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ATTORNEYS AT LAW

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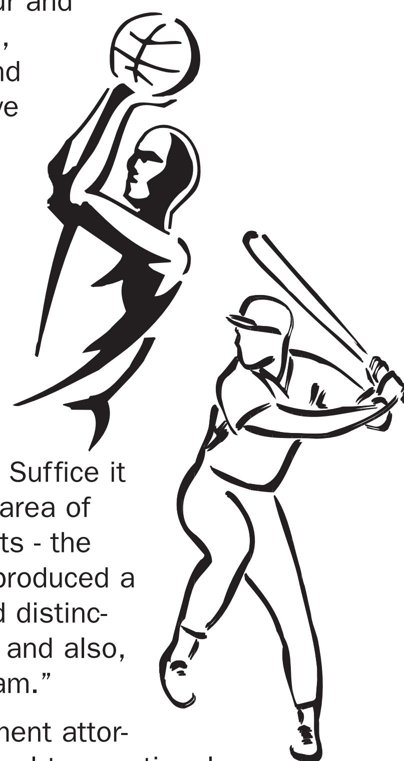
ENTERTAINMENT AND SPORTS LAW: What Are They?

Martin E. Silfen, Esquire

You have heard the songs *There's No Business Like Show Business* and *Let Me Entertain You;* you have seen the movies *The Rose, Broadway Danny Rose, The Producers, Honeysuckle Rose* and *This is Spinal Tap.* In sports you have heard and perhaps sang at ball games *Take Me Out to the Ball Game* and have seen the movies *Jerry McGuire, The Pride of the Yankees, Bull Durham, Raging Bull, Slapshot, The Natural, Major League,* and *A League of Their Own.*

The writing of the songs and the making of the movies are all an end product of entertainment and sports law. Entertainment law is a combination of traditional and specialized law subjects, including sound recordings, copyrights and trademarks, music publishing, literary publishing, personal and business management, literary and concert touring agency, film, television, and cable internet, privacy and publicity rights, theater, concert touring, merchandising, licensing and endorsements.

Like entertainment law, sports law entails services traditionally provided by lawyers and services of a specialized nature. Although many sports lawyers are also sports agents, whether they are lawyers or non-lawyers, who want to represent athletes in the negotiation of their contracts with professional sports teams (hockey, baseball, basketball and football) must be certified by the Players Associations, the unions representing the players. The areas in sports law are antitrust and labor, gender equity, civil and criminal liability, sports agency, ethical considerations in amateur and professional sports, team and individual sports, licensing, merchandising and endorsements, and forum selection. As a consequence of Collective Bargaining Agreements between team management representatives and the Players Association representatives, the predominant forum for the resolution of claims is arbitration.



Sports lawyers as opposed to sports agents provide legal services in traditional legal areas which would include domestic disputes, real property sales and purchases, estate planning, and taxes. There is no hard and fast rule which governs all sports lawyers. Suffice it to say that the critical distinctions come in the area of sports agency where lawyers often wear two hats - the lawyer hat and the sports agent hat. I have reproduced a very helpful chart which explains the recognized distinction between sports agents and sports lawyers and also, identifies other specialists on the athlete's "team."

In the area of entertainment law, entertainment attorneys perform the following services: (a) traditional transactional - review, advice, negotiations and drafting; (b) traditional litigation or alternative dispute resolution - State and Federal Courts, Arbitration (American Arbitration Association and the Guilds representing creative people); (c) mediation; (d) shopping of sound recording demonstration tapes and self-produced and financed CD's; (e) shopping of songs to established artists or music publishers; (f) shopping for music publishing and merchandising; (g) shopping of literary property for books, films or TV deals; (h) music publishing administration of clients' musical compositions; (i) de facto personal management; (j) entertainment industry executives and business affairs directors; (k) CLE presenta-

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The attorneys of Wolcott Rivers Gates concentrate in various practice areas, including, but not limited to:

Banking

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Commercial/Business

Construction

Creditor Representation

Criminal

Divorce, Custody & Support

Entertainment & Sports

Franchising

Guardianships and Conservatorships

Health Care

Labor and Employment

Leasing

Litigation

Mergers, Acquisitions & Divestitures

Non-Profit and Charitable Organizations

Patents, Copyrights & Trademarks

Personal Injury

Real Estate – Financing and Sales

Religious Institutions

Securities

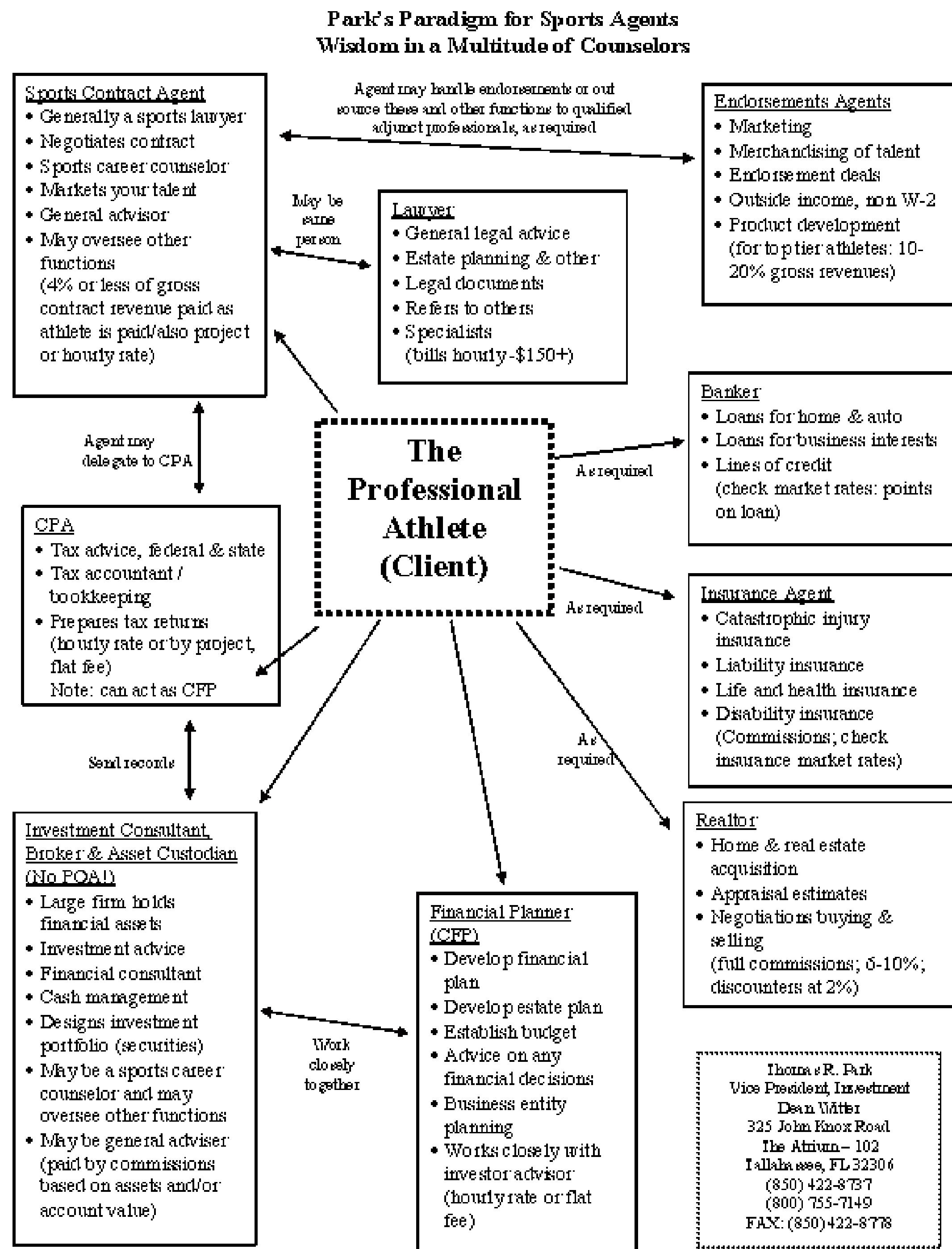
Taxation

Wills, Trusts and Estates

ENTERTAINMENT AND SPORTS LAW: What Are They?

tions and entertainment industries panels; and (l) advise entertainment/arts related non-profit organizations. Shopping is the highly risky, time consuming search for stardom for creative clients. (Contacting entertainment movers and shakers to land a deal for a client.)

Entertainment attorneys are compensated in a variety of ways including: (a) traditional hourly rate; (b) percentage of gross entertainment related earnings of clients; (c) quantum meruit; (d) fixed retainer applied against time spent; (e) fixed retainer applied against percentage of recovery in litigation matters; (f) equity participation in client venture; (g) art work/"barter;" (h) publishing or



income participation in musical compositions written by client; and (i) stock options -from entertainment start up companies.

Sports agents, lawyers or non-lawyers, in professional team sports (football and basketball) have their fees for contract negotiations between the athlete and the team capped at three percent (3%) or four percent (4%). Not so, for services rendered to an athlete in the areas of licensing, merchandising or

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ENTERTAINMENT AND SPORTS LAW: What Are They?

endorsements where there is no Player Association cap on fees. Although there is a movement by one of the associations to cap fees for licensing, merchandising and endorsement services. The parameters (not set in stone) range from ten percent (10%) to thirty-three and one-third percent (33.3%). Leverage often dictates the percentage. High end athletes can dictate the percentages, while low end athletes (athletes who have not reached a level of fame (and fortune)) are at the mercy of the sports agent. There is a movement among high end athletes to have sports lawyers handle all of their business on a per hour basis rather than on a percentage.

Sports is an integral part of entertainment. But in the practice of law, they are separate persuasions. A caveat - because of the involvement of unions in both sports and entertainment, and the peculiar nature of how the two work, it is strongly recommended that artists and athletes be represented by legal specialists in both fields. To do otherwise, would be a disservice to both.

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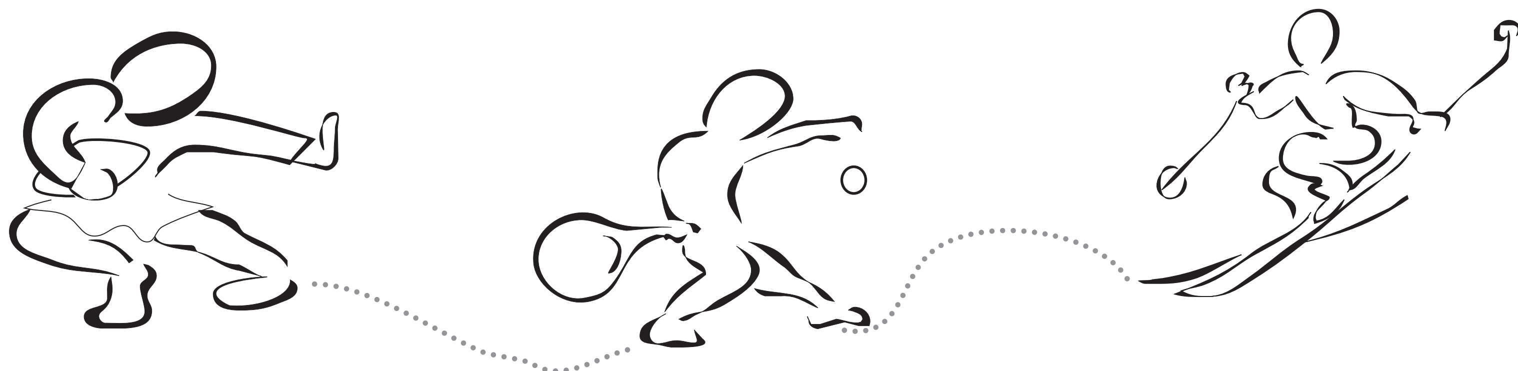


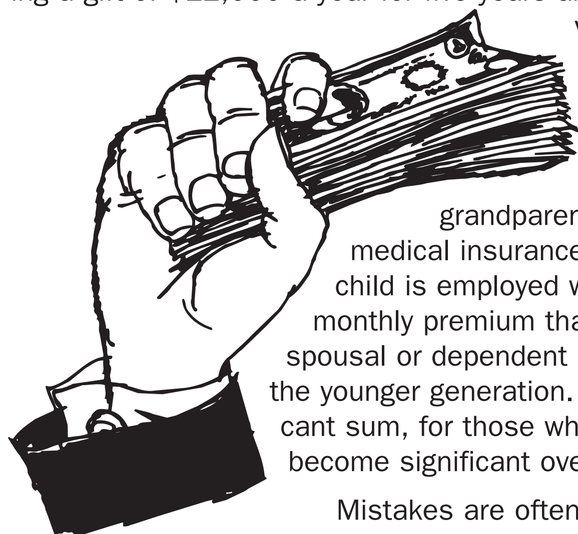
INTER-GENERATIONAL ESTATE PLANNING

Neil L. Rose, Esquire

As we do estate planning with our clients, they face the uncertainty of what the estate tax laws will be when they pass on. With the recent change in Congress, there is significant doubt that the estate tax will be eliminated and there are concerns that the ultimate death exemption in 2011 will be well below the wealth level of many of our clients. Many of our clients also have parents who are financially well-off.

One option is to have the parent of our client bypass or skip their child and leave some or all of their wealth instead to our client's children or grandchildren. The tax code anticipates this planning technique and imposes the generation skipping tax which taxes gifts exceeding $1,000,000 that skip a generation with an additional tax of the maximum estate tax rate. Thus, it is generally a bad idea to have grandparents gift more than $1,000,000 to grandchildren. However, certain "gifts" are not counted for the estate, gift or generation skipping taxes.

The primary group of these are gifts that, for tax purposes, are not gifts. Many people fail to take advantage of their annual gift tax exemption. The first $12,000 given to each person does not count against one's lifetime exemption. Further, many people do not understand the time value of money benefit of making these gifts early. There are special provisions that actually encourage early gifting. For example, a grandparent could gift $60,000 in January into a Section 529 College Fund for a grandchild. This will use up five years of gifting ability for that grandparent to that individual grandchild, but will give the grandchild all of the income and appreciation on that $60,000 rather than making a gift of $12,000 a year for five years and the grandparent retaining and being taxed on that income in the intervening years.



A further gift that is not counted for tax purposes is the gift of paying for medical expenses. It makes sense for the grandparent to write out the co-pay checks for doctor visits for their children and grandchildren since such payments do not count as a lifetime taxable gift. Further, grandparents can write checks directly to the medical insurance company to pay medical insurance premiums for their children or grandchildren. Thus, if the child or grandchild is employed with a company that does not fully pay for their health insurance, the monthly premium that might otherwise be deducted from the child's paycheck to pay for spousal or dependent coverage could instead be paid directly by the grandparent on behalf of the younger generation. While paying co-pays and insurance premiums may not seem like a significant sum, for those who do not have vision or dental coverage, this gifting opportunity may become significant over the years.

Mistakes are often made in trying to help one's children with the payment of tuition. Often the senior generation will hand their child a check to cover the private school tuition for the grandchild.

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INTER-GENERATIONAL ESTATE PLANNING

When this check is made payable to the son and the son writes his personal check to his child's private school, the parent has made a gift to the son. If instead, the parent were to write the check directly to the school, the tuition payment would not be counted as a taxable gift and would greatly assist the child while lessening the parent's estate and not use up any lifetime giving opportunities. Where the senior generation is very senior and fears they may not live long enough to write those checks each year for the benefit of their grandchild's private schooling, the grandparent can enter into an agreement with the private school to pay multiple years of tuition in advance.

A more complex gifting pattern can be used when a senior generation has invested in appreciating assets such as real estate and wishes to move the asset to a younger generation at a lower estate or gift tax rate. In early 2007, after the local real estate market has slowed down, it might be an appropriate time to obtain an appraisal of real estate and use the gifting techniques known as lack of marketability and minority interest discounts to gift percentages of real estate to one's descendants.

For example, if you own a farm that is being approached by development, you could transfer the farm or a significant portion of it to your children and grandchildren prior to selling it to a developer or the family developing it into residential or commercial lots. While the younger generation would not get the benefit of step up in basis, a larger percentage of the asset can be transferred to the younger generations by using gifting techniques before it converts from farm use to more lucrative commercial development.

In such cases, we often use a combination of the lifetime giving exemption and the annual exclusion in order to maximize gifts when the family consists of children, not all of whom are married, or have the same number of children themselves when the grandparents want to "treat each of their children equally." The combined use of the lifetime giving exemption and annual exclusion can move a significant amount of real estate to descendants in a short period of time. This technique can be especially important if the family has real estate that they plan to keep in the family for generations as opposed to property they are planning to develop.

For example, assume that Mom and Dad have three children, one single, one married with no children and one married with two children, and wish to treat each of them equally. Without incurring a gift of estate tax, Mom and Dad can give the unmarried son $24,000 as an annual gift. Mom and Dad can give the married son and his wife $48,000 as an annual gift, and the married son with two children, $96,000. Some parents avoid giving to the spouses and grandchildren because they do not wish to be "unfair" to the unmarried son by giving his married siblings more money.

We can resolve this issue in this example by giving the single son a $24,000 annual gift and a $72,000 lifetime gift, using part of Mom and Dad's $1,000,000 each lifetime giving exemption. We would give the married child without children $48,000 as annual gifts to him and his spouse and another $48,000 from the lifetime exemption, and the married child with two children simply would get the $96,000 gift. All told, we would move $288,000 out of Mom and Dad's taxable estate each year using up $120,000 a year of their lifetime exemption. In this manner, Mom and Dad feel they are treating the three children equally and still maximizing their annual giving. For someone who has already used up their lifetime annual gift exemption of $1,000,000, we can put a clause in their revocable trust to make up for the lifetime giving to the children that are married with children if that is important to the client.

These are just a few examples of ways to look ahead and plan to reduce estate taxes in light of the currently scheduled reduction in the estate tax exemption. Your circumstances may suggest that we should use other techniques.

Mr. Rose is a member of Wolcott Rivers Gates where he concentrates his practice in tax, estate planning and administration and commercial/business law. He can be contacted at (757) 497-6633 or rose@wolriv.com.

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PREMISES LIABILITY IN VIRGINIA: A Summary of the Duties and Responsibilities of the Landowner

Marshall A. Winslow, Jr., Esquire

The issue of whether a landowner may be liable for an injury to someone that occurs on their property depends on the legal classification of the injured person at the time of the injury.

There are three types of visitors that are used in the analysis of premises liability: trespasser, licensee, and invitee. The duties and responsibilities of a landowner are vastly different depending on the status of the person injured. This article provides a summary of the landowner's duties as to each of the three types of visitors.

A trespasser is someone that is on the premises without any right or permission from the landowner. Ordinarily the owner owes no duty to a trespasser except a duty not to injure the trespasser intentionally or wantonly. A trespasser generally cannot recover for injury by reason of defects in the premises, excavations or contact with running machinery or the like. That is, trespassers take the risk of the place as they find it. However, there are two exceptions to this rule for trespassers. One exception occurs if the trespass is of such a nature and so frequent as to charge the landowner with notice of the trespass, and the danger likely to ensue to the trespasser. Under those circumstances, the landowner is chargeable with the duty to lookout for the trespasser. The landowner does not owe a duty of foreseeing or preparing for the frequent trespasser. The other exception is known as the "dangerous instrumentality doctrine" which holds that it is negligent for a landowner to leave on their premises, easily accessible to children, an instrument, machine, appliance or material which contains hidden, concealed, or latent danger when handled by one unfamiliar with its use. This doctrine imposes a duty upon the landowner to take proper precautions to prevent trespassing children from using the machine. In order for the doctrine to apply, the danger of the instrumentality must not only be hidden or latent, but it must be easily accessible to children and in a location where the landowner knows or should know that children frequently gather. Children up to age 7 are legally incapable of committing acts of negligence in Virginia. There is a presumption that children between the ages of 7 and 14 are legally incapable of committing acts of negligence but this presumption can be rebutted by showing the child did have the capacity to understand the danger. Examples of dangerous instrumentalities include explosives, gasoline, charged electric wires and the like.

A licensee is a person who has permission or consent from the landowner to enter the premises, not for a business purpose carried on by the landowner, but for his or her own convenience or benefit. A social guest, however cordially invited, is also only a licensee. Generally speaking a landowner is only liable to a licensee for injuries caused by active negligence or by willful or wanton conduct. When the injury to the licensee involves the activities of the landowner and not the condition of the premises, the landowner owes the duty to exercise reasonable care to avoid injury to the licensee. When the injury to the licensee is caused by a condition on the land the landowner is subject to liability only if, (a) the landowner knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm and should expect the licensee will not realize the danger, and (b) the landowner fails to use reasonable care to make the condition safe or warn the licensee of the condition, and (c) the licensee does not know or have reason to know of the risk involved.

Virginia Code § 29.1-509 specifically sets forth the duty of care and limitations of liability for landowners to hunters, fishermen, and sightseers, etc. that are given permission to enter the premises. This statutory duty and limitation of liability for the landowner most closely resembles the duties owed to a licensee. The activities include hunting, fishing, trapping, camping, water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, fox hunting, racing, bicycle riding or collecting, gathering, cutting or removing firewood, and any other recreational use, etc. According to the statute, the landowner has no duty to keep the premises safe, but the statute does not limit the liability of the landowner that might arise by reason of gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. The limitations of the landowner's liability set forth in this statute do not apply if the landowner receives a fee for use of the premises or to engage in the specified activities.

A person is an invitee when the landowner has extended an express or implied invitation to the visitor and the visitor enters pursuant to that invitation. An invitation typically will be inferred where the visit is of common interest to the landowner and visitor, the premises is thrown open to the public, and the visitor enters for the reason the premises is open. The landowner owes the invitee the duty of using reasonable care to maintain the premises in a reasonably safe condition and to warn the invitee of any hidden dangers. However, the landowner is not an insurer of the invitee's safety. To hold the landowner liable for a hidden unsafe condition on the premises, it must be shown that the landowner had notice of the unsafe condition or that such condition existed long enough to make it the landowner's duty to have discovered it in the exercise of ordinary care. In addition, the landowner has no duty to warn the invitee of a danger that is obvious, reasonably apparent or as well known to the person injured as it is to the landowner. As a general rule, the landowner is under no duty to protect invitees from the criminal acts of third parties on the premises regardless of whether the criminal act is intentional or reckless. There are two narrow exceptions to this rule; the imminent harm exception and the method of business exception. These exceptions occur where there is a special relationship between the landowner and invitee that has been recognized as a matter of law, such as innkeeper and guest, landlord and tenant, or a special relationship that may arise from the facts of a particular case which creates a duty to warn and/or protect the invitee (a) when the landowner has notice of the specific danger just prior to the assault or (b) when the landowner's method of business attracts or provides a climate for assaultive crimes. The determination of whether the landowner is required to warn and/or protect invitees from the criminal acts of third parties depends on the facts of each case.

Hopefully the information in this article will assist you in protecting yourself and/or your business from a premises liability claim. This article is meant to serve only as a general summary of issues as the analysis of premises liability is very often complex and dependent upon the facts and circumstances involved in each case. Please contact an attorney if you have any questions about premises liability.

Mr. Winslow is a member of Wolcott Rivers Gates where he concentrates his practice in litigation. He can be contacted at (757) 497-6633 or mwinslow@wolriv.com.

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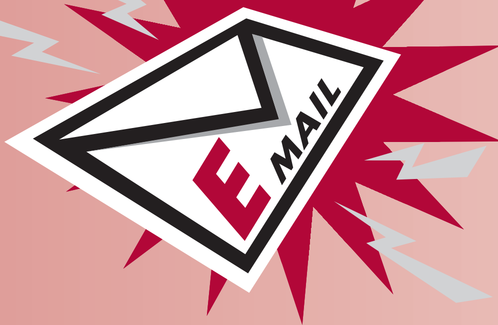

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Martin Silfen, Esquire, is an author, lecturer, and former Professor of Entertainment & Sports Law at Marshall-Wythe School of Law, at the College of William & Mary. He has represented or acted on behalf of Blondie, Aerosmith, REM, LL COOL J, The Dave Matthews Band and Sir Elton John.

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