



Fall 2013

NIABA NEWS

Men and women sharing a common heritage in a chosen profession

NIABA TO VISIT CLEVELAND AND CELEBRATE ITS ITALIAN HISTORY

By Dino Mazzone
NIABA President

Our first NIABA Board of Directors meeting, outside my installation as NIABA's national President in my hometown of Montreal, Quebec, Canada, takes us to Cleveland, Ohio in late September 2013. Cleveland was a deliberate first choice. Aside from the fact that this will mark out organization's first official visit to "The Cleve", Cleveland has a rich history within the Italian-American community.



NIABA President Dino Mazzone

Murray Hill (or better known as Cleveland's "Little Italy"), is the epicenter of Italian culture in Northeast Ohio, an area reporting 285,000 Italian-Americans. Little Italy took root when Joseph Carabelli saw the opportunity for monument work in Cleveland's Lake View Cemetery. Carabelli was a skilled stonemason and influential businessman, son of Carolina Sartori and Carlo Carabelli, and one of the first lay leaders in Little Italy. A native of Porto Ceresio, Como Province, Carabelli immigrated to America in 1870 at the age of 20, following an apprenticeship as a stonecutter. He spent 10 years in New York City as a sculptor, where he carved the statues for the city's Federal Building. Upon his arrival in Cleveland, Carabelli established the Lakeview Granite & Monumental Works, which soon attracted a large group of stonecutters from the province of Campobasso (who settled Mayfield Road near the cemetery) and established what soon became the city's leading marble and granite works.

Inspired by Carabelli, our visit to Cleveland is, in part, to lay NIABA's own stone foundation and ground work. Choosing Cleveland is our small gesture to honor its storied past and to speak to its promising future. As jurists from across the United States and Canada, NIABA seeks to advance the interests of the Italian-American legal community and to improve the administration of justice. As Americans of Italian ancestry, our history, our cultural legacy, is one built on laws, rules and the respect for authority. And, in no small measure, NIABA rejoices in coming to Cleveland at this time in its history, bearing witness to the appropriate justice meted out to the individual who robbed each of Michelle Knight, Amanda Berry, and Gina DeJesus from her unalienable right to life, liberty and the pursuit of happiness. As President of NIABA, we wish each of these women healthy, full and prosperous lives.

I hope you enjoy this latest edition of our NIABA News and that you will join us in Cleveland. Please visit our website at www.niaba.org for a complete itinerary of our next Board of Directors meeting. I welcome your feedback, your ideas and your involvement in our national organization.

Fraternamente,

A handwritten signature in dark ink, appearing to be "D. Mazzone".

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ITALIAN-AMERICAN CONTRIBUTIONS TO U.S. JURISPRUDENCE: THE RIGHT OF PRIVACY

By Clara Flebus, Esq.

In the social context, America has often been described as a “melting pot.” This description is also true in the context of jurisprudence. For instance, the contributions of one Italian-American jurist, Louis Joseph Capozzoli, have proven essential in the development and refinement of the right of privacy under New York law.

Born in Cosenza, Italy, in 1901, Capozzoli emigrated with his family to the United States as a young boy. After receiving his law degree from Fordham Law School in 1922, he engaged in the private practice of law as a trial lawyer. From 1930 to 1937, he served as an Assistant District Attorney of New York County. He was a member of the New York State Assembly from 1939 to 1940, and was elected to the United States House of Representatives. He served as a Congressman until 1945, after which he did not seek re-nomination.

Capozzoli was then elected to the bench in the New York City Court in 1946. Few years later, he moved on to serve as a judge in the Court of General Sessions in 1950. Capozzoli became a justice in the New York Supreme Court in 1957, where he served for almost ten years. In 1966, Governor Rockefeller appointed Capozzoli to the Appellate Division, First Department, in New York City, where he remained until his retirement in 1977.

While sitting on the Appellate Division, Judge Capozzoli authored opinions in a series of glamorous cases that contributed to the definition and scope of New York’s statutory right of privacy, especially vis-à-vis the guarantees of free speech afforded by the U.S. Constitution. More specifically, section 50 of New York Civil Rights Law provides that the use of the “name, portrait or picture of any living person” for advertising or trading purposes, without having first obtained the written consent of such person, constitutes a misdemeanor.¹

Meanwhile, section 51 of that statute authorizes the filing of an action for equitable and/or monetary relief by any party aggrieved by such unauthorized use.² Both sections were designed to protect individuals against commercial exploitation.

During his tenure on the bench, Judge Capozzoli was instrumental in establishing that New York’s right of privacy must be construed narrowly so not to curtail the right of free speech, or free press, or to block the publication of matters newsworthy or of public interest, unless the information is knowingly false or disseminated in reckless disregard of the truth.

For example, in *Wojtowicz v. Delacorte Press*,³ the court dismissed a cause of action for invasion of the right of privacy under sections 50 and 51 of the Civil Rights Law, where it was clear that certain characters depicted in the movie “Dog Day Afternoon” represented the plaintiffs, even though defendants had not used their actual names, portraits or pictures. Plaintiffs were the wife and children of John Wojtowicz, an individual who had attempted, unsuccessfully, to rob a bank in Brooklyn, and became trapped inside with several hostages. The standoff was covered by life television which captured Wojtowicz’s other “wife,” a male transvestite, who was brought to the scene to talk to him. The movie was made after the events took place, and announced to the viewers that it narrated a true story. It depicted Wojtowicz’s wife as an unpleasant person who could be perceived as being the cause of her husband’s “problems.”

In a unanimous decision, Judge Capozzoli wrote that the right of privacy did not protect against the portrayal of acts and events concerning a person designated fictitiously in a novel or play merely because they were similar to the experiences of the living plaintiffs.

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Contributions

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He reasoned that such a construction would broaden the scope of the statute beyond the meaning ordinarily ascribed to the words “name, portrait or picture.”

Another decision authored by Judge Capozzoli, *Namath v. Sports Illustrated*,⁴ established the “incidental use exemption” to the New York statutory right of privacy. In that case, previously published photos of Namath, the then star quarterback of the New York Jets who led them to victory in the 1969 Super Bowl, were used in advertisements promoting subscriptions to the magazine *Sports Illustrated*, accompanied by headings stating “The Man You Love Loves Joe Namath,” and “How to Get Close to Joe Namath.” Judge Capozzoli acknowledged that the republication of the pictures was motivated by a commercial purpose. However, he explained that Namath’s statutory right of privacy was not violated “so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared.”⁵ As the language associated with the picture did not reasonably suggest Namath’s endorsement of the magazine, the advertisements were found to be fully protected as incidental advertising of the news medium itself.

Judge Capozzoli also sat on the appellate panel in other critical decisions that further refined the right of public figures to restrain use of their name and picture and/or recover damages under



sections 50 and 51 of the Civil Rights Law in light of constitutionally protected First Amendment rights. In *Rand v. Hearst Corporation*,⁶ the court addressed the question of whether mentioning the name of plaintiff, who defined herself as a well-known writer, on the cover of a book authored by another writer constituted use for advertising purposes in violation of plaintiff’s right of privacy. The quotation on the book cover favorably compared plaintiff’s writing style to that of the author, and was excerpted from a book review previously published in the *San Francisco Examiner*. The court observed that a public figure, by definition, has no complete privacy, and the New York statute should be interpreted

to avoid conflict with the free dissemination of information on matters of public interest. Consequently, the court reasoned that not every instance in which a public figure’s name or picture is

used in connection with advertising constitutes a breach of privacy. Thus, the court concluded that the defendant had a right to quote from the prior book review since the information conveyed was a matter of public interest and was informative of the nature of the book being sold.

By contrast, the right of privacy was enforced in *Reilly v. Rapperswill Corporation*,⁷ where the manufacturer of an insulation product used

excerpts of a CBS newscast in an advertising film sold to distributors to promote the product to potential customers. Plaintiffs, the television broadcast journalists who had filmed and presented the news report connected to defendant’s product, sought to enjoin defendant from using their name and likeness in its own promotional film. The court held that even though plaintiffs were public figures, defendant’s film constituted a commercialization of their personalities through a form of treatment that was different from the dissemination of news and information the court had found permissible in the *Rand* book advertising decision. In addition, the court observed that the commercial exploitation of an impartial

news report would have a chilling effect on reporters involved in fields of public concern. In light of these considerations, the court enjoined defendant from using the newscast excerpt.

The creation of cogent judicial exceptions to New York’s statutory right of privacy harmonized state law with the constitutional right of free speech. Upon retirement from the bench, Judge Capozzoli continued to apply his legal knowledge and experience by serving on the State Attorney General’s Advisory Committee on Ethical Standards. He died of a heart attack in 1982, at age 81. His contributions as a competent and versatile lawyer who applied his legal skills first as an advocate, then as a legislator, and finally as a judge, live on in the law.

¹ N.Y. Civil Rights Law §50 (McKinney’s 2013).

² N.Y. Civil Rights Law §51 (McKinney’s 2013).

³ 395 N.Y.S.2d 205 (App. Div. 1977).

⁴ 371 N.Y.S.2d 10 (App. Div. 1975).

⁵ Id. at 12.

⁶ 298 N.Y.S.2d 405 (App. Div. 1969).

⁷ 377 N.Y.S.2d 488 (App. Div. 1975).

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Clara Flebus is a NIABA member and an appellate court attorney in New York State Supreme Court. She has clerked in the Commercial Division of the court and holds an LL.M. degree in International Business Regulation, Litigation and Arbitration from NYU School of Law.

AN AMERICAN'S JOURNEY THROUGH THE ITALIAN JUSTICE SYSTEM

By Lawrence S. Katz

Amanda Knox' long roller-coaster ride through Italian halls of justice, after being charged with the 2007 murder of her British roommate Meredith Kercher, has drawn worldwide attention, but garnered particular scrutiny here in the U.S. While the Italian American bar has no responsibility to defend the Italian legal system, it can play a constructive role in promoting a better understanding of that system and how it differs from its American counterpart.

Ms. Knox was convicted along with her former boyfriend Raffaele Sollecito in 2009 and sentenced to 26 years in prison. When an appeals court "retried" and "acquitted" the American college student in 2011, after she had spent four years in prison, she was released and she returned to the United States. But on March 26, 2013, that "acquittal" was reversed, raising the specter of another conviction and fueling speculation as to whether Italy would eventually seek her extradition. In turn, commentators have focused on whether we would honor our extradition treaty with Italy if its laws do not include the procedural safeguards Americans regard as fundamental.

While the American criminal justice system derives from the common law, the Italian system has civil law roots. The derision by some critics in the U.S. is somewhat ironic in that the Italian system has actually moved in the direction of the

American system over the past 25 years. The backbone of the Italian criminal justice system is the Codice Rocco (the Rocco Code of 1930), which entrusted wide-ranging powers in the judiciary. Confident that jurists had more knowledge and training than the general population, the European model eschewed juries, entrusting judges not only to apply the law, but to determine the truth. Traditionally, judges in Italy have worked hand-in-glove with prosecutors in investigating criminal cases, a process that might take ten years or even more before a preliminary hearing could be held. Ultimately, it was the supervising judge who took the lead role over the prosecutor in deciding whether to continue or terminate the proceedings. In this system, attorneys on both sides were relegated to minor roles and defendants played virtually no roles at all, lacking, for example, the right to counsel or to confront the evidence against them.

This inquisitorial system was condemned by the European Court of Human Rights, and in 1988, looking to the American criminal justice system, Italy overhauled its legal structure. The current system, known as the *Codice di procedura penale* (the CCP), incorporates the right to counsel as well as a number of other adversarial provisions. It shifts the responsibility for the presentation of evidence to the prosecutor and defense counsel. It places a six-month limit on the length of the prehearing investigatory stage, with extensions avail-



able up to two years. Other rights regarded as basic in the U.S., however, may be inapplicable or applied differently. For instance, while Italy has adopted a form of the exclusionary rule, evidence may still be admitted if its probative value outweighs the arguments for exclusion. Moreover, because judges continue to dominate every aspect of the process, the CCP bears little resemblance to American rules of criminal procedure. By example, while the prosecutor's role has been expanded, the supervising judge maintains the power to control the prosecutor in investigating crimes and charging defendants.

Knox had little say in the method or manner in which evidence was collected or in the pretrial process. While both American and Italian pretrial hearings are screening mechanisms, the Italian proceeding is based primarily on documents prepared for judicial review, with a recognized but diminished role for counsel. At the same time, with the low standards for a finding of probable cause for trial in American state courts, the role of defense counsel at the preliminary stage is also

limited in this country. And while an American federal grand jury is composed of 16 to 23 lay jurors, there is no right to counsel inside the jury room, enabling prosecutors to obtain indictments in a non-adversarial environment.

Plea bargaining, characteristic of the adversarial approach, is not commonplace under the CCP. In the judge-based Italian system, the end result of negotiation might be a fast-track trial in return for a one-third reduction in the sentence. Rudy Guede, also accused in the Kercher murder, opted for a fast-track trial and was convicted of her murder in October, 2008. He was sentenced to 16 years in prison.

As in the U.S., the Italian courts function on a multi-tiered basis. Knox was originally tried in Perugia, in the *Corte d'Assise*, which has jurisdiction over the most serious offenses, such as murder or terrorism. After hearing evidence at trial, that court, composed of two judges (*giudici togati*) and six citizens (lay judges, or *giudici popolari*), convened privately in the *Camera di Consiglio*

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Journey

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before convicting and sentencing her. This is the equivalent of an American felony trial court proceeding. In contrast, however, Knox would have had the right in every U.S. jurisdiction to bring pretrial motions to safeguard the right to a fair trial in light of the pervasive adverse publicity and to suppress the evidence if it was tainted, the product of an unlawful search and seizure, or insufficient to justify a conviction. She would also have had the right to trial by a judge with the clearly-defined role of gatekeeper and arbiter of the law, and by a jury with the clearly-defined role as arbiter of the facts, free of the pressure and influence of the judiciary.

Her appeal was heard by the *Corte d'Assise d'Appello*. This is the equivalent of an intermediate American felony appeals court, such as the federal circuit courts of appeal and numerous state courts of appeal. It is on this level that the contrast between the two systems is most pronounced. While the American prosecutor is barred from appealing an acquittal on the merits under the double jeopardy clause, a defendant can appeal a conviction. An American appeals panel, appointed or elected to handle only appeals, reviews the facts as established in the plain record at the trial court level and generally determines whether legal error occurred (although it can remand to the trial court for an evidentiary hearing relating to a legal error). It lacks the authority of trial judge to control the proceedings or the reception of evidence. An Italian appeal at this level is composed of a

new panel of *guidici togati* and *guidici popolari*. More significantly, in sharp contrast to the system in this country, that court is empowered to grant a *trial de novo* – a new trial that revisits issues of fact as well as law. After the Knox evidentiary record was re-opened, the court excluded the DNA evidence on grounds that the murder weapon and Kercher's clothing had been mishandled during the crime scene investigation. Exercising its power in this regard, the *Corte d'Assise d'Appello*, reversed her conviction. In the U.S., Knox would not have been given a second bite at the apple.

In Italy, each losing party can seek review as a matter of right; so despite the decision of the *Corte d'Assise d'Appello*, the prosecutor, still entitled to appeal, invoked the jurisdiction of Italy's highest court, the *Corte Suprema di Cassazione* in Rome. Like American appellate courts, that tribunal cannot change the record but may reverse a lower court's application or interpretation of the law. In March of 2013, the *Corte Suprema di Cassazione* reversed the decision of the *Corte d'Assise d'Appello*, and ordered a new hearing for revision and re-consideration to take place in Florence. On June 19, 2013, the Italian news agency LaPresse announced that the *Corte Suprema di Cassazione* had issued a 74-page Opinion highly critical of the *Corte d'Assise d'Appello* for "multiple instances of deficiencies, contradictions and illogical" conclusions. The country's highest court declared that it "had to recognize that he [Guede] was not the sole author" of the

crime, although it stated he was the "main protagonist." The Opinion further anticipated, according to LaPresse, that the next proceeding would serve to "not only demonstrate the presence of the two suspects [Knox and Sollecito] in the place of the crime, but to possibly outline the subjective position of Guede's accomplices." It described theories ranging from a simple case of rape involving Kercher "to a group erotic game that blew up and got out of control." It therefore ordered a complete re-examination of the evidence.

Although it is unlikely that Knox would go to Florence for the hearing, if she did, she would be able to take advantage of the right of "spontaneous declarations," non-existent in the United States, which allows defendants to take the stand and make statements directed to particular testimony against them.

The profound differences in these systems shed some light on the reason that U.S. criminal convictions are reversed less than 10% of the time, while a full 50% of all criminal convictions in Italy are reversed or modified on appeal.

Current debate in the United States focuses on whether -- in light of Italy's arguable violation of American double jeopardy principles -- the United States would honor an Italian extradition request if Knox's original conviction is affirmed or reinstated. The contrasts between the two systems, however, present challenges to any application of American legal principles to Italian

justice. Knox was convicted in her first trial. Did the *Corte d'Assise d'Appello* act as a second trial court to "acquit" her? Perhaps. On the other hand, in the United States a defendant like Knox, already having been convicted in the trial court, is not automatically entitled to a new trial at the next level.

Or did the *Corte d'Assise d'Appello* act as an appellate court? If one concludes that despite receiving additional evidence, it acted solely as a court of review, it did not "acquit" her. It is worth noting that although American appellate courts do not "acquit," they have the authority to review the evidence and determine that it was insufficient to sustain a conviction or that the verdict was against the great weight of the evidence. In those very rare cases where an intermediate appellate court makes such a determination, has the defendant been "acquitted," with jeopardy setting in? The answer is no. That U.S. appellate court did not try the defendant and has not rendered final judgment. The prosecutor can appeal that decision to a court of last resort which, if it disagrees with the intermediate court, will affirm the conviction. From this perspective, and given the marked distinctions between the two systems, claims that Italy has violated American fundamental law -- at least on double jeopardy grounds -- are subject to debate.

In the wake of the *Corte Suprema di Cassazione* decision, Bruce Zagaris, a Washington-based attorney specializing in

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NIABA SAYS "BONJOUR MONTRÉAL" AT SPRING MEETING





LEGAL MAGAZINE COVERS NIABA MEETING IN MONTREAL



Le Monde Juridique, a magazine written in French for Quebec's legal community, covered the NIABA Spring Meeting in Montreal with a two page spread. The magazine provided generous coverage of NIABA's installation of our 2013-2015 officers and directors, and highlighted the evening's co-sponsorship efforts of the Association of Italian Canadian Jurists of Quebec.

MICHIGAN JUDGES HONORED

In June, the Italian American Bar Association of Michigan hosted a Justinian Night event to honor Judge Peter J. Maceroni, winner of the 2013 Justinian award. Judge Maceroni also swore in the organization's new officers that evening.

NIABA's gift of flowers, placed in front of the lectern on the stage, were sent to congratulate Michigan's new Supreme Court Justice David Viviano and all IABAM judicial honorees. It is our hope that both jurists will continue to support the work of Italian American bar associations, and that we will see them at upcoming NIABA events.



WELCOME NEW NIABA MEMBERS

Welcome to the following members, who joined NIABA between April 20 and July 26, 2013.

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MEMBER NEWS



Roy L. De Barbieri, founding partner of De Barbieri

& Associates, Attorneys and Counsellors at Law, has been elected to the Board of Directors of The College of Commercial Arbitrators. The College is a national organization of independent commercial arbitrators who have distinguished themselves within the profession, and devote substantial amounts of their time to the practice

of Commercial Arbitration. Membership is by invitation only and is comprised of 225 experienced and well known arbitrators from across the country.

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Former Illinois Supreme Court Chief Justice **Moses W. Harrison II** passed away on April 25, after a long illness. He was 81.

Justice Harrison was an early NIABA member through the Justinian Society in Chicago.

He was a member of the Illinois judiciary for 29 years; a member of the Illinois Supreme Court for 10 years; and Chief Justice from Jan. 1, 2000 to September 5, 2002, when he retired. His legacy is quite larger.

A *Chicago Tribune* profile in 1999 described him as "a gentleman rebel, a distinctly gracious man whose convictions are firm and manners mild."

* * * * *



Hon. **Paul A. Victor**, former Justice of the New York State Supreme

Court, has accepted the nomination to be inducted into the Fordham Preparatory School Hall of Honor. Fordham Prep is a Jesuit all-male high school on the Bronx Campus of Fordham University. The formal induction will be conducted at a dinner at the New York Botanical Garden on November 22.



National Italian American Bar Association - Application for Membership

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Membership Status: Attorney Judge Retired Law student

Membership Level & Annual Dues: Regular (\$50) Sponsor (\$100) Patron (\$250) Law student (free)

Our newsletter is distributed electronically. If you would prefer to receive a hard copy in the mail, check here .

How did you learn about NIABA? Local Association Web Site The Digest Law Journal Referral Other

Would you like to make a contribution to the NIABA Scholarship Fund? \$100 or more \$50 \$25 Other

Include your check, made payable to NIABA Scholarship Fund

I certify that I am at least one of the following: a lawyer of Italian birth or extraction; a lawyer related by marriage to a person of Italian birth or extraction; a lawyer who is willing to support the purposes and objectives of this association. I further certify that I have been admitted to practice law and am in good standing in any country or jurisdiction; or have been granted and possess a law degree from a college of law in any jurisdiction and would qualify for admission to practice law; or am currently a law student in an accredited law school in any country or jurisdiction. All information I have provided is true and accurate to the best of my knowledge.

Signature _____ Date _____

Please mail this form along with your membership dues and any other amounts listed above, made payable to NIABA, to:

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Washington, DC 20006-1846

www.niaba.org

Phone: 414-750-4404
Fax: 414-255-3615

SCHOLARSHIP WINNER



Christopher Pagliarella, this year's NIABA/SIF Scholarship winner, graduated magna cum laude from Yale University with a double major in Political Science and African American Studies. As a 2010 Yale President's Public Service Fellow, he designed and taught a free SAT curriculum for underprivileged students, raising participating students' scores an average of 360 points. Post-graduation, Christopher worked as a management associate at Bridgewater Associates, America's largest hedge fund.

The scholarship was presented by OSIA National Historian and NIABA Member Richard Della Croce, and the Honorable Judge Francis Allegra of the U.S. Court of Federal Claims at the National Education & Leadership Awards Gala in Washington, DC in May.

Journey

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extradition, said, "The Senate has already ratified [our extradition] treaty and decided that Italy is a country with which we ought to have a treaty. They wouldn't have ratified it if they didn't think the Italian process was fair and due process was sufficient. She can try to fight extradition, but it will be an uphill battle." Professor Alan Dershowitz also weighed in: "America's extradition treaty with Italy prohibits the U.S. from extraditing someone who has been 'acquitted,' which under American law generally means acquitted by a jury at trial. But Knox was acquitted by an appeals court after having been found guilty at trial. So would her circumstance constitute double jeopardy?" Looking beyond the treaty to the world of politics

and emotion, Dershowitz was unwilling to speculate about eventual extradition.

Will Knox be convicted at the final stage? Will Italy then attempt to extradite her? How will law, politics and public sentiment impact the decision? At this point, no one can predict. But, armed with an understanding of the development of both American and Italian law and procedure, Italian American lawyers can contribute positively to a balanced discussion of the differences in the two systems.

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Lawrence S. Katz is a criminal appellate attorney and NIABA member. He has written for a variety of publications including *Primo Magazine*.

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