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# THE REAL TEAM PLAYERS: LEGAL ETHICS, PUBLIC INTEREST, AND PROFESSIONAL SPORTS SUBSIDIES

## INTRODUCTION: FOOTBALL, THE HEART OF AMERICA, AND THE UNDERBELLY OF SUBSIDIZED FINANCING

“Football is not a game but a religion, a metaphysical island of fundamental truth in a highly verbalized, disguised society, a throwback of 30,000 generations of anthropological time.”<sup>1</sup>

This Note will discuss public subsidies for professional sports stadiums, ethical issues that face attorneys involved in stadium deals, and the need for a more transparent bargaining table where millions of taxpayer dollars are involved.

Whether you love it, hate it, or are indifferent, American football encompasses a huge part of modern American cultural identity and passion.<sup>2</sup> Particularly with the rise of television, American football became the country's biggest spectator sport, a cultural pinnacle, and the primary focus of both collegiate athletics and professional sports. Through football, Americans celebrate their local, school, emotional, regional, national, and other identities. Football is an American holiday tradition, a promoter of corporations and universities, a staple of towns, a grower of leaders and promoter of teamwork, a symbol of war, a topic of controversy denounced by some as promoting violence, sexism, and greed, and supported as promoting family values in a religious setting by others. Depending on one's point of view, football may symbolize everything that is right or wrong with American culture and society.<sup>3</sup>

Americans spend billions each year on football-related activities by attending high school, college, or NFL football games, tailgating, hosting viewing parties, or buying team paraphernalia. Indeed it is estimated by the Fantasy Sports Trade Association<sup>4</sup> that of the 32 million Americans who spend around \$15 billion in total fantasy play, about \$11 billion<sup>5</sup> is spent on fantasy football.<sup>6</sup> Ticket prices for the 2013 Super Bowl in New Orleans started at around \$1,249 and went all the way up to \$315,916 for a suite<sup>7</sup> --more than the cost of a picturesque stone house in Tuscany, Italy.<sup>8</sup>

Football is a cultural identity; it is also a massive business enterprise. Cities and states spend millions of hard-earned taxpayer dollars to build stadiums to attract and keep professional teams. The NFL is the most lucrative league in the world, raking in yearly revenue upwards of \$9 billion in 2013 alone.<sup>9</sup> State and local governments have invested billions of public money into professional sports league stadiums,<sup>10</sup> but many cost-benefit analyses conclude that this is a poor public investment,<sup>11</sup> and economists conclude that subsidization is undesirable.<sup>12</sup> The NFL is a carefully and strategically managed franchise that controls the supply of teams and exploits the always-larger demand. Cities aspiring to host a NFL team offset low potential for profits by offering full subsidies for stadiums. This distorts the market for expansion and relocation, resulting in a number of small markets with teams and large ones without.<sup>13</sup> In the 1950s-70s, suburban and county governments were eager to attract

major league teams, and voters approved bond issues to pay full costs of facilities, seeing having a team as a way **\*453** of building up the local infrastructure.<sup>14</sup> City government rationale for footing the bill for this private venture is generally that the area will receive economic benefit,<sup>15</sup> urban development,<sup>16</sup> and other intangible symbolic benefits,<sup>17</sup> all of which would outweigh public costs. However, this is not the case, and an in-depth study of public/private financing of stadiums shows that in addition to the grossly imbalanced numbers put forth in deals, there are many hidden public costs to public/private financing.<sup>18</sup>

When a city negotiates a stadium deal,<sup>19</sup> this can be the ultimate collision of interests--public/private, economic, political,<sup>20</sup> emotional, and cultural. In Part I, this Note uses the 2012-2013 Buffalo Bills lease negotiation as an example of how a public/private stadium lease negotiation plays out<sup>21</sup> because it is **\*454** illustrative of the competing interests at play and the parties involved in a deal. Part II addresses concerns that where vast amounts of public money are at stake, the public interest is not represented. This Note analyzes whether the attorney hired by the government for a stadium deal has an ethical duty to represent taxpayer interest and concludes that the answer is unclear where it is difficult to determine the attorney's client. This Note then analogizes the competing interests and ethical questions to those faced by class action attorneys. Narrowing down this hypothetical class to Bills fans, taxpayers with competing interests are compared to class members. This Note concludes that while similar issues and conflicts of interest can be found, taxpayers in a stadium deal are afforded no procedural protections or court obligations to find justice like those found in a class action. Finally, this Note proposes the establishment of a Public Advocacy Counsel, comprised of legal and business experts in subsidies, stadium leases, and more. This Counsel would have a seat at the table for any professional sports stadium negotiation, and would serve the function of representing public interest. Use of such a mechanism would help alleviate ethical issues faced by attorneys representing the government, and bring expertise and knowledge of actual costs and transparency to the bargaining table to create a more balanced negotiation.

## I. CASE STUDY: BUFFALO BILLS

### A. BACKGROUND

Erie County is located on the western border of New York State. It is 1058 square miles, encompasses three cities and twenty-five townships, and has in total almost 1 million residents.<sup>22</sup> Lake Erie and Niagara County border Erie County.<sup>23</sup> The city of Buffalo lies within Erie County and is the second most populous city in New York, with approximately 265,000 residents.<sup>24</sup> Located in Orchard Park, a suburb of Buffalo, Ralph Wilson Stadium opened in 1973, and is the third-oldest stadium in the NFL.<sup>25</sup> The stadium can currently seat up to 73,079 fans (or casual spectators). It was designed specifically to NFL **\*455** dimensions and sightlines, and therefore is hard to use for any other sport. Ralph Wilson Stadium is owned by Erie County Corporation, a public benefit corporation,<sup>26</sup> and leased by the Buffalo Bills, a NFL franchise team.

While it occasionally hosts other events such as the regional high school football playoffs,<sup>27</sup> the occasional drum corps competition,<sup>28</sup> and concerts,<sup>29</sup> the stadium is used primarily for Bills home games; around ten games each year, including pre-season.<sup>30</sup> Beginning in 2008, the Bills also play a series of "home" games at the Rogers Centre in Toronto, Ontario, Canada (around one each season). This series was conceived in part by owner Ralph Wilson as the Bills and the professional football market has expanded into Ontario.<sup>31</sup> Erie County also **\*456** houses a number of minor league sports teams, college teams, and NHL team, the Buffalo Sabres.<sup>32</sup> The prior fifteen-year Bills lease of Ralph Wilson Stadium expired on July 31, 2013.

The Buffalo Bills were a charter member of the American Football League, joining the NFL as part of the 1970 merger.<sup>33</sup> The Bills are the only team to ever win four American Football Conferences consecutively, and then go on to lose four Super Bowls consecutively in 1961-1965.<sup>34</sup> The Bills are the only NFL team that plays home games within New York State (both the Jets and the Giants play home games in New Jersey), and the only NFL team to play a home game in Canada. Forbes has valued the Bills franchise at \$870 million, ranked it thirtieth out of thirty-two teams in terms of value,<sup>35</sup> and donned the Bills as "arguably

the most troubled franchise in the NFL.”<sup>36</sup> Ralph Wilson, namesake of the stadium, has been the only owner of the Bills in their fifty-three years as a team. The Bills have not made the playoffs since 1999, the longest drought in the NFL, and have had the longest active losing streak of losing seasons, not having won more than half their games since 2004.

Bills fans are widespread and hardcore. A worldwide Bills fan organization, the Bills Backers International (BBI), boasts an organized network of more than 100,000 fans worldwide with 180 different chapters encompassing forty different states and eleven countries.<sup>37</sup> Fans' love of the team and the sport embodies the idea of a football team as part of a national and regional identity. Erie County is teeming with tax-paying, die-hard Bills fans who do not want to see the Bills go \*457 elsewhere. The Bills are part of the regional identity and cultural identity, and a substantial part of the local economy. The estimated payroll and sales tax generated by the Bills playing in Orchard Park is roughly \$30 million per year, and this is the approximate direct benefit the state and county receive from the county-owned stadium.<sup>38</sup>

Buffalo is teeming with taxpaying die-hard Bills fans. Both Erie County executive Mark Poloncranz and New York State Governor Andrew Cuomo headed into the negotiation with the Bills thinking that for the sake of the fans, the regional identity of Western New York, and the economy, the Bills had to stay at Ralph Wilson Stadium. With talk that the Bills could either move to Los Angeles or Toronto for good, the county and state presumed they had the best interest of the taxpayers in mind.

Negotiations over the stadium lease began in April of 2012, and the lease was set to expire July of 2013. The original target date for a new lease agreement was the beginning of training camp for the team in late July of 2012,<sup>39</sup> but this date was repeatedly pushed back as a number of issues and complications arose during the negotiation. The parties in the yearlong lease negotiation were Mark Poloncranz and advisors for Erie County, Governor Andrew Cuomo and company representing New York State, and the Buffalo Bills Franchise, backed by the NFL.

## B. THE DEAL

While the Bills originally sought upwards of \$220 million in restorations to Ralph Wilson Stadium as terms for re-signing the lease, the final terms of the negotiation brought that number down to \$130 million in restoration, of which \$54 million will be paid by New York State, \$41 million by Erie County, and \$35 million from the Bills organization as an NFL franchise. The final lease, signed July 31, 2013, is for ten years, and contains a binding non-relocation clause with a one-time buyout opportunity after seven years.<sup>40</sup> The \$130 million in restoration will go to new technology to improve the fan experience, including new video display boards, a new plaza with team store and “enhanced” gate entries, renovated and expanded concessions, and new luxury boxes.<sup>41</sup>

## \*458 II. LEGAL ETHICS AND A PROPOSED NEXT STEP

How does legal ethics fit in? In a stadium deal such as the above-mentioned Bills negotiation, many different parties represent many different interests. But should someone actually represent the taxpayer interest where taxpayers nationwide unwittingly spend \$2 billion a year on stadiums?<sup>42</sup> As in the Bills negotiation, local city, county and state governments are main players at the table with the team and the NFL. As leagues like the NFL offer limited numbers of beloved professional sports teams to many cities, tensions run high as local and state governments cough up the cash to keep their teams, often without fully understanding the actual price the public will pay and the real potential or lack of potential for economic development.

As in the Bills negotiation, city and state government officials bring in outside counsel. While these are often private firms and attorneys with great expertise in sports law and public/private partnerships, they also serve in the role of a government lawyer, representing parties such as Governor Cuomo in New York, and thus the state of New York. The attorney in this position faces potential ethical issues that are a hybrid of ethical issues faced by government lawyers and representatives of class actions.

## A. GOVERNMENT ATTORNEY: WHO IS THE CLIENT?

Government attorneys are expected to follow the *Model Rules of Professional Conduct (Model Rules)*; however, the *Model Rules* only go so far in discussing the special role of government attorneys, potential conflicts of interest, and how these differ from that of the private practice attorney.<sup>43</sup> The role and responsibilities of a government attorney differs from that of a private attorney whose foremost job is to protect and advocate for the interests of their client. As the Seventh Circuit has said, “[G]overnment lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients ... government lawyers have a higher competing duty to act in the public interest.”<sup>44</sup> Government attorney loyalties lie not only with their client.<sup>45</sup>

One of the most important questions and issues a government attorney must ask is who their client actually is--to whom are these duties of loyalty actually owed? The lawyer-client relationship is altered for a government attorney, and \*459 identification of the client is a primary but often not straightforward priority.<sup>46</sup> Defining who the client actually is helps to identify potential conflicts of interest as can be encountered under Model Rule 1.7,<sup>47</sup> and also helps to define the actual scope of representation.<sup>48</sup> It has been suggested that a good place to start when determining who the client is, is to first be very clear about who is not the client.<sup>49</sup>

While the subject of whom the government attorney owes a duty of loyalty to is under constant debate,<sup>50</sup> possibilities include: (1) the public, (2) the government as a whole, (3) the branch of government in which the lawyer is employed, (4) the specific agency or department for which the attorney works, and (5) the officers in the agency who make decisions.<sup>51</sup> There is some debate about whether the government attorney does and should serve the public interest. Those that criticize the public interest characterization argue that the concept of public interest is unintelligible and fails to provide workable guideposts, and that attorneys working for the government would inappropriately pursue their own ideas of what public interest is in their professional capacities.<sup>52</sup> Those that support the government lawyer as an advocate of public interest argue that while the public interest approach still adopts core concepts of duties of loyalty, zealous representation, and confidentiality found in mainstream legal ethics, the government lawyer in addition owes duties to the courts and innocent third parties, \*460 making service of the public a primary duty.<sup>53</sup> The ABA,<sup>54</sup> former government lawyers,<sup>55</sup> commentators,<sup>56</sup> and scholars<sup>57</sup> have endorsed the public interest approach, as do some courts.<sup>58</sup>

In a stadium (lease) negotiation, attorneys are often hired by government parties to represent interests, making them agents of the government. As such, their client is sometimes difficult to determine. In the Bills lease negotiation, New York and Governor Cuomo hired “noted industry attorney/negotiator Irwin Rajj to represent its interests.”<sup>59</sup> Was the client: (1) the public or taxpayer;<sup>60</sup> (2) the State government as a whole;<sup>61</sup> (3) the branch of government in which the lawyer works;<sup>62</sup> (4) the specific agency or department or more specifically the Governor's Office;<sup>63</sup> or (5) the officers in charge of decisions, in this case Governor Cuomo himself? This list indicates that the answer is not obvious, as \*461 each option is plausible and represents different interests in the outcome of the negotiation.

The attorney was hired to provide expertise and make the stadium deal happen. Negotiations were more about how much each party would pay and what would be included in the lease, not whether or not the lease would even occur. This rules out the attorney representing all taxpayers, or the public, as their interests vary within this group. The general government in New York has interest in retaining the team, but perhaps not as strong as particular factions within the government such as the Governor himself.<sup>64</sup> If the attorney represents the Government, his interests are to keep the Bills in New York, regardless of the desire of taxpayer.

Within the details of the deal itself, interests vary even more, as each party's focus is on different provisions of the lease agreement. For example, one of the issues and then final terms of the long and hard negotiated lease includes a twelve-seat luxury

box for the Governor's administration, described as an "I heart NY Hospitality Center," to promote the State and region.<sup>65</sup> The administration justifies the use of the box for promotion of the state as legitimate because the stadium is publicly owned. Critics remind us that, "No government agency needs to lease a luxury suite to market upstate New York ... The cost of the luxury suite is being paid by the taxpayer, remember that."<sup>66</sup> If the Governor is the attorney's client as is suggested in the fifth model above, different issues are zealously represented at the negotiation table and the final terms of the lease indicate that these desires have been met--perhaps in direct conflict with public interest.

\*462 An attorney representing the government in a stadium negotiation faces the ethical issues any government attorney faces--the primary one being determining the identity of the client. Not surprisingly, this answer is unclear. While government attorneys are given more leeway in representing several government agencies in situations such as intra-governmental controversies in a way in which a private practice lawyer could not represent multiple clients,<sup>67</sup> here if the attorney purports to represent both the Governor's office as well as public interest of the Governor's constituents, they surely face a "conflict of interest" under Model Rule 1.7. The government attorney in this position must be very clear about who the client is, and whose interests are actually to be represented.

## B. TAXPAYER CLASS: A COMPARISON TO ETHICAL ISSUES IN CLASS ACTIONS

If the attorney representing the state in negotiations is to be seen as representing the people of New York, the attorney faces a broad range of interests among the public and taxpayers. As beloved as the Bills are to Buffalo, not all residents of the state are fans, nor do they necessarily wish to pay taxes to support upgrades which will not particularly benefit the state economy, and which many residents will never take advantage of or even gaze upon.

The ethical issues faced by an attorney seen to represent the taxpayers can be loosely analogized to those faced by class action attorneys who often find themselves potentially representing a broad range of interests. Since [Federal Rule of Civil Procedure 23](#) and Supreme Court case law<sup>68</sup> severely narrow the potential classes that can be certified where interests in outcome differ, for the sake of this analogy, we will disregard non-Bills fans in the hypothetical class for this discussion. Thus, we have a hypothetical "class" of taxpaying Buffalo Bills fans who will be wronged by team relocation, and based on their limited knowledge of public financing involvement, wish for the Bills to stay in Buffalo.

With this in mind, an examination of ethical issues faced by class action attorneys provides an idea of the difficulties such professionals may face. The general rule in class actions is that the attorney owes a duty to the class as a \*463 whole,<sup>69</sup> and the ultimate responsibility for protection of the class rests with the court.<sup>70</sup>

In a class action, the attorney-client relationship does not fit well into traditional legal ethics where there is not just a principal and agent, and the attorney faces many different issues.<sup>71</sup> These issues may include circumstances where the attorney represents the client, but also becomes the creditor in a joint venture where the attorney incurs the litigation costs.<sup>72</sup> More relevant to our comparison is the fact that the potential client does not always speak with one voice or have the same interests.<sup>73</sup> Although greatly limited by recent case law, a potential class may consist of members who have differing injuries and preferences for remedies and settlements.<sup>74</sup> The attorney must deal with a number of potential conflicts of interest, such as having greater concern and attention for the class representative than for the unnamed members of the class.<sup>75</sup>

In a stadium negotiation, an attorney representative of public interest represents a "class" whose members have experienced the same harm--loss of the team, but with different interests. Yet this situation lacks even the client voice of a class representative. Under Model Rule 1.7(b), the client may consent to representation even if they believe the lawyer faces a conflict of interest,<sup>76</sup> but in a class action and here, class members or the general public cannot practically consent to representation.<sup>77</sup> The Bills lease negotiation could be compared to class action settlement negotiations where attorneys encounter conflicts of interest among

class members. However, the public Bills supporters in stadium \*464 negotiations lack any of the protections that class actions have. Even if a class action settlement is negotiated out of court, ultimate responsibility still rests with the court. Courts apply the best interest of the class as a whole standard,<sup>78</sup> and classes can challenge settlement negotiations in court,<sup>79</sup> but it would be difficult for a private citizen to challenge a stadium negotiation in court.

Courts have acknowledged that Model Rule 1.7 is hard to apply to class actions and are instead building common law around application of [Federal Rule of Civil Procedure 23](#),<sup>80</sup> specifically section (a)(4) which requires that “the representative parties will fairly and adequately protect the interests of the class.”<sup>81</sup> Taxpayers receive no similar procedural safeguards in stadium negotiations, and since there is no court or judge protection to help ensure justice, taxpayers instead must hope that the officials they elect to represent them will adequately represent their interest.

Thus, while comparing taxpayers with varying interests with class members in a class action can be interesting to identify and analogize potential ethical issues faced by the attorney, the loose analogy falls short where there are neither Federal Rules nor courts involved in a negotiation to ensure adequate representation of interest and fair settlement.

### C. LEVELING THE PLAYING FIELD: PROPOSED PUBLIC ADVOCACY COUNSEL

“The one voice we most need to hear is dispassionate and discerning, tactical and tough, more measured than ‘whatever it takes,’ less defiant than ‘over my dead body,’ and carefully positioned in nobody’s pocket. Someone able to joust with the National Football League across a quasi-level bargaining table.”<sup>82</sup>

#### \*465 1. THEORIES AND ATTEMPTED CHANGE

Legal scholars<sup>83</sup> and others<sup>84</sup> have written and advanced theories about subsidies and public/private financing of professional sports stadium deals nationwide. Such scholars have examined actual economic impact data,<sup>85</sup> analyzed the real cost to the taxpayer,<sup>86</sup> and proposed different ways to eliminate or cut down on public subsidies to private professional sports franchises for stadiums. They have attempted to find solutions that limit the power that a relatively few number of teams hold over many more cities by threatening to move. These propositions have included options such as legislative bills eliminating tax-exempt status of bonds used for public financing of stadiums, limiting ability to relocate franchises, eminent domain, proposed laws addressing monopolies and antitrust violations, and proposing that state-of-the-art clauses in \*466 leases are unconscionable and thus unenforceable.<sup>87</sup> A number of legislative remedies have been proposed in Congress, limiting relocation of teams through various means, but none were enacted.<sup>88</sup>

What becomes clear from the literature on the subject is that remedial measures have been largely unsuccessful, and the average sports fan is completely unaware of the public cost of stadium financing. Further, politicians who lobby so triumphantly to keep their beloved teams local lack the requisite expertise and motivation to represent the public taxpayer interest in negotiations. Often, this leads to negotiations over special interest items such as luxury boxes, which are not available to the general public. This in turn brings up a host of potential legal ethics issues regarding who the clients of attorneys hired by the state actually are<sup>89</sup> and whose interests are addressed in these complex negotiations.

### 2. ANALOGY AND PROPOSAL

In order to ensure that the broader public interest is served (including the taxpayers and the fans),<sup>90</sup> that the requisite expertise armed with all the necessary data and implications is present, and that the most equitable deals can be made at stadium negotiations, this Note proposes the creation and use of a Public Advocate Counsel to be included in negotiation proceedings where such vast amounts of public money are at stake.

A model such as this exists in different contexts and an analogy can be drawn. For example, the Office of the People's Counsel (OPC) in Washington D.C., established in 1975, is an independent agency which advocates for the public and consumers in all utility related proceedings including natural gas, electric, and telephone services.<sup>91</sup> The agency mandate is to advocate for the provision of \*467 quality services at equitable rates and to assist citizens who use these services.<sup>92</sup> The OPC considers public safety, the local economy, the conservation of natural resources, and the preservation of the environment. Customer comments and complaints are welcomed and addressed, investigations are performed, and reports are filed. Overall, this agency helps to ensure that the public interest is represented and served in areas where utility monopolies can otherwise easily take advantage of the local population. Similar specialized and localized agencies are in place in different areas to advocate for and protect the public interest.<sup>93</sup>

#### **a. Necessities: Knowledge of Actual Public Cost, Increased Transparency, Need for Expertise**

Key components of making better deals can be utilized from Long's research and writing on three decades of public/private financing of stadiums. Overlapping elements that should be incorporated into the function of the Public Advocate Counsel, include better knowledge and understanding of more thorough information regarding actual cost, enhanced transparency and communication between parties (and the public), and increased expertise<sup>94</sup> within the negotiation which can serve to both ensure a more fair deal and increase transparency and efficiency for all parties involved.

In the building and operation of an average stadium, governments carry around seventy-five percent of the cost.<sup>95</sup> More fair deals can occur if public partners (and all) have better access and understanding of more information.<sup>96</sup> For example, land infrastructure costs and ongoing public costs are often omitted or not considered, and estimation of total public cost has garnered very little attention from researchers. A Public Advocate Counsel can help stakeholders to better understand and estimate full public costs and compare this against an estimation of full public benefits. There is no chance of a fair deal or transparency to the numbers going in where full public cost is not discussed or understood.

There is little transparency in stadium deals themselves--they are increasingly extraordinarily complex, making it difficult for politicians involved in the deal to understand and even more difficult for them to explain the specifics to the taxpayers and general public where they lack specialized expertise.<sup>97</sup> They are also conducted behind closed doors with parties who levy special interests. A \*468 Public Advocate Counsel could help increase transparency of negotiations by providing the expertise necessary for politicians, parties, and the public to understand complex deals and ensure that the special interests of one player do not effect the fairness of the deal. Long offers a template that helps to simplify understanding and increase transparency of costs: it separates development costs and ongoing annual costs to help better understand total actual cost.<sup>98</sup> Templates such as this can be utilized by the Counsel and assist in giving politicians the ability to understand and share information with taxpayers.

Understanding and expertise in the subject matter is key to reaching more fair outcomes. Complex deals require extremely high levels of both financial and legal sophistication. Private partners serve their own interests in deals by deliberately hiding details of the deal from the public and continuing to redefine the financial and regulatory contexts.<sup>99</sup> Politicians fighting to save the soul of a city lack the requisite background and expertise to negotiate a fair deal in these circumstances.

Long's research suggests a number of specifics that would assist the knowledge and function of a Public Advocate Counsel. For example, looking at the individual deal components and doing line-by-line assessment of categories of public cost indicates that public partners should avoid paying building costs<sup>100</sup> and focus public participation more on land<sup>101</sup> and infrastructure costs.<sup>102</sup> Further, public land ownership and retention is important, and by having the government parties take the lead on infrastructure improvements, more interested parties can come to the table and help with cost-sharing.<sup>103</sup> Close attention should be paid to the projection of ongoing revenues to total public expenses. The collective histories of stadium financing

shows that leases continue to overpromise and under-deliver on profits and paybacks in relation to expenses. Therefore a public commitment to ongoing operations (and costs) should be thought about and dealt with very carefully.<sup>104</sup> Experts on the Public Advocacy \*469 Counsel need also be aware of the implications of deal structures,<sup>105</sup> history and increase in the variety of ways public financing is utilized, and the effect different profiles of teams and sports have on urban development.<sup>106</sup>

### **b. Suggestions for Composition and Structure**

A Public Advocate Counsel for stadium negotiations should be comprised of knowledgeable attorneys and other professionals in the fields of public/private partnerships, land subsidies, stadium deals, sports law, negotiation, and public advocacy.<sup>107</sup> This Counsel should be equipped with the necessary information and expertise to tell the public what is actually happening, request and utilize public comment, and ensure that when stadium deals proceed, negotiations are fair and based on actual economic facts, not just sponsored and biased projections.<sup>108</sup>

In order to make this process more transparent and resources more available, a central office and database should contain records of all past deals and negotiations, all potential issues and conflicts that arose, all research that has been done on the topic, and all continuing research on ongoing and projected deals. This information should be available to the public so that if citizen groups wish to view it to back up or form their complaints or proposals to the Counsel, they may do so. When a team is hinting that it may move, this Counsel should be on the case, researching and preparing all necessary information to both adequately inform the public of any action and be ready to be part of any negotiation or proceedings.

The Public Advocate Counsel need not have offices everywhere, but must be able to travel to any location. This proposed Counsel should serve the dual \*470 purpose of representing taxpayer interest and using developed expertise to advise negotiations where city or state politicians and counsel are at a potential disadvantage and have conflicts of interest. Funding for the Counsel could be provided by a public/private partnership between government and professional sports leagues such as the NFL.<sup>109</sup>

### **c. An Equitable Function**

A Public Advocate Counsel can utilize economic research in an unbiased fashion, offer expertise and balance to any stadium negotiations or deals, and help to create a more transparent and accessible process and a more transparent and equitable deal. Professional sports franchises like the NFL have had the upper-hand for too long, leveraging a small number of teams for huge public payouts, the costs of which are not adequately known or understood. Further, all potential stakeholders can benefit from the function of the Counsel in some respect.

The Counsel will benefit different public stakeholders by providing information, taking public comment from proponents and opponents alike, and helping to ensure a more equitable deal is negotiated. Fans and citizen groups can voice their concerns and raise issues to the Counsel.

Government attorneys struggling to identify who their client is, what the actual interests are and whether or not they represent the public interest will be alleviated of such ethical quandaries. The NFL can potentially benefit from the efficiency the Counsel brings to fact-finding, cost assessment, and decreased trading of special interests.

Involvement of a Public Advocate Counsel can help equip parties to make better deals by providing more information. Greater transparency of costs and process can help promote the legitimacy of deals.

## **CONCLUSION**



Football<sup>110</sup> is part of our cultural and local identity, and for many is a deep matter of the heart. But professional sports leagues levy that love and devotion to get public subsidies for bigger better stadiums. By threatening to move away from the beloved fans and promising often-unrealized economic and urban transformation benefits, teams are able to extract incredible sums of public financing for a private venture. The cost is then passed on to the taxpayer--fan and non-fan alike. When deals such as the Buffalo Bills lease are negotiated, there is a lack of understanding of true public cost and general public interest is \*471 not adequately represented. It is unclear whom the attorneys for the government actually represent, and conflicts of interest abound. Politicians often have limited understanding of necessary financial and legal nuances and different interests in the negotiation than the constituencies they purportedly represent. Even if supportive taxpayers can be likened to class members of a class action who have different interests in a settlement, taxpayers lack the procedural safeguards and court protection of justice that members of a class action, in theory, enjoy. The establishment and use of a Public Advocate Counsel could bring knowledge and understanding of the costs, a forum for public discussion, and the necessary expertise to help negotiate a more transparent and unbiased deal.

## Footnotes

- <sup>a1</sup> J.D., Georgetown University Law Center (expected May 2015); M.B.A., University of Phoenix (2009), B.A., University of California Santa Cruz (2003). The author wishes to thank her editor Michael Johnson for his feedback, her classmate Kevin Birney for his willingness to be a sounding board late into the night, and Dylan Bothamley for his thoughtful discussions on the topic. © 2014, Kukui Claydon.
- <sup>1</sup> Arnold J. Mandell, American neuroscientist and psychiatrist. He is the Vice President and Director of Research at the Cielo Institute, among many other accomplishments. <http://www.cieloinstitute.org/home.html>.
- <sup>2</sup> See generally Peter S. Morris, *Football in the USA: American Culture and the World's Game*, Santa Monica College Presentation (2004), available at [http://homepage.smc.edu/morris\\_pete/resources/Papers-and-Presentations/footballintheusa.pdf](http://homepage.smc.edu/morris_pete/resources/Papers-and-Presentations/footballintheusa.pdf).
- <sup>3</sup> *Id.* at 1.
- <sup>4</sup> The Fantasy Sports Trade Association (FSTA) was founded in the 1990s to “serve the small, the large, the entrepreneurs, and the corporations ... the visionaries, innovators, investors, advertisers, and sponsors ...” FANTASY SPORTS TRADE ASSOCIATION, [www.fsta.org](http://www.fsta.org) (last visited Mar. 18, 2014).
- <sup>5</sup> Brian Goff, *The \$70 Billion Fantasy Football Market*, FORBES SPORTSMONEY (Aug. 20, 2013, 10:01 AM), <http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/>.
- <sup>6</sup> These figures do not even count advertising revenue for hosting sites. *Id.*
- <sup>7</sup> Lou Carlozo, *Super Bowl XLVII: The Shocking \$\$ We Spend*, THE FISCAL TIMES (Jan. 31, 2013), [http://www.thefiscaltimes.com/Articles/2013/01/31/Super-Bowl-XLVII-The-Shocking-\\$\\$-We-pend](http://www.thefiscaltimes.com/Articles/2013/01/31/Super-Bowl-XLVII-The-Shocking-$$-We-pend).
- <sup>8</sup> Andrea N. Browne, *What \$300,000 Buys You Around the World*, KIPLINGER (May 2011), <http://www.kiplinger.com/slideshow/real-estate/T010-S001-what-300-000-buys-you-around-the-world/index.html>.
- <sup>9</sup> Monte Burke, *How The National Football League Can Reach \$25 Billion In Annual Revenues*, FORBES SPORTSMONEY (Aug. 17, 2013, 6:30AM), <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/>.
- <sup>10</sup> This is done through various forms of stadium subsidies such as cash payments, tax breaks, infrastructure improvements and more. Government or public funding comes from state or local tax revenues. The first wave of government subsidization of stadiums was between 1917 and 1926, in sync with the first stadium construction boom. While stadiums back then were meant to have a broad use and serve the broad public interest, today subsidization goes mainly to professional sports franchises that control when and what other events can or cannot take place. See Dennis Coates & Brad Humphreys, *Do Economists Reach a Conclusion on Subsidies for Sports Franchises, Stadiums, and Mega-Events?*, 5 ECON J. WATCH 294 (2008).

- 11 JUDITH GRANT LONG, PUBLIC/PRIVATE PARTNERSHIP FOR MAJOR LEAGUE SPORTS FACILITIES 3 (2013). This book is the result of Long's research and investigation into lease agreements and financing of stadiums and arenas in five professional sports leagues in the United States.
- 12 Coates & Humphreys, *supra* note 10. The authors conducted a review of literature on the economic impact of professional sports and conclude that the majority of economists find professional sports stadium subsidies unwarranted, and with no positive economic impact.
- 13 *Id.*
- 14 *Id.* at 35.
- 15 The economic benefits sought by luring an NFL team are generally discussed in terms of jobs and taxes. However, temporary construction jobs outnumber permanent jobs and the majority of permanent jobs are not high quality, they are seasonal and low-paid with the exception of the athletes themselves. See LONG *supra* note 11, at 7. Cities or counties would also hope a stadium would bring in more taxes, through a trickledown effect where wages and tax cycles repeat throughout the economy. The largest taxes a team and stadium would potentially bring are property taxes, however, NFL facilities are generally exempt. *Id.* If not exempt, the city of Arlington Texas where the Cowboys stadium is located, could charge owner Jerry Jones \$6 million a year in property taxes. See Gregg Easterbrook, *How the NFL Fleeces Taxpayers*, THE ATLANTIC (Sep. 18, 2013, 8:24 PM), <http://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/309448/>; see also, GREG EASTERBROOK, THE KING OF SPORTS: FOOTBALL'S IMPACT ON AMERICA (2013).
- 16 Urban development benefits are thought to include revitalizing the targeted geographic areas, bringing in more real estate and new industry and density, more businesses like clubs and restaurants, more taxes and more residents. However, these factors are often hard to evaluate after the fact. See LONG, *supra* note 11, at 7-16.
- 17 Examples of intangible benefits generated by a city with a professional sports team include civic pride, national recognition, community self-esteem, sense of community, "big league" status, revitalization of citizens and increased quality of life, and the possibility of increased business prospects and higher property values. See e.g., Coates & Humphreys, *supra* note 10, at 298; *Testimony of Brad Humphreys* [hereinafter *Humphreys Testimony*], Subcommittee on Domestic Policy, Committee on Oversight and Government Reform, March 29, 2007. Testimony also available in SCOTT R. ROSNER & KENNETH L. SHROPSHIRE, THE BUSINESS OF SPORTS 247-51 (2011).
- 18 See LONG, *supra* note 11, at 80. Long found that after accounting for hidden tax breaks and lease kickbacks, the average stadium costs 40% (and rising) more than is reported to the public; see also, ROSNER & SHROPSHIRE, *supra* note 17. To use a specific example, research conducted by places like Good Jobs New York found that the hidden cost to taxpayers for a new stadium for the Yankees included around \$280 million to the city, \$100 million to the state, and \$44 million to the federal government. See *Testimony of Neil deMause* [hereinafter *deMause Testimony*], Subcommittee on Domestic Policy, Committee on Oversight and Government Reform, Mar. 29, 2007. Testimony also available in ROSNER & SHROPSHIRE, *supra* note 17, at 251-53.
- 19 I will refer to stadium deal(s) in this note. This term is meant to encompass both negotiations over leases for upgrades, such as in connection with the discussed Bills lease, and also to implicate a broader concept of any negotiation for a stadium deal which could include both new stadiums and new leases.
- 20 Research suggests that elected officials and politicians are "especially susceptible to flattery from professional athletes," and very aware of the political value of keeping a team in town, regardless of the cost. Coates & Humphreys, *supra* note 10, at 311. This is important to keep in mind when assessing the discussion of politicians being the lead negotiators for the Bills stadium lease *infra* Part I, and the discussion of who the government attorney's client is *infra* Part II.
- 21 Compared to many other stadium deals, especially those involving financing new stadiums, the Bills negotiation resulted in a reasonably fair outcome by comparison. Discussion of this deal is used because it is recent, it is illustrative of parties and interests involved, it falls on the smaller end of public spending, and simultaneously represents the power that teams have over smaller cities who wish desperately to keep their team. As former Washington D.C. mayor Sharon Pratt Kelly once said, the number of franchises forces communities into a "prisoner's dilemma of sorts ... if no mayor succumbs to the demands of a franchise shopping for a new home, then the team will stay where they are." However, this is a very unlikely outcome as Mayor B will always be willing to pay,

so after possible initial refusal, Mayor Aoften ends up paying the team's desired price. See ROSNER & SHROPSHIRE, *supra* note 17, at 240.

22 *Living in Erie County*, ERIE COUNTY NEW YORK GOVERNMENT, <http://www2.erie.gov/index.php?q=living-erie-county>.

23 Among others.

24 *Living in Erie County*, *supra* note 22. Compare this to New York City, first most populous city and home to 8.336 million people as of 2012. See, e.g., *Current Population Estimates*, NYC PLANNING, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml>.

25 The stadium is named after founder and current owner of the Buffalo Bills, 93-year-old Pro Football Hall of Famer Ralph Wilson.

26 Erie County Stadium Corporation (ECSC) is a New York business corporation and wholly owned subsidiary of the New York State Development Corporation Empire State Development. ECSC is a public benefit corporation. See 2013 Stadium Lease Between Erie County Stadium Corporation and Buffalo Bills Inc., Public Entities' Consolidated Draft, v. Mar. 18, 2013 [hereinafter *Stadium Lease*], available at <http://www2.erie.gov/exec/sites/www2.erie.gov.exec/files/uploads/Stadium%20Lease%20Agreement123.pdf>. The State Legislature defines the purpose and powers of the entity, governs the Board of Directors appointments, and establishes public benefit corporations in New York. Public Benefit Corporations are widespread including industrial development agencies, sewer and water authorities and other regional authorities. See, e.g., NEW YORK STATE OFFICE OF THE STATE COMPTROLLER, *Public Authority Reform; Reining in New York's Secret Government* (Feb. 2004), at 13, available at <http://www.osc.state.ny.us/press/releases/feb04/publicauthorityreform.pdf>. Most are required to submit annual statements to the State Comptroller. Other examples in New York State include the New York State Canal Corporation, and the Roswell Park Institute. *Id.* at 23.

27 See *Bills to Host High School Football Playoff Game at Ralph Wilson Stadium*, WKBW NEWS (Nov. 1, 2011), <http://www.wkbw.com/news/local/Bills-to-Host-High-School-Football-Playoff-Game-at-Ralph-Wilson-Stadium-133022143.html>. The stadium hosted the Section VI high school football championship in 2011, and sold tickets for seven dollars.

28 See, e.g., Bryan Shaw, "Tour of Champions" to Crown Winner, WIVB NEWS (Aug. 5, 2013), <http://www.wivb.com/news/local/ralph-wilson-stadium-hosts-drum-competition>.

29 The last concert at Ralph Wilson Stadium was Dave Matthews Band in June 2001. See *Tickets for Concerts at Ralph Wilson Stadium*, SONGKICK, <http://www.songkick.com/venues/46779-ralph-wilson-stadium> (last visited Mar. 18, 2014).

30 Buffalo Bills Schedule 2013, available at [http://espn.go.com/nfl/team/schedule/\\_name/buf/buffalobills](http://espn.go.com/nfl/team/schedule/_name/buf/buffalobills).

31 See *Bills owner won't commit to team's future in Buffalo*, USA TODAY SPORTS (Feb. 6, 2008), [http://usatoday30.usatoday.com/sports/football/nfl/bills/2008-02-06toronto\\_N.htm?loc=interstitialskip](http://usatoday30.usatoday.com/sports/football/nfl/bills/2008-02-06toronto_N.htm?loc=interstitialskip). The Bills are the NFL's first franchise to play annual regular games outside the United States. At the time of this article, it was speculated that Wilson might try to move the team to Toronto. Before the series began, there was conjecture that tickets in Toronto would sell for an average of \$250 per seat, compared to the average \$46 seat at Ralph Wilson Stadium. *Id.* Interestingly, Toronto Series games are the only NFL games which are not subject to the NFL's blackout restriction, where historically, unless 85% of non-premium tickets are sold out three days before the game, the game will not be broadcast to the local market. The FCC has proposed eliminating NFL blackout restrictions, and Senator John McCain has proposed that blackouts be banned in stadiums funded by taxpayer money. See The Sports Xchange, *FCC considers lifting NFL blackout restrictions*, YAHOO! SPORTS (Nov. 2, 2013, 10:58 PM), <http://sports.yahoo.com/news/fcc-considers-lifting-nfl-blackout-014426367--nfl.html>. However, the Toronto series, an attempt to regionalize the Bills franchise and also keep them in New York while expanding their fan base, which as stated above, is not subject to blackouts, has not been well attended. The 2010 preseason game against the Colts had an attendance record of around 20,000, in a stadium that seats 53,000. See Gregg Rosenthal, *Report: Only 20,000 at Colts-Bills game in Toronto*, NBC SPORTS (Aug. 20, 2010, 9:42 AM), <http://profootballtalk.nbcsports.com/2010/08/20/report-only-20000-at-colts-bills-game-in-toronto/>. Regular season games usually attract more fans, around 50,000, and in 2012 ticket prices were adjusted and lowered in an attempt to bring up attendance numbers. See Steve Ladurantaye, *Rogers cuts ticket prices to Bills games in Toronto*, THE GLOBE AND MAIL (July 11, 2012, 8:41 AM), <http://www.theglobeandmail.com/sports/football/rogers-cuts-ticket-prices-to-bills-games-in-toronto/article4405092/>.

32 Unlike the Bills, the Sabres play in the city of Buffalo. See *Living in Erie County*, *supra* note 22.

33 BUFFALO BILLS HISTORY, <http://www.history.buffalobills.com/Buffalo+Bills+History>, (last visited Mar. 18, 2014).

- 34 No other NFL team has gone to four consecutive Super Bowls. The Bills had the same head coach for all four (Marc Levy who published his first novel at the age of 85 in 2011), the same general manager who put together four teams to go to four consecutive Super Bowls (Bill Polian who went on to become President of the Colts), and the same quarterback to start four consecutive Super Bowls (Jim Kelly and he has never watched any of those games). Head Coach Levy once said, "There's one way to assure you'll never lose a Super Bowl. Don't go." See Mark Lopresti, *Buffalo Bills fondly recall four consecutive Super Bowl losses*, USA TODAY (Jan. 30, 2011, 8:44 PM), [http://usatoday30.usatoday.com/sports/columnist/lopresti/2011-01-30-lopresti-buffalo-bills-super-bowl\\_N.htm](http://usatoday30.usatoday.com/sports/columnist/lopresti/2011-01-30-lopresti-buffalo-bills-super-bowl_N.htm).
- 35 Value of team based on current stadium deal without deduction for debt. *NFL Team Valuations*, FORBES (calculated August 2013), <http://www.forbes.com/teams/buffalo-bills/> (last visited Mar. 18, 2014). Compare this valuation to that of #1 ranked team, the Dallas Cowboys, which was valued at \$2.3 billion.
- 36 See e.g., *Bills are NFL's 'most troubled franchise': Forbes*, CHICAGO TRIBUNE (Sep. 7, 2012), [http://articles.chicagotribune.com/2012-09-07/sports/chi-bills-are-nfls-most-troubled-franchise-forbes-20120907\\_1\\_forbes-franchise-nfl](http://articles.chicagotribune.com/2012-09-07/sports/chi-bills-are-nfls-most-troubled-franchise-forbes-20120907_1_forbes-franchise-nfl).
- 37 The BBIs organize game day watch gatherings throughout the country and the world. There are also many fans that are not members of the BBI. The BBI also boasts a locator map so fans can find likeminded people to watch the games with no matter where they are. See *Backers FAQs*, BUFFALO BILLS, <http://www.buffalobills.com/fans/billsbackers/backers-faqs.html> (last visited Mar. 18, 2014).
- 38 Former county executive, Chris Collins, from his study of the numbers before he left office, estimated this number. See Denise Jewell Gee, Gene Warner & Mark Gaughan, *Bills buyout fee could pass \$50 million*, BUFFALO NEWS (Sep. 22, 2012), <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20120923/CITYANDREGION/120929601/1043&template=printart>.
- 39 See Matt Warren, *Erie County Seeking Relocation Buyout in Bills Stadium Lease Negotiation*, BUFFALO RUMBLINGS (July 15, 2012, 12:00 PM), <http://www.buffalorumblings.com/2012/7/15/3160664/buffalo-bills-leaseagreement/in/3176067>; see also *Bills Announce Training Camp Schedule*, BUFFALO BILLS (May 30, 2012), <http://www.buffalobills.com/news/article-2/Bills-Announce-Training-Camp-Schedule/e5803af8-3aee-400a-ae7a-588f20a2aed0>.
- 40 See *Stadium Lease*, *supra* note 26.
- 41 *Id.*
- 42 *deMause Testimony*, *supra* note 18, at 251.
- 43 See, e.g., MODEL RULES OF PROF'L CONDUCT scope, (2013) [hereinafter MODEL RULES] ¶ 18 ("[T]he responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in the private client-lawyer relationship ... may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.").
- 44 *In re* Witness Before Special Grand Jury, 288 F.3d 289, 293 (7th Cir. 2002).
- 45 See *In re* Lindsey, 158 F.3d 1263, 1273 (D.C. Cir. 1998).
- 46 See Cathleen Cavell, *Public Secrets and Public Interest: Government Lawyers, Confidences and Conflicts*, MASS. GOV'T (1999), available at [http://www.mass.gov/obcbbbo/pub\\_sec.htm](http://www.mass.gov/obcbbbo/pub_sec.htm).
- 47 MODEL RULES R. 1.7  
 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:  
 (1) the representation of one client will be directly adverse to another client; or  
 (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- 48 MODEL RULES R. 1.2.
- 49 See Cavell, *supra* note 46.

- 50 See, e.g., Marcia E. Mulkey, *A Crisis of Conscience and the Government Lawyer*, 14 TEMP. POL. & CIV. RTS. L. REV. 649, 649-50 (2006).
- 51 See, e.g., Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyer*, 6 GEO. J. LEGAL ETHICS 291, 296 (1991) (discussing in part the dispute between broad loyalty to the public interest or government, and a more restricted client such as the particular agency, and discussing the potential clients as listed above).
- 52 See, e.g., Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 1-14 (2006) (includes a lengthy discussion of the possibilities of who the government attorney represents and the benefits and drawbacks to the “agency” approach which mirrors mainstream legal ethics applicable to all lawyers and defines the client as the agency, and the “public interest” approach which goes further than ethics found in the mainstream approach); see also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 797-802 (2000) (arguing for public interest serving lawyers and discussing counter arguments); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986) (“[P]ublic interest ... is a vague and meaningless abstraction.”).
- 53 See Radack, *supra* note 52, at 9-10.
- 54 See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342, at 120 (1975) (“The duty of all government lawyers [is] to seek just results rather than the result desired by a client.”).
- 55 See Radack, *supra* note 52, at 10-11; see, e.g., Rex E. Lee, *Lawyering for the Government: Politics, Polemics and Principle*, 47 OHIO ST. L.J. 595, 595-96 (1986) (including discussion of government attorney's “enhanced responsibility as an officer of the court precisely because he or she is a government lawyer”).
- 56 See Radack, *supra* note 52, at 10 & n.65, including citations to commentators such as VICTOR S. NAVASKY, KENNEDY JUSTICE 360 (1971) (describing the Attorney General's role in a quote from Joseph Kraft as “less as a player on the government team than as an umpire exerting a legal check on arbitrary action of the executive”); Berry Pendley, *Overzealous Advocates, No Clients No Responsibilities*, LEGAL TIMES (Feb. 15, 1988), at 17 (describing “over-emphasis by government lawyers on their role as zealous advocates” as inappropriate where the government lawyer has no client and unlimited power and resources).
- 57 See Radack, *supra* note 52, at 11; see also Berenson, *supra* note 52 (arguing that government attorneys should serve the public interest); Kenneth W. Dam, THE SPECIAL RESPONSIBILITY OF LAWYERS IN THE EXECUTIVE BRANCH, CHI. B. REC. (Special Centennial Issue) 4 (1974); Steven H. Leleiko, *Professional Responsibility and Public Policy Formulation*, 49 ALB. L. REV. 403, 417 (1985) (“[G]overnment lawyers have a particular public responsibility to ensure fairness and honesty in government affairs.”). Ethical scholars such as David Luban, Thomas Schaffer, and Deborah Rhode also support the public interest approach. See Radack, *supra* note 52, at 9-10 (citing DAVID LUBAN, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS, (1983); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY xxii (1988) (endorsing the “morally activist lawyer [who] shares and aims to share with her client responsibility for the ends she is promoting in her representation [and who] cares more about the means used than the bare fact that they are legal”); THOMAS L. SCHAFFER, FAITH AND THE PROFESSIONS (1987); DEBORAH RHODE, IN THE INTERESTS OF JUSTICE 66-67 (2000) (suggesting that attorneys should “accept personal responsibility for the moral consequences of their professional action”).
- 58 See Radack, *supra* note 52, at 10. See also, cases such as *In re Witness Before Special Grand Jury 2000-02*, 288 F.3d 289, 293 (7th Cir. 2002), and *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998).
- 59 James Fink, *Optimism remains on Bills' stadium lease talks*, BUFFALO BUS. FIRST (Sep. 12, 2012), <http://www.bizjournals.com/buffalo/news/2012/09/12/optimism-remains-on-bills-stadium.html?page=all>.
- 60 If so, does this merely include the taxpayer who in their heart of hearts wishes the Bills to remain in Buffalo, or does the public also include the taxpayer who has no interest in shelling out hard earned money to taxes which will go towards building luxury boxes at a stadium for a team they do not support or are indifferent to?
- 61 Here ostensibly this would indicate the whole government of New York State.

- 62 But here the lawyer doesn't regularly work for a particular branch, instead has been brought in to help negotiate on behalf of "the government."
- 63 Does this mean specifically the governor's office in this particular case?
- 64 Cuomo had promised to keep the Bills in Buffalo and is running for reelection, aiming to this time capture the vote of Erie County, which he lost to his opponent in the last election. *See e.g.*, Joseph Spector, *Cuomo in Buffalo: "The Bills are going to be here,"* POLITICS ON THE HUDSON (Sept. 9, 2013, 12:22 PM), <http://polhudson.lohudblogs.com/2013/09/09/cuomo-in-buffalo-the-bills-are-going-to-be-here/> ("Cuomo lost Erie County in 2010 to hometown favorite Carl Paladino. Cuomo has since made Buffalo a top priority, and Cuomo is seeking re-election next year.").
- 65 *See* Danny Hakim, *Deal Will Give Cuomo Administration 12-Seat Suite at the Bills' Stadium*, N.Y. TIMES (Mar. 21, 2013), [http://www.nytimes.com/2013/03/22/nyregion/deal-will-give-cuomo-administration-luxurysuiteat-bills-stadium.html?\\_r=0](http://www.nytimes.com/2013/03/22/nyregion/deal-will-give-cuomo-administration-luxurysuiteat-bills-stadium.html?_r=0).
- 66 *Id.* (quoting Richard Brodsky, former state assemblyman and long time state agency watchdog). Richard Brodsky was also very critical of efforts by Mayor Bloomberg's administration to get luxury suites at both the new Yankees and the Mets stadiums. Extensive emails were unearthed between former Mayor Bloomberg's aides and stadium lawyers, including extensive negotiation over giving players more parking spots which would have been used for the public, and whether or not the suites would come with food. Query whether these negotiations served any public interest. Brodsky, also a critic of these deals, conducted a hearing on public financing of sports stadiums in the summer of 2008, and questioning what the public interest was in these deals and who was protecting it, said, "[w]e can't find the money for the M.T.A., or schools, or hospitals, and these folks are used to the perks and good things of life, and expect them." *See* David Chen, *City Pressed Hard for Use of Yankee Luxury Suite*, N.Y. TIMES (Nov. 29, 2008), [http://www.nytimes.com/2008/11/30/nyregion/30stadium.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/11/30/nyregion/30stadium.html?pagewanted=all&_r=0). In Hamilton County Ohio where the NFL Bengals and MLB Reds play, sports subsidies given for stadiums hit taxpayers with \$26 million debt. At the same time, the county cut \$23.6 million from the health-and-human-services budget, and \$119 million from County Schools. *See* Easterbrook, *supra* note 15.
- 67 MODEL RULES scope, ¶ 18.
- 68 *See, e.g.*, *Comcast Corp. v. Behrand*, 133 S. Ct. 1426 (2013) (holding class of cable subscribers was improperly certified where the classes' proposed model to show damages on a class wide basis was inadequate); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (certification of national class of female employees improper where failed to show common questions of law or fact and monetary relief is incidental); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997) (finding class certification requirements of commonality of issues of law and fact inadequate for certification in mass asbestos claim).
- 69 *See* Gregg H. Curry, Comment, *Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit*, 24 J. LEGAL PROF. 397, 398 (2000); *see also* *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982).
- 70 *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1438 (2d Cir. 1993) ("A judge in a class action is obligated to protect the interests of absent class members.").
- 71 *See* Milton Regan, Symposium Forward, *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 212 (2000).
- 72 *Id.* introducing what Professor Coffee will discuss.
- 73 *Id.* Again, the parameter for interests which differ are very limited by case law.
- 74 *Id.*
- 75 *Anderson*, 667 F.2d at 1211.
- 76 MODEL RULES R. 1.7  
 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:  
 (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;  
 (2) the representation is not prohibited by law;  
 (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

77 Curry, *supra* note 69, at 407; *see also* Palumbo v. Tele-Communications, Inc., 157 F.R.D. 129, 133 (D.C. 1994) (“unidentified class members cannot waive a potential conflict of interest”).

78 Curry, *supra* note 69, at 407.

79 *Id.* at 402.

80 *Id.* The case law in this area deals in part with class representatives alleging misconduct against the attorney and seeking removal where they disagreed with the settlements reached. Courts have found that the procedural aspects of [Federal Rule of Civil Procedure 23](#) protects classes, and that counsel's duty is owed to the class as a whole where there are conflicts of interest between class members and the class representative. Further, upon certification, class representatives must report conflicts of interest with counsel to the court. *See, e.g.,* [Maywalt v. Parker & Parsley Petroleum Co.](#), 67 F.3d 1072, 1078 (2d Cir. 1995).

81 [FED. R. CIV. P. 23 \(a\)\(4\)](#); *see also* [Weinberger v. Kendrick](#), 698 F.2d 61, 72 (2d Cir. 1982) (quoting [In re Beef Antitrust Litigation](#), 607 F.2d 167, 173-78 (1981) (“The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies.”)).

82 Tim Sullivan, *City needs professionals, not politicians, in stadium talks*, SAN DIEGO UNION-TRIBUNE (July 24, 2010), <http://www.utsandiego.com/news/2010/Jul/24/city-needs-professionals-not-politicians-in/2/?#article-copy> (discussing exploitation of public money when politicians handle stadium deals instead of using experts); *see also*, Neil deMause, *Tales of city mismanagement: How the St. Louis Rams won their sweetheart lease*, FIELD OF SCHEMES (July 26, 2010), [http://www.fieldofschemes.com/news/archives/2010/07/4237\\_tales\\_of\\_city\\_m.html](http://www.fieldofschemes.com/news/archives/2010/07/4237_tales_of_city_m.html) (discussing the Rams deal and the need for dispassionate experts in stadium negotiations).

83 *See, e.g.,* Marc Edelman, [Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums](#), 6 RUTGERS J. L. & PUB. POL'Y 35 (2008) (discussing the monopoly power that professional sports teams hold in the franchise market, and calling for a bill to prevent sports teams from getting public subsidies in order to curb their bargaining power); Frank A. Mayer III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195 (2005) (self-explanatory title); Scott A. Jenson, Symposium: Sports Facilities and Development, Comment, [Financing Professional Sports Franchises with Federal Tax Subsidies: Is It Sound Tax Policy?](#), 10 MARQ. SPORTS L.J. 425 (2000) (calling for amendment to the Internal Revenue Code to either eliminate or restrict tax-exempt status of bonds used to finance stadium); Kristen E. Knauf, Comment, [If You Build It, Will They Stay? An Examination of State-of-the-Art Clauses in NFL Stadium Leases](#), 20 MARQ. SPORTS L. REV. 479 (2010) (examining state-of-the-art clauses in stadium leases and concluding they are unconscionable, unenforceable, and set an “alarming” precedent); Katherine C. Leone, Note, [No Team, No Peace: Franchise Free Agency in the National Football League](#), 97 COLUM. L. REV. 473 (1997) (discussing the problem of franchise free agency and proposing a limited antitrust exemption for the purposes of franchise relocation and legislation to eliminate tax-exempt municipal bonds used to finance stadiums); Todd Senkiewicz, Comment, [Stadium and Arena Financing: Who Should Pay?](#), 8 SETON HALL J. SPORT L. 575 (1998) (concluding that funding schemes using hundreds of millions in public money is not equitable and stadiums should be financed privately).

84 *See, e.g.,* NEIL DEMAUSE & JOANNA CAGAN, [FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT](#) (1998) (discussing the financial cost to the public of the drive for new stadiums, the people that fought back, and discussing a number of stadium battles); MARK ROSENTRAU, [MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT](#) (2000) (describing and critiquing the current system as a waste of public money that providing both government officials and taxpayers with a better understanding of how to negotiate with sports franchises and protect the public good); *see also*, ROSNER & SHROPSHIRE, *supra* note 17, at 245-53 (including testimony from both Brad Humphreys and Neil deMause before the Congressional Committee on Oversight and Government Reform 2007, discussing evidence that professional sports teams have no tangible economic impact in cities on income, earnings, employment or tax revenues, and proposing that Congress is in the best position to end the worst of the publicly funded giveaways by closing loopholes for tax-exempt bonds, restricting business-entertainment deductions for luxury box purchases, and slowing the industries holding cities hostage for tax subsidies); Andrew Zimbalist & Roger G. Nole, [Sports, Jobs, & Taxes: Are New Stadiums Worth the Cost?](#), Brookings (1997), available at <http://www.brookings.edu/research/articles/1997/06/summer-taxes-noll> (discussing the monopoly teams hold over cities, and suggesting various potential strategies to address the problem such as cities bargaining as a group with leagues,

inserting non-relocation terms in leases, and invoking eminent domain. Concluding that prospects for cutting sports subsidies are poor, especially considering the popularity of sports in American culture).

85 See, e.g., LONG, *supra* note 11; ROSNER & SHROPSHIRE, *supra* note 17.

86 *Id.*

87 See, e.g., proposed laws discussed *infra*, note 88; Edelman, *supra* note 83; Jenson, *supra* note 83; Knauf, *supra* note 83; Leone, *supra* note 83; Senkiewicz, *supra* note 83.

88 Laws proposed but not passed include: PROFESSIONAL SPORTS FRANCHISE STABILIZATION ACT OF 1992 (would have limited relocations of franchises and given communities a right to purchase franchises under specified conditions), FANS RIGHTS ACT OF 1995 (setting forth strict criteria for moving a team taking into account (1) fan loyalty, (2) public financing and subsidies, (3) adequacy of stadium, (4) value of the team, and option for any locality to purchase team), FAN FREEDOM AND COMMUNITY PROTECTION ACT OF 1996 (requiring notice to local government and people where teams sought to relocate, and attempted to limit relocation to protect fans and communities), STOP TAX-EXEMPT ARENA DEBT ISSUANCE ACT OF 1997 (attempting to amend the Internal Revenue Code to correct tax-exempt financing of professional sports facilities), PROFESSIONAL SPORTS FRANCHISE RELOCATION ACT OF 1998 (limiting anti-trust liability of professional sports league who restricted relocation of teams, included provisions regarding notice to public, and allowed civil actions by interested parties where league compliance was questioned).

89 See Section II, *supra*, “Government Attorney: Who is the Client?”

90 Many of the fans are of course taxpayers, but fans do not always live in the same city or state as the team, and therefore are not part of the taxpayer base.

91 OFFICE OF THE PEOPLE'S COUNCIL DISTRICT OF COLUMBIA, <http://www.opc-dc.gov>, (last visited Mar. 18, 2014).

92 *Id.*

93 See e.g., MARYLAND OFFICE OF PEOPLE'S COUNSEL, <http://www.opc.state.md.us> (last visited Mar. 18, 2014) (zoning counsel comprised of knowledgeable and experienced attorneys and tasked with promoting and protecting public interest in zoning related matters); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, <http://pubadvocate.nyc.gov> (last visited Mar. 18, 2014) (created in 1993 as a direct link between the electorate and the city government and to serve as a public watchdog).

94 Long, *supra* note 11, at 178-190.

95 *Id.* at 179.

96 *Id.* at 179-80.

97 *Id.* at 182.

98 *Id.* at 183-84. Template available and discussed in ch. 3.

99 *Id.* at 183.

100 *Id.* at 184. Where teams pay rent and share profits to help “pay back” the public cost of building a publicly owned facility, the amounts collected are never enough and never actually pay back that initial cost. *Id.*

101 *Id.* at 185. Government land ownership is important because the government can strategically manage assets over time. It is easier and more expedient for public parties to manage land acquisition particularly where businesses and residents may need to be relocated. This fits into overall core government competency and regulatory control. Further, when the time comes to renegotiate a lease, the public is placed in a better position. It could renew the lease and keep the stadium, or it could demolish the facility and put the land to other use. For example, the old Memorial Stadium in Baltimore was redeveloped and turned into housing for seniors. *Id.*



- 102 *Id.* at 186. Taking the lead on infrastructure does not mean the public will pay all of the associated costs; cost sharing is still necessary. However, by taking the lead, different parties come to the negotiating table such as the team, and even local property owners who would also benefit from such improvements. *Id.*
- 103 *Id.*
- 104 *Id.* at 187. For example, if the public commits to total coverage of cost of routine maintenance of facilities, this is a surer and larger forward-looking cost when measured against the pay off promise of ticket revenue. The number of tickets bought is in constant flux, and often under delivers financially compared with the certainty of the necessity of cost of roof maintenance. *Id.*
- 105 *Id.* at 188. Long's findings show increased numbers of government participants in stadium deals at higher levels of government. Promise and use of county and state funds help to spread costs. However, this cost spreading can also be seen from a different side as a way to circumvent legislation required at a local level for funding approval by voters. *Id.*
- 106 *Id.* at 190. Where one promised pay off of a stadium is often increased urban development, Long explains that different sports make better anchors for urban development. Baseball arenas make better urban development anchors because the large number of games bring more people to an area more frequently and thus help encourage local businesses to move in. Football stadiums draw fans driving from further regional areas, require more land for a larger stadium with more seating, more land for a larger parking lot, and have very few home games to encourage local development. *Id.*
- 107 My suggestions for what a Public Advocate Counsel should encompass are illustrative not limited, and meant to suggest that a number of factors are at play.
- 108 Teams use “promotional studies” which are either sponsored by consultants or teams to provide a forward-looking depiction of the economic impact of a stadium. These studies conclude that new facilities will bring lots of money in to local income and create tons of new jobs. However, academic studies that retroactively look back conclude that there is either no measureable impact on both income and employment, or sometimes a small negative impact. Most promotional studies disappear quickly. *See Humphreys Testimony, supra* note 17, at 249.
- 109 Surely the NFL as a tax-exempt organization made up of billionaires, can afford to help subsidize this Counsel, when in 2011 the NFL paid its leading five executives almost \$60 million. *See Easterbrook, supra* note 15.
- 110 Broadened to include all sports this is true for.

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