

# ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION FORUM ON THE ENTERTAINMENT & SPORTS INDUSTRIES

## Chair's Column

Dear Forum Members,

This is my first message to you as the incoming Chair of the Forum. I look forward to seeing you all at the Forum's Annual Meeting at the Four Seasons Hotel in Las Vegas, October 11, 12 and 13.

We have an exciting program of panels on cutting edge issues including a Mock Negotiation on eSports Investment and Team Ownership; Legal Issues in Protecting a Client's Brand; a Fireside Chat with Seth Krauss, Chief Legal Officer of Endeavor; Mindfulness; Sports Gambling; a Digital Platforms roundtable; a Plenary with leading next GEN

Entertainment and Sports Lawyers; and a Keynote Address by Merck Mercuriadis, CEO and Founder of Hipgnosis Songs Ltd.

In addition, there will be great networking opportunities including a Nightcap Reception on Friday night, a conference wide luncheon on Saturday, the annual Ted Reid reception on Saturday night and several offsite Behind the Scenes activities.



Peter J. Strand

This year the Forum instituted new CLE programming to coincide with our Spring Governing Committee meeting. In April, we met at the Guest House at Graceland in Memphis, Tennessee and presented a half-day CLE program at the Cecil C. Humphreys School of Law at the University of Memphis. This programming will continue in April 2020 when the Governing Committee meets in Milwaukee, Wisconsin next year.

I look forward to seeing you all in Vegas. ■

Best regards,

Peter J. Strand  
*Chair, ABA Forum on the Entertainment & Sports Industries*

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AMERICAN BAR ASSOCIATION

Forum on the Entertainment & Sports Industries

# Wearables In Sports

## Who Are You Betting On?

Melinda L. McLellan, Ronald B. Gaither, Elizabeth G. McCurrach, and Robyn M. Feldstein

**F**itness trackers have become ubiquitous in modern life. While going for a run, you are likely to see someone wearing a watch to track their speed or a bracelet to measure daily steps; and as the technology has improved, professional athletes have joined the fold, increasingly using wearable technology (colloquially known as “wearables”) for more sophisticated purposes. Athletes can now use wearables to gain a competitive edge, better understand their performance, and prevent injury. But as with most technological developments, new insights gained through individualized monitoring are accompanied by certain risks and heightened concerns over the privacy and protection of potentially sensitive personal data.

The uptick in the use of wearables by athletes in professional sports, coupled with the U.S. Supreme Court’s decision in *Murphy v. NCAA*<sup>1</sup> (which overturned the Professional and Amateur Sports Protection Act, clearing the way for more widespread legalized gambling), have provoked questions regarding the regulation of wearables. As sports betting becomes more sophisticated and granular, and statistical analytics improve, wearable technology’s role will continue to evolve, producing an ever-increasing volume of data that could affect a betting spread or alter the outcome of a game. Complicating the integration of wearables in professional sports is the need to balance player privacy and protection against professional and financial interests.

Given the issue’s importance, all of the major U.S. professional sports leagues have adopted their own policies governing wearables and a handful of state laws regulate certain types of biometric data wearables may collect. In Europe, the General Data Protection Regulation (GDPR), which came into effect on May 25, 2018, has put a new spotlight on safeguards around the collection and processing of personal data, adding specific references to biometric data to existing law. In the best-case scenario, wearables can effectively aid in the pursuit of excellence in sport by providing valuable metrics to players and coaches. However, their use must be tempered with an appreciation of the attendant privacy risks and ethical implications.

### WHAT ARE WEARABLE DEVICES?

Wearable technology is a blanket term for a type of electronic monitor that can be worn on the body, typically either sewn into clothing or incorporated in an accessory, that wirelessly transmits data collected through sensors in the device to the Internet. Wearables can track a wide variety of information about the user, such as heart rate, glucose levels, pulse oximetry, sleep patterns, gait, and other physical and physiological metrics that can facilitate the assessment of performance and recovery in sports. These physical and physiological data points may be considered

“biometric information” as defined by certain laws. Within the broader category of biometric information is a subset of data referred to as “biometric identifiers,” which are unique biological characteristics that can be used to identify a specific human being. For example, biometric information may include general data points such as height and weight, whereas a fingerprint is considered a biometric identifier because it is unique to an individual. Biometric identifiers are increasingly used in a variety of settings to verify identity using a distinguishing biological trait or traits (also referred to as “biometric verification” or “biometric authentication”). Although fingerprints have been used for identification purposes for over a century, technology is now being developed to identify individuals using more nuanced information, such as by their gait, odor, posture or keystroke patterns. Such advances may be beneficial in a variety of ways, but carry with them the potential to create additional privacy concerns.

### THE LACK OF UNIFORMITY IN HOW WEARABLES ARE ALLOWED IN PROFESSIONAL SPORTS

The importance of regulating the use of wearables by athletes and teams is not lost on the leagues’ governing bodies. Every major sports association has a policy addressing the use of wearables during practices and games, but the policies differ in meaningful ways.

Major League Baseball (MLB) currently permits wearables to be used in games. Among other benefits, this facilitates analysis of the causes of various ailments common among baseball players, such as specific stresses on pitchers. For example, a common injury suffered by pitchers, an ulnar collateral ligament (UCL) tear, can sideline a player for well over a year. In 2016, MLB and the MLB Players Association approved the in-game use of a sensor-laden sleeve designed to specifically measure the stress on a pitcher’s arm throughout a game. In addition to measuring pitch count, the sleeve measures arm speed, rotation and force on the elbow with every throw, possibly allowing pitchers to avoid injury through rest and pitch correction. While the sleeve is pitcher-specific, MLB players in any position may utilize other types of wearables; for example, players may use wrist sensors that measure heart rate and body strain over a day, heart rate and breathing monitors, or GPS trackers. Although use of these devices is *allowed* during games and practice, a player’s use is strictly voluntary and can be terminated by the player at any time. As an added protection, the most recent MLB Collective Bargaining Agreement (MLB CBA) states that a team must destroy the information collected by wearables if requested by a player.

Similar to the MLB CBA, the National Basketball Association’s (NBA) 2017 Collective Bargaining Agreement (NBA

CBA) sets certain standards to combat the potential manipulation of wearables, codified in Article XXII Section 13. Use is prohibited during games and use in practice is strictly voluntary. The NBA CBA specifies that “data collected from a Wearable worn at the request of a team may be used for player health and performance purposes and Team on-court tactical and strategic purposes only.” To honor this stipulation, any team requesting that a player use wearable technology must explain in writing precisely what’s being tracked, how the team will be using this data and the benefits to the player of obtaining and analyzing the data. In addition to the player, this written explanation goes to the Wearables Committee, a six-person panel composed of three representatives from the players’ union and three from the NBA itself. Per the NBA CBA, the Wearables Committee is also charged with reviewing and approving wearable devices as well as setting the proper cybersecurity standards for the retention of biometrics. The MLB CBA implemented a similar panel, the Joint Committee on Wearable Technology, composed of members from the MLB Players Association and MLB.

The NBA CBA outlines the specific consequences for misuse of players’ biometric data. If the player agrees to use a wearable, the NBA CBA explicitly prohibits the use of this collected biometric data in contract and salary negotiations. Any team found in violation of the prohibition faces a \$250,000 fine. Notably, incoming rookies are not covered by this provision, putting college players in a unique position when it comes to considering how the use (or misuse) of their biometric data may affect their careers. Despite the threat of a fine being levied on a violating team, NBA players may still find themselves wary of how their biometric information could be manipulated. By the terms of both the NBA CBA and the MLB CBA, players may cease use of wearables at any time for any reason. With technology still developing rapidly, these agreements set important standards concerning rights to this potentially sensitive data and attempts to balance both teams’ and players’ desires for improved performance and health with appropriate privacy protection.

While not codified in the 2011 Collective Bargaining Agreement, National Football League (NFL) players currently are permitted to use two types of wearables. The first, Whoop, partnered with the NFL Players Association in a five-year deal to assist players accurately track recovery between games and workouts. The deal offered players the opportunity to monetize their own athletic performance data, explicitly stating that players themselves control the data with all rights to sell it to third parties if they so choose.

In February 2018, the NFL’s competition committee agreed to share data collected by radio-frequency identification (RFID) tags placed in players’ shoulder pads during games. These RFID chips locate the players, allowing teams to track each player’s location 12 times per second. Some of the data collected is shared with broadcasters during games and sponsored online, giving viewers real-time fun facts such as Ezekiel Elliott’s sprinting pace of 21.27 miles per hour or that Baker Mayfield completed the most improbable

throw of the season.<sup>2</sup> These details enhance the level on which fans, players and coaches can interact with and analyze the games. Overtime, rules and regulations may evolve to account for greater transparency into player performance.

After more than four years of work on the proper wearable technology to track every player on the ice, the National Hockey League (NHL) saw its vision come to fruition in January 2019. At two home games in the Las Vegas Golden Knights’ arena, players wore chips inside their shoulder pads which, in addition to a connected puck, collected approximately 10,000 data points per game. To compare, prior to utilizing this technology, a typical NHL game generated approximately 350 data points per game. Eager to benefit from this immense influx of data, the NHL enlisted six different technology companies to propose various uses for the information, spanning the spectrum from virtual reality to sports gambling. While optimistic about its applications, the NHL Players’ Association (NHLPA) also is mindful of the potential intrusions on player privacy. Currently, teams will only be allowed to use the data for strategy and player deployment; bringing the related stats into salary or contract negotiations is forbidden. Given the vast expansion in data collection as well as ongoing efforts to monetize it, a more formal agreement between the league and the NHLPA likely is forthcoming.

## **THE GROWTH OF WEARABLES IN INTERNATIONAL SPORTS**

As American sports leagues and teams work to develop a practical and safe approach to wearable use, the rapid evolution of technology has required synchronization on an international level for certain sports. In July of 2015, the Fédération Internationale de Football Association (FIFA) sent a letter to the major soccer leagues around the world stating that athletes were permitted to use electronic performance and tracking system (EPTS) devices during games, so long as the relevant league approved. FIFA and the International Football Association Board (IFAB) subsequently announced a plan to develop a global standard for electronic performance and tracking systems. Soon after, EPTS devices were used during Premier League matches and the World Cup, with the technology placed in the players’ uniforms. During the most recent World Cup, teams utilized the software and communication equipment for medical and tactical use in addition to post-game analysis.

The U.S. Soccer Federation recently signed a deal worth over \$1.5 billion with Irish wearables company STATSports to provide monitoring devices for its four million registered soccer players. The APEX device tracks speed, acceleration, distance, decelerations, high-speed running, work load, and heart rate. This will be used across the Men’s and Women’s National Teams, the Paralympic National Team, Futsal National Team, Beach Soccer National Team, National Women’s Soccer League, youth national teams, and development academy clubs. Similar agreements have been reached with professional clubs across Europe, including Liverpool, Manchester United, and Tottenham Hotspur, as well as the Belgian, Brazilian, English, German, and Portuguese football associations.

The sport of rugby has taken an even more proactive approach to the regulation of wearables. In 2016, World Rugby, the international governing body for rugby and Rugby World Cup organizer, promulgated strict rules on appropriate devices and uses, allowing use during games and in practice. Referred to as “Player Monitoring Devices” in Regulation 12 Schedule 3 of the World Rugby Handbook, the regulation sets forth specific “mandatory requirements for Player Monitoring Devices without seeking to compromise the form or appeal of the game and with the overall goal being to promote player welfare and reduce the risks of injuries to Players as far as practicable.” Much of the regulation focuses on the ergonomics, construction, size, and weight of the wearable, notably requiring the wearable to be worn in a pouch either in the rear of a jersey or under the jersey. Utilized by numerous rugby clubs, one device that meets all requirements is the Catapult OptimEye S5 device, which can compute 1,000 data points per second during any one training exercise. Reception has been generally positive to the rollout of the rules, with rugby clubs seizing on opportunities to help avoid injury and capitalize on peak condition for game days.

Although the International Cricket Council has yet to release any specific rules, the use of wearables is growing exponentially in the sport. With cricket being India’s most popular sport in terms of viewership and sponsorship, companies are racing to gain wearable market share. Microsoft recently stepped into the space, partnering with Indian cricket legend Anil Kumble, to develop a so-called “Power Bat” which utilizes a wearable sticker to capture real-time data about speed on impact, twist on impact, and shot quality. Bengaluru-based startup Str8bat Sports Tech Solutions has developed a wearable device that attaches itself to cricket bats and records data including bat angle, accelerated downswing, bat speed, and speed impact. Taking the next step toward monetizing the data collected through these devices, the Australian national cricket team, Cricket Australia, reached an agreement last year to televise the team’s statistics obtained through wearable GPS technology. During the broadcast, Cricket Australia’s data for total distance run, top speed, and sprint count was displayed in real time. These statistics gave viewers a granular perspective on the game, but inherent privacy concerns lurk beneath this integration.

These recent developments highlight the quickly evolving landscape of wearables in sports and the need for manufacturers, athletes, teams and leagues to closely monitor the space for developments.

### **SPECIFIC PRIVACY CONCERNS FACING COLLEGE ATHLETES**

In the collegiate context, without a players’ union to advocate for standards concerning wearable use, ad hoc wearable use is regulated by school and National Collegiate Athletic Association (NCAA) rules. Currently, the NCAA does allow the use of wearables in games; however, it prohibits real-time data analysis during games to the extent such analysis is used to make performance-enhancing adjustments. Like with the NFL, Whoop is currently the most popular

wearable among college athletes, used by 50 teams at 12 different schools. Developed by a former Harvard squash player and his classmates to effectively correlate the relationship between fatigue and recovery, Whoop tracks heart rate, ambient temperature, skin conductivity, and sleep, with the ability for the user to enter other salient details concerning diet and physical activity. The information is tracked continuously and uploaded to a dashboard for analysis. The accessibility of the dashboard itself, as well as the volume of information displayed, has led to concern about potential privacy invasions. Even not wearing Whoop presents certain quandaries for a student-athlete. For example, a student-athlete could choose to not wear Whoop for an evening out with friends. However, this gap in tracking could signal to a coach a late night or activities the student-athlete may not have chosen to disclose. Thus far, Whoop has left it to the colleges and universities themselves to develop their own privacy guidelines, leading to variations across schools and sports. Initially, swimming and diving athletes’ dashboards were completely accessible to coaches and fellow teammates at the University of Tennessee. Considering the sensitive nature of the information, certain Tennessee athletes balked at the lack of protections leading to modifications to the public availability of the dashboards. Some Tennessee student-athletes discontinued use altogether. Although they have not been made publicly available, Harvard has adopted a set of written protocols concerning wearable use with the governing principle that anything outside athletic training should be private to the student-athlete. As wearables continue to become more sophisticated and their use increasingly ubiquitous, it is likely that guidelines of this nature will develop apace.

### **THE LAWS AND REGULATIONS GOVERNING WEARABLES**

Currently only three U.S. states—Illinois, Texas, and Washington—have implemented laws that regulate the collection and retention of biometric identifiers. The first biometric privacy law, enacted in 2008, is the Illinois Biometric Information Privacy Act (BIPA). BIPA regulates the “collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information” and creates a private right of action against businesses that do not meet the law’s requirements with respect to the collection and use of biometric information. Specifically, the law requires that companies provide written notice that a biometric identifier or biometric information is being collected or stored, including the purpose of the collection and length of time the identifier will be retained, and obtain a “written release” prior to such collection. Notably, BIPA’s definition of biometric identifiers is limited to retina or iris scans, fingerprints, voiceprints, and hand or face geometry. As a result, in their current form, BIPA does not apply to many types of data captured by a wearable tracker.

Still, it is important to be cognizant of BIPA’s requirements, as BIPA has been the subject of more than 100 lawsuits over the past few years. The subjects of these complaints range from employee time clocks to video game avatars, but the common central allegations are that the

defendants: (1) did not provide written notice explaining the purpose for collecting, and the retention period for, the biometric data; and (2) did not obtain the plaintiffs' written consent prior to the data collection. A plaintiff who sues under BIPA can recover actual damages or up to \$1,000 in liquidated damages for negligent violations, and the greater of \$5,000 or actual damages for intentional or reckless violations, plus attorneys' fees and costs.

The ultimate effect of these BIPA litigations remains unclear. In 2017, an Illinois appeals court ruled that a private entity's failure to comply with BIPA's notice and consent requirements, without any allegation of actual harm, is nothing more than a "technical violation" for which a plaintiff cannot obtain relief.<sup>3</sup> In contrast, the First District of Illinois held in 2018 that a plaintiff has standing to sue under BIPA without an allegation of actual harm.<sup>4</sup> On November 20, 2018, the Illinois Supreme Court heard oral argument whether an individual can obtain statutory damages or injunctive relief under BIPA when the only "injury" alleged is a violation of BIPA's notice-and-consent requirements. This decision will help delineate the contours of BIPA and set the stage for biometric legislation in other states and cities.

Texas's biometric law contains safeguards similar to BIPA's and includes the same definition of biometric identifiers, but has fewer specific requirements and lacks a private right of action. Like BIPA, the Texas act limits the retention of biometric data and requires a business to store, transmit, and protect biometric data at least as rigorously as it would other confidential information in its possession. Under the Texas law, the collection of biometric identifiers for a commercial purpose without notice and consent is prohibited, just as it is in BIPA. Violations of the Texas law may result in a civil action brought by the Texas attorney general, with a maximum penalty of \$25,000 per violation. To date, no such actions have been publicly reported.

Given technological developments in the time since the Illinois and Texas laws were passed (in 2008 and 2009, respectively), it is not surprising that the newer Washington state law includes "other unique biological patterns or characteristics" in its definition of biometric identifier. This description could be interpreted to cover the type of data collected by many wearables. The Washington law was passed in 2017 and was tailored to account for recent advances in biometric identifier technology. Unlike the Illinois and Texas laws that refer more generally to the "capture" or "collection" of such identifiers, the Washington law applies only to "enrollment" of biometric identifiers. To "enroll" a biometric identifier is to capture and convert it so that it can be used to identify an individual. This definition appears to account for the kind of fingerprint scanning technology used in many smart phones and tablet computers, whereby a mathematic representation of a fingerprint is derived from its image, but the image itself is not retained, nor can it be reconstructed. On its face, it seems that the law would exclude certain face scanning technology as well. It is possible that certain types of wearables could work around the inclusion of enrollment in the definition of biometric identifier by saving the information they collect in a way

that would not jeopardize the security of a person's biometric data if the centralized database were to be compromised in some manner. This type of adaptation may exclude that data from falling under the purview of Washington's biometric law.

This past year, California passed a new privacy law to further regulate how businesses collect consumer personal information. The newly passed California Consumer Privacy Act includes exercise or health data in its definition of biometric information, meaning data collected by wearables is likely to be subject to a host of new regulations beginning in January 2020. This law created controversy on several levels and was amended in September 2018, and further changes are likely before it takes full effect in 2020.

Several newly-proposed laws address the proliferation of wearables and expand their definitions of biometric information and biometric data to include data points such as "gait patterns or rhythms" and "sleep, health or exercise data that contain identifying information." As technology advances and new laws are written, it seems likely that wearables, and the personal information they collect and analyze, will be subject to further regulation.

Beyond laws governing the collection and retention of biometric data, several state data security breach laws, including the Colorado, Maryland, North Carolina, and Wisconsin statutes, have added biometric data to their definitions of personal information that, if compromised, may trigger an obligation to provide notification to regulators and affected individuals. These changes reflect an acknowledgement that as the quantity and value of data collected by wearable technology grows, wearable technology companies and their rich stores of personal information will become even more appealing targets for hackers. It is imperative for companies operating in this space, as well as individuals who use wearable devices, to be mindful of the best ways to protect personal data and to keep abreast of the various rules and regulations governing the collection and storage of that information.

At the federal level, wearables largely exist outside the current regulatory framework, though that may soon change. The Federal Food, Drug and Cosmetic Act likely does not apply to wearables unless they proactively characterize themselves as a "medical device." Although wearables, or applications they include, are beginning to be used for medical purposes, an item is not considered a "medical device" without specific manufacturer intention. However, noticing the innovations in wearable technology, the U.S. Food and Drug Administration recently announced a Digital Health Innovation Action Plan which includes wearable devices in order to "better protect and promote public health and provide continued regulatory clarity."<sup>5</sup>

With the consensus that most wearable manufacturers operate outside the purview of the Health Insurance Portability and Accountability Act (HIPAA), sharing data obtained through wearables with the medical community may create additional legal and security risks. To clarify, an individual's personal review of her data collected using a wearable is not subject to HIPAA. However, if a healthcare provider is asked to review the collected data to monitor

chronic conditions, HIPAA likely would apply. Wearable companies are becoming increasingly leery of this risk and some have taken steps to become HIPAA compliant whether or not the law applies directly to their operations. For example, in 2015, Fitbit announced that it “supports HIPAA compliance, enabling Fitbit Wellness to more effectively integrate with HIPAA-covered entities, including corporate wellness partners, health plans and self-insured employers.” Proactively working toward HIPAA compliance likely will benefit companies in this space, both by helping them to get ahead of potential government regulation and by meeting consumer expectations about the privacy of data they may assume is medical in nature due to its potential sensitivity.

Whether or not a wearable company is subject to HIPAA, the Federal Trade Commission (FTC) may step in to regulate data collection and use in certain circumstances. Under Section 5 of the FTC Act, the FTC can bring legal actions against organizations for “deceptive” or “unfair” trade practices, which the FTC has interpreted to include the violation of consumers’ privacy expectations or misleading consumers about their data security posture. The FTC released a report on wearables in January 2017, citing cross-device tracking as a key privacy concern. For example, many wearables have a functionality that allows users to review data across devices, creating a seamless experience for the user. However, this cross-device tracking creates additional sensitive data, possibly without a user’s knowledge or consent. In addition to maintaining appropriate security controls over the sensitive information, the FTC encouraged wearable companies to truthfully disclose tracking to consumers and to obtain affirmative express consent before implementing cross-device tracking functionality.

Given the exponential growth of wearable technology and increasing reliance on biometric identifiers, it seems inevitable that additional legislation will be proposed, perhaps including laws that would govern the manufacture and use of objects and clothing that harvest biometric data, as well as regulations to address the ways in which that data may be used and shared.

## GDPR

The European Union’s General Data Protection Regulation (GDPR) has garnered a great deal of attention—and created a fair amount of angst—since it came into effect in May 2018. Among its myriad objectives, the GDPR is meant to give EU data subjects greater control over how their personal data is collected, used, shared, sold, stored, retained, or otherwise processed by companies and other entities. Recital 7 of the GDPR sets forth the guiding principle that “[n]atural persons should have control of their own personal data.” Relevant to the wearables context, the GDPR establishes the right for EU data subjects to request that their data be deleted from companies’ systems, and a right to “data portability,” aimed at making it easier for individuals to transfer their personal data between service providers. The GDPR imposes heightened security and use restrictions on certain types of sensitive personal data, including the biometric data commonly collected by wearables, if it can

be used to identify an individual. In addition, EU law bans the transfer of personal data outside the EU unless appropriate safeguards, including a legally-compliant data transfer mechanism, are in place.

These restrictions may make it more difficult for companies marketing and designing wearables to retain, analyze, use, and share user personal data—particularly across borders and through social media platforms. Compliance with the GDPR requires that wearable companies be transparent with consumers about how their personal data is being processed, which includes providing comprehensive, accessible, and up-to-date privacy notices to data subjects, and obtaining appropriate consent for data processing activities that are not otherwise permitted under one of the enumerated lawful bases. Although the GDPR’s applicability outside the EU is limited to personal data processing by entities that meet certain criteria (e.g., those that are offering goods or services in the EU or are tracking or profiling data subjects in the EU), the GDPR is likely to serve as a template for other foreign jurisdictions as they implement similar laws.

## WHAT’S NEXT

Understanding the extensive implications of the use of wearables by athletes, the Sports Innovation Lab created an Athlete Data Advisory Board, consisting of 16 executives from major sports leagues, unions, tech companies, and gambling houses. The board’s mission is to produce standards and best practices for the use of wearables by the end of 2019, with discussion focusing on striking a balance between the two competing interests at play: money and privacy.

As athletes continue their pursuit of excellence and companies continue to seek profits, technology will continue evolving and the law will continue its struggle to keep pace. In the end, wearables may prove to be one of the least invasive forms of athletic performance monitoring. The Dallas Mavericks recently used specialized blood tests that analyze player fatigue and diet. While such data may help guide important decisions on recovery and performance, it is more invasive and creates greater risks if mishandled. Players were allowed to opt out of the blood testing, but in many cases such “rights” are premised on commercial agreements, not laws.

Athletes should educate themselves on their rights and the potential privacy implications if they choose to collect, share, and/or allow third parties to have access to data about their performance derived from wearables. Leagues, teams, developers, and other interested parties should closely follow legal developments to ensure they remain in compliance with applicable laws, regulations and industry best practices concerning wearable technology. For more information and guidance, please contact Melinda McLellan, Ronald Gaither, Elizabeth McCurrach, or Robyn Feldstein. ■

*The views expressed in this article are those of the authors and not necessarily those of BakerHostetler or its clients.*

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## ENDNOTES

1. *Murphy v. Nat'l Collegiate Athletic Ass'n.*, 138 S. Ct. 1461 (2018).
2. *Eben Novy-William, Dallas Cowboys' Ezekiel Elliott Runs 21 Miles an Hour, But Who Owns That Data?* BLOOMBERG BUSINESS (JAN. 8, 2019, 9:00 AM), <https://www.bloomberg.com/news/articles/2019-01-08/cowboys-elliott-runs-21-miles-an-hour-but-who-owns-that-data>; NFL NEXT GEN STATS (last accessed Jan. 15, 2019, 5:39 PM), <https://nextgenstats.nfl.com/stats/top-plays/improbable-completions/2018/all>.
3. *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317.
4. *Klaudia Sekura, et al. v. Krishna Schaumburg Tan, Inc*, 2018 IL App (1st) 180175.
5. *Digital Health*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medicaldevices/digitalhealth/> (last updated Dec. 13, 2018).

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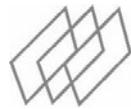
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# To Have and Have Not

## Conflicts of Interest in Entertainment Law

Yocel Alonso

### I. ARE CONFLICTS OF INTEREST ISSUES QUAINT?

There is no shortage of media reporting on Power Lawyers, Super Lawyers, their wealth, and the stars they represent.<sup>1</sup> However, no mention is made of the Super-Duper Lawyers' conflicts of interest and legal entanglements, which may leave the impression that the ethical rules of our profession do not apply to these masters of the universe. This impression is wrong and is belied by the fact that sooner or later lawyers who disregard the rules find their way to Desolation Row and an unwelcome free listing in the "Former Lawyers" section of the state bar journal.

The practice of entertainment law is perceived as a high wire act by professional liability carriers—some refuse coverage altogether. This is true because a vast majority of claims are resolved through confidential settlements. Yet, when *Dimple's got the law looking for you*, as George Strait might say, and the dispute goes to court, they tend to be close encounters of the TMZ kind; not the garden variety business dispute.<sup>2</sup>

While legal fields such as real estate and commercial law are slow to change, entertainment lawyers are required to apply "old school" ethical rules to revolutionary technological changes. These rules have turned the practice on its head and will continue to do so in the foreseeable future.<sup>3</sup> So while an article on conflicts of interest may be less well received than playing *La Macarena*, a thorough understanding of the application of the disciplinary rules to the practice of entertainment law is essential.

The American Bar Association's Model Rules of Professional Conduct<sup>4</sup> ("Model Rules") serve as a model for the ethics rules in most states, including Georgia (Georgia Rules),<sup>5</sup> Florida (Florida Rules),<sup>6</sup> New York (New York Rules),<sup>7</sup> Tennessee (Tennessee Rules),<sup>8</sup> and Texas (Texas Rules),<sup>9</sup> but not California (California Rules).<sup>10</sup> In each state's jurisdiction, the proscriptions are typically found in state codes. This article is a cross-country sashay through the landscape of the most important court decisions on conflicts of law in the entertainment world. New York, Tennessee, and Texas law are referenced throughout because they are usually consistent with the Model Rules, meaning they hold lawyers to a high standard of conduct, and have a rich body of case law.<sup>11</sup> Where possible, the citations in the article are to court decisions involving an entertainment law dispute.

The American Law Institute (ALI) publishes a Restatement of the Law Governing Lawyers. Now in its third edition, the Restatement notes that "professional discipline of a lawyer in the United States is conducted pursuant to regulations contained in regulatory codes that have been

approved in most states by the highest court in the jurisdiction in which the lawyer has been admitted."<sup>12</sup> For example, in Texas these rules are found in the Disciplinary Rules of Professional Conduct<sup>13</sup> ("Texas Rules") and the Texas Rules of Evidence<sup>14</sup> ("TRE"). These issues are joined at the hip with conflict of interest issues that arise when attorneys—or their law firms—attempt to represent clients with adverse positions. Although some conflicts are obvious, others are not. The focus of this article will not be on "garden variety" malpractice, such as improper solicitation of clients, bar-ratry, inattention to client matters, the failure to segregate client funds, failure to communicate with clients, etc., which apply to all practice areas.<sup>15</sup> Instead it will discuss the rules and recent case law pertaining to conflicts of interest, which are the most challenging issues in the practice of entertainment law.

### II. WHO ARE THOSE GUYS?

In federal cases, privileges are governed by the common law as interpreted by the federal courts. However, when a state cause of action is involved, the privilege is determined by state law.<sup>16</sup> The importance of maintaining client confidentiality is the foundation of conflict of interest jurisprudence. A client can refuse to disclose and prevent any other person from disclosing confidential communications made for the purpose of facilitating an attorney's legal services.<sup>17</sup> In addition to the client, an attorney, the client's guardian or representative can also claim this privilege on the client's behalf.<sup>18</sup> These confidential communications can include communications between the client or her representatives and her attorney or the attorney's representatives, the client and her representatives, or the attorney and her representatives.<sup>19</sup>

The attorney-client privilege is a cornerstone of our jurisprudence and has no expiration date.<sup>20</sup> "While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few exceptions."<sup>21</sup> The attorney-client relationship is generally subject to the rules that govern the law of contracts.<sup>22</sup> Absent privity or a duty arising out of tort law, an attorney generally owes no duty to a third party.<sup>23</sup> In *Dimensional Music Publishing, LLP v. Kersey*,<sup>24</sup> Law Firm Paul Weiss' motion to dismiss a music publisher's negligence action was denied, the court holding that, under New York law, "a relationship between the two that, if not rising to an attorney-client relationship, was at least a relationship of privity."<sup>25</sup>

There are also "ethical considerations overlaying the contractual relationship."<sup>26</sup> Lawyers must conduct their business with "honesty and loyalty, always keeping the

client's best interest in mind."<sup>27</sup> As such, "the relationship of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client on the basis of the strictest fidelity and honor."<sup>28</sup> Once a duty is established, the client has standing to sue the attorney for professional malpractice in contract and in tort, should there be a breach.<sup>29</sup>

Attorneys may unknowingly create an attorney-client relationship with a person just by consulting with them on a matter. "An agreement to form an attorney-client-relationship may be implied from the conduct of the parties."<sup>30</sup> However, there must be objective indications of the meeting of the minds ("Kook test").<sup>31</sup> For example, in *Love v. The Mail on Sunday*,<sup>32</sup> Brian Wilson's motion to disqualify Beach Boys Band member Mike Love's attorney was denied after the court found that no attorney-client relationship existed and, even if it did, the alleged matters were not substantially related.<sup>33</sup> "Whether the contract is express or implied, there must be a meeting of the minds."<sup>34</sup> "Moreover, the relationship does not depend on the payment of a fee and may exist as a result of rendering services gratuitously."<sup>35</sup>

When there is an implied contract, the meeting of the minds that an attorney will render professional services to the client can be inferred from the conduct of the parties or the circumstances.<sup>36</sup> Sometimes individuals who are not clients call attorneys to seek legal advice over the telephone. The attorney should first confirm that there are no conflicts of interest with an existing client before rendering any gratuitous advice. Otherwise, even with minimal contacts, a conflict of interest could arise leaving the attorney open to a possible malpractice claim.<sup>37</sup>

"An attorney and a client can create an attorney-client relationship either explicitly or implicitly by conduct manifesting an intention to create the attorney-client relationship."<sup>38</sup> In rock star Trent Reznor's lawsuit against his manager and the manager's accountants, a New York District Court held that, "[s]ince Reznor was not Szekelyi's client, Szekelyi would be liable to Reznor for malpractice only where he was aware that the non-client would rely on his work for a particular purpose."<sup>39</sup> In *City of El Paso v. Salas-Porras Soule*,<sup>40</sup> the court reviewed the law firm billing statements and held that an attorney-client relationship existed even though the company was not billed and the firm did not meet with representatives of the company.<sup>41</sup> The court reasoned that the billing statements were replete with references, conferences, and tax planning sessions made on behalf of the company.<sup>42</sup> Also, when an attorney becomes the general counsel for a partnership, she also creates an attorney-client relationship with the general partner.<sup>43</sup> The court reached a different result where a partner in the *Violent Femmes* band was unable to show he had a reasonable belief that he was previously represented by his partner's lawyer.<sup>44</sup> Accordingly, his motion for disqualification was denied.<sup>45</sup>

Although a consultation does not establish an attorney-client relationship *per se*, attorneys are still required to maintain confidentiality.<sup>46</sup> Model Rule 1.18 provides strong protection for the rights of and information learned from

"prospective clients."<sup>47</sup> This rule is also supported by the common law.<sup>48</sup> "Even in the absence of an express attorney-client relationship . . . a lawyer may owe a fiduciary obligation to persons with whom he deals."<sup>49</sup> "[A] fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe or rely on her."<sup>50</sup>

### ***A. Stir It Up: Exceptions to the Privity Requirement***

Of course, there cannot be a rule without exceptions to keep us awake at night. The privity requirement does not preclude tort-based causes of action against lawyers under section 552 of the Restatement (Second) of Torts.<sup>51</sup> For instance, the Texas Supreme Court has distinguished the negligent misrepresentation cause of action from traditional legal malpractice claims, including attorney opinion letters.<sup>52</sup> Not all jurisdictions follow this application, in *Source Entm't Grp. v. Baldonado & Assoc., P.C.*,<sup>53</sup> the management company for artist Tiffany Evans was allowed by the court to maintain a tortious interference with contract and defamation lawsuit against Evans' lawyers. However, the court held the New Jersey's "litigation privilege" did not apply to a letter sent by the lawyers to Sony Records and the William Morris Agency.<sup>54</sup>

Similarly, lawyers may be liable to third parties for the violation of certain statutes, such as the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>55</sup> This was the case in *Binghaw v. Zolt*,<sup>56</sup> where Bob Marley's estate successfully sued the lawyers who helped Marley's wife divert royalty income from the estate after the singer's death.<sup>57</sup> However, even if their conduct is "frivolous or without merit," lawyers have qualified immunity from civil liability to non-clients if the attorney's conduct "is part of the discharge of their duties in representing his or her client."<sup>58</sup> This rule has also been extended to attorney communications with potential clients.<sup>59</sup>

In a ruling that has had far-reaching implications in claims against accountants and lawyers, the United States Supreme Court denied a private cause of action under the federal securities fraud statutes to defrauded investors against defendants which had "agreed to arrangements that allowed the investors' company to mislead its auditors and issue a misleading financial statement affecting the stock price."<sup>60</sup> The Court rejected the investors' theory of "scheme liability" because there was no actual reliance on the defendants "own deceptive conduct" which, in any case, was "too remote to satisfy the requirement of reliance."<sup>61</sup>

### ***B. Disclosure of Confidential Information***

Model Rule 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).<sup>62</sup> Model Rule 1.6(b) provides that the attorney-client privilege does not apply to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing

a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.<sup>63</sup>

The Texas Rules afford many of the same exceptions to disclosure of confidential information as the TRE.<sup>64</sup> All jurisdictions allow disclosure when an attorney is involved in a lawsuit with her client, and when the client uses the attorney's services in furtherance of a crime or fraud.<sup>65</sup>

The disciplinary rules also require a lawyer to reveal confidential information if the lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person.<sup>66</sup> In John Grisham's best-seller, *A Time to Kill*, the client revealed his intentions to commit a crime to his lawyer, but it was questionable how clear or likely it was that the client was going to commit the crime.<sup>67</sup> The attorney did not reveal the confidential communication to the authorities and his client killed two people.<sup>68</sup> Under Mississippi law, as in the Model Rules, the attorney may, but is not required, to disclose the information.<sup>69</sup> Then again, if the attorney had made the disclosure the movie would not have a plot.

It is not easy for a third party to obtain presumably confidential information on the basis of the crime-fraud exception. In one of the Bill Cosby sexual assault cases, the court denied the plaintiff's request for Cosby's communications with attorney Martin Singer because she was not able to "make out a *prima facie* case that the lawyer was used in order to promote an intended, continuing criminal or fraudulent activity."<sup>70</sup> A more common situation is where a litigator becomes aware that their client is going to commit perjury, thereby triggering the obligation to disclose.<sup>71</sup>

### **C. Back Stabbers: Representation Adverse to a Client's Interests**

While clients can relate to the concepts of disloyalty and betrayal and of course the O'Jays' hit song, they may not be aware of the conflict of interest rules designed to prevent

even the appearance of improper conduct. It's our job to educate them before they learn the rules from a malpractice lawyer. Our obligation to decline representation is one reason why the practice of law is a profession and not just a business. Many lawyers do not realize that the foundation of the rules governing conflicts of interest is the need to maintain confidentiality of client information. When we accept an engagement, we have a fiduciary duty to disclose fully all facts which are material to the client's representation.<sup>72</sup>

Rule 1.07 of the Model Rules generally provides that "a lawyer shall *not* represent a client if the representation involves a concurrent conflict of interest."<sup>73</sup> A concurrent conflict of interest exists if:

(A)(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>74</sup>

### **1. The Line in the Sand: What Does "Directly Adverse" Mean?**

The Tennessee Rules of Professional Conduct do not specifically define "directly adverse" but explain that "a directly adverse conflict may arise when a lawyer is required to cross examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit."<sup>75</sup> General Principle No. 6 then provides specific examples of directly adverse actions by attorneys.<sup>76</sup>

However, Comment 6 to Rule 1.06 of the Texas Rules identifies a representation of a client as being "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.<sup>77</sup> The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.<sup>78</sup> On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

In the very contentious Marvel Enterprises bankruptcy case, the Third Circuit addressed the question of whether the Trustee/Attorney's law firm was disqualified from representing the Trustee because of its prior representation of another creditor, Chase Bank.<sup>79</sup> The court held that the law firm was not disqualified, where Chase had executed a conflicts waiver and agreed to a termination of its representation by the Trustee's law firm.<sup>80</sup> Under the United States Bankruptcy Code, the appearance of impropriety was

insufficient cause for disqualification and that a potential or actual conflict must be shown.<sup>81</sup>

A conflict of interest also exists where the lawyer's interest interferes with those of the client.<sup>82</sup> For example, it would be improper for a lawyer to represent a client in connection with a valuable endorsement agreement being negotiated by a lawyer's management company where the management company's commission would be 10 percent of millions of dollars while the legal fees may only be thousands of dollars. "[i]n the eyes of a disinterested lawyer, the management company's interest in closing the transaction would interfere with the law firm's ability to render independent legal advice with respect to the transaction."<sup>83</sup>

Lawyers may represent two clients if their interests are aligned.<sup>84</sup> For example, legendary actress Mary Pickford was represented by a lawyer who regularly represented a "wannabe" management company in the effort to terminate the contract with her current management company.<sup>85</sup> Pickford negotiated a new contract with her current management company, and then sued to avoid payment to her lawyer, claiming a conflict of interest.<sup>86</sup> The court agreed that an attorney who represents two masters is not entitled to compensation from either one, but found for the lawyer, because the interests of the parties were in consonance.<sup>87</sup> Likewise, the motion to disqualify the law firm representing Disney and the screenwriter of *Bringing Down the House* was denied because the plaintiff could not show that a conflict of interest existed between Disney and the screenwriter.<sup>88</sup>

With full disclosure, lawyers may also represent clients who are generally adverse in unrelated matters.<sup>89</sup> It is not uncommon for lawyers or law firms to represent corporations which may be competitors, but whose representation involves generally unrelated matters. In these situations, it is advisable to notify a potential client that you represent a competitor. This could help prevent any potential conflicts and, at the same time, prevent any surprises which may upset clients.<sup>90</sup> Of course, lawyers cannot sue a current client, even if the lawsuit is unrelated to the subject matter of the lawyer's representation.<sup>91</sup>

## 2. Attorney Employment: Getting to Know You.

In order to determine if conflicts exist, lawyers should interview their prospective clients carefully. The interview should cover such areas as their background, previous lawsuits, business competition and partners, and of course, possible relationships with existing clients.<sup>92</sup> It is important to do this at the very beginning because, under certain circumstances, attorneys may also be disqualified based on conflicts of interest with prospective clients.<sup>93</sup>

If the engagement is accepted, there is no substitute for a clear written agreement. Remembering in Texas, if the contract provides for a contingent fee, it must be in writing.<sup>94</sup> It must also be in compliance with the disciplinary rules, especially the rules governing contingent fee contracts.<sup>95</sup> "Lawyers have a duty, at the outset of the representation, to 'inform a client of the basis or rate of the fee' and the contract's implications for the client."<sup>96</sup> An oral contingent fee contract is voidable by the client.<sup>97</sup> While a contingent fee

agreement should not be unconscionable, some states—not including Texas—have held that an unconscionable agreement may be ratified by the client.<sup>98</sup>

Model Rule 1.8 and Rule 1.8 of the Tennessee Rules of Professional Conduct generally do not permit lawyers to take an interest in the subject matter of the lawsuit, particularly when the interest may be adverse to the client.<sup>99</sup> The purpose of these rules is to protect the client from over-reaching by lawyers on their fees. This is what happened in the case of *In re Stover*,<sup>100</sup> where the lawyer/manager was disbarred because she refused to take down an artist's website that was created by the lawyer after termination of the attorney-client relationship.<sup>101</sup> Before these rules were enacted, it was not uncommon for lawyers to take an interest in a client's book and media rights, particularly when the cases garnered national attention.

This was the case, for example, in *Ray v. Foreman*,<sup>102</sup> where James Earl Ray assigned the literary rights concerning Martin Luther King Jr.'s murder to famed defense lawyer Percy Foreman and then sued Foreman for breaking his contract and taking unfair advantage of him, even though Foreman had assigned back the rights when Ray agreed to a plea of guilty.<sup>103</sup>

Lawyers who prefer to avoid a trial before a jury of their clients' peers may include an arbitration provision, but it should first be cleared with their professional liability carriers.<sup>104</sup> Also, the scope of representation should be defined as narrowly as possible to protect the attorney from possible malpractice and conflict of interest claims based on matters on which the attorney was not employed.<sup>105</sup> All things being equal, it's easier to show that a previous intermittent or limited relationship is not substantially related to a current representation, as opposed to a general retainer.

The Agreement can also provide that the attorney is representing a corporation and not its individual shareholders,<sup>106</sup> although extreme care needs to be taken to make sure that all parties with potential conflicts sign the document. Even then, the lawyer may still have fiduciary duties to shareholders.<sup>107</sup>

Without a written agreement a fact issue may exist regarding who the attorney is representing and who is responsible for the fees.<sup>108</sup> Employment contracts are likely going to be construed against lawyers, who should plan accordingly.<sup>109</sup> For example, while the court in *McDonnell, Dyer, P.L.C. v. Select-O-Hits, Inc.*,<sup>110</sup> found that "the contract fee of \$120,000.00 was excessive," it still awarded the amount of \$89,685.00 against Select-O-Hits, a record distribution company based in Memphis, arising out of its non-payment of attorney fees.<sup>111</sup> If the lawyer for whatever reason does not have a written agreement at the beginning of the representation, this should be handled as soon as possible. As a last resort, the courts have held that a client may ratify an employment agreement under certain circumstances.<sup>112</sup>

Attorneys who are *not* going to undertake representation should advise the person in writing. Attorneys have a duty to inform people of their non-representation when they are—or should be—aware that the attorney's conduct could lead a reasonable person to believe that she is

being represented.<sup>113</sup> Lawyers cannot leave people under the impression that they are representing them or the “transaction.”<sup>114</sup> Of course, if the person understands that the attorney is not representing them, there is no duty.<sup>115</sup> The person should be advised of any applicable statutes of limitation and filing deadlines, not only for the benefit of the individual, but also to protect the law firm from potential exposure.<sup>116</sup>

### 3. Client Waivers: Tell It Like It Is.

Model Rule 1.07(b) allows lawyers to represent clients, notwithstanding the existence of a concurrent conflict if:

(b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.<sup>117</sup>

Lawyers can represent clients if they reasonably believe that the representation of each client will not be materially affected, and each client consents to representation after full disclosure of the existence, nature, implications, and possible adverse consequences of common representation and any advantages involved.<sup>118</sup> Attorneys must disclose all possible conflicts before accepting employment and conflicts which arise during the course of employment.<sup>119</sup>

An example of an effective conflicts waiver is the case of *Sharp v. Next Entertainment, Inc.*,<sup>120</sup> where the court affirmed an order denying the disqualification of the Rothner Law Firm, which was representing the Writers Guild of America and some of the plaintiff-members in a class action alleging that reality television producers were not complying with minimum labor standards, because the law firm filed effective conflict waivers signed by both the Writers Guild and the plaintiffs.<sup>121</sup> Having ruled that the waivers were sufficient, the appellate court did not reach the issue of propriety of the “ethical wall” between the attorney consulted by the Writers Guild and the other members of the Rothner Law Firm which had been ordered by the trial court.<sup>122</sup>

Another example of an effective waiver resulting in a summary judgment in favor of the attorney is the case of *Burton v. Selker*,<sup>123</sup> involving the purchase of the now defunct United States Wrestling Association.<sup>124</sup> The court found that the client has “expressly waived conflicts of interest when he signed and returned via fax (the attorney’s) letter explaining the conflicts...”<sup>125</sup> For example, lawyers must disclose the sources of their compensation, including finder’s fees.<sup>126</sup> To accomplish this, lawyers should draft a detailed consent or waiver form to be signed by the clients. If one of the clients is a non-primary or “accommodation” client (a/k/a easy rider), the consent form should so state. It should be as specific as possible and include the accommodation clients’ acknowledgement that she understands that the information disclosed to the attorneys will be shared

with the primary client.<sup>127</sup> If the client declines to sign the proposed waiver, the attorney should probably decline representation in the matter or otherwise face disqualification or worse.<sup>128</sup>

The lawyer’s obligation does not end there. Lawyers must continue to keep clients informed of all material developments during the course of the representation.<sup>129</sup> The amount of disclosure required depends on the sophistication of the client. Comment 8 Rule 1.06 of the Texas Rules states that “[d]isclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent.”<sup>130</sup> Of course, telling a client the truth, including an adverse development, is not malpractice, even if the client cannot handle the truth.<sup>131</sup>

### 4. The Accidental Mummies Tour and Client Consents.

Lawyers who obtain the client consents must reasonably believe that the representation of each client will not be materially affected.<sup>132</sup> But sometimes a conflict of interest cannot be overcome by consent. In the case of *City of El Paso v. Salas-Porras Soule*,<sup>133</sup> the client executed a waiver letter which admitted that the law firm did not represent Parallax.<sup>134</sup> However, the court found that the waiver letter was invalid because it was inconsistent with the evidence and testimony heard in the case.<sup>135</sup> Just because the letter said the firm did not represent the company, did not make it so.<sup>136</sup> But in *Lessing v. Gibbons*,<sup>137</sup> the court, relying on actress Dolores Del Rio’s waivers and her attorney’s effective client communications, ruled against Del Rio’s conflict of interest claims against her attorney.<sup>138</sup>

Even more troubling is the case of *Eternal Preservation Associates, LLC v. Accidental Mummies Touring Company, LLC*,<sup>139</sup> which involved a dispute between the two equal partners in a limited liability company involved in the United States tour of 36 mummies from Mexico.<sup>140</sup> The company sued one of the partner’s companies and the disgruntled partner moved to disqualify the company’s attorney.<sup>141</sup> A waiver had been executed by the company, but not signed by the disgruntled partner.<sup>142</sup> The court, applying Michigan common law, declined to disqualify the lawyer for the limited liability company but issued the following *post mortem*: “[t]hat is not to say that [the disgruntled partner] may not have recourse against [the lawyer] directly. An attorney who represents a closely held corporation and a controlling shareholder may also have a fiduciary to the other shareholder[s].”<sup>143</sup>

Lawyers may feel that they cannot represent a client fairly without breaching the confidences and privileges of another client. And lawyers may also feel that they cannot fairly and objectively represent a client because of the lawyer’s own interests or responsibilities to others. If so, Comment 4 of Texas Rule 1.06 states that this type of conflict forecloses other alternatives, such as obtaining the client’s consent, which would otherwise be available.<sup>144</sup> In these situations it is best to decline representation or withdraw from representation of the matter to avoid liability from a possible malpractice claim.<sup>145</sup> A lawyer can still represent the client in another matter where no conflicts exist.

## 5. Hot Potatoes.

If a lawyer determines that there is a conflict or a potential conflict in violation of the rules, she can do one of two things: abstain from representing the client or withdraw from the representation when a conflict arises. As soon as the attorney becomes aware of a conflict of interest, she should abstain or withdraw from representation.<sup>146</sup> For example, in *Cassidy v. Lourim*,<sup>147</sup> the attorney for the parents of deceased vocalist Eva Cassidy and Blix Records, Inc. was disqualified from continuing representation in a copyright infringement action where a conflict of interest arose after suit was filed.<sup>148</sup> The federal courts for the Southern District of New York also allow attorneys to withdraw if there are irreconcilable differences between the attorney and the client or if the client refuses to pay her bill.<sup>149</sup>

The failure to withdraw from representation after a conflict arises between clients can also get entertainment lawyers sued. For instance, attorney Dina LaPolt was sued by lead singer Steven Tyler, artist management company Kovac Media Group, Inc. d/b/a Tenth Street Entertainment (“TSE”) for breach of fiduciary duty, breach of the duty of confidence, intentional interference with contract, and intentional interference with prospective economic advantage for allegedly undermining the management of band *Aerosmith*.<sup>150</sup> The Complaint alleged, *inter alia*, that LaPolt “provided legal advice to both [Tyler] and TSE on negotiations, deal points, agreements, and various other matters.”<sup>151</sup> LaPolt countered with a motion to strike the complaint under the California’s anti-SLAPP statute (strategic lawsuits against public participation).<sup>152</sup> LaPolt’s motion was granted by the trial court and overturned on appeal in an unpublished and nonciteable opinion.<sup>153</sup>

If a lawyer is prohibited from representing a client, it is axiomatic that no other lawyer in the firm can do so. Courts have also followed the so-called “Hot Potato Doctrine” which provides one client cannot be dropped “like a hot potato” because the firm has found a case more to its liking, absent a conflict.<sup>154</sup> For example, in a suit by an artist against the record company, attorney Russell Frackman and his law firm, Mitchell, Silberberg & Knupp LLP, experienced the opposite result.<sup>155</sup> Frackman and his law firm were disqualified where, after the client declined to sign a waiver, they proceeded anyway to represent the defendant record company, EMI Group Limited.<sup>156</sup> The court based its disqualification on the basis that Frackman’s firm had represented the client for 10 years, including the negotiation of the recording contracts that were at issue in the case and one of the law firm’s partners still owned an ownership interest in the artist that Frackman was opposing.<sup>157</sup>

### ***D. It All Comes Back: Representation Adverse to Former Client’s Interests***

Model Rule 1.9<sup>158</sup> and its equivalent, Rule 1.09 of the Texas Rules,<sup>159</sup> are derived from the landmark case of *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*,<sup>160</sup> holding that “the former client need show no more than that matters embraced within the pending suit . . . are substantially related to the matters or cause of action when the attorney previously represented the former client.”<sup>161</sup> The black letter rules provide

that “a lawyer who has personally represented a client in a matter shall not thereafter represent another person in a substantially related matter which is materially adverse to the former client.”<sup>162</sup> Ignoring this rule can result in a contract being voided by a court, as Pamela Anderson successfully did in a contract dispute concerning a proposed motion picture titled *Hello, She Lied*.<sup>163</sup> This “side-switching” also earned John Travolta’s former attorney a three year suspension from the practice of law ordered by the Florida Supreme Court.<sup>164</sup>

These rules are extended to lawyers who are or have become associated with a firm whose attorneys are prohibited from representing a client.<sup>165</sup> They also apply to a law firm whose former attorneys would be prohibited from representing a client.<sup>166</sup> Just because an attorney leaves does not cleanse the firm of the conflict of interest. The firm still has a duty of confidentiality and loyalty to former clients.<sup>167</sup>

If there is a “reasonable probability” that the representation would cause the lawyer to violate the attorney-client privilege with the former client by an unauthorized disclosure of confidential information or use of that information to the former client’s disadvantage, the representation would be improper.<sup>168</sup>

In the Fifth Circuit, the applicable test for disqualification of attorneys is articulated in *In re American Airlines, Inc.*<sup>169</sup> “to disqualify opposing counsel on the ground of former representation must establish two elements: ‘1) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and 2) substantial relationship between the subject matter of the former and present representations.’”<sup>170</sup>

With respect to the first requirement, there is disagreement among the circuits as to whether clients and non-clients have standing to move for disqualification. The leading case on the question is also a Fifth Circuit opinion, *In re Yarn Processing Patent Validity Litigation*,<sup>171</sup> where the court denied a patent assignee’s motion to disqualify a lawyer that had previously advised a dismissed co-defendant on the patent that was at issue in the case.<sup>172</sup>

The “substantially related” prohibition “involves situations where a lawyer may have acquired confidential information concerning a prior client that could be used either to that prior client’s disadvantage or for the advantage of the lawyer’s current client or some other person.”<sup>173</sup> In *Prisco v. Westgate Entertainment, Inc.*,<sup>174</sup> the former general counsel for a partnership created to explore the wreck of the Titanic and exploit it in a television show, was disqualified from representing the limited partners in a lawsuit against one of the general partners.<sup>175</sup> However, the court in *Cremmers v. Brennan*<sup>176</sup> denied a motion to disqualify the attorney for singer Amber in a lawsuit against the Nightlife Productions booking agency for unpaid performances.<sup>177</sup> Despite the fact that another member of the Plaintiff’s law firm had represented Nightlife, the court found that the matters were not substantially related and the firm’s representation of Nightlife had been “intermittent,” “limited” and did not involve proprietary information.<sup>178</sup>

Although permissible, it is not generally advisable to sue a former client. In *NCNB Texas Nat. Bank v. Coker*,<sup>179</sup> the

court held that a former client can disqualify an attorney if the matter involved in the case is substantially related to the matters in the former representation.<sup>180</sup> Comment 11 Texas Rule 1.06 also makes it clear that this is not advisable.<sup>181</sup>

Most cases turn on the “substantially related” test. For example, in *Bier v. Grodsky & Olecki*,<sup>182</sup> Marilyn Manson’s law firm was able to defeat a conflict of interest claim when a former band member was not able to show that the previous representation was not substantially related.<sup>183</sup>

### ***E. You Can’t Always Get What You Want: Representing Too Many Clients in the Same or Related Matter***

Attorneys representing multiple clients have to be especially careful to assure that all clients are kept informed and that each client’s best interest is being represented. Even if there is no actual conflict of interest, lawyers have a duty to explain the implications of joint representation to the extent “reasonably necessary to permit the client[s] to make informed decisions regarding the representation.”<sup>184</sup> For example, Victory Lane Productions, LLC, a NASCAR collectibles merchandiser, claimed that it had been damaged by Paul, Hastings, Janofsky & Walker LLP for undisclosed conflict of interest.<sup>185</sup> Victory Lane alleged that the law firm wrongfully represented it and another creditor against the same defendant.<sup>186</sup> After the defendant filed bankruptcy, Victory Lane filed suit against the law firm, alleging that the firm did not disclose its representation of the other creditor, thereby breaching its contract and fiduciary duties and committing professional malpractice.<sup>187</sup> The law firm’s motion for summary judgment was mostly denied by the court, which reasoned that “[the lawyer’s] actual knowledge of the alleged conflict of interest need not be proven for Victory Lane to succeed on its breach of fiduciary duty claim.”<sup>188</sup> “Victory Lane need[ed] only [to] prove that under the circumstances, Defendants reasonably should have known of the alleged conflict, and should have informed Victory Lane of said conflict.”<sup>189</sup> As such, Victory Lane was entitled to a jury trial for its damages, including the possible acceptance of a settlement offer made by the defendant and the \$60,000.00 in fees it had paid to the firm.<sup>190</sup>

Another example comes from *Bolton v. Weil, Gotshal, & Manges, LLP*,<sup>191</sup> where singer Michael Bolton sued the law firm representing him, Sony Music Entertainment, and Warner-Chappell Music Limited for breach of fiduciary duty arising out of their unsuccessful defense of the Isley Brothers’ copyright infringement case against Bolton.<sup>192</sup> In response, Weil, Gotshal, & Manges followed the “sued attorney’s playbook” and filed a third party action against Bolton’s personal attorneys for contribution and indemnity.<sup>193</sup>

Attorneys have a responsibility to every client, regardless of their number and even if there is an aggregate settlement. An aggregate settlement occurs when an attorney who represents two or more clients settles the entire case without individual negotiations on behalf of any one client.<sup>194</sup> An attorney has a duty of loyalty and good faith to each individual client and is required to obtain individual settlements unless the clients are informed and consent otherwise in writing.<sup>195</sup>

### ***F. Ramblin’ Man: Hiring Lawyers That Create Client Conflicts***

Conflict of interest situations may arise when attorneys are hired by a new firm which represents a party adverse to a former client. Before laterally hiring an attorney, (or even a law student) the firm should confirm that neither the attorney, nor her former firm, represents someone adverse to the firm’s clients.<sup>196</sup> In *National Medical v. Godbey*,<sup>197</sup> the Texas Supreme Court held that two irrebuttable presumptions applied to a firm which laterally hired an attorney who held confidences of a client which the firm was suing.<sup>198</sup> The court ruled: (1) it was presumed that the attorney had access to the former client’s confidences; and (2) that knowledge was imputed to the attorneys in his new firm.<sup>199</sup>

This “Typhoid Mary” type Rule, as it’s been dubbed by Judge John McClellan Marshall, has not been extended to disqualify lawyers who have represented a client’s previous counsel in litigation against the same client.<sup>200</sup> The “Typhoid Mary” Rule has also not been extended to disqualify law firms where the alleged malpractice occurred before the new lawyer joined the firm and the firm did not represent the client thereafter.<sup>201</sup>

The Texas Supreme Court has also held that a lawyer who is an at-will employee of a law firm “may properly plan to go into competition with his employer and may take active steps to do so while still employed.”<sup>202</sup> However, the lawyer still has a “fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate’s employer.”<sup>203</sup>

Affiliated law firms are bound by the same rules.<sup>204</sup> This includes two law firms that have a lawyer common to both.<sup>205</sup> This rule also applies to contract lawyers.<sup>206</sup> Conflict of interest issues not only apply to the lawyer’s associates, but also to the support staff.<sup>207</sup> Texas courts have decided a number of cases where a member of a firm’s support staff is employed by another firm, and has possible conflicts of interest problems with the new firm’s clients.<sup>208</sup>

If a non-lawyer employee works on a matter and is later hired by another firm on the opposing side of the same matter, it is presumed the employee possesses confidences and secrets gained from the first employer.<sup>209</sup> If a secretary or paralegal changes firms and creates a conflict by going on the opposing side of the same matter, she is not automatically disqualified if the new firm establishes that the employee has been properly screened from the matter.<sup>210</sup> Of course, disqualification is mandatory if the information has been actually disclosed, or if screening would be ineffectual. The test for disqualification is not actual disclosure, but the threat of disclosure.<sup>211</sup>

The Texas Supreme Court has held that although “the presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that information was shared with a new employer may be overcome.”<sup>212</sup> The only way this presumption may be overcome is: (1) to instruct the legal assistant “not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal has information relating to the former employer’s representation,” and

(2) to “take other reasonable steps to ensure that the paralegal does not work in connection with matters on which the paralegal worked during the prior employment, absent client consent.”<sup>213</sup>

### **G. Screening Procedures: Chinese Wall or Maginot Line?**

The overrated “Chinese Wall” is a well-known, but generally ineffective, screening procedure used by firms. In limited circumstances, states such as California, Delaware, Illinois, and New York, have permitted the Chinese wall procedure to be used as a way to rebut the presumption that confidential information has been shared with the law firm.<sup>214</sup> However, most courts have not approved Chinese walls with respect to lawyers under any circumstances—if one lawyer is tainted, the entire firm is also tainted.<sup>215</sup>

As to non-lawyer employees in Texas, the courts will determine whether the practical effect of formal screening has been achieved by considering the following factors:

the substantiality of the relationship between the former and current matters; the time elapsing between the matters; the size of the firm; the number of individuals presumed to have confidential information; the nature of their involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure.<sup>216</sup>

### **H. Stuck in the Middle with You: Attorneys as Intermediaries**

Attorneys may be requested to help organize a band, entertainment company, or other family related business. Although these situations may be amicable at first, they may lead to malpractice claims.

Rule 2.2 of the Tennessee Rules of Professional Conduct provides that “[a] lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.”<sup>217</sup> Like Tennessee, the Texas Rules places strict obligations on lawyers acting as intermediaries, including that they: (1) explain the implications, “including the advantages and risks involved”, and get written consent from both clients; (2) “reasonably believe the matter can be resolved without the necessity of contested litigation[;]” and (3) reasonably believe (s)he can undertake the representation impartially.<sup>218</sup> Depending on the circumstances, the lawyer may suggest that the parties seek a third party neutral.<sup>219</sup>

The general rule is that the attorney-client privilege does not attach between and among the jointly represented clients.<sup>220</sup> The lawyer should make this clear at the outset. “Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the client should be so advised.”<sup>221</sup>

The lawyer must consult with each client concerning the decisions to be made and the relevant considerations—each

client must have equal input.<sup>222</sup> Naturally, a client must assume “greater responsibility for [her] decisions than when [she] is independently represented.”<sup>223</sup> If a conflict develops, the lawyer must withdraw from the representation.<sup>224</sup> The key is for lawyers to be able to balance each client’s interests and maintain their impartiality between the clients.<sup>225</sup> If this can no longer be achieved, the lawyer should withdraw from all representation.

### **I. The Year of Living Dangerously: Doing Business with Clients**

In the event of a dispute, lawyers who have business dealings with clients must overcome the presumption that the transaction with the client was unfair, which is a difficult obstacle to overcome.<sup>226</sup> The seminal case in Texas is *Archer v. Griffith*.<sup>227</sup> In California, it is *Felton v. LeBreton*,<sup>228</sup> and in New York it is *Greene v. Greene*.<sup>229</sup> These cases are a must-read for all lawyers who are tempted to do business with clients, whether it be investing, trading equity for services, media rights contracts, or other wonderful business deals offered by clients.<sup>230</sup> If it turns out that the business deal is profitable, the lawyer may still be out of luck. This is what happened to the California lawyer who entered into a joint venture with a client, sued the client for termination of the agreement and an accounting for lost profits...and lost.<sup>231</sup> This is a “tales I win, heads you lose” scenario all the way.

Lawyers should also be wary of setting up a “side” business, such as a record publishing companies, and talent agencies to profit from the attorney-client relationship. Model Rule 1.8(a) describes the requirements for attorneys who want to do business with clients.<sup>232</sup> If attorneys choose to proceed with a side business regardless, then they need to make sure that clients know that they are not being engaged as attorneys.<sup>233</sup> Otherwise, attorneys may find themselves in the predicament of the Winogradsky/Sobel (W/S) music clearance firm.

W/S and one of its principals, entertainment lawyer Steven Winogradsky, were sued for negligence and malpractice for their inability to obtain the grand rights for the use of two Ray Davies/Kinks songs.<sup>234</sup> The client alleged that Winogradsky was retained as its counsel for legal advice, that W/S shared the same name as the law firm, maintained the same address, and shared a checking account with Winogradsky’s law firm. Winogradsky responded that he and W/S were not retained as attorneys and moved for summary judgment.<sup>235</sup> The United States District Court denied Winogradsky’s motion, except for the client’s speculative \$10 million damages claim, and the case was settled soon thereafter at a mandatory settlement conference.<sup>236</sup> New York attorney Rachel Rodgers obtained a better result when she was sued in connection with an e-book joint venture with a client.<sup>237</sup> By having most of her paper-work in order, she was able to win a summary judgment on all of the client’s claims, with exception of a \$1,345.00 claim concerning the filing of an S-corporation election form.<sup>238</sup>

Another example of a “side business” misadventure is the case of *Lenhoff v. Svatek*,<sup>239</sup> where Los Angeles entertainment lawyer Charles Lenhoff agreed to represent Svatek as a talent agent before Lenhoff had obtained his agency

license.<sup>240</sup> When Lenhoff sued for unpaid commissions, the Labor Commission rejected Lenhoff's argument that his *ex post facto* license was legally sufficient and voided the agency agreement.<sup>241</sup>

To illustrate how much attorney side businesses with clients are disfavored, Texas has not just one, but several, disciplinary rules which address this issue—including Texas Rules 1.02, 1.03, 1.04, 1.06, 1.07, 1.08, 2.01, and 2.02.<sup>242</sup> Lawyers must be convinced and prepared to prove that: (1) they can maintain independent professional judgment and give detached advice despite their investment; and (2) the fee was not objectively unfair at the time the agreement was made. Even if the attorney wins the breach of contract claim, the client can still pursue other causes of action, such as fraud, negligence, and DTPA claims.<sup>243</sup>

Lawyers should also review their professional liability policy before doing business with a client because there may be applicable exclusions and restrictions. By pursuing a business relationship outside of the classic attorney-client relationship, lawyers open themselves up to claims not only from clients,<sup>244</sup> but also third party claim—for example, interference with business relations.<sup>245</sup> The landmark Doris Day case, *Doris Day v. Rosenthal*,<sup>246</sup> where the court awarded the actress/singer damages of \$26 million judgment against her attorney for legal malpractice, breach of fiduciary duty, and fraud, provides an eye-opening lesson on what lawyers should not do.<sup>247</sup> *Qué Será, Será*.

### III. A WALK ON THE WILD SIDE: CONSEQUENCES OF LEGAL MALPRACTICE

Attorneys are subject to disciplinary proceedings,<sup>248</sup> malpractice claims, disqualification, and court sanctions when they violate the attorney-client privilege, fail to disclose a conflict of interest, or file frivolous lawsuits.<sup>249</sup> Although attorneys do not *ipso facto* violate the law when they disobey a disciplinary rule, the consequences can be very serious.<sup>250</sup>

Under the doctrine of collateral estoppel, the findings made in a disciplinary proceeding may be used against lawyers in a later judicial proceeding seeking damages against the lawyer.<sup>251</sup> For example, in *A to Z Associates v. Cooper*,<sup>252</sup> based on the findings and conclusions of a disciplinary proceeding, the court upheld a summary judgment in favor of artist Gloria Vanderbilt's claims of fraud and breach of fiduciary duty against her attorney/manager and former psychiatrist who had formed a partnership that misappropriated her funds.<sup>253</sup>

A malpractice suit can take various forms. Clients can sue attorneys under several causes of action including: breach of fiduciary duty,<sup>254</sup> breach of contract,<sup>255</sup> violation of the Texas Deceptive Trade Practice Act,<sup>256</sup> actual and constructive fraud,<sup>257</sup> common law negligence,<sup>258</sup> negligent misrepresentation,<sup>259</sup> and the tort of malpractice.<sup>260</sup> These claims may also be assignable by the client.<sup>261</sup> A breach of fiduciary duty, and possible fee forfeiture, can occur even without actual damages. However, causation and damages are essential elements of other causes of action,<sup>262</sup> such as fraudulent and negligent representation,<sup>263</sup> negligence,<sup>264</sup> negligence per se, and breach of fiduciary duty.<sup>265</sup>

There is an ever-increasing number of malpractice suits brought against attorneys and their law firms.<sup>266</sup> Small firms get sued more often than do large firms.\* Even non-clients can sue lawyers if the court finds that the lawyer has acted in such a way that could lead a person to reasonably believe that she was a client.<sup>267</sup> Lawyers who are sued by clients can also file third party claims for contribution against other lawyers who may be partially responsible for the client's damages.<sup>268</sup>

Juries are not known for their warm and fuzzy feelings toward lawyers. In a classic malpractice case, the client must prove that its damages were sustained because of the attorney's malpractice,<sup>269</sup> that goes wrong during the course of the representation.<sup>270</sup> However, unfair as it may seem, juries generally hold lawyers responsible for anything that goes wrong during the course of representation. On the bright side, we are fortunate that options such as flogging, dismemberment, scalping, stoning, foot roasting, and other anatomical remedies are not available to juries against lawyers.

Many states require attorney fee forfeiture in cases of malfeasance or breach of faith.<sup>271</sup> Most jurisdictions recognize fee forfeiture for breach of fiduciary duty in the context of the attorney-client relationship.<sup>272</sup> To be entitled to forfeiture, the client need only prove the existence of a breach; proof of causation and/or damage is not necessary. However, the Texas Supreme Court has also held that, upon proof of the breach, total fee forfeiture is not automatic.<sup>273</sup> The trial court must consider several factors to determine the amount of forfeiture, including: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of the culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.<sup>274</sup> The Texas Supreme Court added another factor to consider—the public interest in maintaining the integrity of attorney-client relationships.<sup>275</sup> The court also held that the amount of the fee to be forfeited is a question for the court, not the jury.<sup>276</sup>

On the other hand, if the attorney has not committed legal malpractice and the client has terminated the lawyer without cause, the lawyer is entitled to compensation from the client in quantum meruit.<sup>277</sup> However, quantum meruit recovery is not available against the client if the employment contract provided for a “clearly excessive” fee.<sup>278</sup>

### IV. AMARILLO BY MORNING

Attorneys should have well thought out employment, conflicts waiver, and non-representation forms ready to be executed by clients. The forms then should be adapted to the specific conflict and contain clear, readable language that clients can understand.

Law firms should also have good screening procedures to avoid conflicts of interest. Some large firms do this through a computer screening program or a full-time attorney, which may not be feasible for a small firm. A good policy and procedures manual containing screening procedures and the steps attorneys should take should a conflict arise is also helpful. It is especially important to determine possible

conflicts when hiring a new attorney. If a firm determines that a possible new hire has a conflict which cannot be screened, the firm may decide not to employ the attorney and avoid the conflict. If the proper procedures are not in place, it may not be possible to avoid a conflict.

A good screening procedure not only prevents conflicts from occurring, but also helps attorneys and their firms in malpractice suits. Courts will usually weigh all doubts and inferences in favor of the client because the attorney has the fiduciary duty to the client and is in the position of power and control.<sup>279</sup> Courts often look at the procedures which were in place at the time of the violation and consider the steps taken by an attorney to avoid conflicts. Finally, attorneys should think about the situations that were presented in this article and develop a personal strategy to resolve these situations as they arise. ■

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## ENDNOTES

1. See THR Staff, *Power Lawyers 2018: Hollywood's Top 100 Attorneys*, THE HOLLYWOOD REPORTER (April 4, 2018, 6:30 AM) (<https://www.hollywoodreporter.com/lists/power-lawyers-2018-hollywoods-top-100-attorneys-1097287> [<http://perma.cc/4AL8-TARU>] (indicating he top "power" lawyers in Hollywood for 2018)).

2. As with business litigation, the case eventually settles without a reported opinion. See Richard E. Flamm & Joseph B. Anderson, *Conflict of Interest in Entertainment Law Practice, Revisited*, 14 ENT. & SPORTS LAW. 3, 4 (1996) (citing *Grisham v. Garon-Brooke Assocs., Inc.*, Action No. 3:96 CV045-B (N.D. Miss. 1996) and *Adler v. Manatt, Phelps, Phillips & Kantor*, No. BC 053076 (Cal. S. Ct. 1992)) ("Reported decisions involving conflict-based allegations against entertainment attorneys are few and far between. Of course, not every conflict of interest based claim results in a reported decision."). Sometimes "confidential" settlements are later made public as, for example, recording artist Billy Joel's malpractice lawsuit against his attorney, Allen Grubman. After the case was dismissed, it became public that Joel's record company, Sony Music—a non-party—paid Joel \$2.4 million to withdraw the suit, perhaps out of fear that other Grubman Indursky clients would follow Joel's lead. See Geraldine Fabrikant, *The Media Business – A Tangled Web of a Suit, a Lawyer, and Billy Joel*, N. Y. TIMES (May 3, 1995) <https://www.nytimes.com/1995/05/03/business/the-media-business-a-tangled-tale-of-a-suit-a-lawyer-and-billy-joel.html> [<http://perma.cc/9PPW-9LPB>] ("Copies of the \$2.4 million check and the two agreements have been obtained by the New York Times."). For a punch-by-punch account of the Joel saga, see STAN SOOCHER, *THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT 2142* (1998) (recounting the legal troubles of Billy Joel of the 1990's); "Ethics Rules Changed to Halt L.A. Lawyers' Conflicts of Interest," Wall Street Journal, December 10, 1993 (EP).

3. Indeed, attorneys may find themselves having to defend their actions

in "foreign" jurisdictions where they have hired local counsel. See *Simons v. Steverson*, 88 Cal. App. 4th 693, 713–14 (Cal. Ct. App. 2001) ("[T]he crucial fact is that defendant Rudolph & Beer, a New York law firm, employed Steverson, an attorney licensed to practice law in California, and not in New York, to represent plaintiff's."):

4. MODEL RULES OF PROF'L CONDUCT (AM. BAR. ASS'N 2018).

5. GA. RULES OF PROF'L CONDUCT (2001).

6. FL. RULES OF PROF'L CONDUCT (2018).

7. N. Y. RULES OF PROF'L CONDUCT (2017).

8. TENN. RULES OF PROF'L CONDUCT (2018).

9. TEX. DISCIPLINARY RULES PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtitle. G, app. A.

10. CALIFORNIA RULES OF PROFESSIONAL CONDUCT (2018).

11. See *McIntyre v. Comm'n for Lawyer Discipline*, 169 S.W. 3d 803, 810 (Tex. App.—Dallas 2005) (upholding disciplinary sanctions for attorney with some experience because "appellant knew or should have known he was not competent to accept and continue employment . . ."); *Cavender v. U. S. Enter., Inc.*, 191 F. Supp 2d 962, 965 (E.D. Tenn. 2002) (explaining the courts duty to hold attorneys to the highest ethical standard to protect client's interest, confidence, and the integrity of the judicial process). Although there is a notable lack of an express rule in Texas concerning lawyers' sexual relations with clients, sexual relationships with clients is prohibited in all states. See TEX. DISCIPLINARY RULE PROF'L CONDUCT R ?, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A. (showing an absence of a rule governing sexual relationship with clients); see also MODEL RULES OF PROF'L CONDUCT r. 1.08(j) (AM. BAR ASS'N 2018) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between the when the client-lawyer relationship commenced."):

12. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §1 cmt. b (AM. L. INST. 2000).

13. TEX. DISCIPLINARY RULE PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A.

14. See, e.g., Tex. R. Evid. 503 (governing privilege in an attorney-client relationship).

15. See *Kearney v. Unibay Co.*, 466 So. 2d 271, 271 (Fla. Dist. Ct. App. 1985) (indicating where the lawyer purchased certificates of deposits with funds from the estate of Scott Joplin and put them in his own name, subjecting the funds to garnishment by a creditor); *Laird v. Blacker*, 828 P.2d 691, 692 (Cal. Ct. App. 1992) *aff'd*, 2 Cal.4th 606 (1992) (discussing the statute of limitations defense in a television writer's lawsuit against television production company Spelling-Goldberg); *Attorney Grievance Comm'n Of Maryland v. Gardner*, 60 A.3d 456, 474–75 (Md. 2013) (demonstrating an attorney who represented the White House "Gate Crashers" was disbarred for overbilling and misuse of trust account funds).

16. See FED. R. EVID. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court."):

17. See, e.g. Tex. R. Evid. 503(b)(1) (explaining the client's rights governing privilege).

18. See, e.g. Tex. R. Evid. 503(c) (expanding the reach of privilege to other authorized individuals).

19. See, e.g. Tex. R. Evid. 503(a)(5) (indicating the types of conversations covered under privilege).

20. *Simon v. Northwestern Univ.*, 321 F.R.D. 328, 333 (N.D. Ill. 2017).

21. *Solin v. O'Melveny & Myers*, 89 Cal. App. 4th 451, 457 (Cal. Ct. App. 2001) (citing *Geragos v. Borer*, No. B208827, 2010 WL 60639, at \*1

- (Cal. Ct. App. Jan. 11, 2010). The *Solin* court reversed, remanded and remitted a judgment in favor of Michael Jackson's criminal lawyer Mark Geragos for the illegal (and inept) videotaping of his conversations with Jackson on the chartered flight to his date with the Santa Barbara Sheriff's Department for booking on child molestation charges. *Solin v. O'Melveny & Myers*, 89 Cal. App. 4th 451, 457 (Cal. Ct. App. 2001) (citing Geragos v. Borer, No. B208827, 2010 WL 60639, at \*1 (Cal. Ct. App. Jan. 11, 2010).
22. *Texas Emp'r Ins. Ass'n v. Wermseke*, 349 S.W.2d 90, 93 (Tex. 1961).
23. *See Draper v. Garcia*, 793 S.W.2d 296, 301 (Tex. App.—Houston [14th Dist.] 1990, no writ) (finding attorney owed no duty to a third party absent privity); *Invictus Records, Inc. v. Am. Broad. Cos., Inc.*, 98 F.R.D. 419, 428 (E.D. Mich. 1982) (establishing attorney owes no duty of care to opposing party); *Garrison Printing Co. v. Steven Mandarino Fine Arts, Inc.*, No. CIV.A. 86-2489, 1986 WL 13837, at \*7 (E.D. Pa. Dec. 5, 1986) (dismissing breach of duty claims for failure to allege privity).
24. *Dimensional Music Publ'g, LLP v. Kersey*, 488 F. Supp 2d 643, 655 (E.D. Pa. 2006).
25. *Dimensional Music Publ'g, LLP v. Kersey*, 488 F. Supp 2d 643, 655 (E.D. Pa. 2006); *see also Candela Entm't, Inc., v. Davis & Gilbert, L.L.P.*, 39 Misc.3d 1232(A), at \*1 (N.Y. Sup. Ct. 2013) (granting Defendant's motion to dismiss for lack of privity).
26. *Lopez v. Muñoz, Hockema & Reed, LLP*, 22 S.W.3d 857, 868 (Tex. 2000).
27. *Lopez v. Muñoz, Hockema & Reed, LLP*, 22 S.W.3d 857, 866–67 (Tex. 2000).
28. *Curb Records v. Adams & Reese, LLP*, No. 98\_31360, 203 F.3d 828, at \*4 (5th Cir. Nov. 29, 1999) (unpublished opinion) (quoting *Cattle Farm, Inc. v. Abercrombie*, 211 So. 2d 354, 365 (La. Ct. App. 1968)).
29. *See Cosgrove v. Grimes*, 774 S.W.2d 662, 663 (Tex. 1989) (holding client was entitled to relief in a malpractice action against attorney).
30. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).
31. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, no writ) (finding sufficient evidence to support existence of attorney-client relationship).
32. *Love v. The Mail on Sunday*, No. CV05-7798, 2006 WL 4046168 (C.D. Cal. Apr. 17, 2006).
33. *Love v. The Mail on Sunday*, No. CV05-7798, 2006 WL 4046168, at \*5 (C.D. Cal. Apr. 17, 2006). Similarly, the details in Brian Wilson's \$10 million private settlement of his lawsuit against A&M Records and the Law Firm of Mitchell, Silberberg and Knupp did not see the light of day until long afterwards. *See Appellant Brief, In re Matter of Wilson*, No. B113259, 1998 WL 34351613, at \*i (Cal. App. [1st Dist.] 1998) (requesting reversal of trial court orders).
34. *First Nat'l Bank of Durant v. Trans Terra Corp.*, 142 F.3d 802, 808 (5th Cir. 1998).
35. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).
36. *First Nat'l Bank of Durant v. Trans Terra Corp.*, 142 F.3d 802, 808 (5th Cir. 1998).
37. *See Baptist Mem'l Hosp. Sys. v. Bashara*, 685 S.W.2d 352 (Tex. App.—San Antonio 1984), *aff'd*, 685 S.W.2d 307 (Tex. 1985) (EP).
38. *City of El Paso v. Salas-Porras Soule*, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).
39. *Reznor v. J. Artist Management, Inc.*, 365 F. Supp. 2d 565, 580 (S.D.N.Y. 2005).
40. *City of El Paso v. Salas-Porras Soule*, 6 F. Supp. 2d 616 (W.D. Texas 1998).
41. *City of El Paso v. Salas-Porras Soule*, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).
42. *City of El Paso v. Salas-Porras Soule*, 6 F. Supp. 2d 616, 622 (W.D. Texas 1998).
43. *Prisco v. Westgate Entm't, Inc.*, 799 F. Supp. 266, 270 (D. Conn. 1992).
44. *See Ritchie v. Gano*, No. 07 Civ. 7269(VM)(JCF), 2008 WL 4178152, at \*7–8 (S.D.N.Y. 2008) (demonstrating the reasonable belief that an attorney-client relationship existed).
45. *Ritchie v. Gano*, No. 07 Civ. 7269(VM)(JCF), 2008 WL 4178152, at \*7–8 (S.D.N.Y. 2008)
46. *See MODEL RULES OF PROF'L CONDUCT R. 1.6(a)* (AM. BAR ASS'N 2018) (outlining duty of confidentiality with non-clients).
47. *MODEL RULES OF PROF'L CONDUCT R. 1.18* (AM. BAR ASS'N 2018).
48. *See E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 394 (S.D. Tex. 1969) (explaining attorney general duties to clients once a relationship exists).
49. *Croce v. Kurnit*, 565 F. Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).
50. *Croce v. Kurnit*, 565 F. Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).
51. *RESTATEMENT (SECOND) OF TORTS § 552(1)* (AM. LAW INST. 1977).
52. *See McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests*, 991 S.W.2d 787, 793 (Tex. 1999) (establishing an attorney cannot give out evaluations, like opinion letters, unless through furthering representation and having client consent).
53. *Source Entm't Grp. v. Baldonado & Assoc., P.C.*, No. 06–2706(JBS), 2007 WL 1580157 (D.N.J. May 31, 2007).
54. *Source Entm't Grp. v. Baldonado & Assoc., P.C.*, No. 06–2706(JBS), 2007 WL 1580157, at \*22–23 (D.N.J. May 31, 2007).
55. *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. § 1962 (1970); *also see Bingham v. Zolt*, 66 F.3d 553, 558 (2d Cir. 1995) (alleging violations of the RICO Act in the case of Bob Marley's estate).
56. *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1994).
57. *Bingham v. Zolt*, 66 F.3d 553, 562 (2d Cir. 1994).
58. *See Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 406 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (focusing on the type of conduct committed). Of course, other causes of action may arise from a lawyer's communication with third parties. *But see Friend v. Paisely Park Enter., Inc.*, No. B1699989, 2004 WL 2211931, at \*4 (Cal. Ct. App. Oct. 4, 2004) (affirming summary judgment in favor of Prince's attorney was affirmed against claims of defamation by Prince's ex-girlfriend).
59. *See Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Rptr. 2d 830, 833 (Cal. Ct. App. 1996) (highlighting when Audrey Hepburn's lawyer won a lawsuit brought by a record company arising out of the lawyer's allegedly defamatory statements in a solicitation letter to other celebrities). However, in *Source Entm't Grp., supra*, the court held that under New Jersey law, lawyers may be liable where communications to third parties terminating the artist's management contract could be defamatory. *Source Entm't Grp. v. Baldonado & Assoc., P.C.*, No. 06–2706(JBS), 2007 WL 1580157, at \*22 (D.N.J. May 31, 2007).
60. *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 555 U.S. 148, 152–53 (2008).
61. *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 555 U.S. 148, 149 (2008).
62. *MODEL RULES OF PROF'L CONDUCT R. 1.6(a)* (AM. BAR ASS'N 2018).
63. *MODEL RULES OF PROF'L CONDUCT R. 1.6(b)* (AM. BAR ASS'N 2015).
64. *See TEX. DISCIPLINARY RULES PROF'L CONDUCT R.*

1.05(c), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app A (emphasizing when a lawyer may reveal confidential information); Tex. R. Evid. 503(d) (demonstrating the different privileges that exist and exceptions to when privileges do not apply).

65. *See, e.g.* Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 302 (Cal. Ct. App. 2001) (holding an attorney has the ability to reveal confidential information to respond to material presented by client).

66. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(e), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app A (showing the attorneys ability to reveal confidential information to prevent a crime that would result in death or substantial bodily harm); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (AM. BAR ASS'N 2015) (providing that an attorney may reveal information if they have a reasonable belief that such disclosure is necessary to prevent reasonably certain death or substantial bodily injury).

67. *See generally* JOHN GRISHAM, TIME TO KILL (1988) (illustrating confidential communication between attorney and client).

68. *See generally* JOHN GRISHAM, TIME TO KILL (1988) (showing, at time, the failure to reveal confidential can result reasonably certain death or substantial bodily injury).

69. *See* MISS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (amended 2005) (explaining an attorney may reveal confidential information but is not required); MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 2015) (showing the exceptions for revealing confidential information by a lawyer).

70. *Constandt v. Cosby*, 232 F.R.D. 494, 500 (E.D. Penn. 2006) (citing *In re Westinghouse*, 76 F.R.D. 47, 57 (W.D. Pa. 1977) (showing the belief of participation in criminal activity does not automatically remove the privilege) (emphasis added).

71. *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175(JSM), 2002 WL 59434, \*5 (S.D.N.Y. Jan. 16, 2002) (demonstrating the importance that an attorney assures that client does not obstruct justice).

72. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (AM. BAR ASS'N 2015) (explaining the lawyers duty to identify conflicts of interests); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (showing how an attorney needs to be open with all facts material to a client's representation).

73. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (AM. BAR ASS'N 2015) (emphasis added).

74. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1)(2) (AM. BAR ASS'N 2015); *see also* *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*, 43 Cal. Rptr. 2d 327, 331 (Cal. Ct. App. 1996) (explaining the different rules governing different times of representation).

75. TENN. RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2018).

76. TENN. RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2018).

77. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 6, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app A.

78. *See also* *Lott v. Ayres*, 611 S.W.2d 473, 474 (Tex. App.—Dallas 1980, writ ref'd n.r.e.) (demonstrating the matter of representation needs to be "substantially related").

79. *In re Marvel Entm't Grp.*, 140 F.3d 463, 467 (3d. Cir.1998).

80. *In re Marvel Entm't Grp.*, 140 F.3d 463, 469 (3d. Cir.1998).

81. *In re Marvel Entm't Grp.*, 140 F.3d 463, 477 (3d. Cir.1998).

82. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (AM. BAR ASS'N 2015) (identifying the personal interest of an attorney as a potential conflict of interest if it is likely to materially limit the representation of a client).

83. N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. 784 (2005); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (AM. BAR

ASS'N 2015) (showing an attorney's personal interest in a matter could materially affect the representation).

84. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (AM. BAR ASS'N 2015).

85. *Field v. Moore*, 178 N.Y.S. 842, 843–844 (N.Y. App. Div. 1919).

86. *See* *Field v. Moore*, 178 N.Y.S. 842, 843–845 (N.Y. App. Div. 1919) (narrating how defendant sought to avoid paying plaintiff on the grounds of conflicting interests after the latter secured a re-negotiated contract with defendant's management company).

87. *Field v. Moore*, 178 N.Y.S. 842, 845 (N.Y. App. Div. 1919).

88. *Flaherty v. Filardi*, No. 03Civ.2167 (LTS)(HBP), 2004 WL 1488213, at \*5 (S.D.N.Y. July 1, 2004).

89. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (AM. BAR ASS'N 2015).

90. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (AM. BAR ASS'N 2015).

91. *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*, 43 Cal. Repr. 2d 327, 332 (Cal. Ct. App. 1995) ("Something seems radically out of place if a lawyer sues one of the lawyer's own present clients [on] behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client sued can obviously claim that the lawyer's sense of loyalty is askew.") (emphasis in original) (citing *Flatt v. Superior Ct.*, 885 P.2d 950, 956 (Cal. 1994) (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3.2 (1986))).

92. *See* Mary Beth Robinson, *Putting Clients To The Test*, 84-NOV A.B.A. J. 80 (1998) (describing the steps of screening a potential client to avoid a troublesome representation).

93. *See* *Cascades Branding Innovation, LLC v. Walgreen Co.*, No. 11 C 2519, 2002 WL 1570774, at \*10 (N.D. Ill. May 3, 2012) (holding that because an attorney learned confidential information compromising to the other party during client negotiations, the attorney was disqualified from representing the other party); *Zalewski v. Shelroc Homes, LLC*, 856 F. Supp. 2d 426, 437 (N.D.N.Y. 2012) (mandating the disqualification of an attorney from representing an opposing party when the attorney could have been biased by privileged, sensitive information procured from client negotiations with the other party).

94. *See* TEX. GOV'T CODE ANN. § 82.065(a) (West 2018) (explaining the requirements for a contingency fee contract).

95. *See* *Hoover Slovacek L.L.P. v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006) (holding that a lawyer's employment agreement could not supersede Texas law on contingent fee contracts). *But see* *Musburger, Ltd. V. Meier*, 914 N.E.2d 1195, 1212–13 (Ill. App. Ct. 2009) (affirming the trial court's attorney fee award to discharged lawyer in quantum merit action against radio personality client when the contingency arrangement was not in writing because the client refused to sign updated agreement).

96. *Hoover Slovacek L.L.P. v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006) (quoting *Levine v. Bayne, Snell & Krause, Ltd.* 40 S.W.3d 92, 96 (Tex. 2001)); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(c), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (laying out the procedures to be followed by attorneys when explaining fees to clients in Texas); MODEL RULES OF PROFESSIONAL CONDUCT r. 1.5(b) (AM. BAR ASS'N 2015) (explaining the qualifications laid out for attorneys regarding fees).

97. *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App.—Austin 1994, no writ) (citing *Mason v. Abel*, 215 S.W.2d 377, 381–82 (Tex. Civ. App.—Dallas 1948, writ ref'd n.r.e.)) (holding that oral contingent fee agreements are voidable against whom it is being enforced).

98. *See* *King v. Fox*, 851 N.E.2d 1184, 1190 (N.Y. 2006) (holding that attorneys for former Lynyrd Skynyrd band member Edward King could

raise a ratification defense under New York law, recognizing that this defense would not be permitted in California and Texas).

99. MODEL RULES OF PROF'L CONDUCT R. 1.8 (AM. BAR ASS'N 2015); TENNESSEE RULES OF PROF'L CONDUCT R. 1.8 (2011).

100. *In re Stover*, 104 P.3d 394 (Kan. 2005).

101. *In re Stover*, 104 P.3d 394, 397–98 (Kan. 2005).

102. *Ray v. Foreman*, 441 F.2d 1266 (6th Cir. 1971).

103. *See Ray v. Foreman*, 441 F.2d 1266, 1267 (6th Cir. 1971) (narrating how the counsel for assassin, James Earl Ray obtained literary rights as the price of legal services).

104. *See Taylor v. Wilson*, 180 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2005, writ denied) (reversing the trial court's denial of motion to compel arbitration).

105. *See Hogarth v. Edgar Rice Burroughs, Inc.*, No. 00 Civ. 9569(DLC), 2001 WL 515205, at \*6 (S.D.N.Y. May 15, 2001) (denying a motion to disqualify an attorney because his previous representation of the moving party was unrelated to the present action).

106. *See Nelson v. Anderson*, 84 Cal. Rptr. 2d 753, 768 (Cal. Ct. App. 1999) (determining that a lawyer represented a corporation, but not its individual shareholders).

107. *Eternal Preservation Associates, LLC v. Accidental Mummies Touring Company, LLC*, 759 F. Supp. 2d 887, 894 (E.D. Mich. 2011).

108. *See Arrow, Edelstein, & Gross, P.C. v. Rosco Productions*, 581 F. Supp. 520, 524 (S.D.N.Y. 1984) (allowing a quantum merit recovery of attorney's fees was allowed against a corporation created for the band, but not against the band members individually, with the exception of personal legal services that were rendered); *Filler v. Motta*, No. CV-008532/RI, 35 Misc. 3d 1215(A), at \*8 (N.Y. Civ. Ct. Apr. 2, 2012) (showing quantum merit recovery was allowed and involved the collection of proceeds from an album distribution by Select-O-Hits in Memphis).

109. *In re Estate of Miller*, 447 A.2d 549, 555 (N.J. 1982).

110. *McDonnell Dyer, P.L.C. v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386 (Tenn. Ct. App. Apr. 20, 2001).

111. *McDonnell Dyer, P.L.C. v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386, at \*6–7 (Tenn. Ct. App. Apr. 20, 2001).

112. *King v. Fox*, 851 N.E.2d 1184, 1192 (N.Y. App. 2006) (allowing the ratification of unconscionable fee agreements by clients with equal bargaining power, and full understanding of their rights as well as the ramifications and voidability of the contract).

113. *See Parker v. Carnahan*, 722 S.W.2d 151, 157 (Tex. App.—Texarkana 1989, no writ) (mandating a duty to clarify known misunderstandings of whom an attorney represents).

114. *See Richardson v. Artrageous, Inc.*, No. 93 Civ. 5221 (RPP), 1994 WL 97222, at \*3 (D.C. N.Y. Mar. 8, 1994) (citing *Croce v. Kurnit*, 565 F. Supp. 884, 890 (S.D.N.Y. 1982) *aff'd* 737 F.2d 229 (2d Cir. 1984)) (explaining that an attorney had a duty to inform a woman seeking and relying on his advice that she should seek independent counsel, as he did not represent her).

115. *See Dillard v. Broyles*, 633 S.W.2d 636, 643 (Tex. Civ. App.—Corpus Christi 1982, writ ref'd, n.r.e.) (holding that an attorney for one party was under no affirmative duty to deny he was an attorney for another party when there was no indication of misunderstanding).

116. *See Hansell, Post, Brandon & Dorsey v. Foulter*, 288 S.E.2d 227, 227–228 (Ga. Ct. App. 1981) (detailing how a law firm was sued for not informing the client of the statute of limitations); *Hallstrom v. Feldman*, No. B159016, 2003 WL 21744094, at \*6 (Cal. Ct. App. July 29, 2003) (unpublished opinion) (reciting the misfortune of a client whose lawyer failed to inform her of a potential disability discrimination claim).

117. MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N

2015).

118. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 18 (AM. BAR ASS'N 2015); *see also Cassidy v. Lourim*, 311 F.2d 456, 460 (D. Md. 2004) (narrating a disastrous joint representation between famous singer's heirs and a record company).

119. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 2015).

120. *Sharp v. Next Entm't, Inc.*, 78 Cal. Reprtr. 3d 37 (Ct. App. 2008).

121. *Sharp v. Next Entm't, Inc.*, 78 Cal. Reprtr. 3d 37, 48 (Ct. App. 2008).

122. *Sharp v. Next Entm't, Inc.*, 78 Cal. Reprtr. 3d 37, 47 (Ct. App. 2008).

123. *Burton v. Selker*, 36 F. Supp. 2d 984 (N.D. Ohio 1999).

124. *Burton v. Selker*, 36 F. Supp. 2d 984, 985 (N.D. Ohio 1999).

125. *Burton v. Selker*, 36 F. Supp. 2d 984, 988 (N.D. Ohio 1999).

126. *See Bar Ass'n of Greater Cleveland v. Nesbitt*, 431 N.E.2d 323, 323–324 (Ohio 1982) (suspending attorney from the practice of law because of failure to disclose a finder's fee in a loan transaction).

127. *See Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 453 (S.D.N.Y. 2000) (discussing of the “accommodation client” defense to a disqualification motion).

128. *See Davis v. EMI Group*, No. 12–cv–1602 YGR, 2013 WL 75781, at \*1 (N.D. Cal. Jan. 4, 2013) (unpublished opinion) (disqualifying attorney and law firm who continued to represent defendant after plaintiff declined to waive conflict of interest); *Kovac Media Group v. La Polt*, No. B247579, 2015 WL 800380, at \*1 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion) (demonstrating the vulnerability to suit for breach of duty and intentional interference an attorney opens when she represents, without waiver, clients with possible conflicting interests); *see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS*, §§ 122, 132 (AM. LAW INST. 2001) (prohibiting a lawyer from representing a client in a same or similar matter which would be materially adverse to the interest of a former client without obtaining both clients' consent)

129. *See Lessing v. Gibbons*, 45 P.2d 258, 261 (Cal. Dist. Ct. App. 1935) (prevailing attorney in wrongful discharge case kept client constantly apprised of representation until the client's abrupt termination of contract); *Crean v. Chozick*, 714 S.W.2d 61, 62 (Tex. App.—San Antonio 1986, writ ref'd. n.r.e.) (categorizing omissions in communication to client as malpractice).

130. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 8, *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app A (“[d]isclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent.”).

131. *See, e.g. Proskauer Rose, LLP v. Blix Street Records, Inc.*, 384 F. App'x 622, 624 (9th Cir. 2010) (unpublished opinion) (affirming summary judgment for attorney who told client he wasn't looking forward to trial).

132. MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2015).

133. *City of El Paso v. Salas-Porrás Soule*, 6 F. Supp. 2d 616 (W.D. Tex. 1998).

134. *City of El Paso v. Salas-Porrás Soule*, 6 F. Supp. 2d 616, 620 (W.D. Tex. 1998).

135. *City of El Paso v. Salas-Porrás Soule*, 6 F. Supp. 2d 616, 625 (W.D. Tex. 1998).

136. *City of El Paso v. Salas-Porrás Soule*, 6 F. Supp. 2d 616, 625 (W.D. Tex. 1998).

137. *Lessing v. Gibbons*, 45 P.2d 258 (Cal. Dist. App. 1935).

138. *Lessing v. Gibbons*, 45 P.2d 258, 261 (Cal. Dist. App. 1935).

139. *Eternal Preservation Assocs., v. Accidental Mummies Touring Co.*,

759 F. Supp. 2d 887 (E.D. Mich. 2011).

140. *Eternal Preservation Assocs., v. Accidental Mummies Touring Co.*, 759 F. Supp. 2d 887, 888 (E.D. Mich. 2011).

141. *Eternal Preservation Assocs., v. Accidental Mummies Touring Co.*, 759 F. Supp. 2d 887, 890 (E.D. Mich. 2011).

142. *Eternal Preservation Assocs., v. Accidental Mummies Touring Co.*, 759 F. Supp. 2d 887, 892 (E.D. Mich. 2011).

143. *Eternal Preservation Assocs., v. Accidental Mummies Touring Co.*, 759 F. Supp. 2d 887, 894 (E.D. Mich. 2011).

144. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (emphasizing that the problem with fundamental conflict—involving the interests of other clients or the attorney's self-interest—is that it effectively removes from consideration options and actions which should otherwise be pursued on behalf of a client).

145. *See* *Lott v. Ayres*, 611 S.W.2d 473, 474 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (examining a malpractice claim against an attorney who represented a wife in a damage suit against a medical care provider and then later in her divorce from husband who then claimed a conflict existed based on knowledge from previous representation).

146. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR. ASS'N 2015) (prohibiting an attorney from accepting or continuing representation of a client when it violates other model rules, including improper conflict of interest).

147. *Cassidy v. Lourim*, 311 F. Supp. 2d 456 (D. Md. 2004).

148. *Cassidy v. Lourim*, 311 F. Supp. 2d 456, 460 (D. Md. 2004).

149. *TufAmerica, Inc. v. Codigo Music LLC*, No. 11 Civ. 1434 (ER), 2017 WL 3475499, at \*7 (S.D.N.Y. Aug. 11, 2017).

150. *Kovac Media Group, Inc. v. La Polt*, No. B247579, 2015 WL 800380, at \*1 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion).

151. *Kovac Media Group, Inc. v. La Polt*, No. B247579, 2015 WL 800380, at \*2 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion).

152. *Kovac Media Group, Inc. v. La Polt*, No. B247579, 2015 WL 800380, at \*2 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion); *see also* CAL. CIV. PROC. CODE § 425.16 (West. 2018) (codifying California's Anti-SLAPP motion statute).

153. *Kovac Media Group, Inc. v. La Polt*, No. B247579, 2015 WL 800380, at \*12 (Cal. Ct. App. Feb. 25, 2015) (unpublished opinion).

154. *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 453–455 (S.D.N.Y. 2000) (finding that in this case Time Warner's motion to disqualify should be denied absent a showing of prejudice).

155. *Davis v. EMI Group*, No. 12–cv–1602 YGR, 2013 WL 75781, at \*5 (N.D. Cal. Jan. 4, 2013) (unpublished opinion).

156. *Davis v. EMI Group*, No. 12–cv–1602 YGR, 2013 WL 75781, at \*1 (N.D. Cal. Jan. 4, 2013) (unpublished opinion).

157. *Davis v. EMI Group*, No. 12–cv–1602 YGR, 2013 WL 75781, at \*5 (N.D. Cal. Jan. 4, 2013) (unpublished opinion).

158. MODEL RULES OF PROF'L CONDUCT R. 1.9 (AM. BAR ASS'N 2018).

159. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.09, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A.

160. *T.C. Theatre Corp. v. Warner Bros Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953).

161. *T.C. Theatre Corp. v. Warner Bros Pictures, Inc.*, 113 F. Supp. 265, 286–69 (S.D.N.Y. 1953); *see also* *Team Obsolete, Ltd. v. A.H.R.M.A. Ltd.*, No. 01CV1574(ILG(RML)), 2006 WL 2013471, at \*6–\*7 (E.D.N.Y. July 18, 2006) (denying plaintiff's motion for disqualification of attorney in the absence of a “substituted relationship” or breach of fiduciary duty); *Texaco, Inc. v. García*, 891 S.W.2d 255, 256 (Tex. 1995) (determining district court judge abused his discretion in denying Texaco's motion

to disqualify plaintiff's attorney—who had worked with Texaco's long-time counsel—under Rule 1.09, and granting mandamus).

162. *See* TEX. DISCIPLINARY RULE PROF'L CONDUCT R 1.09, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A (Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . .”); *see also* MODEL RULE OF PROFESSIONAL CONDUCT 1.9 (Am. Bar Ass'n 2018) (“[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”).

163. *See generally* *Private Movie Co., Inc. v. Anderson*, No. BC136805, 1997 WL 465467 (Cal. Ct. App. May 27, 1997) (voiding entertainment contract because attorney had not disclosed conflict of interest to Pamela Anderson prior to negotiating the contract and not disclosing the substantive terms of the agreement).

164. *Compare* *The Florida Bar v. Keasler*, 133 So. 3d 528, 528 (Fla. 2014) (approving and adopting the report of the Florida State Bar referee and suspending Frank Ray Keasler, Jr. for three years and ordering restitution), *with* Daniel Winters, *Travolta's Lawyer Dances to a New Tune*, *FOLKNEWS* (Jan. 17, 2014) <https://www.lawyersweekly.com.au/folklaw/15036-travolta-s-lawyer-dances-to-a-new-tune> [<http://perma.cc/E6A5-JEU8>] (reporting the conflict of interest for Keasler when representing a set of clients, and desire of John Travolta to stay out of the litigation against his attorney).

165. MODEL RULES PROF'L CONDUCT R. (Am. Bar Ass'n 2018).

166. MODEL RULES PROF'L CONDUCT R. (Am. Bar Ass'n 2018).

167. *See* MODEL RULES PROF'L CONDUCT R. 1.9(c) (“After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.”) *But see* *Canal+Image UK Ltd. v. Lutvak*, 792 F. Supp. 2d 675, 688–89 (D.C. N.Y. 2011) (mem. op.) (applying New York Rule of Professional Conduct 1.10 and finding Loeb & Loeb was not tainted by the confidential information held by a former member of the firm in order to be disqualified from representation of a client with an adverse position to a former client).

168. MODEL RULES PROF'L CONDUCT R. 1.9(b)(2) (Am. Bar Ass'n 2018); *see also* TEX. DISCIPLINARY RULE PROF'L CONDUCT R 1.09 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A (“Paragraph (a)'s second limitation on undertaking a representation against a former client is that it may not be done if there is a reasonable probability that the representation would cause the lawyer to violate the obligations owed the former client under Rule 1.05.”); *Cremers v. Brennan*, 764 N.Y.S.2d 326, 331 (N.Y. 2003) (holding defendant's prior attorney-client relationship with plaintiff's counsel discrete and unrelated to cause of action—and thus, insufficient to warrant disqualification of plaintiff's attorney or law firm).

169. *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992).

170. *In re American Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992) (quoting *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1569 (5th Cir. 1989)).

171. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976).

172. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 91 (5th Cir. 1976); *see also* *Decaview Dist. Co. Inc. v. Decaview Asia Corp.*, No. C99-02555 MJJ (ME) 2000 WL 1175583, at \*16 (N.D. Cal. Aug. 14 2000) (“[Allowing] a third party standing if the litigation will be so infected by the presence of opposing counsel so as to impact the moving party's interest in a just and lawful determination of its claims.” (citing *In*

re Appeal of Infotechnology, Inc., 583 A2d 215, 21819 (Del. 1990)).

173. TEX. DISCIPLINARY RULE PROF'L CONDUCT R. 1.09 cmt. 4B, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A.

174. Prisco v. Westgate Entertainment, Inc, 799 F. Supp. 266 (D. Conn.1992).

175. Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266, 268 (D. Conn. 1992) *But see* Team Obsolete, Ltd. v. A.H.R.M.A., Ltd., No. 01 CV 1574(ILG)(RML), 2006 WLL 2013471, at \*9 (E.D.N.Y. July 18, 2006) (attorney was not disqualified because the breach of a fiduciary relationship was not alleged and a substantial relationship was not shown).

176. Cremers v. Brennan, 764 N.Y.S.2d 326 (N.Y. Civ. Ct. 2003).

177. Cremers v. Brennan, 764 N.Y.S.2d 326, 330 (N.Y. Civ. Ct. 2003).

178. Cremers v. Brennan, 764 N.Y.S.2d 326, 329 (N.Y. Civ. Ct. 2003).

179. NCNB Texas Nat. Bank v. Coker, 765 S.W.2d 398 (Tex. 1989)

180. NCNB Texas Nat. Bank v. Coker, 765 S.W.2d 398, 400401 (Tex. 1989); *see also* Metropolitan Life Ins. Co. v. Syntek Fin. Corp., 881 S.W.2d 319, 321 (Tex. 1994) (concluding district court did not abuse discretion by finding no substantial relationship existed between former and current represented clients); Troutman v. Ramsay, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, no pet.) (“An attorney should not accept representation adverse to a former client if such representation deals with matters substantially related to the factual matters involved in the former representation.” (citing TEX. DISCIPLINARY RULE PROF'L CONDUCT R. 1.09(a) (3) *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A); TEX. DISCIPLINARY RULE PROF'L CONDUCT R. 1.09 cmt. 4, 8, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A (noting some courts, though not required to do so under Rules 1.05 or 1.09, may disqualify a lawyer for representing a present client against a former client if the “substantial relationship” test is met); MODEL RULES OF PROF'L CONDUCT r. 1.09(b) (AM. BAR ASS'N 2018) (“A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client.”).

181. TEX. DISCIPLINARY RULE PROF'L CONDUCT R. 1.06 cmt. 11, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A; *see also* Bashara v. Baptist Mem'l Hosp. Sys., 685 S.W.2d 307, 308 (Tex. 1985) (disallowing a conflicted attorney to recover fees under the doctrine of quantum meruit).

182. Bier v. Grodski & Olecki, No. B204887, 2009 WL 1549546 (Cal. Dist. Ct. App., June 4, 2009).

183. Bier v. Grodski & Olecki, No. B204887, 2009 WL 1549546, at \*11 (Cal. Dist. Ct. App., June 4, 2009).

184. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2018); *see also* N.Y. State Bar Ass'n Prof'l Ethics Comm., Formal Op. 2017-7 (2017) (“When a joint representation does not involve a conflict of interest between the joint clients that would require the lawyer to obtain the client's ‘informed consent’ to the joint representation, the lawyer must nevertheless explain the implications of the joint representation to the extent ‘reasonably necessary to permit the client[s] to make informed decisions regarding the representation.’”).

185. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780 (S.D. Miss. 2006).

186. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780 (S.D. Miss. 2006).

187. Victory Lane Productions, LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 77678 (S.D. Miss. 2006).

188. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 780 (S.D. Miss. 2006).

189. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 781 (S.D. Miss. 2006).

190. Victory Lane Prod., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773, 782 (S.D. Miss. 2006). *But see* Frazee v. Proskauer Rose, LLP, No. B254569, 2016 WL 6236400, at \*6 (Cal. Ct. App. Oct. 25, 2016) (finding no harm and therefore no foul arising out from the law firm's joint representation).

191. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470 (N.Y. Sup. Ct. July 13, 2005).

192. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470, at \*1 (N.Y. Sup. Ct. July 13, 2005).

193. Bolton v. Weil, Gotshal, & Manges, LLP, No. 602341/03, 2005 WL 2185470, at \*12 (N.Y. Sup. Ct. July 13, 2005).

194. TEX. DISCIPLINARY RULE PROF'L CONDUCT R. 1.08(f), *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A; MODEL RULES OF PROF'L CONDUCT r. 1.08(g) (AM. BAR ASS'N 2018); *see also* Arce v. Burrow, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999) (discussing the duty owed by attorney to clients in regard to aggregate settlements).

195. MODEL RULES OF PROF'L CONDUCT R. 1.08(g) (AM. BAR ASS'N 2018).

196. *See* MODEL RULES OF PROF'L CONDUCT T. 1.9(b) (AM. BAR ASS'N 2018) (“A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person . . . .”); *see also* Allen v. Acad. Games Leagues of Am., Inc., 831 F.Supp. 785, 78789 (C.D. Cal. 1993) (finding no conflict of interest for when the law student had not passed the bar, but carrying over the knowledge and experience gained pre-licensing to disqualify lawyer and firm after the lawyer gained licensure).

197. Nat'l Med. Enter., Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996).

198. Nat'l Med. Enter., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996); *see also In re* Columbia Valley Healthcare Sys., 320 S.W.3d 819, 824 (Tex. 2010) (establishing there is an “irrebuttable presumption that the lawyer obtained confidential information during representation” and if a lawyer moves to a firm representing opposing party in an ongoing litigation, “a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm”).

199. National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996); *see also* Flatt v. Superior Court, 885 P.2d 950, 95960 (Cal. Dist. Ct. App.1994) (examining the “insoluble ethical dilemma raised by imposing on a fiduciary to provide advice against the interests of existing client”); Pound v. DeMera DeMera Cameron, 36 Cal. Rptr. 2d 933, 928 (Cal. Dist. Ct. App. 2005) (suggesting a presumption of an attorney's access to privileged and confidential matters relevant to a certain representation extends to disqualify entire firm).

200. *P&M Electric Co. v. Godard*, 478 S.W.2d 79 (Tex. 1972), citing *T.C. Theatre Corp. v. Warner Bros. Pictures, supra*.

201. *See* Licette Music Corp. v. Sills, Cummis, Zuckerman, Radin, Tischman, Epstein, & Gross, P.A., No. L-1469-99, 2009 WL 2045259, at \*11(N.J. Sup. Ct Feb. 11, 2009) (announcing law firm not vicariously liable for malpractice by lawyer who represented client before joining the firm and billed client directly).

202. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 201 (Tex. 2002).

203. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 203 (Tex. 2002).

204. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 94-388 (1994) (emphasizing clients are entitled to know whether a second firm, currently affiliated with the first, represents interest adverse to their

interests); *Mustang Enter., Inc. v. Plug-in Storage Systems, Inc.*, 874 F.Supp. 881, 88990 (N.D. Ill. 1995) (“Under the circumstance here, where two firms involved have chosen to hold their ‘affiliated firm’ relationship out to the world without limitation,” should expect to have “all of the same principles and policies that have led courts to that approach operate with equal force.”).

205. *See* Source Needed (EP).

206. *See* Tex. Comm. On Prof’l Ethics, Op. 515, 59 Tex. B.J. 646, ? (1996) (establishing the rules regarding an attorney entering into an agreement with a contract lawyer placement agency).

207. MODEL RULES OF PROF’L CONDUCT r. 5.7 cmt. 3 (AM. BAR ASS’N 2018) (“Even when the law-related and legal services are provided in circumstance that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer . . .”).

208. *See, e.g.*, *Occidental Chemical, Corp. v. Brown*, 877 S.W.2d 27, 29 (Tex. App.—Corpus Christi-Edinburg 1994, no.writ) (reviewing whether a law firm should be disqualified after a secretary who previously worked for the firm representing the opposing).

209. *See* Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 834 (Tex. 1994) (citing *Coker v. ,* 765 S.W.2d 398, 400 (Tex. 1989) (“We agree that a paralegal who has actually worked on a case must be subject to the presumption set out in *Coker*, that is, a conclusive presumption that confidences and secretes were imparted during the course of the paralegal’s work on the case.”)

210. *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 835 (Tex. 1994).

211. *See* *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 476 (Tex. 1994) (reiterating the test for disqualification is a genuine threat of disclosure—not an actual, materialized disclosure).

212. *In re Am. Home Prod. Corp.*, 985 S.W.2d 68, 75 (Tex. 1998).

213. *In re Am. Home Prod. Corp.*, 985 S.W.2d 68, 75 (Tex. 1998) (quoting *Phoenix Founders v. Marshall*, 887 S.W.2d 831, 835 (Tex. 1994)).

214. *See* *Kassiss v. Teacher’s Inc. and Annuity Ass’n*, 717 N.E.2d 674, 678 (N.Y. 1999) (“In [a] factual scenario, with presumption rebutted, a “Chinese Wall” around the disqualified lawyer would be sufficient to avoid firm disqualification.”). *But see* *Higdon v. Superior Court*, 227 Rptr. 588, 595 (Ct. App. Cal. 1991) (“California precedent has not rushed to accept the concept of disqualifying the attorney but not the firm, nor has it enthusiastically embarked upon erecting Chinese walls.” (quoting *Klien v. Superior Court*, 244 Cal. Rptr. 226 (Cal. Dist. Ct. App. 1988)).

215. *See* MODEL RULES OF PROF’L CONDUCT R. 1.8(k) (AM. BAR ASS’N 2018) (“While lawyers associated in a firm, a prohibition . . . that applies to any one of them shall apply to all of them.”); MODEL RULES OF PROF’L CONDUCT R. 1.10 (AM. BAR ASS’N 2018) (establishing associated lawyers in a firm cannot represent clients if they would be prohibited from doing so in solo practice); *see also* *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821, 825 (D. Conn. 1961), *aff’d. per curiam* 302 F.2d 268 (2d Cir. 1962) (stating the court has a duty above that of counsel to uphold the integrity and good name of the bar and of the administration of law); *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 30001 (Tex. App.—Dallas 1998, orig. proceeding) (noting presumption that an attorney who gains confidences of a client will share them with other member of the attorney’s firm).

216. *Phoenix Founders, Inc v. Marshall*, 887 S.W.2d 831, 836 (Tex. 1994) (citing *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 71115 (1980)).

217. TENN. RULES OF PROF’L CONDUCT R. 2.2 (2011).

218. TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07(a)(1),(2),(3),

*reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A.

219. *See* TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07 cmt. 2, *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A (“Because confusion can arise as to the lawyer’s role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence the requirement of written consent. Moreover, a lawyer should not permit his personal interest to influence his advice relative to a suggestion by his client that additional counsel be employed.”).

220. *See* TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07 cmt. 6, *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A (“With regard to the attorney-client privilege, the general rule is that between commonly represented clients the privilege does not attach.”); *see also* TEX. R. EVID. 503(d)(5) (“If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (c) is relevant to a matter of common interest between the clients . . .” the information is admissible).

221. TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07 cmt. 6, *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A.

222. TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07(b), *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A.

223. TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07 cmt. 9, *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A.

224. TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07(c), *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A; MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2018).

225. TEX. DISCIPLINARY RULE PROF’L CONDUCT R 1.07 cmt. 6, *reprinted in* TEX. GOV’T CODE ANN., tit 2, subtit. G, app. A.

226. *See* MODEL RULES OF PROF’L CONDUCT R. 1.8 (AM. BAR ASS’N 2015) (stating a lawyer shall not enter into a business transaction with a client or knowingly acquire a pecuniary interest adverse to the client unless the transaction and terms of the agreement are fair and reasonable and fully disclosed in writing; client is advised to seek third-party counsel; and client gives informed consent).

227. *See* *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) (“There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney”).

228. *See* *Felton v. Le Breton*, 28 P. 490, \* (Cal. 1891) (stating an attorney must “show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect” and “the burden of proof is always upon the attorney to show that the dealing was fair and just”).

229. *See* *Greene v. Greene*, 436 N.E.2d 496, \* (Cal. Ct. App. 1982) (explaining that business agreements with clients may be invalid if it appears the attorney “got the better of the bargain,” unless the attorney can show that the client’s confidence was not exploited and the client was fully aware of the consequences).

230. *See* *Beets v. Scott*, 65 F.3d 1258, 1261, 1299 (5th Cir. 1995) (finding assignment of media rights from a criminal defendant to attorney’s son as payment of attorney’s fee posed only a potential conflict of interest); *Black v. Sussman*, No. M2010-01810-COA-R3-CV, 2011 WL 2410237, at \*12 (Tenn. Ct. App. June 9, 2011) (remanding malpractice action by Clint Black against his CPA/Partner to trial court to determine extent of Black’s reliance on representations of partnership);

231. *See* *Gold v. Greenwald*, 247 Cal. App. 2d 296, 299, 313 (Cal. Ct. App. 1966) (holding attorney’s failure to fully disclose the legal consequences and the rights and liabilities under the agreement created a presumption of undue influence and lack of consideration, due to his fiduciary relationship with defendant).

232. MODEL RULES OF PROF’L CONDUCT R. 1.8(a) (AM. BAR ASS’N

2018).

233. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 2 (AM. BAR ASS'N 2018).

234. *Unichappell Music, Inc. v. Modrock Prod., LLC*, No. CV 14-02382 DDP (PLAx), 2016 WL 1065707, at \*1 (C.D. Cal. Mar. 16, 2016).

235. *Unichappell Music, Inc. v. Modrock Prod., LLC*, No. CV 14-02382 DDP (PLAx), 2016 WL 1065707, at \*4-5 (C.D. Cal. Mar. 16, 2016).

236. *Unichappell Music, Inc. v. Modrock Prod., LLC*, No. CV 14-02382 DDP (PLAx), 2016 WL 1065707, at \*17 (C.D. Cal. Mar. 16, 2016).

237. *See Small Bus. Bodyguard, Inc. v. House of Moxie, Inc.*, 230 F. Supp. 3d 290, \* (S.D.N.Y. 2017) (granting attorney's motion for summary judgment because an essential element for New York malpractice claims—an assertion that attorney's actions caused pecuniary loss—was not met).

238. *Small Bus. Bodyguard, Inc. v. House of Moxie, Inc.*, 230 F. Supp. 3d 290, \* (S.D.N.Y. 2017).

239. *Lenhoff v. Svatek*, TAC 20-99, 2000 WL 36111604 (Cal. Dep't Indus. Relations 2000).

240. *Lenhoff v. Svatek*, TAC 20-99, 2000 WL 36111604, at \*1-2 (Cal. Dep't Indus. Relations 2000)

241. *Lenhoff v. Svatek*, TAC 20-99, 2000 WL 36111604, at \*3 (Cal. Dep't Indus. Relations 2000).

242. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A ("When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A ("A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee."); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A (covering conflicts of interest, such as representing opposing parties to the same litigation and withdrawing in cases of multiple representation that is or becomes improper under the Rule); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.07, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A (advising lawyers to avoid conflicts of interest unless "the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients."); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 2.01, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A ("In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 2.02, *reprinted in* TEX. GOV'T CODE ANN., tit 2, subtit. G, app. A ("A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless: (a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and (b) the client consents after consultation."); *see also* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000) ("In providing legal services to the client's business while owning its stock, the lawyer must take care to avoid conflicts between the client's interests and the lawyer's personal economic interests as an owner").

243. *See Lopez v. Muñoz, Hockema & Reed, LLP*, 22 S.W.3d 857, \* (Tex. 2000) ("[A] law firm may breach its fiduciary duty if it provides little or no services, but still collects a substantial part of its clients recovery in the face of a pending settlement."); *see also* N.Y.C. Bar Ass'n Prof'l Ethics

Comm., Formal Op. 1988-6 (1988) (holding that a law firm representing a criminal defendant may not enter into a production rights contract for the story of the client's criminal trial); N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 621 (1991) (reviewing the opinion on client contracts with attorney-owned businesses; concluding that real estate attorneys may not employ attorney-owned abstract company for their clients); Tex. Comm. On Prof'l Ethics, Op. 643, (2014) (ruling that it is "not permissible for a lawyer to arrange for a debt management services company owned by the lawyer to refer customers of the company to the lawyer's law firm for legal services . . .").

244. *See In re O'Brien*, 351 F.3d 832, 838-40 (8th Cir. 2003) (describing facts such as appear in this case, where George Harrison won an \$11.7 million judgment against his business manager attorney, only to have it discharged in bankruptcy after Harrison could not appear for his deposition shortly before passing away).

245. *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) ("If clients themselves divulge such information to parties, chances are that they would also have divulged it to their attorneys.")

246. *Doris Day v. Rosenthal*, 170 Cal. App. 3d 1125 (Cal. Ct. App. 1985), *cert. denied*, 975 U.S. 1048 (1986).

247. *Doris Day v. Rosenthal*, 170 Cal. App. 3d 1125, 114252(Cal. Ct. App. 1985), *cert. denied*, 975 U.S. 1048 (1986).

248. *See In Matter of Crane*, No. 84-O-14252 & 84-O-14253, 1990 WL 608663, at \*145(Rev. Dep't. St. Bar of Cal. Aug. 3, 1990) (discussing a case where inside counsel for SEGA Corporation and an outside lawyer were suspended from the practice of law for making improper "side deals" in the marketing of video games).

249. *See Humphrey v. Columbia Records*, 124 F.R.D 564, 569 (S.D.N.Y. Mar. 17, 1989) ("Noble [attorney] has handled this case unprofessionally both in practice and in principle. . . . This case had no sound factual or legal foundation and should not have been brought. . . . While an attory is not required to conserve his opponent's expenditures, he or she is at risk when the attorney deliberately causes an opponent to expend needlessly, as was done here."). In *Comden v. Superior Court*, the court disqualified Doris Day's attorney because a member of his law firm was a fact witness and the client's right to counsel "must yield . . . to considerations of ethics which run to the very integrity of the judicial process." *Comden v. Superior Court*, 20 Cal. 3d 906, 915 (Cal. 1978) (en banc) (quoting *Hull v. Celanese Corp.*, 512 F.2d 568, 572 (2d Cir. 1975)).

250. *In Matter of Crane*, No. 84-O-14252 & 84-O-14253, 1990 WL 608663, at \*145 (Rev. Dep't. St. Bar of Cal. Aug. 15, 1990); *People v. Davis*, 911 P.2d 45, 47-8 (Colo. 1996).

251. *See, e.g., A to Z Assoc. v. Cooper*, 613 N.Y.S.2d 512, 519 (N.Y. Sup. Ct. 1993) (concluding, as a matter of law, administrative disciplinary findings against a lawyer may be used, to the extent applicable, as dispositive of those issues in a civil action) (citing *Ryan v. N.Y. Tele. Co.*, 62 N.Y.2d 494, 499 (N.Y. 1984) and *Johnson v. Penn. Mut. Life Ins. Co.*, 184 A.D.2d 230, 231 (N.Y. App. Div. 1992)).

252. *A to Z Assoc. v. Cooper*, 613 N.Y.S.2d 512 (N.Y. Sup. Ct. 1993)

253. *A to Z Assoc. v. Cooper*, 613 N.Y.S.2d 512, 515 (N.Y. Sup. Ct. 1993)

254. *See Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995) (affirming district court's award of damages to Bob Marley estate administrator for breach of fiduciary duty, fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act [RICO] (citing *Long Island Lighting Co. v. IMO Indust.*, 6 F.3d 876, 887 (2d. Cir.1993)).

255. Source Needed

256. *See Streber v. Hunter*, 221 F.3d 701, 727 (5th Cir. 2000) (EP).

257. *See Brown v. Woolf*, 554 F, Supp. 1206, 1209 (S.D. Ind. 1983)

(concerning sports agent/attorney's lawsuit for constructive fraud arising out of contract negotiations with professional hockey team).

258. *See* *Curb Records v. Adams & Reese, LLP*, No. 98-31360, 203 F.3d 828, at \*6-7 (5th Cir. 1999) (unreported opinion under FED. R. APP. PRO. 32.1) (holding an inherent and nondelegable duty exists under Louisiana law, requiring local counsel to directly inform client of any known instances of malfeasance or misfeasance on the part of lead counsel); *see also* *HNH Int'l., Ltd. v. Pryor Cashman Sherman & Flynn, LLP*, 63 A.D.3d 534, 534-35\* (N.Y. App. Div. 2009) (reversing the court's dismissal of claims based on negligent advice regarding common law copyright issues on appeal, and allowing the case to go forward).

259. Source Needed

260. *See* *Hanlin v. Mitchelson*, 794 F.2d 834, 838 (2d Cir. 1996) (citing *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9 (2d Cir. 1983) and *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985) (denying negligence claims against celebrity palimony attorney Marvin Mitchelson in summary judgment, affirmed in part and reversed in part).

261. *See* *Even St. Prod., Ltd. v. Shkat Arrow Hafer & Weber, LLP*, 643 F. Supp. 2d 317, 323 n. 5 (S.D.N.Y. 2008) (Need an better EP here).

262. *See* *Deep v. Boies*, 53 A.D.3d 948, 949-51 (N.Y. App. Div. 2008). In a malpractice action arising against David Boies out of the unsuccessful defense of the AIMSTER file sharing litigation, the client's conflict of interest case was not allowed to go forward because of the failure to prove causation. *Deep v. Boies*, 53 A.D.3d 948, 949-51 (N.Y. App. Div. 2008); *see also* *Resendez v. Maloney*, No. 01-08-00954-CV, 2010 WL 5395674, at \* (Tex. App.—Houston [1st Dist.] 2010, pet. filed) (citing *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989) and *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no. writ) (“The plaintiff must demonstrate that any alleged damages, including attorney's fees, were proximately caused by the breach of a duty by the defendant.”).

263. *See* *Snorkel Prod., Inc. v. Beckman Lieberman & Barandes, LLP*, 62 A.D.3d 505, 506 (N.Y. App. Div. 2009) (holding attorney's negligent advice regarding lapse date of option to produce musical drama co-written by Barry Manilow was not the proximate cause of damages, except for defense costs in arbitration action brought by Marlow to terminate rights); *Jackson v. Broad. Music, Inc.*, No. X 04 CV 5948(TPG), 2006 WL 250524, ay \* 9 (S.D.N.Y. 2006) (granting motion to dismiss fraud case against William Krasilovsk because plaintiff did not read agreement before signing it, so cannot prove reasonable reliance); *Viner v. Sweet*, 12 Cal. Rptr. 3d 553, 538 (Cal. Rptr. 3d 2004) (reversing judgment for plaintiff-owners of audio book company where the trial court erred in ruling that they do not have to prove a “more favorable result” in a cause of action based on the “negligent negotiation” of the sale of their company).

264. *See* *Cappetta v. Lippman*, 913 F. Supp. 302, 307 (S.D.N.Y. 1996) (allowing wrestling announcer recovery of only the fees for hiring new law firm, and denying other compensatory and punitive damages).

265. *See* *Spera v. Fleming, Hovenkamp & Grayson, PC*, 25 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing various circumstances where “damages are an essential element” of the claim, including negligence per se and fraudulent misrepresentation).

266. *See, e.g. Sherwood v. South*, at 809 (EP).

267. *See* *Parker v. Carnahan*, 722 S.W.2d 151, 159 (Tex. App.—Texarkana 1989, no writ) (remanding case to district court to determine whether attorneys were negligent in failing to advise former wife of client that they were not representing her interests).

268. *Bolton v. Weil, Gotshal, & Manges, LLP*, No. 602341/03, 2005 WL 2185470, at \*3 (N.Y. Sup. Ct. July 13, 2005). (“An action for contribution is predicated upon a third party's breach of a duty owed to either the

plaintiff or the defendant.” (citing *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540 (N.Y. 1992)).

269. *See* *Blanks v. Shaw*, 89 Cal. Rptr. 3d 710, (Cal. Ct. App. 2009) (EP); *Even St. Prod., Ltd. v. Shkat Arrow Hafer & Weber, LLP*, , 643 F. Supp. 2d 317, 323 n. 5 (S.D.N.Y. 2008) (EP); *Proskauer Rose, LLP v. Blix St. Records, Inc.*, 384 F. App. 622, pincite (9th Cir. 2010) (concluding “Blix Street records failed to establish the elements of causation and damages critical to a malpractice claim.”).

270. *See* *Viner v. Sweet*, 12 Cal. Rptr 3d 533, 537 (Cal. Ct. App. 2004) (We see nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from, the well-established requirement in negligence cases that the plaintiff establish causation by showing either (1) *but for* the negligence, the harm would not have occurred, or (2) the negligence was a concurrent independent cause of the harm.” (quoting *Viner II*).

271. *See, e.g., See McDonnell Dyer PLC v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386, at \*7 (Tenn. Ct. App. Apr. 20, 2001) (“[H]olding that malfeasance or breach of faith by an attorney against his client during the performance of services may support a complete forfeiture of fees” (citing *Crawford v. Logan*, 656 S.W.2d 360, (Tenn. 1983)).

272. *McDonnell Dyer PLC v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386, at \*7 (Tenn. Ct. App. Apr. 20, 2001); *see also In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, pincite (3d Cir. 1998) (EP).

273. *McDonnell Dyer PLC v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386, at \*6 (Tenn. Ct. App. Apr. 20, 2001) (explaining the importance of taking into account different circumstances when evaluating each fee forfeiture case).

274. *See* *McDonnell Dyer PLC v. Select-O-Hits, Inc.*, No. W2000-00044-COA-R3-CV, 2001 WL 400386, at \*6 (Tenn. Ct. App. Apr. 20, 2001); *see also* TEX. CIV. PRAC. & REM. CODE ANN., Sec. 41.011(a) (West 1997) (“In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.”).

275. *See* *Arce v. Burrow*, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997, pet. granted), *rev'd in part sub nom. Burrow v. Arce*, 997 S.W.2d 229, 245-46 (Tex. 1999) (citing *S.V. v. R.V.*, 933 S.W.2d 1, 34 (Tex.1996) (J. Owen, dissenting) (citing *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197, 205 (1Tex. 958)); *Murphy v. Canion*, 797 S.W.2d 944, 948 (Tex. App.—Houston [14th Dist.] 1990, no writ) (citing *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938)). (“When parties enter a fiduciary relationship, each consents to have its conduct toward the other measured by high standards of loyalty as exacted by courts of equity.”).

276. *Arce v. Burrow*, 958 S.W.2d 239, 246 (Tex. App.—Houston [14th Dist.] 1997, pet granted), *rev'd in part sub nom. Burrow v. Arce*, 997 S.W.2d 229, 245-46 (Tex. 1999).

277. *See* *Sanchez v. MTV Networks*, No. 10 Civ. 7854(TPG), 2012 WL 2094047, PINCITE (S.D.N.Y. June 11, 2012), *aff'd* *Sanchez v. MTV Networks*, Nos. 12-1860-cv, 12-2670-cv, 12-2671-cv, 2013 WL 1876599 (2d Cir. May 7, 2013) (deferring to district court's findings that attorney's fee of a portion of settlement was reasonable and that attorney was entitled to intervene to defend fee award); *Filler v. Motta*, 951 N.Y.S.2d 85, PINCITE (N.Y. Civ. Ct. 2012) (allowing lawyer to recover judgment for work performed under a theory of quantum meruit).

278. *See* *McDonnell Dyer PLC v. Select-O-Hits, Inc.*,

No. W2000-00044-COA-R3-CV, 2001 WL 400386, at \*6 (Tenn. Ct. App. Apr. 20, 2001) (awarding fees in the amount of \$89,685.00 to music distribution company's attorney).

279. See *In re Miller*, 447 A.2d 549, 555–56 (N.J. 1982) (“Especially where, as here, the agreement in question was drawn by a party who had a greater sophistication in drafting legal documents, the Court must examine all the evidence with an eye toward determining the true intent of the parties.”).

# When Crime Pays, Does Anyone Lose?

## Why Owners And Teams Should Care When Their Athletes Get Arrested And What Can Be Done To Prevent It

Anne Phillips

**C**onor McGregor, Aaron Hernandez, Michael Vick, Ezekiel Elliot, Pacman Jones, J.R. Smith. When you hear these names, what comes to mind first? Elite athletes at the top of their professions or their criminal records?

Although it seems as if trouble follows many of these recent multi-millionaires, professional athletes committing and being indicted for crimes is not a modern phenomenon. The NBA alone “boasts” 350 arrests of players over the past 65 years for serious crimes such as aggravated assault, trafficking and selling drugs, sexual assault, domestic violence, manslaughter, and first-degree murder.<sup>1</sup> As early as 1920, with baseball’s infamous Black Sox Scandal and the indictment of eight Chicago White Sox players for conspiracy to throw the 1919 World Series, athletes have been formally accused of committing crimes. Although all eight players were acquitted of these crimes in 1921, newly-appointed baseball Commissioner Kenesaw Mountain Landis permanently banned them from baseball.

“Regardless of the verdict of juries,” Landis wrote, “no player who throws a ballgame, no player that undertakes or promises to throw a ballgame, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed and does not promptly tell his club about it, will ever play professional baseball.”<sup>2</sup> Commissioner Landis’ edict from a century ago seems quaint today, given that athletes have been arrested for and convicted of far more serious and violent crimes, served prison sentences, and generally have been permitted to keep playing professional sports (e.g., Michael Vick, discussed below.)

Although all the major professional sports leagues have players that have been arrested, the NFL seems to stand out as the league with the most arrests and convictions for the most serious crimes. Former Carolina Panthers wide receiver Rae Carruth went from making \$40,000 a game to earning 40 cents a day as a janitor at Nash Correctional Institution in North Carolina, where he served a 19-year sentence following his conviction for conspiracy to murder his girlfriend in 1999. He was recently released from prison.<sup>3</sup> Michael Vick was at the peak of his career as an NFL quarterback with the Atlanta Falcons in 2007 when he was convicted of owning and operating an illegal dog fighting ring on his property in Virginia and spent 21 months in federal prison. He was suspended from the NFL and had to return a large portion of his salary to the Falcons. He was able to return to the NFL in 2009, following his release from prison, with the Philadelphia Eagles. Vick’s story is unique in that he appears to have achieved a measure of

redemption; he now helps mentor younger NFL players.<sup>4</sup>

When a professional athlete is arrested, we hear about it on television, radio, sports talk shows and social media for several days or weeks (usually until the next professional athlete gets into trouble.) This amplifies the problem and makes it appear as if the professional athlete population has a crime “problem.” In reality, as a percentage pro athletes are arrested less than the general population. Tom Keane of the Boston Globe opined that the apparent tendency of pro athletes to be criminals more so than the rest of the population is a myth:

The fall from grace of Patriots tight end Aaron Hernandez should be no surprise. Football is a violent game, war by other means (albeit with black-and-white-striped referees). Here we have young men, taught from an early age to be brutal and then handed extraordinary riches for acting savagely. Conceived of this way, the remarkable thing about the Hernandez saga is not the charge of one murder (and perhaps three), but that it doesn’t happen more frequently. The boundaries of civilization that constrain most people don’t apply to NFL athletes. They can do whatever they want, indulging in their darkest and most vicious impulses mostly without consequence.

There is a surface appeal to the above, and I suspect more than a few reading it are nodding their heads in agreement. But it is also, utterly, nonsense. According to crime reports, NFL pros are not, on the whole, more prone to behaving badly than the rest of us. If anything, they are more law-abiding. And from there should pop the balloon of commentary that has followed Hernandez, commentary that has struggled to find the meaning of it all, as if one arrest must somehow tell us something important and deep about sports and ourselves. It doesn’t. Hernandez is — allegedly — a bad man. There are bad people everywhere, in all walks of life. And some of them, it turns out, happen to be famous.<sup>5</sup>

This is an extreme oversimplification of life imitating art. There is enough anecdotal evidence to suggest that a talented athlete, who is taught early in life that he is “special” and is coddled and treated differently from others who must follow the rules of life, feels a sense of entitlement. Because the powerful and gifted athlete is often able to “get away” with minor infractions (traffic tickets, minor police contact) he often feels, perhaps unconsciously, that he is above the

law. Both professional leagues and the public are no longer willing to tolerate this attitude.

The public perception that there is a problem with NFL players and violent crimes is justified. In 2006, 71 NFL players were arrested. In 2017, 43 players were arrested. In 2018, 32 players had been arrested as of mid-November. Crimes included assault, possession and sale of drugs, robbery, and DUI. The problem is not resolving itself.<sup>6</sup>

This pattern of violence is likely to continue if the 2017 NFL draft is any indicator. In the first round of the draft, the Oakland Raiders drafted Gareon Conley who has been accused of rape. In the second round, the Cincinnati Bengals selected Joe Mixon who, in a viral video, punches a woman so hard that she falls down unconscious. In the sixth round, the Cleveland Browns selected Caleb Brantley who is also accused of punching a woman unconscious. And these are not the only drafted players who have faced such charges.<sup>7</sup>

## **WHY IT IS A PROBLEM FOR TEAMS WHEN PLAYERS GET ARRESTED?**

### *Professional sports teams have a social responsibility to set an example for youngsters and adults who idolize them*

In 2014, the NFL Baltimore Ravens had five players arrested and their security officer was charged with a sex offense. In 2015, three more Ravens players were arrested. These eight arrests in 13 months were by far the most of any NFL team during that period. To the Ravens' credit, the three players arrested in 2015 for various crimes (DUI, felony animal cruelty, and drug charges) were immediately cut by the team.<sup>8</sup>

Still, the NFL has an image problem that players who are arrested do not suffer any negative consequences; 260 players were arrested in 260 weeks during the period of 2010-2015, and many of them kept playing. Cornerback Adam "Pacman" Jones, has the most arrests with 10 during his 13-year career. Jones, who currently plays for the Broncos, has been arrested for, among other crimes, poking a hotel worker in the eye, punching a woman, spitting in a woman's face at a nightclub, being involved in a strip club shooting that paralyzed a man, and as recently as this past July, punching an airport worker, yet teams keep signing him.<sup>9</sup>

Jones is not the only player with multiple arrests who continue to play in the league. As of September 2015, there were 27 active NFL players who had multiple arrests, many of whom had not been punished by the league.<sup>10</sup> Is this the example that the league wants to set for young football players who want to turn pro? Should society not hold professional athletes to a higher standard of moral conduct, or at least a *minimal* standard of conduct, the same standard of conduct, i.e., being law-abiding, to which we hold ourselves?

Charles Barkley, an MVP in the NBA from 1984-2000, who is currently an analyst and commentator for NBA television broadcasts, famously once said that he was not a role model. Karl Malone, an equally prominent NBA player during the same era, responded:

Charles, you can deny being a role model all you want, but I don't think it's your decision to make. We don't choose to be role models, we are chosen. Our only choice is whether to be a good role model or a bad one. I don't think we can accept all the glory and the money that comes with being a famous athlete and not accept the responsibility of being a role model, of knowing that kids and even some adults are watching us and looking for us to set an example. I mean, why do we get endorsements in the first place? Because there are people who will follow our lead and buy a certain sneaker or cereal because we use it.<sup>11</sup>

Being paid to play a game is a privilege, earned when following the rules. As former baseball commissioner Bud Selig has stated repeatedly, "baseball is a social institution;" it should follow high moral standards and set the example for the rest of society.<sup>12</sup> Simple morality and following the same laws and rules in society as everyone else should be the standard for all athletes in every sport who are citizens of the community just like the rest of us. Why does it often appear that professional athletes are above the law? Does this message not encourage the next generation of athletes to presume that they too are above the law? It is this cycle of lawlessness that current athletes can and should strive to break. This is an issue of personal responsibility and moral ethics. The "boys will be boys" attitude is destructive and harmful to society and should not be tolerated, particularly when the "boys" are on a national stage. Team owners and management must set the tone and the lead in this regard as employers. Fortunately, it does appear that leagues' and teams' attitudes have changed towards athletes who commit crimes. The "boys will be boys" attitude appears to be a thing of the past. Or is it?

### *Teams should consider the monetary loss from losing players to suspensions*

If simple morality and example-setting is too idealistic or unrealistic a goal, teams can look to the monetary costs of athletes getting into trouble. Having to pay league fines, legal expenses, actual and potential loss of advertising revenue, player suspensions, and missed games, are all costs to a team when a player gets arrested.

Ezekiel Elliott, the NFL Dallas Cowboys star running back, missed six games during the 2017 season because of his suspension for domestic violence and his unavailability to play had a negative impact on his team as the Cowboys were 3-3 during his suspension. His suspension by the league and the drama of his attempts at an injunction staying the suspension and the Second Circuit Court of Appeals case, surely was a tremendous distraction to the Cowboys. One can only speculate on the enormous legal fees being expended by the league, the team and the players' association in this process.<sup>13</sup>

### *The public perception is that professional athletes can commit crimes and get away with it*

In any other business, an employer would not knowingly hire an employee with a violent criminal history. At the very

least, a lawyer, a doctor or other licensed professional would likely lose their professional license if arrested for or convicted of most of these crimes. As noted above, the major sports leagues might suspend the player for a few games or cut the player from their roster, but that player often ends up being picked up by another team. For example, Adrian Peterson, whose child abuse charges are discussed below, now plays for the Washington Redskins. Most businesses have their reputation and employee morale to worry about, but sports teams don't seem too concerned. When there is a perceived problem, however, then there is a problem. Professional sports teams are private businesses, but they do have public responsibilities.

## **SOLUTIONS: HOW TEAMS AND LEAGUES ARE FINALLY ADDRESSING THE PROBLEM: PREVENTIONS, PENALTIES AND PUNISHMENTS**

### *New league penalties: what the leagues are doing to prevent criminal behavior including suspension and termination*

Until Ray Rice's 2015 arrest for domestic violence assault, the NFL did not appear to take the issue of domestic violence seriously. The NFL had to have a "Rodney King"-type watershed moment when a surveillance video of Rice punching his fiancée in an elevator went viral on social media and the network news channels repeatedly played the video. Prior to the Rice incident the NFL, as well as the other leagues, minimized the punishments for those accused or convicted of domestic violence crimes. Under former baseball commissioner Bud Selig, MLB had never suspended a player for his involvement in a domestic violence situation. Former NBA commissioner David Stern did not suspend a player arrested for domestic violence charges for more than five games and some players arrested were not suspended at all. The NHL had an incident where Semyon Varlamov was arrested for domestic violence assault and kidnapping and was named starting goalie 48 hours after his arrest.<sup>14</sup> After the Rice incident and all the public outcry and news media coverage, the NFL finally took a serious look at this issue and changed their personal conduct policy in 2016 to include discipline not only for those convicted of a crime, but also for players who are found to have "engaged in the conduct."<sup>15</sup>

The new policy begins with the following statement, then lists with specificity the offenses covered:

Conduct by anyone in the league that is illegal, violent, dangerous, or irresponsible puts innocent victims at risk, damages the reputation of others in the game, and undercuts public respect and support for the NFL. We must endeavor at all times to be people of high character; we must show respect for others inside and outside our workplace; and we must strive to conduct ourselves in ways that favorably reflect on ourselves, our teams, the communities we represent, and the NFL.<sup>16</sup>

The policy then provides a long list of crimes, including

assault and battery, threats, family violence, illegal gun possession, and "conduct that poses a genuine danger to the safety and well-being of another person; and conduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel," and provides a schedule of penalties, including leave with pay, suspension and termination. There is also this controversial provision:

In cases where a player is not charged with a crime, or is charged but not convicted, he may still be found to have violated the Policy if the *credible evidence* establishes that he engaged in conduct prohibited by this Personal Conduct Policy.<sup>17</sup> (emphasis added).

What constitutes "credible evidence"? Does this provision provide NFL players clear notice on what type of behavior is no longer tolerated? The new policy also requires players and teams to "self-report" any conduct that may constitute a violation of the policy. The policy puts in writing what was once discretionary action on the part of the league or the teams, which are often reluctant to discipline their own employees (the trend has been to cut or trade them from the team, which usually results in the player going elsewhere to play.) The player will be placed on notice of the findings and evidence gathered by the league's own investigation and will be able to offer mitigation in response. Repeat offenders will be subject to harsher penalties. Some of the players who were suspended under the new policy at the beginning of this season were Nigel Bradham of the Eagles (2016 aggravated assault charge), Daryl Worley of the Raiders (found passed out inside a vehicle blocking the highway), Dante Fowler, Jr., of the Jaguars (battery, mischief and petty theft in a 2017 conviction), and Jameis Winston of the Buccaneers (incident with Uber driver in 2016) to name a few.<sup>18</sup>

Although it appears the policy is designed to be strictly enforced, at least one NFL insider has publicly stated that the new policies are merely "lip service." Professor Deborah Epstein resigned her position on the NFL Players' Association Commission on Domestic Violence this past May after nearly four years of frustration trying to get new policies and recommendations implemented to help curb the incidence of domestic violence committed by its players. According to Professor Epstein, who had to sign a confidentiality agreement, the NFLPA created the commission in name only to make it appear that the players and league were sincerely confronting the problem of domestic violence long enough for the Rice issue to die down all the while continuing to draft players who have been arrested for a variety of assault and domestic violence incidences.<sup>19</sup>

### *Incentives for athletes to complete counseling to mitigate their punishment and save their salaries and jobs*

The new NFL personal conduct policy also includes a provision for evaluation, counseling and treatment, to be paid for by the league, whenever a player is arrested. It also includes a mitigation clause to incentivize players to make a sincere effort at treatment:

The evaluation, counseling and other services are not disciplinary, but are instead intended to help and assist the player address the issues giving rise to the proceedings. The player's decision to make beneficial use of these clinical services will be considered a positive factor in determining eventual discipline if a violation is found, and his satisfactory participation in counseling, treatment, or therapy may mitigate the fine or suspension that might otherwise be imposed.<sup>20</sup>

Players can mitigate their suspensions or terminations while they are getting professional help; this motivates the players to not re-offend and also provides excellent public relations for the NFL. Take the example of Josh Brown, a kicker for the Giants, who only received a one-game suspension when he was arrested for, but not formally charged with, domestic violence in May 2015, prior to the new policy. The Giants later released him, but then re-signed him, even though the allegations were still under investigation. When the Cowboys' Ezekiel Elliott was suspended for six games last year under similar circumstances, the NFL decided to re-suspend Brown under the new policy for an additional five games, apparently in response to criticism that it was unfair to suspend Elliott for six games when Brown received only a one-game suspension. The NFL clearly responds to public pressure, however inconsistently.

Not surprisingly, there is player criticism surrounding the new NFL policy, which permits the league to discipline a player who is not arrested, charged, or convicted of a crime, but is found in violation of the personal conduct policy if *credible evidence* establishes that he engaged in the prohibited conduct. The controversy surrounds the definition of "credible evidence" and how the league will make this determination. It appears that this standard may be too overbroad, vague, and subjective to put players on notice as to what other types of behavior will or will not be tolerated by the league.

#### *Early intervention can start in high school or college*

The case of Aaron Hernandez is an extreme tragedy. Hernandez committed suicide in jail following his murder conviction in 2017. What is less known is that his father died suddenly when he was only 16 and his mother has stated that this affected him deeply in that he began to rebel against authority. He became a star player in high school and college at the University of Florida under coach Urban Meyer, and was drafted by the Patriots following his junior year. He admitted to using marijuana in college after the Boston Globe reported that he had failed numerous drug tests; this did not deter the Patriots from signing him.<sup>21</sup> What if one of Hernandez' high school or college programs had taken a pro-active approach to help him get counseling? Perhaps he, and his victims, might still be alive.

Under the new NFL Player Conduct Policy noted above, players in the NFL will get counseling the first time they get into trouble. But what about preventative counseling early in a player's career, even as early as high school and college?

Some schools do recognize the need for sports psychologists for their student athletes and many schools do provide

full-time sports psychologists for their student athletes. For example, Oklahoma, Virginia, Ohio State, Virginia Tech, Arizona, Southern California, Washington, Iowa, Arkansas, LSU, Missouri, Kansas, and New Mexico have full-time sports psychologists that provide individual counseling for student-athletes, coordination of substance abuse and eating disorder services, team consultations for both clinical (e.g., grief counseling) and performance (e.g., team building) issues, and consultations with athletics administrators on psychological care issues within the athletics department (e.g., establishing postgraduate support programs for former student-athletes).<sup>22</sup> For schools that do not have the resources to have a full-time sports psychologist, there are part-time psychologists or counselors, or a referral to an outside therapist. In addition to the cost, the biggest issue surrounding the slow growth of the use of sports psychologists in the college arena is primarily the stigma of psychological distress in a sports setting. For example, student athletes and coaches tend to minimize mental disorders because of the expectations of strength, stability, and "mental toughness" inherent in the sports culture. As a result, student athletes often avoid disclosing mental health concerns, especially if the perceived negative consequences include being rejected by teammates or coaches due to their disclosure as a sign that they may be "weak." This stigma further exacerbates the problem of the student athlete's mental health as it inhibits effective dialogue, and education and development of resources to address these issues. As a result, many problems get swept under the rug or ignored.<sup>23</sup>

#### *Teams should encourage mentoring by older players*

Michael Vick, as noted above, spent time in federal prison on dog fighting charges. He was able to reinvigorate his career with the Philadelphia Eagles following his release in 2009 and retired after last season, having been named the Sporting News Comeback Player of the Year in 2011.<sup>24</sup> He became an outspoken proponent for anti-dogfighting laws,<sup>25</sup> had a coaching internship with the Kansas City Chiefs,<sup>26</sup> and is presently an in-studio analyst for Fox Sports.<sup>27</sup> He is also one of the NFL's most active players involved in charities. He created the Team Vick Foundation to support the power of a second chance by partnering with charities that provide help to at-risk youth, the incarcerated, addicted or impoverished, and animal welfare charities. He also helps to promote Team Freedom Outreach, a charity that mentors children in youth detention centers. He donated \$200,000 to create a football field for at-risk youth in a North Philadelphia neighborhood. He visits schools and prisons and reaches out to help wherever he can, and none of his work is court-ordered.

Vick has truly shown a desire to make amends and improve his life by helping others, including his teammates while he was still playing. "It's all about being a role model," Vick said. "I try to set the example for athletes to come, the younger players who are going to step foot in the league and try to show them how to make an amazing impact not only for the organization they play for and the team, but the community, too."<sup>28</sup> All teams should encourage this type of behavior from older players, encouraging

them to mentor the younger ones. Players like Vick can teach younger players the importance of staying clean and out of trouble, and the consequences of what can happen if they don't.

### *Teams should institute mandatory wellness programs*

Many large companies have recognized the benefits of providing their employees with wellness programs to keep them healthy, happy, and productive, and some even offer on-site yoga classes. Professional sports teams recognize the need to keep their athletes physically fit, with state-of-the-art practice and workout facilities, but more can be done to help the players improve their mind-body connection. One way to do this is through yoga. Many NFL players are now practicing yoga to help with their strength and balance, or to facilitate recovery from injury. Mike Adams of the Indianapolis Colts practices yoga regularly and encourages other athletes to do so:

I don't believe that yoga is unpopular. I just think that players are uninformed about the many benefits that yoga can provide. The mental benefits of yoga, for me, are a more relaxed mind—I am able to focus on more positive thoughts, and I can clear my mind and eliminate any stress I may feel in my life. Football players in particular can definitely benefit from yoga because the practice can help you build endurance, as well as become more flexible, balanced, agile, and strong overall. Unfortunately, athletes are prone to injuries, but yoga can also supplement our recovery and get us back in the game.<sup>29</sup>

Yoga in the locker room before or after each practice is an idea whose time has come. It is an inexpensive preventative measure that all sports teams can adopt immediately to help their athletes with both their physical and mental well-being. In fact, for baseball players in particular, a regular yoga practice has four key benefits: injury prevention, injury recovery, mental focus through meditation, and strength. Yoga strengthens muscle, improves body tone, and increases flexibility.<sup>30</sup> Evan Longoria, LeBron James, Kevin Love, Ray Lewis, Victor Cruz, and Shaquille O'Neal are among the professional athletes who practice and praise yoga.<sup>31</sup> Teams should consider making it a regular part of team practices.

### *Clarify and strengthen contract provisions with "behave or else" morals clauses*

The first morals clause for a professional athlete may be from a November 11, 1922 contract addendum for Babe Ruth. The standard language in the New York Yankees' agreement stated that "The Player must keep himself in first-class physical condition and must at all times conform his personal conduct to standards of good citizenship and good sportsmanship." Ruth's contract included the following language:

It is understood and agreed by and between the parties hereto that the regulation above set forth...shall be construed to mean among other things, that the player

shall at all times during the term of this contract... refrain and abstain entirely from the use of intoxicating liquors and that he shall not during the training and playing season in each year stay up later than 1 o'clock A.M. on any day without the permission and consent of the Club's manager, and it is understood and agreed that if at any time during the period of this contract, whether in the playing season or not, the player shall indulge in intoxicating liquors or be guilty of any action or misbehavior which may render him unfit to perform the services to be performed by him hereunder, the Club may cancel and terminate this contract and retain as the property of the Club, any sums of money withheld from the player's salary as above provided.<sup>32</sup>

Today, morals clauses in athletes' contracts are commonplace, but are they a deterrent to bad behavior, or just a punitive measure after-the-fact? Each of the four major sports leagues include "morals clauses" in their standard player contracts in their collective bargaining agreements. Section 11 of the NFL standard player contract provides that "if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract."

As noted in more detail above, the NFL Personal Conduct Policy authorizes the NFL Commissioner "to impose discipline as warranted" when a player fails to conduct himself "in a way that is responsible, promotes the values upon which the League is based, and is lawful . . . even where the conduct itself does not result in conviction of a crime."<sup>33</sup> The CBAs also set forth the range of punishments for these behaviors.

Endorsement contracts between players and advertisers also typically include a morals clause which can be negotiated by the individual advertisers and players. These clauses have become increasingly important to companies who do not want their reputations or businesses tarnished by an athlete who commits a bad act, whether or not they are arrested. A corporation may have a large sum of money invested in a player's reputation both on and off the field and any immoral or illegal conduct is going to negatively impact a corporation economically. Under these types of contracts, there is a financial incentive for a player to behave because he will lose money if his endorsement contracts are terminated due to his unlawful behavior. An excellent example is NFL star running back Adrian Peterson and Wheaties. When Peterson was indicted on child abuse charges in 2014, Wheaties immediately removed any mention of Peterson from its website. Peterson had appeared on the front of the cereal box approximately one year prior to the indictment.<sup>34</sup>

Obviously, morals clauses protect the economic interest of the advertisers and corporate sponsors, but they should also serve as both a warning and a deterrent to players to incentivize players to keep their behavior in check, otherwise they stand to lose money.

There are many problems with morality clauses for athletes. When does a lack of "morality" rise to the level of

termination the contract of a player? How is “morality” defined? How does a team or advertiser place the player on notice on exactly what is and is not acceptable behavior? What if an athlete was cheating on his taxes or his spouse or defrauding investors or making racially insensitive comments on social media? What about behavior that might be subjectively objectionable to some but is not illegal such as taking a knee during the national anthem? Morality clauses need to be written as precisely as possible, both to provide notice to the athlete as to what conduct will result in termination and so that in event of a breach of contract action the court will uphold the contract. Leaving the punishment up to the league commissioners is an arbitrary process that generally leaves everyone – the teams, the players, the public – unsatisfied.

While the morality clause with a team can be used as a basis to suspend athletes, it is rarely used as the basis for terminating a contract. In general, state law and the legal process both take an employee’s right to work very seriously and examine carefully the provisions of a mutually agreed-upon employment contract and uphold the terms of that contract. Upholding the termination of a contract usually requires the employer to show extraordinary circumstances to justify such a harsh punishment. This is why the NHL’s Los Angeles Kings made headlines in 2015 by taking steps to terminate the contract of forward Mike Richards twelve days after his arrest at the U.S.–Canadian border for possession of a controlled substance, oxycodone. The move was especially explosive because the Kings had initiated the process of terminating the contract *before* Richards had been convicted of any crime at all. The NHL CBA provides for arbitration in such situations, but Richards and the Kings settled before the matter could be decided by an arbitrator just a few short months after Richards’ arrest; the Kings will pay out Richards’ contract over a period of time. Following Richards’ contract termination, the team instituted drug education and mentoring by former players for current players to help prevent this type of situation from happening again.<sup>35</sup>

## CONCLUSION: PLAYERS, TEAMS AND LEAGUES HAVE COME A LONG WAY, BUT MORE MUST BE DONE

Without question, all the major sports leagues have come a long way since the 1919 Black Sox scandal in dealing with players’ criminal behavior, but much more can and should be done. Each league and team must continue to encourage and incentivize positive behavior and provide the resources for the players to be ethical, moral, and exemplary citizens. Prevention, through early intervention counselling and wellness programs, can and should be implemented by every team. Penalties for bad behavior need to be clearly set forth and implemented accordingly. Punishment should be swift and meaningful. The fans and younger athletes deserve nothing less. ■

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# ABA Entertainment & Sports Lawyer Journal

## Litigation & Industry Updates Column

Michelle M. Wahl, Kyle E. Simmons, Sarah E. Visnovsky, and Tyler Corcoran

### **“BILLIONS” ON THE LINE FOR ALLEGED COPYRIGHT INFRINGEMENT**

Denise Shull and The ReThink Group Inc., recently filed a lawsuit in the U.S. District Court for the Southern District of Illinois against CBS Corp, Showtime and the creators of the hit television show, “Billions”, claiming copyright infringement, injury to business reputation, breach of implied contract, and violation of rights of privacy. Showtime promotes “Billions” as a “complex drama about power politics in the world of New York high finance.” Plaintiffs claim that a character in the popular show, Dr. Rhoades, is a character in Shull’s book, “Market Mind Games: A Radical Psychology of Investing, Trading, and Risk” and that Defendants’ use of real-life encounters to psychologically evaluate financial investors is an unauthorized rip-off of Plaintiffs’ book.

It is alleged that show concepts were discussed but never memorialized in a writing between the parties. Plaintiffs claim they were asked to help develop the character of Dr. Rhoades and to promote “Billions.” However, Plaintiffs argue they never granted Defendants any right to use their persona for commercial purposes or to create derivatives, and certainly without providing appropriate compensation.

Prior to the Complaint being filed, Showtime’s attorneys demanded that Plaintiffs stop referring to themselves as consultants to “Billions” and refrain from claiming themselves as having inspired the Dr. Rhoades character. In response, Plaintiffs filed suit and are now seeking injunctive relief and a monetary award.

*Shull v. Sorkin*, S.D.N.Y., No. 18-12400, filed 12/31/18.

### **44% SONGWRITER STREAMING ROYALTY INCREASE SUBMITTED BY U.S. COPYRIGHT ROYALTY BOARD**

Songwriters and publishers have been waiting a long time to see a major increase in streaming royalty rates. Although the decision to increase mechanical royalties was announced a year ago, the U.S. Copyright Royalty Board did not publish the streaming royalty rate increase until February 2019. From that point, streaming services have 30 days to oppose the increase. However, major publishers have issued clear warnings to Spotify, Amazon and others suggesting they refrain from doing so. Specifically, these publishers have claimed that should the streaming services challenge the rates, they would essentially be declaring war on songwriters.

Historically, however, platform giants like Spotify and Pandora have not held back in challenging royalty rates they felt were neither fair nor reasonable, particularly when the risk involved a loss of income to their investors.

Others, such as Apple, have already indicated they have no intent to challenge the rates. Granted, only time will tell whether the royalty increase will be welcomed as a true partnership between the streaming services and the songwriters/publishers. Stay tuned.

### **RUM GOLD V. USA TRACK & FIELD**

The plaintiff in the case, Gold Medal LLC, conducts its business under one of its products; Run Gum. The company markets its product to runners and as part of its marketing scheme, it sponsors a team of professional runners who promote the product by wearing Run Gum branded apparel in competition. Run Gum, alleges as a result of a conspiracy, it was unable to have its sponsored athletes compete in branded apparel at the 2016 Olympic Trials.

Run Gum stated that the exclusion of sponsors and use of only preapproved sponsors from the marketplace was a violation of §1 of the Anti-Sherman Act. (*Gold Medal LLC v. USA Track & Field*, No. 6:16-cv-00092-MC (9th Cir. Aug. 7, 2018)). The restrictions on advertisements was the basis of the alleged Antitrust violations and served as “price fixing both horizontally and vertically. (*Gold Medal LLC*. at 5-6). As a result, it sought injunctive relief to allow its logos on the uniforms of competitors at the track and field trials.

In order to establish an antitrust claim, there must be four elements present. “The four elements are:

- First: Combination or conspiracy between or among the Defendants to fix the prices of;
- Second: Combination or conspiracy constituted an “unreasonable” restraint on interstate commerce as hereafter defined;
- Third: Defendants’ business activities had a substantial effect or the potential of causing a substantial effect on interstate commerce and the Defendants’ challenged activities involve a substantial amount of interstate commerce; and
- Fourth: Plaintiff suffered injury in its business or property as a proximate result of the combination or conspiracy. ([https://www.americanbar.org/content/dam/aba/publications/antitrust\\_law/at325050\\_tft\\_lcd\\_11th\\_circuit\\_sherman\\_1\\_conspiracy\\_to\\_fix\\_prices.pdf](https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at325050_tft_lcd_11th_circuit_sherman_1_conspiracy_to_fix_prices.pdf).)”

The Ninth Circuit Court of Appeals however decided the case differently. Instead of going through a rule of reason analysis that is customary in Antitrust cases the Court held

that the Ted Stevens Olympic and Amateur Sports Act (ASA) conferred implied antitrust immunity that shielded the advertising restrictions from attack. (*Gold Medal LLC*, at 6.). In fact, under the ASA, “the Olympic Committee exercises exclusive jurisdiction over all matters pertaining to the United States participation in the Olympic games including organizing, financing and representation control of amateur athletics.” (*Gold Medal LLC*, at 4.).

The question of implied antitrust immunity under the ASA was one of first impression for the Ninth Circuit. In conducting its analysis, the court relied heavily on *Behagen v. Amateur Basketball Assoc. of the United States*. (*Behagen v. Amateur Basketball Assoc. of the United States*, (10th Cir. 1989)).

“In *Behagen v. Amateur Basketball Assoc. of the United States*, the Tenth Circuit overturned a jury verdict in favor of a basketball player who challenged a rule prohibiting a player from participating in amateur events if the player had previously participated in professional games. The Tenth Circuit recognized that the basketball association had an underlying need to maintain control over its sport, and the ASA’s intent was to provide that degree of control to such associations.” (*Gold Medal LLC*, at 9.).

The Court in applying *Behagen* believed that as the Olympic Committee was within its authority by not allowing athletes to run in Run Gum apparel. The court emphasized that the District court was correct in its interpretation that because the United States does not provide funding for their Olympic team(s) and relies on the Olympic Committee to raise the financial resources, then protection of the brand through the advertising restrictions may be warranted to preserve the exclusivity and value of the brand. (*Gold Medal LLC*, 6-13).

Run Gum was not the victim of a conspiracy to fix prices; it did however fall victim to the ASA. Although the ASA is silent on antitrust immunity in the act, it appears that the courts have upheld that nationwide sports-governing bodies are free to make restrictive rules so long as those rules are integral to the organizations’ mission evidence by *Behagen v. Amateur Basketball Assoc. of the United States* and now this case.

## **DENT RESURRECTS DIRECT LIABILITY CLAIM AGAINST NFL**

Richard Dent and several other retired players filed a class action lawsuit against the National Football League (NFL) alleging that the NFL has distributed controlled substances and prescription drugs to its players in violation of both state and federal laws, and that the manner in which these drugs were administered left the players with permanent injuries and chronic medical conditions. (*Dent v. NFL*, No. 15-15143, 2018 U.S. App. LEXIS 25302 (9th Cir. Sep. 6, 2018)). Moreover, the players in the suit allege that during their years in the NFL, they received “opioids, non-steroidal anti-inflammatory medications, and local anesthetics.” (*Dent* at 6.). Furthermore, the allegations suggest that the NFL encouraged players to take these medications to keep players on the field without warnings about potential side effects and health issues associated with continued use. (*Dent* at 7.).

The NFL filed a motion to dismiss, arguing that the players’ claims were preempted by § 301 of the Labor Management Relations Act (LMRA) and the district court held a granted the NFL’s motion to dismiss on preemption grounds. The players timely appealed.

Section 301 of the LMRA has been interpreted to address disputes arising out of labor contracts. In fact, § 301 is to “protect grievances and arbitrations as the forum for resolving CBA disputes and the substantive supremacy of federal law within that forum.” (*Dent* at 9.). As a result, § 301 preempts state-law claims, founded directly on rights created by collective-bargaining agreements and are not preempted when; (1) the rights are conferred by state law independent of the collective bargaining agreements; or (2) an interpretation through the collective bargaining agreement is needed. (*Id.*). This notion of preemption refers to the idea that Federal Statutes will displace the law of State Statutes when the two authorities come into conflict.

The Ninth Circuit Court of Appeals heard the case to determine solely if the players’ case was preempted by § 301 of the LMRA. “To determine whether state-law claims are preempted by § 301, a two-step inquiry is conducted:

1. whether the cause of action involves rights conferred upon an employee by virtue of state law, not by a CBA; and
2. if the right exists independently of the CBA.

A hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim nor is using the CBA to calculate damages.” (*Dent* at 10-11.).

This case did not address the merits, but rather the issue of whether the NFL players’ claim was preempted by § 301 of the LMRA. The Ninth Circuit held that the players’ negligence claim did not require interpretation of the CBAs, because each element; duty of care, breach, causation, and damages falls outside the scope of the CBAs and thus the negligence claim regarding the NFL’s alleged violation of federal and state laws governing controlled substances is not preempted by § 301.

## **ONE YEAR AFTER SENTENCING: THE LARRY NASSAR POST-TRIAL TIMELINE OF EVENTS**

### *Nassar’s Sentencings*

After facing more than 100 allegations of sexual assault arising out of his abuse of athletes while acting under the guise of providing medical treatment, on November 22, 2017, Lawrence Gerard Nassar, the former Michigan State University and team USA gymnastics physician, pled guilty to seven counts of first-degree criminal sexual conduct in Ingham County Circuit Court, Michigan. *People v. Nassar*, Ingham County District Court Case No. 17-00425-FY. On January 24, 2018, Circuit Court Judge Rosemarie Aquilina accepted Nassar’s guilty pleas and sentenced him to serve between 40 and 175 years in prison, an effective life sentence. *Id.*

At the same time, Nassar was also facing charges in federal court for receiving child pornography in 2004,

possession of child pornography between the years of 2003 and 2016, and the destruction/concealment of evidence of the child pornography in 2016. *USA v. Nassar*. Case No.: 1:16-cr-00242-1, slip.op. (W.D. Mich. Dec. 7, 2017). On December 7, 2017, just weeks prior to Nassar’s sentencing in state court, U.S. District Court Judge for the Western District of Michigan, Janet T. Neff, sentenced Nassar to serve 60 years in federal prison. *Id.* Nassar’s federal sentence is to be served consecutively to the sentences he received in state court.

### ***USOC Initiates Independent Investigation***

In response to the allegations and after Nassar’s admissions of guilt, on February 2, 2018, the United States Olympic Committee (the “USOC”) engaged the law firm of Ropes & Gray LLP to conduct an independent investigation “into the decades-long abuse by Nassar to determine when individuals affiliated with USA Gymnastics or the USOC first became aware of any evidence of Nassar’s abuse of athletes, what the evidence was and what they did with it.” Joan McPhee and James P. Dowden, *The Constellation of Factor’s Underlying Larry Nassar’s Abuse of Athletes*, Ropes & Gray LLP (2018), <https://www.ropesgray.com/-/media/Files/USOC/ropes-gray-full-report.pdf>.

On February 28, 2018, the USOC released the “New Forms & Initiatives Fact Sheet,” in which the USOC recognized “that the system failed too many girls and women” and assured the public and survivors that it is “demanding a complete leadership and cultural change at USA Gymnastics.” United States Olympic Committee, *U.S. Olympic Committee Announces Significant Changes to Further Protect Athletes* (2018), <https://www.teamusa.org/News/2018/February/28/US-Olympic-Committee-Announces-Significant-Changes-To-Further-Protect-Athletes>. The fact sheet is the USOC’s attempt to inform the public that it is taking the necessary steps to help protect athletes from future abuse and making a concerted effort to respond both quickly and effectively when reports are made. These actions set forth in the fact sheet included identifying new leadership, providing new funding and resources, forming an advisory group, revisiting the SafeSport procedures, and launching a review of the USOC’s and its National Governing Bodies’ (“NGBs”) governance structures. USA Gymnastics is one of the USOC’s many NGBs. *Id.*

### ***Nassar’s Appeals***

On April 10, 2018, in regards to his guilty pleas relating to child pornography and destruction of evidence, Nassar, by and through his counsel, filed an appeal in federal court to the U.S. Court of Appeals for the Sixth Circuit challenging the sentence imposed by Judge Neff. Brief for Appellant, *USA v. Nassar*, No. 17-2490 (6th Cir. Apr. 10, 2018). The brief argues that the district court erred when it counted two state convictions in Nassar’s criminal history because those convictions were underlying conduct to the relevant conduct in this case, and again erred when it imposed procedurally unreasonable consecutive federal and state sentences. *Id.* The brief further argues that the court miscalculated Nassar’s sentencing guidelines range, and that such a

miscalculation “almost certainly increased the length of [his] sentence” and “negatively impact[ed] ... the integrity of the judicial proceedings.” *Id.*

On May 8, 2018, the U.S. Attorney responded by stating that the District Court properly calculated Nassar’s total offense level and the advisory guideline range. Brief for Appellee, *USA v. Nassar*, No. 17-2490 (6th Cir. May. 8, 2018). The federal court of appeals ultimately upheld his 60-year sentence.

On August 3, 2018, Nassar filed a motion in Ingham Circuit Court to disqualify Judge Aquilina, who was assigned to his criminal case. *People v. Nassar*, Ingham County District Court Case No. 17-00425-FY. On August 14, 2018, that motion was denied. *Id.* Nassar’s counsel argued that Aquilina was biased and her comments merited disqualification. *Id.* On December 17, 2018, the Michigan Court of Appeals decided to review whether Nassar received an unfair hearing as to his seven sexual assault charges. *Id.*

### ***The Results of the Independent Investigation***

On December 10, 2018, following its ten-month-long investigation, Ropes & Gray released a thorough 233-page independent report to the public, which was appropriately titled “The Constellation of Factors Underlying Larry Nassar’s Abuse of Athletes.” The independent report outlines the institutional failures that enabled Nassar to abuse athletes for approximately 30 years. Joan McPhee and James P. Dowden, *The Constellation of Factor’s Underlying Larry Nassar’s Abuse of Athletes*, Ropes & Gray (2018), <https://www.ropesgray.com/-/media/Files/USOC/ropes-gray-full-report.pdf>.

The report is divided into five areas of primary concern:

- Part I: What Happened
- Part II: Nassar’s System of Abuse
- Part III: Who Knew What When and What Was and Was Not Done in Response
- Part IV: Contributing Cultural Conditions
- Part V: Olympic Governance Structure and Disconnect Between Adopted Policies and Effective Action

Ropes & Gray, *Report of Independent Investigation into Larry Nassar’s Abuse of Athletes* (2018), <https://www.prnewswire.com/news-releases/report-of-independent-investigation-into-larry-nassars-abuse-of-athletes-300762806.html>.

Ms. Joan McPhee and Mr. James Dowden, Partners of Ropes & Gray and former federal prosecutors, said:

“Nassar’s sexual abuse of hundreds of girls and young women was a manifestation of a broader set of factors and conditions in elite gymnastics and Olympic sport that allowed the abuse to occur and then to continue uninterrupted for almost 30 years. The fact that so many different institutions and individuals failed

to stop him does not excuse any of them, but instead reflects the collective failure to protect young athletes.” *Id.*

McPhee and Dowden continued by explaining that:

“Our aim was to get to the bottom of what went wrong. And it remains our sincere hope that our factual findings will inform efforts going forward to protect young athletes, and will help to ensure that a predator like Nassar can never again find so accommodating a home in sport.” *Id.*

### **Legislative and Institutional Changes**

On March 1, 2018, the USOC Athletes’ Advisory Council (the “Advisory Council”), an organization which represents Olympic athletes, wrote a memorandum to Congress requesting it impose changes on the USOC in order to prevent future abuse of athletes. USOC Athletes’ Advisory Council, *Statement on Athlete Sexual Abuse and Necessary Reforms* (2018), <http://koaa.images.worldnow.com/library/39cc4330-7545-463e-bae1-3e98166bbd07.pdf>. The Advisory Council claimed to believe that the abuse within USA Gymnastics NGB is a symptom of a larger problem within the USOC. Additionally, the Advisory Council asked for an independent committee to review and recommend improvements to the Ted Stevens Amateur Sports Act (36 U.S.C. Sec. 220501 et seq.), the federal law governing Olympic sports. *Id.* The USOC has since launched an internal review of the USOC and its NGBs to determine the necessary changes. Universally recognized throughout this ongoing process and unquestionably problematic was the exorbitant lack of oversight while these incidents of sexual abuse were occurring, as well as the fact that no one within the institution has been held accountable for such oversight.

Following legislative action taken earlier in 2018, on December 17, 2018, Michigan Governor Rick Snyder signed bills inspired by Nassar’s misconduct into law. The newly enacted laws lengthen the time permitted for the filing of civil lawsuits in matters involving sexual assault and criminal charges in child sexual abuse cases. *Michigan Governor Signs More Bills Inspired by Nassar Case* (2018), <https://www.apnews.com/d10813334e46432497c03a97a4a426bd>. Additionally, the new laws give judges increased flexibility and greater discretion when admitting evidence of a defendant’s prior sex assaults, stiffen prison terms imposed on crimes involving child pornography, and expand who is permitted to provide a victim impact statement at a sentencing under certain circumstances. *Id.*

Currently, the USOC enjoys a tax-exempt status because it does not receive any government funding and is incorporated as a 501(c)(3) not-for-profit organization. Additionally, judges have consistently held that the Ted Stevens Act gives the USOC antitrust immunity. *See Gold Metal LLC v. USA Track & Field*, 899 F.3d 712 (9<sup>th</sup> Cir. 2016). However, Senator Richard Blumenthal of Connecticut announced that the USOC should be concerned about the longevity of its tax-exempt status and antitrust exemption,

as the exemptions could be at risk when Congress revisits the Ted Stevens Act. The Associated Press, *Senator Suggests Possible End of USOC’s Tax-Exempt Status* (2018), <https://www.usatoday.com/story/sports/olympics/2018/10/03/senator-suggests-possible-end-of-usoc-tax-exempt-status/38038187/>. Undoubtedly, revocation of the USOC’s tax-exempt status and subjecting it to potential antitrust litigation could pose detrimental financial ramifications to the USOC operation, which brought in \$336 million during the 2016 Olympic year alone. *Id.*

In an attempt to prevent future athlete abuse, Blumenthal also suggested the position of an “athlete advocate” and “inspector general” be added to the USOC. *Id.* Currently, the USOC has an “athletes’ ombudsman” position; however, as was recently revealed in its previously mentioned reports, it intends to implement policies that give athletes more-accessible avenues to report abuse and other wrongdoing. Blumenthal, working in conjunction with numerous other U.S. Senators on the issue, stated that Congress would make the necessary revisions to the Ted Stevens Act to ensure that “the USOC is held to a higher standard of accountability.” *Id.*

On December 20, 2018, a 132-page Congressional Report was released, echoing the contents of the Ropes & Gray independent report and detailing the USOC’s failure to protect athletes. The Congressional Report pointed out that the vast majority of Olympic athletes are minors and that the USOC has adopted a prioritization of “medals and money” over the safety of its athletes, which has in turn “creat[ed] a culture that contributed to widespread instances of sexual abuse.” Carroll, Rory, *USOC Prized Winning Over Athlete Safety: Congressional Report* (2018), <https://www.reuters.com/article/us-olympics-usoc-report/usoc-prized-winning-over-athlete-safety-congressional-report-idUSKCN1OJ2KV>.

### **The USOC’s Response to the Legislative Pressure**

In response to the widespread criticism surrounding its handling of sexual misconduct allegations, the USOC followed up on its “New Forms & Initiatives Fact Sheet” with the publication of the “Release Reforms Fact Sheet.” This subsequent fact sheet outlines the organization’s “significant progress” by its implementation of a number of reforms and initiatives, including instituting new leadership and stronger accountability measures. United States Olympic Committee, *USOC Reforms Fact Sheet* (2018), [https://www.teamusa.org/-/media/TeamUSA/Documents/USOC-Reforms-Fact-Sheet\\_FINAL.pdf?la=en&hash=3A1F650C9E6906B22C516696AAA66DBC13AD61C6](https://www.teamusa.org/-/media/TeamUSA/Documents/USOC-Reforms-Fact-Sheet_FINAL.pdf?la=en&hash=3A1F650C9E6906B22C516696AAA66DBC13AD61C6). Also included in this fact sheet is the USOC’s announcement that it has begun the process of revoking USA Gymnastics’ recognition as the NGB governing gymnastics in the United States. *Id.* On November 5, 2018, the USOC Chief Executive Officer Ms. Sarah Hirshland released a statement concerning this revocation. Hirshland, Sarah, *USOC Statement Regarding Action To Revoke USA Gymnastics’ Recognition As Member National Governing Body* (2018), <https://www.teamusa.org/News/2018/November/05/USOC-Statement-Revoke-USA-Gymnastics-Recognition-As>

Member-National-Governing-Body.

However, the looming concern and unanswered question is whether this decision to revoke USA Gymnastics' NGB recognition will negatively impact athletes. The December 20th Congressional Report did recommend that disciplinary actions be taken against NGBs, but it also emphasized the importance of only taking those actions that do not detrimentally affect those athletes who have dedicated their lives to the sport. Carroll, Rory, *USOC Prized Winning Over Athlete Safety: Congressional Report* (2018), <https://www.reuters.com/article/us-olympics-usoc-report/usoc-prized-winning-over-athlete-safety-congressional-report-idUSKCN1OJ2KV>.

## OAKLAND TAKING "NFL CARTEL" TO COURT OVER RAIDERS' LAS VEGAS RELOCATION

*(City of Oakland v. The Oakland Raiders, et al., Case No. 4:18-cv-07444 (N.D. Cal., 12/11/2018))*

In December 2018, the City of Oakland filed a blockbuster lawsuit related to the relocation of the National Football League's (the "NFL") Raiders franchise to Las Vegas.<sup>1</sup> The complaint—consisting of both federal antitrust and breach of contract claims—alleges that the Raiders, the NFL, and the NFL's other 31 teams ("Member Clubs") (collectively, the "Defendants"), negotiated in bad faith with the City of Oakland, acted as an illegal cartel in approving the Raiders' relocation, and violated the NFL's own relocation policies. Oddly, the complaint does not seek to prevent the Raiders relocation, but instead seeks to recover the maximum amount of damages.

Over the last few years, the NFL has experienced a frenzy of franchise relocation: the Rams moved from St. Louis to Los Angeles in 2016; the Chargers moved from San Diego to Los Angeles in 2017; and, the Raiders are set to leave Oakland for Las Vegas in 2020.<sup>2</sup> While relocations are relatively rare, they follow a general pattern: the owner of the team makes demands for the city to provide public funding for a new stadium; the city declines; if the city does not acquiesce to the owner's demands, the owner relocates to a new city that is willing to offer public funding for a new stadium, which significantly increases the franchise's valuation.<sup>3</sup> After a sports franchise leaves their old home for a new city, fans in the team's former city are often left scorned and heavily in debt, often resulting in litigation. In fact, Oakland's lawsuit is remarkably similar to the one filed by the City of St. Louis over the Rams relocation.<sup>4</sup> However, key differences between the two cases do exist. While both cases allege breach of contract claims, the City of Oakland—unlike St. Louis in the Rams' litigation—will have the additional burden of proving it has standing to sue under the breach of contract claims; to do so, the city would have to show that it was a third-party beneficiary of the NFL constitution and bylaws, which could prove quite difficult.<sup>5</sup>

Another key difference between the two cases relates to antitrust claims. Here, the complaint alleges that the nature and effect of the NFL's relocation policy amounts to a group boycott and refusal to deal, and effectively operates as a horizontal price fixing scheme—all in violation

of Section 1 of the Sherman Act. Compl., *City of Oakland v. Oakland Raiders, et al.*, Case No. 4:18-cv-07444 (N.D. Cal., Dec. 11, 2018). Yet, as some legal experts have noted, this antitrust theory is rather peculiar, as cities do not typically file this type of antitrust action.<sup>6</sup> More interestingly, the very NFL relocation policies challenged by the plaintiffs in this case were implemented in order to mitigate the potential antitrust liability from the "territorial allocations of NFL teams." *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984).

In *Los Angeles Memorial Coliseum*, the Ninth Circuit affirmed the district court's ruling that the NFL relocation policy requiring the approval of three-quarters of Member Clubs ("Rule 4.3") was an unreasonable restraint of trade and thus violated Section 1 of the Sherman Act. *Id.* The plaintiff in that case was the Oakland Raiders franchise, led by owner Al Davis, who wanted to relocate the Raiders to the Los Angeles Coliseum in 1980 but needed to first obtain the approval of three-quarters of Member Clubs. The NFL rejected the relocation bid and Davis subsequently sought to have Rule 4.3 ruled illegal under federal antitrust law. The district court agreed with Davis' contention and enjoined the NFL from enforcing Rule 4.3. In affirming the district court on appeal, the Ninth Circuit reasoned that, though the unique industry structure of the NFL made some collective action necessary, the "competitive harms of Rule 4.3 are plain," and, in effect, "insulate each team from competition within the NFL market . . . allowing them to set monopoly prices to the detriment of the consuming public." *Id.* at 1395. However, the Court also recognized that because Rule 4.3 does serve a legitimate purpose, the voting requirement failed to make sure that purpose is met because it contained "no standards or durational limits." *Id.* at 1396. Moreover, the Court held that the "restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL 'product' . . ." *Id.* at 1397. Critically, the Court suggested the NFL's relocation policies should expressly recognize objective factors such as "population, economic projections, facilities, regional balances" and should also incorporate "fan loyalty and location continuity." *Id.* In response, the NFL amended Rule 4.3 in 1984 to incorporate the factors suggested by the Ninth Circuit, as well as other additional factors (the "Rule 4.3 factors"). *Id.* at 1396.

Oakland's current complaint alleges that, in deciding to relocate to Las Vegas, the Defendants ignore the carefully tailored Rule 4.3 factors, and are effectively in violation of the antitrust laws once again. Compl. 7, *City of Oakland v. Oakland Raiders, et al.*, Case No. 4:18-cv-07444 (N.D. Cal., Dec. 11, 2018). The complaint asserts that "[e]very one of the Relocation Policies' considerations and factors supported a decision to keep the Raiders in Oakland." Compl. 5. Moreover, the complaint argues the current relocation policies "promotes relocations in order to further line the pockets of NFL Club owners with millions of dollars paid by their billionaire competitors." That is, current relocation policies state that a relocating Member Club will ordinarily be expected to pay a relocation fee if the relocation is approved, and because "the non-relocating NFL owners

determine the relocation fee” and “typically [do so] before a relocation vote is taken,” the Member Club Owners “decide in concert how much money they will receive for voting ‘yes’ to allow an NFL Club” to relocate. Compl. 16–17.

The relocation fees are significant too: the Rams (\$645mm), Chargers (\$645mm), and Raiders (\$378mm) will collectively pay just under \$1.7 billion in relocation fees over the next decade.<sup>7</sup> This results in roughly \$55.2 million dollars over an eleven-year period for each of the non-relocating teams. Further, because “the relocation fee is a source of income that the NFL Club owners do not share,” it functions as a “pure cartel payment that goes straight to the NFL Club owners’ bottom lines. . . .” Compl. 17. Such massive payments give owners a strong incentive to favor the relocation of other Member Clubs. In total, the complaint alleges that the Defendant’s conduct amounts to “a leveraging of the NFL’s monopoly power, used to extract value from municipalities through an auction that ignores the court-mandated objective relocation procedures.” *Id.*

Though Oakland does not seek to use the lawsuit to stop the Raiders from moving to Las Vegas, the complaint’s invocation of antitrust laws is understandable for one reason: the availability of treble damages under federal antitrust laws. 15 U.S.C. §§ 1 and 15. As a result of the NFL’s monopoly power over NFL franchise location, Oakland claims the City and its taxpayers have been seriously harmed. Indeed, the complaint states that the City of Oakland has “invested and borrowed . . . over \$240 million, in reliance on the Relocation Policies and the presence of the Raiders in Oakland and at the Coliseum.” Compl. 32. To that end, it is estimated the City of Oakland and Alameda County still owe \$83 million in debt from the 1995 renovation of the Coliseum.<sup>8</sup> Moreover, the complaint argues the City will also “lose the significant tax and other income that it derives from the presence of the Raiders and the economic activity their presence generates.” Thus, given that the Ninth Circuit has recognized both that the Member Clubs effectively operate as a Cartel, and that the NFL has monopoly power over franchise allocations, treble damages offer a glimmer of hope for the economic harm wrought by the Raiders move. It is therefore not entirely surprising one Oakland City Councilmember thinks the City could win up to \$500 million dollars if the suit is ultimately successful.<sup>9</sup>

Yet, as some legal experts have recognized, the suit may prove to be ultimately unsuccessful for Oakland residents.<sup>10</sup> Still, the harms created by franchise free agency to both municipalities and fans are real, and perverse incentives for owners to agree to club relocations exist. And in light of the populace’s increasing understanding that the public funding of sports stadia is not the economic development panacea once thought,<sup>11</sup> the Defendants would be wise to note that hell hath no fury like a fan base scorned. Raider Nation, facing the Defendant’s proffered “Hobson’s Choice: [to] pay the enormous demands associated with new and renovated stadia or lose your NFL Club,” would certainly be justified in feeling scorned. Compl. 28. ■

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# Has the Supreme Court's Sports Gambling Decision Opened the Door for Corruption in eSports?

Christopher C. Schwarz

## INTRODUCTION

The United States Supreme Court's recent decision on sports betting in *Murphy v. National Collegiate Athletic Association*, is monumental.<sup>1</sup> It allows states to regulate gambling within their borders, setting the stage for cataclysmic changes to many of the most popular gambling outlets including sports, particularly popular professional sports such as the National Football League ("NFL"), the National Basketball Association ("NBA"), Major League Baseball ("MLB"), the National Hockey League ("NHL"), as well as many others. However, the decision will not just impact traditional sports leagues, it is also poised to revolutionize one of the fastest growing forms of professional competition across the globe: eSports gaming leagues.

While the decision by the Court liberates gambling proponents of all shapes and sizes, it also could create an environment where corruption and manipulation run rampant, given the unique structure of eSports gaming and competition. Perceived cheating in one jurisdiction may not be so in another jurisdiction, and punishment may be nearly impossible to enforce with the amount and forms of money that could change hands. Sufficed to say, the Court's decision and reactions thereto have implications on both national and international levels of eSports competition. eSports themselves are probably not as well-understood by the general public as traditional sports, so to properly assess Murphy's impact on eSports, it is necessary to first understand eSports.

## HISTORY OF ESPORTS

A common misconception about eSports and their competitions is that they are entirely a 21st century concept, derived from the Internet, increased data processing speeds, cloud computing, and other recent technological advances. The reality however, is that the roots of eSports tournaments date back to the first video game experiences of the 1970s when students at Stamford University organized a competition on the video game, *Spacewar*.<sup>2</sup> Nearly a decade later, a *Space Invaders* video game tournament garnered mainstream media attention in bringing together more than 10,000 competitors for the video game challenge.<sup>3</sup> While not yet virtual interaction, early video game experiences set the stage for the monetization of video game tournaments, which were ready to cascade onto the scene with the strike of a technological match.

So, let's get to that match that changed eSports—and the world—forever: the Internet. In the 1990s, as world came online, internet PC games exploded in popularity and Nintendo fostered video game tournaments of epic proportions.<sup>4</sup> One of the first eSports tournaments was the 1997

Red Annihilation tournament, drawing nearly 2,000 competitors.<sup>5</sup> A few weeks after that tournament, eSports made history again: the first major gaming league, the Cyberathlete Professional League ("CPL") was formed and soon held its first tournament.<sup>6</sup> Staunch in their belief that video games can be sport requiring training and skill, the league made a point to include "athlete" in its official CPL name. Even more importantly, other leagues popped up as well, and prize money began to reach the tens of thousands of dollars.<sup>7</sup>

The leagues continued to grow across the globe: from South Korea's Global StarCraft 2 League, to France's Electronic Sports World Cup, to the powerful Major League Gaming league established in North America in 2002. The latter even has its own global streaming platform: MLG.tv.<sup>8</sup>

With the leagues came the money. Last year, the total eSports prize money awarded amounted to approximately \$110.6 million USD from a total of 3,765 worldwide tournaments.<sup>9</sup> That number has already more than quadrupled for 2018.<sup>10</sup> The largest prize pool from a single tournament in 2017 was \$24.6 million at The International 2017.<sup>11</sup> eSports revenue is projected to hit \$1.5 billion by 2020.<sup>12</sup>

Furthermore, what might have been thought to be unfathomable in the past, eSports arenas are now becoming as popular as traditional sports arenas. For example, for more than four decades, Key Arena in Seattle, Washington, housed the famed Seattle Supersonics NBA basketball team. What was once a premiere championship-winning NBA franchise that sold out games with ease in their early days, struggled to fill seats in the early 2000s. More seats were empty than filled on numerous occasions and the city soon sold the team. However, the old venue recently hosted the \$24-million 2017 "Dota 2" International eSports gaming tournament, selling out every one of the more than 10,000 seats in less than 30 minutes for hundreds of dollars on average per seat.<sup>13</sup> How times have changed.

Fans of these eSports leagues are paying hundreds of dollars, much more than many traditional sporting events, to sit in a sold-out arenas and watch competitors play video games hundreds of yards away. Arenas for eSports, like eSports themselves, are a global trend taking over the sports world whether fans like it or not. Significantly, eSports popularity to gambling enthusiasts and gambling manipulators is just as prevalent and cannot be ignored in this new era that the Supreme Court has ushered in of deregulated sports gambling.

Gambling and sport set us apart as a species. Our intellectual capabilities require us to effectuate order to stymie the inherent manipulation that comes with both gambling and sport. Order is not always easy, but order in many ways

has successfully wrangled the marriage of gambling and sport producing billions of regulated tax dollars, while failing miserably in other aspects. The Internet has changed the dynamic between gambling and sport, and so has the advent of eSports. If you don't believe eSports are taking over the world, you may be living in a false reality akin to the virtual ones eSports has placed in the venues all around you. Simply put, eSports are popular and here to stay, making the Supreme Court's decision in *Murphy v. NCAA*, without more, exceptionally concerning. First however, we must understand the pitfalls of gambling and sports gambling's troubled past.

## GAMBLING AND ITS AMERICAN REGULATION

### (A) *Our Early Days*

Gambling is in human's DNA, literally. We unknowingly play with chance in evolution, survival, and reproduction. It makes sense that we would extract from our very lucky and very chancy DNA games of chance. We've been doing it for millennia in fact. Gambling dates back to at least the Paleolithic period, before written history.<sup>14</sup> Our ancestors would roll figurative dice on hunting for food and avoiding diseases and then sit by fire and roll actual six-sided dice, at least as early as 3,000 B.C.

China takes a lot of credit for "inventing" gambling, as it should. Records show gambling houses were widespread in the first millennium B.C.<sup>15</sup> Animal fights, lottery number types games, and versions of dominoes were the gambling pleasures that the Chinese grew to love and perfect in ancient times. Playing cards eventually joined the Chinese gambling floors as far back as the Fourteenth century.

Not to be outdone, and with the advent of expansive trade and the silk road, Europe and Africa claimed their own cultural stake to gambling. Playing cards arrived in Europe from Mamluk, Egypt, in the Fourteenth Century, while Persia popularized versions of card games such as poker in the Seventeenth century.<sup>16</sup> The four-suited playing cards popular in most table gambling games are likely derived from the Mamluk suits of cups, coins, swords, and polo-sticks.<sup>17</sup> The suits were later replaced as cards spread into Germanic countries. The first known casino, the Ridotta, opened in Venice, Italy in 1638. Gambling and the games associated therewith had drug-like affects, and its lures spread like wildfire.

Colonial America could not escape the gambling gene either. To raise revenue in the new colonies, authorities instituted lotteries to raise funds, which eventually funded many universities.<sup>18</sup> The Continental Army survived many a cold winter from jackets provided in part from gambling revenue.<sup>19</sup> In fact, prior to American independence, Britain implemented a lottery regulatory scheme in 1769, another line item entry on the long list of grievances that eventually led to the Revolutionary War. With the advent of American independence and loosened gambling restrictions came a new gambling frontier where newer city centers on the American frontier emblazoned with freedom, fear, wonder, and curiosity such as New Orleans, Louisiana became some the prime locations for American gambling.<sup>20</sup> Dogs, pigs,

horses, roosters, cards, dice, the list of gambling activities of the era was only limited by the now antiquated reserved colonial mind.

However, cultural norms reverted to the conservative days of old, as gambling became overpowering to many communities and regulations from all levels of government became increasingly prevalent. The gamblers headed for the riverboats and railroads.<sup>21</sup> With the rise of lotteries and riverboat casinos came corruption, fraud, and cronyism. For example, contractors hired to use gambling revenue from national lottery efforts, in order to beautify Washington D.C. ran off with the funds before the eventual lottery winner was ever paid.<sup>22</sup> Those new to gambling were taken advantage of by seasoned gambling veterans who knew how to alter the odds in their favor and collect immense sums of money.<sup>23</sup> Gambling remained detested by many for these and other reasons.

Gamblers were eventually chased west, so far west that San Francisco became a new gambling hotbed.<sup>24</sup> It only made sense. The folks settling in the Bay Area were children of the Gold Rush. They were dreamers, eternal optimists that the dice would always land on seven for them. But even dreamers must wake up. California initiated regulations that essentially crippled mainstream gambling and sent it hurling into the confines of private life and underground. Even race track betting was banned until a state constitutional amendment legalized it again in 1933.<sup>25</sup> Indian reservations and the accompanying recognized independence of course paved the way for what many recognize today as some of the most well-known of gambling locales.

When the stock market crashed in 1929 and the Great Depression settled in, people lost all morale left over from the end of World War I. The only parties more desperate than the citizens were the states, which were wiped clean of any money and in need of revenue ideas. Nevada not only had the Great Depression to deal with, it also had one of President Roosevelt's iconic dreams resting in the balance: the Hoover Dam. Nevada's once-lucrative mining business had lost its luster.<sup>26</sup> Desperate and with public opinion on its side, Nevada's legislature legalized casinos with the Wide-Open Gambling Act of 1931.<sup>27</sup> Liberal states quickly followed suit and betting, especially sports betting on race-tracks, began to flourish.<sup>28</sup>

At the federal level, Congress organized a committee to investigate fraud, money laundering, and the mob's influence on gambling revenue and casinos.<sup>29</sup> Unsurprisingly, Congress discovered that the mob's control over gambling revenue led the mob to withhold tax dollars as profit.<sup>30</sup> As the mob rigged the games, they cooked the books. Focused on ulterior solutions to the gambling problem (other than an absolute prohibition), Congress allowed gambling to continue as the revenue was still too juicy to simply let the mob shut it down. With no outright prohibition, a few states joined the casino and gambling arms race. Oregon, Delaware, and Montana opened sports lotteries allowing players to legally bet on sports, while Nevada expanded to include licensed sports pools.<sup>31</sup> But, sports betting was not new to the country. Sports wagering has been going on as long as Americans have had sports to wager on. Simply put

the money is there to be had, as well as hard lessons to be learned.

### ***(B) The Lure of Sports Gambling in Recent Centuries and the Painful Lessons eSports Must Learn from the Past***

What if nearly \$3 billion in sports wagering occurred annually in the United States? What if that represented less than 1% of all sports betting in the world? Not only is that the case, but those estimates may be conservative.<sup>32</sup> There is simply more consumer money dedicated to gambling than anybody really knows what to do with. Additionally, one of the more upsetting conclusions from the above figures is that almost every gambling transaction is unregulated, untaxed, or subject to a broken international gambling system full of corruption.

Meanwhile, money continues to pour into sports as well. The highest paid public employee in 39 of the 50 states is the head football or basketball coach for the local college sports team.<sup>33</sup> The Governor of Texas, Greg Abbott, made \$150,000 last year.<sup>34</sup> Tom Herman, the head football coach at the University of Texas made more than 36 times that figure: \$5.5 million.<sup>35</sup> No public employee in Texas earned a higher salary.<sup>36</sup>

In professional sports, the number of multibillion-dollar sports franchises grows by the year.<sup>37</sup> The Los Angeles Lakers are purported to be worth \$3.3 billion.<sup>38</sup> That's more than the total annual gross domestic product ("GDP") for the countries of Belize, Micronesia, and Samoa... *combined*. The Lakers are worth more than the annual GDP of Greenland and around thirty other countries.<sup>39</sup> The Lakers are not even the most valuable sports team.<sup>40</sup> They're not even in the Top 5.<sup>41</sup> They're not even the most valuable NBA team!<sup>42</sup>

The money is there because sports have in many ways become the backbone of popular competition and consumer discretionary spending in the United States. Disney, a longtime economic king of consumer discretionary economics even owns the "worldwide leader in sports": ESPN. The money is there, both in gambling and in sports. However, history has shown that mixing the two together creates a powerful cocktail of unprecedented proportions, a potentially dangerous yet unbelievably lucrative revenue stream.

Players and gambling organizations alike can easily change or unduly influence the outcomes of games if the price is right. Some student-athletes, typically broke and without salaries, along with their coaches and executives, have notoriously fixed games for financial profit, from coast to coast. In 1950s New York, 32 players from 7 schools in the state were caught in a scheme to fix the outcomes of more than 85 games.<sup>43</sup> In the 1970s, members of the Boston College basketball team were caught shaving points in nine games depending on the gambling spread, resulting in one individual receiving a multiyear prison sentence.<sup>44</sup> In 1985, five players from Tulane University allegedly split \$18,000 for point-shaving games, with the coach in on the plot as well.<sup>45</sup> College sports gambling scandals continued well into the 1990s with similar schemes at Northwestern University and Arizona State University.<sup>46</sup>

Professional sports have suffered from the vices of

gambling as well. Consider baseball, where money schemes have existed since at least 1877 when players of the Louisville Grays accepted money to throw games.<sup>47</sup> The infamous 1919 Black Sox scandal, also known as the "Big Fix" saw 8 Black Sox players intentionally sabotage their team's appearance and chance at winning the 1919 World Series in exchange for money from a gambling syndicate led by Jewish mob boss, Arnold Rothstein.<sup>48</sup>

In March of 1989, Pete Rose, MLB's all-time hits leader and manager of the Cincinnati Reds at the time, was caught betting on MLB games, including Reds games he was coaching. The results of the ensuing investigation, called the "Dowd Report," revealed that Rose bet on 52 Reds games in 1987, at a minimum of \$10,000 per day.<sup>49</sup> One of the most prolific baseball players of all time, Rose has since been banned for life from the sport, including from the Baseball Hall of Fame.

Basketball provides us a chilling example from relatively recently. In 2007, the Federal Bureau of Investigation ("FBI") investigated NBA referee Tim Donaghy for betting on games. The FBI concluded that Donaghy not only had bet on games during the 2005-06 and 2006-07 NBA seasons, but he did so in games he was refereeing.<sup>50</sup> He was sentenced to 15 months in prison.

Safe to say, gambling and sports have a vicious relationship with one another. The terrifying reality is that the aspects of sport traditionally manipulated in gambling controversies—the environment; the players; the stats; the effort; the controlling pieces—are much more subject to manipulation in the virtual worlds of eSports where so much of the sport is dependent on microchips, connectivity, and computer code among other things. How might wagering crooks manipulate gambling? In the early 1990s, Congress was forced to ask itself a that question for traditional sports.

### ***(C) Modern Times Under the PASPA***

In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA," or also known as the "Bradley Act") in an attempt to define a consistent understandable legal status for sports betting throughout the United States.<sup>51</sup> As its name suggests, the act sought to, among other things, protect the integrity of sports, and did so by outlawing sports betting nationwide, with the exceptions of the sports lotteries conducted in Oregon, Delaware, and Montana, and the sports betting established in Nevada. Interestingly enough, the legislation provided a one-year window for New Jersey, which operated licensed casino gaming during the previous ten-year period, to pass laws permitting sports wagering, but New Jersey did not do so and was effectively included in the list of banned states.

For 20 years, certain excluded states realized they were missing out on filling their coffers with sports gambling revenue. In 2012, with growing and overwhelming support to legalize sports betting in New Jersey, New Jersey passed a law to legalize gambling in the state in licensed locations. The Department of Justice, the major American sports leagues, and the NCAA, all generally longtime opponents of gambling, argued the law violated PASPA. New Jersey

didn't disagree in the manner one might think. New Jersey took the position that regardless of its new law's legality, PASPA was the problem as it violated the Tenth Amendment of the United States Constitution and its protection from anti-commandeering federal laws. New Jersey essentially told the court it's not okay to tell the states they cannot pass laws. The Court found for the sports leagues, reasoning that New Jersey's law violated the federal PASPA. New Jersey appealed to the Third Circuit, which also found for the sports leagues on preemption grounds.<sup>52</sup> However, the Court held that New Jersey could possibly repeal any existing state law prohibiting gambling and potentially legalize licensed sports gambling in that vein.<sup>53</sup> In the meantime, New Jersey was enjoined from enacting the gambling legalization law.<sup>54</sup>

New Jersey went back and took to heart every word of the court's opinion. Based on the Third Circuit's comment that New Jersey may be able to get away with reverse engineering legalized sports gambling by lifting its own ban and nothing else, New Jersey passed a law in 2014 repealing New Jersey's now-former ban on sports gambling, hoping to backdoor the system PASPA put in place based on suggested instructions from the Third Circuit. The sports leagues again filed suit and again won, in the District Court and the Third Circuit, for the same reason that the law violated PASPA.<sup>55</sup> The court emphasized in its ruling that the second attempt is not really deregulation, but rather a law contradictory to PASPA veiled as something else. This time, New Jersey appealed to the United States Supreme Court, requesting the Court examine PASPA as a clear violation of the anti-commandeering provisions of the Tenth Amendment. The stage was set for the *Murphy* decision.

#### ***(D) Gambling Regulations Hit Critical Mass in America Just in Time for the Explosion of eSports Popularity and the Murphy Decision***

Ultimately, as New Jersey fought the federal government over its rights to legalize sports wagering, eSports were simultaneously beginning to be taken seriously, earning players and gamblers alike substantial sums of unregulated cash. The sports garnering gamblers' attention were changing faster than gambling could be regulated. As the nation stumbled over itself to get the law right, the Supreme Court finally stepped in. But was it enough?

### **MURPHY V. NCAA: THE DECISION**

6 to 3. That was the Supreme Court's majority split in ruling that PASPA violates the Tenth Amendment.<sup>56</sup> Justice Alito writing for the majority, explained that the Court need not decide whether New Jersey's wagering law violates PASPA, because PASPA's provision prohibiting state authorization of sports gambling schemes violates the Tenth Amendment's anti-commandeering rule. Justice Alito focused on the national policy towards gambling and spent a lot of time on the fact that gambling for 200 years in the United States has been a hotly debated policy, mostly a state-level experience, with little federal intervention besides PASPA.<sup>57</sup>

Morally, the Court ensured that it is not taking any position regarding whether gambling is good or bad, right or wrong. The key in the case truly was the issue of Congress

regulating versus commandeering, and whether PASPA veered into the realm of commandeering, which is constitutionally prohibited. Three policy reasons underlie the Tenth Amendment's anti-commandeering doctrine and ultimately underlie Justice Alito's majority opinion.

First, the anti-commandeering doctrine ensures the continued fundamental balance between state and federal power that the Framers believed was crucial to the success of the nation. Sports betting has almost always been left to the states, so why have Congress suddenly tell the states otherwise?

Second, anti-commandeering promotes political accountability. When Congress regulates, voters blame Congress, but if a state imposes regulations because Congress told it to do so, responsibilities suddenly becomes blurred. Who does a voter blame when Congress passes PASPA, but tells the voter's state the state cannot allow sports gambling for the voter? The Tenth Amendment's anti-commandeering clause keeps these lines of accountability clean.

Third, anti-commandeering prohibits Congress from shifting regulatory costs to the states, which would contradict the edicts of federalism altogether. Sports gambling can exist in a regulatory framework—it just has to be the proper constitutional framework.

In making its ruling, it is probably safe to say the Court was not expressly thinking about eSports gambling. The Court surely did not address those unique digital precepts in the slightest. The Court brings up the Black Sox scandal, and the 1950s basketball points shaving scandal,<sup>58</sup> but does not address the potential of similar travesties occurring in virtual realities where tangible money is at stake and chance can be even more easily manipulated than in traditional sports. The Court largely did not address eSports.

In fulfilling its duties however, the Court really didn't have to. Its interpretation of the Constitution and subsequent ruling sufficiently placed the ball (or shall we say the controller) in the hands of the states. The Court was Player 1 in sports gambling regulation for the Twenty-First century and Player 2 has now entered the game, along with Player 2's 49 other companions united by statehood. Like any great online multiplayer game, hundreds of other players, each with a different national flag, also lurk across our nation's borders as well. What could possibly go wrong in this new world *Murphy* has created? eSports remain left for dead.

### **WHY MURPHY, WITHOUT MORE, CAN LEAD TO ESPORTS GAMBLING SCANDALS**

#### ***(A) eSports Exists in a Virtual Medium***

Most obviously, eSports are not real ... at least not in the classic sense of a sport. Sure, video game competitors in eSports leagues could be paid off to throw games just like in basketball or baseball, but those individuals might not be the target for gambling criminals. Instead, the real concern is that the games may be subject to covert hacking threats.

If for example, a hacker subtly commandeers a player on the screen in a massive multimillion-dollar eSports tournament, or alternatively, commandeers the environment around the player on the screen, there is a substantial

chance that nobody would even know the hack is occurring. It would be like a bank heist where the crook is invisible and walks through the bank walls to retrieve the money without anybody realizing the crime until it is too late.

In many aspects, eSports threats are similar to the threats that plague cryptocurrencies. The criminal could be anywhere in the world controlling what's on the screen in real-time, and money would be long lost before it is ever found to have been stolen in the first place.

As such, how can a state that has legalized sports betting after *Murphy*, confidently protect its eSports gambling consumers if the state legislation avoids expressly addressing eSports altogether, as prior legislation and court decisions have? Theoretically, a law legalizing "sports betting and wagering in licensed locations in state X" might very well include eSports. Not to be cynical, but good luck trying to find a legislator who not only is conscious enough to add eSports to such a law, but who can also properly define eSports to correctly apply it to legislation. The fact that there might not be very many such legislators that can define eSports is troubling, considering states are starting to pass sports betting legislation in response.<sup>59</sup> Nevertheless, many states are being quite proactive about sports wagering.

Take, for example, West Virginia. The following definitions, which come from West Virginia's recent Lottery Sports Wagering Act of 2018, may be troubling to eSports and eSports wagering:

"Professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event.

"Sports event" or "sporting event" means any professional sport or athletic event, any collegiate sport or athletic event, motor race event, or any other special event authorized by the commission under this article.<sup>60</sup>

Theoretically, eSports might be covered by these definitions, but maybe not. The law may not apply to manipulation and cheating in virtual arenas at all. Also, the definition of "sports" can differ by individual. The concern here for eSports gambling must not be ignored. Consider another excerpt from the same law:

(b) A person is guilty of a felony when: (2) A person changes or alters the normal outcome of any game played on a mobile or other digital platform, including any interactive gaming system used to monitor the same, or the way in which the outcome is reported to any participant in the game;<sup>61</sup>

Digital and interactive gaming kind of sounds like eSports. However, reading the law in totality reveals these terms probably mean something else. Parsing the law reveals "digital," an undefined term, appears to relate more to the digital mediums used to wager and watch the sports and digital programs licensed by state; not necessarily the digital

arenas where the eSports actually occur and are wagered on. At best, this probably means: don't hack the electronic machines, like the horse racing machines, located on site.

It might be a stretch for a court to later claim this includes virtual eSports arenas, but then again maybe not. It is tough to say, and therein lies the problem: the ambiguity may result in problematic outcomes for eSports, which may or may not be covered and which may or may not fall within the jurisdictional reach of state laws prohibiting tampering within the state. Consider this final example from the same law:

§ 29-22D-18. Law enforcement; inspection and seizure

Notwithstanding any provision of this code to the contrary, the commission shall, by contract or cooperative agreement with the West Virginia State Police, arrange for those law-enforcement services uniquely related to gaming as such occurs at facilities of the type authorized by this article, that are necessary to enforce the provisions of this article and are not subject to federal jurisdiction: *Provided*, That the State Police shall only have exclusive jurisdiction over offenses committed on the grounds of a licensed gaming facility that are offenses relating to gaming.<sup>62</sup>

It is tough to say what exactly this would cover in an eSports context. If eSports wagering is covered in the state but the hacker is in China, and collects his, her, or its undue gambling reward through U.S. dollars or even, Bitcoin, is there any jurisdictional reach whatsoever? Would this even be cheating in another jurisdiction? Even if it was, punishment would be nearly impossible to enforce.

To be fair, after the passage of the Act, West Virginia enacted a set of rules for "successful implementation, administration, and enforcement of the West Virginia Sports Wagering Act" in which the legislature makes clear: "'Prohibited sporting event' does not include eSports in which participants are at least 18 years old."<sup>63</sup> West Virginia's inclusion of eSports should be applauded for recognizing the changes nature of sports wagering. However, without addressing the nuances of eSports and eSports wagering in greater detail, much is left to be desired of the law, which is still largely structured around traditional athletic event wagering.

Ultimately though, states like West Virginia are smart to regulate and cash in on the deregulated sports wagering landscape left by *Murphy*, but many questions remain for the vulnerable but rapidly expanding eSports gambling community. Local eSports teams and American eSports gamblers should be worried. International eSports teams and wagering communities should be worried too. How international eSports teams fit into the regulatory framework is another immense consideration with more questions than answers.

**(B) Effect of Decision on International eSports Teams**  
The Overwatch League ("OWL") is a professional eSports league dedicated entirely to the videogame, Overwatch.<sup>64</sup>

Founded in November of 2016, the league has twenty city-based teams.<sup>65</sup> The best part? Nine of the twenty teams are not from the United States.<sup>66</sup> The league has four Chinese teams, two Canadian teams, one South Korean team, one French team, and one team from London (the current champions).<sup>67</sup>

OWL's season plays out eerily similar to most North American professional sports leagues, in which there is a regular season and playoffs.<sup>68</sup> Events are played typically in various locations and the prizes easily surpass \$1 million.<sup>69</sup>

One can only imagine the hypothetical scenarios these teams might face in a virtual eSports world semi-regulated by some states after *Murphy* and not much at all by the federal government. The same can be said for those that wager on OWL. This article doesn't posit the doomsday scenario but the possibilities to cheat across international online gaming arenas are endless. At this juncture, the potential effects on international eSports teams can only be said to be one with fewer grounds for recourse than domestic eSports teams and wagering parties. Manipulation will surely run evermore rampant in international eSports circles.

We could very easily see complete chaos as hacking scandals penetrate eSports from all edges of the map. Protecting teams and individuals may become exceptionally difficult as invisible criminals adjust to the new mechanisms and technology by which to commandeer eSports arenas and the money associated therewith. If the international teams can be easily hacked, or cheating is widespread, what's stopping criminals from bankrupting organized eSports leagues and eSports wagering institutions? While not purely an American responsibility, the United States will surely struggle to patrol these virtual worlds that can be easily created, destroyed, expanded, augmented, and hidden in. Questions of interstate commerce may also arise. *Murphy*, while positive in many ways, leaves the states and the world with still much work to do.

### **(C) Building Blocks for the Future**

Congress may be unlikely to step in and address eSports gambling at this point. The Court has now spoken and made clear that Congress has done enough with enacting the now-unconstitutional law known as PASPA. For better or worse, states are now left to their own devices, their own laboratories of democracy, as James Madison had envisioned them in Colonial times.

While no be-all end-all solution exists, some practices may be helpful. First, states must educate themselves. The advent of eSports is complicated and like Bitcoin, blockchain, or cellphone data, the legislatures of old will need to learn the ways of new and react accordingly. The eSports movement is the future, meaning legislation must reflect what is yet to inevitably come.

States must also learn from each other and the rest of the modern world. Nevada, a state with much more evolved gambling regulations, has already enacted forms of eSports wagering that may hold key clues to future eSports regulatory frameworks.<sup>70</sup> In Europe, where sports betting is second-nature, authorities are partnering with important eSports bodies to properly learn the business of eSports first,

so as to effectively regulate the industry. For example, the UK Gambling Commission has signed an information sharing Memorandum of Understanding ("MOU") with the ESports Integrity Coalition ("ESIC") to better eradicate corruption in eSports.<sup>71</sup> Work is needed but all hope is not lost for proper regulation of eSports and eSports wagering.

## **CONCLUSION**

The United States Supreme Court's *Murphy* decision changed sports gambling as America has known it. The decision will surely send ripple effects throughout the sports world and into the eSports world and leagues far and wide. Moreover, while eSports leagues present a rather contemporary and lucrative monetization opportunity for the ambitious gambling enthusiast and the budding gambling enterprise, it also represents a new target for corruption and controversy. eSports are virtual, and their elements can be commandeered and manipulated by even a single person, with little reliable oversight.

What can go wrong surely will go wrong, so said the famous Murphy's Law. Gambling is one of man's earliest cheat codes, a prehistoric concept hell-bent on challenging the efficacy of meritocratic order and oligarchic tendencies. But now, with *Murphy*, the first cheat code meets man's virtual world made entirely of cheat codes: video games and eSports. eSports and wagering on eSports are an exciting new frontier, but work must be done. If eSports gambling corruption is not addressed and cheating is not mitigated in this new gambling reality that *Murphy* has established, *Murphy* and Murphy's Law may quickly become one. ■

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# Renewed for Another Season

## International Cyberattacks on the Entertainment Industry

Lucas J. Tanglen and Reymond E. Yammine

Executives, in-house lawyers, and outside counsel might already be keenly aware of the continuous string of cyberattacks that have recently plagued entertainment companies. On the other hand, keeping track of the arcane dealings of United Nations (UN) committees is, quite understandably, probably not a very high priority for many of those same industry-savvy professionals. Nonetheless, these two subjects have converged in a manner that anyone involved in running or counseling an entertainment business may find deeply troubling. Specifically, the UN group charged with reaching a consensus on international norms governing conduct in cyberspace admitted failure in 2017, and despite some efforts to revive discussions in 2018, there is still no end in sight for the damaging cyberattacks carried out by foreign governments, militaries, and political actors that have adversely impacted companies in the entertainment field. Accordingly, it remains vitally important for entertainment companies to understand their potential vulnerability to nation-state cyberattacks and the possibility of using their insurance to manage those risks.

### CYBER ATTACKS REPEATEDLY HIT ENTERTAINMENT BUSINESSES

A 2018 survey of cyber security decision-makers at U.S. media and entertainment companies concluded that 51% of such firms experienced *three or more* cyberattacks over a 12-month period.<sup>1</sup> In a 2015 survey of media executives, 46% reported being subject to cyberattacks in the prior year.<sup>2</sup> Respondents to the 2015 survey attributed those cyberattacks to a range of attackers, including “foreign nation-states.”

There are many reasons why an entertainment company might be an attractive target for a cyberattack. For example, a TV production company might house valuable intellectual property—such as unaired episodes of popular shows—on its digital servers. Confidential e-mail discussions regarding high-profile projects, celebrities, or executives might be used to blackmail or embarrass businesses and individuals. Media companies with expansive online presences might simply present a cyber target that is too large to resist, particularly where they communicate with and deliver content to customers online, thereby potentially exposing a wealth of valuable customer data.

In one of the most notable entertainment cyberattacks—the 2017 attack on HBO—the value of the target’s intellectual property contributed to the attack’s effectiveness. As alleged by federal prosecutors, HBO’s attacker successfully stole unaired episodes of several original HBO series, scripts and plot summaries for unaired programs (including *Game of Thrones*), confidential cast and crew contact lists, e-mails belonging to at least one HBO employee, and online

credentials for HBO social media accounts.<sup>3</sup> According to prosecutors, this attack was neither random nor spontaneous. To the contrary, charging documents describe an “online reconnaissance” operation on HBO’s networks and employees. The perpetrator allegedly succeeded in compromising not one, but multiple authorized user accounts. The suspect allegedly spent approximately three months stealing confidential and proprietary information. With the theft complete, the attacker allegedly commenced an “extortion scheme,” demanding \$6 million worth of Bitcoin from HBO based on a threat of releasing the stolen content.

As entertainment firms assess the likelihood of similar attacks occurring, at least two significant points from the HBO attack are worth noting. First, the government asserts that the alleged HBO attacker is an Iranian national who previously hacked computer systems for his country’s military, raising the specter of foreign-government involvement in a targeted cyberattack on a US business. Second, despite his recent indictment by federal prosecutors, it is not clear that the alleged thief will ever face trial in the US, given the absence of an extradition treaty between the US and Iran. As such, the threat of criminal charges in the US may have limited deterrent effects on international cybercriminals.

There have been many other cyberattacks on entertainment and media targets, some of which have been publicly attributed to foreign nation-states or associated organizations. For example:

- In 2014, 21 of the world’s 25 largest news outlets had been targeted by likely state-sponsored hacking attacks, according to findings presented by a pair of Google security engineers.<sup>4</sup>
- In 2015, the French television network TV5Monde was taken off the air by a malware attack whose perpetrators initially claimed to be associated with the Islamic State, but were later understood to be part of a group of Russian hackers who carry out attacks that are perceived to advance Russia’s interests. The attack used highly targeted (bespoke) malicious software designed to destroy the network’s systems, and it succeeded at knocking all twelve of the network’s channels off the air for several hours. A network executive said that fast action by a technician who fortuitously was onsite during the attack saved the company from “total destruction.” An investigation revealed that the attackers had carried out reconnaissance to understand how TV5Monde broadcast its signals, and they had used seven different points of entry to carry out the attack.<sup>5</sup>

- A hacker (or hackers) breached an audio post-production studio's network in late 2017, resulting in the unauthorized leak of an episode of *Orange is the New Black*, according to media reports. Despite being paid about \$50,000 in Bitcoin, the hacker reportedly leaked the episode to "punish" the studio for contacting the FBI.<sup>6</sup>
- Saudi Arabia's General Entertainment Authority, which sponsors concerts and shows in that nation, announced in September 2017 that its website had been hit by a cyberattack from outside the country.<sup>7</sup>

While it is clear that cyberattacks may be committed against entertainment companies for a variety of reasons (e.g., for money, as a hoax, or for political reasons), it is also clear that entertainment companies exist in a cyber world in which nation-states are willing to use cyberattacks against diverse targets in order to advance geopolitical agendas. The President's National Infrastructure Advisory Council has stated: "Cyber is the sole arena where private companies are the front line of defense in a nation-state attack on US infrastructure."<sup>8</sup> The Council of Economic Advisers warns that nation-states may attack businesses "potentially as a retaliation against sanctions or other actions taken by the international community."<sup>9</sup> While recently describing the cyber threats that the US currently faces across many fronts, US Director of National Intelligence Dan Coats ominously compared the current situation to the indications of a possible terrorist attack in the lead-up to September 11, 2001: "The warning lights are blinking red again. Today, the digital infrastructure that serves this country is literally under attack."<sup>10</sup>

## THE FAILURE OF UN TALKS ON INTERNATIONAL NORMS FOR CYBERSPACE

In the face of these threats, media companies would be justified in taking some small comfort from the prospects for an effective, international legal order that would punish and deter global cyberattacks. Unfortunately, recent events strongly suggest that this would be wishful thinking.

A decade's worth of international discussions regarding the future of international law in cyberspace came to a fruitless conclusion in 2017.<sup>11</sup> The UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security had been considering the application of international norms to the member countries' activities in cyberspace. The talks had the potential to resolve questions such as whether, and under what circumstances, a nation might be justified in responding to a foreign-government cyberattack with counter-cyberattacks or even military force. Traditional powers, including the United States, China, and Russia, had participated in the effort,<sup>12</sup> but negotiations were ultimately frustrated, as divisions along old "Cold War" lines prevented agreement on key terms.<sup>13</sup> Furthermore, although 2018 and early 2019 brought the creation of two new UN Groups: a 6th GGE<sup>14</sup> and an open-ended working group,<sup>15</sup> it is unclear whether either of these

groups will be able to overcome the 2017 impasse. Indeed, the creation of these separate groups reflects the same ideological division that led to the failure of the GGE in 2017.<sup>16</sup> One internet policy advocate stated: "[T]here are now two parallel work streams on this topic in [the UN General Assembly], with different procedures, led by governments with competing visions for how the UN should address norms on international security in cyberspace."<sup>17</sup>

This is important to US entertainment companies because recent history—including the cyberattacks on HBO and TV5Monde—shows that attacks by nation-states may have substantial adverse effects on those companies. Accordingly, entertainment companies need to understand their potential vulnerability to nation-state cyberattacks and the possibility of using their insurance to manage those risks. The remainder of this Article explores the development and ultimate collapse of the UN cyber talks and related insurance considerations for entertainment companies.

In 1999, the UN General Assembly recognized the "scientific and technological" value that cyberspace represented and the need to protect its civilian uses.<sup>18</sup> The General Assembly concluded that it was "necessary to prevent the misuse or exploitation of information resources" and that member states should work toward considering the "[a]dvisability of developing international principles that would enhance the security of global information and telecommunications systems and help to combat information terrorism and criminality."<sup>19</sup>

The GGE officially began its work in 2004, and, over the years, has been seeking to promote cyber security and develop a framework to govern international conduct in cyberspace. The GGE recognized the impact that the development of information and communications technologies (ICTs) could have on matters of national security. In 2009, the group alerted member states that the growing use of ICTs would create "new vulnerabilities and opportunities for disruption."<sup>20</sup> In 2013, the GGE acknowledged the importance of maintaining an international legal framework that could preserve peace in cyberspace. The group's recommendations stated, "the application of norms derived from existing international law . . . is essential to reduce risks to international peace, security and stability."<sup>21</sup> Furthermore, "States must not use proxies to commit internationally wrongful acts" and should seek to ensure "that their territories are not used by non-State actors for unlawful use of ICTs."<sup>22</sup> In 2015, the GGE noted "[t]he diversity of malicious non-State actors, including criminal groups," which could create misperception of state action and the "possibility of harm to their citizens, property and economy."<sup>23</sup> The GGE called for increased cooperation between nations and the use of ICTs in a way consistent with preserving "global connectivity and the free and secure flow of information."<sup>24</sup>

Despite such indications of progress, 2017 brought the breakdown of the GGE's talks. The failure of the negotiations was driven, in part, by what media described as divisions along Cold War lines.<sup>25</sup> On one side, the US expert to the GGE, Michele Markoff, argued that the GGE was misguided in not seriously considering the inclusion of the member states' right to self-defense against foreign-state

attacks.<sup>26</sup> The right to self-defense, in its broad sense and as memorialized in Article 51 of the UN Charter, refers to a state's right to respond to an "armed attack" against it.<sup>27</sup> Markoff argued that the recognition of the right to self-defense in the cyber context would "help reduce the risk of conflict by creating stable expectations of how states may and may not respond to cyber incidents they face."<sup>28</sup> On the other side, Cuba opposed recognizing a right to self-defense, arguing that such a regime would "convert cyberspace into a theater of military operations and . . . legitimize, in that context, unilateral punitive force actions, including the application of sanctions and even military action by States claiming to be victims of illicit uses of ICTs."<sup>29</sup>

This ideological division appears to be ongoing, with no end in sight. Following the UN Secretary's calls for action in light of "the permanent violation of cybersecurity" in early 2018,<sup>30</sup> the UN General Assembly approved two separate resolutions to attempt to revive the talks. The Russia-sponsored resolution called for a new open-ended working group and 13 "international rules."<sup>31</sup> The US-sponsored resolution called instead for the formation of a new GGE.<sup>32</sup> The division along Cold War lines arguably remained evident,<sup>33</sup> and although there continues to be international interest in managing global cyber threats, there is no indication that a meaningful solution is near or that the disagreements that doomed the talks in 2017 have gone away.

## CYBER RISK MANAGEMENT AND INSURANCE CONSIDERATIONS

The potential losses to an entertainment company from a cyberattack are vast and varied. For example, if a malware attack against a television production studio destroys digital assets such as scripts, casting lists, and video clips, the costs of recreating the lost materials could be substantial. If a ransom attack compromises proprietary IP such as unaired episodes, the studio could incur loss in the form of payment of the ransom demand or the lost value of the IP in the event that it is leaked (or both, if the IP is leaked after payment). If networks or computers are rendered unusable in a cyberattack, the studio might incur "business interruption" losses in the form of payroll costs and lost profits during the downtime, as well as "extra expense" losses for the cost of taking any steps necessary to minimize the interruption. In the event of a breach of private data, an entertainment company might experience damage to its reputation and brand, various response costs in the form of fees for forensic investigators, notification of affected consumers or vendors, and establishment of call centers and credit monitoring.

Given the immense threat posed by international cyberattacks and the apparent failure of the international community to develop a legal framework to deter nation-state cyberattacks, there is no time like the present for policyholders to understand potential insurance coverage for these types of risks. "Traditional" insurance may provide coverage for certain cyber-related losses and liabilities. Such traditional coverages include commercial property policies, commercial general liability insurance, crime policies, and errors and omissions (or professional liability)

insurance policies. Policyholders will want to review carefully whether any "cyber" exclusions that may limit or divest the policyholder of coverage have been included in those policies. Depending on policy wordings, insurers may assert that certain cyber risks are not covered by such traditional insurance.

In recent years, the number and variety of specialty cyber-insurance coverages has grown significantly, with approximately 70 insurers currently offering some form of cyber coverage. Cyber policies may differ widely in the types of coverages provided and the scope of coverage that would be provided in the event of a cyberattack. "Media liability" coverage—for losses related to defamation, privacy/publicity violations, copyright violations, and other liability risks related to the creation or dissemination of media content—is often included as a component of cyber insurance policies. In fact, given their line of business, some entertainment companies might have purchased a stand-alone media liability insurance policy, which may (or may not) include certain cyber coverages. Given the many forms in which cyber insurance is sold and the many distinct types of coverages that it might include, entertainment businesses might find it useful to review the types of cyber coverages that appear in their existing insurance.

For example, because of the nature of cyberattacks, "business interruption" coverages are likely to be implicated. With cyberattacks like WannaCry and NotPetya, a victim's entire computer network may become unusable for a sustained period of time. In the deadline-oriented world of the entertainment industry, such downtime may translate into significant costs, including lost profits and the extra expenses of mitigating such losses. Entertainment policyholders may wish to consider whether their current cyber policy contains coverage for business interruption and whether there are any relevant policy exclusions for attacks allegedly or actually initiated by nation-states.

We note that some insurance policies contain exclusions related to "war," "warlike action," "terrorism," "hostilities," and "hostile acts," which an insurer might invoke in an attempt to avoid coverage. Policyholders should not assume that such an exclusion necessarily bars coverage for a particular cyberattack. The precise wording of each exclusion, which may vary substantially among policies issued by different insurers, should be applied carefully and narrowly. For example, depending on the wording of the exclusion, it may be very difficult for an insurer to establish that a particular cyberattack rises to the level of, for example, "war" or "warlike action." Similarly, the undefined term "hostilities" (for example) is very vague and ambiguous. Where an ambiguous term like "hostilities" appears in a list with other excluded events such as "war" and "warlike action," the doctrine of *ejusdem generis* holds that the meaning of the ambiguous term should be restricted to something similar to "war" or "warlike action." Also, the origin of a cyberattack is often unclear and subject to dispute, even years after the attack occurred. It may be inappropriate for an insurer (who generally bears the burden of proving that an exclusion applies) to invoke an exclusion where there exists any uncertainty as to a cyber attack's origin, even if government

or media sources have attributed the attack to a government or military entity.

Most cyber policies also contain exclusions for property damage and bodily injury. Cyber-physical attacks are real, and are no longer just the product of speculation. For example, a cyberattack may affect equipment connected to the so-called “internet of things,” such as remotely operated production cameras or on-premises security systems (e.g., locks, gates, security cameras). A careful analysis of how property damage and bodily injury exclusions might apply may be very useful in assessing the responsiveness of a cyber policy to such a cyber-physical attack.

As the foregoing suggests, it is in an entertainment business’s interest to carefully review, in consultation with insurance coverage counsel, the wording of any cyber insurance that the company currently has in effect or is considering purchasing. Policyholders and their counsel may be able to negotiate with insurers during the placement or renewal of an insurance program to obtain more favorable wording than the “off-the-shelf” language might provide (including with respect to “war” and other exclusions).

Likewise, in the event that an entertainment business finds itself in the unfortunate position of being a victim of a cyberattack, coverage counsel can assist with a prompt, careful review of any potentially applicable insurance policies and analyze the necessary steps to pursuing insurance coverage including the timely provision of notice to relevant insurers. ■

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# A Review of “Music Money and Success – The Insider’s Guide to Making Money in the Music Business”

by Jeff Brabec and Todd Brabec

Andrea Mansourian

Are you sick of asking legal questions and always hearing the same response of “it depends”? Could it really be true that a book exists with all the answers? After almost three years of hearing “it depends” to any question I ask in law school, this book has given me hope that there actually are answers to my questions. If you feel the same way I did, reading this book is a MUST. The Eighth Edition of *Music Money and Success – The Insider’s Guide to Making Money in the Music Business* (MMS), by Jeff Brabec and Todd Brabec, has in-depth breakdowns and explanations of virtually all questions you could ever have regarding the music business.

It is extremely apparent upon reading that only bright legal minds who have an undeniably deep understanding of the ins and outs of the music business could have created this book. Authors Jeff Brabec and Todd Brabec have been instrumental in shaping the music industry as we know it today. In addition to their success as entertainment attorneys, Jeff Brabec is currently the Vice President of Business Affairs for BMG and Todd Brabec is the former ASCAP Executive Vice President and Worldwide Director of Membership. Their achievements in and impressions made on the entertainment industry are endless.

Before you get to Chapter One, the introduction begins with the formula to success, which, in my opinion, is a great way to start a book about success. The formula is supported throughout the following twenty chapters. The topics covered throughout the chapters include: songwriting and music publishing; co-publishing, subpublishing, and administration deals; streaming and download royalties; recording contracts/major vs. indie; ASCAP, BMI, SESAC, and GMR; major studio and independent films; television; video games; audio visual streaming services; advertising commercials; Broadway musicals and touring productions; foreign country rights and royalties; buying, selling, and valuing copyrights; managers, lawyers, and agents; Copyright protection; putting it all together; breaking into the business; sampling songs and records; artist and publishing company joint ventures; apps, holograms, ringtones, e-cards, and new media; and music-industry organizations.

One of my favorite chapters is Chapter Five titled “Music, Money, and the Recording Artist.” I find it artful how the chapter begins with transcripts of sample phone calls between a record company executive and an artist’s attorney. The different scenarios detail conversations discussing a 360 deal, indie record net profit deal, major record company traditional deal, net profits licensing deal for future recordings, and marketing and distribution deal. Rest assured, if you are unfamiliar with the deals I just

listed, after reading Chapter Five, not only will you become familiar with them, you will also know how to successfully conduct such deals.

In addition to the definitions and explanations, MMS also includes helpful tables and charts throughout the book that layout the material clearly and succinctly. For example, Chapter Five includes a chart that helps determine an artist’s royalties, Chapter Three has a chart detailing how to share income under the standard terms of a co-publishing agreement, and Chapter Eleven has a chart demonstrating three alternative formulas for sharing subsidiary rights revenue. This book truly covers it all.

The music industry is not the only industry that has expressed their praise for MMS. The New York Post recently wrote an article titled “B’Way’s Follies,” highlighting MMS in their discussion about development actors’ rights in Broadway shows. Todd Brabec’s interview, as their theatre industry expert, gives you just a taste of what is discussed further in Chapter Eight, “Music, Money, and Broadway.”

MMS also includes a guide to music industry organizations. This guide is a great resource for all professionals and newcomers. Another great resource is the section that provides multiple sample contracts. These contracts include musical composition synchronization-use license agreements for the motion picture, television, advertising commercial, and video game industries. There are also mechanical license agreements for digital and physical use.

If you are an attorney who practices in the entertainment field, you should own and use this book. Additionally, if you are an industry professional, be it a songwriter, publisher, manager, agent, or anything in-between, you should also own and use this book. Personally, I wish I had this book during my undergraduate studies when I majored in Commercial Voice and Entertainment Industry Studies. Chapter Eighteen, “Music, Money, and Breaking into the Business,” would have been a great tool when I began my music career, but now I can use the information to help my future clients and myself. Let me be clear, this book is not only for newcomers or people who know very little about the entertainment industry. If you are currently a practicing attorney, this chapter and this book as a whole can improve your ability to help your artist clients today.

MMS is an absolute gem that you should keep in your back pocket. It will not fit there, but honestly, I wish it did because this is a resource I will use regularly. In law school, when I make a really good outline, I call it the Bible. MMS is definitely now my Bible and go-to source for all music business questions. I truly believe anyone who reads MMS will feel the same. ■

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*Andrea Mansourian is a third-year law student who is graduating from The John Marshall Law School in May of 2019. With her legal education and experience as a performer, she looks forward to protecting the creative thinkers of the world.*

# BOOK REVIEW | “The Legendary Harry Caray: Baseball’s Greatest Salesman”

by Don Zminda

Valencia King

Author of *The Legendary Harry Caray: Baseball’s Greatest Salesman*, Don Zminda, has more than two decades of experience working in broadcast support as the Director of Research with STATS LLC. In addition to acting as the Director of Research for STATS LLC, Zminda has forty years of membership with the Society for American Baseball Research (SABR). Over the years, Zminda has written and edited a number of sports related books giving him the background and expertise to discuss one of the most influential figures in sports broadcasting, Harry Caray.

*The Legendary Harry Caray* provides an appealing look at Caray’s life, as one of the most well-known baseball announcers of all time. Zminda conveys the detailed progression of Caray’s life while intertwining the rich history of baseball with Carey’s life story. The book dives into the details of Caray’s childhood, his rise to fame as a baseball announcer, his untimely passing, and how his legacy lives on today. The reader is taken on a journey through Caray’s life with candid accounts from his family, friends, and other announcers who worked alongside him. These first-hand accounts provide deeper insight into the moments that defined Caray’s life. *The Legendary Harry Caray* is a compelling glimpse into the life of the man that forever changed the way professional sports are broadcast.

The organization of *The Legendary Harry Caray* allows the reader to follow the evolution of Caray’s career as a celebrity sports announcer. The book is divided into twenty-five concise chapters, making it an easy read. The book opens with the Chicago Cubs monumental World Series win for the first time in 108 years and examines how Cubs fans were impacted by the absence of Caray. The book then progresses through the early days of Caray’s life and discusses defining moments such as how Caray became the voice of the Cardinals, when Caray was the new man in town broadcasting for the Chicago White Sox, his move to the Chicago Cubs, his stroke and recovery, and a farewell to the beloved sports announcer. Within each chapter, Zminda also provides detailed footnotes and bibliographic information referencing sources while recounting the stories.

Each chapter opens with a quote from Caray himself, or from a news publication which fits logically into the topic of each chapter. Although today Caray is seen as a treasured legend who influenced the world of sports broadcasting, that was not how he was always viewed throughout his career. The book details several instances when Caray endured controversy and intense criticism before becoming the icon we know today.

While some details regarding the controversies in

Caray’s life are well-known, the book provides more detail and insight into those controversies. For instance, Chapter 9 examines an incident where Caray was hit by a car while walking across a six-lane highway. Caray sustained a broken and dislocated shoulder, facial cuts, and compound fractures of both legs. After a long recovery, Caray returned to work for the Cardinals. However, not long after, he heard a rumor that his contract with the Cardinals would not be renewed. Rumors had also been swirling that Caray was having an affair with Susan Busch, the wife of the Cardinals owner’s son. Caray fueled the rumors with amused and vague responses. Before long the rumors that Caray’s contract with the Cardinals would not be renewed were no longer just rumors. Caray was officially fired from the Cardinals on October 9, 1969, seemingly due to his alleged affair with Susan Busch.

Additionally, the book discusses controversies such as Caray’s feuds with players, fellow announcers, and executives. During his time broadcasting for the Cardinals games, Caray’s relationships with members of the St. Louis sports media and with Cardinal players were strained. Carey broadcasted games over the radio so enthusiastically that listeners felt as if they were sitting in the stands watching the game. However, as entertaining as Caray was, he could be brutal in his criticisms towards individual players. Critics of Caray would often wonder and disprove of his broadcast style. Caray’s response: “I broadcast the way a fan would broadcast.”

*The Legendary Harry Caray* offers readers a balanced look at monumental and pivotal moments throughout Caray’s life. Through the interviews and commentary of Caray’s friends, family, and peers in the sports broadcasting world, the book pieces together intimate fragments of his life to honor a sports broadcasting legend. As evidenced by the stories recounted throughout the book, no other sports announcer compares to Caray’s larger than life personality.

Overall, the book provides great insight into the man and legend who broadcasted the Chicago Cubs games for nearly 16 years. Caray was able to overcome the odds, withstand controversy and make a lasting impact on the sports world. It has been two decades since Caray’s death, but he is still celebrated in the sports world and by his fans nationwide. Harry Caray will be forever remembered during any seventh inning stretch when fans sing “Take Me Out to the Ball Game.” ■

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