Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Summer 2021 — Volume 29 • No. 3

TESLAW.ORG

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CHAIR'S REPORT

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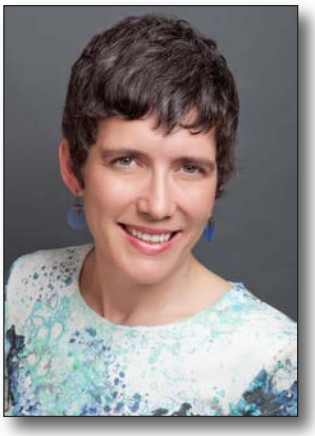

Melissa G. Thrailkill
Chair 2020-2021

Somehow 2020 felt like both the longest year ever, as well as the shortest year ever. I write this as I head into my final weeks as Chair of the Texas Entertainment and Sport Law Section. As I approach the end of my term, the contents of this journal have made me realize that I've come almost full circle in terms of addressing current issues as they affect the sports and entertainment worlds, and lawyers' role in it all.

This journal includes an article on "cancel culture," and, in all honesty, the author of the article and I have different opinions on the matter. I, along with the journal's editors, however, agreed that our difference of opinions should not interfere with our decision to publish. Instead, because this is not a political journal and we strive not to publish overtly political articles, we all worked to focus on the substance and ensure that it brought forth a meaningful discussion for our readers. I believe we struck that balance, and I appreciate the author working with us on that goal.

Most assured, some readers will agree with the author's point of view, and other's will not. I for one, do not necessarily believe that we have a problem with "cancel culture," in the United States, and to the degree that I would admit we do, it would be to point out that all sides of the political spectrum engage in it. But, regardless of my beliefs on the topic, it is a topic that undoubtedly dominates much of our media and political debates, as of late. Usually, in the middle of these debates on cancel culture are athletes and entertainers. Historically, this is nothing new. The sports and the entertainment industries are at the center of Americans' lives, and they are made up of individuals with their own beliefs and ideas on right and wrong. When popular athletes or entertainers use their position to take a stand on a social issue, they must both be ready to stand by it and their influence, as well as face the criticism that will surely follow.

As lawyers, we have the unique education, ability, and position to have more nuanced discussions on the topic, even if we sometimes disagree on the politics of it. This is what I mean by coming full circle. In one of my last acts as Chair of this Section, I had to decide if this journal would dip its toes into the waters of the cancel culture debate, knowing that it's one that sparks lots of emotions. At the same time, one of my first acts as Chair last year was to address this Section in regard to George Floyd's murder and the protests that sparked a movement and incredibly heated discussions on race. In the letter, I reminded us how much the sports and entertainment worlds bring us together, as well as the role we lawyers play in the design and function of our legal and political systems and lives.

Also, coming full circle, this time last year, the Board of the Directors of the State Bar of Texas were holding public meetings concerning comments made by State Bar President Larry McDougal – comments that concerned his opinion on the Black Lives Matter movement, as well as apparent acceptance of police violence. During those discussions, some lawyers called for his resignation, while others decried the "woke mob" and "cancel culture." One particular discussion focused on whether or not the State Bar should begin requiring continuing education on implicit bias for lawyers. But, even in that debate, the emotions of "cancel culture" and belief that it would be "liberal indoctrination" prevented, in my opinion, a more meaningful discussion of the real issue of implicit bias. I found it troubling that lawyers turned the issue into a such a political debate that we missed the opportunity to listen to each other, as well as face the very real existence

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CHAIR'S REPORT

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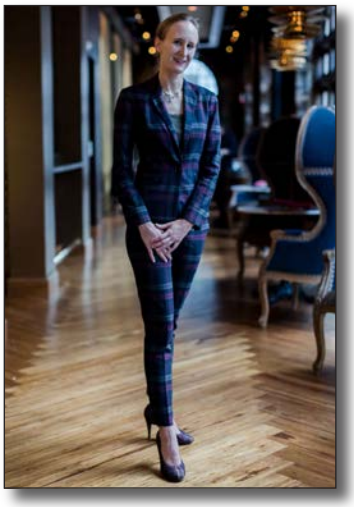
of implicit bias. Instead, during these discussions, lawyers regurgitated the talking points of the media talking heads, which can be good for getting viewers and scoring social media points but aren't always very beneficial for promoting meaningful discussions needed for progress, healing, and problem solving.

As lawyers, we are trained to understand and pick up on peoples' biases. Indeed, recognizing peoples' biases can make the difference in winning or losing at trial, or closing that deal for a client. We are a profession that is supposed to get into the nitty gritty of issues. While it may be helpful for advocacy to paint issues as black and white, it doesn't always bring about a larger understanding over time and tends to put everyone in their separate corners. I believe the article in this issue opens the door to discussing whether, or how, cancel culture is a problem and, regardless, how lawyers can protect their clients when the marketplace of ideas rejects their tweet. While I may not agree with everything, it does not mean the door should be closed to discussion.

It has been an honor serving as the Section's Chair during a year like 2020. Thank you for the opportunity, and I hope that, as a Section, we can continue to be willing to have the hard and tough talks 2020 brought about.

Sincerely,

Melissa G. Thrailkill
Chair 2020-2021
Entertainment & Sports Law Section
State Bar of Texas



Erin Rodgers
Editor
Texas Entertainment and Sports Law Journal

Editor's Letter

As we start to emerge from our houses again, it's interesting to see the ways in which things have changed – and the ways they haven't. Yesterday, I participated in a Houston arts advisory discussion regarding the future of digital content: will everyone abandon their livestreams as they head back to venues, or will they stick around, in some capacity?

Regardless, most of us spent the last year socializing and consuming culture through screens. We were also captive audiences to news from all sources, as we consumed information on the COVID crisis, the election, and the Black Lives Matter movement (perhaps making exceptions to our own strict COVID protocols to attend protests).

This issue of the journal includes articles on two timely and difficult topics – sexual assault, and "cancel culture." Even prior to the pandemic, our society had begun to hold people accountable, and to stumble toward something more equitable for everyone. Our sudden involuntary house arrest gave us nothing but time to focus on these topics; to read and to learn. That process is frequently messy and polarizing. Sometimes it's difficult to divorce law from politics, and these days that seems especially true. I only hope that as we finally have these tough conversations, that we end up somewhere better once the dust settles.

If you are interested in submitting articles for potential publication, please email me at erin@rodgersselvera.com. We are always seeking long-form content for the journal, but we also accept case notes and shorter articles for the newsletter.

As always, thanks to our publications committee - Stephen Summer and Adam Mandell – for their assistance, and to Steven Aguilar for compiling the bibliography of entertainment cases.

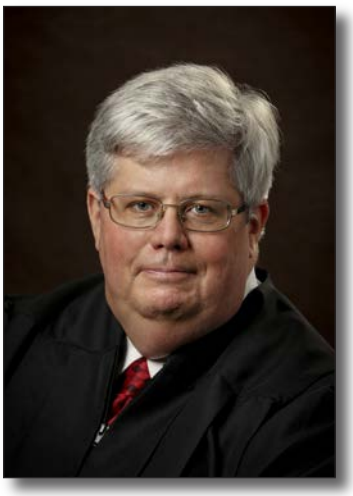
Hopefully we'll see you this fall at the Entertainment Law Institute.

Erin Rodgers

TESLAW Journal Editor

STEERING CLEAR AND FIGHTING BACK IN THE CANCEL CULTURE AGE

By John G. Browning



Seemingly everywhere one looks nowadays, someone in the sports and entertainment world is being "canceled." Gina Carano, one of the supporting stars of Disney Plus' smash hit "The Mandalorian," was abruptly fired by Lucasfilm/Disney after a number of controversial tweets. The actress and former MMA fighter had been as combative online as her Cara Dune character was on screen, tweeting about her beliefs regarding supposed election fraud, the transgender community, and the wearing of masks during the COVID-19 pandemic.[1] The tipping point for Lucasfilm was apparently a tweet that equated criticizing those with conservative views with the intolerance that accompanied the rise of Nazism in 1930s Germany. Strangely enough, the studio executives elected to overlook the controversial—but progressive-leaning—tweets by Carano's titular co-star, Pedro Pascal, who had compared the U.S. government's treatment of detained immigrants on the border to Nazi Germany's concentration camps.[2]

Nick Cannon was fired in July 2020 by ViacomCBS over "hateful speech" involving anti-Semitic comments.[3] But that firing was only for his VH1 and MTV show, "Wild 'n Out," a post he returned to in early 2021 while continuing hosting duties on other shows like Fox's "The Masked Singer." *Harry Potter* author J.K. Rowling stoked the ire of the Twitterverse with comments that were perceived as insensitive of the transgender community.[4] And while merely identifying as politically conservative in recent years has been known to stifle some actors' careers or foment criticism for athletes, it would seem that even something as outrageous as a past appearance in blackface can be shrugged off with a "heartfelt" apology—as long as you're a progressive-leaning talk show host like Jimmy Fallon or a Democrat governor like Virginia's Ralph Northam.[5]

Indeed, cancel culture doesn't always make much sense. This could be because society's online perception of celebrities doesn't always make sense either. Psychology professor John Suler, author of *Psychology of the Digital Age: Humans Become Electric*, theorizes that "people unconsciously perceive the celebrity as being like some significant other in their lives. They then transfer their feelings about that person, often strongly negative ones, onto the celebrity."[6] On social media, celebrities nurture the public's illusion of intimacy by providing a lens into their private lives—engaging in the latest TikTok challenge, Instagramming their dates, breakups, and even miscarriages, etc. With the intense reliance on social media relationships and communications, access to what celebrities say and have said on their social media allow virtually anyone to investigate and find a public figure's past.

Clients in the sports and entertainment world need to know the very real risks that an online misstep (or past online mistakes) can bring. In as divisive a society as we currently live, that misstep can be as extreme as racist or sexist tweets, or as benign as being too open about one's political leanings, such as choosing to kneel or to stand during the national anthem. In fact, as the following case study illustrates, it doesn't even matter if you've said or done nothing wrong; like most mobs, the Twitter mob frequently claims truth as its first casualty.

John Browning is a Partner at Spencer Fane, LLP, where he handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law, and general negligence matters. Prior to rejoining Spencer Fane, Justice Browning served on Texas' 5th Court of Appeals. Justice Browning has extensive trial, arbitration, and summary judgment experience and has represented companies in a wide variety of industries throughout Texas. Justice Browning received his Bachelor of Arts with general and departmental honors from Rutgers University in 1986, where he was a National Merit Scholar and member of Phi Beta Kappa. He received his Juris Doctor from the University of Texas School of Law in 1989. He is the author of the books The Lawyer's Guide to Social Networking, Understanding Social Media's Impact on the Law, (West 2010), the Social Media and Litigation Practice Guide (West 2014); Legal Ethics and Social Media: A Practitioner's Handbook (ABA Publishing 2017); and Cases & Materials on Social Media and the Law (forthcoming, Carolina Academic Press). An award-winning author, Justice Browning has published hundreds of articles for practitioners and the public, as well as more than forty academic articles. Justice Browning's work has been cited in over 400 law reviews, numerous books, treatises and practice guides in at least 11 states, and by courts in California, Texas, New York, Florida, Illinois, Tennessee, Washington D.C., and Puerto Rico. He has been quoted as a leading authority on social media and the law by such publications as The New York Times, The Wall Street Journal, TIME magazine, The National Law Journal, ABA Journal, Law 360, and Inside Counsel magazine, and he is a recurring legal commentator for the NBC and FOX news stations in Dallas. Justice Browning serves as an adjunct law professor at SMU Dedman School of Law, Texas A&M University School of Law, and Texas Tech University School of Law. He is the immediate past Chair of the Computer & Technology Section of the State Bar of Texas.

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Steering Clear and Fighting Back In the Cancel Culture Age

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DOUG ADLER: A CASE STUDY

In the sports world, athletes at virtually every level have gotten into trouble as a result of comments on social media. General managers have as well, such as when Philadelphia 76ers GM Bryan Colangelo resigned after the discovery of anonymous accounts on Twitter (purportedly opened by Colangelo's wife) that were used to criticize players on the NBA team.[7] Even owners aren't immune from drawing heat for their tweets, as Dallas Mavericks owner Mark Cuban and Miami Heat owner Micky Arison can readily attest.[8] And sports journalists like former ESPN commentator Jemele Hill have found out the hard way that there is a price to be paid for courting controversy on social media.[9]

But what about those who had no ill intent, and whose innocent comments resulted in being pilloried by the "social media mob"? Consider the case of former ESPN tennis analyst Doug Adler. The 59-year-old Adler was providing commentary for ESPN during the January 2017 Australian Open, specifically calling a match between Venus Williams of the U.S. and Stefanie Voegele of Switzerland.[10] Adler, a former All-American tennis player in singles and doubles during his collegiate days at USC, had played the professional tour. He was also a seasoned veteran of the broadcast booth, having been hired by ESPN in 2008.[11] During the Williams-Voegele match, Adler commented on Williams' aggressive rushing of the net, pressuring Voegele during the Swiss player's service games.[12] Such play involves elements of both surprise and aggression, often "sneaking" up to the net behind an approach shot that enables the receiver to control the net and hopefully end the point.[13] After Voegele had missed a first serve, Williams attacked the net after returning her opponent's weaker second serve. Adler commented, "She misses a first serve and Venus is all over her. You see Venus move in and put the guerilla effect on, charging."[14]

Unfortunately for Adler, the word he used innocently and correctly—"guerilla"— is a homonym. Some tennis fans watching at home believed that the word they heard, disregarding context, was "gorilla." And given that Venus Williams is not only a seven-time Grand Slam singles champion with four Olympic gold medals and 41 WTA tour titles, but also an African American who has endured racism during her illustrious career, the use of a term that some listeners associated with a simian reference spurred a handful of people to speak up indignantly on Twitter.[15] But the spark of controversy wasn't fanned into full-blown flame until freelance tennis writer Ben Rothenberg noted the activity in the Twitterverse and entered the fray.[16] It's not clear whether Rothenberg ever actually watched and heard Adler's coverage of the match, but that didn't stop the *New York Times* stringer from tweeting a condemnation of Adler, labeling the broadcaster a racist for his "appalling" act of calling Venus Williams a "gorilla" and stating, "Horrifying that the Williams sisters have to be subject to this in 2017."[17] Rothenberg's tweet, cloaked with the reputation and respectability of the *New York Times*, resulted in a "Twitter mob" frenzy.[18] The online backlash spurred by a source as impeccable as the Gray Lady herself drew a swift reaction from ESPN.[19]

According to Adler, he only learned of the controversy 24 hours after the broadcast, when ESPN replayed the tape for him and his broadcast partner and asked if they noticed anything unusual.[20] Neither did.[21] The network authorities then explained about the viral controversy; Adler said, "They told me the Twitter world had basically started labeling me a racist."[22] His employers at ESPN provided Adler with an apology to issue on air, in which Adler said he "simply and inadvertently chose the wrong word to describe her play," and said of Williams, "She's a great champion and I respect her immensely."[23] Adler was relieved of further on-air duties during the Australian Open, and he was led to believe that this remedial action, combined with the apology, would end the matter.[24] Instead, ESPN fired him the next day, saying "Doug Adler should have been more careful in his word selection."[25]

It's important to note the role of Ben Rothenberg and the lapse in responsible journalism. Plenty of people defended Adler, recognizing that he used the word "guerilla" and that his comments were not racist but were taken out of context; these included former New York City mayor David Dinkins, who is African American.[26] Rothenberg was asked if Adler could have said "guerilla" instead; in response, Rothenberg (now stuck with the fact he helped fire Adler) simply responded: "Doubtful!"[27] It's hardly "doubtful" to objective listeners of the audio (note: ESPN has since scrubbed all video and audio of the incident).[28] And, as some commentators have noted, journalists, whose job is to be objective, should exercise at least a modicum of due diligence, perhaps even asking a respected veteran tennis analyst what he actually meant by his remarks, and contemplating that his language was not focused on race, but rather on style of play.[29]

Yet that's not what Ben Rothenberg did. Rothernberg himself has been no stranger to controversy; after a 2015 article of his bodyshaming Serena Williams for her "mold-breaking muscular frame" that her more slender white rivals on the tour "choose not to" emulate, it caused such a backlash for a tone critics called "racist and sexist" that the *Times* was compelled to address it in an editorial.[30] And even a cursory review of Rothenberg's Twitter history reveals that Rothenberg himself has tweeted comparisons of former Wimbledon champion Andy Murray to a "gorilla" and Roger Federer to an "ape." And, as opposed to having watched the match and its commentary in context, Rothenberg admitted in a January 25, 2017 tweet that he "reacted to the clip someone had posted on Twitter and I stand by my original reaction."[31]

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Title IX and Sexual Assault

By James A. Johnson

Colleges and universities over the past several years have experienced a plethora of litigation involving student-on-student sexual assaults.[1] The majority of these suits assert Title IX causes of action. Title IX of the Education Amendments of 1972 was designed to provide equal access to *women* in higher education and *sports.* It provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[2]

James A. Johnson is an accomplished trial lawyer. His primary area of concentration is serious Personal Injury, Insurance Coverage under the Commercial General Liability policy, Sports & Entertainment Law and Federal Criminal Defense. Jim is an active member of the Massachusetts, Michigan, Texas and Federal Court Bars. He can be reached at www.JamesAJohnsonEsq.com

The U. S. Department of Education Office of Civil Rights has used the statute to encourage federally funded education institutions to investigate and adjudicate sexual harassment and sexual abuse. The Department of Education made significant changes to Title IX's implementing regulations that became effective on August 14, 2020.[3] The revisions modify the standards and procedures for investigating claims of sexual harassment and sexual assault on schools receiving federal funds. Attorneys are now allowed to question witnesses at hearings.

Definition of Sexual Harassment

Another area of change in the regulations is the definition of sexual harassment. Previously defined as unwelcome conduct that is severe, pervasive or persistent enough to interfere or limit a student's ability to participate in school services, activities or opportunities. It is now defined as *quid pro quo* sexual harassment, certain types of sexual assault, and unwelcome conduct that is so severe, pervasive and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity.[4]

Definition of Actual Knowledge

The definition of actual knowledge is another change. Institutions of higher education have actual knowledge *when notice of sexual harassment or allegations of sexual harassment is brought to the attention of the Title IX Coordinator or any official of the institution who has the authority to institute corrective measures on behalf of the institution.*[5]

To avoid potential conflicts, the regulations prohibit the investigator from being the decision maker or Title IX coordinator. Also, the standard of evidence for adjudication of Title IX complaints has changed. Previously the standard mandated by the Department of Education was the preponderance of the evidence. The regulations now permit the use of either the preponderance of the evidence or clear and convincing standard. The institution must adopt one of the two standards and use it consistently regardless of the origin of the claim.[6]

University Process

Typically, at the college level a ***student-complainant*** alleges that he or she was sexually assaulted by a fellow ***student-respondent***. University investigators determine if the respondent violated school policy. This student conduct investigation is separate from a criminal investigation. If it is determined by a preponderance of evidence, after a hearing that the student-respondent violated university policies, sanctions are issued. In most cases, the respondent can appeal the decision at the university level. As of August 14, 2020 under Title IX regulations promulgated by the U.S. Department of Education now allow attorneys to question witnesses at hearings.

A common claim alleged under Title IX in federal court is the ***deliberate indifference claim***. The crux of these suits are that the university was deliberately indifferent, had an official policy of deliberate indifference creating a heightened risk of sexual harassment to the plaintiff.[7] For liability to attach the university response must be unreasonable, deliberately indifferent, the student-respondent must have been under the university's control, the response must have effectively precluded the student access to an education, and the university must have had ***actual notice*** of the alleged harassment or assault.[8]

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Title IX and Sexual Assault

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In Rebecca Foster v Bd. of Regents University of Michigan et al, the 6th Circuit Court of Appeals found no deliberate indifference in a peer-on-peer sexual harassment claim. Rebecca Foster suffered peer-on-peer sexual harassment while enrolled in the University of Michigan Executive MBA program. The University of Michigan ratcheted up protections for the plaintiff from a no-contact order, that the harasser stay in a separate hotel to an order not to attend graduation. The court stated that it is not the university's job to do the impossible – to purge its school of actionable peer harassment.[9]

Title IX

In federal court lawsuits under Title IX are commenced when respondents are found to have violated school sexual assault policies. In this context, many federal courts recognize two different Title IX causes of action: ***erroneous outcome and selective enforcement.***[10]

Erroneous Outcome Claims

Erroneous outcome claims require a plaintiff to prove:

(1) the disciplined student was innocent and wrongfully found to have committed the offense and

(2) that gender was a motivating factor in imposing discipline.[11]

To prove sex bias, the plaintiff may refer to statements by university officials or members of the disciplinary tribunal reflecting bias[12] and that discrimination was a motivating factor for the university's actions.[13] However, where the university disciplinary decision was based on a credibility determination a claim of erroneous outcome will be dismissed on summary judgment.[14]

Selective Enforcement Claims

This claim is based on the plaintiff's allegation that the severity of the penalty or decision to initiate the proceeding was affected by the student's gender. In short, the plaintiff must show that a similarly situated comparator was treated more fairly.[15]

Conclusion

A bevy of student-complainants in federal court are asserting a *heightened risk claim* under Title IX alleging that institutions had an official policy of deliberate indifference to reports of sexual misconduct. Thus, the plaintiff was harassed as a result. A university that receives federal funds may be liable for its response to student-on-student sexual harassment or assault. However, ***actual notice*** and deliberate indifference by the university must be proven for liability to attach constituting intentional Title IX violation.

The U.S. Department of Education regulations effective August 14, 2020 set out university procedures in cases involving student-on-student sexual assault. See C.F.R. Section 106. Also, attorneys are now permitted to question witnesses at university hearings and in some cases conduct cross examination.

It is important that counsel read the cases in his or her jurisdiction to glean the application of Title IX litigation. This area of law is developing rapidly.

ENDNOTES

1 *Doe v Brown Univ., 166 F. Supp 3d 177, 180 (D.R.I. 2016), Doe v. Univ. KY*, (6th Cir Aug 19, 2020) - standing to bring an alleged deliberate indifference claim although not technically enrolled. *Decision limited to the unique facts in this case.*
2 Title IX, 20 USC Section 1681 et seq.
3 34 CFR 106 et seq.
4 34 CFR 106.30 (a)(1)-34 CFR 106.30 (a)(3).
5 34 CFR 106.30 (a).
6 34 CFR 106.
7 *Karasek v Regents of Univ. of Calif.*, 956 F. 3d 1093, 1112 (9th Cir. April 20, 2020); *Lozano v Baylor Univ.*, 408 F. Supp. 3d 861, 882-883 (W.D. Tex.2019) - denying a motion to dismiss on heightened risk claim; *Davis v Monroe County Bd.*, 526 U.S. 629 (1999).
8 *Lopez v. Regents of Univ. of Calif.*, 5 F. Supp. 3d 1106, 1122 (N.D. Cal. 2013). *Kollaritsch v Michigan State Univ. Bd. of Trustees*, 994 F. 3d 613, 619-24 (6th Cir 2019)-student must plead & ultimately prove that school had actual knowledge of actionable sexual harassment that was not found here.

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Compiled by Stephen A. Aguilar, Senior Counsel at Michael Best & Friedrich LLP

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In the aftermath, no one at ESPN defended Doug Adler. None of their well-known tennis greats providing commentary, like John McEnroe or Martina Navratilova, did either. In fact, Navratilova even piled on, saying rather incredibly that "[t]here is no such thing in tennis lingo as a guerilla effect, charging, etc."[32] It's an astonishing statement coming from a Hall of Famer, whose aggressive serve and volley style of play was all about charging and sneaking up to the net to end the point more quickly. The *New York Times*—a media outlet whose 2017 advertising included the statement "The truth is more important now than ever"—never followed up on Rothenberg's story, including neither refuting or clarifying the questionable claim of racism.

Was the rush to judgment a reasonable one? In reality, use of the term "guerilla tennis" is a rather common one. In 1995, Nike ran what remains one of the most successful ad campaigns in the history of tennis, entitled "Guerilla Tennis."[33] The commercials featured superstars Andre Agassi and Pete Sampras hastily erecting a net and playing on a busy street before authorities arrive to shut them down.[34] Venerable tennis journalist Peter Bodo has used the term on multiple occasions.[35] Even the New York Times itself ran a 2004 piece entitled "Guerilla Tennis," on the challenges of finding courts in urban spaces.[36] *Sports Illustrated* ran a 2012 article on "Guerilla Tennis"; its author was Courtney Nguyen—also known as the tennis podcast partner of one Ben Rothenberg.[37]

If a "responsible" tennis journalist like Rothenberg wasn't familiar with the common term "guerilla tennis," his podcast partner could have explained it to him. ESPN never acknowledged the rather common use of the phrase "guerilla tennis," but then again, it has what appears to be a double standard when it comes to racially troubling statements. An expendable "B team" analyst like Adler can be fired for an unfounded accusation, but when tennis legend Chris Evert referred to Asian tennis player Naomi Osaka's slicing play as a "chop-suey shot" during the final of the 2019 Australian Open, ESPN was silent in the face of numerous enraged tweets.[38] In a further show of hypocrisy, ESPN was silent when Steve Harvey called the Golden State Warriors "gorillas" during an ESPN interview during the 2018 NBA playoffs.[39]

"Gorilla" (the African primate) and "guerilla" (the term used to describe unconventional, hit-and-run military tactics, originating during the Peninsular War in 19th century Spain) are certainly homonyms. So how much damage could a misunderstanding over one homonym cause when the digital pitchforks and torches of social media are amplified by sensational journalism? Doug Adler became a pariah overnight, losing not just his ESPN gig but all other employment as well. Eight years of calling Wimbledon for ESPN, nine years of covering the French Open for the Tennis Channel, ten years of contributing to the world feed of the U.S. Open for the United States Tennis Association, as well as other assignments—all quickly evaporated.[40] Adler said, "I've been told by people in the tennis business that I will never be hired again. I've been blackballed as a racist by a ludicrous claim . . . It's surreal, a bad dream."[41] The stress of the nightmarish situation contributed to a heart attack that nearly killed Adler.[42]

Adler pursued the only solution that seemed available to him: litigation. In 2017, Adler filed a wrongful termination suit in Los Angeles Superior Court against not only ESPN but vice presidents Mark Gross and Jamie Reynolds individually. The suit asserted not only employment-related claims but claims for both negligent and intentional infliction of emotional distress, as well. The suit alleged that Adler had been fired after using "a perfectly apt tennis term" in "a perfectly apt moment to describe Venus' brilliant, aggressive, dominating play that day."[43] It went on to claim that "ESPN took the easy way out and bowed to the Twitter universe of haters and those ignorant of tennis," resulting in the loss of Adler's "job, his broadcast career, and his reputation over this single remark."[44] Adler's then-attorney, David Ring, summarized the case as "not only political correctness gone overboard, but also a cowardly move that ruined a good man's career."[45]

ESPN fired back, arguing that, regardless of whether Adler said "guerilla" or "gorilla," his claims had no merit.[46] In 2018, it filed a motion for summary judgment, arguing that Adler was a freelance contractor and not an employee.[47] Of the analyst whose services it had used since 2008, ESPN said it "had no contractual obligation to put Adler on the air; it's obligation was to pay him for seven days of possible work."[48] Since it didn't have a contractual obligation to retain Adler for a future announcing assignment, ESPN maintained "no 'cause' was needed" to terminate him.[49] ESPN added that even if it did need to show cause, "Adler's controversial comment supplied it," because "he chose his words poorly and provoked a public outcry that ESPN had to take steps to quell, to stem criticism of Adler and ESPN itself and return the focus to the competition on the court."[50] In its summary judgment, to demonstrate the allegedly widespread outcry over Adler's choice of words, ESPN cited roughly 100 tweets.[51] However, many of those tweets—including the one that Ben Rothenberg first noticed and retweeted—originated from the same single Twitter user, identified as "pinacocoblog."[52]

Eventually, Adler switched attorneys. His new attorney, James Bryant, sought to amend the complaint in order to add new causes of action for defamation and for fraudulent and negligent representation.[53] He also sought to add two additional defendants: ESPN senior director Don Colantino and ESPN vice president of corporate communications Mike Soltys.[54] However, Judge Elizabeth Feffer denied the plaintiff's

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request.[55] The case's October 2018 trial date was moved to April 2019, but, suddenly, in February 2019, a settlement was announced.[56] Adler confirmed that "I am no longer pursuing legal claims against ESPN . . . at this point I believe it is in my best interests to move forward and to focus on the future. I look forward to my employment with ESPN."[57] For an undisclosed money settlement, and the apparent promise of a return for Adler to the broadcast booth, the matter was resolved.

Why did ESPN reverse course? One explanation could be the change in ESPN's leadership when Jimmy Pitaro became the network's president in March 2018 and promised to change ESPN's culture to focus on "less politics and more sports."[58]

But what initially sounded like good news would be short lived. Yes, Adler did return to the broadcast booth for ESPN, calling two college tennis matches on regional networks.[59] After that—crickets. Because the terms of his settlement with ESPN are confidential, it is not known how much Adler actually received or the extent of ESPN's obligation to reinstate him. What is known is that Adler's other broadcasting gigs have not returned, and he was absent from ESPN's 2021 Australian Open coverage.[60] He was unfairly branded a racist, and the stigma apparently persists.

If it weren't for the very real cost in terms of someone's reputation and career, this "guerilla/gorilla" debacle would be relegated to that section of the theater of the absurd reserved for incidents where ignorance and overactive political correctness have intersected. This theater includes such episodes as the forced resignation in 1999 of Washington, D.C. mayoral staffer David Howard for using the word "niggardly" to describe his administration of a government fund.[61] The word may mean "stingy" and have its etymological roots in Scandinavia, but by sounding "like" a racial slur, it was enough to cost Howard his position.[62] Another example is Hallmark Cards' pulling an outer space-themed graduation card with a voice chip that referred to the celestial phenomenon of black holes, because the then-president of a NAACP chapter complained that is sounded like "black hos," and was therefore racially insensitive.[63]

Yet another example of ignorance and political correctness overtaking fact can be found in the 2015 demand by "woke" students at Pennsylvania's Lebanon Valley College that administrators rename the school's Lynch Memorial Hall because of the word's "racial connotations."[64] The students were apparently unaware of the fact that the building was named for former college president Dr. Clyde Lynch and that it had nothing to do with lynchings or racial violence.

CONCLUSION—POINTERS FOR ADVISING SPORTS AND ENTERTAINMENT CLIENTS ON AVOIDING SOCIAL MEDIA DISASTERS

As the cautionary tale of Doug Adler shows, it's no comfort to be right when you're besieged by the digital torches and pitchforks of the Twitter mob. And given how vital a tool social media has become for building and expanding one's brand, simple avoidance of social media platforms is not an option. But there are steps your clients can take to head off reputational disasters.

First, exercise caution over who has access to the client's social media login credentials. While hacking and employee sabotage are legitimate concerns, so is the inadvertent post or like by a well-meaning assistant/friend/family member/significant other. Practice good digital hygiene in order to avoid things like accidentally "liking" an inappropriate post, tweeting a personal message from a professional or official account, or unintentionally making an offensive statement.

Second, as early as possible in your client relationship, take a digital inventory of the client's social media history. Past tweets or posts that are offensive (or can be construed as such) can be deleted, and, if necessary, an entire account can be deactivated. Bear in mind, this is no guarantee that offensive or controversial content hasn't already been preserved somewhere, by someone; screenshots always seem to pop up when least welcome. But every ethics opinion that has addressed the issue of counseling one's client to "clean up" her social media profile has blessed the practice, so long as anything that is or could be evidence in a proceeding is digitally preserved.[65]

The list of athletes, actors, and entertainers who have been vilified in the press for past online statements—in some cases dating back to their teens—is unfortunately a long one. In addition to counseling clients about their past online escapades, it's always advisable to remind them of the potential consequences of their current social media conduct. If the client's budget and media presence justifies it, consider employing a social media manager.

Finally, while you and your client may not be able to prevent a controversy from occurring in the first place, you can plan ahead by creating a crisis communication plan. With a plan already in place, and a public relations consultant ready to work with you and your client, the

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damage from a social media misstep can at least be minimized. Because reaction time can be critical in defusing a brewing controversy, having a team already set to work on appropriate messaging can make a world of difference. The right response may not always involve legal action, or the threat of it. A number of companies and celebrities who opted to respond with a cease and desist letter or a threatened lawsuit simply drew more negative attention to themselves by doing so.

Cancel culture is real. Whether a given individual in the sports and entertainment realm "deserves" cancellation is a matter of debate. Unfortunately, facts are frequently the first casualty in a public rush to judgment. Journalistic responsibility to set the record straight cannot be taken as a given. But the risk of your client facing a digital mob can be minimized with prior planning.

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65 Jan L. Jacobowitz & John G. Browning, *Legal Ethics & Social Media: A Practitioner's Handbook* (2017).

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9 *Rebecca Foster v. Bd of Regents Univ. of Michigan et al*, No 19-1314, (6th Cir. Dec. 11, 2020); See also *Stiles ex rel D.S. v Grainger Cnty, Tenn et al*, commenced by a 7th-8th grader and his mother under 42 USC Section 1983 substantive due process claim. Plaintiffs could not show a violation of rights by the school board and city officials under Title IX or Section 1983.

10 *Klocke v. Univ of Tex. at Arlington*, 938 F. 3d 204, 210 (5th Cir. 2019); *Plummer v Univ of Houston*, 860 F. 3d 767, 777 (5th Cir. 2017).

11 *Plummer v. Univ. of Houston*, 860 F. 3d 777 (5th Cir. 2017)

12 *Yusuf v Vassar Coll.*, 35 F. 3d 709, 715 (2nd Cir. 1994).

13 *Doe v. W. New England Univ.*, 228 F. supp 3d 154, 186-190 (D. Mass 2017).

14 *Haidak v Univ of Mass at Amherst*, 229 F. Supp. 3d 242, 270 (D. Mass. 2018).

15 *Klocke at 213; Yu v Vassar Coll.*, 97 F. Supp 3d 448, 480-481 (S.D.N.Y 2015).