



For The Record

The Official Newsletter of the National Sports Law Institute

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IN MEMORIAM: BERNICE K. TIERNEY



Bernice Tierney with the 2005-2006 *Sports Law Review* Editorial Board

On Thursday, March 12, 2009, Mrs. Bernice K. Tierney, a long time benefactor of Marquette's Sports Law program and the National Sports Law Institute passed away at the age of 93. Bernice was a graduate of the Marquette University School of Journalism in 1937. She was a founding member of the Association of Marquette University Women in 1938, past President of the Marion Club and Christ Child Society, and a member of the Wauwatosa Women's Club, the Women's Club of Wisconsin, the Lawyers' Wives Club, the 20th Century Club, and St. Jude the Apostle Parish for 62 years. Bernice met her late husband, Joseph Tierney, Jr., as an undergraduate at Marquette. They were married for 58 years. In the late 1980s Joe was instrumental in the formation of the National Sports Law Institute, securing funding from the Milwaukee Admirals. After Joe's passing, Bernice created the Tierney scholarships to provide financial support to the student editors of the *Marquette Sports Law Review*.

The following tributes are from students, alumni and faculty involved in the National Sports Law Institute and Marquette's Sports Law program.

Mrs. Tierney was a most engaging person. Her charm, intelligence, and interest in others made her an extraordinary conversationalist. I shall especially miss the annual lunches that we would have with her and various of our sports-law students; our students will be the poorer for her passing.

Dean Joseph Kearney, Marquette University Law School

Bernice Tierney, along with her late husband Joseph, Jr. and her family, was a strong and enthusiastic supporter of our Sports Law program and the National Sports Law Institute. In addition to establishing scholarships for the editors of the *Marquette Sports Law Review* and an award to honor her husband, Bernice served as a role model for our sports law students. During the past several years many of them had the opportunity to meet Bernice during the annual Tierney family scholarship luncheon or the NSLI awards banquet. She was always eager to learn about our students and their career aspirations, while encouraging and helping them to achieve their dreams in her graceful and humble manner. I, along with our students, will really miss Bernice, especially her cheerful disposition and zest for life. However, her generosity, caring nature, and memory live on and will continue to inspire us.

Professor Matt Mitten, Director, National Sports Law Institute

The Tierney family over the years have been great supporters of the NSLI. First Joe, embracing the vision and committing the Milwaukee Admirals to a sizeable sponsorship. After Joe's passing, Bernice carried the torch, helping not only to create scholarships and awards in honor of her husband, but attending our events, and being an incredible inspiration to our students and professors. The Tierney family is synonymous with the success of the sports law program and the ethics and ideals which the NSLI stands for.

*Martin J. Greenberg, Partner, Greenberg & Hoeschen, LLC,
former Director, National Sports Law Institute, and member, NSLI Board of Advisors*

Bernice Tierney's support of Marquette University began more than seventy years ago. Her husband Joe's support of the National Sports Law Institute was instrumental in allowing us to build the strong foundation that ensured our success over the past twenty years. When Joe passed away, Bernice and the Tierney family stepped in to directly support the students within the Sports Law program by providing scholarship support to the important work they do as editors of the *Marquette Sports Law Review*. Beyond this support, each group of editors was given the chance to meet Bernice and to learn from her selfless example. Our students, our Program, and the Institute, can never repay Bernice for her support. I will personally miss the genuine joy she displayed each year as she met our students and as we were able to thank her in a very small way. Her impact on the Sports Law program will never be forgotten.

Professor Paul Anderson (L'95), Associate Director, National Sports Law Institute

Thank you, Bernice, for helping so many students during our time in the Marquette Sports Law program.

*Attorney Kristin R. Muenzen (L '03), United States Department of Justice, Washington, D.C.
Editor-in-Chief, Marquette Sports Law Review, 2002-03*

I will never forget meeting Mrs. Tierney and can never fully express my gratitude for her support for me and for our Sports Law Review. Her warm smile and kindness were so inviting and provided a small

glimpse of the quality of her character. I am so sorry to learn of her death and know that she will be deeply missed by many.

*Brent Moberg (L'04), Director of NCAA Compliance, Northern Illinois University, DeKalb, IL
Executive Editor, Marquette Sports Law Review, 2003-04*

Mrs. Tierney not only generously provided scholarship support to Marquette's Sports Law students, but she generously gave her time once a year to share a meal and her life experiences with the scholarship recipients. I won't soon forget her kindness or that memorable day!

*Attorney Katie Featherston (L'06), Quarles & Brady LLP, Milwaukee, WI
Managing Editor, Marquette Sports Law Review, 2005-06*

Mrs. Tierney was an amazing woman to have the opportunity to meet. She was a real trailblazer for the many woman who followed in her footsteps, and it was through her generosity that many of us were able to achieve our dreams. Although I only knew her briefly, I will always remember her personality and spunk.

*Attorney Jenni Spies (L'06), Assistant District Attorney, Milwaukee County, Wauwatosa, WI
Editor-in-Chief, Marquette Sports Law Review, 2005-06*

To receive an award from the Tierney family was a great honor, especially having the pleasure to meet Bernice Tierney and see the joy she found in her family and their contribution to our education. Mrs. Tierney's giving and energetic spirit demonstrate the best of the Marquette University and Law School communities.

*Attorney Susan K. Allen (L'06), Stafford Rosenbaum LLP, Brookfield, WI
Executive Editor, Marquette Sports Law Review, 2005-06*

I would like to sincerely thank Mrs. Tierney for her never-ending support of the Sports Law program and its students. Her selflessness and generosity not only contributed to the program's success, but also eased the financial burden of many students in the program throughout the years. My thoughts and prayers go out to her family in this difficult time.

*Attorney Ron Cadwalader (L'08), Cassidy & Mueller, Peoria, IL
Lead Articles Editor, Marquette Sports Law Review, 2007-08*

I would like to extend my condolences to the Tierney family and thank Mrs. Tierney for everything she has done for the Sports Law Program, the Sports Law Review, and myself.

Brian C. Hartley (L'09), Lead Articles Editor, Marquette Sports Law Review

I would like to offer my utmost condolences to the Tierney family in their time of loss. Mrs. Tierney was an imperative component to the success and furtherance of Marquette's Sports Law program. Without her continued dedication to this cause, many sports law students, including myself, would have surely suffered.

Andrew Hohenstein (L'09), Executive Editor, Marquette Sports Law Review

Profiles of the new Chair and Vice Chair of the NSLI's Board of Advisors



Casey Coffman

Casey Coffman began her two year term as the new Chair of the NSLI's Board of Advisors in 2009. Ms. Coffman serves as the Executive Vice President of Hicks Holdings, and is also the Chief Operating Officer of Hicks Sports Group.

Ms. Coffman is active in the Hicks family's day-to-day oversight of its sports teams' business operations, including the Texas Rangers Baseball Club, the Dallas Stars Hockey Club, 50 percent of Liverpool Football Club, 50 percent of Center Operating Company, which operates American Airlines Center, and the Mesquite Championship Rodeo. She provides day-to-day oversight of the Hicks family's sports-related real estate developments and maintains oversight over the Hicks' Jack Nicklaus-designed golf course, luxury home and hotel development project in Argentina.

Ms. Coffman joined Hicks Holdings in 2000, as Vice President and General Counsel, after nine years with The Coca-Cola Company. From 1999-2000, she served as counsel to The Minute Maid Company, where she was involved with the brand's marketing relationship with the Houston Astros. From 1994-1999, she served as counsel to Coca-Cola's division in Bangkok, Thailand, and its bottling division in Singapore. Prior to that she was involved in several sports-related transactions involving MLB, the NFL and the Olympics.

Ms. Coffman received her BA Summa Cum Laude in political science and communications from Stephen F. Austin State University and earned her JD with Honors from the University of Texas School of Law. She is the President of the Texas Rangers Baseball Foundation and serves on the board of the Dallas Stars Foundation and the North Texas Board of Directors of Big Brothers Big Sisters. She also is a member of the Board of Directors of The Real Estate Council.

Richard McLaren (H.B.A. (U.W.O.) 1968, LL.B. (U.W.O.) 1971, LL.M. (London) 1972, Ontario Bar 1974, C.Arb., 1989), is the current Vice Chair of the NSLI's Board of Advisors. Professor McLaren has experience as a commercial lawyer, a labour and commercial arbitrator, and a mediator. Member of International Court of Arbitration for Sport, an organization based in Lausanne, Switzerland and sponsored by the International Olympic Committee. Arbitrator for the National Hockey League salary arbitrations and more recently Player/Agent disputes for the NHL Players' Association. Appointed Chairman of the Independent International Commission of Inquiry on Doping Control to investigate allegations against certain American track and field athletes. Past Co-Chief Arbitrator for ADRsportRED, a body dealing with disputes at the national level of Canada's sport system and past Chairman of the Association of Tennis Professionals (ATP) Anti-Doping Tribunal. Co-founder of Sport Solution, an athlete advocacy association funded by Athletes CAN located at the Faculty of Law, The University of Western Ontario.

Prof. McLaren was a consultant to Senator Mitchell on the inquiry into the use of performance enhancing drugs in baseball and worked with the Senator from March 2007 until the Press Conference reporting the results on 13 December 2007. McLaren advised on the drug testing regime used by baseball, recommending improvements and how to make changes.

Professor McLaren has recently returned from being an arbitrator for the CAS Ad hoc Division at the August 2008 Beijing Olympic Games.



Richard McLaren

THE NATIONAL SPORTS LAW INSTITUTE CELEBRATES ITS 20TH ANNIVERSARY

2009 marks the 20th Anniversary of the creation of the National Sports Law Institute of Marquette University Law School. The 2009 issues of **For The Record** will include reports and perspectives from current and former leaders of the NSLI. The first perspective, from former Board of Advisor's Chair Clark Griffith was originally presented at the NSLI's 2008 annual conference on **Professional Sports: Current Issues and Their Implications**, held on Friday, October 24, 2008, at the Marquette University Alumni Memorial Union.



Clark Griffith

The Importance of the Study of Sports Law and the Sports Law program at Marquette

By **Clark Griffith**, Commissioner, Northern League, and past Chair, National Sports Law Institute Board of Advisors

It is my considerable pleasure to address you this afternoon. I have had the honor of serving this organization for four years, the last two as Chairman of the Board of Advisors. More importantly, I am honored to have served after Attorney Ron Walter, from the Milwaukee Bucks, and before Attorney Casey Coffman, from Hicks Holdings, LLC, both leaders in the sports law community.

Today, I will discuss the importance of the study of sports law and the increasing importance of the National Sports Law Institute and Marquette's Sports Law program.

My path to this understanding has been long and not particularly straight. My first job in baseball with the Twins was the first year of the Major League Baseball Players Association. Needless to say, baseball executives of the day turned all the Union stuff over to the recent college graduate who seemed to have interest in the area. I learned an important lesson in my first year. In spring training 1967, while waiting for a table, I noticed Union Executive Director Marvin Miller and General Counsel Richard Moss in an adjoining room. Joe Cronin, American League president and a Hall of Fame shortstop and manager, was a member of our party and whispered to me "Come with me. Always be the big leaguer." We walked over and met Mr. Miller and Mr. Moss and I began a very long, friendly, argumentative, but cordial relationship with the two men who would introduce labor law to the Major Leagues. I learned that developing relationships is essential to deal making.

My introduction to sports law came through marketing and labor. When I was a young executive, I had this crazy idea that all major league logos should be sold centrally. This was not a very popular idea when I first proposed it to Commissioner Kuhn, and my audacity led to my becoming the head of the Major League Baseball Promotion Corporation, now MLB Properties.

Our first activity was to have the teams register their trade marks under the Lanham Act. One team said that this was foolish, because letting companies use our marks provided them with a lot of free publicity. I suggested that we would get more publicity and that we would be paid for it. Another team showed me a letter indicating that they had granted perpetual rights to the use of their marks to the biggest t-shirt seller in the Midwest. We had to buy back those rights at significant cost as the t-shirt seller understood

what he had even though the team did not. These situations brought me into contact with lawyers and the legal process and I found it fascinating.

My next experience was in negotiating stadium use agreements, which tied me to the legal process again. I learned about “use agreements” and “leases.”

The final straw that sent me to law school occurred one afternoon in an office nine stories over Sixth Avenue in New York. I was a member of the Player Relations Committee that managed player labor matters. I was in a conference room with five lawyers. One said to the other “That sounds like a §8(a)2 violation to me.” To which the other lawyer said, “No, that’s a §8(a)5 violation.” I heard that and decided that I had to know what it meant so that I could do the work better. I was in law school just over a year later.

I thought that I could go to law school full time and work full time. I did it, but I don’t recommend it. It was just after law school that I encountered sports law, which was unknown as a sub specialty in those days. The study of sports law is the study of that remarkable conflict between labor law, which encourages and embraces combinations restraining trade, and antitrust law, which finds such combinations, contracts, and conspiracies to be illegal. The conflict has been wonderful to watch as it has resolved itself over the seventy-four years from *Federal Baseball* to *Brown*.¹ Where among our cases can you find more lyrical descriptions of baseball than in Judge Smythe’s description of the game in his appellate court decision where he describes a game as being created by the players only to disappear (like a sunset) to be created again some other time and at some other place?² Clearly that is not the stuff of interstate commerce as it is incapable of being transported from place to place as each game is new. It is Smythe’s decision in *Federal Baseball* that was affirmed by Oliver Wendell Holmes, Jr.. How could he not? All of this occurred in the 1920s and continued into the 1970s. *Flood v. Kuhn* starts with a catalog of ninety-two former baseball players’ names—Eppa Rixey, Iron Man McGinnty, and Old Hoss Radbourne, and one umpire, Bill Klem.³ Only sports allows Justices this levity.

The creation of unions is what really drove sports law, and when the football guys started suing each other, it really got moving. In a way, it begins when John Mackey started the long search for accommodation between labor and antitrust. The trial in Minneapolis started badly for the NFL when it was assigned it to NFLPA general counsel Leonard Lindquist’s best friend, Earl Larson, who found that the NFL was guilty of a per se violation.⁴ Then 8th Circuit Court of Appeals Judge Donald Lay found that the rule of reason was appropriate, ruled against the NFL and laid down the Mackey rules.⁵ Under the decision, the exemption applies where the contract deals with mandatory subjects of bargaining, is between the parties only, and is the product of bonafide arms length negotiation. Every sports law student learns to recite these rules by heart - at least in my class.

So it was settled that the labor exemption attached to negotiated contracts, but variations in that scheme took us to *McNeil, White*,⁶ the convoluted settlements, and the bizarre scenario of a union de-certifying in a Judge’s chambers so that an antitrust case could be filed, then re-certifying to make a deal, then de-certifying again to sue, and finally re-certifying to make a deal. Where else do you find this drama in our jurisprudence? It doesn’t exist. You can only find it in sports law cases.

¹ *Federal Baseball Club of Baltimore, Inc. v. Nat’l League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

² *Nat’l League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681 (D.C. Ct. App. 1920).

³ *Flood v. Kuhn*, 407 U.S. 258, 263 (1972).

⁴ *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975).

⁵ *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

⁶ *McNeil v. NFL*, 790 F.Supp. 871 (D. Minn. 1992); *White v. NFL*, 41 F.3d 402 (8th Cir. 1994).

Not only are the sports law battles intellectually expanding, but we have our personal battles as well. The ying and yang between Judges Will and Easterbrook, and between the Bulls and the NBA in the WGN series of cases,⁷ are examples of the drama of sports law that can only be duplicated in Tolstoy or Dickens. Of course, Judge Will dying in the process added a Greek tragic moment as well.

Then we have our insiders fights, my favorite being the squabble between Shira Scheindlin and Sonja Sotomayor. In the *Clarett* case, the two judges sat on the same bench in the Southern District of New York for several years and Sotomayor went on to the Second circuit court. When Maurice Clarett wanted to attack NFL restrictions so that he could play, he filed his case in that same Southern District. Of course I consider that to be a great error in that you do not want a player's case ending up at the Second Circuit. As happens on so many sports cases, the player wins at the trial level only to be reversed on appeal. (It just occurred to me that may be the reason I like this so much). The timing of the suit was such that a favorable decision by Sheindlin would put Clarett on the field before the Court of Appeals could act, dealing a *fait accompli* to the NFL. But when the decision was rendered by Sheindlin,⁸ Sotomayor swooped in and invoked the non-statutory exemption for labor from antitrust and reversed her before poor Clarett could have his ankles taped.⁹ The non statutory exemption won again and the drama of sports law continued.

Then again, there are those dramas that occur in the law that take on added significance in sports. This is where a litigant has no idea why he or she is in the court room. This happened with Umpires Association Director Richie Phillips who, when appearing in court on a motion argument, was asked by a judge why he was there, and said, "Well I hoped you'd think of something." He lost.

There is also the lawyer who told a team to renew its "lease" in October, because no one can enjoin a breach of a lease only to learn later that it was a "use agreement" that the team had and the arguments were all wrong. That one saved the Minnesota Twins from contraction.

My favorite case for bald faced temerity is the NCAA case where it had a classification of coaches known as the "Restricted Earnings Coaches."¹⁰ That kind of label does not get you success in antitrust court rooms and it cost the NCAA a lot of money. Neither does arguing impasse when the union makes a counter offer, or arguing that salary arbitration is a permissive subject of bargaining, and not sufficiently related to wages, hours, and other terms and conditions of employment to be a mandatory subject of bargaining. That one lost too, but ended a strike in 1995.

That leads me to a consideration of why the NSLI is important to the sports community. First, it concentrates on its faculty and Board of Advisors, both leading thinkers in sports. Second, it takes that intellectual activity and produces learning that is distributed by a variety of means, including the *Marquette Sports Law Review*, and its web presence, that offers resources for sports lawyers worldwide.

In brief, sports law is the most exciting area of the law for students and practitioners, and the NSLI is the leading institution in furthering the study and practice of sports law. It has been my honor to serve and I look forward to my continued association. Thank you.

⁷ Chicago Professional Sports Limited Partnership & WGN v. NBA, 95 F.3d 593 (7th Cir. 1996).

⁸ Clarett v. NFL, 306 F. Supp. 2d 411 (S.D. NY 2004).

⁹ Clarett v. NFL, 369 F.3d 124 (2nd Cir. 2004).

¹⁰ Law v. NCAA, 134 F.3d 1010 (10th Cir. 1992).

CELEBRATES ITS 20TH ANNIVERSARY:

Publications

Founded in 1989, the National Sports Law Institute (NSLI) is affiliated with Marquette's Sports Law program. Its mission is to be the leading national educational and research institute for the study of legal, ethical, and business issues affecting amateur and professional sports from both an academic and practical perspective. During 2009, each issue of **For The Record: The Official Publication of the National Sports Law Institute** will provide a retrospective on various areas the NSLI has focused on for the past 20 years.

Beginning with the creation of the **Marquette Sports Law Journal** in 1990, the NSLI has introduced several publications in its continuing efforts to provide a national forum for discussion and consideration of United States and international sports issues and to encourage input by persons and organizations with a wide range of viewpoints.



PERIODICALS

Marquette Sports Law Journal/Review

Established in 1990 as the *Marquette Sports Law Journal*, the *Marquette Sports Law Review* was the first United States scholarly publication to focus on legal, ethical, and business issues related to professional and amateur athletics. Now in its nineteenth volume, the *Sports Law Review* is produced and edited by Marquette University Law School students and publishes articles and essays submitted by sports lawyers, sports industry professionals, law professors, and law students on a broad range of sports-related topics. Recent symposium issues of the *Sports Law Review* have focused on topics from "Doping in Sports: Legal and Ethical Issues," to "Alternative Dispute Resolution in Sports," and "International Sports Law & Business in the 21st Century." In addition, since 1997, the *Sports Law Review* has included an index to "Sports Law in Law Reviews and Journals," now containing bi-annual indices of sports law scholarship in each issue, and, since 2003, each volume has contained an extensive annual survey reporting on the cases that have impacted the sports industry during the past year. Further information about the *Sports Law Review* can be found online at <http://law.marquette.edu/jw/mslr>.

For the Record

Established in 1990, *For The Record* is the official newsletter of the National Sports Law Institute. Now published four times annually, the newsletter focuses on providing current practical research and scholarship, as well as information on Marquette Sports Law program events and activities. Further information about *For The Record* can be found online at <http://law.marquette.edu/jw/ftc>.

For the Record Online

In 1998 and 1999, *For The Record Online* was an online companion to *For The Record*. *For The Record Online* included links to outlines and presentations that supplemented materials provided originally in *For The Record*. *For The Record Online* can still be found at <http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=195>.

For the Record Extra

From 1992 until 1995, *For The Record Extra* was a monthly supplement to *For The Record*, providing information on current topics in sports law and sports business for the media.

You Make the Call. . .

Created in 1998, *You Make the Call. . .* is a bi-annual online newsletter that provides an analysis of significant cases impacting the sports industry. *You Make the Call. . .* is only produced online and is distributed to subscribers by email. The most recent issue of *You Make the Call. . .* focuses on cases covering the following areas of law:

- Alternative Dispute Resolution
- Americans with Disabilities Act Cases
- Antitrust Law
- Constitutional Law
- Contract Law
- Discrimination Law
- Education Law
- Employment Law
- Gender Equity Law
- Intellectual Property Law
- Labor Law
- Property Law
- Tort Law

You Make the Call. . . can be found online at <http://law.marquette.edu/jw/ymtc>.

Sports Facility Reports

Created in 2000, *Sports Facility Reports* is an annual online newsletter providing articles, facility databases, and other information related to the sports facility industry. The most recent issue of *Sports Facility Reports* includes the following information:

- PRESENTATION: Professional Sports Facilities: The Costs, the Public, the Benefits and the Law of the Deal
- ARTICLE: Resurgence of the NHL
- *Facility Update Charts*
 - Major League Baseball (appendix 1a & appendix 1b)
 - Minor League Baseball™ (appendix 1.1)
 - Minor League Baseball™ (appendix 1.2)
 - Minor League Baseball™ (appendix 1.3)

- National Basketball Association (appendix 2)
- Other Basketball Leagues (appendix 2.1)
- National Football League (appendix 3)
- Other Football Leagues (appendix 3.1)
- National Hockey League (appendix 4)
- Other Hockey Leagues (appendix 4.1)
- Other Hockey Leagues (appendix 4.2)
- Soccer (appendix 5)
- Motorsports (appendix 6)

Sports Facility Reports. . . can be found online at <http://law.marquette.edu/jw/sfr>.

BOOKS

Sports Law Practice

Written by former NSLI Director Martin Greenberg, *Sports Law Practice* was published by the Michie Company in 1993. The book is a guide for lawyers who want to practice within the sports industry. The NSLI and several Marquette University Law School students assisted in the research, writing, and development of various chapters of the book until its final supplement was published in 1996. The second and most recent edition of *Sports Law Practice* was published in 1998 by Lexis Law Publishing.

The Stadium Game

Written by former NSLI Director Martin Greenberg and former NSLI Assistant Director James Gray, *The Stadium Game* was published by the National Sports Law Institute in 1996. The book provides an overview of the sports facility industry from the development of a sports facility to sample lease provisions and agreements. *The Stadium Game: Second Edition*, written by Martin Greenberg, was published in 2000 by Marquette University Press.

Sports Law: A Desktop Handbook

Written by NSLI Associate Director Paul Anderson, *Sports Law: A Desktop Handbook* was published by the National Sports Law Institute in 1999. The book was written to provide an answer to the question: What is Sports Law? The *Desktop Handbook* is meant for journalists, students, academics and others who desire a quick understanding of the field of sports law. The *Desktop Handbook* is now out of print ; it can be found in many law libraries.

Sports Law and Regulation

Edited by former NSLI Interim Director Gordon Hylton and NSLI Associate Paul Anderson, *Sports Law and Regulation* was published by Marquette University Press in 1999. The book was compiled to alleviate some of the confusion those in the sports industry encounter when trying to understand the developing legal framework that shapes the sports world. The essays in the collection explore the law's impact on sport in a variety of contexts from stadium and arena management and intellectual property in sports, to the power of teams to discipline players and female athletes and gender equity. *Sports Law and Regulation* is now out of print it can be found in many law libraries.

MANUALS & SURVEYS

Sports Lawyers Directory

In conjunction with Sportsguide, Inc., the National Sports Law Institute published the *Sports Lawyers Directory* in 1992. The *Directory* included up-to-date listings of those who either practiced or taught in the sports law field along with detailed information about their areas of practice or expertise.

Reduce Your Risk Manual

In conjunction with the Interscholastic Athletic Department of the Milwaukee Public Schools, the National Sports Law Institute created the *REDUCE YOUR RISK—Risk Management for High School Athletic Programs* manual in 1992. Revised and republished in 2001 the manual provides basic instruction to high school athletics personnel in the city of Milwaukee including specific instruction related to legal issues, insurance, WIAA rule making, medicine, and ethics.

Sports Law in the State of Wisconsin

With the support of the Sport & Entertainment Law Section of the State Bar of Wisconsin, the National Sports Law Institute published the “Sports Law in the State of Wisconsin” survey in the Spring 2005 issue of the *Marquette Sports Law Review*, Volume 15, Number 2. The survey provides an overview of the development of sports law in the state of Wisconsin until the end of 2004. The survey can be found on Westlaw, Lexis, HeinOnline, and other legal research databases.

Entertainment Law in the State of Wisconsin

With the support of the Sport & Entertainment Law Section of the State Bar of Wisconsin, the National Sports Law Institute published the “Entertainment Law in the State of Wisconsin” survey in Spring of 2007 issue of the *Marquette Sports Law Review*, Volume 17, Number 2. This survey provides an overview of the development of entertainment law in Wisconsin until the end of 2006. The survey can be found on Westlaw, Lexis, HeinOnline, and other legal research databases.

ANNUAL CONFERENCE MATERIALS

Beginning with the “Sports Dollars & Sense” conference in October of 1992, the NSLI has hosted an annual conference for the past eighteen years. Extensive printed conference materials are produced and sold in conjunction with each conference. Currently, the NSLI is selling conference materials from recent conferences focusing on "Professional Sports: Current Issues and Their Future Implications" (2008), "The Increasing Globalization of Sports: Olympic, International and Comparative Law & Business Issues" (2007), "Individual Performer Sports: Current Legal and Business Issues" (2006), "The Evolving Nature of High School, College and Olympic Sports in the 21st Century" (2004), and "International Sports Law & Business in the 21st Century" (2003). If you are interested in purchasing any of these materials, please visit the NSLI's publication website at <http://law.marquette.edu/jw/pubs>.

Visit the National Sports Law Institute on Twitter at

<https://twitter.com/musportslaw>



Interview—You May Be Fired

By **Martin Greenberg**, Greenberg & Hoeschen, Member, Southeast Wisconsin Professional Baseball Park District, and Member, National Sports Law Institute Board of Advisors

Martin Greenberg

Jeff Jagodzinski was the thirty-third football coach in Boston College history.¹ Jagodzinski inked a five-year deal with Boston College in 2007 and replaced Tom O'Brien, who left for North Carolina State.² Jagodzinski previously spent a brief time at Boston College in 1997 and 1998 as an offensive coordinator and line coach. Since 1999, until his return to Boston, he was tight-ends coach, offensive line coach, and offensive coordinator for the Atlanta Falcons and Green Bay Packers.³

In both of his two seasons at Boston College, Jagodzinski coached the Eagles to a first place finish in the ACC's Atlantic Division. In 2007 the Eagles went 11-3 including a victory over Michigan State in the Champs Sport Bowl. This past season, Boston College finished 9-5 after losing to Vanderbilt in the Gaylord Hotels Music City Bowl.⁴ During his tenure, the Eagles were ranked as high as No. 2 in the national rankings in 2007 and were a combined 20-8.⁵

Jagodzinski was told by Boston College Athletic Director, Gene DeFilippo, that he would be fired if he interviewed for the New York Jets head coaching vacancy. On January 6, 2009, he met with Jets officials anyway. On January 7th, DeFilippo fired Jagodzinski.⁶ As one commentator noted, "DeFilippo gave Jagodzinski his first head-coaching job. Gave him a five-year contract. In return, he asked for five years of loyalty. After only two years, Jags took that fateful interview."⁷

In the big money world of college coaching where contracts are treated like toilet paper, can a university tell a coach who he can talk to regarding their career during the term of their contract? It all depends upon the contract.

A college coach's contract handles the issue of whether or not the coach can have discussions with other universities or teams during the term of the contract in several ways, including:

1. Silence. The contract is silent and does not contain a non-compete, notice, or university approval provision relative to discussions or negotiations with other universities during the term of the contract.

{A special thank-you to Adam Ben-Zikri, a second-year law student at Marquette University Law School, who was helpful in the editing and footnoting of this article.}

¹ *Boston College Terminates Employment of Football Coach Jeff Jagodzinski*, THEACC.COM, Jan. 7, 2009, <http://www.theacc.com/sports/m-footbl/spec-rel/010709aaa.html>.

² Eric Avidon, *It's Official: Jagodzinski Out at BC*, ENTERPRISENEWS.COM, Jan. 7, 2009, <http://www.enterpriseneews.com/sports/x376745596/It-s-official-Jagodzinski-out-at-BC>.

³ *Jeff Jagodzinski – Boston College Football*, BOSTONCOLLEGERIVALDS.COM, <http://bostoncollege.rivals.com/viewcoach.asp?Coach=1926> (last visited Feb. 20, 2009).

⁴ Avidon, *supra* note 2.

⁵ Howard Ulman, *BC Fires Jagodzinski After Coach Met With Jets*, SEACOASTONLINE.COM, Jan. 8, 2009, <http://www.seacoastonline.com/articles/20090108-SPORTS-901080432>.

⁶ Avidon, *supra* note 2.

⁷ Bob Molinaro, *Firing of BC Coach Exposes 'Flawed' System*, HAMPTONROADS.COM, Jan. 9, 2009, <http://hamptonroads.com/2009/01/firing-bc-coach-exposes-flawed-system>.

2. Prior Approval Clause. The contract contains a prior approval clause; that is, the coach must first obtain the consent or approval of the Athletic Director before having discussions with other universities. Examples of prior approval clauses include:

a. Tommy Bowden – former head coach at Clemson University.

University Approval Required Prior to Negotiation with Other Schools: “The parties agree that should another coaching opportunity be presented to Coach or should Coach be interested in another coaching position during the Term of this Agreement, Coach must notify the Athletics Director of such opportunity or interest and obtain permission from the Athletics Director before any discussions can be held by Coach with anticipated coaching position principals.”⁸

b. Tommy Tuberville – Auburn University.

Prospective Employment by Coach or Auburn: “Unless notice has been given to Coach by Auburn of his termination, neither Coach nor any person or entity acting at or under his express authority shall under any circumstances discuss or negotiate directly or indirectly his prospective employment with any other institution of higher learning or professional athletic team without notice to the Director of Athletics and the express permission of Auburn, which shall not be unreasonably withheld. Unless notice has been given by Coach to Auburn of his termination of this Agreement, neither the President nor the Athletic Director of Auburn or any person or entity acting at or under their express authority shall discuss or negotiate directly or indirectly Auburn’s prospective employment of any other person as Head Football Coach of Auburn without notice to Coach.”⁹

c. Francisco J. Martin – Kansas State University. The coach must give notice of discussions with other prospective employers.

“Exclusivity of Services (b). Coach agrees that during the term of this agreement he will notify the Athletic Director or his designee of, and obtain permission prior to, any discussions by Coach, his agents or representatives, pertaining to coaching opportunities at any NCAA member institution, or any other coaching or non-coaching positions that may result in termination of his employment at the University. Likewise, Athletic Director or his designee agrees to notify Coach prior to any discussions with other coaches, their agents or representatives pertaining to head coaching opportunities in the men’s basketball program at the University.”¹⁰

3. Prior Approval Clause Subject to Time Limitations. The contract contains a prior approval clause (i.e. the Coach must first obtain the consent or approval of the Athletic Director), and also limits the time in which discussions or negotiations may take place. An example of a prior approval clause subject to time limitations is as follows:

Urban Meyer – University of Florida.

“Coach agrees that he shall not under any circumstances discuss or negotiate directly or

⁸ Employment Agreement between Clemson University and Tommy P. Bowden, at Section 13, Dec. 1, 2007.

⁹ Amended and Restated Agreement between Auburn University and Thomas Hawley Tuberville, at 6, Dec. 31, 2004.

¹⁰ Employment Agreement between the Intercollegiate Athletic Council of Kansas State University, Incorporated, Kansas State University, and Francisco J. Martin, at 5, Apr. 6, 2007.

indirectly his prospective employment with any other institution of higher learning or professional athletic team except between the final day of the regular football season and January 2 of each year in which this Agreement is in effect. Coach agrees to provide Athletic Director with written notice prior to engaging in such contract discussion or negotiation. In the final year, as specified in sub-paragraph 4A herein, he is granted permission to discuss such employment with any person or entity at any time after the final day of the regular football season. It is particularly understood that on-going rumors or media reports of such negotiations are damaging to team morale and recruiting, and therefore the parties expressly agree that time is of the essence as to the provisions of this sub-paragraph, and that the time shall be strictly construed.”¹¹

4. Notice. A notice clause requires the Coach to notify the Athletic Director of his desire to engage in discussions or negotiations with another institution during the contract term. Examples of this kind of clause include:

a. Paul H. Davis, Jr. – The University of North Carolina at Chapel Hill.

“The parties agree that Coach shall be required to notify the Athletic Director and Chancellor prior to engaging in discussions with other institutions through their representatives or agents, including discussions related to offers of administrative opportunities at other educational institutions.”¹²

b. Les Miles – Louisiana State University and Agricultural and Mechanical College.

“Unless notice has been given to Coach by the University of Coach’s termination pursuant to Section 13 of this Contract, neither Coach nor his agent shall, under any circumstances, discuss or negotiate directly or indirectly his prospective employment with any other institution of higher education or professional athletic team without giving at least 24 hours prior written notice to the Athletic Director.”¹³

c. Gregory Schiano – Rutgers, the State University of New Jersey.

Solicitation Provision. “At any time prior to the conclusion of this Employment Agreement Extension, Schiano must notify in writing the Director prior to speaking with any other university or college regarding any head coaching position.”¹⁴

d. Mark Richt – University of Georgia.

“During the term of his employment by the University and the Term, Richt shall notify the Athletic Director of any offers of employment, employment opportunities or requests for meetings or discussions with respect to possible employment opportunities before engaging in substantive discussions regarding such employment or employment opportunities.”¹⁵

¹¹ Head Coaching Agreement between the University Athletic Association, Incorporated and Urban Meyer, at 12, Apr. 20, 2005.

¹² Employment Agreement between the University of North Carolina at Chapel Hill and Paul H. Davis, Jr., at 10, Nov. 27, 2006.

¹³ Contract of Employment between Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and Les Miles, at 8, Jan. 1, 2005.

¹⁴ Addendum to the February 28, 2006 Extension Agreement between Rutgers, The State University of New Jersey and Gregory Edward Schiano, at 17, Feb. 17, 2007.

¹⁵ Amended and Restated Agreement between the University of Georgia Athletic Association and Mark Richt, at 4, Jan. 1, 2006.

5. Notice – Athletic Director Contact. A modified notice claim may require the Coach to not only provide notice to the Athletic Director, but also to direct the potential employer to contact the Athletic Director prior to any further discussions. An example of this kind of modified notice claim follows

Bob Stoops – University of Oklahoma.

“Coach will not contact or hold discussions with any potential employer, other than through the University, regarding job opportunities without first providing notice to the Athletic Director. Additionally, if Coach is contacted by any representative of a potential employer, other than the University, regarding job opportunities, Coach will require that representative or potential employer to contact the Athletic Director prior to any further discussions.”¹⁶

6. Restrictive Covenant. If the coach’s contract contains a restrictive covenant, this may prohibit discussions or negotiation with other universities prior to the end of the contract term. An example of a restrictive covenant includes:

Lon Kruger – University of Nevada – Las Vegas.

“Recitations Regarding Employee’s Status. The parties hereby agree that Employee has special, exceptional and unique knowledge, skill and ability as a coach at the intercollegiate level, which in addition to his continued acquisition of coaching experience and reputation at UNLV, as well as Employer’s special need for continuity and competitiveness in its Men’s Basketball Program, render Employee’s services to Employer unique. Therefore, Employee acknowledges that the resignation or termination of this Employment Agreement by Employee in order to accept employment at another NCAA member institution or professional team, or without Employer’s prior consent, would damage Employer to an extent that cannot be estimated with certainty or be fairly or adequately compensated by money damages. Employee therefore agrees for himself, his agents and representatives, specifically that he and they shall not seek, discuss, negotiate for or accept other full-time employment of any nature prior to the termination date of the term of this Employment Agreement or any extension thereof without prior written consent of the Director of Athletics or his designee.”¹⁷

7. An Obligation to Notify the University of Another Coaching Opportunity and a Covenant that Failure to Notify the Athletic Director Constitutes an Event for Termination for Cause. An example follows:

a. Thomas Crean – Indiana University

i. 7.01. Other Coaching Positions.

“The parties agree that should another coaching opportunity be presented to the Employee or should the Employee be interested in another coaching position during the Term, the Employee is to notify the Director of Athletics in writing (hard copy, not electronically) of such opportunity or interest before any discussions can be held by the Employee or any agent or intermediary of the Employee with the anticipated coaching position principals.

¹⁶ Contract of Employment between the University of Oklahoma and Robert Anthony Stoops, at 3, Jan. 1, 2002.

¹⁷ Contract Extension Agreement between University of Nevada, Las Vegas and Lon Kruger, at 27, Apr. 1, 2007.

Failure to do so is a material breach of this Agreement and a reason for termination of the employment of the Employee by the University for Cause under Section 6.02.B.”¹⁸

ii. 6.02.B. “Action by the University for Cause. The University may terminate the employment of the Employee by the University under this Agreement prior to the Normal Expiration Date for Cause. The term “Cause” shall include, in addition to and as examples of its normally understood meaning in employment contracts, any of the following:... (11) “Any failure by the Employee to comply with his obligations, duties and responsibilities under Section 7.01 or any material breach of the representations and warranties of the Employee in Section 7.02.”¹⁹

iii. 6.01.B. “Effect of Termination. If the Employee terminates his employment by the University under this Agreement prior to the Normal Expiration Date in accordance with the provisions of this Section 6.01.A, the Employee shall be obligated to pay to the University the amount provided in Section 6.01.C below and all obligations of the University to make further payments and/or to provide any benefits or other considerations hereunder shall cease as of the earlier of the effective date of the termination or the end of the month in which the notice of termination is given.”²⁰

CONCLUSION

While Jagodzinski’s contract was not available for review, it has been reported that Jagodzinski was fired without cause. Athletic Director DeFilippo has said that Jagodzinski’s contact with the Jets did not violate his contract and that he would receive money remaining on his deal. These statements indicate clearly that the firing was without or not for cause.²¹

If the contract is silent and there is no prohibition against discussions or negotiations with other universities during the contract term, the University could, like Boston College, terminate the contract without cause. The university would be subject to whatever liquidated damage provision is contained in the contract, in addition to whatever mitigation of damage clause offsets the continued payment.

If a coach has discussions or negotiations with other universities in violation of a notice, consent, or approval clause (that is, the coach must first notify the University of his desire to interview for any other job opportunity or receive the consent of the Athletic Director), the University has the opportunity to terminate the coach for cause, which subject to the terms of the contract would relieve the University of any further financial responsibility.

If the contract is silent or if the coach violates a covenant of notice or prior approval clause and there is also a buyout clause for early termination by the coach, the University could be relieved of financial responsibility, and still receive the contractual liquidated damages owed by the coach for leaving early.

Following Jagodzinski, Jerry Holmes, head football coach at Hampton University was similarly let go. Athletic Director Lonza Hardy learned that Hampton was interviewing for NFL assistant coaching jobs and fired him. Athletic Director Hardy informed Coach Holmes that “we felt it was not in the best interest of the program at this critical time right before signing day to have our head coach interviewing

¹⁸ Employment Agreement between the Trustees of Indiana University and Thomas Crean, at 18, Apr. 2, 2008.

¹⁹ *Id.* at 12

²⁰ *Id.* at 11.

²¹ Avidon, *supra* note 2.

for other positions.”²²

Interviewing at other schools was one of the sticking points in the now acrimonious contract renegotiations between Mike Leach and Texas Tech University. In his prior contract Leach had no restrictions on interviewing and actually interviewed for the University of Washington job in December of 2008 without notifying Texas Tech. In subsequent negotiations for a new contract Texas Tech asked to include a clause that if Leach interviewed for another job without permission, he would be fired and a buy-out penalty would be invoked.²³ Athletic Director Gerald Myers had said “I’ve made it clear that I would not withhold permission to interview. I just want him to let me know.”²⁴

Consent not being “unreasonably withheld” opens another arena of legal issues as to which objective standards will be used to withhold permission. The Leach negotiations signify the new importance of loyalty and control in college athletics. Leach ultimately signed a new contract extension with Texas Tech that states, “Unless notice of termination of employment has been given to Coach in accordance with Articles V.A. or V.D. below, Coach shall not engage in discussions or negotiate, either directly or indirectly, concerning Coach’s prospective employment by any other employer without first providing prior written notice to the Director of Intercollegiate Athletics of such discussions or negotiations. Failure to provide such notice may be considered a material breach of this Agreement.”²⁵

Jagodzinski’s situation may give rise to future contracts that contain an absolute, locked-in no-interview clause for a fixed period of time similar to a restrictive covenant. This provision may be accompanied by an absolute obligation to coach for a definite period, regardless of back-end buyout clauses. The bottom line is, regardless of the strength of a coaching contract, the collegiate athletics is “a wild west environment that essentially allows each school and each conference to roam at will for coaching talent.”²⁶ This situation is another signal that the legal environment between universities and coaches has become more hostile, with universities willing to challenge a coach for merely seeking other job opportunities.

²² Melinda Waldrop, *Holmes Out as Pirates Coach*, DAILYPRESS.COM, Jan. 27, 2009, http://www.dailypress.com/sports/college/hu/dpspt_d1holmes_0127jan27_0,175037,story.

²³ *Report: Texas Tech, Leach Taking Break After Heated Contract Talks*, SI.COM, Feb. 6, 2009, http://sportsillustrated.cnn.com/2009/football/ncaa/02/06/texastech.leach.ap/index.html?eref=si_ncaaf.

²⁴ *Id.*

²⁵ *Leach, Tech Reach Five-Year Agreement*, ESPN.COM, Feb. 20, 2009, <http://sports.espn.go.com/ncaa/news/story?id=3919674>.

²⁶ Caulton Tudor, *BC AD’s Decision Worth Noting*, NEWSOBSERVER.COM, Jan. 9, 2009, <http://www.newsobserver.com/sports/college/story/1360112.html>.

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