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An Interview with Steve Underwood, Senior VP and General Counsel of the Tennessee Titans

By Stacey Schlitz



On Aug. 26, 2006, Steve Underwood was promoted to senior executive vice president/COO, general counsel and executive assistant to the chairman of the board, Mr. K.S. "Bud" Adams Jr. Underwood has served the Tennessee Titans and the Titans' predecessor, the Houston Oilers, since working as the Oilers' primary counsel while in private practice in the late 1970s. He interacts on a daily basis with Adams, the coaching team led by Head Coach Jeff Fisher, Mike Reinfeldt, the general manager of the Titans and Executive Vice President Don MacLachlan. Underwood is a proud member of the Texas Bar and speaks to professional groups frequently about sports law. He graciously accepted an invitation to sit down with me and discuss his promotion in the Titans Club, the role of media in the NFL, the economic challenges ahead for professional sports and the Titans' successful 2008 season.

By way of introduction, Underwood familiarized me with the basic legal issues that an NFL lawyer deals with on a day-to-day basis. When the Oilers came to Nashville, the Club had to have relocation agreements, a stadium lease, scores of partnerships with sponsors, a naming-rights partner and signage partners. Lawyers were (and are) also necessary for labor and employment issues. NFL employees including not only players, but staff, have to have written employment agreements that comply with League rules.

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LETTER FROM THE EDITOR

On Underdogs, Being a Team Player and The Pain Train!

By Stacey Schlitz

Nobody thought the Titans could win the AFC South Division title this year.

I was raised a Cleveland Browns fan, so I know what it means to be the under-Dawg (sorry — I had to say it!). The inferiority complex that comes with being a Browns fan keeps you from getting too full of yourself. That's why Browns fans hate Pittsburgh, pure and simple.

There is something about sports events that offers a hopeful message. Kerry Collins has beaten teams with more glamorous quarterbacks, getting little respect from the media and press, and has methodically driven the team down the field — passing or running the ball — for touchdown after touchdown. But it's not just a flashy quarterback and the smashing and dashing of LenDale White and Chris Johnson that wins games, it is a near-impeccable kicker like Rob Bironas and an unrelenting Pain Train led by Albert Haynesworth that gets the job done.

In this issue, Steve Underwood, the senior executive VP and general counsel of the Tennessee Titans, discusses his role in the Titans Club, and the cooperation of Head Coach Jeff Fisher, Mike Reinfeldt, the general manager of the Titans, and Executive Vice President Don MacLachlan in creating a winning organization. Marc Edelman, assistant professor of law at Rutgers School of Law and adjunct professor at New York Law School, discusses the challenges facing the NFL's recent personal conduct policy in his article,

“Can the NFL Really Banish Pacman Jones? A Look at What Might Become the Biggest Sports Law Case of 2009.” We will talk to Mark Slough, NFL agent and former attorney, about the role of perseverance and tenacity in being an agent, and whether *Jerry Maguire* was true after all. Ken Sanney spotlights Larry Thrailkill and the Sports Authorities of both Metro Nashville and Memphis, and what they do to promote the cities' respective agendas for professional sports. Finally, Jefferson Wallace, entertainment lawyer and 2008-2009 chair of the Mentoring/Networking Committee, introduces our E&S Section to the concept of mentoring and assisting others in becoming a part of the E&S community as a whole.

We beat the odds in our legal practice by methodical preparation and execution. We find mistakes only when we actually read through a draft of a contract. We have rebuttal exhibits ready at trial only when we have read through the trial record multiple times.

At the time of this writing, the Titans may or may not have made it to the Super Bowl, but they sure had a stellar season. As lawyers, our own preparation — and our legal team's — will not ensure victory, but it will ensure that we put up a darn good fight. **E&S**

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The Forgotten Art of Entertainment Law

By Amy J. Everhart

I wanted to be a country superstar long before I wanted to be a lawyer. Not a singer/songwriter, not a recording artist, but a country superstar, like Loretta Lynn. It didn't help that I turned 8 just in time for *Coal Miner's Daughter* and *Urban Cowboy* to hit the big screen. I spent the better part of my childhood giving concerts to the other neighborhood kids, belting out "One's on the Way" and "Could I Have This Dance," my sister's Tickle deodorant as my microphone and my living room couch (cushions removed) as my stage.

Most little girls grow out of their childhood dreams and mature into rational adults. Not me. The minute I graduated from college I loaded my car with little more than a pillow and my keyboard (no kidding) and drove from Small Town, North Dakota, directly to Nashville, do not pass Go (or Nebraska). And even though I'd never been to this town and didn't know a soul here, I, like Loretta, found success in Music City.

Not as a country superstar, but as a lawyer to country superstars. And to non-country-superstars, too. A fulfilling career. But sometimes, when I'm sitting across the table from one of my entertainment clients, a songwriter, say, asking him how he created a song so we can establish "independent creation" as a defense to copyright infringement, and appearing ever the authority on all things intellectual and lawyerly, I want to say, "Me, too! I'm an artist, too, you know!" Only I never say this. Instead I pull my lawyer's hat more firmly onto my head and get back to the business of drafting my summary judgment motion on independent creation.

At December's Entertainment and Sports Law CLE, the first segment was legal writing lessons we can learn from songwriters, specifically songwriting hero Don Schlitz. When moderator Stacey Schlitz ably gave us tips to improve our legal writing (write concisely, simply, choose the perfect word, tell a story), the lawyer-me was all into it, taking notes, nodding in agreement at a particularly good point. But when Don launched into one of my favorite songs after another — "The Gambler," "When You Say Nothing at All," "Forever and Ever, Amen," "I Feel Lucky" — I couldn't help but set logic aside and float into oblivion for a moment, tapping my foot and swaying along. (I didn't go so far as to sing along like I would have at the Bluebird ... that "Gambler" chorus is the most infectious melody in show business, isn't it?) *Who cares what I'm learning*, my soul hummed ... *just enjoy*. To quote

Stephen King, who, in a recent *Entertainment Weekly*, quoted Steve Martin: "Talking about music is like dancing about architecture." (I am told this quote has also been attributed to Frank Zappa, but I digress.)

Later, a panel of Music City leaders debated the effects of the revolution in the music industry, and the conversation returned, time and again, to the music. "What kind of model is best? The one that promotes good music first." "It should be about the music." "I want to be drawn to buy music by the music itself before I ever see the album cover," one Belmont student said. "Nashville is, in essence, about the song," said a panelist. And another: "When I think about the great music that's coming out of this town, I'm so proud of Nashville."

After the CLE, as we were pulling stiff coats over our lawyer uniforms and preparing to get a good night's sleep so we could be up for motion day or that important negotiation, we all noted to each other things like, "Wow, I'm reminded why Nashville's so great." "I used to go hear live entertainment all the time, but now I never have time to listen to my clients' music. I need to do that more often."

Some of you may have no clue what I'm talking about, choosing entertainment law perhaps because you're a savvy negotiator or because the theories of intellectual property entice you. (I must admit, I'm kind of an IP nerd myself, getting my kicks reading *Nimmer*.) But I'll bet many of you, like me, chose entertainment law not only because you can do all those lawyerly things, but also because you admire the art, or, like me, create it yourself, sometimes, or once long ago, or still.

So the next time you're drafting a royalty clause or attempting to determine whether your client's song is substantially similar to that of the copyright plaintiff, allow yourself to enjoy, for one intellectually free moment, what you're fighting for, why you chose to spend your days doing this. Some would say money. I like to think it's the art, at least a little bit, too.

As for me, the little girl with the big dreams of becoming a country superstar still emerges every once in a while — usually when *Coal Miner's Daughter* comes on cable and she sings along with the soundtrack-montage as the credits roll. **ESL**

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"[S]ometimes, when I'm sitting across the table from one of my entertainment clients ... I want to say, "Me, too! I'm an artist, too, you know! Only I never say this."

Can The NFL Really Banish Pacman Jones?

A LOOK AT WHAT MIGHT BECOME THE BIGGEST SPORTS LAW CASE OF 2009

By Marc Edelman

On April 10, 2007, NFL Commissioner Roger Goodell unveiled a new, league-wide personal conduct policy (“Personal Conduct Policy”), which vests in the league commissioner the power to indefinitely suspend any player who engages in “violent or criminal behavior.”¹ The NFL Personal Conduct Policy is not written directly into the league’s collective bargaining agreement. It was, however, endorsed by certain NFL players.

One of the first NFL players disciplined under the new Personal Conduct Policy was former Tennessee Titans cornerback Adam “Pacman” Jones, whom Goodell suspended for the entire 2007 season.² Goodell reinstated Jones before the 2008 season, thus allowing him to join the Dallas Cowboys. Shortly thereafter, however, on October 8, 2008, Jones was involved in a drunken altercation with his bodyguard. At that time, Goodell warned Jones that his next infraction might lead to lifetime banishment.³

At the time of this writing Jones had not since been involved in any similar incidents. If Goodell ultimately seeks to banish Jones, however, the former Tennessee Titan’s next move might be to file an antitrust suit, alleging that his banishment would violate antitrust laws.

ANTITRUST ARGUMENT AGAINST THE NFL PERSONAL CONDUCT POLICY

Section 1 of the Sherman Act states, in pertinent part, that “[e]very contract, combination ... or conspiracy, in the restraint of trade or commerce ... is declared to be illegal.”⁴ Practically speaking, however, Section 1 of the Sherman Act does not disallow every agreement. It only disallows those agreements that a court deems economically unreasonable.

Most agreements to restrain player eligibility would violate Section 1 of the Sherman Act. For example, in the case *Denver Rockets v. All-Pro Management*,⁵ the District Court for the Central District of California overturned an NBA rule that had required all prospective men’s professional basketball players to wait at least four years after completing high school before entering the league. According to that court:

The harm resulting from [boycotting a player from a professional sports league] is threefold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.⁶

Thereafter in *Linseman v. World Hockey Association*,⁷ the District Court for the District of

Connecticut found the group boycott of hockey players that were under a certain age to similarly violate Section 1. Likewise, in *Boris v. United States Football League*,⁸ a California district court struck down an education requirement in the United States Football League.

Indeed, commissioner suspensions are facially different from age/education requirements because of their intended punitive effect. From an antitrust perspective, however, these differences are largely irrelevant. Antitrust law is about preventing anti-competitive effects — not enforcing social policy.⁹

THE NFL’S LIKELY DEFENSES

If challenged, the 32 NFL clubs would likely seek to defend their Personal Conduct Policy on three grounds. First, the NFL may attempt to argue that the league is not a collection of separate teams but rather a single entity. A single entity, as a matter of law, cannot conspire with itself.¹⁰ Although this argument is factually weak,¹¹ the recent Seventh Circuit opinion *American Needle v. Nat’l Football League*¹² held the NFL to be a single entity for the purposes of trademark licensing, explaining that the question of whether any professional sports league is truly a single entity should be addressed “one league at a time[;] one facet of a league at a time.”¹³

Second, the NFL clubs might attempt to rely on the case *Molinas v. Nat’l Basketball Ass’n*¹⁴ to support the argument that a lifetime ban under the NFL Personal Conduct Policy is economically reasonable. In that case, the U.S. District Court for the Southern District of New York upheld the lifetime ban of a National Basketball Association player who had gambled on his team’s games. The decision of the court set forth that “a disciplinary rule against gambling seems about as reasonable a rule as could be imagined [because] the confidence of the public in basketball has been shattered due to a series of gambling instances.”¹⁵

Finally, the NFL clubs might argue that the NFL Personal Conduct Policy is exempt from antitrust law based on the non-statutory labor exemption. The Second Circuit in *Clarett v. Nat’l Football League*¹⁶ held that the non-statutory labor exemption applies wherever it is needed to “ensure the successful operation of the collective bargaining process.”¹⁷ Other circuits, however including the Third, Sixth, Eighth and D.C. Circuits, have interpreted the non-statutory labor exemption more narrowly.¹⁸ In these circuits, the non-statutory labor exemption would not likely apply to conduct not written directly into a collective bargaining agreement.

WOULD PACMAN JONES HAVE A CLAIM?

Ultimately, whether Pacman Jones could win rein-

statement into the NFL on antitrust grounds would depend on where he brought suit. If Jones were to bring suit in the Second or Seventh Circuit, his chances would be slim. If he brought suit in either the Third, Sixth, Eighth, or D.C. Circuits, however, such a challenge would have a much stronger chance. **E&S**

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NOTES

1. NFL Personal Conduct Policy.
2. See Judy Battista, "NFL Assesses Lengthy Ban for Misconduct," *N.Y. Times*, Apr. 11, 2007, at D; Judy Battista, "Two Players Meet with Commissioner," *N.Y. Times*, Apr. 4, 2007, at D.
3. Reggie Hayes, "Cheap Shots Column: Pacman on Double Secret Probation," *News Sentinel* (Ft. Wayne, Ind.), Nov. 25, 2008, available at 2008 WLNR 22526688.
4. 26 Stat. 209 (1890), codified as amended, 15 U.S.C. §§

- 1-7 (2000).
5. 325 F. Supp. 1049 (C.D. Cal. 1971).
6. *Denver Rockets*, 325 F. Supp. at 1061.
7. 439 F. Supp. 1315 (D. Conn. 1977).
8. 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461 (C.D. Cal. Feb. 28, 1984).
9. See *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 689 (1978).
10. See *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).
11. See Marc Edelman, "Why the 'Single Entity' Defense can Never Apply to NFL Clubs: A Primer on Property Rights Theory in Professional Sports," 18 *Fordham Intell. Prop. Media & Ent. L.J.* 891, 893 n. 11 (2008); see also Marc Edelman, "Single Entity Ruling: 'Needle' in Haystack," *N.Y.L.J.* 4, 12 (Jan. 2, 2008).
12. 538 F.3d 736 (7th Cir. 2008).
13. *American Needle*, 538 F.3d at 742.
14. 190 F.Supp. 241 (S.D.N.Y. 1961).
15. *Molinas*, 190 F.Supp. at 243-44.
16. *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004).
17. *Clarett v. Nat'l Football League*, 369 F.3d 124, 142 (2d Cir. 2004).
18. See *Philadelphia World Hockey Club Inc. v. Philadelphia Hockey Club Inc.*, 351 F. Supp. 462 (S.D. Pa. 1972); *McCourt v. California Sports Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976); *Zimmerman v. Nat'l Football League*, (D.D.C. 1986).

Member Update

By Tim Stehli

There were all sorts of exotic and frightening creatures to be encountered at the Tennessee Volunteer Lawyers for the Arts Halloween party and fundraiser at Limelight, including Catwoman, a caveman and above all, lawyers, lawyers and more lawyers! While the ghouls mingled and networked with the goblins, TBA Entertainment and Sports Law Section member **Bob Sullivan** and his band Tokyo Sauna rocked the house with everyone's favorite classic rock songs. Word on the street has it that their stellar performance landed them the coveted opening slot on the as-yet-unannounced Led Zeppelin reunion tour.

Boult Cummings Conners & Berry has announced a merger with Birmingham's **Bradley Arant Rose & White**. The combined firm will be called Bradley Arant Boult Cummings and will have more than 350 attorneys in multiple states throughout the Southeast. There is no word yet on what effect, if any, the merger will have on Boult Cummings' sizable Nashville entertainment law section.

It was a night (well, late afternoon) of stargazing at the recent number-one party for "You Look Good In My Shirt" at BMI. Both Keith Urban and Nicole

Kidman were in attendance, but what truly sent the paparazzi into an all-out feeding frenzy was the appearance of Sony/ATV's **Duff Berschback**. Is Nashville ready for this level of star power?

Big things are happening at the **Gordon Law Group**. The Music Row firm has recently added several new associates, including **Noah McPike**, **Michael McNulty** and **Grady Turner**. The firm hosted an open house last month to show off both their new associates and their new office at 803 18th Avenue South.

Carole King once asked the musical question, "Doesn't anybody stay in one place anymore?" It was likely rhetorical, but **David Maddox** and **John Rolfe** would no doubt answer with a resounding "No!" David's new office is at 5543 Edmondson Pike, Suite 161, in Brentwood, while John has gentrified the neighborhood of 210 25th Avenue North, Suite 1200. Best wishes to both of you in your new locations, and next time, remember, if you throw in some pizza and a six-pack, I'll be glad to help you move some boxes! **E&S**

Email Tim with your entertainment and sports news and member updates at tstehli@bellsouth.net.

The Sports Agent

By Kendra Tidwell

The NFL agent (officially referred to as a “contract advisor” in the NFL) acts as a confidant, advisor and career manager to the elite athlete.

Mark Slough, a former banker, now lives the stuff of movies as an NFL contract advisor to some of the game’s newly emerging shining stars. He started off providing financial services to entertainers but had his sights set on transitioning into a career in sports. Slough attended Baylor University, where he obtained a dual degree, an MBA/JD and soon landed a job as a transactional/real estate associate with mega firm Fulbright & Jaworski. One day, in true “Jerry Maguire”-esque form, Slough walked into a partners’ meeting and informed all those in attendance that he was leaving to pursue his dreams.

Now, almost 10 years later, Slough is a “contract advisor” — the official title for an agent licensed by the NFL’s Players Association. As contract advisor, Slough is charged with responsibilities to his clients that seem more like those of a “career manager” than a contract advisor. He deals with issues ranging from marketing and endorsements, contract negotiations and disputes, injuries, fines and hearings, to securing other specialized professionals, such as business managers and financial planners, to assist his players in areas outside the scope of his representation. While Slough is a licensed attorney, he has not engaged in the practice of law since he began representing players and does not hold himself out to players or to others as their lawyer.

Slough had to be creative at the outset, as we all must, in developing clients, so he went back to the

basics. His first players were students at his alma mater, who eventually made teams’ practice squads. After that, Slough was effectively “in the business.” Then, as good fortune would have it, his client Sammy Morris was drafted to the Buffalo Bills. That began a string of successes, with Slough’s roster including Jay Ratliff, rising star for the Dallas Cowboys’ defense, who is now one of the most prominent names in the NFL.

According to Slough, the NFL should be credited for the lengths to which it has gone to ensure players receive quality representation. To qualify as a licensed NFLPA Contract Advisor, a master’s degree is required. A legal background is clearly an asset, though not required, whenever contract negotiation is necessary. For his part, Slough is entitled to 3 percent of his players’ signing bonuses and contracts, which is a cap imposed by the NFLPA. And contrary to popular belief, his percentage is not an up-front payment to the agent but is paid as earned or over the life of the players’ contracts.

The life of an NFL contract advisor is, according to Slough, “85 percent trying to get the next client.” The relationship between advisor and player is hugely important, and Slough tells me the movie *Jerry Maguire* hit the nail on the head. Recognizing talent, sticking with the player through all of his ups and downs, and managing the complex career of an NFL star has its risks and challenges, but, Mark Slough will acknowledge, the rewards are worth it. **ES**

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MEMPHIS 2009

Plan Now to Attend the 128th Annual Tennessee Bar Association Convention

If you’re mapping out the CLE programs you want to attend this coming year, put a big red circle around June 18 – 20, 2009. A series of top programs are already scheduled for those dates at the TBA Annual Convention in Memphis.

Former Senator Howard Baker and former Congressman Harold Ford Jr. will lead one program, presenting a bipartisan panel discussion entitled “What Our Country Must Do Now.” Also on tap is ABA Spirit of Excellence Award winner Cesar L. Alvarez, CEO of Greenberg Traurig in Miami, who will speak on diversity in our profession.

Compelling programming continues when the ethics prosecutors from the Duke University Lacrosse case present their moving “Anatomy of a

Hoax” presentation. Along with that, four former Tennessee Supreme Court Justices will discuss historical mileposts from their time on the court, and federal judges from the Western District will be on hand to present a panel discussion on jury selection.

The convention promises to be a great place to go for continuing legal education. Mix that in with great entertainment from the Jimmy Church Band and the Bouffants, a trip to Graceland that will include music from the high-octane rockabilly band the Dempseys, and you have an event you don’t want to miss. Make plans today to be at the Peabody Hotel in Memphis, June 18 – 20, 2009. **ES**

For more information visit <http://www.tba.org/convention2009/>

SPOTLIGHT ON ...

Nashville Sports Authority

By Kenneth J. Sanney

Several months ago, while I was channel-surfing and waiting for the kickoff of Monday Night Football, I ran across an interesting prologue to the game. It wasn't on ESPN or Fox Sports. It wasn't a pregame show. It was on public access channel 3. At first glance it appeared to be just another Metro-Nashville public hearing. But then I recognized the former president of the San Francisco 49ers, and it appeared that he was addressing the Nashville Sports Authority. No, it was not Carmen Policy; it was our very own Larry Thrailkill of the law firm Thrailkill, Harris, Wood & Boswell PLC.

Larry, who currently serves as the Nashville Sports Authority's special counsel, was discussing landlord/tenant and municipal tax law with the Authority's Board of Directors. Those of you who do not practice sports law might be wondering, what exactly do landlord/tenant law and municipal taxes have to do with sports?

To answer that question, you have to first understand how professional sports franchises make money. Besides television revenue and the sale of merchandise, the other major stream of revenue for professional sports franchises is generated by lucrative stadium or arena leases that provide teams with income from ticket sales, personal seat licenses (PSLs), luxury boxes, advertising signage, corporate sponsorships, facility naming rights and concessions. While the vast majority of facilities are owned by their host city and simply leased to the team for home games, many cities are willing to grant a professional team large shares of such revenue to either lure them away from their current host city or lock them into a long-term lease to keep them from leaving for greener turf.

In 1997, Nashville lured the NFL's Oilers/Titans from Houston, and in 2001, Memphis lured the NBA's Grizzlies from Vancouver, Canada. Both campaigns were pursued through leveraging public financing (municipal tax) to build new sports facilities. These facilities were then rented to their respective potential professional sports teams under very profitable terms. Conversely, to keep the Nashville Predators from defecting to Ontario, Canada, Nashville used the stadium lease it had with the Predators as both the proverbial carrot and contractual stick with both the franchise and the NHL.

I recently sat down with Larry Thrailkill and asked him to explain the role the Nashville Sports Authority and the Memphis and Shelby County Sports Authority play in Tennessee's professional sports. Larry, as always, was generous with both his time and his knowledge.

According to Larry, the Sports Authorities have

three basic functions: (1) to issue and administer bonds and other financing vehicles to build sports facilities, (2) to serve as the landlord of their municipality's designated sports facilities once constructed, and (3) to assess and collect taxes for the upkeep and capital improvements of such facilities.

As we talked, I learned that Sports Authorities were authorized by the *Tennessee Code* — specifically the *Sports Authority Act of 1993*, which can be found at *Tenn. Code Ann. § 7-67-101 to 122*. Statutory authorization was necessary to allow the sports authorities to generate the public funding necessary for the construction, upkeep and improvement of the venues.

Section 102 of the act states that in 1993 there was "an immediate need to promote and further develop recreational opportunities in this state ..." The act further provides for the establishment of sports authorities to develop and finance sports venues and facilities for public participation and enjoyment of professional and amateur sports, fitness, health and recreational activities.

Pursuant to the act, Nashville and Memphis and Shelby County have established sports authorities. The Nashville Sports Authority is comprised of a 13-member board of all volunteers. Each member is selected and appointed to a six-year term by Nashville's mayor. None of the members is paid or otherwise compensated for their service on the board.

The Memphis and Shelby County Sports Authority is comprised of 11 members. Five members represent the city of Memphis, five represent Shelby County, and one joint member represents both governments. Like the Nashville Sports Authority, each member serves a six-year term.

The General Assembly reasoned that authorizing local sports authorities who could efficiently and effectively develop such facilities and attract major professional sports franchises to Tennessee would enhance Tennessee's image as a sports center and encourage and foster economic development. The issues the Sports Authorities discuss become issues that are presented to our legislature and ultimately affect us as citizens, from taxes and special events to building rents and downtown parking. Through the hard work of the men and women serving our state through the Nashville and Memphis and Shelby County Sports Authorities, the legislature's objectives of economic development and enhancing Tennessee's image in professional sports may be realized. **E&S**

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Mentoring: A Practical Tool for the Legal Profession

By Jefferson Wallace

In furtherance of providing an instrument for growth for attorneys in the entertainment and sports field, the Entertainment and Sports Law Section of the Tennessee Bar Association recently announced the institution of a new mentoring program. This program was devised to provide support to attorneys seeking to enter into, or further develop their practice within, the entertainment and sports industries by pairing them with seasoned industry attorneys. Jefferson Wallace, entertainment lawyer and 2008-2009 chair of the Mentoring/Networking Committee, provides a few words about mentoring.

There are some in our field who believe that the combination of self-reliance and on-the-job-training is the single tool that a young lawyer must use to create a true understanding of the legal profession. Though I would be remiss to acknowledge the value in this tool, I question the end result in a larger sense. This process may allow individuals to find their legal bearing, but what influence does this process have on our profession as a whole? It would seem that in order for the legal profession en masse to grow, there must be a medium in which lawyers can compare and contrast general knowledge and practical experiences. Fortunately, an ever growing number of bar associations are addressing this issue by developing mentoring programs.

Most first-year lawyers have had the wonderful experience of being placed in a room with piles of work with the door locked, figuratively speaking, until the work has been completed. Some of the lucky few will have a supervising attorney check on them from time to time to make sure the young attorney still has a pulse. During that time the supervising attorney will redline and edit the young lawyer's work to a point that it becomes a sadistic crossword puzzle. The dutiful lawyer then spends hours, days, weeks, whatever time is necessary, to put humpty-dumpty back together again. Then, when the light appears at the end of the tunnel, and that door cracks open again, well, rinse and repeat. All the while, the response the supervising attorney gives to any questions the young lawyer poses is often a direction to go find the answer in a legal reference tool. At the end of this process, the young lawyer is told, without explanation, that the original draft was not necessarily wrong or poorly drafted; rather, it was simply not the way the supervisor would have written it.

Though it sounds coarse, there is individual value in this process for the young attorney. But what developmental value was gained by the supervisor from this process, or any other attorney for that matter? It would seem that this process would lead our profession to become a myriad of stalwart ships, each built upon a unique plan, which simply pass in the night. I am not suggesting that we create a unified navy, as doing so would likely damage our ability to be dedicated advocates to our clients and likely create conflicts with our professional rules. What I am suggesting is that we consider the value in sharing our unique ship-building plans and basic navigational charts.

It would seem the greatest value in history is equated to identifying and developing the best of all available ideas and processes. The end result of being locked in a room to figure it all out on our own would be in contrast to historic value, and thus suppress the sum total growth of our profession. If we were to shift our focus slightly from the goal of individual development to a shared professional growth, it would seem that we would all become better advocates for our clients. Now enters the often forgotten but highly effective tool: mentoring.

Generally speaking, a mentor is someone who serves as a counselor or guide and demonstrates by example the values and ethics of the profession they represent. As the late congressman John C. Crosby once stated: "Mentoring is a brain to pick, an ear to listen and a push in the right direction." Being asked to serve as a mentor should be taken as an honor. It indicates that the protégé has faith in the mentor's abilities and trusts him or her to have a positive impact on their life. As a reward for this veneration, the mentor should endeavor to provide his or her best during all stages of the relationship.

During onset of the relationship, a mentor often helps to alleviate some of the frustration a new attorney feels when getting his or her feet wet. Though a supervising attorney may claim to be available to discuss personal development and shortcomings, it's much more practical and productive to open up to a mentor. By sharing insight of both the general practice of law and the unwritten rules of the professional environment, young attorneys in the field can be spared a great deal of stress and receive help to address feelings of ineptitude and isolation.

In order for the mentor to provide the best for the protégé, the protégé must be respectful of the mentor's time and privacy. The protégé must always remember that the mentors are volunteers, and whether informal or formal, both parties need to understand the parameters of the relationship. Accordingly, here are a few helpful guidelines to remember when developing a mentoring relationship:

- **Time:** The mentor must expect to give the protégé adequate time. In turn, the protégé should not expect excessive amounts of time from the mentor. Setting a schedule at the beginning avoids irritating misunderstandings later.
- **Openness and Respect:** Be open and honest, yet respectful of each other. Comments should be

delivered with tact and courtesy, and, even if somewhat hurtful, received with an open mind.

- **Professionalism:** This is a professional relationship, not a personal one. This is critical for the young attorney who may be more susceptible to influence. A mentor should never volunteer for the goal of personal gain or to create blind alliances.
- **Individual Growth:** There is great value in solving sadistic crosswords on your own. The mentor is there to guide you, not provide all of the answers.
- **Confidentiality:** Discussions should remain confidential; however, both attorneys should always be mindful to avoid contravention of the Tennessee Rules of Professional Conduct.
- **Boundaries:** Certain areas may be considered off-limits by either person, and both the mentor and the protégé should outline those areas from the offset.
- **Communication Medium:** Decide in advance how you will communicate. Determine whether communication will be face-to-face, over the telephone, via e-mail, etc.

As time goes on, professional mentoring often becomes a two-way street and offers benefits to both parties and the profession as a whole. As the protégé develops his or her own sphere of influence, likewise

does the mentor. As the mentoring process cultivates, the developmental focus shifts from individual achievement to professional growth as a whole. To continue this trend would seemingly diminish the time and effort that so many attorneys spend trying to prove their individual importance and instead shift the focus to providing the highest level of service. After all, we are a service industry, and we must remember our oath: "... truly and honestly demean myself in the practice of my profession to the best of my skill and abilities" It is my humble opinion that mentoring is an effective tool to fulfill that oath.

Those interested in being a mentor or a protégé/mentee should fill out the appropriate form found at <http://www.tba.org/sections/EntertainmentLaw/index.html>. Each form provides more information about the program, and you can email Sarah Hayman at shayman@tnbar.org for more information. Members of the Entertainment and Sports Law Section are encouraged to become part of this program regardless of their level of experience. The program is straightforward in that you simply need to reach out to those you admire and respect, cultivate a good relationship with your mentor or protégé, and pay it forward. **E&S**

JEFFERSON WALLACE is the principal at the Law Office of Jefferson A. Wallace PLLC in Nashville. His areas of practice include contract drafting and negotiation, intellectual property and small business formation.

Legislation Update

By Heather Hubbard

Capitol Hill hasn't focused much on sports lately. As you may recall, in early 2008, the issue of steroids and testing in baseball became the focus of congressional hearings yet again. The MLB agreed to heighten some of its standards and the matter seemed to die down. Don't expect the matter to be raised again in the near future or at least garner support from the White House. During his campaign, President-Elect Barack Obama criticized Congress for spending so much time on an issue he thought would be better handled by the MLB, especially in light of the financial meltdown and other foreign-policy matters. He did indicate, however, that his attorney general would be asked to investigate instituting a college football playoff system through executive order. To be continued ...

In other football news, 13 senators recently wrote NFL Commissioner Roger Goodell to encourage over-the-air broadcasts of NFL games instead of an exclusive pay television model. Congress created an antitrust exemption for the NFL to negotiate agreements with over-the-air broadcasters. These senators,

however, allude to possible legislation that would change such exemption if the NFL continues to offer certain games only on the NFL Network. The NFL guarantees free over-the-air television only to those cities with team franchises, "leaving behind" many cities and fans who are near that same market. The senators further suggest that the NFL may face potential anti-trust lawsuits for trying to force fans to pay for NFL Network access. Of course, the NFL Network is not carried by Time Warner, Cablevision and Charter and while Comcast carries it, a higher-rate sports package is required. Accordingly, fans in many markets cannot watch their favorite teams play even with a cable subscription. It is unclear whether there is enough support in Congress to actively take up this issue in the coming year. **E&S**

HEATHER HUBBARD is an associate at Waller Lansden Dortch & Davis PLLC in Nashville. She practices in the area of trial and appellate litigation and intellectual property law.

Steve Underwood *(continued from page 1)*

On having non-legal responsibilities as head of the Titans Club ...

In addition to being a lawyer I wear other hats around here. I participate in the administration of our business and in keeping our owner informed. Just because you are a lawyer doesn't mean that you can't do other things. I think the legal training is important and the experience that you have as a lawyer is invaluable, but you still can do other things than just practice law. Thankfully!

On part of his official job title being "Executive Assistant to Mr. Adams" ...

I worked with Mr. Adams on a daily basis when I was still in Houston for not quite 30 years. Among the things that Mr. Adams has always insisted on is being informed. He wants to know what's going on. If there's a development or something of some importance, what the trends are in our business, how we're doing with ticket sales, how we're doing with suite sales, what's our sponsorship like, who do we think we need to hire for this particular role, if it's an administrative job, how are we going to make our salary cap work, coaching decisions. All of those things are something that he's very interested in and has a wealth of experience in.

I think one of the reasons that he was interested in me coming here [from Houston to Nashville when accepting the position as senior VP of the Titans] was to be sure that he got timely, important information about things that were going on with our business.

Even at his age, he is very active, comes to work every day and Mr. Adams and I talk almost every day.

On whether he gets involved in player contract negotiation ...

I work with Mike [Reinfeldt, the general manager] and Vin [Marino, the senior director of football administration] to sort of keep an eye on our salary cap, which is a very important component of our business and how our free agency system works, but again, both of those people have huge expertise in salary cap as well. We'll meet together to discuss what our salary cap is going to look like in the upcoming year and how it's going to be managed, so that we're all on the same page and so that Mr. Adams also understands what our game plan is when we get his comment as well. In fact, Mr. Adams signs off on a control sheet every week of the season so that he certifies to the League that he knows what's going on with our player contracts.

On whether Mr. Adams weighs in on scouting decisions and whether it's any coincidence that the Titans have several recruits from the University of Texas ...

[laughs] He has seen guys from Texas and has made suggestions and recommendations not only to Mike Reinfeldt but to our prior general manager as well. If he sees some unique piece of talent that he's interested in, you bet. He has let them know and has indicated

preferences from time to time of who he'd prefer to see drafted or signed. We have several great players here from the University [of Texas].

On how the role of media has changed the NFL since the late 1970s ...

When I first started doing work for the Club as an outside lawyer, in the late seventies, clubs were not what I consider to be "legal intensive." The businesses were much smaller, franchises had a much smaller value, and we were still basically a ticket business. Media was there and on the horizon and our games were certainly on television and radio, but our business now is driven almost entirely by media. Today, you have to have people buying tickets and coming to the game and participating in the activity [to drive the media]. Would you still be interested in watching a game live on television if there was no one in the stands? Of course not.

On publicity and keeping his organization "on the same page" ...

Our head coach [Jeff Fisher], as far as I'm concerned, and our general manager [Mike Reinfeldt], are two of the best in the business as far as answering questions, and motivating players, and addressing whatever issues come up as far as media. They're both very media savvy and have done a great job on both TV and radio. Jeff is, as far as I'm concerned, one of the foremost head coaches in the league in terms of understanding what message our club is trying to get out, and why. Don MacLachlan [the executive vice president of administration], one of my colleagues here, also does a great job in communicating issues that relate to tickets, our ticketing business, and our game-day experience.

Media is a big part not only of what we do but how our product is distributed nationally or worldwide. We also have a full-time internet department that's working to get our message out 24-7. And while I do not have day-to-day oversight of those areas, we do have a full-time media relations department that has three employees (and usually an intern during the season) that are very skilled and very experienced.

On planning your strategy when a sensitive publicity issue arises ...

I guess we plan in the sense that we have people in place who are knowledgeable about what needs to be said and what message that we need to get across. But we rely on their expertise in terms of what approach to take to whatever the issue happens to be. Since I have been here, we had a player who had a lot of off-field problems, we had a player that had an on-field issue, and we made a change in general managers. In all of those circumstances, our head coach, our general manager, our media relations people, we would all meet together and get on the phone and talk about what issues needed to be addressed, what kind of response

we needed to make, and how it needed to be made.

On the use of bailout money by Citibank to purchase naming rights for the new Mets stadium ...

In the case of our own naming rights partner [Louisiana Pacific], this season since we've had really a great year, there's been a lot of attention focused on our club, and on Nashville, and that has been a huge benefit in terms of exposure of the name Louisiana Pacific and their brands in the home-building business.

With respect to Citibank and the Mets, New York is still the largest media market in the country. The bank is going to have to spend money to promote itself and to advertise just like any other retail or commercial enterprise. So the notion that they would be criticized for devoting some portion of their advertising budget to naming rights seems to me to be misplaced. If they're not going to spend money advertising in that venue, they're going to spend it somewhere else. They're like any other business; they have a[n advertising] budget.

If you had been through what we went through in Houston in the mid 80s watching every major banking organization in the city fail, people would have a different notion why it's important to keep banks afloat.

On reintroducing the municipal ticket tax after a sharp economic downturn [This was a big issue for the Titans back in the spring of 2008] ...

LP Field represents one of Metropolitan Government's greatest public works, and is, I think, the largest single investment that they've made in public works. In working through how to handle the long-term capital expense of the building, to keep it in first-class condition, one of the ideas that was suggested at the table was the notion eventually of a user fee, or a ticket tax. There is already such a tax for Sommet Center, and for all the events that take place there.

We did want to wait until everybody thought that it would be a more appropriate time to try and put a tax on tickets, because our customers are already having to pay for PSLs. The ticket tax was incorporated in the development agreement, and, while we don't like taxes — I don't think anybody likes taxes — everyone understands that the stadium needs to be maintained and needs to be kept in first-class condition.

The position that we have taken as an organization over the last 10 years is to do what is necessary minimally to keep the building in condition comparable to other facilities.

LP Field is the least expensive building of its generation by far, costing \$168 million in construction costs compared to the new stadium that's being built for the Jets and Giants in the Meadowlands, which is, at the moment, \$1.6 billion.

Now, over time, there's going to be some expenses come along that the million-dollar set aside, and us sort of carrying that expense for a number of years isn't

going to work well. That includes, for example, re-seating the stadium is going to cost between a 15 and 20 million dollars. Fortunately, it's several years away, we think. We would like to make sure that there is some plan for having that money on hand when the expense comes due, if you will. And there are other things that down the road will need to be done.

On branding and striking a balance between team spirit and preserving your brand ...

We spend a good bit of effort protecting our trademarks, and our name marks, our service marks., All of those things are critically important, not only in terms of our team branding, but also in terms of apparel sales, and associations with our sponsors and partners.

The league is also very active in helping those marks and to protect our business from those who unfairly would try to capitalize on the association. Our own trademarks and trade names, not only the Titan brands but also the Oiler brands, all appear on the primary register of the [United States Patent and Trademark Office].

On enforcing your trademarks and service marks ... personally! ...

We do have issues come up from time to time, particularly at the game. Recently I was in our parking lots with others, and shooing away people who were selling unlicensed, unbranded merchandise that has our trademarks.

Yes [laughs], I try to be in our parking lots and our tailgate areas all around the stadium every game, I spend time at one of our gates every game. If you don't know how your business works and what's going on at your facilities, you're at a disadvantage as a manager. So I try and spend time with every phase of our operation however unimportant it may seem to others.

But in any event, with respect to our trademarks, we do spend a lot of time in trying to protect our marks, making sure that we have everything done that we can do in protecting from infringement. You know, the internet is so large and so expansive it's hard to keep track of everybody who is trying to trade on your name.

We also have to work against local infringers here who, for instance, try to use our tickets as premiums and giveaways that they publicize. Well, that ticket is an admissions license that has our trademarks on it, and they're violating applicable trademark law by using that ticket in the promotion and violating the terms of the ticket license itself by offering it without our permission as part of a promotion. And so we, rather aggressively, try to get cease-and-desist letters out to those businesses so that they understand that if they want to do a promotion involving our exhibition, then they need to do it with us and with our blessing. And, as you know, if you don't protect your marks and don't try to stop infringers, you weaken your trademark position.

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Litigation Update

By Cassie Madden

“Football is an incredible game. Sometimes it’s so incredible, it’s unbelievable.” — Tom Landry

Feldman v. Pro Football Inc., 2008 U.S. Dist. LEXIS 85149 (D. Md. Sept. 30, 2008)

Plaintiffs sued the owners and operators of the Washington Redskins and FedEx Field alleging ADA violations for failure to provide hearing-impaired fans equal access to aural information. The court denied defendants’ motion for summary judgment, finding that Title III of the ADA requires Defendants to provide deaf and hard-of-hearing fans equal access to broadcasts over the stadium’s public-address system including music with lyrics, play information, advertisements, referee calls, safety/emergency information and other announcements.

Auburn Univ. v. Mike Moody & Sixfingeryear, 2008 U.S. Dist. LEXIS 89578 (M.D. Ala. Nov. 4, 2008)

To commemorate Auburn’s six-game winning streak against Alabama, Moody created and sold a six-finger foam hand bearing Auburn’s trademarks and service marks. In an amusing opinion from a judge clearly familiar with football parlance, the court found that Auburn has a substantial likelihood of success on the merits and granted a preliminary injunction prohibiting Moody from selling the foam hands.

Bouchat v. Baltimore Ravens L.P., 2008 U.S. Dist. LEXIS 95114 (D. Md. Nov. 21, 2008)

Plaintiff sought an injunction prohibiting the Ravens from displaying pictures and memorabilia of the 1996-98 seasons in which Plaintiff’s copyrighted Flying B logo is visible. The court denied the injunction, holding that the Ravens’ use of the Flying B logo constitutes fair use because the nature and purpose of the use is historical, the logo is an inconsequential portion of the overall work and there is no present or foreseeable market for the logo.

“You don’t play against opponents. You play against the game of basketball.” — Bobby Knight

Welsh v. The Big Ten Conference Inc., 2008 U.S. Dist. LEXIS 95553 (D. Ill. Nov. 21, 2008)

Welsh sued The Big Ten under the Lanham Act for trademark violation for The Big Ten’s use of the “Big Ten Network,” which Welsh alleges he pitched to The Big Ten over a decade ago in his business plan for a television station providing in-depth coverage of sports and the culture of The Big Ten. The court dismissed Welsh’s claims, holding that trademark rights are established through use, and a mark is not considered “used” when it is presented as part of a business plan, only when employed in commerce.

“Ice hockey is a form of disorderly conduct in which the score is kept.” — Doug Larson

Madison Square Garden L.P. v. NHL, 2008 U.S. Dist. LEXIS 80475 (S.D.N.Y. Oct. 10, 2008)

NHL’s motion to dismiss Madison Square Garden’s antitrust claims was granted in part and denied in part based on the court’s interpretation of a release in a consent agreement signed by both parties in 2005. Because the release was not prospective, it did not bar Madison Square Garden’s claims against NHL’s New Media Policy, which banned teams from operating websites independent of NHL’s server. The release did bar all claims against NHL’s restrictions on merchandising, broadcasting and advertising.

“Wrestling is ballet with violence.” — Jesse Ventura

World Wrestling Entm’t Inc. v. AWA Wrestling Entm’t Inc., 2008 U.S. Dist. LEXIS 85823 (D. Minn. Oct. 21, 2008)

Because Defendants continued to use and authorize others to use the “AWA” mark after Plaintiffs acquired ownership of the mark, the court granted Plaintiff’s

Steve Underwood (continued from page 11)

On whether the folks in the office have ever parachuted to work like Jeff Fisher did? ...

Jeff is very good at motivating our players. And he has a great supporting cast of assistant coaches and coordinators. So if we happen to be fortunate enough to make it to the Super Bowl, you can be sure they’ll be working overtime to be sure we win.

As to whether any of Coach Fisher’s stunts will be duplicated by the Titans’ General Counsel, we shall keep an eye on the skies over the Titans’ MetroCenter facility. **E&S**

Stay tuned for Part II of the E&S Newsletter’s interview with Steve Underwood of the Titans in which he will discuss careers in sports law, sports agent negotiations and the NFL’s collective bargaining agreement with the NFL Players Association.

STACEY SCHLITZ is an associate at Drescher & Sharp PC in Nashville. She represents clients in the music and film industries in a variety of matters including contract negotiation, business formation, intellectual property and litigation.

Litigation Update (continued from page 12)

motion for summary judgment on its claims for trademark infringement, unfair competition, cybersquatting and deceptive trade practices.

"If there is any larceny in a man, golf will bring it out." — Paul Gallico

Callaway Golf Co. v. Acushnet Co., 2008 U.S. Dist. LEXIS 91243 (D. Del. 2008)

In this case for patent infringement of Plaintiff's golf ball technology, the court denied Defendant's request for judgment as a matter of law because substantial evidence supports the jury's verdict of nonobviousness. Defendants were also denied a new trial as the court found inconsistent jury verdicts to be "a fact of life in law" and a lack of harm to Defendant or any evidence of manifest injustice. Plaintiff was granted a permanent injunction prohibiting the production and sale of Defendant's ProV1® golf balls, but professional golfers are permitted to play the ProV1® balls until the end of 2008.

"One of the advantages bowling has over golf is that you seldom lose a bowling ball." — Don Carter

Bowling Proprietors' Ass'n of Am. v. Greater Mich. Bowling Proprietors' Ass'n, 2008 U.S. Dist. LEXIS 90972 (E.D. Mich. 2008)

Defendant moved for summary judgment on Plaintiff's claims that Defendant's use of the terms "Bowling Proprietors' Association" and "Bowl-Expo" constitutes unauthorized use of the marks "Bowling Proprietors' Association of America" and "International Bowl Expo," which Plaintiff owns, and constitutes trademark infringement, unfair competition, false advertising, trademark dilution and similar state-law claims. Though the court found compelling Defendant's argument that the terms are generic or descriptive phrases, the court ultimately denied summary judgment on the basis that Plaintiff may be able to establish that the phrases have acquired second meaning. **EBG**

CASSIE MADDEN is an associate at Riley Warnock & Jacobson PLC in Nashville. She focuses her practice on commercial litigation.

CLE Calendar

FEBRUARY 4

New Digital Media: Recent Law & Emerging Trends 1 general hour. Provider: ALI/ABA. (Online) Contact Jan McCarver 215-243-1600

FEBRUARY 5

Effective Contract Negotiations: The Fusion of Law, Relationships and Project Expectations 1.5 general hours. Provider: Lorman. (Teleconference) Contact Kari Campbell 715-833-3940 or 715-883-3944

FEBRUARY 9

Handling Intellectual Property Issues in Business Transactions 2009 10 general, 2 dual hours. Provider: PLI. (Online) Contact Stephen Schlicht 800-260-4754

FEBRUARY 11

E Marketing: IP Issues for Business Lawyers 1 general hour. Provider: ALI/ABA. (Online) Contact Jan McCarver 215-243-1600

FEBRUARY 19

Navigating Trademark Practice Before the PTO 2009: From Filing through the TTAB Hearing 10.5 general, 1 dual hours. Provider: TNVLA. (Online) Contact Stephen Schlicht 800-260-4754

FEBRUARY 26

Recent Developments on Intellectual Property Law 3 general, 1 dual hours. Provider: NBA. (Nashville) Contact Edward Lanquist 615-242-2400

MARCH 2

Advanced Employment Law: Working Through Common Problems 6 general hours. Provider: NBI. (Knoxville) Contact Laura Shay 715-835-8525

MARCH 23

Digital Summit CLE TBD. Provider: Leadership Music. (Nashville) Contact Kira Florita 615-770-7090

APRIL 1 – 4

24th Annual ABA Intellectual Property Law Conference CLE varies by state. Provider: ABA Intellectual Property Law Section. (Arlington, VA) Contact Kim Jessum 312-988-6268

MAY 7

Navigating Collective Bargaining Agreement Negotiations 5 general, 1 dual hours. Provider: NBI. (Knoxville) Contact Laura Shay 715-835-8525

MAY 19

Chicago White Sox: Winning the Battle but Losing the War 1.5 general hours. Provider: Harry Phillips American Inn of Court. (Nashville) Contact Judge William C. Koch Jr. 615-741-5150

JULY 28

5th Annual Southeastern Intellectual Property Job Fair CLE TBD. Provider: Georgia State University Law School. (Atlanta) Contact Crystal Amos 404-413-9078



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