

PBPA Podcast Transcript

Picture This: Privacy & Photo Releasees for Nonprofits

(24:05 minutes)



[00:00:00] **Sireesha:** For nonprofits, photography serves as a powerful storytelling tool, but every photo posted online carries considerable legal and ethical questions that can be easy to overlook. In this episode of the PBPA Podcast, we sit down with Creighton Frommer to break down what nonprofits need to know about photo releases, social media, and privacy so that your organization can tell its story without putting clients, staff, or itself at risk

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Creighton Frommer is no stranger to the IP and technology concerns of small nonprofits. He is Staff Attorney and Operations Director with PBPA. Prior to joining the staff of PBPA, Creighton was Chief Counsel at a major analytics and technology firm. I'm also excited to note that Creighton is an inaugural member of the PBPA Hall of Fame for his years of service and dedication to PBPA clients. Alongside his experience in the areas of IP and technology law, he understands the concerns of small nonprofits very well. Thanks so much for being here today, Creighton.

[00:02:35] **Creighton:** Thanks, Sireesha. It's nice to be here as a colleague.

[00:02:37] **Sireesha:** So Creighton, we talk about these topics often, and there are a few different ways nonprofits can get permission for taking pictures. In this day where it seems so many people take pictures all the time, can you help me understand why does a nonprofit need to get permission to take photos?

[00:03:02] **Creighton:** Yeah. It's become such a staple of what we see in social media, and we see pictures all the time, but there are both legal and reputational reasons to get permission before an organization, whether it's a nonprofit or not, takes and publishes people's photos, and I think it's good to think through both of those.

So on the legal side, you've got current law, which can be confusing and varies a lot by state, but in essence, you can't use somebody's likeness or their picture or their image without permission for commercial purposes. That can be marketing, sales of products, or in the nonprofit world it could be even fundraising.

I know if you've followed college sports in the last few years, you've heard a lot about NIL rights, and that's what we in the legal business sometimes call rights of publicity, and that's that individual's

right to control how their name, image, and likeness is used by others to make money and to suggest some sort of endorsement or affiliation with an organization.

Then on the reputational side, you also just don't wanna publish or post somebody's image on your social media account and have them publicly complain on social media or with your stakeholders that they never wanted their image to be used for whatever reason, whether you agree with it or not.

Um, it's just good practice to make sure that you think you've got permission to use their image before you do. And so that discussion or that conversation can happen before it's posted, not after.

[00:04:31] **Sireesha:** I can understand that, but then it gets to be a little tricky, to figure out how to get approval, considering all the events, all the activities that a nonprofit might be hosting, and pictures they might want to gather. Can you share with us the ways that a nonprofit can get approval for photos?

[00:04:53] **Creighton:** Yeah, there's a few ways, and really the best way, the gold standard way, is to get their approval by a written documented consent. So if you've got a small group or you're gonna be using that purpose of for fundraising or for raising funds, it's best to have some sort of written waiver, and if it's a volunteer, it can be included in your volunteer waiver, or it can be a standalone consent agreement for people to sign.

You know, one example is if you've got a team of corporate volunteers coming to help pack boxes, have them sign your participant waiver and have that waiver include a consent for you to use their pictures in social media and for fundraising. Or you might have regular volunteers who come in every single week, and you know that they're frequently on your property or at your programs. Have them sign a waiver that just covers them for that whole period.

But you're right. Sometimes you've got a large activity, a large group. It might be a big fundraiser, like it could be a festival or a 5K, and it's just hard to get everybody's written consent. You may not be able to easily manage all that.

So in some cases, you might just put... And you might have seen this in your world as an individual where you might post a sign, like at the registration table or it might be posted in some other frequent places, maybe next to the bar or next to the food line, that just says something to the effect of, name of your organization, we'll be taking pictures today. If you don't want your picture used by the organization, please let a staff member know.

And that kind of opt-out message lets people know that if they don't want their picture used, they should come talk to somebody. Now, it's not quite that easy to just tell them. You also have to have a way for them to identify how they don't want their picture taken. And depending on how your organization works, maybe you can get their name and you know who they are. Maybe you even ask for a quick headshot, which seems counterintuitive, but having a quick headshot of them, you can then match them with the pictures later, especially if you have an outside photographer going through the pictures or a contractor. Or some organizations will put maybe a blue sticker on their badge that just lets them know this is not somebody who wants their picture used, social media or published.

Uh, another way would be, you've seen maybe at large sporting events at the... on the back of the ticket in that very, very fine print, it'll say something to the effect that you can have their picture taken. That might be a last-ditch effort for just really large events. But I think you really wanna make sure that you're documenting how you got people's consent. And the best case is through that, that written consent or through a general knowledge or a general notice that people can opt out of.

We even had a client who liked to have pictures taken of people when they were in the office. It was a friendly office, and they even put one of these notices up at their intake desk just to let people know that come in, "Hey, we might be taking pictures. If you don't want your picture taken, just let us know." The main thing again is to make sure that, uh, it's not nuanced, that it's clear what they're doing and what they're agreeing to, and that if you don't want their picture... if they don't want their picture taken, that they know exactly how to opt out of that discussion and opt out of that decision.

[00:07:54] **Sireesha:** I've seen both of those options out there, and have seen those signs at events frequently. And this also makes me wonder about some terms that some of our listeners may have heard before, such as photo release and media consent. Creighton, what's the difference between those two documents?

[00:08:17] **Creighton:** Yeah.

It's a great question, and it's one that has a bit of legal nuance. These are sort of terms of art that, that lawyers will use. But effectively, a photo release is just a simple consent that you can use their picture for various things, and this might be a very simple release. It can, like I said e-earlier, can be included in a participant waiver or a volunteer waiver, something like that, that just says you can use their picture for social media and also for those commercial reasons we talked about before.

Now, a media consent or a media release is something a little bit more complicated that will go into uses of the picture for different outside the scope of use. So maybe if you're gonna use that picture in, like, a documentary or a published book, some other type of media or some other type of IP.

Or it could be that you're going to use more than just their picture. Maybe you wanna take a video of somebody, or you wanna tell their story if it's part of a case study. Then you probably want a more fulsome general media consent, which if written correctly, will often get rights for any use that's whether in that me- in any type of media, whether now known or later used, because you want that media consent to be as broad as possible for your organization and to include as many purposes as needed.

Now, to ask for that type of consent is a bigger ask, and so you only generally wanna use that if you really need to. And of course, like a lot of things, you can, and really you should probably talk to your attorney if you want to get into needing a media release or a media consent

[00:09:46] **Sireesha:** And for the purposes of today's podcast episode, we're going to be focusing more on the photo release area. And in that situation, Craig, when does a nonprofit legally need a signed release versus when is it just a best practice?

[00:10:04] **Creighton:** Yeah, there's a lot of middle ground here, and if you're not sure you might wanna talk to your attorney to see if you can get a better answer.

But generally speaking, if you're taking some pictures at a simple event, you're not really gonna use the photo to earn any money or for fundraising, it's really just to show how much fun people are having at your golf tournament, for instance, then maybe it's not legally required.

You're just gonna show people what a good time and what who was at your tournament to kinda show off a bit. It's not legally required, but it is still a best practice because, again, we don't wanna, we don't wanna have that conversation after it's already been posted if somebody's frustrated or doesn't want their picture taken, you you never know if somebody's picture at a golf tournament, maybe they told their wife they were going to play, s- go do something else or go to work. Uh, you wanna avoid those kinds of situations. But then again, if you are gonna be using the photo in some sort of fundraising email that, or some sort of context where it looks like the photo or your image in the photo, that person is endorsing or is affiliated with your organization, then in those situations, you do wanna get a release for legal purposes.

[00:11:09] **Sireesha:** And I know that we're mostly talking about or alluding to situations where photos are posted online in a forum where they can be easily removed if a nonprofit has to do that. But is there a difference if, for example- A nonprofit takes pictures, and one of the pictures ends up being just really phenomenal. They want to include it in their annual report, which is printed out. And in that situation, do you think that it matters more or less if it's signed or not? Because if that is printed, and you mail it out, a nonprofit can't take it back.

[00:11:51] **Creighton:** Yeah. That's wonderful example because those are the kind of risks that yeah, can cause financial problems. If somebody says they don't want that image included in something that's printed, it can be very expensive to have to reprint. And so yes, getting a documented release is a wonderful idea in that situation. And frankly, you might be using that annual report for additional fundraising purposes, so you may have that endorsement relationship that you wanna avoid. But yeah, if you've got printed materials, T-shirts anything like that, that, that would cost money to undo, it's good to get a written release.

Now, I would say one thing I always tell my clients is if at all possible, both for the legal but mostly for the reputational risk, if somebody comes back later and says that they want their image removed or unpublished for some reason, it is best to try to do that and try to listen to their request.

As a good practice, you wanna make sure being a good steward of their image and their likeness and to have a ... keep up your good reputation to do whatever you can to help to unpublish, that picture. Now, you talk about like an annual report. Sometimes that may not be possible or may not be financially feasible, or you may have to work out some kind of negotiation with the individual.

And again, that's where you might talk with your attorney to, to work out a resolution, even if they've already provided their consent. But it certainly helps to have that documented written consent upfront.

[00:13:14] **Sireesha:** And does it matter if the photo is taken at a public event versus a private program site?

[00:13:22] **Creighton:** Well, a little bit. So if the consent we've talked about is required by law, where it's that endorsement situation or fundraising purpose, it doesn't really matter because that consent and that right of publicity belongs to the person no matter where they are. So you can't just walk up

to somebody in the street, take their picture, and then use it to suggest that they're somehow affiliated or endorsing your organization, public or private.

But for the reputational reasons, it is generally less likely somebody's gonna complain if they're in a public area or at a public festival that you're at and you've taken their picture, and it's just a person on the street. But it's still a good practice, if possible to treat them the same way and somehow get their waiver.

And again, maybe that was a sign at your, if even if it's a public festival, maybe it's a sign at your table in that area or just checking with them because you also might not know how you might use that photo in the future. So if you take somebody's picture at a public event and you think it's not gonna be used for that legal purpose, but then five years down the road somebody does use it for that purpose and you never got the consent, then you might be stuck

[00:14:31] **Sireesha:** And what changes in this analysis, Creighton, if we're talking about a minor? If the person in the picture is a child or if there are children in the picture

[00:14:44] **Creighton:** Yeah, so far we've talked about these kind of standard cases of people and how you approach taking their pictures. But yeah, taking photos of minors is definitely a special case to take a special interest in and to really think about.

First of all, from a legal perspective, minors can't effectively sign contracts, so you'll have to get their parent or guardian to sign their consent for them. If it's a school or a daycare or something, you can't just have somebody walk in and take pictures without having had their parent or guardian sign that consent. Now, maybe that consent was part of their registration in the program, but if it wasn't, then you need to get that parent or guardian to approve it.

And then from a reputational perspective, I think often rightfully people are just more protective of how their children's images are used online. There's a lot of risks of having people's images on the internet, and it's a fair position that parents get more protective of having their children's images online. And so just for good reputational and business practices, it is best to, unless you have very clear affirmative consent from a parent where they really want you to have that picture, to probably not publish the children's photos.

You can still blur their faces. You might take pictures from behind where you can't see their face. And you might still use their images for internal purposes. If you need to keep a register of their image for an internal confidential book, that's fine, but you wouldn't wanna publish them online unless it's very clear that you've got their consent. And even in that case, again, you might wanna talk with your attorney to talk through the ramifications and making sure that consent is complete.

[00:16:23] **Sireesha:** And what about for nonprofits that serve vulnerable communities or communities where there's a heightened need for privacy, uh, such as survivors of domestic violence or immigrants, people in shelters?

[00:16:38] **Creighton:** Yeah. Anytime you've got somebody who by having their their image published, it could affect their wellbeing, their chance of employment or future employment, or even put them at risk for physical harm, you really need to be careful about publishing their image online.

You know, if you have their consent, you need to make sure it's well documented. These are always risk balances, but you definitely wanna think about speaking with your attorney from the beginning before you publish photos of these types of vulnerable people

[00:17:09] **Sireesha:** And talking about the release, how long does it last? For example, you made reference to a photo that you might take today and then five years from now you want to use it. If you had the individual sign a photo release back when you took the picture five years ago, can I use that picture, post it now, five years later?

[00:17:29] **Creighton:** Yeah, this is actually one of the most common questions we get from our clients, and a release really can last indefinitely. There's-- You don't have to put a date on the end of that consent. In fact, it's probably best practice not to put an end date on that consent, 'cause may not remember to take it down later. Once you publish something on social media or in a pamphlet, it's just out there forever. So it is fine to keep it and have that release indefinitely.

Again, it goes back to what I mentioned earlier. You do always have to keep in mind that if somebody does come back later, they might, what we call, revoke that consent. And whether or not your... even if your contract says they can't revoke that consent, if at all possible, you still probably wanna try to remove that image, especially if it's online and published digitally. And again, if you get into some, needed some kind of negotiation with that individual, you would wanna speak with your lawyer.

And frankly, normally, it's just the right thing to do if somebody comes back and wants it to end. But your consent documents and agreements can be, uh, noted as indefinite, perpetual.

[00:18:32] **Sireesha:** And thus far, we've been talking about pictures that are taken by a member of the nonprofit organization. What, if any, concerns are there if a third party, such as a donor or a volunteer or someone else attending an event, takes and posts a photo of a client of the organization without the nonprofit's involvement or nonprofit's knowledge?

[00:19:00] **Creighton:** Yeah, these can be really tricky to address. If it's another business or another nonprofit and they're using it for commercial reasons, then that individual, like they could talk to you, has the right to tell them to take it down. Now, you might help coordinate that request between the individual and the other party, the third party, but eventually it's-- inevitably it's the person's right, and it's their responsibility to then work through taking those, those actions to have the image taken down.

Now, if it's another attendee and you receive maybe a complaint, and it's not a commercial business, but just a normal person who maybe took pictures, especially if we're talking about vulnerable people or minors, you might ask them, reach out to them and ask them to remove the image, because you also wanna avoid those reputational problems.

While it wasn't your organization maybe that posted the image, people online still may blame you or ask for your help to have the image removed. And again, just for as a best practice, it's best to try to help facilitate that type of thing.

[00:20:00] **Sireesha:** I'd like to close out with a hypothetical just to wrap up everything that you've shared so far in this episode. Say, for an example, we have Tammy, an intern, and she takes pictures on her phone of children participating in a fun run fundraising event for a domestic violence shelter.

Uh, she figures it will look great on the organization's socials, and she can even share some of these pictures on her personal page to show the great work she's been doing during her summer break. What are the concerns with this situation?

[00:20:43] **Creighton:** Yeah, and it's funny, when we talk about these concerns, I just-- maybe it was kind of implied in my earlier conversation with you, but, people post images all the time, and so it's funny to think, "Why do I have to be concerned about this? I never hear about these issues coming up." And a lot of times they may never come up, but a lot of times they may be resolved behind the scenes where people are asking somebody to take an image down or taking some kind of action and it's quietly being removed. So especially when you're talking about, again, about these kind of vulnerable people, you're thinking about the possibility of possible physical safety for these children. They are minors.

So it's good to consider those risks and think about the event. So we talked about being a fun run, a 5K. Maybe you have a sign up asking folks to opt out of images, or normally would do that. But because of this vulnerable population, that might not be the best solution because some people may miss the sign and still be needing to have their safety and their image protected.

So I think in this situation you might ask the intern not to share the image, and also the organization would not share it, unless you have physically or specifically talked to those individuals who are in the picture to make sure they feel safe with the image being posted. Or if you happen to know that this includes family members who wouldn't feel safe, then just don't post it.

Maybe, there are people that at the event who are not themselves vulnerable. Maybe there are people who are okay and wanna support the organization and have in other situations, and you know that they're happy to have their image shared. But in that situation, I think you wanna be very careful, and I know it becomes like a broken record, but you can of course always speak with your attorney to get more information of how to approach the situation.

But we've talked about a menu of different options to go through this process, and there is still some work that's needed to kinda figure out which item to pick from the menu of how to get that release based on the situations and the circumstances of the individual organization, who they serve, who they're taking pictures of, and the type of event.

[00:22:47] **Sireesha:** This has all been so helpful, Creighton, and especially for nonprofits to know that they have a menu of options to choose from depending on the situation. I know in this era now where pictures seem to be taken everywhere, it's still important to remind nonprofits that there are privacy concerns out there and considerations that they should keep in mind as they are taking photos and documenting the amazing work that they are doing.

So thank you so much, Creighton, for sharing this guidance with us today.

[00:23:23] **Creighton:** You're welcome and thanks for hosting me today.

[00:23:27] **Sireesha:** We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.