Technology, Julliard, and Tisch/Cooper Union.

In addition, VLA also administers several additional programs:

- **MediateArt**, a dispute resolution program that provides pro bono dispute resolution, contract negotiation and negotiation counseling, which assists the arts community in resolving arts-related disputes, in forming mutually agreeable arrangements among collaborators, and in preparing for negotiation;
- The **Artists Over Sixty Program**, which enables senior artists to obtain legal services, business information, and practical skills that address age-specific

Amy Lehman, Dance/NYC Symposium

issues related to their work, particularly in the areas of estate planning and copyright;

- The **Artist Legacy Project and Emergency Legal Assistance Program**, which, through a partnership with Broadway Cares/Equity Fights AIDS, provides legal and estate planning to artists living with HIV/AIDs free of charge; and
- The **Patent Pro Bono Program**, established with and supported by the United States Patent and Trademark Office, which assists low-income inventors in pursuing patent prosecutions.

VLA also acts as a powerful advocate on behalf of the arts community, by participating in events like Arts Advocacy Day in Washington D.C. and filing amicus curiae briefs in important cases. VLA recently filed an amicus brief with the U.S. Court of Appeals for the Fourth Circuit in connection with *Brammer v. Violent Hues Productions, Inc.*, which concerned the unlawful misappropriation of a photographer's work and a claim of fair use. The Fourth Circuit agreed with VLA's views that the District Court's finding of fair use in favor of the defendant was in error, reversing and remanding the matter. (See article on p.22.)

In order to provide these services, VLA relies on the dedication of a robust pro bono attorney network. Volunteer attorneys may work on their own or in teams to help VLA clients; in particular, pro bono representation provides opportunities for junior attorneys to directly represent clients under the supervision of senior attorneys, giving them client contact and responsibilities that they might not have in the context of their ordinary practices. VLA is also accredited by New York State to grant Continuing Legal Education credits for completed pro bono work. Due to the variety of VLA matters, pro bono engagements can last anywhere from two weeks to several years, depending on their nature and complexity. If you are an attorney and would like to volunteer with VLA please visit our website at https://vlany.org/ or email probono@vlany.org.

Amy Lehman is VLA's Director of Legal Services. Her relationship with VLA began as soon as she had the opportunity to volunteer her services as an associate at Fleming Zulack Williamson Zauderer L.P. Through VLA and her own practice, she has gained experience advising clients in non-profit corporate governance, negotiating and drafting contracts and license agreements. Her primary practice has been general commercial litigation, including matters involving art law, media law, employment, intellectual property, constitutional law, real estate, insurance, contract disputes, torts, as well as other disputes.

Amy is a trained mediator with extensive experience working with VLA in the MediateArts program and is on the panel of mediators assigned to resolve cases for the Southern District of New York. She is a member of the Entertainment Law Committee of the New York City Bar Association and is a 2018 and 2019 New York Metro Super Lawyer.

NYSBA City Bar Justice Center: Pro Bono Advising for Emerging Entrepreneurs Builds Businesses, Communities, and Attorney Engagement

By Akira Arroyo and Kurt M. Denk

As a nonprofit legal services provider that is "built for pro bono," the City Bar Justice Center (CBJC) (https://www.citybarjusticecenter.org/about-cbjc/our-story/), an affiliate of the New York City Bar Association (https://www.nycbar.org/), leverages the time and expertise of volunteer attorneys to serve over 26,000 low-income New Yorkers each year. Integral to this engagement, but perhaps at times overlooked if pro bono is thought of as just "volunteering," is pro bono advising's capacity to help keep our communities and economy dynamic and diversified. As CBJC's work with volunteer attorneys and emerging entrepreneurs attests, a pro bono spin on the increasingly ubiquitous goal of "doing well by doing good" is the belief that "doing good builds businesses"—including in areas like the arts, entertainment, and sports.

Since 2001, CBJC's Neighborhood Entrepreneur Law Project (NELP) (https://www.citybarjusticecenter.org/projects/neighborhood-entrepreneur-law-project/) has provided low- to moderate-income micro-entrepreneurs with the legal services necessary to start their businesses on sound legal footing. With significant reliance on transactional and other attorneys who volunteer their time, NELP guides clients through incorporation and tax issues, contracts and agreements, commercial lease negotiations, and copyrights, trademarks, and patents. Volunteers also offer presentations and legal clinics at community-based organizations on issues of concern to micro-entrepreneurs. Two recent success stories demonstrate how attorney engagement in pro bono work has helped transform creative individuals' passion for the arts, sports, and entertainment into dynamic enterprises that contribute to community transformation.

Success Story Example #1: Kidspire

Karen Domingo-Moran, a Queens mom with years of professional experience in architecture and design, saw opportunity in the absence of extracurricular arts programs at her children's underfunded public school. She first volunteered to develop and teach in-school architecture workshops where students could explore their creativity. Inspired by rave reviews from students, parents, and staff, Domingo-Moran eventually founded the now-thriving business **Kidspire**—the website of which proclaims its success at inspiring students "to stand at the intersection of their art, history, social studies, math, and science lessons, and develop new connections" (http://www.kidspirenyc.com/).

No business effortlessly transforms from idea to existence, and no less Kidspire. Money was not the only issue. Even after securing grants from the Queens Council on the Arts and the Queens Economic Development Corporation's StartUP! Business Plan Competition, Domingo-Moran found herself in need of what turned out to be cost-prohibitive legal expertise addressing entity formation; tax, insurance, and liability concerns; commercial leasing; and other issues.

Beginning in 2014, Domingo-Moran turned to NELP, attending five of its small business legal clinics to obtain no-cost advice from volunteer attorneys. She credits that assistance with not only making her business possible, but freeing her up to focus on expanding its potential for impact in the community. Reflecting on her experience, Domingo-Moran shared her gratitude "that a service like this exists" in New York City, and also for the individual attorneys she worked with, who she believes gave her confidence in negotiating fair terms and establishing agreements between Kidspire and various public schools and other entities.

Kidspire is a proven success, having served multiple schools and over 3,000 children in just a handful of years. Kidspire participants have learned to push creative boundaries through hands-on projects that, thanks to Kidspire's curriculum, integrate their learning with their teachers' lesson plans so that the students build on their knowledge across disciplines and are more likely to develop interests in science, technology, engineering, arts, and mathematics (STEAM) fields. In this sense, Domingo-Moran's enterprise not only expands children's' horizons in art and other areas today, but helps them build the skills by which they will contribute to and transform our communities in the future.

Success Story Example #2: EAT SOCCER

The story of Qiana Martin, a professional athlete turned social entrepreneur, and her enterprise, EAT SOCCER, offers similar inspiration.

Martin was looking to start a multimedia digital channel targeting young sports fans interested in positive sports culture, lifestyle tips, and relevant sports products when she attended a NELP legal clinic in October 2016. Like Domingo-Moran, she sought general guidance on forming a business entity and a better understanding of how to protect intellectual property rights and draft agreements with potential sponsors and partners. Eventually relying on both NELP and an expanding team of volunteer corporate attorneys who took on her matter for extended representation, Martin has described "working tirelessly to surround herself with a team of advisors" who, she knew, would "share in her enthusiasm and passion for the sport of soccer." (If they had not shared that passion before working with her, she believes they certainly do now!)

Consistent with that model of engagement, EAT SOCCER uses "a team of soccer creatives" to "help soccer fans satisfy their cravings for the sport" by providing, each week, a globally sourced digest of "interesting stories, intriguing people and expert tips to help our brands and community stay in the game." (https://www.eatsoccer.com/) In this sense, Martin's initiative "isn't just a website set up by a soccer enthusiast" with the help of pro bono attorneys. Rather, it is part of a series of platforms by which Martin promotes "the idea that people should embrace the 'universal language of soccer'"—a vision, first shared in a 2011 TedX Talk by that name, rooted in a belief that "the sport can serve as a vehicle for people of all backgrounds in the U.S. to become global citizens." Martin's belief in this respect rests on the premise "that soccer's dominance as the world's favorite sport is fueled by the diverse voices, perspectives and experiences of those that play, coach and support the game." At the heart of EAT SOCCER's mission is the conviction "that when people share a common bond"—here, a focused passion for soccer—"it can serve as a starting point from which they can learn about and appreciate each other's differences."

Positive Effect of Doing Pro Bono

The arts, sports, and entertainment success stories that Kidspire and EAT SOCCER represent ultimately turn on the vision and grit of the women who founded these enterprises. Yet they also should serve as inspiration to lawyers to consider both the impact that transactional pro bono work can have on the individual clients served, and the capacity of that work to transform communities and the economies they support.

Valerie Farkas, senior counsel and founder of Bloomberg LP's pro bono program, volunteered her time to help launch Kidspire, and describes Domingo-Moran as "a role model" who "demonstrates that one small business owner can really make a difference in their local community." Farkas's experience makes her a committed champion of transactional pro bono work: "Emerging entrepreneurs are fantastic clients! They have so much energy, drive and enthusiasm to get their businesses off the ground and their excitement is contagious. After my 30-minute clinic consultation with Karen Domingo-Moran, I was happy to continue working with her to develop a contract template for her after-school programs."

Farkas's perspective also highlights the pay-it-forward dimensions of transactional pro bono work—both in terms of its impact on a client, and that client's consequent impact on our community. Remarking, in light of her work on Kidspire's behalf, how "a few hours of pro bono advice can have an immeasurable impact on a client's business," Farkas opined that Kidspire "is introducing students to a new way of looking at the buildings in New York City that they pass every day. She is sparking their curiosity to learn about how these buildings are constructed and encouraging them to look at everything in our built environment with a creative eye. I hope she is inspiring future architects and artists!"

Similarly, Latham & Watkins corporate associate Brian Yoon, who along with corporate partner Senet Bischoff coordinated a team of more than a half-dozen attorneys assisting Martin in launching EAT SOCCER, observed that both the substance of Martin's matter and her own spirit in pushing it forward allowed "members of the corporate, tax and IP departments to work together on a pro bono project with an inspiring entrepreneur whose business model and determination made her a standout client." Yoon further remarked that Martin "was really a force all on her own, always working on creating partnerships"—so much so that even now, more than a year after

his firm helped her create a business entity for EAT SOCCER and helped her draft agreements, Martin "continues to reach out to her legal team at Latham & Watkins to invite them to EAT SOCCER sponsored events."

In short, Yoon's observations demonstrate how transactional pro bono—in this instance, in the sports and entertainment spaces that EAT SOCCER inhabits—builds the relationships that build businesses, which in turn create previously unimagined networking and other opportunities rich in potential. Communities benefit, and so too do the attorneys who play a key role in helping it all to happen.

Akira Arroyo is the founder and legal director of the City Bar Justice Center's Neighborhood Entrepreneur Law Project, which since 2001 has partnered with more than 100 law firms, 25 corporate legal departments, and 30 community-based organizations to assist more than 14,000 low- to moderate-income micro-entrepreneurs by providing brief services, direct representation, legal clinics, and community presentations.

Kurt M. Denk is Pro Bono Counsel at the City Bar Justice Center, where he develops pro bono-oriented CLEs, publications, trainings, outreach opportunities, and new legal services projects, and serves as a liaison to law firms, corporate in-house counsel, and individual attorneys to support and staff pro bono cases originating from the Justice Center's dozen projects serving low-income New Yorkers.

A Brief History of the Pro Bono Partnership Program at Prisoners' Legal Services of New York

By Karen Murtagh and John Amodeo

Prisoners' Legal Services of New York (PLS) is a non-profit organization that provides civil legal services to indigent persons incarcerated in New York State correctional facilities. Since its creation in 1976, PLS's mission has been to provide high-quality, effective legal representation and assistance to its clients, to help them to secure their civil and human rights, and to advocate for more humane prisons and for a more humane criminal justice system. With its current roster of 23 staff attorneys, tasked with fielding more than 10,000 requests for assistance each year, PLS has become adept at leveraging its resources to increase access to justice for incarcerated persons.

Incarcerated individuals and their families, like other families, have been adversely impacted by 21st century economics. The economic downturn increased the civil legal service needs of New Yorkers, including many of the nearly 50,000 persons incarcerated in state facilities and their families. In an effort to address this growing hardship, PLS, in 2011, mobilized a statewide group of volunteer attorneys and law firms to take the cases it lacked the resources to staff. New York attorneys responded robustly to the call, and the result was PLS' Pro Bono Partnership Program (PBPP).

Now in its ninth year, the PBPP connects volunteer attorneys and firms with cases involving challenges to prison disciplinary hearings that result in the imposition of solitary confinement; claims of excessive use of force where incarcerated people have received serious injuries; jail time; parole jail time; merit time and sentencing; access to medical and/or mental health care; medical parole; Conditional Parole for Deportation Only; clemency; First Amendment rights; and prisoner reentry issues. The PBPP coordinates training, recruitment and support for volunteer attorneys who are eligible to receive CLE credit for trainings provided by PLS as well as for the time spent working on their pro bono cases. Attorneys volunteering with the PBPP benefit from a host of support services, including assistance from PLS staff attorneys who are experts in prisoners' rights issues, liability coverage, assistance in filing/serving documents, and the pre-filing review of pleadings.

Like many fledging legal projects, the PBPP started small. Under the leadership of PLS' first Pro Bono Director, Samantha Howell, the PBPP initially developed a pro bono referral panel of some 50 law firms and attorneys, conducted trainings for volunteer attorneys and law students, and assisted more than a dozen incarcerated persons on legal matters ranging from divorce and custody to challenges to prison disciplinary hearings and parole denials. Law students from Albany Law School, Syracuse Law School, and CUNY Law School volunteered their time to research legal issues, draft legal memoranda, correspond with clients, and assist in drafting legal pleadings.

As the need for its volunteer services grew over the years, the PBPP saw a corresponding increase in the number of participating attorneys and pro bono hours worked. In 2014, for example, the PBPP reviewed for possible pro bono referral more than three times the number of cases it reviewed in the prior year, referred out twice as many cases to pro bono attorneys and firms and doubled the number of pro bono service hours, from 1,700 to more than 3,600. In the first seven years of the program, moreover, the number of PBPP attorney and non-attorney volunteers nearly quadrupled, from 32 volunteers in 2011 to more than 120 volunteers in both 2017 and 2018. It is estimated that, in 2018 alone, the dollar value of the attorney-hours worked by PBPP volunteer attorneys was well in excess of $2.5 million.

Earlier this year, PLS announced the expansion of the PBPP to include a dedicated "deportation defense" component aimed at recruiting volunteer attorneys to assist PLS's Immigration Unit with removal cases in several of the Immigration Courts located throughout New York. As part of that expansion, its Immigration Unit has recently begun referring a portion of its Second Circuit caseload both to major New York City-based law firms that are handling the cases pro bono, and to the Immigration Clinic at Cornell Law School.

As the PBPP continues to expand and provide pro bono legal representation to an even greater percentage of New York State's incarcerated population, one critical aspect of the program has not changed: the extraordinarily high quality of representation provided by its volunteer attorneys. In the past year alone, attorneys working pro bono on behalf of PLS have notched hard-fought

victories in diverse areas of law governing incarcerated persons in this State. These include a recent Third Department decision holding that § 50-a of the Civil Rights Law does not provide a legal basis for the New York's practice of withholding the names of corrections officers from certain records used at prisoner disciplinary hearings, and a State Supreme Court decision reversing and expunging a disciplinary determination against an incarcerated person suffering from severe mental illness, who was subject to around-the-clock suicide watch at the time of his disciplinary hearing.

From its inception, the PBPP has hosted an annual event during National Pro Bono Week that recognizes the contributions of the pro bono attorneys, law firms, law students, and other volunteers throughout New York State who agree to take on or provide assistance with such cases. Each year, the event centers around a different theme directly related to the personal experiences, tribulations, and aspirations of PLS's incarcerated clients. In 2012, PLS celebrated the inaugural year of the PBPP with an event, "Walking a Mile in Their SHUs." SHU (pronounced "shoe"), is an acronym used by the Department of Corrections and Community Supervision for its Special Housing Units, areas of a prison where people are placed in solitary confinement for disciplinary reasons, often for weeks, months or even years at a time. The event featured six local actors performing dramatic interpretations of letters, poems, and stories submitted by individuals incarcerated in New York State prisons. The passionate and often heart-wrenching performances shined a light on the use of solitary confinement in New York State, and provided guests a window into the world of isolation and the impact solitary confinement has on an individual and his, her, or their family.

In subsequent years, PLS' annual pro bono event has highlighted themes, such as the importance of maintaining family ties during extended periods of incarceration, and at last year's event, the transformational power of education in prison. Each year at the event, moreover, the PBPP honors its outstanding attorney and law student volunteers through the Robert F. Bensing Award for Pro Bono Service by a Law Student, the Paul J. Curran Award for Pro Bono Service by a Solo Practitioner or Small Firm, the Honorable J. Clarence Herlihy Award for Pro Bono Service by a Large Law Firm, and the John R. Dunne Champion of Justice Award.

Through the generosity of spirit and hard work of its dedicated volunteers, the PBPP has, in a relatively short time, become an indispensable part of PLS' mission to provide high quality legal assistance to the thousands of incarcerated persons it serves.

For more information, visit our website at https://www.plsny.org/ or call 518-445-6050 x1101.

Karen L. Murtagh is the Executive Director of Prisoners' Legal Services of New York (PLS). She is a graduate of Clarkson University and Albany Law School and is admitted to practice law in New York State, all Federal District Courts of New York and the U.S. Supreme Court. Ms. Murtagh has litigated issues concerning prisoners' due process rights at disciplinary hearings, prison conditions, deliberate indifference, the First Amendment and the Prison Litigation Reform Act (PLRA). She has tried cases in both the Court of Claims and Federal Court and has argued cases before New York State courts including the New York Court of Appeals where she successfully argued that an incarcerated person's mental health must be considered as a mitigating factor at a prison disciplinary hearing. Ms. Murtagh was also successful as amicus, appearing before the U.S. Supreme Court in a case challenging the constitutionality of a New York State statute that prohibited prisoners from filing federal § 1983 actions in state court.

Ms. Murtagh is the author of *Solitary Confinement in New York State* the New York State Bar Association's Committee on Civil Rights Report to the House of Delegates which resulted in the House of Delegates adopting a resolution urging, among other things, that the imposition of long-term solitary confinement on persons in custody beyond 15 days be proscribed.

Ms. Murtagh is a member of the New York State Bar Association and sits on the New York State Bar Association's Civil Rights Committee. She is also an advisor to the New York State Bar Association's Immigration Committee. In 2017, Ms. Murtagh was presented with the Outstanding Contribution in the Field of Correctional Services award from the Criminal Justice Section of the New York State Bar Association.

John Amodeo is the Pro Bono Coordinator and a Staff Attorney at Prisoners' Legal Services of New York. Prior to joining PLS in 2017, he served as Deputy Counsel for the Office of the NYS Attorney General; Chief Counsel to the NYS Senate's Standing Committee on Codes; Counsel to the NYS Commission on Sentencing Reform and Assistant Deputy Counsel for Criminal Justice for the NYS Office of Court Administration. He is a graduate of Siena College and the New England School of Law/Boston.

Fourth Circuit Court of Appeals Reverses Heavily Criticized Fair Use Decision

By Joel L. Hecker

District Court Decision

In what appeared to be a run of the mill copyright infringement claim brought in the United States District Court for the Eastern District of Virginia, the unforeseeable occurred, when the District Judge found that the infringing acts actually constituted fair use under the Copyright Act, 17 U.S.C. § 107.

That District Court decision, in *Russell Brammer v. Violent Hues Productions, LLC*,[1] found that all four factors of the fair use test favored the defendants' use of Brammer's stock photograph. It was roundly criticized by almost everyone.

The Appeal

The decision was appealed to the Fourth Circuit Court of Appeals. The importance of overriding the clearly erroneous analysis and conclusions of the district court judge was clear by the appearance on appeal of 12 prominent photography, artists' rights, and other advocacy rights organizations in support of plaintiff.[2]

The appeal was argued on March 19, 2019. The three-judge panel, taking only 38 days from argument to a fully well-reasoned decision, unanimously reversed the district court in a decision dated April 26, 2019 (the Circuit Court Opinion)[3] citing to a number of Second Circuit Court of Appeals precedents. Those litigators who can wait months for an appellate decision may rightfully conclude how easily the panel viewed the lack of merit to the district court decision.

The Facts

The fact pattern was quite straightforward and largely undisputed. Plaintiff Russell Brammer is a professional photographer who on November 19, 2011, created a photograph depicting a busy street during the evening in the Adams Morgan neighborhood of Washington D.C., with the vehicle traffic rendered as red and white trails (the Photo). Brammer published a digital copy of the Photo on his own website. He also uploaded it to the image-sharing website Flickr, which included the phrase "© all rights reserved" beneath it. Brammer had previously sold physical prints of the Photo for $200 to $300 each, and licensed it for online use twice, once for $1,250 and once for $750.

In 2016, the defendants' owner, Fernando Miko, posted the Photo on novafilmfest.com, a website owned by defendant, a film production company. It promoted the Northern Virginia International Film and Music Festival, which was a revenue-generating event.

The website contained a page titled "Plan Your Visit," which highlighted various tourism attractions around the Washington metro area. Mico posted a cropped version of the Photo above the caption "Adams Morgan, DC," without any attribution or other commentary.

Mico testified that he found the Photo through a Google Image search, which led him to the website Flickr, but claimed he did not see any indication on the Photo or the Flickr website that the Photo was copyrighted. He therefore said he believed it to be publicly available. After downloading, Mico cropped out the Photo's negative space for what he considered to be "stylistic reasons" before posting it on defendant's website.

After Brammer discovered the unauthorized use, his counsel sent a letter to the defendant requesting compensation. The defendant refused, but did remove the Photo from its website. Brammer then commenced copyright infringement litigation, seeking damages and attorney's fees. The defendant asserted a fair use defense and moved for summary judgment, which the district court granted.

Issue On Appeal

The Circuit Court framed the issue on appeal as "whether Violent Hues made fair use of Brammer's Photo. The fair use defense presents a mixed question of law and fact, requiring us to "review the district court's legal conclusions de novo and its findings of fact for clear error."[4] Furthermore, the Circuit Court, following its precedents, opined that an appellate court need not remand for further factfinding when the district court found facts sufficient to evaluate each of the statutory fair use factors. Instead, it may conclude as a matter of law that the challenged use does not qualify as a fair use of the copyrighted work. The panel did just that—finding that the record on appeal was sufficient for it to render a decision on the merits.

Fair Use Affirmative Defense

The panel first set forth the usual recitation of the purpose of the fair use defense, which is to advance the U.S. Constitution's stated purpose of promoting "the progress of science and useful arts"[5] by allowing others to build freely upon the ideas and information conveyed by a work. However, fair use "is not designed to protect lazy appropriations. Its goal instead is to facilitate a classes of uses that would not be possible if users always had to negotiate with copyright proprietors."[6] The panel looked to the Second Circuit Court of Appeals, which held that the ultimate test of fair use is whether the progress of human thought "would be better served by allowing the use then by preventing it."[7]

The Copyright Act at 17 U.S.C. Section 107 sets forth four non-exclusive factors to weigh in considering whether a use is fair:

1. The First Factor—Purpose and Character of the Secondary Use

The primary inquiry on this factor is whether the use "communicates something new and different from the original or [otherwise] expands its utility."[8] This is now referred to as a transformative use. Part of the analysis is whether the use "is of a commercial nature or is for nonprofit educational purposes, and, finally, the propriety of the defendant's conduct may be relevant."[9]

The panel cited another Second Circuit opinion, *Author's Guild, Inc. v. HathiTrust*, to the effect that, to be transformative, a use must do "something more than repackage or republish the original copyrighted work."[10] The panel further followed the Second Circuit's lead by citing to *Cariou v. Prince,* which held that "what is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."[11] With these legal standards in mind, the panel determined that its side-by-side examination of the Photo and the defendant's cropped version showed only the defendant's removal of negative space, which did not alter the original with new expression, meaning or message.

The defendant contended that it transformed the Photo by placing it in a list of tourist attractions. The panel acknowledged that a transformative use may occur when the image is placed in a new context to serve a different purpose, but rejected the defendant's contention that it did so in this case. The panel referenced, by way of example, other situations, such as technological or documentary uses, which were found to be transformative.[12] The panel concluded that Violent Hues' copying did not fall into either of these categories. Since the defendant used the Photo expressly for its content to depict Adams Morgan—rather than for data organization or historical preservation, it did not create any new function or meaning.[13] As a result, the panel concluded that the copying was not transformative, overruling the district court finding.

The first factor also requires consideration of whether the "use is of a commercial nature or is for non-profit educational purposes."[14] The panel relied upon its own Fourth Circuit precedent[15] to determine "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[16]

The defendant's website did not generate direct revenue or run advertising, but, as a limited liability company, the defendant used the Photo on its website to promote a for-profit festival. The panel found that this fact was sufficient to demonstrate commercial use.

The defendant argued that the third prong of the first fair use factor concerned whether it acted in good faith, which of course it claimed it had. The panel rejected this argument, holding that although the Supreme Court had approved weighing bad faith against an alleged infringer,[17] that does not necessarily lead to the conclusion that a showing of good faith weighs in finding a use to be fair.

Copyright infringement is a strict liability offense.[18] Accordingly, there is a presumption that an alleged infringer acted in good faith. Therefore, when considering a user's mental state, most (but not all) appellate courts just ask whether the "bad faith subfactor weighs in plaintiff's favor."[19] The panel determined that, in any event, the defendant had not offered any evidence that it acted in good faith and reversed the district court's contrary finding as clearly erroneous.

Finally, based upon its determination that the defendant's reproduction of the Photo was not transformative, and was commercial in nature, the first fair use factor weighed against fair use.

2. The Second Factor—Nature of the Copyrighted Work

This factor is usually considered the least important of the fair use factors. The panel looked to the concept of assessing the "thickness or thinness of the author's exclusive copyright rights. Thicker rights apply when works are closer to the core of intended copyright protection."[20]

The panel accepted prior caselaw, which established that photographs have long received thick copyright protection because of the creative choices made by the photographer, such as lighting, camera angle, depth of field, and selection of foreground and background elements.[21] It also rejected the defendant's contention that prior publication of the Photo must necessarily weigh in favor of fair use.

Applying these legal concepts to the facts in this case, the panel had no difficulty in overriding the district court. It concluded that the Photo merited thick protection, prior

publication was not relevant, and therefore the second factor weighed against fair use.

3. The Third Factor—Amount and Substantiality of the Portion Used

The key question, as stated by the Second Circuit in *HathiTrust* and cited by the panel, is "whether no more was taken than necessary to accomplish the alleged infringer's purpose."[22] As the defendant used roughly half of the Photo and kept the most expressive features, which constituted the heart of the work (merely removing the negative space), the panel determined that such taking was not justified. Accordingly, the third fair use factor also weighed against fair use.

4. The Fourth Factor—Effect of the Use Upon the Potential Market or Value of the Copyrighted Work

The panel spent little time in analyzing this factor, which other circuit courts have considered to be of primary importance. Rather, it just accepted what it called the "common sense presumption that cognizable market harm exists when a commercial use is not transformative but instead amounts to mere duplication of the entirety of an original."[23]

Further finding that Brammer had produced evidence showing that, on two occasions, the Photo had been licensed to others as a stock image, the panel rejected the defendant's argument that Brammer did not show market harm. Accordingly, it reversed the district court on this as well, and found factor four also weighed against fair use.

Conclusion

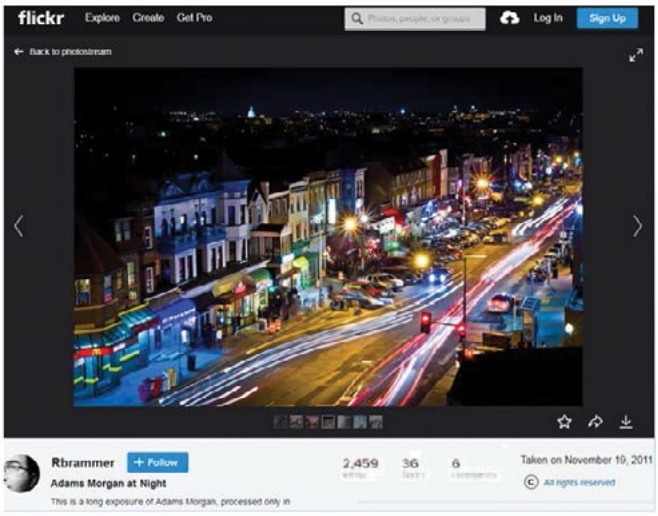
The panel's ultimate conclusion was that the defendant published a tourism guide for a commercial event and included the Photo to make the end product more visually interesting; and this did not constitute fair use. Noteworthy of interest was the panel's recognition that the Internet has made copying as easy as a few clicks of a button, and that much of that copying actually serves the objectives of copyright (i.e., Twitter, Facebook, and Instagram participatory sharing or copying of content). The panel expressed no opinion as to whether that type of sharing constitutes fair use, noting only that the defendant's use was not of this kind.[24]

The panel utterly rejected the district court's findings that all four fair use factors favored fair use. Finding the record sufficiently well established, it reversed the district court as a matter of law without remanding for further factfinding or legal determination.

The United States federal justice system is built upon the ability to seek appellate review of seemingly incorrect decisions. This was one occasion where the appellate court, supported by many prominent photography and artists' rights and other advocacy rights organizations, did just that, and permitted justice to indeed prevail.

APPENDICES

Appendix A



Appendix B

Endnotes

1. Eastern District of Virginia, Case No. 17-cv-01009.
2. The Amici supporting plaintiff-appellate were American Photographic Artists; American Society of Media Photographers, Inc.; Arts & Entertainment Advocacy Clinic at George Mason University Antonin Scalia Law School; Copyright Alliance; Digital Justice Foundation; PACA, Digital Media Licensing Association, Inc.; Volunteer Lawyers for the Arts, Inc.; New York Intellectual Property Law Association; National Press Photographers Association; Graphic Artists Guild, Inc.
3. U.S. Circuit Court for the Fourth Circuit Court of Appeals, Case No. 18-1763, Docket No. 68.
4. Circuit Court Opinion at page 5.
5. Circuit Court Opinion at page 5 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)).
6. Circuit Court Opinion at page 5 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991); *Kienitz v. Sconnie Nation LLC*, 766 F. 3d 756, 759 (7th Cir. 2014)).

7. Circuit Court Opinion at page 6 (citing *Cariou v. Prince*, 714 F. 3d 694, 705 (2d Cir. 2013)).
8. Circuit Court Opinion at page 6.
9. *Id.*
10. 755 F. 3d 87, 96 (2d Cir. 2014).
11. Cariou, 714 F. 3d at 707.
12. Circuit Court Opinion at page 9 and cases cited therein.
13. Circuit Court Opinion at page 10.
14. 17 U.S.C. § 107 (1).
15. *Bouchat v. Balt. Ravens Ltd P'ship*, 619 F. 3d 301, 307 (4th Cir. 2010).
16. Circuit Court Opinion at page 11.
17. Circuit Court Opinion at page 12 (citing *Harper and Row Publishers, Inc. v. Nation Enters*, 471 U.S. 539, 562-63 (1985)).
18. Circuit Court Opinion at page 13 (citing *Harper and Row Publishers, Inc.*, 471 U.S. at 562).
19. Circuit Court Opinion at page 13 (citing *NXIVM Corp. v. Ross Inst.*, 364 F. 3d 471, 479 (2d Cir. 2004)).
20. Circuit Court Opinion at page 14 (citing *Campbell*, 510 U.S. at 586).
21. Circuit Court Opinion at page 14 (citing *Rentmeester v. Nike, Inc.*, 883 F. 3d 1111, 1120-21 (9th Cir. 2018)).
22. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (quoting *Campbell*, 510 U.S. at 589).
23. Circuit Court Opinion at page 18 (citing *Campbell*, 510 U.S. at 591).
24. Circuit Court Opinion at pages 19-20.

Joel L. Hecker, principal of the Law Offices of Joel L. Hecker, practices in every aspect of photography and visual arts law, copyright, licensing, publishing, contracts, privacy rights, trademark and other intellectual property issues, as well as real estate and estate planning matters. He has acted as general counsel to the hundreds of professional photographers, stock photo agencies, graphic artists, and other photography and content-related businesses he has represented nationwide and abroad. He also lectures and writes extensively on issues of concern to these industries. He is past Chair and a member of the Copyright and Literary Property Committee of the New York City Bar Association, a long-time member and past Trustee of the Copyright Society of the U.S.A., and a member of the EASL Section. He has also been continually designated as a New York Super Lawyer. His offices are at the Helmsley Building, 230 Park Avenue, Suite 660, New York, NY 10169. He can also be reached at (212) 481-1850 ext. 106, at his website www.HeckerEsq.com, or via email: HeckerEsq@aol.com. Specific references to his articles and lectures may be located through internet search engines under the keywords: "Joel L. Hecker" or at the HeckerEsq@aol.com website.

The Transfer of the Offseason: A Justin Fields Saga

By Joseph M. Hanna, Dustin W. Osborne, and Thomas Grenke

Leading up to the 2018 college football season, quarterback prospect Justin Fields made waves when he declared his intention to sign with the University of Georgia (Georgia). Per recruiting experts, Fields was a clear top dual-threat quarterback ranked either first or second in all "Big Board" rankings of recruits, occasionally coming in second only to now reigning national champion quarterback Trevor Lawrence.

Becoming a Georgia Bulldog presented plenty of enticing opportunities for Fields: Not only would he have a legitimate opportunity to contend for the starting job against incumbent Bulldog quarterback Jake Fromm, Fields would also have the unique prospect of competing for both a national football championship and competing on the baseball diamond. More than just a sterling talent on the gridiron with exceptional ability, Fields was also considered a potential high-round Major League Baseball (MLB) draft choice while in high school. Per an MLB scout in 2017, Fields was in a "[s]imilar situation as Jameis Winston when he was in high school. He's a better overall athlete and runner for sure, but [Fields'] baseball skills are behind due to all the time he gives to football." This acumen apparently runs in the family, as Fields' sister later enrolled at Georgia to play softball.

A Georgia native, Fields ultimately found the prospect of becoming a Bulldog too enticing to refuse. Unfortunately, whether due to his own performance, the coaching regimen, or a combination of the two, Fields drastically underwhelmed during the 2018 college football season. Throughout the season, Fields completed just 27 of 39 passes for 329 yards, with four touchdowns and no interceptions. Further, Fields rushed for 266 yards, with four touchdowns, on 42 carries. Whether at the whim of head coach Kirby Smart or offensive coordinator Jim Chaney, Fields was largely used in "mop-up duty," only coming into games in select packages or once a win was all but guaranteed.

Indeed, Fields' frustration with his role was evident early on in the 2018 season. For example, in an expletive-driven tirade delivered while walking off the field at the conclusion of a week two 41-17 victory over rival South Carolina, Fields complained that he simply handed the ball off in the game and contributed next to nothing in Georgia's victory.[1] Furthermore, during the biggest games of the season, Fields seemed to falter and/or simply disappear. At one point, for example, Fields carried the ball once for three yards against Missouri, delivered the same line in a loss to Louisiana State University (LSU), saw no game time against the University of Florida (Florida), and had one ill-fated fake punt attempt in the SEC Championship loss to Alabama.

To add insult to injury, Fields' performance on the field ultimately paled in comparison to a controversy that occurred off the field. During a baseball home game against Tennessee, Georgia first baseman Adam Sasser reportedly shouted racial slurs aimed at Fields. While under investigation, Sasser ultimately admitted to the comments, apologizing publicly and noting that he and Fields had since made amends. Regardless, Georgia promptly dismissed Sasser from the university.

At the end of this tumultuous year, rumors quickly swirled that Fields intended to transfer from the University of Georgia—per reports, Fields supposedly had interest in transferring to Florida State University, University of Oklahoma, Penn State University, or The Ohio State University (Ohio State).[2] Within weeks, these rumors came to fruition: Fields announced his intention to transfer to Ohio State University in advance of the 2019 season. Of course, this created a new narrative for everyone to ponder—would Fields be eligible to play quarterback at Ohio State in 2019, or would he be required to sit out the 2019 season?

On February 8, 2019, the NCAA rendered its final decision—Fields obtained his waiver and will be eligible to lead the Buckeyes out onto the field in the 2019 season. This came as no surprise based on the recent history of waiver requests; however, the facts particular to Fields' situation provide additional insight into the new NCAA Transfer Guidelines and the growing trend toward abolishing the "one-year" rule altogether.

Current NCAA Transfer Guidelines[3]

Per the NCAA Transfer Guidelines, "[t]he NCAA Division I Committee for Legislative Relief, formerly the NCAA Division I Management Council Administrative Review Committee was created in 1993 as a response to the membership's desire for more rules flexibility." In essence, this Committee reviews the application of NCAA legislation in a case-by-case basis to determine whether a waiver is needed due to extraordinary circumstances.

Back in April 2018, and pursuant to Bylaw 14.5, "the NCAA Division I Council approved an amendment to the NCAA Division I Committee for Legislative Relief polices [sic] to specify that immediate eligibility may be provided in certain situations."[4] To procure granting of these waivers, the institution needs to establish that the transfer is as a result of **"documented mitigating circumstances outside of the student-athlete's control and directly impacts the health, safety or well-being of the student-athlete"** (emphasis added). The transferring student's overall academic record and any opposition by the previous institution will also be considered.

"A few high-profile waivers granted over the span of the past year serve as examples and can be used to construct a narrative regarding what kinds of transfers are entitled to immediate eligibility."

Bylaw 14.5 continues to provide sections outlining the most common assertions submitted as mitigating circumstances for these requests. In pertinent part:

1. Assertions of Egregious Behavior.
    - Guidelines.

      During its February 2016 meeting, the committee reviewed waivers involving assertions of egregious behavior by a staff member or a student at the previous institution and determined that immediate eligibility is appropriate.

      The committee approved the following guidelines regarding assertions of egregious behavior:

      a. In cases where the student-athlete was a victim of objective, documented egregious behavior by a staff member or student at the previous institution and the previous institution does not oppose the waiver, staff may grant immediate eligibility.

      b. In cases where the applicant institution cannot document that the student-athlete was the victim of egregious behavior by a staff member or a student at the previous institution or the previous institution does not oppose the waiver, staff should review on a case-by-case basis.

Evolution and Application of Reformed Transfer Guidelines

Prior to the monumental changes made to the Transfer Guidelines, a transferring student would have needed to demonstrate that his, her, or their previous institution exhibited extremely egregious behavior in order to warrant immediate eligibility. Without such a showing, NCAA officials were restricted to simply granting an additional year of eligibility added onto the end of an athlete's college career. Dave Schnase, NCAA vice president of academic and membership affairs, elaborated on the monumental changes made to the Transfer Guidelines: "The membership wanted to put immediate eligibility back on the table. And so whether that resulted in a high approval rate, I don't think membership knew. They just wanted to put that back on the table. And then the circumstances of each individual case would essentially dictate the approval rate."[5]

Ultimately, establishing immediate eligibility for all transfer requests was considered and discussed, but the changes stopped just short of dismissing the gatekeeper and opening up the floodgates in their entirety. Since this drastic change, 63 college football players have requested waivers to play immediately and the NCAA has granted 50, a rate of 79%. Notably, the NCAA and various schools do not publicly explain their waiver decisions, using student privacy laws as the alleged reason for their silence. Nonetheless, a few high-profile waivers granted over the span of the past year serve as examples and can be used to construct a narrative regarding what kinds of transfers are entitled to immediate eligibility.

Shea Patterson: University of Mississippi to University of Michigan

Quarterback Shea Patterson serves as the first well-known case of a granted waiver request pursuant to the reformed Transfer Guidelines. Following a 2017 recruiting scandal and subsequent sanctions brought down on Mississippi State University (Mississippi or Ole Miss), the NCAA permitted rising Mississippi seniors to transfer in lieu of the rule typically requiring them to sit out for one year upon transferring.[6] Patterson, along with several other Ole Miss teammates, wanted to transfer and in doing so requested the same treatment—waiver of the "one year" rule. In rationalizing their requests, Patterson, along with several other Ole Miss teammates, argued that Ole Miss coaches and staff deceitfully misled them during the recruiting process regarding the ongoing NCAA investigation—at the time, Ole Miss staunchly denied any wrongdoing.

The University of Michigan (Michigan), where Patterson intended to transfer, made his initial waiver application before the 2018 amendments were made to the Transfer Guidelines. As a result, Michigan actually withdrew its application in favor of this new cooperation-based approach.[7] Upon approval of the amendment, Mississippi, Michigan, and the NCAA national office staff worked concertedly in an effort to craft a new waiver application—one that was predictably approved.[8]

Given Patterson's transfer route under the new Transfer Guidelines, a new roadmap presented itself for players and schools alike. Simply put, as long as the student requesting a transfer bases the appeal on something happening out of his, her, or their control—something that was detrimental to his, her, or their health, safety, and/or well-being—the student can demonstrate sufficient academic progress, and the prior school had no objection, it appeared that the NCAA would grant immediate eligibility.

Demetris Robertson: University of California to University of Georgia

In the summer of 2018, former five-star wide receiver Demetris Robertson decided to leave California after two years. On its face, it appeared to be a typical hardship waiver request—Robertson's home state was Georgia, and per his older brother, a handful of family health scares arose over the previous seasons that made it difficult for him to focus on academics and his college football career from so far away.[9]

Typically, the NCAA had handled such requests similar to a medical redshirt, permitting an extra year of eligibility on the end of a college career as opposed to immediate eligibility. In theory, this methodology was intended to actually benefit the transferring player—whether dealing with a medical issue, family situation, or something in the same vein, the NCAA typically gave these students a year to settle in and work on the reason why the students felt the need to transfer in the first place. However, given the shift in direction with the Transfer Guidelines, Robertson found himself with the potential to have immediate eligibility at a school closer to home. Provided that Robertson maintained sufficient academics and gave California no reason to dispute his desire to move closer to home, he was left with simply the "mitigating circumstances" hurdle to clear.

The NCAA ultimately granted Robertson's waiver request. As the NCAA does not elaborate on why a waiver is granted or denied, it remains a relative mystery as to what the determining factor was; while he likely could point to these health issues causing "homesickness" or concern impinging upon his day-to-day life, he had also been attending California for two years and had an older brother living close by, which cuts in the other direction. Accordingly, this gives credence to the narrative that the NCAA evinces leniency in its final decision, especially given situations where the transfer is cordial between the two schools involved.[10]

Antonio Williams: The Ohio State University to University of North Carolina

Like Robertson, Ohio State running back Antonio Williams also sought a transfer prior to the 2018 college football season. While in high school, Williams had committed to the University of North Carolina at Chapel Hill (North Carolina); however, he changed his mind twice and ended up playing at Ohio State. Once there, Williams amassed six carries in 2016 and carried the ball 57 times in 2017—far fewer than lead rusher J.K. Dobbins, with his 194 carries. With Ohio State signing three top running backs in preparation for the 2018 season (ranked #2, #3, and #11), Williams found himself as a third-string running back with three highly touted, driven freshmen behind him. Naturally, he felt he could benefit from a change of scenery where he may be able to rise above a less talent-laden depth chart, ultimately deciding to return to his original commitment, North Carolina.

"NCAA evinces leniency in its final decision, especially given situations where the transfer is cordial between the two school involved."[10]

Though North Carolina also requested a hardship waiver in order to allow Williams to play immediately, it again remains a relative mystery as to what kinds of hardships Williams faced that permitted his immediate eligibility. Back in April 2018, his Twitter account relays his thankfulness for his time at Ohio State, his announcement of transferring to North Carolina, and that "this was a decision based on multiple things, from family, to having particular opportunities." Similarly, head coach Larry Fedora offered even less information, simply indicating that a waiver had been filed and they awaited the NCAA's decision.[11] Again, given that this request took place prior to the 2018 season, we know that the NCAA ultimately permitted Williams to play immediately, giving no rationale as to the decision.

The Tom Mars Effect

Notably, the Shea Patterson saga also revealed a powerful secret weapon available to college football athletes looking for immediate eligibility at a new school: Arkansas attorney Tom Mars. Dubbed the "Great Emancipator," Mars has proven himself a staunch NCAA antagonist ready to push back against the establishment. According to Patterson's father, "[n]ever in my life have I met anyone like him. I call it a Mars thing, where you really can't understand unless you experience it. He's committed to

you, and you really don't want to be on the other side of him."[12]

Though his ability in fighting for this immediate eligibility came to the forefront with the Mississippi underclassmen, these success stories just scratch the surface. In essence, Mars has changed the face of the NCAA, succeeding in gaining immediate eligibility for Shea Patterson at Michigan, wide receiver Van Jefferson at Florida, wide receiver Tre Nixon at the University of Central Florida, and defensive back Deontay Anderson at the University of Houston, just to name a few.

Indeed, the 2018 changes of the NCAA Guidelines provided Mars with enough ammunition to continue turning the NCAA on its head. Per Mars, "[b]y enacting a new rule that allows such allegations to be described as mitigating circumstances instead of egregious behavior, the NCAA has encouraged member institutions to settle these matters without the student-athlete's previous school having to admit to any wrongdoing. Over time, this more collaborative approach to addressing waiver requests is likely to result in more positive outcomes for student-athletes. What's more, the new rule's endorsement of cooperation between the two schools will undoubtedly result in speedier decisions by the NCAA staff."

Fields' Waiver Approval

Based on the recent transfer precedent, it comes as no surprise that the NCAA ultimately granted Fields his waiver; perhaps coming as even less of a surprise, it gave no reasoning for its decision. If history is any indication, the stars seemed to align for Fields from the get-go; first, one may infer that Fields met any and all academic requirements. The crux of the issue, then, turned on whether Fields suffered from "documented mitigating circumstances outside of [Field's] control and [whether it] directly impacts the health, safety or well-being of [Fields]" pursuant to the new NCAA Guidelines. This is where perennial NCAA transfer expert Tom Mars clearly came into play—according to Mars, "[u]nlike the situation with the Ole Miss transfers, the process of obtaining a waiver for Justin isn't going to drag on for months." Specifically, Mars added that he believed a decision by the NCAA would be made by February.[13] While perhaps a week off his initial target, the expedited granting of the waiver shows a drastic decrease in the NCAA's decision-making timeline when compared to previous cases.

Likening the Fields saga to the Shea Patterson, Demetris Robertson, and Antonio Williams success stories, it almost becomes more appropriate for one to ask why the NCAA *would not* grant Fields' request. The Patterson transfer was monumental, setting the stage for warranted transfers under the new Transfer Guidelines as a result of actions outside of the student-athlete's control. Even more telling, then, are the case studies that followed—Robertson was permitted to transfer to be closer to family, while Williams obtained a waiver seemingly to be closer to family and seek additional game-time opportunities.

One notable difference is that, unlike Robertson or Williams, Fields actually wanted to move *away* from his family—a native of Kennesaw, Georgia, his family presumably still lives in the state, with his sister playing softball for the very university from which he wished to depart. However, tilting the scales back in favor of Fields' waiver, Robertson and Williams also never dealt with anything remotely similar to the Adam Sasser incident—at least to the public's knowledge. Especially when considering Fields' talent and potential to play baseball at a high level for Georgia, the Sasser fiasco proves immense in warranting Fields' desire to leave for cause.

"Over time, this more collaborative approach to addressing waiver requests is likely to result in more positive outcomes for student-athletes."

With the education and "documented mitigating circumstances" boxes presumably checked off, the inquiry finally turned to whether the University of Georgia would push back against the transfer. This is where the process could have sunk into the swamp—with Jake Fromm being a rising junior and thusly eligible to depart for the National Football League (NFL) after the 2019 season, the last thing Georgia would want is to have the top quarterback remaining on the depth chart transfer and potentially play against it in the future playoffs. However, given the circumstances, the Bulldogs would have been hard-pressed to push back against Fields' request—after all, in the wake of Adam Sasser's incendiary racist comments directed at Fields, the public outrage against Georgia fighting Fields' request would have been astronomical.

At the end of the day, the fact that Ohio State was willing to bring in Fields and file the waiver request essentially scripted how the story would unfold. Newly implemented head coach Ryan Day has seen a revolving door as the entryway to his quarterback room: Starting quarterback Dwayne Haskins departed for the NFL, four-star quarterback recruit Dwan Mathis flipped from Ohio State to Georgia, and presumed-starter Tate Martell vehemently denied any intention to transfer before changing course and taking his talents to the University of Miami. For Day to be willing to bring in Fields knowing that it likely meant the end of Mathis' and Martell's tenure at the university, one has to imagine that he always had the utmost confidence in Mars and the transfer process. As we now know, this confidence paid off in spades.

Endnotes

1. "Justin Fields had Voiced his Frustrations with his Play at Georgia," *Atlanta Journal-Constitution*, (Dec. 18, 2018), *available at* https://www.ajc.com/sports/college/justin-fields-had-voiced-his-frustrations-with-his-play-georgia/wI9RlhKmUFwBuEzKzNv4GL/.
2. David Kenyon, "Landing Spot Odds for 5-Star QB Justin Fields' Transfer from Georgia," BleacherReport.com, (Dec. 28, 2018), *available at* https://bleacherreport.com/articles/2812464-landing-spot-odds-for-5-star-qb-justin-fields-transfer-from-georgia#slide1.
3. "NCAA Division I Committee for Legislative Relief Information Standards, Guidelines and Directives," (January 2019), available at https://ncaaorg.s3.amazonaws.com/committees/d1/clr/D1CLR_Guidelines.pdf.
4. *Id.*
5. Ralph D. Russo, "Revamped NCAA Waiver Policy Helps Transfers Play Right Away," *Seattle Times*, (Jan. 23, 2019), *available at* https://www.seattletimes.com/sports/college/revamped-ncaa-waiver-policy-helps-transfers-play-right-away/.
6. Steven Godfrey, Richard Johnson, and Morgan Moriarty, "Ole Miss Hit with Extra Bowl-Ban Year and Scholarship Reductions, with Former Coaches Getting NCAA Show-Cause Penalties," SBNation.com, (Dec. 1, 2017), *available at* https://www.sbnation.com/college-football/2017/12/1/16512428/ole-miss-ncaa-sanctions-penalties-investigation.
7. David Ablauf and Chad Shepard, "Joint Statement from Michigan and Mississippi Regarding Shea Patterson," Michigan University, (Apr. 27, 2018), *available at* https://mgoblue.com/news/2018/4/27/football-joint-statement-from-michigan-and-mississippi-regarding-shea-patterson.aspx.
8. Ralph D. Russo, "QB Shea Patterson Eligible for Michigan, Good News for Other Transfers," *Chicago Tribune* (Apr. 27, 2018), *available at* https://www.chicagotribune.com/sports/college/ct-shea-patterson-michigan-transfer-20180427-story.html.
9. Jeff Sentell, "Family Reasons: Why Demetris Robertson is Now a Georgia Bulldog," DawgNation.com, *available at* https://www.dawgnation.com/football/family-reasons-why-demetris-robertson-is-now-a-georgia-bulldog.
10. "WR Demetris Robertson Joining Georgia as Transfer," ESPN News Services, (Jul. 16, 2018), *available at* http://www.espn.com/college-football/story/_/id/24097215/demetris-robertson-transferring-georgia-bulldogs-california-golden-bears.
11. Rob Goldberg, "Former 4-Star RB Prospect Antonio Williams Transfers to UNC from Ohio State," BleacherReport.com, (Apr. 23, 2018), *available at* https://bleacherreport.com/articles/2772063-former-4-star-rb-prospect-antonio-williams-transfers-to-unc-from-ohio-state.
12. Pat Forde, "Meet College Football's Most Unexpectedly Impactful Man This Season," Yahoo Sports, (Nov. 15, 2018), *available at* https://sports.yahoo.com/meet-college-footballs-unexpectedly-impactful-man-season-080057186.html.
13. Kyle Rowland, "Lawyer: Eligibility Case for Ohio State's Fields Will Not Drag On," *The Toronto Blade*, (Jan. 9, 2019), *available at* https://www.toledoblade.com/sports/ohio-state/2019/01/08/college-football-ohio-state-buckeyes-justin-fields-tom-mars/stories/20190108198.

Joseph M. Hanna is a commercial litigator and legal adviser nationally recognized for his work in sports, media, and entertainment law, as well as for being a leading voice for diversity in legal and business communities. Joe is the founder and chair of Goldberg Segalla's Sports and Entertainment Practice Group, chair of its Retail and Hospitality Practice Group, and chair of the firm's Diversity Task Force. His clients include major athletes, entertainers, and national league sports teams, as well as developers and property owners and international retail and hospitality enterprises. Law360 in 2014 named Joe a Rising Star in Media and Entertainment Law, and since 2016 he has served on the organization's Sports Editorial Advisory Board. He also edits Goldberg Segalla's Sports and Entertainment Law Insider blog. In 2015, Joe was the youngest honoree ever to be named Lawyer of the Year in the Bar Association of Erie County's 130-year history, and multiple times he has ranked among the top 10 attorneys in Western New York in Business First's annual Legal Elite. In 2017 the ABA recognized Joe as one of its "Top 40 Young Lawyers." In addition to his legal practice, he is the founder and president of Bunkers in Baghdad, a charity that collects and ships new and used golf balls, clubs, and other equipment to active duty troops in over 65 countries and to veterans recuperating at home.

Dustin W. Osborne is an associate in Goldberg Segalla's Workers' Compensation and Sports and Entertainment Practice Groups. Dustin is a frequent contributor to Goldberg Segalla's Sports and Entertainment Law Insider blog, where he covers the latest and breaking news, as well as legal battles, developments, and trends impacting all aspects of sports and entertainment. He has also written on sports law for publications, including the *Denver Entertainment and Sports Law Journal* and the *EASL Journal*.

Thomas Grenke is a graduate of the University at Buffalo School of Law (2019). Since January 2018, Tom has been a law clerk within the Sports and Entertainment Practice Group at Goldberg Segalla, as well as a contributor to the firm's Sports and Entertainment Law Insider blog. In addition, as an undergraduate at Penn State University, Tom was a Sports Editor/Contributing Writer for the its newspaper, *The Behrend Beacon*. He is also an avid Washington Capitals fan.

SCOTUS Weighs in on Non-Taxable Costs Recoverable in Copyright Suits and on Standing to Sue

By Jana S. Farmer

The U.S. Supreme Court recently issued decisions in two copyright cases, both of which concern narrow issues of statutory interpretation and are examples of matters that it addresses to ensure uniformity in the decisions of the lower courts. Below are accounts and analyses of the cases.

Rimini Street, Inc. v. Oracle USA, Inc.

In the first case, *Rimini Street, Inc. v. Oracle USA, Inc.*,[1] the Supreme Court overturned a ruling of the Ninth Circuit, which awarded Oracle over $12 million in non-taxable litigation costs under 17 U.S.C. § 505 in a suit against Rimini Street, a technical support service that offered software updates to the customers of Oracle's enterprise software.[2] Oracle claimed copyright ownership in various aspects of the software programs that it markets.[3] It claimed that Rimini infringed those copyrights in the course of providing software updates to customers that were using Oracle's software.[4] Oracle prevailed in the copyright lawsuit, winning over $124 million in total monetary judgment.[5] At issue was the award of expert witness fees, e-discovery expenses, contract attorney services fees, and jury consultant fees totaling over $12 million.[6]

The Copyright Act gives federal district courts discretion to award "full costs" to a party in copyright litigation.[7] Rimini argued that "costs" is a term of art in federal statutes that refers directly to the taxable costs defined in 28 U.S.C.A. § 1920; Oracle's counter-argument was that the word "full" authorizes the courts to award expenses beyond the six categories of costs specified in the general costs statute, codified as 28 U.S.C.A. § 1821 and § 1920, and instead means recovery of all litigation costs.[8] In a unanimous ruling authored by Justice Brett Kavanaugh, the Supreme Court held that that the provision authorizing award of "full costs" to a party in copyright litigation does not authorize courts to go beyond the specific types of costs available in the general costs statute.[9]

While the costs at issue in *Rimini Street* were significant, the practical application of this decision going forward may be modest. First, the decision makes the non-taxable cost awards in copyright infringement litigation more predictable. Second, this decision will likely encourage federal courts to read the costs provisions under other federal statutes narrowly.

Fourth Estate Public Benefit Corporation v. Wall-Street.com

In the second matter, *Fourth Estate Public Benefit Corporation v. Wall-Street.com*,[10] the Supreme Court resolved the conflict in authority between the Circuit Courts as to the meaning of the phrase "registration of the copyright claim has been made," as contained in Section 411(a) of the Copyright Act.[11]

While copyright protection is automatic and copyright registration is optional, a copyright owner must register its copyright before filing a copyright infringement suit. Prior to the decision in *Fourth Estate*, there existed a split in authority as to whether Section 411(a)'s registration requirement may be satisfied merely by submitting a copyright registration application (as the Fifth and Ninth Circuits allowed) or whether it was necessary for the Register of Copyrights to either register the copyright claim or deny the registration (as the Tenth and the Eleventh Circuits required).[12]

Fourth Estate is a journalism organization, which licenses news articles written by its journalists to online sites, and claims to own the copyrights to those articles.[13] The license agreement terms required Wall-Street.com, a subscribing website, to remove any Fourth Estate articles before canceling its subscription.[14] Wall-street.com subscribed for a time but after canceling its subscription continued to display those articles.[15]

While Fourth Estate's copyright registration for the articles at issue was still pending, it filed suit against Wall-street.com, alleging that the website reposted articles without permission after its subscription had expired.[16] The district court dismissed the case on the grounds that Fourth Estate had filed the lawsuit before it had fully registered the copyright.[17] Eleventh Circuit affirmed, holding that, that "[f]iling an application does not amount to registration."[18] Justice Ruth Bader Ginsburg penned the unanimous opinion of the High Court, which held "that 'registration . . . has been made' within the meaning of 17 U. S. C. §411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application."[19]

Besides the resolution of the longstanding circuit split, the practical implication of this opinion is that litigants may delay filing copyright suits for several months while their registration applications are pending and will likely discontinue forum shopping for the jurisdiction that gets

them to court faster. Copyright holders may also be deterred from including in their lawsuits claims of infringement of unregistered, peripheral copyrights in an attempt to present a case as one meriting a larger damages award and try to thus secure an advantage in resolution discussions.

Conclusion

In both *Rimini Street* and *Fourth Estate*, the Supreme Court stuck closely to the plain language of the relevant statutes, possibly providing insights about how it may rule in similar matters involving narrow, statutory interpretation issues. Overall, the results of both cases should provide practitioners a greater degree of certainty in how copyright infringement matters will be resolved going forward.

Endnotes

1. *Rimini Street Inc. v. Oracle USA Inc.*, 139 S. Ct. 873 (2019), *full text of opinion available at* https://www.supremecourt.gov/opinions/18pdf/17-1625_lkhn.pdf (last accessed on April 8, 2019).
2. *Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 948, 962, 966 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 52 (2018), *and rev'd in part*, 139 S. Ct. at 873.
3. *Oracle USA, Inc.*, 879 F.3d at 952.
4. *Id.*
5. *Id.*
6. *Oracle USA, Inc. v. Rimini St., Inc.*, 209 F. Supp. 3d 1200, 1218 (D. Nev. 2016), *aff'd in part, vacated in part, rev'd in part*, 879 F.3d 948 (9th Cir. 2018), *rev'd in part*, 139 S. Ct. 873 (2019).
7. 17 U.S.C. § 505.
8. *Rimini Street Inc.*, 139 S. Ct. at 873.
9. *Id.* at 881.
10. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019), *full text of opinion available at* https://www.supremecourt.gov/opinions/18pdf/17-571_e29f.pdf (last accessed on April 8, 2019).
11. 17 U.S.C. § 411(a).
12. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1339 (11th Cir. 2017), *cert. granted sub nom. Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (2018), *and aff'd*, 139 S. Ct. at 881.
13. *Fourth Estate Public Benefit Corp.*, 856 F.3d at 1339.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1341.
19. *Fourth Estate Public Benefit Corp., supra, n. 10*, 139 S. Ct. at 892.

Jana Farmer represents client interests in connection with matters involving copyright, sale and transfer of rights in artworks; protection of valuable creative assets; and general commercial disputes and transactional matters. Jana provides reliable legal counsel to virtually all participants in the creation, licensing, sale, lending, gifting, merchandising and display of art. Frequently working cross-practice with Wilson Elser's attorneys focusing on other areas such as trusts and estates, taxation and bankruptcy, she represents artists, collectors and buyers, sellers, insurers, gallerists, dealers and consultants. A key contributor to the expansion of the firm's Art Law practice, Jana is familiar with applicable statutes and codes and skilled at safeguarding and protecting valuable creative assets. She is a member of the Board of Advisors for the Center for Art Law and an active member of the EASL Section and its Fine Art Committee. Jana publishes articles and presents on art law topics and provides pro bono services for Volunteer Lawyers for the Arts, which offers free legal counseling to low-income artists in New York City.

Lawyer Assistance Program

Your **First Choice** or Your **Last Resort**

Call us when you see the early warning signs… missed deadlines, neglected email, not returning phone calls, drinking too much, feeling sad and hopeless.

OR

Call us when you see the consequences of ignoring the early warning signs… work problems, relationship difficulties, an arrest, fired from your job, notice from grievance.

Call **1.800.255.0569**

NEW YORK STATE BAR ASSOCIATION
LAWYER ASSISTANCE PROGRAM

www.nysba.org/lap

NYSBA

A Revolution in French Doping Legislation

By François Berbinau and Mathilde Dulize

Citius, Altius, Fortius: 100 years later, Paris will once again host the summer Olympic Games.

In five years, France will pay a tribute to the creator of the modern Olympic games, Baron Pierre de Coubertin, by being the center of the world for sport. This event is a wonderful opportunity to shine a light on the city of Paris and on the entire country of France, as it shows its deeply rooted culture and sense of hospitality as host to thousands of tourists and sport fans.

Needless to say, hosting such an event requires the country to comply with several compulsory international regulations. Among other things, France needs to bring existing installations, like stadiums, into compliance with the Olympics criteria. In addition, the Olympic Games also have an impact on French anti-doping legislation. Even though an anti-doping platform has always been a central priority of the French government when dealing with sports, France has refused to implement in its legislation the World Anti-Doping Code (the Code) itself. Indeed, while some of the obligations stated in the Code were transposed in the French legislation, others were not.

However, with the 2024 Olympics now in sight, these outstanding issues caught up with the growing international pressure and eventually defeated the French long-lasting reluctance to abide by the World Anti-Doping Agency (WADA) rules. This prompted significant changes in rules governing the prevention and the sanction of doping.

Prevention—The Tracking Obligation

The fight against doping is organized through several complementary mechanisms and adapted to each population of athletes or their athletes' entourages. A particularly important measure in this fight lies in the possibility of subjecting certain athletes to unannounced checks. In France, this checking process is provided in article L. 232-15 of the French sport code,[1] but this measure only applies to a limited list of athletes named the "target group." This list is set every year by the French Anti-Doping Agency (AFLD), an independent public authority created in 2006 and charged with ensuring that sports participants do not violate rules regarding doping.[2] The target group includes:

- Athletes who are or were registered at least for one year during the last three years on the lists of high-level athletes and promising athletes within the meaning of the sport code,
- athletes who are or were licensed professionals of an affiliated federation at least for one year during the last three years, and
- athletes who have already been the subject of disciplinary sanctions during the last three years.

As part of this scheme, athletes of the "target group" are required to provide specific information on their whereabouts for the conduct of doping controls. Pursuant to Article L.232-9-3 of the French sports code,[3] the combination of three failures by an athlete to his, her, or their tracking obligations constitutes a violation of the anti-doping rules and is punishable by disciplinary sanctions. On the basis of these provisions, the French boxing Olympic champion, Tony Yoka, has been suspended for one year from practicing his sport.[4]

"For certain athletes and their trade unions, such constraints are deemed detrimental to their freedom to come and go, their right of privacy and family life, and to their right to peaceful enjoyment of their home."

The "target group" was created by an Order of April 14, 2010[5] (the Order). Its existence was challenged before the French national courts and before the European Court of Human Rights (ECHR), the latter of which delivered a ruling on January 18, 2018.[6] The claimants, led by the famous French cyclist Jeannie Longo, an athlete holding several Olympic and world titles, argued that as a consequence of belonging to the "target group," the athlete was subject to possible tracking outside his, her, or their place of training and competition, at home, and during rest time or vacations. To this end, the target athletes are indeed subject to a strong and up-to-date localization obligation. For certain athletes and their trade unions, such constraints are deemed detrimental to their freedom to

come and go, their right of privacy and family life, and to their right to peaceful enjoyment of their home. They also claim that these constraints are a violation of competition law.

Before the ECHR was seized, the French Council of State dismissed in its decision of February 24, 2011[7] the motions of several French sport federations seeking the annulment of all or part of the Order. The French Council of State, when seized by targeted athletes, had also refused to refer a priority question of constitutionality on these same issues to the French Constitutional Council.[8]

"The tracking obligation is justified since it is part of the fight against doping, a scourge that threatens the fairness of competitions and constitutes a public health issue."

In its January 18, 2018 ruling, the ECHR considers that the tracking obligation effectively constitutes an intrusion into the private life of the "target athletes." However, it also considers that the interference is "prescribed by law" within the meaning of Article 8 § 2 of the European Convention on Human Rights,[9] that the constraints imposed pursue a legitimate aim and that they are proportionate. The tracking obligation is justified since it is part of the fight against doping, a scourge that threatens the fairness of competitions and constitutes a public health issue.

So that France will be in compliance with the WADA rules, its government has recently proposed a bill to the French National Assembly in order to amend the list of athletes who can be part of the "target group," by adding the athletes enlisted on the national collective list—i.e., those who are playing for their national teams.

Sanction—The Disciplinary Process

In France, the main disciplinary body in the fight against doping previously was each sporting discipline's Federation. The AFLD, although not part of the federal system, also used to play a significant role in this now obsolete disciplinary process.

In order to be able to receive subsidies from the French government, organize national competitions or deliver national titles, a Federation needs to be affiliated by the Ministry of Sports, and there can be only one affiliated Federation per sport. In each discipline, each affiliated Federation used to have exclusive jurisdiction over doping litigation, as part of its disciplinary powers. However, if a Federation failed to act swiftly, it was considered as relinquishing its exclusive jurisdiction. In case of an alleged disciplinary offense, the first instance federal commission had a 10-week delay from the moment this offense was identified to issue a ruling. Otherwise, the file was automatically referred to the federal appeal commission. If this appeal commission did not issue a ruling within four months from the time the offense was identified, the case was automatically referred to the AFLD.[10] The AFLD was also entitled to take the initiative to appeal the ruling of first instance or the appeal commission's ruling.[11]

Even before the legal changes prompted by the perspective of the 2024 Olympic Games kicked in, which significantly impacted the AFLD's role and powers, the AFLD had been challenged throughout certain important decisions, which had forced it to initiate its reorganization. This started with a decision of the French Constitutional Council of February 2, 2018,[12] in which its members declared Article L232-22 3° of the-then applicable version of the French Sports Code (mentioned hereinabove) unconstitutional for the following reasons:

8. *The challenged provisions thus entrust the French anti-doping agency with the power to take action on decisions issued by the sports federations it wishes to reform. This power is not assigned to a specific person or body within the agency, while it belongs to the latter to judge on the violation that was the subject of the federation decision.*

9. *The challenged provisions do not create any separation within the French anti-doping agency between, on the one hand, the prosecution of the potential violations which have been the subject of a decision by a sports federation pursuant to Article L232-21 and, on the other hand, the judging functions of these same violations. They thus violate the principle of impartiality.*

At the time, the AFLD immediately reacted to this decision and announced that the bill on the organization of the 2024 Olympic and Paralympic Games, then under discussion before the French Parliament, would include a provision creating an independent commission within the AFLD, distinct from its prosecuting body. The independent commission was called the College, and it would be in charge of imposing disciplinary sanctions against athletes guilty of anti-doping rule violations.[13] This new piece of legislation was enacted on March 26, 2018,[14] followed by an Order of July 11, 2018,[15] thereby creating a Sanction Commission within the AFLD. Since then, the College has been responsible for deciding whether to bring disciplinary proceedings against athletes who have allegedly violated anti-doping rules. The Sanction Commission has jurisdiction to decide hear the cases and, if necessary, to pronounce disciplinary sanctions against athletes.

Since this first step was achieved and placed under WADA's influence, the AFLD's role in the fight against

doping has expanded. An Order was issued on December 19, 2018,[16] entirely entrusting the disciplinary procedure to the AFLD, which has new prerogatives, while the Federations have completely forfeited their disciplinary monopoly. This is a significant change for the athletes charged with anti-doping violations, since they no longer appear before their own Federations, nor are they judged by familiar faces. Now, their only recourse against the decisions of the College or of the Sanction Commission is an appeal before either national courts for matters involving French athletes and national events, or the Court of Arbitration for Sport for proceedings involving offenses allegedly committed by international athletes or during international events.

This arbitral jurisdiction was already accepted by the other States Parties to the International Convention against Doping in Sport of 2005[17] and by all international sports federations. The acknowledgment by the French Parliament of the jurisdiction of the Lausanne Court of Arbitration for Sport over appeals against the decisions of the AFLD involving international athletes or events shows France's dedication towards harmonizing anti-doping rules applied to high-level sport. Until now, France had always refused to transpose the Code into its internal legislation and such stance might have ruined France's chances to host the Olympics. On the above-mentioned procedural issues, as well as on others, the provisions of the December 19, 2018 Order that have come into force on March 1, 2019 ensure compliance of French law with the Code, which has been a recurring demand from WADA. This will trigger numerous new obligations and especially the implementation of new provisions every six years for full compliance.

This revolution of its anti-doping regulations should assert the credibility of France internationally in view of the 2024 Olympic Games. The question now is, how will the sports stakeholders (i.e., athletes, Federations, and agents) adapt to this new set of legislation and will it serve its purpose: a faster, stronger, and thus more effective anti-doping policy?

Endnotes

.1. Article L 232-15 of the French Sport Code.

2. Law no. 2006-405 of April 5, 2006, on the fight against doping and the protection of the health of athletes, published in JORF no. 0082, (April 6, 2006), p. 5193, text no. 2.

3. Article L 232-9-3 of the French Sport Code.

4. L'Equipe–July 5, 2018: "Tony Yoka suspended for one year for violations of anti-doping rules," available at https://www.lequipe.fr/Boxe/Actualites/Tony-yoka-suspendu-un-an-ferme-pour-infractions-aux-regles-antidopage/919484.

5. Order no. 2010-379 of April 14, 2010 on the health of athletes and the compliance of the sport code with the principles of the world anti-doping code, published in JORF no. 0089 (April 16, 2010), page 7157, text no. 26.

6. European Court of Human Rights (ECHR) – Judgment of January 18, 2018 (Final version of April 18, 2018), Case of *National Federation of sportspersons' association and unions (FNASS) and others v. France* (Applications nos. 48151/11 and 77769/13) *available at* https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2248151/11%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-180442%22]}.

7. CE 2ème et 7eme section réunies, (Feb. 24, 2011), no. 340122, *available at* https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000023632413.

8. CE, 2ème et 7ème sections réunies, (Dec. 18, 2013), no. 364839 and no. 368890, *available at* http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-18-decembre-2013-Mme-Longo-Ciprelli.

9. European Convention on Human Rights – Art. 8 § 2.

10. Art. L 232-21 of the then applicable French Sport Code.

11. Art. L 232-22 § 3 of the then applicable French Sport Code.

12. Conseil constitutionnel, 2017-688 QPC, (Feb. 2, 2018).

13. "L'AFLD prend acte de la decision QPC no. 2017-688 du Conseil Constitutionnel du 2 février 2018," *available at* https://www.afld.fr/lagence-francaise-de-lutte-contre-dopage-afld-prend-acte-de-decision-qpc-n-2017-688-conseil-constitutionnel-2-fevrier-2018/.

14. Law no. 2018-202 of March 26, 2018 on the organization of the 2024 Olympic and Paralympic Games, *available at* https://www.legifrance.gouv.fr/eli/loi/2018/3/26/SPOV1729269L/jo/texte.

15. Order no. 2018-603 of July 11, 2018 on the disciplinary procedure before the AFLD, *available at* https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037182032&categorieLien=id.

16. Order no. 2018-1178 of December 19, 2018 on the legal measures necessary to perfect the transposition of the principles of world anti-doping code into French law, *available at* https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037833532&categorieLien=id.

17. International convention against doping in sport, (Oct. 19, 2005), *available at* https://bdoc.ofdt.fr/doc_num.php?explnum_id=19138.

François Berbinau is a partner and Mathilde Dulize is an associate at BFPL Avocats AARPI, a Paris-based law firm. François holds a LL.M degree from the University of Chicago and Mathilde holds a sports law degree from the University of Paris East Créteil. François is also chair of the French chapter and co-chair of European chapters of NYSBA's International Section.

Sports and Entertainment Immigration: Detention, Baseball, Only the Best and the Brightest, and Resignations. The Trump Administration's Greatest Hits!

By Michael Cataliotti

The calendar says it is only a few months between installments of Sports and Entertainment Immigration—the publication cycle and the dates on the articles used as source material confirm this; it still feels like years. Of course, not all of this could be happening in such a short period, could it? It could; it does, and it is.

Since our last discussion, Immigration and Customs Enforcement (ICE) detained an internationally recognized musician, 21 Savage;[1] the administration suddenly and unexpectedly canceled a previously approved deal between Major League Baseball (MLB) and the Cuban Baseball Federation;[2] the administration published a plan to increase its AI competitiveness,[3] while also making it harder for the "best and brightest" to enter and remain in the U.S.;[4] we are learning more about "extreme vetting" and what it looks like; and the Secretary of Homeland Security was ousted, as was the Head of U.S. Citizenship and Immigration Services (USCIS). These are just some of the items impacting our communities and clients.

Other items include the implementation of General Data Protection Regulation (GDPR), consistently, and in some cases, increasingly long waits at embassies or consulates for visa interviews or issuances, retrogression of the EB-1A (extraordinary ability) category—which is where many in sports, arts, and entertainment will go for a green card—the requests for evidence (RFEs) continue to be surprising and fun, and confirmation that copyright infringement is a deportable offense. Ultimately, this has all happened in a very tight time frame, and I did not even mention issues at the Southern border, or the fact that the administration is monitoring immigration attorneys!

Nonetheless, in this installment of the Sports and Entertainment Immigration column, we will (i) break down the situation involving 21 Savage; (ii) look at where the MLB went wrong—spoiler alert, it did not; (iii) explain how the administration is showing us that wanting the "best and the brightest people" to come into the U.S. is not true, which is, in part, by developing the "National Vetting Center" and other means of "extreme vetting"; and (iv) close out with a look at those who have resigned (and their replacements, if possible) and what this may mean going forward. So, without further ado, and because we are already tired, let us dive in!

"How Many Problems You Got? (A Lot.) How Many Lawyers You Got? (A Lot.)"

She'yaa Bin Abraham-Joseph, better known as "21 Savage," (21) was arrested by ICE on February 3, 2019. The basis of his arrest and subsequent detention was that he was unlawfully present within the U.S. as a British National who was convicted of criminal possession of a controlled substance, a misdemeanor, and has overstayed his previously issued visa since entering the U.S.[5]

21 has a few problems here: If he was convicted, then the question would be whether that conviction would constitute a "crime involving moral turpitude" (CIMT).[6] He also has the issue of having overstayed his once-valid visa for many years, having accrued decades of unlawful presence.[7]

One of 21's attorneys has stated that "he has no criminal convictions"; however, this has been refuted by Jacoby Hudson, the attorney who represented 21 in 2017 to have the charge expunged.[8] Hudson states, "The sentence wasn't vacated. It was just sealed."[9] This matters for immigration purposes, because the question of "have you ever been convicted"—asked of nearly all non-U.S. citizens seeking a visa—would need to be answered in the affirmative. It would also mean that ICE had a lawful basis to detain 21.

What about the fact that he has overstayed his visa? This is simple: Yes, that too would be a lawful basis for ICE to detain 21.

If the basis of the detention seems lawful, why is this such a big deal? Aside from 21's name recognition, we focus on this matter because it is an example of a disproportionately active ICE division operating within a state (Georgia) that is unabashedly anti-immigrant.[10] According to the former National Security and Immigrants' Rights Project Director for the ACLU Georgia, "the regional ICE office in Atlanta made nearly 80 percent

more arrests in the first half of 2017 than it did in the same period the previous year, representing the largest increase of any field office in the country."[11] Likewise, the Stewart Detention Center—where 21 was taken—is notorious for its high prevalence of hardline immigration decisions: "In Lumpkin, [Georgia,] for example, the three immigration judges serving the Stewart Detention Center had an average 93.5% denial rate for asylum cases."[12] Bond denial rates were comparably high.

"If you have a client who is not American and wants to spend some time down in Atlanta or elsewhere in Georgia (or South Carolina or North Carolina, for that matter) make sure that client is mindful of the risk."

What is also important about 21's case is that it appears he has applied for a U visa, which is for non-U.S. nationals who (i) were victims of one or more serious crimes and (ii) helped law enforcement with investigating the crime(s) and/or prosecuting the actor(s).[13] The victim's cooperation with law enforcement must be certified by the enforcement agency or judiciary.[14] As a result of the sensitivity and importance of U visa classification, "It used to be that once you were in that queue you're not really [seen as] a risk, you're not a priority [for ICE]."[15] It would appear that this is no longer the situation.

A key takeaway is that 21 was ultimately granted bond, which he posted, and was thereafter released from detention. Yet he has a significant amount of lawyers and resources helping him. If you have a client who is not American and wants to spend some time down in Atlanta or elsewhere in Georgia (or South Carolina or North Carolina, for that matter) make sure that client is mindful of the risk.

Bottom of the Ninth. Two on. MLB at Bat. He Hits a Long, Fly Ball! It's Going! It's Going! It's… Caught?

In April 2019, after more than two years of negotiations and having received a license from the Treasury Department's Office of Foreign Assets Control (OFAC), an agreement between MLB and the Cuban Baseball Federation (FCB) was ended by the Trump Administration, abruptly, and publicly.[16] The basis of the agreement was to allow Cuban baseball players to sign with and play for MLB teams without having to defect to another country.[17] In exchange for this authorization, and under terms "similar to deals with foreign players from Japan and [South Korea, and China], the U.S. baseball clubs would pay a fee—equivalent to 25% of the player signing bonus—to the [FCB]."[18]

The Washington Post notes that MLB had been in contact with government officials throughout the multi-year process and received regular confirmation that the negotiations and subsequent agreement were in accordance with U.S. law and policy goals of hindering human trafficking and smuggling.[19] If this is so, why then did the administration cancel the deal? Its position is that "facts recently brought to our attention, and after consultation with the U.S. Department of State," made it determine that a payment to the FCB would be a payment to the Cuban government.[20]

As odd and as sudden as the decision appears to be, it also appears to be global politics: The current administration has alleged "that tens of thousands of Cuban intelligence and security agents are in Venezuela, keeping President Nicolas Maduro in power and preventing the Venezuelan military from recognizing opposition leader Juan Guaido as interim president."[21] This is noteworthy, because in an interview with Fox News,

> Secretary of State Mike Pompeo replied 'Yep' when asked whether the move was 'more effort to pinch Cuba.' Without mentioning the embargo, Pompeo said the administration was 'going to do everything we can to pull [Cuba] out' of Venezuela.[22]

Pompeo with the surprise catch over the fence, leaving MLB stunned. A crafty play, it is just too bad that this game has a direct and now negative impact both on foreign relations and U.S. business operations.

The Brightest Bulb Gets the Visa! Maybe? Maybe Not.

Trump has indicated, through Twitter and executive order, that he "wants better reporting and tracking of spending on AI-related research and development."[23] As reported by Reuters, "Under the American AI Initiative, the administration is directing agencies to prioritize AI investments in research and development, increase access to federal data and models for that research and prepare workers to adapt to the era of AI."[24]

How nice!

Unfortunately, while welcome to hear, the Initiative has no teeth: As Andrew Yang explains, "We have to be realistic about what actually happened—the announcement amounted more to an assignment of agencies[.] […] If you were to make a list of the top folks in AI, a very, very low proportion of them work in the government at present. And if you were to dig into one of these agencies and see what they're doing on AI, you would [probably] find that they're doing very little, in most places."[25]

Further, it is unfortunate that Trump wants to slash immigration levels, which will hinder American competitiveness across industries. This is no less true for Ameri-

can AI innovation. As per *The Hill*, "In 2015, for instance, the nation had 58,000 graduate students in computer science fields, the overwhelming majority of which (79%) are international students. Unfortunately, only a subset of these students are able to stay in the country long term, due to the small and fixed cap of H-1B visas, the primary immigration pathway available for high-skill workers."[26] This is true: In my practice alone, I have represented individuals from India, Belarus, Russia, the Netherlands, Italy, Spain, China, Taiwan, Hong Kong, England, Greece, and Australia who are all involved in the design and development of AI-based or AI-associated projects.[27]

Another piece of this humble pie that is unfortunate is that China, the U.S.'s main competitor in AI innovation and policy, has made successful attempts at repatriating its citizens who went abroad. Again, as per *The Hill*, China recognized many years ago that there was a large quantity of talented engineers and minds who left China to study and work in American universities and companies. Accordingly, in "the early 2000's, only 1 in 10 Chinese students returned home after studying abroad, today it's 8 in 10."[28]

What to do? Well, we could start by reinstating the Immigrant Entrepreneurship Rule, and proceed to create a new category of employment authorization for individuals working within AI, machine learning or other similar industries,[29] bring up a very narrow scope of immigration reform to create a new classification, and provide better training and clearer, more objective, guidance for immigration services officers to follow when reviewing petitions *with regular oversight to ensure that clear, objective guidance is followed*.

Is America Doing Anything with AI? Yes, and It's Not Ideal

What is also frustrating on the immigration side, is that as we look to foreign-born individuals to maintain America's competitive edge—across industries, not just in AI—and what further demonstrates the administration's disinterest in truly enticing the best and brightest individuals to come and stay within the U.S., is "The National Vetting Enterprise" (NVE).[30]

Created in response to the executive order demanding "Extreme Vetting" of all foreign-born applicants and residents, the NVE is a collaboration among the Department of Homeland Security agencies. As indicated in the *LawFare Blog*,

> Each component's role in carrying out the NVE is informed by how the information provided by continuous monitoring can aid these broader goals. Essentially, USCIS is the judge, using the new contextual sources of information to decide on administrative immigration issues such as entry, removal, benefits and relief on an individual level. CBP is the gatekeeper, the first line of defense against any threat at points of entry, and will rely on the centralized trove of information to create intelligence reports based on trend analysis about national security threats and trends. ICE is the police force, and will use the new information and technology to identify specific individuals within the United States who are suspected of violating civil, criminal and immigration laws, or posing a threat to national security or interests.[31]

As we previously discussed, in September 2017, USCIS published notice that it was expanding the categories of records collected to include "social media handles, aliases, associated identifiable information, and search results" derived from "publicly available information obtained from the internet, commercial data providers, and information obtained and disclosed pursuant to information sharing agreements."[32] As concerning as this may be, we control the majority, if not all, of the information posted to social media, and so, we must be mindful of what we disseminate.

However, also as we noted previously, "new visa policies require some immigrants to expose their private communications as well by handing over their account credentials."[33] Itemizing this, we see that:

> The State Department has used its authority in overseeing the visa application process, with the advice of DHS as required by the Homeland Security Act, to require the collection of social media credentials in the following ways: First, all individuals subject to increased scrutiny for being a member of a State Department-identified 'risky population' […], must hand over five years of phone number, email and social media account history as a condition of their visa application. Second, **the State Department is currently proposing a policy change to expand this requirement to include all visa applicants**. Third, as a matter of practice, **consular officers and CBP officers have required individuals to hand over account credentials on a case-by-case basis in order to further investigate online activity beyond what is publicly available**. Fourth, […] John Kelly indicated that he hoped to implement a policy change requiring immigrants to list identifiers and passwords for their online accounts as a condition of entry to the country and **DHS has moved forward with the proposal to require collec-**

> **tion of social media handles** despite his departure. The proposal **does not require applicants to list passwords** […].[34]

Considering the subjectivity and autonomy of USCIS's decision-making process and rationales, this goes from unpleasant to terribly unpleasant. What could be more concerning than one individual having all of this information at his, her, or their fingertips? "Combining both sources of data, USCIS is now equipped with a deluge of new information **it is required** to use in deciding questions of benefits, status applications or appeals."[35]

"Yet, now, these same individuals, who are likely overwhelmed, overworked, and ill trained for the type of review they are conducting, will be trying to parse through whether someone's tweet was serious or sarcastic . . . "

As we have noted time, and time, …and time, *and time*, and—you get the idea—again, Immigration Services Officers—those folks at USCIS who review the visa petitions and applications—are humans who operate with great autonomy and in many cases, subjectivity. When the standard of review is a simple "preponderance of the evidence," we have seen them demand "clear and convincing evidence." Yet, now, these same individuals, who are likely overwhelmed, overworked, and ill trained for the type of review they are conducting, will be trying to parse through whether someone's tweet was serious or sarcastic; evaluating the merits of whether someone is really playing a gig or simply trying to drum up interest in their names; investigating whether that "*F--- Donald Trump*" tour, tweet, or comment, was a threat or mere vocalization.[36]

Now, you may be asking, "What does all of this have to do with AI? I thought that's what we were talking about!" AI comes into focus with the other two divisions of the NVE: CBP and ICE. With all of this new information available to them, CBP will analyze the data sources "using existing predictive tools such as the Analytical Framework for Intelligence (AFI) and the Intelligence Reporting System (IRS) to identify relationships between individuals, entities, threats and events in an automated fashion."[37] Note that neither AFI nor IRS are machine-learning technologies (AI), but "The CBP [Office of Intelligence], where the [CBP Intelligence Records System] will be housed, is shifting to a cloud-based shared services model specifically to adopt machine-learning technologies."[38] Further, ICE has sought machine-learning technology to determine, among other things, "whether immigrants were likely to be positive contributors to society or a threat to general welfare."[39] That search was abandoned when "52 technologists criticized the ability for an algorithm to make accurate and ethical non-rules-based determinations."[40] Nonetheless, ICE has continued its pursuit of AI-based technologies by outsourcing the task to a third-party contractor under a labor contract. "Essentially, ICE is not asking for technology it can house and use itself, but a contractor that will automate the functions with which ICE seeks assistance."[41]

These policies and activities raise significant privacy and Fourth Amendment concerns that are not going to entice individuals to come to and remain in the U.S. for longer than they need to complete their education, finish their trainings or leave their jobs. Likewise, giving a USCIS Officer more information with which to grant or deny immigration benefits increases confusion and leads to inconsistent decisions.

The Immigration Apprentice: Starring DHS

Since the last column, Secretary of Homeland Security, Kirstjen Nielsen, resigned,[42] the nomination of acting ICE Director, Ron Vitiello, to replace Nielsen was withdrawn,[43] and the Director of USCIS, L. Francis Cissna, resigned.[44] In each of these instances, the need for a "tougher direction" has been made clear through reporting and tweeting. Most important for us to look at is the resignation of L. Francis Cissna, which came abruptly on May 25th and was effective as of June 1st.

As we have been discussing, Cissna has proposed and enacted policy changes—see, RFEs, delays, "extreme vetting" and enhanced scrutiny, inconsistent applications of law and precedent, erroneous decisions, removal of work authorization, and so on—that have made it more difficult for non-U.S. citizens to obtain immigration benefits. As per Dara Lind at *Vox*:

> Under his watch, USCIS has instituted massive changes to how immigration applications are reviewed (resulting in delayed approvals and increased denials). His agency participated in the efforts to strip deportation protections from over a million immigrants by ending the Deferred Action for Childhood Arrivals program (DACA) and sunsetting several countries' Temporary Protected Status designations. (The fate of both DACA and TPS is held up in several pending court cases, none of which have yet been taken up by the Supreme Court.)
>
> He overhauled the process for granting H-1B visas, making it more difficult for employers to win visas for high-skilled workers (expected to go into effect later this year). He attempted to make it easier to deport people for overstaying student visas. And his asylum officers participat-

> ed in Trump's efforts to crack down on asylum-seekers crossing the U.S./Mexico border, from the short-lived "asylum ban" to the ongoing policy of returning thousands of asylum seekers to Mexico—a policy under which, asylum officers told Vox, officers and their supervisors have been overruled to force asylum-seekers back to Mexico even when they might be in danger there.[45]

Nothing like encouraging the best and the brightest to want to be here!

Who is Cissna's replacement, though? The former Attorney General of Virginia, who is well-known as being unfriendly to immigration, Ken Cuccinelli. Just how inappropriate would it be for this former Virginia Attorney General to be nominated to head USCIS? "In April, as rumors swirled that Trump was considering Cuccinelli for head of the Department of Homeland Security, McConnell told reporters that he had 'expressed my, shall I say, lack of enthusiasm' for Cuccinelli to the president."[46] Unfortunately, it appears this does not matter, as Cuccinelli is consistently reported as a likely successor. He is currently acting director of USCIS.

The point of all of this is that the administration aims to make immigration more, not less, restrictive. By making the process more onerous, it will be hard to maintain competitive edges and continue inspiring artists, engineers, and entities to enter into *and remain* in America.

Conclusion

As always, immigration is a carnival! We have fun games, bad games, and rigged games, but like any good carnival goer, we must play them all or at least *know how* to play them all.

There is much more than what was covered herein, but to summarize: (1) The administration is taking a consistently more restrictive approach to immigration; (2) as a result, immigrants and immigration practitioners are being scrutinized regularly, but not equally in all jurisdictions; and (3) because of this heightened, yet inconsistent, scrutiny, it is important to be overly conservative with data about your clients and their personal, professional, and immigration pursuits. Ultimately, as the administration continues to play its greatest hits, we must continue dancing, no matter how much we dislike the songs.

Endnotes

1. https://www.rollingstone.com/music/music-features/21-savage-ice-arrest-legal-situation-791267.
2. https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.97cc7c7f27e9.
3. https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence.
4. Donald J. Trump, Speech in the Rose Garden on May 16, 2019: "And, second, it establishes a new legal immigration system that protects American wages, promotes American values, and attracts the best and brightest from all around the world." https://www.whitehouse.gov/briefings-statements/remarks-president-trump-modernizing-immigration-system-stronger-america.
5. https://www.rollingstone.com/music/music-features/21-savage-ice-arrest-legal-situation-791267.
6. For a discussion of what constitutes a crime involving moral turpitude, http://www.usvisalawyers.co.uk/article13.htm.
7. https://www.npr.org/2019/02/04/691210275/atlanta-rapper-21-savage-arrested-by-ice-for-allegedly-overstaying-visa.
8. https://www.rollingstone.com/music/music-features/21-savage-ice-arrest-legal-situation-791267.
9. *Id.*
10. *Id.; see also* https://www.wabe.org/analysis-immigrants-detained-ga-deported-higher-rate/ discussing deportation rates in Georgia, https://trac.syr.edu/immigration/reports/519.
11. https://www.rollingstone.com/music/music-features/21-savage-ice-arrest-legal-situation-791267/; *see also* https://projectsouth.org/wp-content/uploads/2018/05/UN-Communication-Re-Detention-Conditions-in-GA-Facilities.pdf for a full copy of the report.
12. https://slate.com/news-and-politics/2019/04/william-barr-asylum-bond-policy-trump-cruelty.html.
13. https://www.rollingstone.com/music/music-features/21-savage-ice-arrest-legal-situation-791267.
14. *See* https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf for a guide to the process and requirements involved.
15. https://www.rollingstone.com/music/music-features/21-savage-ice-arrest-legal-situation-791267.
16. https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.c95002f7774e.
17. To "defect" consists of being smuggled out of Cuba, typically to Haiti, the Dominican Republic or Mexico, in order to establish residency and then sign with the MLB. The risks involved range from death, imprisonment, and extortion of the player to the same of his family that remains in Cuba. https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.c95002f7774e.
18. https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.c95002f7774e .
19. "In a letter to the Treasury Department in January, after administration officials said they were still examining the signed agreement, attorneys for Major League Baseball noted that Japan, South Korea and China had similar deals in which league payments were made to national federations. 'MLB has been in regular contact with the U.S. government throughout its multi-year effort to address human trafficking through the establishment of a safe and orderly system' for Cuban athletes to play in this country, including as recently as November, 'and received assurances throughout that period that such efforts were not only consistent with U.S. law and policy, but would be welcomed as a means to address the dangerous smuggling of these Cuban baseball players.' A list of 'restricted [Cuban] entities' published by the administration Nov. 15, it noted, did not include the baseball federation. A copy of the letter was obtained by The Washington

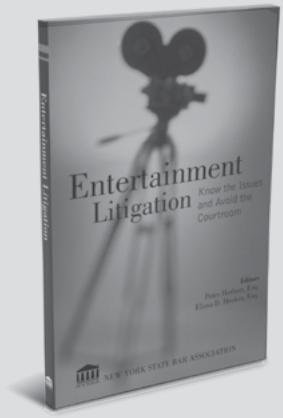
Post." https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.c95002f7774e.

20. https://www.apnews.com/c42e1215334c4251b4ddbdd06dc3e9b5.
21. https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.f74bc25db75f.
22. https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html?utm_term=.f74bc25db75f.
23. https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/; https://www.vox.com/future-perfect/2019/2/19/18232074/trump-artificial-intelligence-immigration-visa.
24. https://www.reuters.com/article/us-usa-trump-artificialintelligence/trump-administration-unveils-order-to-prioritize-and-promote-ai-idUSKCN1Q00A3.
25. https://venturebeat.com/2019/05/21/andrew-yang-the-u-s-government-is-24-years-behind-on-tech.
26. https://thehill.com/opinion/cybersecurity/401773-to-win-the-ai-race-we-need-more-humans.
27. I would like to add that these individuals, despite their talents, awards, partnerships, and the like, still face great issues whether directly resulting from stricter / less consistent processing guidelines or long wait times for green cards.
28. https://thehill.com/opinion/cybersecurity/401773-to-win-the-ai-race-we-need-more-humans.
29. Interestingly enough, this idea has been touted for some time. *See* https://www.vox.com/future-perfect/2019/2/19/18232074/trump-artificial-intelligence-immigration-visa.
30. https://www.whitehouse.gov/presidential-actions/presidential-memorandum-optimizing-use-federal-government-information-support-national-vetting-enterprise; https://www.dhs.gov/sites/default/files/publications/NSPM-9%20Implementation%20Plan.pdf
31. https://www.lawfareblog.com/national-vetting-enterprise-artificial-intelligence-and-immigration-enforcement.
32. https://www.federalregister.gov/documents/2017/09/18/2017-19365/privacy-act-of-1974-system-of-records; https://www.lawfareblog.com/national-vetting-enterprise-artificial-intelligence-and-immigration-enforcement.
33. *Id.*
34. *Id.* Emphasis added.
35. *Id.* Emphasis added.
36. https://www.billboard.com/articles/news/7430903/musicians-against-donald-trump.
37. https://www.lawfareblog.com/national-vetting-enterprise-artificial-intelligence-and-immigration-enforcement.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. https://www.vox.com/2019/4/7/18299585/kirstjen-nielsen-trump-dhs-homeland-security-resign-secretary-new.
43. https://www.usatoday.com/story/news/politics/2019/04/05/donald-trump-withdraws-nomination-ronald-vitiello-lead-ice/3374121002/, noting that Mr. Trump wants to go "in a tougher direction."
44. https://www.nbcnews.com/politics/immigration/u-s-citizenship-immigration-services-director-asked-resign-n1010231.
45. https://www.vox.com/2019/5/25/18639156/trump-cuccinelli-cissna-uscis-director.
46. *Id.*

Michael Cataliotti is the Managing Shareholder of Cataliotti Law P.C., a law firm concentrating on business immigration and international corporate transactions. His clientele includes individuals and entities from such industries as sports, music, fashion, film, television, art, theatre, new media, and technology. Michael is a faculty member at Lawline CLE; a frequent speaker on the topics of corporate transactions, business immigration, and entrepreneurship; a member of the American Immigration Lawyers Association (AILA) where he is an active participant on several committees; and was most recently recognized as one of Super Lawyers' "Rising Stars" in 2019.

From the NYSBA Book Store

Entertainment Litigation



Entertainment Litigation **is a thorough exposition of the basics that manages to address in a simple, accessible way the pitfalls and the complexities of the field, so that artists, armed with that knowledge, and their representatives can best minimize the risk of litigation and avoid the courtroom.**

Written by experts in the field, ***Entertainment Litigation*** **is the manual for anyone practicing in this fast-paced, ever-changing area of law.**

EDITORS

Peter Herbert, Esq.
Hinckley, Allen & Snyder LLP
Boston, MA

Elissa D. Hecker
Law Office of Elissa D. Hecker
Irvington, NY

PRODUCT INFO AND PRICES

2007 | 232 pp. | softbound
PN: 4087 (Print)
PN: 4087E (E-Book)

NYSBA Members	**$40**
Non-members	$60

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

Contents

Co-sponsored by the New York State Bar Association's Entertainment, Arts and Sports Law Section and the Committee on Continuing Legal Education

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: PUB9227N

NYSBA

Resolution Alley
The Value in Direct Party-to-Party Negotiations

By Theo Cheng

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

Earlier this year, between April 25th and April 27th, the National Football League (NFL) franchises met in Nashville, Tennessee for the 84th annual time to conduct the 2019 NFL Draft (the Draft) and select newly eligible players. The teams not only selected players, but also negotiated player contracts with them and negotiated with other teams both before and after the Draft. That series of negotiations reminded me of the value we place in society on direct party-to-party negotiations, as opposed to resorting to litigation or some other process, to resolve our disputes.

Let us begin with the notion that a dispute belongs to the parties who created it. There can be no question that the parties who/that created a dispute are the ones exercising ownership over it. In the first instance, they are the ones in control of the dispute and how it will get resolved. This means that the parties most directly affected by a dispute are, given the right circumstances, those best able to resolve it. They know the intimate details of the dispute and how a resolution will affect them. Thus, the best resolution of a dispute is more than likely to flow directly from the parties themselves.

As the parties agree to engage some kind of intervener—whether a judge, an arbitrator, a mediator, or some other kind of third party—the more that intervener is involved, the greater control over the dispute resolution process the parties cede from themselves to that third-party. That is, by definition, in engaging a third party to assist in resolving the dispute, the parties are necessarily giving up some control over both the manner in which the dispute is resolved and the nature of the outcome. The more the parties permit that third party to be involved, the less control the parties will have over both the manner and the nature of the outcome.

All disputes, of course, end sometime. Even court litigation, endless and painful as it may seem, reaches finality at some point. Indeed, nationwide, somewhere between 95% and 98% of all court actions ultimately result in a voluntarily negotiated settlement, instead of being decided in a trial setting. Sometimes that happens early in the life of a litigation; other times, it happens on the proverbial courthouse steps. Yet at some point, whether by settlement or by entry of a judgment, that dispute will end. The same is true for any other dispute resolution process the parties ultimately decide to use.

The resolution of any particular dispute usually begins with direct party-to-party negotiations. The party who feels aggrieved is likely to raise the issue with the other party (or parties) and attempt to find a mutually acceptable resolution of the dispute. If direct negotiations should fail to produce a resolution of some kind, there are many other processes that can be used to resolve a dispute, including processes called facilitation, conciliation, mediation, fact-finding, peer-review, a mini or summary jury trial, and, of course, litigation. These other processes will always involve the active engagement of a third-party, such as an ombudsman, a dispute resolution board, an arbitrator, an early neutral evaluator, or a judge, who serves to assist the parties in reaching some kind of resolution. For example, in a mediation, the parties engage a disinterested third party (the mediator) to try and improve communications between the parties, explore possible alternatives, consider options, and address the underlying interests and needs of the parties, with the goal of helping them move towards a negotiated settlement or other resolution of their own making. Thus, mediation is oftentimes referred to as "facilitated negotiations." In a mediation, the intervener guides the process but has little control over the outcome because the parties determine the course of their negotiations. By contrast, in a litigation, the parties cede nearly all of the control over the manner and outcome of the dispute to the judge, who serves as the adjudicator of their dispute. Looking at it as a spectrum, while direct negotiations represent the most collaborative process for resolving disputes (in that the parties are jointly exploring ways to reach some kind of resolution acceptable to each of them), litigation represents the most adversarial process for achieving that end.

No matter which dispute resolution process is chosen along that spectrum, each entails four principal transactional costs: money, time, emotions, and control over the outcome.

Money. It is beyond obvious that it costs money to resolve disputes. However, it is also important to remember that the true costs can be both direct and indirect. Direct costs could encompass e-discovery and document produc-

tion costs, deposition expenses, expert witness fees, and, of course, legal fees. The more adversarial the dispute resolution process, the higher these costs tend to be. Indirect costs could include negative publicity, reputational harm, loss of employee productivity, and lost business opportunities, because resources are being directed towards resolving the dispute. The longer it takes to reach a resolution, the greater the likelihood that all of these costs will have an adverse impact on a party's future growth, profitability, and success.

Time. Relatedly, as Benjamin Franklin noted, "Time is money." On that topic, three-time Pulitzer Prize-winning American poet, writer, and editor Carl Sandburg once said that time "is the coin of your life. It is the only coin you have, and only you can determine how it will be spent. Be careful lest you let others spend it for you." Aristotle's successor, Theophrastus, said: "Time is the most valuable thing a man can spend." Yet disputes unavoidably spend time on your behalf. Every metric of time diverted to handling a dispute is not being devoted to furthering a company's mission or an individual's goals and dreams. Disputes also hold parties and their affected affiliated entities or individuals (such as business partners, directors, officers, and employees) hostage to a particular moment or moments in time. Most poignantly, the point in time when the dispute arose becomes a focus and remains so until the dispute is finally resolved.

Emotions. As David Packard, the late co-founder of Hewlett-Packard, said: "A group of people get together and exist as an institution we call a company so they are able to accomplish something collectively that they could not accomplish separately—they make a contribution to society, a phrase which sounds trite but is fundamental." A company is nothing but the passion, dedication, and commitment of its people, and, as Jack Welch, former CEO of GE, said: "It goes without saying that no company, small or large, can win over the long run without energized employees who believe in the mission and understand how to achieve it." Individuals who can direct their emotional capital toward what they enjoy doing are the ones who contribute the most to a company's objectives or their own goals and dreams and, consequently, to overall success. At the same time, individuals who are compelled to invest emotionally in issues having little or nothing to do with the company's mission or their own goals—such as an unresolved dispute—are likely to find their ability to participate meaningfully towards those missions and goals appreciably impeded. That invariably leads to disheartenment, discouragement, and demoralization. Devoting energies towards resolving disputes requires an expenditure of emotional capital that will almost always take a negative toll.

Control Over the Outcome. Influential management consultant Peter Drucker once said: "Management is doing things right; leadership is doing the right things." Steering a company or yourself in line with a mission or objective, growing profitability, respecting and responding to customers, and safeguarding reputation all require the proper exercise of control over resources, including money and time. Disputes, however, hold the potential to diminish one's ability to control one or more of these things. Sometimes, depending on the process used to resolve the dispute, a company's decision makers or individuals may have little to no control over the outcome, creating the potential for adverse outcomes.

Considered together, these four transactional costs point to one inescapable conclusion: moving from a pure negotiation process for dispute resolution toward court litigation results in spending *more* money, *more* time, and *more* emotional capital to achieve an outcome over which you have increasingly *less and less* control. Thus, when direct negotiations fail, litigation generally should be the *last* stop, not the first stop, in the dispute resolution process. It behooves all of us to consider carefully how these transactional costs manifest themselves in and within the various forms of resolution processes along this spectrum. No single process is appropriate for every dispute, and many disputes could likely benefit from a combination of processes. By educating ourselves about the various types of processes that are available, the right process for any particular dispute can be identified so that the dispute can be resolved in the most expeditious and cost-effective manner possible.

So now we come full circle. Direct party-to-party negotiations represent one end of the spectrum—the one involving comparatively the least amount of money, time, and emotional capital, while simultaneously providing the parties with the most control over the outcome. It is, on some level, the ideal process to explore in attempting to resolve disputes. Moreover, litigation represents the completely opposite characteristics, in that the parties expend the most in terms of money, time, and emotional capital, while ceding nearly all control over the outcome to a judge or jury. Certainly there are disputes where litigation may be appropriate, such as where there is a desire to set a binding precedent or a need to enjoin non-parties from engaging in certain conduct. Yet aside from those discrete categories, litigation is usually not the best alternative for resolving the dispute. Rather, processes that bring the parties closer to the ideal of direct party-to-party negotiations are worth exploring and attempting if the parties are having difficulties negotiating on their own.

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, Resolute Systems, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com.

Thank You!

For your **dedication**,
For your **commitment**, and
For recognizing the **value** and
relevance of your membership.

As a New York State Bar Association member, your support helps make us the largest voluntary state bar association in the country and gives us credibility to speak as a unified voice on important issues that impact the profession.

Henry M. Greenberg
President

Pamela McDevitt
Executive Director

NYSBA NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING AND EXPO

CONNECT • INSPIRE • LEARN

JANUARY 27–31
NEW YORK CITY

2020

NYSBA
NEW YORK STATE BAR ASSOCIATION

Hollywood Docket
My Big Mouth: When Do Legal Communications Result in Liability?

By Neville L. Johnson and Douglas L. Johnson

Introduction

Much of an attorney's job is communication. Attorneys may talk to the press about a case on which they are working, write letters to other parties, or draft memoranda for the courts. If a lawyer is not careful, these statements could subject him, her, or their to civil liability or judicial sanctions, "litigation privilege" notwithstanding. This article explores potential liability for attorney communications under both New York and California laws.

I. New York Law

Aguirre v. Best Card Agency, Inc.

In *Aguirre v. Best Care Agency, Inc.*,[1] Aguirre, a Filipino immigrant, accused her H1-B visa sponsors, Best Care, of exploiting her for cheap labor under threat of withdrawing their sponsorship.[2] Afraid of losing her visa, Aguirre "felt compelled to agree to [Best Care's] proposals" regarding her assigned duties and pay, "and continued to work for them at a much lesser compensation rate than required by law."[3] After years of exploitation, it was revealed that Aguirre's sponsor was not even capable of paying her the amount stated in her work petition, leading the United States Citizenship and Immigration Services to reject her green card application.[4] At this point, the Department of Homeland Security served Aguirre a Notice to Appear in Immigration Court, which signified the beginning of removal proceedings against her.[5]

At this point, Aguirre began to tell her story to the public. In an article published by the *Filipino Times*, Aguirre blamed Best Care for her predicament. She then sued Best Care and its proprietors, claiming in her complaint that Best Care "promised but failed to sponsor her green card application, effectively enslaving her, paying her far less than promised for long hours of work, and keeping her in 'silence, fear and obedience through the defendants' constant veiled threats and intimidate[ion] that she might be deported.'"[6] Another article quoted Aguirre's attorney as saying that the defendants "knew they did not have the financial capacity to sponsor Plaintiff but misrepresented their financial capacity to Plaintiff, who became a 'one woman office staffing agency for them.'"[7]

The defendants countersued, alleging that quotations accusing them of "human trafficking" and fraudulent inducement were inaccurate and defamatory.[8] The court rejected the defendants' claim on the grounds of litigation privilege, which "offers a shield to one who publishes libelous statements in a pleading or in open court for the purpose of protecting litigants' zeal in furthering their causes."[9] This privilege extends to out of court statements that "constitute substantially accurate descriptions and characterizations of the Complaint."[10] Here, the statements the defendants cited as defamatory were either directly quoted from the complaint or made by Aguirre and her attorney that did "not suggest misconduct more serious than that alleged in the Complaint."[11] Specifically, because Aguirre had sued for violation of The Victims of Trafficking and Violence Protection Act (TVPRA), statements accusing the defendants of human trafficking were privileged.[12]

Officemax Inc. v. Cinotti

In *Officemax Inc. v. Cinotti*,[13] an employee of Officemax, Cinotti, left for a competitor and solicited his former Officemax customers for their business in violation of a settlement agreement between Officemax and the competitor. Officemax sent both Cinotti and his new employer a letter notifying them of this breach, then sued them for breach of the duty of loyalty and violation of the Computer Fraud and Abuse Act.[14] Cinotti filed a counterclaim for defamation concerning the letter from Officemax, arguing that because it did not relate to the then-still-forthcoming lawsuit between Officemax and Cinotti, it was not protected by litigation privilege.[15] The court rejected Cinotti's argument, holding that litigation privilege extends to communications pertinent to *any* litigation, no matter whether or not the parties have actually commenced litigation.[16] Here, the letter was pertinent to previous litigation between Officemax and Cinotti's new employer, because it alleged a violation of the settlement agreement that resulted from that litigation.[17] Furthermore, the letter was pertinent to possible litigation between the parties, because Cinotti's violation of the terms of the settlement agreement gave rise to Officemax's lawsuit.

Polin v. Kellwood Co.

Polin v. Kellwood Co. (*Polin*)[18] serves as an example of the unique perils of arbitration when it comes to sanctionable attorney communications. The underlying matter concerned a corporate president suing his ex-employer for wrongful termination.[19] After his suit ended up in arbitration, his attorney complained in a letter to the American Arbitration Association that the neutrality of their assigned arbitrator had been compromised by the defendants making payments directly to said arbitrator (rather than through the Association), and that "*defendants would withhold any further payments to the neutral arbitrator as a means of coercing him into desisting from granting such additional time necessary to complete the arbitration.*"[20] When the arbitration panel convened a special hearing to explore the factual basis for this letter, the plaintiff's attorney refused to answer the panel's questions "[o]n constitutional grounds as well as jurisdictional grounds," leading the arbitration panel to sanction him personally for one-half of the arbitration costs.[21]

"Thus, because courts have the power to sanction attorneys appearing before them for improper conduct, so too did the arbitrator."[23]

The attorney attempted to have these sanctions reversed in federal court as violative of New York's public policy against punitive damages in arbitration. However, the court found that the parties had contracted around this prohibition by permitting the arbitrators to award "any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court."[22] Thus, because courts have the power to sanction attorneys appearing before them for improper conduct, so too did the arbitrator.[23]

Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.

Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. (*Lipin*)[24] is a sequel to *Polin,* featuring the same plaintiff's attorney suing the defense attorneys for defamation and injurious falsehood arising out of a memo they filed in the *Polin* proceedings to confirm the arbitration sanctions.[25] The memo highlighted a continuous pattern of deception by the plaintiff's attorney, including stealing and copying documents from the other side's file.[26] The court held that this memo was protected by the litigation privilege, because conduct in the earlier proceedings was "pertinent" to the defense attorneys' request to uphold the *Polin* arbitration sanctions.[27] The court emphasized that "the concept of pertinent material is 'extremely broad' and 'embraces anything that may possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability.'[28] Here, demonstrating that a party had a propensity to engage in unethical conduct if left undeterred was reasonably related to the propriety of arbitration sanctions over precisely such conduct.

Giuffre v. Dershowitz

Giuffre v. Dershowitz[29] provides a new test case for the litigation privilege's expanse and features famed attorney Alan Dershowitz as the defendant. Dershowitz had repeatedly called the plaintiff a liar and extortionist for accusing him of statutory rape in the aftermath of his defense of convicted pedophile Jeffrey Epstein. The complaint discusses a prior settlement with Dershowitz concerning his accusations, made through interviews in national media outlets, that the plaintiff's attorneys had engaged in unethical behavior with respect to one of Epstein's victims. Dershowitz's public statements on the matter included "challenging them to sue me for defamation." The *Giuffre* complaint accordingly states: "Mr. Dershowitz now has what he claims he has been looking for." The case is currently in its nascent stage, but should certainly be followed by all attorneys.

II. California Law

Flatley v. Mauro

In *Flatley v. Mauro* (*Flatley*),[30] an attorney sent a demand letter on behalf of a client to a famed dancer, accusing him of rape.[31] The letter warned that if a monetary settlement was not urged, the rape allegations would be revealed in court (and therefore to the media), and various other matters would thereby be "exposed."[32] The letter threatened outsized punitive damages, made abundant use of bold and capitalized fonts, and imposed a non-negotiable timeline of 28 days to reach a settlement.[33] The attorney thereafter badgered the dancer's counsel with numerous phone calls, threatening to "go public" with the story and "ruin" the dancer unless he agreed to pay the client and his attorney "seven figures."[34]

Instead, the dancer filed a civil extortion suit against the attorney, who responded by bringing a motion to strike the complaint under California's anti-SLAPP statute (Code Civ. Proc. Section 425.16), arguing that the dancer was attempting to hold him liable for constitutionally protected speech (i.e., settlement negotiations made in contemplation of litigation). The California Supreme Court denied the anti-SLAPP motion on the basis that the attorney's letter constituted criminal extortion as a matter of law.[35] The threats to "go public" with the accusations were coupled with an immediate demand for a seven-figure sum, and were further compounded by the insinuation that the dancer could be reported to tax and immigration authorities for conduct entirely unrelated to the client's claims.[36]

Before the case was completed, the attorney resigned as a member of the Illinois Bar.

Malin v. Singer

In *Malin v. Singer* (*Malin*),[37] an attorney sent a letter to a restaurant and nightclub owner demanding the return of allegedly embezzled funds to the owner's business partner. The attorney threatened to file a lawsuit alleging not just embezzlement, but use of the funds to "arrange sexual liaisons with older men such as 'Uncle Jerry', Judge -----, a/ka 'Dad'…, and many others."[38] The case initially played out much like *Flatley*—the owner sued for civil extortion, the attorney filed an anti-SLAPP motion in response, and the trial court found the letter to be criminal extortion as a matter of law.[39] On appeal, however, the court distinguished the two cases on the grounds that "Singer's demand letter did not expressly threaten to disclose Malin's alleged wrongdoings to a prosecuting agency or the public at large."[40] The salacious details about the arranged sexual liaisons was held not to be extortionate because the activity was "inextricably tied" to the embezzlement complained of by the business partner.[41]

Though the attorney in *Malin* evaded liability and was awarded $323,689 in attorney's fees following his successful anti-SLAPP motion, the distinctions drawn by the Court of Appeals demonstrate that demand letters require a careful threading of the needle in order to remain on the right side of zealous advocacy. Not only can excessive demands expose the drafting party to liability, being named in a suit over such demands likely creates a potential or actual conflict of interest between the lawyer and client, which could require the lawyer to withdraw from representation.

Mendoza v. Hamzeh

In *Mendoza v. Hamzeh* (*Mendoza*),[42] an attorney demanded that the manager of a print and copy shop repay $75,000 to the shop's owner, lest he be reported to the California Attorney General, the Los Angeles District Attorney, and the Internal Revenue Service regarding tax fraud. The court ruled the attorney's letter to be civil extortion, as the demand of $75,000 was directly coupled with a threat to report a crime, and demanding money in exchange for silence with respect to a reportable crime cannot be transmuted to something other than extortion merely because it is accompanied by a threat of garden-variety civil litigation (here, for fraud and breach of contract).[43]

The *Mendoza* court further noted that such conduct will subject an attorney to State Bar discipline, as the Rules of Professional Conduct "specifically prohibit attorneys from 'threaten[ing] to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.'"[44] New York similarly forbids lawyers from threatening criminal prosecution "solely to obtain an advantage in a civil matter."[45] Notably, Rule 7-105(a) has been interpreted in New York to prohibit lawyers from even *mentioning* an adversary's potential criminal liability to obtain a litigation advantage.[46]

Dickinson v. Cosby

Dickinson v. Cosby (*Dickinson*)[47] involved an attorney—the same one from *Malin*—sending a demand letter to a television network that planned to broadcast an interview with one of Bill Cosby's accusers, claiming that the accuser's story was "fabricated and is an outrageous defamatory lie," and explicitly threatening litigation if the broadcast occurred.[48] Similar letters were sent to several other media outlets contemplating similar coverage of the matter.[49] The accuser responded by suing Cosby and his attorney for defamation, arguing that the letters' assertion that the accuser made up her allegations was false and damaging to her reputation.[50]

"Back at the trial court, the tribunal found an independent reason for why the lawsuit could not succeed against the attorney: the plaintiff was a public figure and could not satisfy the constitutional malice standard for defamation under New York Times v. Sullivan." [52]

Once again, the attorney brought an anti-SLAPP motion to strike the complaint as futile in the face of litigation privilege, the trial court denied the motion, and the appellate court reversed. Originally, the court held that litigation privilege did not apply to the letters because they were not written in good faith contemplation of a lawsuit, but were merely intended to intimidate media outlets that had yet to run relevant segments, and no litigation was filed when the letters' demands were not met.[51] Back at the trial court, the tribunal found an independent reason for why the lawsuit could not succeed against the attorney: the plaintiff was a public figure and could not satisfy the constitutional malice standard for defamation under *New York Times v. Sullivan*.[52] A near-identical result was reached in *McKee v Cosby*,[53] prompting Justice Clarence Thomas to muse on whether the standards of *New York Times v. Sullivan* should be reexamined.[54]

As for *Dickinson,* the parties ultimately settled with a "walkaway": the accuser did not appeal, and the attorney waived his right to collect fees under California's anti-SLAPP statute. Notably, Cosby did not enjoy the same level of success in escaping from the lawsuit, and his appellate challenges continue. His attorney was also forced to withdraw from the action in recognition of the ethical issues raised in the discussion of *Malin, supra.*

Rothman v. Jackson

Rothman v. Jackson (*Rothman*)[55] serves as a forerunner to the previously discussed cases. A defamation suit was filed against Michael Jackson, his companies, his lawyers, and his private investigator over assertions during a press conference that his alleged molestation victims and their counsel had made false accusations in order to extort money from Jackson. The defendants argued that litigation privilege protected the statements as made in anticipation of a possible criminal prosecution against Jackson.[56] The court rejected this argument, holding that litigation privilege applies to statements that have a "functional connection" with potential litigation, not merely a connection to *the subject matter* of litigation.[57] Here, the statements were made to members of the press, who had "no legitimate connection with any litigation that could be anticipated between" the accusers' counsel and the defendants.[58]

The court also dispensed with the notion that litigation privilege should be extended based on societal expectations of celebrity litigants' typical public relations strategies. The court pointedly observed:

> [W]e are frankly astonished by the contention made by [Jackson attorney Bertram] Fields that celebrities and their lawyers must litigate their cases in the press because the public expects it. Fields argues that, because of such public expectations, 'media attention becomes part of the forum of litigation . ,' and to deny celebrity litigants protection for statements made in this 'forum' would contravene the policies of the litigation privilege. We expressly reject this argument.[59]

Thus, *Rothman* made clear that litigation privilege has no sliding scale between public and private figures. The court's most salient guidance came in the form of a simple, pithy maxim: "attorneys who wish to litigate their cases in the press do so at their own risk."[60]

III. Rules of Professional Conduct

Recognizing that trial publicity remains invariable in a hyperconnected age, various state bars have implemented ethical rules—typically tracking the model rules promulgated by the American Bar Association—regarding how such publicity may be conducted. Rules 3.6 of both the New York and California Rules of Professional Conduct, for example, prohibits lawyers from making extrajudicial statements that they know (or reasonably should know) will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Both rules provide representative lists of permissible statements under this standard, while New York additionally provides a representative list of impermissible statements. These lists and governing standards should be carefully studied by all attorneys considering turning to the press for assistance in their matters.

Conclusion

The foregoing cases and professional rules counsel a conservative approach to any out-of-court communications regarding litigation matters, whether currently pending or not. Attorneys must take care to ensure that their statements on behalf of clients are functionally related to legitimate legal claims that they truly intend to pursue. They must also carefully weigh the possibility of their clients being sued even if they personally are immune, which raises the specter of malpractice claims. While provocative gestures and strong-arm tactics may momentarily impress clients, they can quickly become significant liabilities that subsume even meritorious cases. Attorneys must be well-versed in all relevant authority concerning the limits of extrajudicial advocacy, lest their big mouths get them in big trouble.

Endnotes

1. *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427 (E.D.N.Y. 2013).
2. *Id.* at 432-44.
3. *Id.*
4. *Id.* at 437.
5. *Id.* at 437-38.
6. *Id.* at 440-41.
7. *Id.* at 441.
8. *Id.* at 459.
9. *Id.* at 456.
10. *Id.* at 459.
11. *Id.* at 460.
12. *Id.* at 459.
13. *Officemax Inc. v. Cinotti*, 966 F. Supp. 2d 74 (E.D.N.Y. 2013).
14. *Id.* at 76-77.
15. *Id.* at 77.
16. *Id.* at 80.
17. *Id.* at 81.
18. *Polin v. Kellwood Co.*, 103 F. Supp. 2d 238 (S.D.N.Y. 2000).
19. *Id.* at 241.
20. *Id.* at 246 *(emphasis in original).*
21. *Id.* at 247.
22. *Id.* at 267-68 (quoting National Rules for the Resolution of Employment Disputes Rule 32(c) (American Arbitration Association 1997)).
23. *Polin*, 103 F. Supp. 2d at 248.
24. *Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 202 F. Supp. 2d 126, 130 (S.D.N.Y. 2002).
25. *Id.* at 137.
26. *Id.* at 138.
27. *Id.*

28. *Id*. at 137.
29. *Giuffre v. Dershowitz*, Case No. 1:19-CV-03377 (S.D.N.Y. Apr. 16, 2019).
30. *Flatley v. Mauro*, 39 Cal. 4th 299 (2006).
31. *Id*. at 308.
32. *Id*. at 309.
33. *Id*. at 308-09.
34. *Id*. at 311.
35. *Id*.
36. *Id*. at 330.
37. *Malin v. Singer*, 217 Cal. App. 4th 1283 (2013).
38. *Id*. at 1289.
39. *Id*. at 1291.
40. *Id*. at 1298.
41. *Id*. at 1299.
42. *Mendoza v. Hamzeh*, 215 Cal. App. 4th 799 (2013).
43. *Id*. at 805-06.
44. *Id*. at 805 (quoting former Rules of Prof. Conduct, rule 5-100(A)).
45. New York Disciplinary Rule 7-105(a).
46. *See Heng Chan v. Sung Yue Tung Corp.*, 2007 U.S. Dist. LEXIS 33883, at *22 (S.D.N.Y. May 4, 2007) (noting that "the mere mention of potential criminal liability can constitute a threat under this provision").
47. *Dickinson v. Cosby*, 17 Cal. App. 5th 655 (2017).
48. *Id*. at 662.
49. *Id*.
50. *Id*. at 655.
51. *Id*. at 684.
52. *New York Times v. Sullivan*, 376 U.S. 254 (1984).
53. *McKee v Cosby*, 874 F.3d 54 (1st Cir. 2017), *cert denied*, 139 S. Ct. 675 (2019).
54. *McKee v. Cosby*, 139 S. Ct. 675, 680 (2019).
55. *Rothman v. Jackson*, 49 Cal. App 4th 1134 (1996).
56. *Id*. at 1145.
57. *Id*. at 1146.
58. *Id*. at 1156.
59. *Id*. at 1149.
60. *Id*. at 1148.

Neville Johnson and Douglas Johnson are partners at Johnson & Johnson in Beverly Hills, CA, focusing on media, entertainment, business and class action litigation. Daniel Lifschitz, a litigation associate at Johnson & Johnson, and law clerk Andrew Keyes, a student at Loyola Law School, Los Angeles, assisted in writing the article.

Krell's Korner

Krell's Korner is a column about the people, events, and deals that shape the entertainment, arts, and sports industries.

The Lone Ranger, the Green Hornet, and Legacies

By David Krell

Batman

When *Batman* premiered on ABC in January, 1966, its immediate success signaled Hollywood producers like a beacon through a dense fog. They scrambled to find writers for the superhero trend sparked by Adam West portraying the title role. It was camp to the point of absurdity, with bona fide actors and actresses giving the show credibility through their Guest Villain and Guest Villainess roles: Art Carney (three-time Emmy Award winner), Milton Berle (Emmy Award winner), Shelley Winters (two-time Academy Award winner), Joan Collins, Cesar Romero, Burgess Meredith, Eartha Kitt, Julie Newmar, Cliff Robertson, Vincent Price, David Wayne (two-time Tony Award winner), Frank Gorshin, and Cesar Romero.

Batman is the alter ego of millionaire Bruce Wayne, who resides in stately Wayne Manor with his aunt (Harriet); butler (Alfred); and teenage ward (Dick Grayson, a.k.a. Robin). Adam West and Burt Ward played Batman and Robin, respectively. Such was the show's influence that rival CBS programmed its entire Saturday morning cartoon slate in this genre and marketed it as "Super Saturday." Prime-time offerings included NBC's *Mr. Terrific* and *Captain Nice*.

Batman could not sustain the energy it created and was canceled in 1968.

The Green Hornet

William Dozier produced *Batman* and followed it up with a movie version during the summer and *The Green Hornet* in the fall. Where *Batman* was tongue-in-cheek pop art, far removed from the character's essence of vigilantism, *The Green Hornet* played it straight. The title character and his partner, Kato, crossed over to Gotham City in a two-part episode—the traditional story paradigm for *Batman*—involving the duo teaming up with Batman and Robin to battle Colonel Gumm.

Both heroes had sidekicks, gadgets, wealth, and tricked-out cars (the Batmobile for Batman, Black Beauty for Green Hornet). It is easy to surmise that they were owned by the same entity, but they were not.

The Green Hornet is Britt Reid, owner of *The Daily Sentinel*—a newspaper in an unnamed metropolis—and local television station DSTV. The Reid family bounty began with a silver mine owned by Britt's great-uncle—John Reid, the Lone Ranger. It was the mine that provided the silver for the character's trademark silver bullets.

The Lone Ranger

In 1933, *The Lone Ranger* débuted on WXYZ, a Detroit radio station. Three years later, *The Green Hornet* débuted. George Trendle owned WXYZ with partners John Kunsky and Harold Pierce; Trendle is credited as the shows' creator. Kunsky-Trendle Broadcasting added Grand Rapids stations WASH and WOOD to its roster, then expanded further to create the Michigan Radio Network.

The Lone Ranger was an instant success, gaining a foothold in the imagination of Depression Era children. The character's origin, which developed later, involves a massacre of John Reid's squad of Texas Rangers. Butch Cavendish's Hole-in-the-Wall Gang ambushes the Rangers at Bryant's Gap and leaves Reid as the sole survivor. Captain Dan Reid, John's older brother, was the squad leader aiming to catch the legendary outlaw; he trusted a guide who double-crossed him.

Tonto, a Potawatomie Indian, discovered the younger Reid, helped him recover from his injuries, and partnered to complete the mission of bringing Cavendish to justice. Thereafter, popular culture trademarks were born: Part of the *William Tell Overture* as the theme song, the phrase "Hi-Yo-Silver" to signal the Lone Ranger's horse that it's time to gallop away, and, of course, the use of a mask to disguise himself. Beneficiaries of the Lone Ranger and Tonto's quest for justice often asked: "Who was that masked man?"

In 1949, Trendle brought the Lone Ranger to television. Clayton Moore portrayed the character and became linked to it, though John Hart played it for two seasons. In 1954, Trendle broke up the Reid family—he sold the Lone Ranger property to oilman and entertainment mogul Jack Wrather, whose first order of business was mandating that the show be shot in color. This was rare in the early days of television. The show lasted another three seasons.

Rights

Trendle kept the Green Hornet rights in his portfolio. Like his great-uncle, Britt Reid wore a mask and projected a persona of being on the wrong side of the law to infiltrate rackets and catch bad guys. Dozier's television version starred Van Williams and lasted one season during the mid-1960s superhero frenzy: 1966-67. It is most notable, perhaps, for introducing karate icon Bruce Lee to a national audience. Lee played Kato.

The 2011 movie *The Green Hornet* paid homage to its lineage by using a poster of the Lone Ranger character as part of the set dressing in Britt Reid's home. Once part of the same corporate family, the characters have separate owners who need to preserve how they are used. In this case, the movie's producers licensed the right to use the Lone Ranger likeness from Classic Media, then the owner.

Licenses

Absent parody, satire, or fair use, licenses are necessary and complex legal organisms to protect the owner's rights. The licensor will want to address several issues in a character license for movies and television:

- How does the licensee intend to use the property?
- If the license is for a video clip from a movie or television show, how long will the clip be on screen?
- Are there other licensing deals in-house that may prevent this license because of exclusivity?
- If it is an artistic depiction, will the licensor have the final say over the artwork to ensure that it meets in-house requirements of proportion and color?
- Will the use be exclusive or non-exclusive?
- Is there an opportunity to review the script to ensure that the licensee will not disparage the property?
- What will the courtesy line be in the credits?

There may also be merchandising issues concerning a license for property protected by copyright or trademark. However, this can be addressed during the negotiation phase.

It is very important for licensors to protect the artistic integrity of their intellectual property. Although attorneys do not make artistic, marketing, or publicity decisions for their clients, they should be consulted for those areas, to ensure that the intellectual property rights are protected properly and in conjunction with the overall licensing vision of the property.

David Krell is the author of *The New York Yankees in Popular Culture* and *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*.

The Entertainment, Arts and Sports Law Section Welcomes New Members

The following members joined the Section between February 20, 2019 through September 4, 2019.

First District

Emily Altman
Anna Antonova
Eric W. Apple
Brooke Banks
Caroline Davina Barnard
Allison Laura Bassin
Morgan Berenbaum
Sarah Bovard
Spencer Brachfeld
Melissa Colleen Brown
Madison Chajson
Paul Scroppo Cossu
Celeste Dufournier
Paige B. Frankel
Jennifer Taylor Friedland
Melanie Friedman
Caroline Garlick
Bliss Griffin
Jesse Lawrence Hallock
Ben Halperin
Caitlin Hannibal
Catherine Rebecca Hartman
Jason R. Heller
Deborah Hrbek
Jennifer Jacques
Kelly M. Johnson
Elizabeth Clare Kaminski
Adriana Kertzer
Rachel Helen Kiwi
Misha Lee
Carolyn N. Matos Montes
Judith E. McCaffrey
Aviva A. Michelman-Dumas
Diana Theresa Mohyi
Donald Robert Munson
Christina Ngyyen
Sarah Sohyun Park
Aleena Pasha
Merissa Beth Pico
Fernando J. Ramirez
Christine Rosenblatt
Madison Roshkoff
Samantha Nicole Ros
Michael Andrew Scott
Jonathan P. Sellers
Shannon Kerry Such
Tin-Fu Tiffany Tsai
Taylor Rene Washington
Matthew Aaron Windman
Sally Vold Winters
Matthew Aaron Wolff
Tianpu Zhang
Motisola Zulu

Second District

Nikki Breeland
Laurel Dawn Brewer
Christopher A. Cooksey
Marissa Cunha
Samuel Ditchek
David H. Fuchs
Giuliano Godorecci
Levi Gourarie
Beatrice Elizabeth-Ann Hinton
Randall Kaufman
Rayna McKenzie
Mandisa Nickerson
Marcin Podsorski
Alexandria Todd
Massy Vainshtein
Shawn White
William H. Williams, Jr.

Third District

Megi Bejleri
Catherine J. Carl
Nathanial Clark
Daniel Hodgkinson
David P. Johnson

Fourth District

Mark A. Stuart

Fifth District

Jeremy Torres

Sixth District

Chloe Agelov
Szu-Yu Chen
Jennifer Mancini
Sarah Min
Trevor Thompson
Zachary Zaremba

Seventh District

Tyler Wilson

Eighth District

Mahbod Bahramian
Elizabeth Bourne
Steven Brachmann
Harley Carrol
Mare Alexander Congé
Franklin Dalton

Helen A. Drew
Canio Marasao
Trevor L. Mattice
Dustin W. Osborne
Nate Ploetz
Daniel Saltzman
Mae Sedita
Kimberly D. VanOpdorp

Ninth District
Joseph A. D'Avanzo
Alexander Farah
William Ogden
Joseph Perry

Tenth District
Anthony Accardi
Arianna Bianchino
Robert J. Burney
Bari Brandes Corbin
Andrew Deckel
Avita A. Delerme
Maria Famiglietti
Jenna A. Kon
Nicole Lamanna
Travis Lee Marmara
Jason Morrin
Saradja Paul
Andrew Segura
Sonia Sharma
Jacqueline Steinberg
Louis Stober
Thomas Tiernan

Eleventh District
Peter George Colin
Jessica Friedman
Andy Laine
Ashley Misir
Darlene Lorraine Mottley
Jason Petropoulos
Bryan Ramdat
Natalie Rivera
Benjamin T. Simpson
Katherine Marie Subasic

Twelfth District
Elyse L. Dayton
Jonikay Johnson
Cameron Kellett

Out of State
Veruchem Altusky
Lisa A. Andrzejewski
Corey Aronson
Skyler Berman
Aurielle Brooks
Melissa Cifone
Bryan Cloth
Matthew Paul Cormier
Robert Joseph Desmond
Gregory Esposito
Jaclyn Felber
Brian Michael Fielding
Gillian A. Fisher
Edward Peterie Fricker
Thomas A. Gallo
Andrew Eskandar Gergres
Warren Gilmore
Seth M. Goldstein
Byron Halford Greely
Kiel Buchanan Green
Brett A. Greenfield
Rebecca L. Grove
Chelsea Elizabeth Hack
Timothy Haga
Maximilian Thomas Hass
Stacey Haber Hofberg
Matthew Kane
Sophia Katsitadze
John Wesley Pohai Kealoha Kelly
Ameen Khdair
Jace D. Krakovitz
Yurika Kushibiki
Adrian Michael Laluk
Christopher LaRosa
David M. Lehn
Brian Lewis
Sandile Mangagula
Michael McFerron
Owen Mitchell
Elizabeth J. Moody
Leah Newman
Vivekananda Nittala
Matt Nosenchuk
Jennifer Obodo
Leeah Odom
Jaymin Arun Patel
Franchezka Louise Reichard-labault
Brandon Rosenbach
Michael A. Ross
Giancarla Sambo
Emily M. Schlaeger
Adam Schuler
Jo Schumacher
Kaitlin Serola
Jared Michael Shababb
Michael A. Siravo
Eric Matthew Tatman
Madeleine Teele
Amanda Trachtenberg
Scott G. Waldman
Connor Grady Wetherington
Katherine Wilcox
Siyasanga Batandwa Wotshela
Brielle Zarelli

NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

JOIN A COMMITTEE

Knowledge Enhancement via Committee Involvement

The EASL Section's committees address unique issues facing attorneys, the profession and the public. Committees allow you to network with other attorneys who practice in the entertainment, arts, and sports areas of the law. Committee membership gives you the opportunity to research issues and influence the laws that can affect your practice. Committees are also an outstanding way for you to achieve professional recognition and development.

The Section offers opportunities to serve on many committees.

Entertainment, Arts & Sports Law Section Committees

Please designate the committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space permits.

__ Alternative Dispute Resolution (EASL3100)
__ Copyright and Trademark (EASL1300)
__ Digital Entertainment (EASL3300)
__ Diversity (EASL3800)
__ Ethics (EASL3600)
__ Fashion Law (EASL3200)
__ Fine Arts (EASL1400)
__ In-house Counsel (EASL3700)
__ International (EASL3900)
__ Law Student Liaisons (EASL4200)
__ Legislation (EASL1030)
__ Literary Works and Related Rights (EASL1500)
__ Litigation (EASL2500)
__ Membership (EASL1040)
__ Motion Pictures (EASL1600)
__ Music and Recording Industry (EASL1700)
__ Not-for-Profit (EASL4100)
__ Phil Cowan Memorial Scholarship (EASL3500)
__ Pro Bono Steering (EASL3000)
__ Publications (EASL2000)
__ Publicity, Privacy and the Media (EASL1200)
__ Sports (EASL1800)
__ Television and Radio (EASL1100)
__ Theatre and Performing Arts (EASL2200)
__ Website (EASL4000)
__ Young Entertainment Lawyers (EASL2300)

NYSBA

Section Committees and Chairpersons

The Entertainment, Arts and Sports Law Section encourages members to participate in its programs and to contact the Section Officers or the Committee Chairs or Co-Chairs for further information.

Alternative Dispute Resolution
Peter V. Arcese
11 Broadway
Suite 615
New York, NY 10004
peter@pvacounsel.com

Judith B. Prowda
Sotheby's Institute of Art
570 Lexington Avenue
New York, NY 10022
judith.prowda@gmail.com

Copyright and Trademark
Donna E. Frosco
Dunnington Bartholow & Miller LLP
250 Park Avenue
Suite 1103
New York, NY 10177
dfrosco@dunnington.com

Teresa Lee
Pryor Cashman LLP
7 Times Square
New York, NY 10036-6569
tlee@pryorcashman.com

Digital Entertainment
Sarah Margaret Robertson
Dorsey & Whitney LLP
51 West 52nd Street
New York, NY 10019
robertson.sarah@dorsey.com

Andrew Howard Seiden
Curtis, Mallet-Prevost, Colt
& Mosle LLP
101 Park Avenue
Suite 3500
New York, NY 10178-0061
aseiden@curtis.com

Diversity
Anne S. Atkinson
Pryor Cashman LLP
7 Times Square
New York, NY 10036-6569
aatkinson@pryorcashman.com

Diversity (continued)
Cheryl L. Davis
Authors Guild
31 East 32nd Street
7th Floor
New York, NY 10016
cdavis@authorsguild.org

Fashion Law
Kristin Gabrielle Garris
Scarinci & Hollenbeck
3 Park Avenue
15th Floor
New York, NY 10016
kgarris@sh-law.com

Fine Arts
Mary Elisabeth Conroy
Edward W. Hayes P.C.
515 Madison Avenue
31st Floor
New York, NY 10022-5418
melisabeth.conroy@gmail.com

Paul Scroppo Cossu
Pryor Cashman LLP
7 Times Sq.
New York, NY 10036-6569
pcossu@pryorcashman.com

Judith B. Prowda
Sotheby's Institute of Art
570 Lexington Avenue
New York, NY 10022
judith.prowda@gmail.com

Carol J. Steinberg
Law Firm of Carol J. Steinberg
74 E. 7th St.
Suite F3
New York, NY 10003
elizabethcjs@gmail.com

Law Student Liaisons
Jason Aylesworth
Sendroff & Baruch, LLP
1500 Broadway
Suite 2201
New York, NY 10036
jaylesworth@sendroffbaruch.com

Legislation
Marc Jacobson
Marc Jacobson, PC
440 East 79th Street
11th Floor
New York, NY 10075
marc@marcjacobson.com

Steven H. Richman
Board of Elections, City of New York
32 Broadway
7th Floor
New York, NY 10004-1609
srichman@boe.nyc.ny.us

Literary Works and Related Rights
Judith B. Bass
Law Offices of Judith B. Bass
1325 Avenue of the Americas
27th Floor
New York, NY 10019
jbb@jbbasslaw.com

Joan S. Faier
1011 North Avenue
New Rochelle, NY 10804-3610
bookf@aol.com

Litigation
Brian D. Caplan
Reitler Kailas & Rosenblatt LLC
885 Third Avenue
New York, NY 10022
bcaplan@reitlerlaw.com

Paul V. LiCalsi
Robins Kaplan LLP
885 Third Avenue
20th Floor
New York, NY 10022
plicalsi@reiterlaw.com

Membership
Anne Louise LaBarbera
Thomas LaBarbera Counselors at Law PC
11 Broadway
Suite 615
New York, NY 10004
anne@tlcpc.law

Membership (cont.)
Judah S. Shapiro
33 Brandt Street
Hastings On Hudson, NY 10706
judahshap@aol.com

Motion Pictures
Ethan Y. Bordman
Ethan Y. Bordman, PLLC
244 Godwin Avenue
Ridgewood, NJ 07450
ethan@ethanbordman.com

Robert L. Seigel
The Law Office of Robert L. Seigel
575 Madison Avenue
10th Floor
New York, NY 10022
rlsentlaw@aol.com

Music
Judah S. Shapiro
33 Brandt Street
Hastings On Hudson, NY 10706
judahshap@aol.com

Not-for-Profit
Robert J. Reicher
630 Ninth Avenue
Suite 802
New York, NY 10036
rjr@rjreicherlaw.com

Pro Bono Steering
Elissa D. Hecker
Law Office of Elissa D. Hecker
64 Butterwood Lane East
Irvington, NY 10533
eheckeresq@eheckeresq.com

Pro Bono Steering (cont.)
Carol J. Steinberg
Law Firm of Carol J. Steinberg
74 E. 7th Street
Suite F3
New York, NY 10003
elizabethcjs@gmail.com

Publications
Elissa D. Hecker
Law Office of Elissa D. Hecker
64 Butterwood Lane East
Irvington, NY 10533
eheckeresq@eheckeresq.com

Publicity, Privacy and Media
Edward H. Rosenthal
Frankfurt Kurnit Klein & Selz, P.C.
488 Madison Avenue
10th Floor
New York, NY 10022-5702
erosenthal@fkks.com

Barry Werbin
Herrick Feinstein LLP
2 Park Avenue
New York, NY 10016-5603
bwerbin@herrick.com

Scholarship
Judith A. Bresler
Withers Bergman LLP
430 Park Avenue
9th Floor
New York, NY 10022
JudithABresler@gmail.com

Hon. Barbara Jaffe
Supreme Court of the State of New York
60 Centre Street
New York, NY 10013-4306
bjaffe@nycourts.gov

Sports
David S. Fogel
NBA Coaches Association
545 Fifth Avenue
Suite 640
New York, NY 10017
david.fogel@nbacoaches.com

Television and Radio
Pamela C. Jones
Law Offices of Pamela Jones
P.O. Box 222
Fairfield, CT 06824
pamela@pamelajonesesq.com

Theatre and Performing Arts
Jason P. Baruch
Sendroff & Baruch, LLP
1500 Broadway
Suite 2201
New York, NY 10036-4052
jbaruch@sendroffbaruch.com

Kathy Kim
101 Productions, Ltd.
260 West 44th Street
Suite 600
New York, NY 10036
KathyK@productions101.com

Diane F. Krausz
Diane Krausz & Associates
115 West 29th Street
3rd Floor
New York, NY 10001
DKrausz@dianekrausz.com

Young Entertainment Lawyers
Christine M. Lauture
44 Wall Street
New York, NY 10005
c.lauture@gmail.com

Publication of Articles

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

Elissa D. Hecker
Editor, *EASL Journal*
eheckeresq@eheckeresq.com

This *Journal* is published three times a year for members of the Entertainment, Arts and Sports Law Section of the New York State Bar Association. Members of the Section receive the *Journal* without charge. The views expressed in articles published in this *Journal* represent those of the authors only, and not necessarily the views of the Editor, the Entertainment, Arts and Sports Law Section or the New York State Bar Association.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 1090-8730 (print) ISSN 1933-8546 (online)

Entertainment, Arts and Sports Law Journal

NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION
One Elk Street, Albany, New York 12207-1002

Legacy donors provide a better tomorrow for generations of New Yorkers in need.
Your gifts help the Foundation fund charitable and educational law-related projects in perpetuity – safeguarding access to justice and the rule of law in New York State.

A Legacy Gift is the greatest honor that a donor can bestow upon the Foundation.
Please join these guardians of justice by making a bequest or establishing a planned gift to the Foundation of $1,000 or more.

Call the Foundation at **518/487-5650** for more information or download the form at **www.tnybf.org/legacysociety**.

THE NEW YORK BAR FOUNDATION
Advancing Justice and Fostering the Rule of Law