

Passages Friendly

Supporting Equal Access to Law in Florida

Summer
2017

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida





Summer 2017

Table of Contents

Published since September 2011 for the purpose of promoting intelligent education of the Bar and general public about law as a basis for growth of justice and the common welfare, while combating the indifference which might hinder such growth.

On Behalf of the Publisher

By James T. Walker Page 3

An Introduction to Workers' Compensation Law

By The Hon. Keef F. Owens Page 5

U.S. Law Schools Facing New Challenges, Part 2 of 2

By Leonard Pertnoy Page 8

Jerry Giesler, Hollywood's Favorite Attorney

By Richard Wires Page 10

Supreme Court Betting on New Jersey?

By Mark Miller Page 11

Hit 'em Again Harder: Star Athletic, L.L.C. v. Varsity Brands, Inc. et. al.

By Adrienne Naumann Page 13



President of the Friends and General Manager
James T. Walker 772-461-2310
Editor: Nora J. Everlove 727-644-7407
Graphic Design: Paul Nucci
Assistant Editor: Katie Everlove-Stone
Assistant Editor: Kim A. Cunzo

By email, you can reach the editor at:
nora@rjsslwlibrary.org
We wish to thank our authors and other contributors for making this issue a success!

On The Cover

"Sunrise from the River"
Photograph by Jim Wilder

Officers of the Friends of the Rupert J. Smith Law Library of St. Lucie County

James T. Walker, President
Andrew Blum, Vice President
Rene Arteaga, Treasurer
Nora Everlove, Secretary
Kim Cunzo, Chair, Art Contest



On Behalf of the Publisher

*By James T. Walker President,
Friends of the Rupert J. Smith
Law Library*

Pub. Law 87-20

April 7, 1960

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the first day of May of each year is hereby designated as Law Day, U.S.A. It is set aside as a special day of celebration by the American people in appreciation of their liberties and the reaffirmation of their loyalty to the United States of America; of their rededication to the ideals of equality and justice under law in their relations with each other as well as with other nations; and for the cultivation of that respect for law that is so vital to the democratic way of life The President of the United States is authorized and requested to issue a proclamation calling upon all public officials to display the flag of the United States on all government buildings on such day and inviting the people of the United States to observe such day with suitable ceremonies and other appropriate ways, through public bodies and private organizations as well as in schools and other suitable places.

Approved April 7, 1961

On February 5, 1958, President Dwight Eisenhower declared that henceforth May 1 would be known as Law Day. Three years later Congress followed by adoption of an implementing resolution, Pub. Law 87-20 (April 7, 1961) (above). Such resolution was later enacted into law, pub. Law. 105-225 (Aug. 12, 1998), codified at 36 USC sec. 113.

Law Day, as set out in the resolution, celebrates our country's commitment to "equality and justice under law", an ideal that county law libraries serve by assuring that all members of the community enjoy equal access to the law and thus secure equal justice to themselves through knowledge of their rights, remedies and obligations. It is a task that our Rupert J. Smith Law Library of St. Lucie County so proudly undertakes on the Treasure Coast.

With this in mind, the Friends of the Rupert J. Smith Law Library (FRJSLL) annually in cooperation with the law library Trustees, the St. Lucie County School Board and the St. Lucie County Bar Association, and our sponsors, hosts the Law Day Reception and Art Contest. The purpose is two-fold: first, to educate local residents on the importance of law to our way of life and to show them how the law library is available to all as a resource for accessing the law; and second, to honor those young artists whose art work best exemplifies Law Day's theme of justice, as established each year by the American Bar Association. This year's ABA theme for Law Day was "The 14th Amendment-- Transforming American Democracy".

This year's event convened on Monday, May 1, 2017, at the Bailey Auditorium, in the Treasure Coast Public Safety Complex at Indian River State College, in Fort Pierce. Sponsorship support was provided by the SLC Bar Association; Florida Rural Legal Services Corp.; TD Bank; Searcy Denney Scarola Barnhart & Shipley, P.A.; Gordon & Donor, P.A.; Kim Cunzo, Esq; Law Office of Jason Berger, P.A.; Carlos Wells and Everlove & Associates, Inc. Attendees included members of the local bar, students and their parents, and invited guests from the SLC County Commission, School Board, and local judiciary. Jim Walker was Master of Ceremonies. The Hon. Burton Connor, District Court Judge for the Fourth District Court of Appeals, opened with the pledge of allegiance and gave a brief discussion on the history and significance of the pledge.

The Hon. Charles Schwab, Circuit Court Judge, introduced our keynote speaker, the Hon. Michael J. McNicholas, Circuit Court Judge. Judge McNicholas is the newest member of the 19th Judicial Circuit Court bench. He won election to the office in 2016, and is a graduate of

continued from page 3

On Behalf of the Publisher

Stetson Law School. Judge McNicholas began his career as an Assistant Prosecutor with the State Attorney's Office. He went into commercial practice as General Counsel to Sun Bank, working on commercial litigation, banking/creditor's rights, and real estate transactions. Later he was a partner with the McCarthy, Summers law firm in Stuart. He prepared for his judicial career through service as a circuit court mediator and Traffic Court Hearing Officer. Judge McNicholas spoke on the history of the Fourteenth Amendment, explaining its importance as a supporting element in the bedrock of American Law.

Two very special people were honored this year for their contributions to the rule of law on the Treasure Coast, Lane Frye and Wendy Dwyer. Tragically, Ms. Frye passed away only the day before she was to receive her award. It was presented in memoriam and received in her behalf by Bruce Colton, States Attorney for the Nineteenth Circuit. Mr. Colton recalled her 18-year career in his office as a victim's advocate. He spoke of her passion for justice and deep commitment to the victims of sexual assault, as she made sure that they received the respect and support needed by them at every step of the healing process. Mr. Colton noted that, as Director of the Sexual Assault Assistance Program, she was a strong, encouraging leader who expected much of her staff and established high standards for her office as well as allied partner agencies. Hers was a visionary voice for sexual assault survivors.

Wendy Dwyer was also honored, after her introduction by Diamond Litty, Public Defender for the Nineteenth Judicial Circuit. Ms. Litty described Ms. Dwyer as an award-winning writer, educator and public relations professional, deeply engaged in the life of the community. Through introduction it was disclosed that Ms. Dwyer is an Associate Professor at Indian River State College, writes a weekly column spotlighting events, volunteers and non-profit activities for Luminaries in TCPalm Newspapers. She writes regularly for STUART Magazine and a variety of other publications. She is a founding board member for Van Duzer Foundations and works closely with a number of charitable organizations including Mustard Seed, HANDS/VIM, Southeast Florida Honor Flight, Creature Safe Place, the Inner Truth Project, Guardians for New Futures, Fort Pierce Jazz and Blues Society, the Sunrise Theatre Foundation, LifeBuilders of the Treasure Coast, United for Animals, and many other groups.

Also honored were St. Lucie county school students, from both public and private schools, who compete in an annual Law Day Poster Board Art Contest, chaired and overseen by Kim Cunzo, Esq., to see who can best express the ABA's theme for Law Day. There were over 400 entries. The Master of Ceremonies for this was Carlos Wells, a Director of FRJSLL, who is also an Assistant State Attorney. He recognized Troy Ingersoll, Chair of the St. Lucie County School Board, who, in turn,

introduced Wayne Gent, County School Superintendent, who spoke on law and education. Mr. Gent then presented cash awards on behalf of FRJSLL to those students whose works were deemed superior in portraying the 14th Amendment's value to America's system of justice. Our elementary school honorees (K - 2nd Grade) were first place winner Michael Pennachio, first grader at Palm Pointe; Dakota Buonocore, placed second, and is also in the first grade at Palm Point. Placing third was Alana Borgella, second grader at Palm Point. In elementary school (3rd - 5th grade) first place went to Kenadie Byrd, fourth grader at Palm Point; Nico Tovar, fifth grader from Palm Pointe, was second. The third-place award was won by Lupita Vargas, fifth grader from Palm Pointe. In middle school rankings, Animesh Saha, eighth grade, placed first, from Lincoln Park Academy (LPA); in second place was Christen McCain, also an eighth grader at LPA. Eric Hernandez, in the sixth grade at Palm Pointe, won the third-place award. On the high school level, our first-place winner was Amanda Fishbain, in the twelfth grade from LPA. Second place was taken by Isabella Moreno, who is in the ninth grade at LPA. Nadia Dimitroff, a tenth grader at LPA, won third place. We are so very proud of these accomplished young people.

In addition to those participants named above, there were others whose contributions were important to the success of our 2017 Law Day Event. They included Olga Hamilton, who helped out with photography, Carmela Gallese and Merrilyn Phillips, who assisted with refreshments and greeting attendees. There were also our extraordinary directors, who planned the ceremonies months in advance, including Nora Everlove, Kim Cunzo, Carolyn Fabrizio, Carlos Well, Rene Artaega and Andy Blum. Also, to be most respectfully acknowledged is Tom Genung, Court Administrator, who marshalled resources and who allowed all our young artists to publicly display their work in the Fort Pierce Court House. Merit likewise accrues to Kelly Padrick, Chief Communications Officer for the St. Lucie Schools, for assisting in disseminating awareness of the event to local students, and for making a video crew available for the proceeding.

There is a short quote attributed to Aristotle, which well serves as the underlying point to Law Day and its observance: "At his best, man is the noblest of all animals; separated from law and justice he is the worst." His point,

continued on page 17

Come Visit Us

At 221 So. Indian River Drive
Fort Pierce, Florida 34950

An Introduction to Workers' Compensation Law



By Hon. Keef F. Owens

There are many people, attorneys included, who know little about workers' compensation. Although the expression "workers' compensation" may be familiar to them, they do not know what workers' compensation includes, what it does not include, or how a workers' compensation claim is pursued. The intent of this brief article is to introduce those who are not familiar with workers' compensation to its function in broad strokes. This article is not intended to be exhaustive, and there are exceptions to many of the general rules stated herein.

Purpose

Workers' compensation provides benefits to employees who are injured in an accident arising out of the course and scope of their employment. An employer is required by law to provide workers' compensation benefits to its employees. The type and amount of these benefits is established by statute. Many employers satisfy the requirement to provide benefits by procuring workers' compensation coverage from a workers' compensation carrier. In the event benefits are due, the carrier pays those benefits directly to the employee. Other employers fund their own benefits and utilize a servicing agent to administer their workers' compensation claims.

Benefits are due when the work-related accident is the major contributing cause of the employee's disability or need for medical treatment. In order to be deemed the major contributing cause, the work-related accident must represent more than 50% of the cause of the employee's disability or need for treatment. For example, if the employee has a prior history of low back injuries and treatment, but the medical evidence establishes that the work-related accident is more than 50% responsible for the employee's current symptoms and need for treatment, then the employee has made the threshold showing required to obtain benefits. This is frequently referred to as demonstrating that the condition is "compensable." On the other hand, if the employee's work-related accident is relatively minor in comparison to the prior injury and the medical evidence demonstrates that it is less than 50% responsible for the employee's symptoms and complaints, then benefits would likely not be due.

If an employee is injured within the course and scope of their employment, then their exclusive remedy is workers' compensation. They cannot sue their employer for tort damages. In exchange for the forfeiture of the right to sue their employers in tort, injured employees are entitled to workers' compensation benefits on a no fault basis. Despite workers' compensation's no fault nature, there are some fault-based factual scenarios under which the employee may lose entitlement to all benefits (e.g., when the employee intentionally injures themselves) or may receive a reduced amount of benefits (e.g., when the employee intentionally fails to use a safety device required by law or regulation).

Types of benefits

There are essentially two classes of benefits available to injured workers: medical benefits and indemnity benefits. Medical benefits include treatment and care. The benefits can include, but are not limited to: medical treatment, diagnostic testing, medications, physical therapy, surgery, medical mileage reimbursement, durable medical goods, and attendant care. In order to receive medical treatment, in addition to demonstrating that the work-related accident is the major contributing cause of the need for treatment, the claimant must also demonstrate that the treatment requested is medically necessary.

continued on page 6

An Introduction to Workers' Compensation Law

The employer/carrier generally controls the identity of the medical providers. Although an injured worker may make one request for a change in treating physicians, the employer/carrier also selects the identity of the new physician. Medical providers are paid according to an established fee schedule, so some medical providers refuse to treat patients through the workers' compensation system.

The other class of benefits is indemnity benefits. There are several types of indemnity benefits: permanent total disability benefits (PTD), temporary total disability benefits (TTD), temporary partial disability benefits (TPD), and permanent impairment benefits (IB). Permanent total disability benefits are paid to an employee who has reached maximum medical improvement (i.e., the point at which further improvement or lasting recovery is not expected) and the employee is unable to engage in even part-time sedentary work within 50 miles of their home. Temporary total disability benefits are paid when an employee has been temporarily restricted from working in any capacity. Temporary partial disability benefits are paid when the claimant has been assigned work restrictions and has earned less than 80% of the average weekly wage that they were earning at the time of their accident. Finally, permanent impairment benefits are paid when the employee has reached maximum medical improvement and has been assigned a permanent impairment rating due to a ratable permanent injury under the Florida Impairment Guidelines.

There is also a statutory provision which allows the payment of death benefits to a surviving spouse or dependents under certain circumstances. These benefits are paid biweekly and cannot exceed a total amount of \$150,000.00.

Dispute resolution

Most benefits due to an injured worker are handled administratively by the employer, the carrier, or the servicing agent. Medical appointments are authorized and scheduled and lost wages are paid. In the event the claimant believes that there is a benefit that he or she is due which has not been provided, then they may file a "claim" (hence the title "claimant" is frequently used to refer to an injured worker). The parties may each obtain one Independent Medical Examination with the medical provider of their choice in the event of a dispute.

Procedurally, a claim for benefits is initiated by filing a Petition for Benefits. A response may or may not be filed by the employer/carrier, but the lack of response is deemed to be a denial of the requested benefits. The parties are compelled to mediate by statute. If the issues are not resolved, they are adjudicated by a Judge of

Compensation Claims (JCC). Judges of Compensation Claims are executive branch judges appointed by the governor. A JCC acts as the finder of fact. Finally, an appeal from an order of a Judge of Compensation Claims is pursued in the First District Court of Appeal.

The applicable law for workers' compensation matters appears almost exclusively in chapter 440 of the Florida Statutes. The rules of procedure for workers' compensation matters ("Rules of Procedure for Workers' Compensation Adjudications") appear at chapter 60Q-6 of the Florida Administrative Code.

Length of the claim

Workers' compensation claims can unfold in a piecemeal nature. Some threshold issues are determinative and can resolve a claim with finality. For example, if the employer defends a claim on the grounds that an accident did not take place and prevails, then the claim has concluded. Other issues may relate to a specific issue which will not extinguish the claim regardless of the result. For example, if the claimant seeks payment for a finite period of temporary partial disability benefits, then the claim can live on regardless of whether the claimant wins or loses. The claimant may file additional claims in the future if they could not have been litigated at the time of a previous claim or claims.

The statute of limitations currently requires that a claim be filed within two years of the date of accident. Alternatively, a claim may be filed within one year of the last provision of benefits. This generally permits a claimant to file a claim within one year of the last date of service with an authorized medical provider or the last date indemnity benefits were paid. This tolling mechanism can allow workers' compensation claims to go on for years.

Attorney's fees

Section 440.34, Florida Statutes, provides a shifting mechanism which allows a claimant to seek attorney's fees and costs from the employer/carrier. The primary basis for doing so is when the claimant prevails on a claim made pursuant to a Petition for Benefits.

Attorney's fees must be approved by a Judge of Compensation Claims. The starting point for the determination of the amount of the fee is a statutory formula. The formula permits an attorney's fee of 20% of the first \$5,000.00 in benefits obtained, 15% of the next \$5,000.00 in benefits obtained, and 10% of the value of benefits obtained over \$10,000.00. The problem with this formulaic approach is its inflexibility when the benefit obtained has a low monetary value. For example, if the benefit obtained is the payment of \$350.00 in past due temporary partial disability benefits, then the corresponding attorney's fee would be only \$70.00. The Supreme Court of Florida

continued from page 6

An Introduction to Workers' Compensation Law

recently addressed this issue and determined that the fee statute created an impermissible irrebuttable presumption. As a result, a claimant must be permitted to demonstrate that the statutory attorney's fee is insufficient and that an hourly fee is reasonable. If this is done, then the Judge of Compensation Claims may approve the hourly fee.

Workers' compensation's intersection with tort claims

The claimant's pursuit of workers' compensation benefits as opposed to tort damages may be deemed to be an "election of remedies." This title is somewhat of a misnomer. An injured worker may not voluntarily "elect" to receive workers' compensation benefits in lieu of tort remedies or vice versa. If an individual is injured within the course and scope of their employment, then workers' compensation is their exclusive remedy against their employer. If the individual was *not* within the course and scope of their employment, then their remedy is a liability action against the employer.

The effect of an "election of remedies" is to preclude a subsequent claim of the type not initially sought. For example, if an injured worker pursues workers' compensation benefits to a final order on the merits that addresses compensability, then that worker cannot subsequently file an action against the employer in tort for the same accident. A similar bar may apply to an employer who defends a workers' compensation claim on the grounds that the claimant was not an employee. If the claimant dismisses their workers' compensation claim and then files a liability action against the employer, then the employer may be estopped from taking the inconsistent position in the liability action that the claimant was an employee and that their exclusive remedy was workers' compensation.

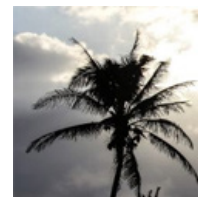
Another area in which workers' compensation law and liability law intersect is with respect to recoveries by the injured worker from a third party. A frequent fact pattern involves an employee who is required to drive as part of their employment duties. If that employee is injured in a motor vehicle accident, then they have two potentially viable causes of action: a workers' compensation claim against their employer and a liability action against the driver of the other vehicle. In order to prevent a double recovery by an injured employee, the employer/carrier has a statutory lien over the proceeds of the liability action under section 440.39, Florida Statutes. The manner of valuing the lien was established in *Manfredo v. Employer's Casualty Insurance Company*, 560 So. 2d 1162 (Fla. 1990). The employer/carrier is entitled to a percentage of what it paid in workers' compensation benefits. The specific percentage is determined by

dividing the employee's net tort recovery (i.e., the settlement or judgment amount less attorney's fees and costs) by the full value of his or her tort damages.

Conclusion

As noted above, there are many exceptions to the general rules stated in this article. Despite being confined to a single statutory chapter, workers' compensation issues can quickly become very technical. A relatively simple general rule (e.g., an employer must provide workers' compensation benefits for its employees) can beg numerous legal questions (e.g., What is an employer? What is an employee?). Accordingly, injured workers and non-practitioners confronted with workers' compensation issues are wise to seek the advice of an attorney with substantial workers' compensation experience.

Judge Keef Owens graduated from Stetson University with a bachelor's degree in political science and a minor in mathematics, and he studied law at the University of Florida. Following law school, he served as a four-year law clerk to the Honorable Charles M. Harris of the Fifth District Court of Appeal. Subsequently, he entered private practice in Orlando, Florida with the law firm Zimmerman Kiser Sutcliffe. Judge Owens was appointed to serve as the Judge of Compensation Claims for Port St. Lucie in 2016.



The Lighter Side of the Law

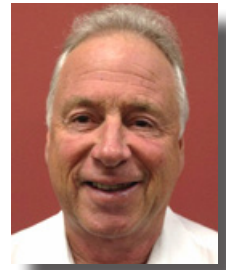


U.S. LAW SCHOOLS FACING NEW CHALLENGES

PART 2 OF 2

BY: LEONARD PERTNOY

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages



III. Globalization of Law Schools and Foreign Student Programs

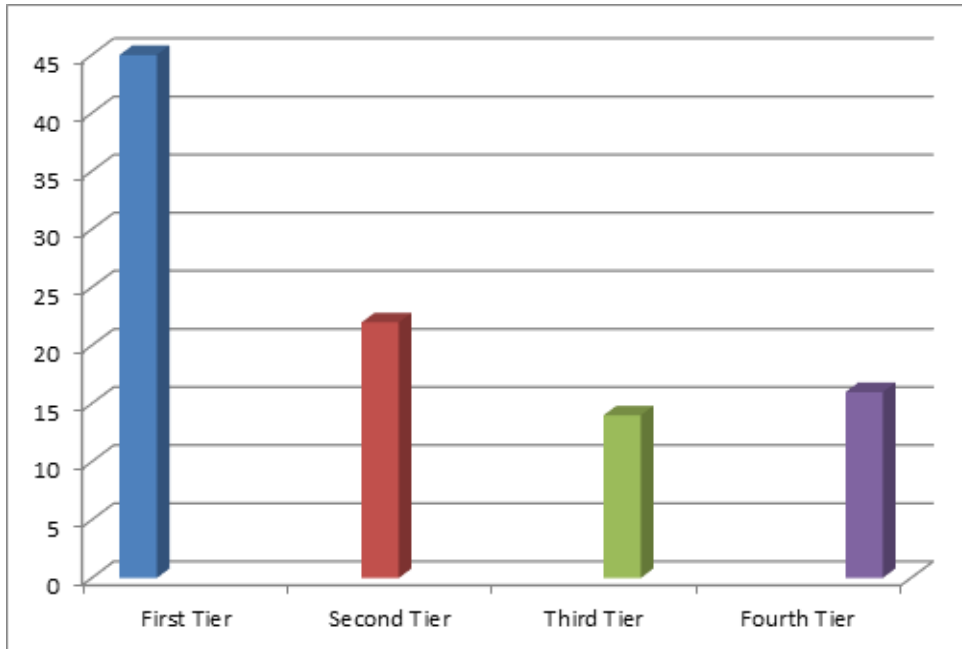
Over the last decade one aspect of law school enrollment has shown growth despite the grim climate. The number of foreign lawyers in U.S. law school graduate programs has increased as well as the number of graduate programs available. Currently 93 U.S. law schools offer graduate programs to law graduates of foreign countries, and one-third of these are public institutions.¹

TABLE 1: SCHOOLS WITH LL.M. PROGRAMS IN WHICH FOREIGN LAWYERS MAY ENROLL

| | | |
|--------------------------------|-----------------------------------|--------------------------------|
| 1. Alabama, U. of | 37. Harvard | 78. San Diego, U. of |
| 2. Albany Law School | 38. Hawaii, U. of | 79. San Francisco, U. of |
| 3. American U. | 39. Hofstra U. | 80. Santa Clara U. |
| 4. Arizona, U. of | 40. Houston, U. of | 81. Seattle U. |
| 5. Arkansas, U. of | 41. Howard U. | 82. Southern California, U. of |
| 6. Baltimore, U. of | 42. Illinois, U. of | 83. Southern Methodist U. |
| 7. Boston U. | 43. Indiana U. (Bloomington) | 84. St. John's U. |
| 8. Brigham Young U. | 44. Indiana U. (Indianapolis) | 85. St. Mary's U. |
| 9. California Western | 45. Iowa, U. of | 86. St. Thomas U. |
| 10. California-Berkeley | 46. John Marshall School of Law | 68. Stanford U. |
| 11. California-Davis | 47. Lewis and Clark College | 69. Stetson. U. |
| 12. California-Hastings | 48. Louisiana State U. | 70. Suffolk U. |
| 13. California-Los Angeles | 49. Loyola U. (Chicago) | 71. SUNY Buffalo |
| 14. Capital U. | 50. Loyola Marymount U. | 72. Temple U. |
| 15. Cardozo School of Law | 51. Miami, U. of | 73. Texas, U. of |
| 16. Case Western Reserve U. | 52. Michigan State U., Detroit | 74. Touro College |
| 17. Chicago U. of | 53. Michigan, U. of | 75. Tulane U. |
| 18. Chicago-Kent | 54. Minnesota, U. of | 76. Tulsa, U. of |
| 19. Cleveland State | 55. Missouri, U. of (Columbia) | 77. Utah, U. of |
| 20. Columbia U. | 56. Missouri, U. of (Kansas City) | 78. Valparaiso U. |
| 21. Connecticut, U. of | 57. New England School of Law | 79. Vanderbilt U. |
| 22. Cornell U. | 58. New York U. | 80. Vermont Law School |
| 23. Denver, U. of | 59. Northwestern U. | 81. Villanova U. |
| 24. DePaul University | 60. Notre Dame, U. of | 82. Virginia, U. of |
| 25. Duke U. | 61. Pace U. | 83. Wake Forest U. |
| 26. Emory U. | 62. Pacific, U. of | 84. Washington and Lee U. |
| 27. Florida State U. | 63. Pennsylvania State U. | 85. Washington U. (St. Louis) |
| 28. Florida, U. of | 64. Pennsylvania, U. of | 86. Washington, U. of |
| 29. Fordham U. | 65. Pepperdine U. | 87. Wayne State U. |
| 30. Franklin Pierce Law Center | 66. Pittsburgh, U. of | 88. Whittier Law School |
| 31. George Mason U. | 67. Saint Louis U. | 89. Widener U. |
| 32. George Washington | | 90. Willamette U. |
| 33. Georgetown | | 91. William and Mary College |
| 34. Georgia, U. of | | 92. Wisconsin, U. of |
| 35. Golden Gate U. | | 93. Yale U. |
| 36. Hamline U. | | |

U.S. LAW SCHOOLS FACING NEW CHALLENGES
PART 2 OF 2

FIGURE 1: U.S. NEWS RANKINGS FOR ALL LAW SCHOOLS WITH LL.M. PROGRAMS OPEN TO FOREIGN LAW GRADUATES



In 1998, over 2000 foreign law graduates were enrolled in the sixty-seven schools with eligible graduate programs for foreign students and they accounted for forty-four percent of the total post-J.D. population.² In the five years ending in 2004, the number of foreign law students in post-J.D. programs in U.S. law schools increased by more than 130%, according to the ABA. The ABA reported that, in 2004, a total of 4,469 foreign law graduates attended ninety-six U.S. law schools.³ This growth rate exceeds the rise in the number of foreign lawyer graduates who took the New York bar exam during roughly the same period, which was an increase of fifty-four percent.⁴ The majority of foreign students returned to their home country after graduation in accordance with their plan at the time of enrollment.⁵

This is a fortuitous facet of an increasingly global economy. The legal system of the United States has more interaction with other countries today than other years in history, and more foreign lawyers are establishing themselves in America with the purpose of learning more about common law or to explore more opportunities in the international legal market.⁶ As a result of this interaction, American law schools can offer new programs for foreign lawyers and expand LL.M. and J.D. degree programs.⁷

As fewer legal jobs exist for graduates in the U.S., foreign students bridge the gap by providing a revenue stream for law schools without irresponsibly glutting the American market with job seekers. Offering graduate programs for foreign law graduates can provide both financial and

reputational benefits for law schools.⁸ By providing these programs the student community becomes more culturally diverse as a result of the international presence.⁹ A law school's LL.M. program provides a global influence, which is an added benefit for attracting applicants for its J.D. program.¹⁰ When foreign students attend graduate programs in U.S. law schools, the school can advertise its international presence, which can be compelling for prospective J.D. applicants as it demonstrates the ability to look ahead to the future of education. However, the bottom line may be that graduate programs for foreign law graduates are a significant revenue source for the school.¹¹

Still, the ability of U.S. law schools to attract growing numbers of students has been hindered by the economic downturn in the early 2000s, as well as the attitudes towards immigration after 9/11. European and Australian universities are now offering less expensive options as compared to the high tuition of U.S. law schools.¹² In addition, many U.S. graduate program alumni who choose to remain in the U.S. have been unable to obtain employment, which impacts their ability to pay their tuition debt.¹³

Increased competition for foreign law graduate students will likely have little effect on elite U.S. law schools. Having a degree from Harvard may not provide an increased chance of passing a U.S. bar exam, but it undoubtedly provides additional opportunities worldwide. Schools which don't have the internationally recognized prestige of Harvard or Yale, which includes the majority

continued on page 21

Jerry Giesler: Hollywood's Favorite Attorney

By Richard Wires

Criminal lawyers become famous through cases where a crime is highly sensational or a trial creates debate over an accused's guilt or innocence. If their defenses are successful they gain name recognition and draw new clients. For four decades Hollywood attorney Jerry Giesler was kept in demand. His reputation was built on winning criminal cases most thought to be unwinnable. Celebrities and studios finding themselves in difficulties repeatedly turned to him for advice and representation. Out would go the call: "Get me Giesler."

Giesler was born in 1886 in a small Iowa town, given the names Harold Lee but known as Jerry from early childhood, and attended the University of Southern California in Los Angeles. He passed the bar examination in 1910 without having completed a law degree. As both a student and young lawyer Giesler worked for the noted Earl Rogers and helped him in his defense of Clarence Darrow when Darrow faced charges of bribing a juror in a famous trial. Through his years of association with the clever and skillful Rogers, Erle Stanley Gardner's model for the fictional Perry Mason, Giesler developed a similar approach and courtroom style in defending clients. It combined careful preparation, the effective handling of witnesses, keen awareness of juries' reactions, and often blatant showmanship. Subsequently in his own practice he was soon representing film and other celebrities in both civil and criminal cases. His clients included Rudolph Valentino and Charlie Chaplin, Zsa Zsa Gabor and Marilyn Monroe; the gangster Bugsy Siegel, exotic dancer Lili St. Cyr, and heiress Barbara Hutton; producer Walter Wanger for shooting his wife Joan Bennett's admirer. Looking at several other situations shows how Giesler handled difficulties posed by tinsel-town trials.



Jerry Giesler

Alexander Pantages was a Greek-American who had built a chain of over eighty vaudeville and movie theaters in America by the late 1920s. In 1929 he was accused of raping a seventeen-year-old dancer in a theater office and was convicted in October. The sentence was fifty years. Newspaper stories had made it an instance of trial by publicity. There was much to question about the charge and case. When the defendant then hired Giesler and Jake Ehrlich to handle his appeal they got the California Supreme Court to order a new trial. By the time of the retrial in 1931 opinions about the case had changed. The suspicion had grown that the alleged rape was a set-up and Giesler was in fact able to discredit the accuser and her rather flimsy claims. Spreading rumors had also revealed a possible motive for framing Pantages even though there was no supporting evidence or proof. Pantages had refused to sell his theater chain to the powerful businessmen who were then creating the film production and distribution company called RKO. The Radio-Keith-Orpheum circuit of theaters was controlled by David Sarnoff of Radio Corporation of America (RCA) and by Joseph Kennedy. Because his trial costs had ruined Pantages financially he was forced to sell his theaters to RKO for less than he originally refused. Whatever the background of the situation, Giesler had succeeded in vindicating Pantages, firmly establishing his reputation and career.

Another example of Giesler's skills and the studios' power involved famed choreographer-director Busby Berkeley and his three successive trials for causing a deadly 1935 auto collision. Driving fast one evening while returning from a party, where he had been drinking, his car crossed the line into the oncoming traffic. It hit two cars, taking four lives and injuring another person, but he suffered only cuts and bruises, all quite minor. Berkeley called the head of security at MGM and he in turn quickly summoned Giesler. The attorney made certain his client was well bandaged and in a wheelchair when he appeared in court; he then based his defense on the dubious claim that a burst tire had actually caused the accident. Jurors in two separate trials could not agree, resulting in mistrials, but a third trial ended in an acquittal. News sources reported that MGM paid \$100,000 to the victims and families. It was in 1935 a huge sum. But Giesler's success in the case outraged many of those outside the Hollywood world.

Supreme Court Betting On New Jersey?

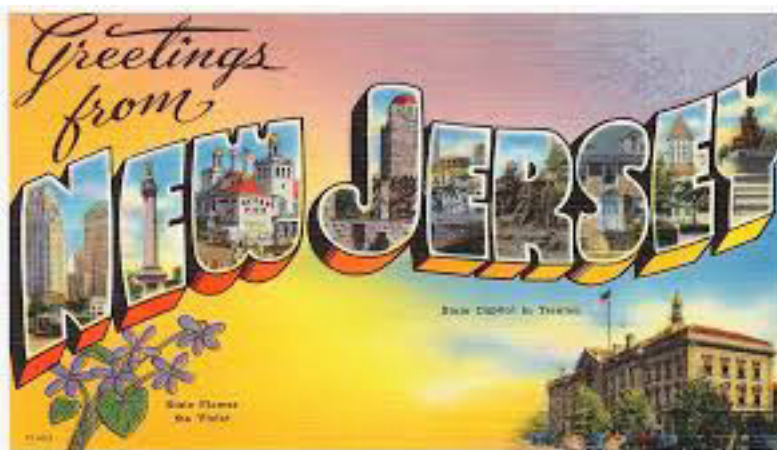


By Mark Miller

In late June, the Supreme Court of the United States surprised court watchers and granted review of a case that previously came up snake eyes at the Court—a case known as *Christie* (yes, Governor Chris Christie) v. *NCAA*. In granting review of the case, the High Court may have tipped its hand regarding its intent to place all its chips on freedom.

Unless my belabored use of metaphor in my opening paragraph missed its mark, I bet you recognize this article is about sports gambling. Many men and women – perhaps even you! – enjoy playing fantasy football and baseball. That is, you like gambling – even if some would call it illicit or even illegal. You also may participate in “March Madness” college basketball brackets. “March Madness” does not refer to springtime climate change. Rather, it is a term coined in Illinois to describe high school basketball and then made ubiquitous when legendary broadcaster Brent Musburger made it his own as it relates to big-time college basketball. “March Madness” describes the NCAA College Basketball tournament that dominates the sports world for the better part of March and into the first week of April each year.

Madness, depending on your perspective, may also describe the federal government’s decision to make sports gambling illegal throughout this fair land . . . except for in Nevada, Oregon, Montana, and Delaware. As I mentioned above, some of you likely engage in various forms of illegal sports gambling – whether it be fantasy baseball, football, March Madness, or something else. You know who you are. And although the government typically looks the other way regarding small-dollar sports betting pools (or considers them not illegal gambling for a variety of reasons), the fact remains that for the most part sports gambling is prohibited everywhere in the United States except for those four states listed above – most notably Nevada.



Why is this so? Because, a little over 20 years ago, Congress passed a law that prohibited sports gambling anywhere except for those four states. Theoretically, Congress passed the law, called the Professional and Amateur Sports Protection Act of 1992 (“PASPA”), to combat the scourge of sports gambling and its impact on amateur and professional sports. To address that concern, the law forbade a state from authorizing, licensing, or operating sports gambling. And whatever the merits of that concern, Congress undercut the sincerity of its concern for the issue when it exempted those states from the law. Some would say the law is a form of federally-endorsed economic protectionism that favors those four states over the other 46 states.

To its credit, Congress used the law to open a window for other states to change their own laws to allow sports gambling. If a state did so – quickly – then that state could have also had legal sports gambling, according to PASPA. Clearly, Congress opened the window so as to allow for sports gambling outside of those four states, including states where gambling was

continued from page 10

Jerry Giesler: Hollywood's Favorite Attorney

The 1942 high-profile trial following charges of statutory rape brought against Errol Flynn, then thirty-four, had many elements of courtroom theater provided by both Giesler and Los Angeles prosecutors. Two girls and separate incidents were involved, one at a party, one aboard his yacht, each girl supposedly under the age of consent. Prosecutors had the accusers dress modestly, in the bobby socks then in fashion, even their hair in pigtailed. But many thought their claims highly suspect and Giesler proved one a liar and of legal age. Giesler had also worked to obtain a jury mostly of women; some of them were clearly quite taken with the dashing Flynn. He was acquitted and despite widely repeated jokes stayed popular. Yet much of the public thought the charges had some degree of truth.

Lana Turner's involvement in the 1958 murder of gangster Johnny Stompanato brought international attention to Giesler. Although the victim worked for the notorious mobster Mickey Cohen, and had been her lover for some time, Turner insisted she had not known of his mob connections. Just what happened that April night in Turner's bedroom is not clear. She and the victim were alone and apparently quarreling loudly; he had allegedly been physically abusive on earlier occasions.



The star's fourteen-year-old daughter, Cheryl Crane, had supposedly come to her aid. She reportedly brought a ten-inch kitchen knife with her and fatally stabbed the gangster. But what then happened would arouse doubts. The star first telephoned Giesler, who came at once, and Cheryl had called her father. Not until two hours after the killing did Giesler finally summon the police to the crime scene. The police found that the body had been moved and the bed linen changed. They discovered too that all the fingerprints on the knife were smudged. Why had so much been done to alter the scene? How had the girl been able to stab a strong man? At her subsequent trial Giesler did not let her testify, declaring in public that he felt she

was too traumatized, but he had Turner give a long and dramatic account. Because the story she told painted Stompanato as a vicious monster, a verdict of justifiable homicide was rendered, but many still questioned just how Stompanato had really been killed. Cohen was especially angry with how Giesler had presented the character of Stompanato: he said he had "seen a dead man convicted of his own murder." After they had filed a civil suit Stompanato's family accepted an out-of-court settlement.

Under some circumstances Giesler like Perry Mason played the investigator. When actor George Reeves was found dead from a gunshot in his home in 1959, the police ruled it a suicide, but Reeves' mother thought it murder and a cover-up and she hired Giesler to investigate. Although the victim had appeared in *Gone with the Wind* his career had stalled until he got the lead in *The Adventures of Superman* on television. Shortly before his death he had ended an affair with Toni Mannix, former wife of Louis B. Mayer's general manager, which had left her very angry with Reeves, whose new affair with Leonore Lemmon had rather quickly turned rocky. One evening while entertaining friends, he had reportedly gone up to a bedroom, where he supposedly shot himself. Once again a delay in calling the police would create doubts. Guests said they had heard the shot and found the body at once but then forty-five minutes passed before they called the police. The police investigation was also questionable. For some reason they took no fingerprints, questioned all the guests as a group, and accepted the uniform story they told. Yet unexplained were two other fresh bullet holes in the room, bruises on the body, and evidence that the fatal bullet was fired from a distance. The Los Angeles authorities stuck to their ruling, however, and Giesler soon decided to drop his inquiries. Why he did so is unknown, but he allegedly told a friend that the situation involved too many important people, and his

continued on page 17

Coming Soon!
Rupert J. Smith Law Library
South County Branch

Late October

Hit 'em Again Harder: Star Athletic, L.L.C. v. Varsity Brands, Inc. et al.



Endnotes for this article can be found on page 26 of the online edition of Friendly Passages.

By Adrienne Naumann

In *Star Athletica, L.L.C. v. Varsity Brands, Inc., et al.*, 137 S.Ct. 1002 (2017) [hereinafter *Star Athletica* and *Varsity Brands*], the U.S. Supreme Court provided uniform criteria for U.S. copyright protection eligibility when visual art is applied to useful articles. The Court applied this test to Varsity Brands' graphic designs upon cheerleading uniforms and held that these designs were eligible for U.S. copyright protection. In reaching this conclusion the Court observed that the United States copyright statute provides protection for two-dimensional designs that are separable from utilitarian features of a useful article. Unfortunately, inconsistent judicial implementation for this copyright protection previously existed among federal appellate courts, and especially for visual art applied to clothing. As a result, copyright eligibility outcome depended in large part upon the jurisdiction of a federal court in which litigation occurred.

History of the Litigation

Varsity Brands manufactures apparel and accessories for cheerleading and other athletic activities, and in doing so it creates colorful graphic designs. Varsity Brands owns U.S. copyright registrations for two-dimensional visual art of many of these designs. By their terms these registrations exclusively protect these graphics, and they do not protect (i) the underlying cheerleader uniforms individually or (ii) the uniforms combined with the designs.

Star Athletica also markets uniforms and accessories for cheerleading and popular sports. In 2010 Varsity Brands observed that Start Athletica's marketing brochures displayed cheerleading uniforms with graphic designs which were extremely similar to Varsity Brands' registered designs. Thereafter, Varsity filed a copyright infringement lawsuit for five of its U.S. copyright registered graphic designs. Upon motions for summary judgment Star Athletica contended that Varsity Brands' copyright registrations were invalid because (i) the graphic designs were part of useful articles and useful articles are not copyright registration eligible, and (ii) in any event the designs were not physically or conceptually separable from the uniforms. Varsity Brands contended that its copyright registrations were valid, because its graphic designs (i) are separable from the cheerleading uniforms, and (ii) are not utilitarian features of useful articles.

The district court entered summary judgment for Star Athletica, because it considered Varsity Brands' designs to not be physically or conceptually separable from the cheerleader uniforms. It also reasoned that Varsity's designs are typically associated with sports and cheerleading. As a result, these graphic designs are functional, because they characterize Varsity's apparel as cheerleading uniforms. Since by statute functional features of useful articles are not copyright eligible, then the graphic designs were not copyright eligible.

Upon appeal the Sixth Circuit Court of Appeals [hereinafter the appellate court] reversed the district court judgment. In doing so the appellate court observed that the U.S. copyright statute provides protection for 'original works of authorship fixed in any tangible medium of expression....and which include pictorial, graphic, and sculpture works.' 17 U.S.C. 102(a). The appellate court also noted that the copyright statute defines pictorial, graphic and sculptural works to include two dimensional and three dimensional works of fine, graphic and applied art. 37 U.S.C. 101. The design of a useful article that includes a pictorial, graphic or sculptural work is copyright eligible if the design may be identified separately, and exist independently, from the articles' utilitarian features. However, functional features do not include those features which (i) merely portray the article's appearance or (ii) convey information. 37 U.S.C. 101.

continued from page 13

Hit 'em Again Harder: Star Athletic, L.L.C. v Varsity Brands, Inc. et al.

After reviewing copyright eligibility criteria from other federal appellate court jurisdictions, the Sixth Circuit created its own test as follows:

- (i) Is the design a pictorial, graphic or sculptural work;
- (ii) If yes, is it a design of a useful article;
- (iii) What are the utilitarian features of the useful article;
- (iv) Could observers of the design identify pictorial, graphic or sculptural features separately from the utilitarian features; and
- (v) Could the aesthetic features exist independently of the utilitarian aspect of the useful article?

The appellate court then characterized Varsity Brands' designs as two-dimensional works of graphic art, while the uniforms were intrinsically utilitarian as apparel for covering a torso. Star Athletica had contended that Varsity Brand's graphics could not be identified separately,



and independently, from the uniforms because their decorative function is intrinsically utilitarian. However, the appellate court rejected this argument, in part because the garment's functional feature of covering a torso does not require graphic designs. The court agreed that Varsity Brands' designs could convey the message of cheerleader status. However, the graphic designs did not comprise utilitarian features, because the statute explicitly states that features which merely convey information or visual appearance do not qualify as functional. 17 U.S.C. 101. The appellate court further observed that Varsity Brands' graphic designs were similar to copyright eligible fabric designs, and are not similar to strictly utilitarian structural features such as a uniform collar or sleeve shape.

Issues Before the U.S. Supreme Court

Star Athletica requested that the Supreme Court provide a uniform circuit-wide test for determining when a feature of a useful article is protectable by copyright registration. For the case itself, Star Athletica maintained that Varsity Brand's designs were not physically or conceptually separable from the functional features of the uniforms,

and therefore they were not copyright eligible under 17 U.S.C. sections 101 and 102(a). In particular, Star Athletica contended that Varsity Brand's graphic designs were functional, because they identified the uniforms as being apparel of cheerleaders.

Varsity Brands' position was that a separability analysis for its designs was unnecessary, because its registrations exclusively covered two-dimensional graphic designs and not the uniforms. It also emphasized that their registrations do not claim the uniforms on which the designs were affixed; instead the uniforms served merely as three-dimensional tangible media. Varsity's alternative position was that even under a separability test, its uniforms were useful articles of which its two dimensional designs served exclusively as decorative features. Varsity Brands also asserted that registered designs were both physically and conceptually separable, as well as independent from the uniforms. As evidence of this separability Varsity Brands offered identical designs that appeared on other Varsity Brands products.

In its amicus curiae brief the government concluded that Varsity Brands' graphic designs are copyright protection eligible, because the statute expressly states that a design of a useful article qualifies if:

- (i) the design incorporates pictorial graphic or sculptural features that can be identified separately from, and
- (ii) may exist independently, of the utilitarian aspects of this useful article. 17. U.S.C. 101.

The government also noted that by law an original work of authorship fixed in any tangible medium of expression is copyright protection eligible. *See* 17 U.S.C. 102(a). The government further supported its position by referencing 17 U.S.C. 113(a) which grants the copyright owner of visual art the exclusive right to *reproduce the work in or on any kind of article, whether useful or otherwise* [emphasis added].

The government further noted that according to the copyright statute, features which exclusively either convey information or affect visual appearance are not functional features of a useful article. 17 U.S.C. 101. The government also observed that Varsity Brands' two-dimensional designs could exist independently from uniforms, because Varsity Brands had affixed them to products other than cheerleader uniforms.

The U.S. Supreme Court Decision

The Court held that Varsity Brands' registered graphics were eligible for copyright protection because they met the statutory requirements for visual art applied to useful articles. The Court initially resolved the criteria for eligibility with a new separability analysis as follows:

continued on page 16

Law Day 2017

Photographs by Olga Hamilton. The Friends gratefully acknowledge her excellent work.



Bernard Romero, Hon. Daryl Isenhower, Hon. J. Mc-Nicholas, Hon. J. Burton Conner, Bruce Colton



Wayne Gent, Kara Hilson Odom, Kathryn Hensley, Troy Ingersoll



Diamond Litty in tribute to Wendy Dwyer



Kathleen Ems, Henry Sanabria, Kerry Padrick



Stephanie Morris, Brian Beauchamp, Mary Jane Keria-kos, Carolyn Fabrizio

Hit 'em Again Harder: Star Athletic, L.L.C. v Varsity Brands, Inc. et al.

- (i) a feature incorporated into the design of a useful article; in which
- (ii) the feature can be perceived as a two or three-dimensional work of art separate from the useful article; and
- (iii) would qualify as a protectable pictorial, graphic or sculpture work, either on its own or fixed in another tangible medium of expression, and if imagined separately from the useful article into which it is incorporated.

The Court observed that the statute provides these same requirements for copyright protection eligibility because:

- (i) 17 U.S.C. 101 expressly protects art initially fixed in a useful article as a tangible medium, while
- (ii) 17 U.S.C. 113(a) protects art initially fixed to a useful article or other tangible medium, and
- (iii) 17 U.S.C. 102(a) provides protection for any original work of authorship fixed in any tangible medium of expression, and explicitly including pictorial, graphic and sculptural works, but
- (iv) Useful articles in and of themselves are not eligible for U.S. copyright protection. *See* 17 U.S.C. 101.

The Court next applied its criteria to Varsity Brands' designs upon the cheerleader uniforms. The Court characterized Varsity Brands' two-dimensional designs as graphic works of authorship applied to useful articles, i.e., cheerleader uniforms. The Court next stated that its separability analysis was necessary, because the graphics were part of the overall article design, that is, a total collection of features that together comprise the useful article. *See* 17 U.S.C. 101. The separability inquiry then became whether the graphic designs upon the uniforms could be identified separately from, and be capable of existing independently of, the utilitarian uniform features (such as the cut of the sleeves and collar). 17 U.S.C. 101.

The Court observed that Varsity Brands' two-dimensional graphic designs could be mentally removed from the uniforms. It also concluded that the designs were independent visual art, and in fact these designs did appear upon Varsity's other non-cheerleader uniform products. The designs were therefore both conceptually separable and independent from the uniforms and eligible for copyright

protection.¹ The uniforms without graphic designs comprised the remaining useful articles which retained their identity as non-copyright eligible apparel.²

The Court addressed numerous issues that Star Athletica raised in its briefs. In particular, Star Athletic had contended that because Varsity Brands' graphics retained the uniform shape, they exhibited no separability as independent protection eligible visual art. However, according to the Court, a two-dimensional graphic may conform to a useful article shape without forfeiting copyright protection eligibility. In so stating, the Court noted that that the Varsity Brands' graphics would still qualify for protection if they acquired the shape of a square canvas or other useful article of a different shape. However, the Court also emphasized its holding extended exclusively to Varsity Brands' registered graphics and not to the functional uniform features.

Star Athletica had also contended that removal of Varsity Brands' graphics from a uniform would diminish the uniform's utility as cheerleader apparel. In response, the Court observed that the copyright statute does not require that the remaining useful article retain its original utility. Instead the statute only requires that the disputed features be (i) identifiable as visual art and (ii) conceptually separable, and capable of existing independently from, the useful article. Furthermore, an artistic feature that would qualify for copyright protection on its own does not lose this protection simply because it was initially created as a feature of a useful article. *See* 17 U.S.C. 101 (statute expressly protects two- and three-dimensional *applied* art) (emphasis added). The Court also dismissed any requirement for evidence of design methods, physical separability, and marketability. *See* 17 U.S.C. 101.

Conclusion

There are several beneficial results from this decision. First, there is nothing better than consistent requirements for copyright eligibility when outcomes previously depended upon the judicial jurisdiction in which litigation occurred. Hopefully this consistency will also prevent forum shopping for cases addressing copyright protection for visual art applied to useful articles in general, and clothing in particular. Secondly, the Court provided straightforward simplified requirements of copyright protection eligibility for applied visual art applied to useful articles. Perhaps the most helpful aspect of the decision is that these requirements do not apply exclusively to apparel, but to all useful articles as a tangible media of expression.

continued from page 12

Jerry Giesler: Hollywood's Favorite Attorney

health had been failing. He was then in his mid-seventies and perhaps thought another involved case would be too much. Giesler died on New Year's Day in 1962.

Observers have noted that criminal investigations and trials involving celebrities in Los Angeles are frequently marked by deferential treatment and a rather curious approach. The pattern appears in Giesler's most widely known cases. He flourished at a time when film studios exerted great power and influence over how public officials carried out their duties and juries made decisions. The film and entertainment industry provided many jobs in the city; the public was often fascinated by everything the stars would do. Especially worth noting were official tolerance of delays before the police were summoned, the inadequate and careless nature of investigations, and juries' willingness to believe what celebrities said and to protect their reputations. Perhaps it was inevitable in a world of press agents, publicists, and others employed just to create images and spin stories. Giesler was part of that Hollywood. That it survived his era is evident from the Manson murders and the O.J. Simpson case's coverage in tabloid stories and then courtroom theater.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II."



Library Holiday Schedule

We will Close for Labor Day, September 2 - 4
Rosh Hashanah, September 21st
Veterans' Day, November 10 -11

continued from page 4

On Behalf of the Publisher

one thinks, is that law is the element that binds all people together and permits them to live in peace and harmony. Surely it is proper, as Congress and our former President recognized, to set aside one day of the year when we honor the role of law and justice in making possible our democratic union and way of life. It was a privilege for Friends of the Rupert J. Smith Law Library to participate in such recognition and we thank the many organizations and individuals which and who came together to make this possible. Thank you and thank you. /JimW



Law Office of George L. Metcalfe Sr.

George L. Metcalfe

Attorney At Law

Civil and Taxation Practice

2770 Indian River Boulevard Suite 36

Vero Beach Florida 32960

**(772) 217-8120 * METCALFELAW@AOL.COM
WWW.METCALFELAW.COM**

Last Issue's Cryptoquote Answer

WBIOVUW RVR XDE VXFIXE QJBWX OVY-
QEZ. VX W FIOM OIWG ZIXZI QJBWX OVY-
QEZ VXFIXEIR WBIOVUW. - KVBBM UWEOIO

America did not invent human rights. In a very real sense human rights invented America. - Jimmy Carter

See page 24 for this month's puzzle

continued from page 11

Supreme Court Betting On New Jersey?

legal—like New Jersey. But for whatever reason, New Jersey did not act to amend its law at the time in 1992 to allow sports gambling and the window that PASPA opened for the Garden State closed. Nevada remained – and to this date, remains – the primary state in the country where sports gambling is legal and a multimillion-dollar business.

Anyone who has ever visited the Jersey shore knows that Atlantic City could use an economic boost, and few could argue that legal sports gambling would not provide such a boost. To that end, the people of New Jersey amended their constitution to allow for sports gambling a few years ago, and the Legislature and Governor Christie then approved a state licensing scheme for businesses that wished to become involved in sports gambling. And, as so often happens when someone wants to shake things up, somebody sued.

The NCAA, MLB, the NFL, the NBA, and the Feds sued Governor Christie. They pointed out that PASPA prevented New Jersey from licensing sports gambling, and the leagues suggested that gambling on sports negatively affects their sports.



Think about that latter argument for a second. Then think about how sports betting lines are printed in most every daily newspaper, are all over the internet, and are talked about on the airwaves and on television each and every day. People don't play "fantasy sports" because they like to follow certain athletes. They play them as a form of gambling. And, not surprisingly, the rise of fantasy sports has tracked a rise in popularity in the sports leagues – those same sports leagues that are now suing New Jersey.

In response to the sports leagues' and the Feds' arguments, New Jersey suggested to the courts that Congress could not favor one state (or four states) at the expense of all the other states; put another way, the question presented to the High Court is this:

Whether a federal statute (PASPA) that prohibits Codification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of [prior Supreme Court precedent and the Tenth Amendment, which reserves powers to the States and the people not otherwise delegated to the federal government in the Constitution and its Amendments]?

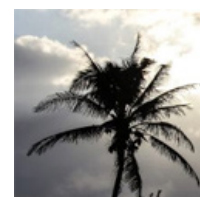
To date, the sports leagues and the Feds have won the argument. Currently, New Jersey is precluded from allowing the legal sports gambling that the people of New Jersey want, and the courts have told New Jersey that, in the face of the federal law PASPA, it had no legal authority to approve licensed sports gambling.

But, depending on the highest court in the land, that all could change. Governor Christie challenged the lower court decision, and the justices of the Supreme Court of the United States have elected to hear the case in the next Court term. If nothing else, Governor Christie has hired the right lawyer to make the state's case. Ted Olsen, who you may remember from the *Bush vs. Gore* election litigation in 2000 or from the more recent litigation over California (and the nation's) gay marriage debate, will argue New Jersey's case. This is a gamble that Governor Christie clearly intends to win.

I work for a law firm—Pacific Legal Foundation—that has argued in favor of the State of New Jersey's position regarding sports gambling and the impropriety of PASPA. My PLF colleague Jonathan Wood, of Washington, D.C., authored an amicus brief supporting Governor Christie's effort to make this ubiquitous practice (sports gambling) legal.

Let's hope common sense—and freedom—prevail in this high-stakes battle.

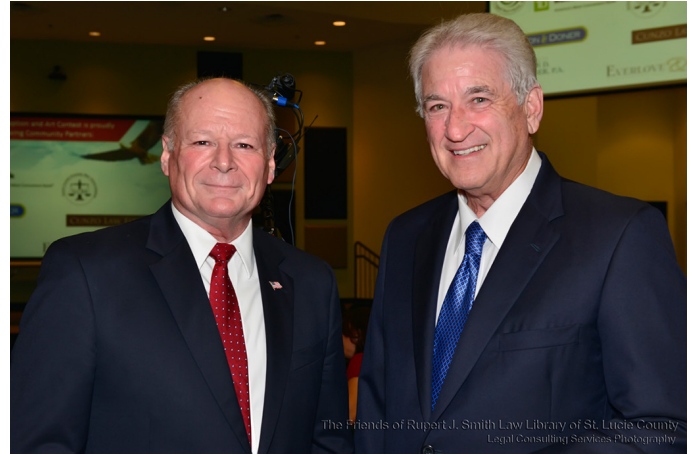
Mark Miller will appear as co-counsel for Hawkes Co. before the Supreme Court of the United States later this year. He is a Florida Bar board certified appellate attorney, the Vice President of the Martin County Bar Association, and Managing Attorney of Pacific Legal Foundation's Atlantic Center in Palm Beach Gardens.



Law Day 2017



James T. Walker



Hon. J. Burton Conner and Bruce Colton



Diamond Litty and Wendy Dwyer



Kerry Padrick and Rene Arteaga



Carmela Gallesse, Wayne Gent, Merrillyn Phillips, James Walker, Carolyn Fabrizio, Jeffrey Rollins, Kim Cunzo, Carlos Wells, and Joshua Heller



Carlos Wells, Tracy Amandro, Julie Stoyka, Bruce Colton

Law Day 2017



Alana Borgella, Dakota Buoncore, Michael Pennachio



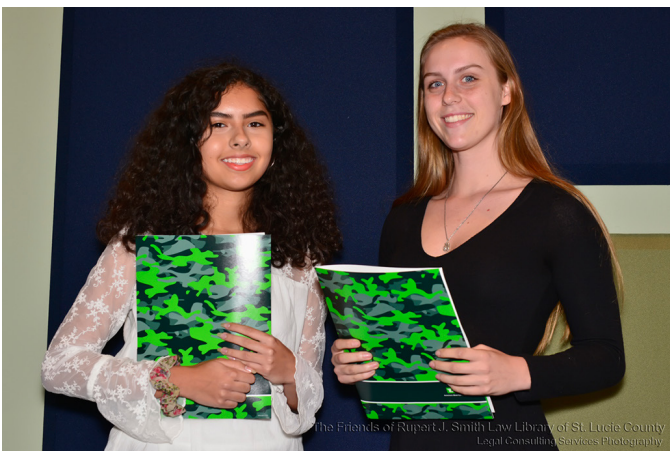
Hon. J. Michael McNicholas, Kim Cunzo, Jeffrey Rolins



Lupita Vargas, Nico Tovar, Kenadie Byrd



Eric Hernandez, Christen McCann, Animesh Saha.
Animesh also served as our library intern this summer.



Nadia Dimitrioff, Amanda Fishbain



The Winners

continued from page 9

U.S. LAW SCHOOLS FACING NEW CHALLENGES

of U.S. law schools, will need to provide innovative curriculums and programs to draw in foreign students. Despite the upsurge in options, if U.S. law schools can provide meaningful educational experiences they will continue to be sought after as long as U.S. business and law remains significant worldwide.

Thus, as critical as revenue is for a law school, even more critical is the benefit of the services to the students. Young people who go abroad to obtain double degrees have a greater space of professional practice, in both a national and global context.¹⁴ It is a valuable opportunity for students to gain a different view of the world and to become vividly aware that in the current economy professionals must be equipped to compete not only locally, but internationally.¹⁵ For many years, foreign law students have been drawn to law schools in the U.S. to achieve their academic goals.¹⁶ In turn, academic institutions in many countries seek to employ students who have studied in the U.S.¹⁷

Typically, foreign graduate students of law enter into either a Juris Doctor (JD) program or a Master of Law program (LL.M.). The JD is the United States law degree that signifies that the graduate has developed the analytical skills to assess a client's legal problems, and to advise and represent the client in the resolution.¹⁸ The LL.M. is usually pursued by practicing lawyers or those who have already earned a JD or its equivalent abroad.¹⁹ In LL.M. programs in U.S. law schools foreign students take a majority of their classes alongside J.D. students, providing for cross cultural discourse between the groups and enabling the LL.M. students to share experiences from their home country, which gives different perspectives to American born J.D. students.²⁰ International students describe the U.S. law school experience as very valuable and note that pursuing a degree abroad did not deter them from achieving their original career goals.²¹

The first hurdle in expanding graduate programs for foreign students in American law schools is eligibility. Typically, the ABA, which determines the accreditation status of U.S. law schools, sets the rules regarding criteria that schools use to evaluate the adequacy of the applicants to start in law school.²² Graduates from foreign law schools cannot obtain credits from their former titles unless they follow certain standards imposed by the ABA.²³ In order to be eligible for J.D. programs, the student must hold either a bachelor's degree from an institution in the U.S. or the equivalent degree from a foreign institution.²⁴

The ABA has three criteria for accepting foreign credits from students who have studied at international institutions.²⁵ They are: Criteria for Approval of Foreign Summer and Intersession Programs Established by

ABA-Approved Law Schools; Criteria for Approval of Foreign Semester and Year-Long Programs; and Criteria for Accepting Credit for Student Study at a Foreign Institution. The last qualification is the primary focus for the purposes of this analysis.²⁶

Standard 307 of the ABA Program of Legal Education provides that law schools may not grant credit toward the J.D. degree for foreign lawyers unless the studies of the foreign lawyer are approved accordingly with the ABA Rules of Procedure for Approval of Law Schools and the provisions related to the Program of Legal Education of the American Bar Association and the Florida Board of Bar Examiners.²⁷ Specifically, Standard 307 provides with regard to legal education that the objective of law schools is to maintain a "rigorous program" in order to prepare students for the bar examination, and the effective application of the ethical rules upon graduation.²⁸

A practical example of the application of the Standards and Rules of Procedure of the ABA, Chapter 3 of Program of Legal Education, is the Advanced Standing Program at St. Thomas University School of Law in which students may receive up to 30 hours of credit towards their J.D. for prior legal studies in another country.²⁹ Additionally, the Advance Standing students may also receive credit towards their J.D. for coursework completed as part of a graduate degree in law, such as a LL.M. at an ABA accredited law school.³⁰

The criteria for foreign students from the ABA provide a framework for law schools to grant students credit toward the J.D. degree for studies abroad.³¹ The ABA Standards for legal education require that law schools shall verify that the quality of the legal programs at the foreign law school were at least equal to that of an ABA accredited school.³² Once verified, it is inferred from the Standard 307 that the ABA seeks to provide a certain amount of independence and flexibility for a law school to design and promote its own programs and to permit study abroad consistent with the law school's mission, while maintaining a level of oversight of the school's program of legal education that is consistent with the role and scope of the Standards for the Approval of Law Schools.³

American law schools that are offering programs for foreign lawyers have an opportunity to engage in new curriculums involving all members of the law school community while addressing challenges inherent in diversification.³⁴ The administration and faculty of the law school have the responsibility for determining the

continued on page 22

Do You Have a Quick Question?

*Call us at: 772-462-2370
or email lucielaw@bellsouth.net*

continued from page 21

U.S. LAW SCHOOLS FACING NEW CHALLENGES

quality of the education that students receive during a study abroad educational experience.³⁵ A successful program will address the needs of foreign students while providing an immersive educational experience allowing students to integrate into the law school community and successfully achieve their academic goals. It's a tall order.

Paramount to the program is the ability of a student to take in and understand information in a meaningful way. Establishing a base line of English proficiency is the first step but it is not enough on its own.³⁶ Professors may utilize American idiosyncrasies, not realizing that foreign students may not be able to understand due to references that are only inherent in American culture.³⁷ Lack of comprehension can impact the overall value of the program to foreign students and prohibit interactions between students as well. English language studies, test taking and training in legal writing are services which law schools catering to a foreign market must develop.³⁸

Law schools offering programs for foreign lawyers must offer resources to educate foreign lawyers in philosophies underlying American code as the majority of foreign lawyers do not have previous experience with the American legal system.³⁹ The establishment of comparative law courses orienting students to global legal principles would help to facilitate this understanding.⁴⁰ Within the comparative law courses, Roman law should be one of the main components as Roman law principles are implicit in American legal rules of wills, property,

business associations, contracts, criminal law and evidence, among others.⁴¹ By making a comparison between Common law and Roman law principles, the foreign lawyer gleans a better understanding of the American legal doctrines.⁴² Furthermore, comparative law courses prepare students for the practice of international law which is essential to multinational corporations and interests.⁴³

It is clearly also integral to include better methods to train all students, not just foreign law students, to focus on passing the bar exam. This is comprised not only of teaching the differences between common law and civil law, but must consist of a holistic approach to all tested subject matter and, most importantly, must incorporate training in the different ways students are evaluated during law school and during the bar examination.⁴⁴ While not all foreign students will endeavor to sit for a bar exam in the U.S. this instruction is a necessary component of a fruitful legal education. Finally, the quality of life for foreign students must be appealing and law schools who court international applicants must foster a culture of inclusivity. Implementing an orientation program which gives foreign law students an opportunity to interact with other classmates and professors and also helps to facilitate their achievement in law school as well as with the bar exam would allow students to start their matriculation on the right foot.⁴⁵ Most law schools require orientation for first year students, but expanding programs specifically designed to meet the needs of foreign students will optimize the chance for long term success.

continued on page 23

PERSONAL INJURY / AUTO ACCIDENTS
SOCIAL SECURITY DISABILITY
BANKRUPTCY
WORKERS' COMPENSATION

Ft. Pierce
464-4600

Port St. Lucie
344-7770

Toll free
866-460-1990

HoskinsTurco.com

Personally serving
client needs in
the 19th Judicial Circuit

LAW FIRM OF
**Hoskins Turco
Lloyd & Lloyd**

We are a debt relief agency and attorneys. We help people file for bankruptcy relief under the Bankruptcy code. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

continued from page 22

U.S. LAW SCHOOLS FACING NEW CHALLENGES

Additionally, to assist foreign law students in working through any complications they may encounter in the early weeks and months of school, each U.S. law school should establish a mentoring program. Interested professors, third year American law students and alumni could be invited to become mentors and work one-on-one with a foreign student. The relationship would last throughout the year and would even start prior to the student arriving in the U.S. Reviewing resumes, assisting with school-related issues and course selection, helping with English and participating in social events are examples that J.D. advisors may provide for their graduate advisees.⁴⁶ To further assist foreign students, especially in the early stages of the program, each law school may find it useful to create a committee of students, professors, and staff to develop guidelines and checklists, as well as identify helpful community resources.

Shifting focus to insure that foreign students receive the same level of education as American students is a self-evident priority for schools looking to globalize. Not only does an international student body open the door to new revenue streams but it benefits the academic community as a whole. American law students and professors benefit from the opportunity to interact with foreign students. Since foreign students are often already lawyers or accomplished professionals in their own legal systems, they can provide insights and share what they have learned from their prior experiences.

IV. Conclusion

The way forward for U.S. law schools is to adopt a new model for an internationally focused education which embraces the appropriate balance of quality and cost. This is a great opportunity to make a much needed transformation in the legal education industry and to take into account globalization and modernization.⁴⁷ Historically America has been a place for immigrants from different cultures, who speak different languages, and who were raised in countries with different legal systems and governments.⁴⁸ Students are coming to America looking for a better quality of life, and also to exchange their ideas, experiences, and philosophies. They have legal education and are looking to practice law in America and abroad because they have the knowledge and experience to do it.⁴⁹ Offering a curriculum which highlights comparative and international law further educates American students to similarly take on the world. When law schools begin to redirect their energy to concentrate on the quality of education they are offering, qualified students will return, and the market for truly exceptional legal minds is global.

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

Leonard D. Pertnoy is a Professor of Law at St. Thomas University School of Law in Florida Practice, Professional Responsibility, and Real Estate Transactions. A.B., 1964, University of Vienna, Austria; J.D., 1969, University of Miami, B.A., 1966, University of Louisville.

continued from page 16

Hit 'em Again Harder: Star Athletic, L.L.C. v. Varsity Brands, Inc. et al.

The author observes that it was crucial to the outcome that Varsity Brands properly registered only the graphics and not the combination of graphics and uniform. This is also why attention should be paid very early to the copyright registration phase and not initially at the onset of litigation.

Adrienne B. Naumann has practiced intellectual property for almost twenty years in Chicago. She graduated from Chicago-Kent College of Law with high honors. She attended the University of Chicago where she received her bachelor's degree and the University of Illinois where she received her master's degree. Ms. Naumann provides trademark, copyright and patent applications as well as supporting areas of law. <http://home.comcast.net/~adrienne.b.naumann/IP/>

continued on page 26

CRIMINAL DEFENSE
LAW OFFICE OF BRIAN H. MALLONEE

**CREATIVE.
AGGRESSIVE.
RESULTS.**

RENAISSANCE FINANCIAL CENTER
DOWNTOWN FORT PIERCE

772.464.1991
www.stluciecriminallaw.com

THE FLORIDA BAR
WORLD CERTIFIED
CRIMINAL TRIAL

New South County Law Library Branch

We are proud to announce the opening of our new South County Branch of the Rupert J. Smith Law Library. Due to open in late October, the library is housed within the new Paula A. Lewis branch of the Public Library. Please watch for details such as the exact dates and hours the library will be open.



Cryptoquote

CP WPHV, RLFQDQWW, LMR
DBQZQFCQYQH, VPPZ
HBVYX, B YLXQ XP VP LHZ WQLGQ XYBC
AFQXXO CBVYX.

For the impatient, e-mail your answer to nora@rjsslwlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue.

LAW FIRM

Hayskar, Walker, Schwerer,
Dundas & McCain, P.A.,
(772) 461-2310

- GENERAL CIVIL PRACTICE,
- COMMERCIAL TRANSACTIONS
- TRIAL PRACTICE ● DOMESTIC RELATIONS,
- AND WORKERS COMPENSATION

U.S. LAW SCHOOLS FACING NEW CHALLENGES

(Endnotes)

1 See the ABA's list of Post-J.D. Programs available at <http://www.abanet.org/legaled/postJ.D.programs/postJ.D.-school.html>.

2 See Best Graduate School available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools>.

3 *Id.*

4 *Id.*

5 Carole Silver, Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers, 14 CARDOZO J. INT'L & COMP. L., 143, 145 (2006).

6 See Carole Silver, The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession, FORDHAM INT'L L. LAW J. 1039, 1039 (2001).

7 Luz Estella Nagle, Maximizing Legal Education: The International Component, 29 STETSON L. REV. 1091, 1091 (2000).

8 Carole Silver, *supra* note 77, at 156.

9 *Id.*

10 *Id.*

11 *Id.*

12 Interview with Alba Liliana Silva de Roa, Dean Saint Bonaventure University Law School, Cali, Colombia South America.

13 *See id.*

14 *Supra* note 84

15 *Id.*

16 Mindie Lazarus, et al., *Foreign Attorneys in U.S. LL.M. Programs: Who's In, Who's Out, and Who They Are*, IND. J. GLOBAL LEGAL STUD. 3, 25 (2015).

17 *Id.*

18 http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2014_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf

19 *Id.*

20 *Supra* note 77 at 156.

21 *Id.* at 145

22 *See generally,*

(describing the standards of ABA for foreign lawyers, for example Standard 307 states that: "(b) The total credits for student participation in such studies or activities may not exceed one-third of the credits required for the J.D. degree.

23 *Id.*

24 *Id.*

25 Douglass G. Boshikoff, *The Foreign Law School Dilemma*, ABA. 32, 33 (1977) (discussing criteria for foreign lawyers to become American lawyers).

26 ABA PROGRAM OF LEGAL EDUCATION STANDARD § 307 (2016) provides:

Standard 307. STUDIES, ACTIVITIES, AND FIELD PLACEMENTS OUTSIDE THE UNITED STATES

(a) A law school may grant credit for (1) studies or activities outside the United States that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council and (2) field placements outside the United States that meet the requirements of Standard 305 and are not held in conjunction with studies or activities that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council.

(b) The total credits for student participation in such studies or activities may not exceed one-third of the credits required for the J.D. degree. (4) The registry must be maintained in a secure database that is designed to provide authorized health care providers with immediate access to the registry at all times. (5) The attorney general may adopt rules to implement the creation and maintenance of a health care declaration registry and for the creation and maintenance of the statewide education and outreach program created in 50-9-505.

27 ABA PROGRAM OF LEGAL EDUCATION STANDARD § 301 (2016) (stating the objectives of the legal education).

28 *Id.*

29 *See generally,* ST. UNIVERSITY SCHOOL OF LAW, available at <https://www.stu.edu/law/admissions/foreign-attorneys> explaining Foreign Attorneys program:

As an institution that prides itself on the diversity of its student body, St. Thomas Law is proud to offer an accelerated law program for foreign attorneys. Foreign attorneys may complete their legal studies in an abridged program and receive a Juris Doctor degree

U.S. LAW SCHOOLS FACING NEW CHALLENGES

after roughly two years (or 60 credits) of consecutive study at St. Thomas Law. St. Thomas Law may accept up to 30 credits as “advanced standing credits” from any student who engaged in legal studies at an academic institution in another country and obtained the terminal academic degree required for the student to practice law in said country. These credits are applied toward St. Thomas Law’s 90 credit hour graduation requirement, thus shortening the Juris Doctor Program for Advanced Standing Students to approximately two years.

30 See FLORIDA INTERNATIONAL UNIVERSITY, available at <https://law.fiu.edu/international-grad/jd-foreign-lawyers/>

31 *Id.*

32 *Id.*

33 *Id.*

34 Barbara D. Barth, Comment, American Legal Education: Some Advice from Abroad, 23 BUFF. L. REV. 681, 690 (1974). Barth mentioned that

[I]ncreased mobility among the peoples of the world and the “position that the United States has suddenly come to occupy in world affairs” have created a greater need for us to understand the legal structure of other nations and the legal mentality of those people who represent these nations on the diplomatic scene. The civil law system alone governs three-fourths of the world.

35 *Supra* note 103.

36 Luz Estella Nagle, Maximizing Legal Education: The International Component, 29 STETSON L. REV. 1091, 1112 (2000).

37 *Id.*

38 *Supra* note 89 at 7.

39 Silver, *supra* note 79 stating

Law schools are an additional site of interaction for lawyers trained in different national systems, and U.S. law schools are attracting increasing numbers of foreign lawyers in their one year LL.M. degree programs. These programs have proliferated in recent years, and at the same time the number of foreign lawyers enrolling in U.S. law schools for the LL.M. degree has mushroomed. A U.S. experience is considered valuable, and in some circles even required, for foreign lawyers wishing to participate in the international legal services market.

40 See generally *supra* note 107 (describing the importance to include Roman law in American law schools or at least a comparative course that provide the differ-

ences between Common law and Roman law: “Also there is particular virtue in using Roman law as an object of comparative study in order to give the common law student a better perspective of his own system”). *Id.*

41 *Id.* at 690.

42 *Id.*

43 Anthony A. Tarr, *Legal Education in a Global Context*, 36 U. Tol. L. Rev. 199, 201 (2005).

44 *Id.*

45 *Supra* note 89

46 *Id.* at 7.

47 Nagle Luz Estella, *supra* note 109, at 1114.

48 *Id.*

49 *Id.*

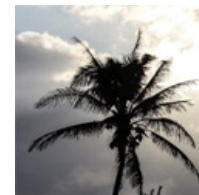


continued from page 23

Hit ‘em Again Harder: Star Athletic, L.L.C. v. Varsity Brands, Inc. et al.

1. The Court stated that its statutory interpretation of 17 U.S.C. sections 101, 102(a) and (113(a) was consistent with *Mazer v. Stein*, 347 U.S. 201, 214 (1954).

2. The Court did not address whether Varsity Brands’ designs were sufficiently original for copyright protection, or whether any other prerequisites of a valid U.S. copyright registration had been fulfilled.



Do You Have a Quick Question?

Call us at: 772-462-2370
or email lucielaw@bellsouth.net