

## 10 Questions to a Media Lawyer: Mickey Osterreicher



**Osterreicher testifies before the House Subcommittee on Courts, Intellectual Property and the Internet on allowing cameras in federal courts.** *Photo by John Shinkle, Politico*

*Mickey Osterreicher is general counsel for the National Press Photographers Association (NPPA) and of counsel to Barclay Damon, LLP in its Media and First Amendment Law practice area.*

### **1. How'd you get into media law? What was your first job?**

Having been a photojournalist in both print and broadcast for over 40 years, it seemed like a natural progression of things to be drawn to media law once I decided to go to law school, which happened toward the end of my career in television. One of the reporters who I worked closely with got in the car one day on our way to an assignment and said he was thinking about going to law school. I replied that I had always thought about going to law school and so we embarked on that journey – first taking study courses, then the LSAT's and then applying to only one school. Since we were both still working at the station the sole viable option was the University of Buffalo School of Law. We were both accepted and went to classes from 8am to 2pm and then raced to work 2:30 – 11:30pm.

Aside from working and going to school I also freelanced for ESPN. Sitting outside the Buffalo Bills locker room reading my contracts book while waiting for weekly practice to end so I could do interviews, the Bills' head coach, Marv Levy, stopped to ask me what I was doing? "Studying," I said. He replied he could see that but wanted to know what I was studying for? I told him I had returned to law school. He just shook his head and walked away. It turns out he had gone to Harvard Law for 2 weeks and hated it, graduating instead with a master's degree in

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English history. It became a running joke – when he saw me outside the locker room Marv would ask if I was still studying (my nose was in the book) and I would look up to say, “yep coach, still studying.” When I found out (by pager) that I passed the bar I was at Bills’ quarterback Jim Kelly’s house doing an interview with ESPN’s Chris Berman. They were the first two people I told and got high-fives from both of them.

My first job in journalism was as the photo editor of the Spectrum which is the school paper at SUNY Buffalo. My first job as a lawyer was as a sole practitioner taking whatever came in the door, which was family law.

**2. What do you like most about your job?  
What do you like least?**

I am so grateful that I can give back to journalism, a profession I loved when I worked as a photojournalist. It is also very helpful that I truly understand what it is my client does (having done it for so long) which is so important as an attorney. It has been very frustrating trying to make sure that photographers, in particular visual journalists, are paid for their work in an age when far too many people believe the Internet is the public domain and there is an almost mob mentality of entitlement to taking anything found there without permission, credit or compensation.

**3. What’s the biggest blunder you’ve committed on the job?**

My biggest blunder was not going into First Amendment law immediately – but because Buffalo is not yet the media capital of the world, I took what came through the door. Much of what I learned practicing family law has actually been very helpful in dealing with clients and issues, so really when you ask I don’t have any regrets. As for actual big blunders – I can’t recall any – that is not to say I have not made plenty of mistakes but none of them have been uncorrectable.

**4. Highest court you’ve argued in or most high profile case?**

NPPA has been involved in a number of very important First Amendment case regarding the right to photograph and record police officers performing their official duties in a public place. We have helped draft or been signatories to amicus briefs supporting that proposition and I am



**Osterreicher on the campus of SUNY Buffalo circa 1970.** Photo by Marilyn Brenner

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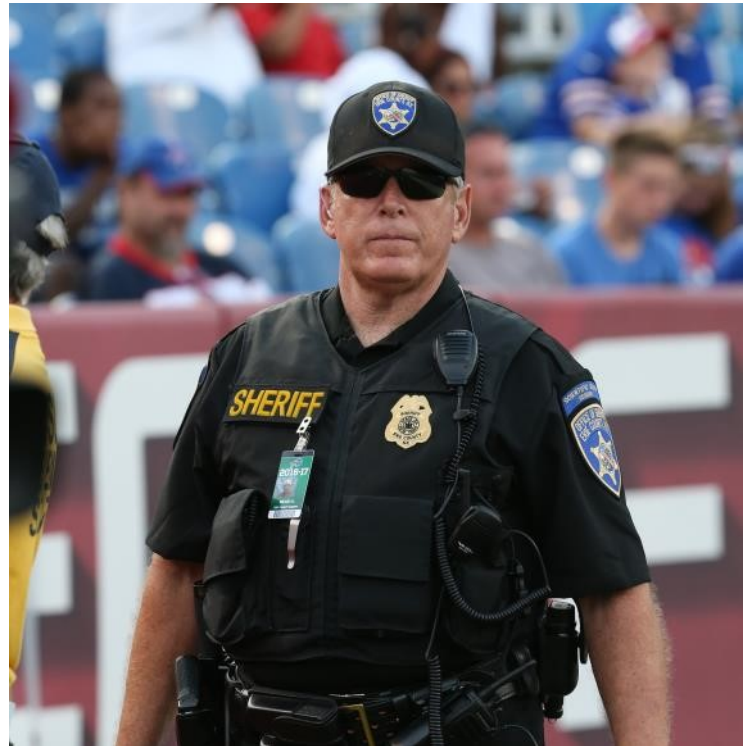
proud to say that since the U.S. Supreme Court has declined to rule on this issue, such a right is now clearly established in the First, Third, Fifth, Seventh, Ninth and Eleventh U.S Circuit Courts of Appeals.

Most recently I was involved in an amicus brief concerning such a matter in the Second Circuit. One of our members, Douglas Higginbotham, had been arrested and charged with disorderly conduct while filing an Occupy Wall Street demonstration in 2011. I was able to have those charges dismissed almost immediately. Higginbotham then brought a federal civil rights lawsuit in the United States District Court for the Southern District of New York against the arresting officers and the City of New York. Among other things, his complaint alleged that “the defendants retaliated against him for filming a violent arrest in violation of his First Amendment rights.” In refusing to grant the defendants’ motion to dismiss the case, the judge held that “the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was ‘clearly established’ at the time of the events alleged in the complaint.”

Unfortunately, a motion for summary judgment on probable cause was granted and subsequently appealed. Attorneys Robert Balin, Abigail Everdell and Jack Browning, of Davis Wright Tremaine LLP drafted and filed an *amicus* brief with my help and joined by more than 60 leading news outlets and free speech organizations. Despite our best efforts, the Second Circuit upheld the lower court on probable cause and refused to address the right to record question as other Circuits had done.

## 5. What’s a surprising object in your office?

A framed photo of President John F. Kennedy looking over Niagara Falls taken by a photographer at the newspaper where I used to work. Also an engraved shell casing from a USAF A-10 Thunderbolt II “Warthog” commemorating the event where my son was awarded the Distinguished Flying Cross by the Secretary of the Air Force for flying that aircraft and helping to save 60 soldiers in Afghanistan who were under attack.



**Osterreicher, a uniformed Reserve Sheriff's Deputy with the Erie County Sheriff's Office since 1976, at Ralph Wilson Stadium during a Buffalo Bills game.**

*Photo by James P. McCoy*

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**6. What's the first website you check in the morning?**

In the morning, the Media and Entertainment feed from Law 360 and the MLRC MediaLawDaily mid-day.

**7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?**

Alicia Calzada, a past president of NPPA who brought me onboard to represent the organization, asked me a few years later if she should go to law school. I encouraged her to do so (as I encourage anyone to go to law school if they have the desire). I am so very pleased to now be working with her in advocating for the rights of visual journalists.

**8. One piece of advice for someone looking to get into media law?**

I would strongly advise that anyone looking to get into media law join the MLRC and the ABA Communications Law Forum. It is extremely collegial and there are many programs to help and encourage law students. It is also a wonderful place to find a mentor while learning about this very crucial area of law.

**9. What issue keeps you up at night?**

The fact that far too many newspapers are folding or laying off staff. The loss of entire photo departments is frightening, and things are only slightly better on the broadcast side. Contracts for freelancers are becoming more onerous – with more rights being demanded for less compensation – and copyright infringement of images is running rampant. Being labeled as the “enemy of the people” creates an atmosphere in which core First Amendment protections may be further eroded.

**10. What would you have done if you hadn't been a lawyer?**

I would have remained a photojournalist, a profession where I felt I never really worked a day in my life because I so loved going places, meeting people and telling stories. But at this point in my life I am so grateful for the opportunity to represent such an important organization as NPPA and be part of such a supportive firm as Barclay Damon.



**Osterreicher's photograph for the *Buffalo Courier-Express* of Harvey Weinstein, left, and O.J. Simpson in 1977.**

*Photo by Mickey Osterreicher*