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MLRC Media Law Resource Center

MEDIALAWLETTER

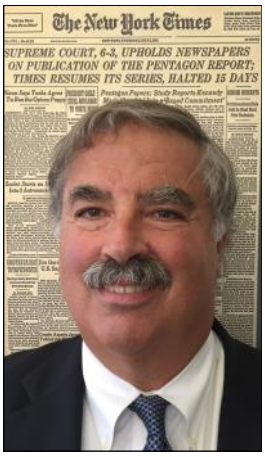
Reporting Developments Through November 29, 2017

From the Executive Director's Desk

MLRC Fall Events Round-Up

Dinner, Forum and Host of Meetings Make for a Busy New York Week

It's an old adage around the MLRC office that the second week of November is the busiest week of the year for us. That may well be true, but for me, more importantly, it's the most interesting and gratifying, indeed, the best. This year, as in the past, six MLRC events and meetings were scheduled in the Wednesday-Friday of what was once called "PLI week" – now, appropriately, perhaps called "MLRC Annual Dinner week." In addition to the PLI conference itself and meetings of other organizations – all of which bring media lawyers from all over the country to New York – this makes for a teeming schedule.


The New York Times
SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

But first a little history. Jim Goodale, then GC of the New York Times, started the PLI Conference in 1973. At that time, there was no MLRC or even LDRC. (The Libel Defense Resource Center, the forerunner to our present organization, was born in 1980.) Jim started it as a way to bring what was then a very small media bar together, both in the interests of collegiality and, more important, common strategies. As far back as I can remember, the PLI Conference was always on the Thursday and Friday of the second week of November. (I recall, as a young associate, what a status symbol it was just to be asked by my firm to attend the conference for a day.) Then, sometime in the 1980's, the LDRC came up with the bright idea of scheduling its steering committee's annual meeting and later a fundraising dinner during that week, since so many members were in New York anyhow. In 1992 came the first Brennan award dinner – in the Starlight Room of the Waldorf Astoria – but soon we grew out of that space. Former Justice Brennan appeared at the 1992 dinner, and the award in his name and honor was unveiled.

Some enmity grew between the principals of PLI and the LDRC, because PLI felt that the LDRC was free-riding on its successful conference. I was never sure whom that hurt, however; over time the synergy has clearly aided both organizations. And, indeed, now the MLRC Dinner draws about twice as many people as does the PLI Conference. But, in addition to making sense to have these two events on back-to-back days when lawyers congregate in New York, over time more and more meetings – both of the MLRC and other organizations, such as the ABA Forum on Communications Law – were scheduled for the same few days, leading to a cornucopia of meetings, meals and receptions. By Friday night, many attendees, fully sated by food and drink and exhausted by all the information fed into them at the various programs and meetings, stagger home.

From the MLRC point-of-view, this year the festivities began with our open Annual Board Meeting Wednesday afternoon. This is our only Board meeting which is open to all members. A few interested souls came; interestingly, our newly-founded Insurance Committee – whose start-up has been very successful – held a welcome reception at the hotel bar at the same time. The

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Panelists and MLRC leadership at the Annual Dinner. Left to right: George Freeman, Katy Tur, Ari Fleischer, Mark McKinnon, Dana Perino, Joe Lockhart and Lynn Oberlander

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Board meeting started with the election of Ted Lazarus of Google to the Board. MLRC staffers David Heller, Jeff Hermes, Michael Norwick and Jake Wunsch all reported on our conferences and activities. I noted that fiscally, this has been a tough year, and that I expected to end the year only slightly above break-even, but reminded the Board that that was the result we budgeted a year ago; in general, though, I concluded that the number of members had grown slightly and that the state of the MLRC is strong.

Finally, we feted Debby Seiden, who is retiring after 17 wonderful years as chief Administrator of the MLRC. More than just ensure that our trains run on time and that we don't spend any excess pennies, which she does, Debby has graced our office with dedication, loyalty, smarts and a lovely personality, and has been involved in every aspect of the MLRC's activities, from office maintenance to suggesting and soliciting sponsors for conferences, and from setting agendas for our various board meetings to dunning late payers. Indeed, I noted that just with respect to the upcoming Annual Dinner, Debby took care of matters as varied as assigning everyone a table and getting gifts for our dinner panelists. Liz Zimmermann, who we are lucky to have found as Debby's successor, was then introduced to the Board.

Following the Board meeting came the Forum on the timely subject "Is Libel Back?" Although the MLRC tracks trials, and not filings, we certainly seem to feel an increase in the number of libel suits in the last year, and an even more pronounced increase in cases against the major media outlets, which, at least anecdotally, have had very few suits filed against them in

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Six hundred MLRC members and friends gathered at the Grand Hyatt for the Annual Dinner

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the last decade. In addition, we were anxious to discuss the recent over $200 million settlement by ABC in the Pink Slime case, and what analysis supported such a huge payout. While, as moderator, I posited that much of this may well be due to the President's daily bashing of the media and his undermining of its credibility and minimizing of its role at every turn, the panelists tended to disagree with my laying this at the feet of Donald Trump.

Bob Lystad, giving the facts from the insurance side, David McCraw, speaking largely about the print media, Lynn Oberlander, discussing the digital viewpoint, Liz McNamara, talking about the recent UVA-Rolling Stone case she litigated, and Eriq Gardner, who reported on the Pink Slime case in South Dakota for the Hollywood Reporter, all added interesting perspectives. Rich financiers of plaintiffs seeking revenge on the media, the 24/7 digital age's emphasis on speed, the leaner staffs at some organizations, and the incentives given by a few well-publicized huge verdicts were all considered as possible reasons for an increase in lawsuits. Unfortunately, with nobody connected to ABC willing to speak about their Pink Slime case, we were disappointed in not learning more about what propelled that unprecedented settlement and were left to speculate, though Eriq, having been there, did contribute some interesting observations about the matter. In general, the audience reaction was very positive, especially about the relevance of the topic and the variety of considerations which were offered by the panelists. (A fuller description of the Forum is at p. 21 herein.)

Immediately after the Forum came the Reception and Dinner. The Reception, generously sponsored by AXIS PRO, featured excellent food and drink and much energized conversation. It took place right outside the doors of the Grand Ballroom of the Grand Hyatt (which sits atop

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Grand Central Station) and was, by all accounts, grand. 600 members and friends attended the subsequent Dinner in the Grand Ballroom. The after-dinner program was entitled "Trump and the Press: A Conversation with Former Presidential Press Secretaries." Those press secretaries were Dana Perino, currently a Fox news host, and Ari Fleischer, president of a PR firm that bears his name, both press secretaries of George W. Bush, and Joe Lockhart, currently the EVP of Communication for the NFL. (When introducing him, I quipped that we didn't play the national anthem at the start of the dinner so as not to engender controversy for him.) Joe was Pres. Clinton's press secretary during the impeachment proceedings. Also on the panel was Mark McKinnon, a savvy political analyst for candidates on both sides of the aisle, and co-producer and co-host of the recent Showtime documentary "The Circus: Inside the Greatest Political Show on Earth," a video history of the 2016 campaign. Mark kindly put together a tape of clips of Trump's ravings against the press, which either entertainingly or depressingly served to kick off the program. Katy Tur, who was excoriated almost daily by President Trump while she covered his campaign for NBC, and who also just wrote a book about her experiences on the campaign trail, moderated.

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George Freeman thanks Laura Prather for her service as president of the DCS at the Annual Luncheon at Carmine's in New York.

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Katy did a great job as moderator, even more so when you consider she had gotten married 10 days earlier, and so, essentially, was still on her honeymoon. Indeed, when I met with her just a few days after her wedding day, I was impressed not only by how delightful and down-to-earth she was, but that she was totally prepared and had read the outline I had sent her seemingly on her wedding trip itself. The panelists, for their part, were also excellent. In general, they all were critical of the way Trump is dealing with the press, but they clearly respected the position they had, and therefore shied away from harsh ideological exchanges and from excessively attacking or criticizing either Sean Spicer or Sarah Huckabee Sanders. But their discussion was informative, nuanced and very interesting.

Thursday midday, the MLRC held its annual DCS luncheon, focused on Defense Counsel Section members and the 18 committees run by the MLRC under the aegis of its DCS Executive Committee. It was at Carmine's, a family-style Italian restaurant hard by Times Square. Two features of the lunch were outstanding. First, the amount of food served was overwhelming. Second, at the lunch, attended by somewhat over 100 members, each committee offered a short report on its activities in the last year and its plans for the next. The amount of work done and discussed by the committees was astounding – from the issuing of reports, guidelines and checklists to monthly conference calls on substantive matters, and from webinars on timely subjects to a model brief on access to presidential press conferences and the Executive Branch. It certainly gave everyone present a positive feeling about the MLRC and a sense that, somewhere, somehow, a lot of worthwhile work was being performed.

Thursday evening, squeezed in between the afternoon PLI program and various dinner/ theater outings, was an open meeting to begin planning for our big Virginia Conference in September '18. Hosted by Jake Goldstein at Dow Jones, about 25 members came to give their suggestions as to what the plenary sessions, breakout meetings and boutiques should be about. In the end, we tentatively decided that about four boutiques will be new and different than those offered in '16; the breakout categories will be similar, but the topics within those breakout sessions will be largely updated; and many ideas were offered for topics for the five plenary session slots. It was a very promising start for the content of next year's Conference.

Finally, on Friday morning, right after the defamation program at PLI, we held an informal joint meeting of the combined MLRC Board and the DCS Executive Committee. It was hosted by Laura Prather, the outgoing Chair of the DCS Ex Com who has done a superlative job in that role, at her offices at Haynes & Boone in the venerable 30 Rock. Lynn Oberlander, Chair of the MLRC Board, and Jack Greiner, who will succeed Laura, were among those present. We discussed the Dinner and the other events of the two proceeding days; we established a Task Force to take another look at our rules barring law firms from representing Plaintiffs in libel or privacy cases against the media; we talked about strategies to ensure the participation and enthusiasm of younger members in the MLRC; and we took a deep breath of relief and congratulations that a busy week had successfully been completed.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Dinner Program Highlights

Mark McKinnon: Two things have come out of this election that are unique that we are all grappling with. One is fake news that is perceived as real. The other is real news that is perceived as fake. … There are millions of Americans who are convinced, because the president told them so, that anything that Katy Tur does, that anything that CNN does – really all the mainstream media – is fake. That's a new thing.

Mark McKinnon

I'm a little bit encouraged because a lot of Americans, myself included, we woke up and are learning that there is content all over the place that is not real. As a result, many Americans are more discerning about what they see on the news. And as a consequence of that, we're going to see a flight to quality. People are going to go to news institutions like the New York Times, The Washington Post, NBC – trusted sources that have the resources to really report the news and investigate. That's why in a lot of ways it's turning into a golden era of journalism.

* * *

Dana Perino: It's not new that the media has had low approval ratings.

Katy Tur: But it's new to the degree that people think we're making things up.

Dana: Exactly. Approval was one thing, [but now] a significant portion of the population believes that you're lying, believes that the news is fake.

Dana Perino

Maybe they know there's a kernel of truth to it, but they don't care. That said, what have we seen this year? Already the media's approval ratings are now higher than Trump's when it comes to trust.

Joe Lockhart

* * *

Joe Lockhart: There's always the temptation to say that everything is new, but we have seen a version of this before. First of all, there's no president that thinks the press is for them. They always think they're against them – every single one of them, Democrat or Republican. And I think all administrations use the press as a foil to make their point. One of the best ways to show what you're for is to highlight who's against you.

That's not particularly new, but the way it's being done now is new. There are two things: one is the technology. Voters, consumers have the ability now to curate their own news. They don't need some figure in New York sitting behind a desk to tell them what happened. They can ask their friends. … The second thing with Trump is a political calculation that generating this hatred for the media is part of the strategy. He's the first president I've seen who believes he's only governing for the people who voted for him. He's only governing for 46 percent of the country and as a strategy he's only speaking to them. He understands their motivations and he knows exactly what he needs to feed them to keep them with him. And he's not wrong – he hasn't lost many of those people.

Ari Fleischer

* * *

Ari Fleischer: I'm convinced the problem is inherent in the natural selection of who goes into the media. I think journalism schools are not ideologically mixed places. They're overwhelmingly liberal students who are taught by overwhelmingly liberal professors and it's a self-perpetuating cycle. I think the solution is for journalism schools to really take ideological diversity seriously. One of the reasons it was such a shock that Donald Trump won is that there are too many ideologically like-minded people. I'm one of them.

* * *

Katy Tur

Katy: When you saw Sean Spicer walk up to the podium and lie about the inauguration crowd size – something so silly in the scheme of things. As people who have taken your jobs seriously - did that offend you?

Joe: My initial reaction was: If I had known I could do that, it would've been a much easier job! But seriously it is very hard work to balance. … Your first job is to advocate for your boss. People who say it's to advocate for the American people are not telling the truth. But you've got to connect it to a responsibility to tell people what's really happening.

* * *

Dana: If my briefings were being taken live, something had gone drastically wrong. Nobody knew my name at Saturday Night Live and that's exactly how I wanted it. We're just in a different world.

Joe: Let's be honest, the reason the briefings are being taken live is because they're entertaining. There's conflict, there's drama and you set them up that way. For an hour before, it's "Sarah Huckabee Sanders is gonna handle a hostile press core today. Tune in at 2:30." And that's part of the problem.

* * *

Katy: It's not the press secretary's job to tell the truth to the American people?
Ari: It's to advocate on behalf of the president and to represent what the president's position is and then you can have an argument about is the president's position a good one or a bad one.

Katy: But there should be a baseline of "I'm not going to lie to you."

Ari: Show me where Sarah lied. The notion that she's lying when she says "Tax cuts are going to grow the economy and create trillions in revenue" – is that a lie or is that a conservative philosophy?

Katy: Beyond that, though, she'll sometimes deny Donald Trump has said the words he's said.

Joe: It shouldn't be up for debate whether you tell the truth or not.

* * *

Katy: Do you think he can completely circumvent the media by tweeting?

Dana: He's proven that.

Joe: He has social media, Twitter, he has friendly media, and that's what he concentrates on. He's not trying to reach the rest of us.

* * *

Katy: Do you think the surge in libel lawsuits is a direct result of Donald Trump media bashing, Donald Trump saying "I'm going to change the libel laws and give you the right to push back on the press?"

Joe: I don't know that I would put this at Trump's feet. I think this has to do more with the business of the media. The precipitating event behind Gawker was a very rich individual who had a grudge who financed the libel lawsuit. He knew he could use the law to bankrupt this company and he did that. This all happened well before Donald Trump so I don't think we could blame him.

Mark: I don't know that there's a direct cause and effect but libel suits are up. You throw that in the stew of all the other things that maybe are Trump related and this is maybe just a minor reflection of how many media related issues are bubbling to the surface and how important they are.

Second Circuit Affirms Dismissal of Sheldon Adelson's Suit Against National Jewish Democratic Council

By Al-Amyn Sumar

Late last month, the Second Circuit issued a decision — the fourth in the five years since litigation began — affirming dismissal of a defamation lawsuit brought by billionaire Republican donor Sheldon Adelson against the National Jewish Democratic Council (NJDC) and two members of its leadership. Adelson v. Harris, No. 13-4173 (Nov. 29, 2017) (per curiam).

This decision, together with the district court's initial ruling and an opinion from the Nevada Supreme Court issued this past September, are important precedents for application of both the fair report privilege in the Internet age and anti-SLAPP statutes in federal court.

The Lawsuit

The basis for Adelson's suit was an online petition published by the NJDC on its website in July 2012, during the presidential election campaign. The petition urged then-candidate Mitt Romney not to accept political donations — what it termed "dirty money" — from Adelson. Among other things, the petition noted that "reports [had] surfaced" that Adelson had "personally approved" of prostitution in his casinos in Macau, and pressed Romney and the Republican Party to "cease accepting Adelson's tainted money immediately."

This decision, together with the district court's initial ruling are important precedents for application of both the fair report privilege in the Internet age and anti-SLAPP statutes in federal court.

The words "personally approved" contained a hyperlink to an article by the Associated Press, which discussed a lawsuit against Adelson by one of his former Macau executives, Steven Jacobs. A sworn declaration from Jacobs, submitted in connection with that litigation and quoted in the AP article, stated that when Jacobs pushed to rid the Macau casinos of prostitution, he was informed that "the prior prostitution strategy had been personally developed and approved by Adelson."

Adelson's counsel contacted the NJDC to inform them that the statements in the Jacobs Declaration, and therefore the petition, were false. The NJDC ultimately withdrew the petition, explaining its decision to do so in a press release, but declined to retract or apologize for its statements. Adelson responded by filing a defamation suit in the Southern District of New York less than a month later, in August 2012. The defendants moved to dismiss the lawsuit under the Federal Rule 12(b)(6) and the anti-SLAPP statutes of D.C. and Nevada.

Judge Oetken's Decision

Judge Oetken dismissed Adelson's action in September 2013. Holding that Nevada law

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governed, he held that dismissal was warranted under Rule 12(b)(6) and also applied Nevada's substantive anti-SLAPP statute to award the defendants attorneys' fees and costs.

Judge Oetken ruled that the statements at issue in the suit were either protected by the fair report privilege or were nonactionable statements of opinion. Addressing the privilege first, Judge Oetken explained that the hyperlink contained in the words "personally approved" was sufficient to attribute that statement to an official proceeding, namely, Jacobs' lawsuit against Adelson. As he put it, "[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law." Here, the hyperlink to the AP article, which quoted from the Jacobs declaration, along with the use of the word "reports," were sufficient to alert the reader to the underlying source. Because the petition also accurately stated the content of that source, its statement was privileged as a fair and true report.

Judge Oetken found the other statements at issue in the suit, that Adelson's money was "dirty" and "tainted," were not actionable because they could not be proven true or false. This conclusion followed from the "patently partisan and political" context of the statements, the full disclosure of the facts underlying the opinions, and the "debatable, loose, and varying" understandings of the words "dirty" and "tainted."

The court also granted the defendants' anti-SLAPP motion. Judge Oetken concluded that statements in defendants' petition and press release each came within the protection of the anti-SLAPP statute as a "communication that is aimed at procuring any government or electoral action, result or outcome," made in good faith, *i.e.*, that is "truthful or is made without knowledge of its falsehood." That the petition was aimed at procuring an electoral result or outcome was clear on its face: the petition and press release contained "patently partisan statements made by a Democratic organization to Democratic-leaning voters in an effort to undermine Republic candidates' financial support."

Whatever ambiguity was created by Nevada precedent about application of the statute was settled by its legislative history. And the communications were made in good faith, Judge Oetken found, because Adelson "failed to plead that Defendants acted with knowledge of falsehood." He therefore granted the anti-SLAPP motion, although the award of fees and costs has remained pending since 2013 during a lengthy appeal to the Second Circuit, with a detour to the Nevada Supreme Court.

2d Cir. Certifies Questions to Nevada SCT – and it Sides with the Defendants

In December 2014, following briefing and argument, the Second Circuit issued a decision that adopted some of the district court's analysis, but also certified two questions to the Nevada Supreme Court: (1) whether a hyperlink to source material about judicial proceedings suffices in an online petition for purposes of applying Nevada's fair report privilege, and (2) whether the Nevada anti-SLAPP statute, as it existed at the relevant time, covered speech seeking to influence an election but not addressed to a government agency. The question of hyperlinks as sufficient attribution for the fair report privilege, in particular, was then an undecided question in Nevada — and, indeed, across the nation.

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The Nevada Supreme Court answered both questions in the affirmative. As to the privilege, the court accepted that a hyperlink could provide the necessary attribution, and focused on whether the hyperlink in this case provided sufficient notice to the reader of the underlying proceeding. The court held that it did: the hyperlink was in the same sentence as the content it purported to support, and "textual references" helped "make apparent to an average reader that the petition draws information from another source." The court disposed of the anti-SLAPP question more summarily, referring to one of its 2017 decisions holding that a communication need not be made directly to a governmental agency to fall within the ambit of the statute. It explained, however, that the Second Circuit had not addressed whether the defendant's communication was also made in good faith, and it declined to do so either.

Second Circuit Affirms Dismissal

The Second Circuit then ordered the parties to address the import of the Nevada Supreme Court's decision to the resolution of the appeal. Adelson asked the court to reinstate his appeal, arguing that (i) his defamation claim also rested on the alleged implication, not protected by the fair report privilege, that he "used funds from prostitution to finance his campaign contributions," (ii) the district court erred in holding that the defendants made the statements without knowledge of their falsehood, and (iii) Adelson should have been permitted additional discovery on the anti-SLAPP statute's scienter requirement.

The Second Circuit therefore affirmed the district court's application of the anti-SLAPP statute and dismissal of the claim.

The Second Circuit rejected each argument. The Nevada Supreme Court's affirmative answer to the first certified question settled the application of the fair report privilege, and required dismissal of the defamation claim. And the Second Circuit noted that while its prior opinion did not expressly address whether the defendants acted in good faith, it had held so implicitly. In any event, the district court was correct to rule that Adelson failed to allege knowledge of falsity, and no additional discovery was warranted**.** The Second Circuit therefore affirmed the district court's application of the anti-SLAPP statute and dismissal of the claim.

The Second Circuit's decision, along with the Nevada Supreme Court's ruling and the district court opinion upon which these decisions heavily rely, are important precedents nationally for the application of the fair report privilege. But their impact may not be limited to that context. Indeed, in a recent decision dismissing Sarah Palin's defamation suit against the *New York Times*, Judge Rakoff of the Southern District of New York noted that the existence of a hyperlink in the offending article undercut the plausibility of Palin's allegation of actual malice. In so noting, Judge Rakoff cited Judge Oetken's observation that "the hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law."

Al-Amyn Sumar is an associate in the New York office of Ballard Spahr LLP. Representing the NJDC and the individual defendants during the litigation were Lee Levine, Seth Berlin, Chad Bowman, and Matthew Kelley, all of Ballard Spahr, as well as Gayle Sproul, now at CBS

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Broadcasting Inc., and Rachel F. Strom, now at Davis Wright Tremaine LLP, and in Nevada by J. Colby Williams and Donald Campbell of Campbell & Williams. Mr. Adelson was represented by L. Lin Wood, Jonathan D. Grunberg, and Amy M. Stewart of Wood, Hernacki & Evans, LLC; by James R. Ferguson, Michele L. Odorizzi, Demetrios G. Metropoulos, and Andrew L. Frey of Mayer Brown LLP; by David M. Olasov of Olasov + Hollander LLP; and in Nevada by Steve Morris and Rosa Solis-Rainey, of Morris Law Group. Media amici were represented by Laura Handman of Davis Wright Tremaine LLP and by the Nevada firm of McDonald Carano Wilson LLP.

"The Twists and Turns" of a Libel Case vs. Jim Risen's "Pay Any Price"

D.C. Cir. Affirms Summary Judgment: Protected Opinion, Insufficient Showing of Falsity, and No Actual Malice

By Laura R. Handman and Lisa Zycherman

In 2015, Dennis Montgomery brought a libel action against author James Risen, the Pulitizer -Prize winning, *New York Times* national security reporter, and his publisher Houghton Mifflin Harcourt Publishing Co., concerning a chapter in the book *Pay Any Price: Greed Power, and Endless War*. Mr. Montgomery claimed to have developed technologies that the government subsequently employed in the war on terrorism in the years following the September 11, 2001 terrorist attacks. One of those technologies, Montgomery claimed, could detect hidden letters and numbers in Al Jazeera broadcasts.

Government officials purportedly concluded that those letters and numbers identified airline flight numbers, or longitudinal targets for al Qaeda terrorist attacks and President Bush stopped planes flying from Europe based on this "intelligence." The relevant chapter of *Pay Any Price* explained how government officials, Montgomery's former employees, and others came to believe that his technology was a fraud. The chapter repeated assertions made by such critics that Montgomery is a con man and described his technology as a hoax.

Mr. Montgomery claimed to have developed technologies that the government subsequently employed in the war on terrorism.

Mr. Montgomery filed suit in the Southern District of Florida. Defendants moved to dismiss or transfer the action, arguing that the court lacked personal jurisdiction over the Defendant Risen, was an improper venue and was an inconvenient forum. Defendants also moved for a stay of discovery pending resolution of their motion to dismiss or transfer, which was denied by the Florida court. Notwithstanding this ruling, the court issued no further ruling on Defendants' transfer motion or their motion to dismiss, which argued that Plaintiff's complaint, as amended, may be dismissed in its entirety because Plaintiff failed to plead a plausible claim for defamation or other related torts.

The discovery process was overseen by Magistrate Judge Jonathan Goodman, who issued several orders on the parties' various discovery motions including a series of orders related to and granting Defendants' motions to compel Plaintiff to produce the "critical evidence' in the case – Mr. Montgomery's software. Remarkably, the day before his deposition Mr. Montgomery claimed to give his one and only copy of his software – the critical evidence in his libel case – to the FBI along with 51 million other files which he claimed were his illegal surveillance on behalf of the NSA.

Over the next weeks and months, Mr. Montgomery failed to provide the FBI the information required to identify his software among the millions of files. Defendants sought sanctions on

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the grounds that Plaintiff violated three court orders and spoliated what the Magistrate had found "could be the most important evidence in the entire case," the software central to Plaintiff's burden to prove falsity, which a previous court had determined was not classified. Discovery proceedings culminated in briefing and a hearing on Defendants' motion for sanctions for Plaintiff's failure to produce the software.

At the close of discovery, Defendants moved for summary judgment on all claims. Defendants argued that Plaintiff's deliberate failure to produce the software at the heart of his claim compelled the conclusion that he could not meet his burden of proving falsity as a matter of law. Even if Plaintiff could carry his burden to prove falsity, Defendants argued that as a limited public figure, he had not and could not put forth concrete, affirmative evidence that would allow a reasonable jury to find, by clear and convincing evidence, that Defendants published with actual malice, i.e., with knowledge of falsity or serious doubts as to the truth of the challenged statements. Defendants contended that statements Plaintiff challenged were non-actionable expressions of opinion and rhetorical hyperbole, not verifiable statements of fact, and that Mr. Montgomery's claims were also barred by the fair report privilege.

On the eve of submitting Defendants' reply in support of their motion for summary judgment, in January 2016, the Southern District of Florida granted Defendants' motion to transfer pursuant to 28 U.S.C. § 1404(a), and transferred the case to the District of Columbia. The case was assigned to Judge Rudolph Contreras, who had before him three, fully-briefed, dispositive motions, including (1) Defendants' motion for summary judgment; (2) Defendants' motion to dismiss pursuant to Rule 12(b)(6); and (3) Defendants' motion for sanctions for dismissal and other relief related to the alleged spoliated evidence.

Remarkably, the day before his deposition Mr. Montgomery claimed to give his one and only copy of his software – the critical evidence in his libel case – to the FBI.

District Court Grants Summary Judgment

On July 15, 2016, Judge Contreras issued his 74-page ruling, granting Defendants summary judgment on all claims. Taking full measure of the complicated factual background and litigation history, the Court opened his opinion by observing: "The twists and turns of this case could fill the pages of a book. In fact, much of it already has." What follows is a very careful decision – a must read for every media lawyer – basing summary judgment on opinion and Mr. Montgomery's failure to come forward with sufficient evidence of either substantial falsity or actual malice.

Preliminarily, the court explained that it was "substantially troubled by Montgomery's and his counsel's conduct in this case," but nevertheless denied Defendants' motion for dismissal sanctions for spoliation of the Plaintiff's software because Defendants obtained dismissal via summary judgment. The court noted, however, that "[i]f the judgment in this case were ever

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reversed, thereby removing the basis for the Court's denial of Defendants' motion for spoliation sanctions, the Court would entertain a renewed motion."

The district court concluded that several of the Chapter's statements were non-actionable statements of opinion or hyperbole. For example, the court agreed with Defendants that "[t]he assertion that Montgomery was motivated out of greed or ambition is a subjective judgment that is not verifiable," and that Risen's "own subjective opinion that Montgomery is a con artist" was also protected opinion "particularly given the surrounding context of the Chapter and the information disclosed therein. As for Plaintiff's vociferous argument that he was defamed by the statement: "Montgomery was the maestro behind what many current and former U.S. officials and others familiar with the case now believe was one of the most elaborate and dangerous hoaxes in American history," the court concluded that this statement was also non-actionable insofar as "[a] person's opinion concerning which events rank among the greatest hoaxes in American history is a quintessential example of a subjective opinion."

The court rejected the Plaintiff's argument that he need not prove substantial falsity to succeed on his defamation by implication claims. The court explained that "although Montgomery does not have to show that the challenged ***statements*** were literally false to succeed on a defamation by implication claim, he still must show that the challenged ***implication*** or ***meaning*** that a reader might reasonably derive from those true statements is false." (Emphasis in original). And, most importantly, the court found: "Without the software, he cannot do so." Because the software, and therefore any ability to confirm whether or not it works, was absent from the record, the court reasoned, such "absence was fatal to any claim Montgomery's complaint asserts based on Defendants' statements or statements by implication that the software did not work or did not exist." The court otherwise disregarded the Plaintiff's "own, vague representations that the technology worked," because without any additional evidence a reasonable jury "would not be in a position to assess his claim that the Chapter's assertions that the software was fraudulent or a hoax were false."

The district court concluded that several of the Chapter's statements were non-actionable statements of opinion or hyperbole.

Ruling the Plaintiff was a limited-purpose public figure, the court concluded that even if Montgomery's assertions regarding the effectiveness of his technologies sufficed to create a triable fact on falsity, summary judgment was also warranted for the independent reasons that Montgomery did not show the level of fault necessary to prevail on his claims. The court pointed to "an abundance of evidence in the record," including "the plethora of news articles, court documents, and government records, pre-dating the Chapter," which aligned with and corroborated the Chapter's "general thrust" that Plaintiff's technology did not work and thus showed that the Defendants neither knew nor had reason to suspect that the Chapter's assertions regarding Montgomery, his technology, and the surrounding circumstances were false.

Judge Contreras further noted that "Montgomery's inability to show falsity," presented a "persistent stumbling block," because "if the fact finder is unable to determine whether

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statements were false, it becomes all the more difficult to show that Risen had reason to doubt the chorus of sources in government, in the media, and personally connected to Montgomery, who all contended that Montgomery's technology was either fabricated or proven not to be a valid source of intelligence." The court otherwise disregarded Plaintiff's claims that his own denials were sufficient to establish actual malice, especially where Montgomery failed to "point to anything specific and concrete that accompanied his denial," as well as Plaintiff's claims that Risen's sources were biased, affirming that "the mere possibility that a source may be biased in some way or hold a subjective viewpoint does not, without more, create obvious reasons to doubt a source's accuracy or establish actual malice."

D.C. Circuit Court Decision

Montgomery appealed and last month the D.C. Circuit issued a unanimous decision, authored by Judge Pillard, affirming summary judgment. Montgomery v. Risen and Houghton Mifflin Harcourt Publishing Co., No. 16-7096 (Nov. 17, 2017).

Noting "[t[his is Montgomery's defamation case—he chose to bring it," the court found he failed to "marshal sufficient evidence to create a triable issue for a jury as to each element of his claim," and "produced virtually no evidence of the software's functionality to factually rebut Risen's statements that it never worked as Montgomery said it did." The court reasoned "Risen's reporting is, at its core, about how authorities at the highest levels of government fell for a 'ruse,' … software that could never be verified." The court outlined steps that Montgomery could have taken but never did to try and satisfy his burden, notwithstanding a court order to do so, noting that this was not the first time he had failed to produce his software in other litigation.

Risen's characterization of Montgomery as a "maestro" and the software as an "elaborate and dangerous hoax" was "'loose, figurative, or hyperbolic' commentary."

The court concluded Montgomery's suit also "has been defined by the software's persistent absence," and "[t]hat lacuna in the record dooms Montgomery's case." Finally, the court also affirmed that Risen's characterization of Montgomery as a "maestro" and the software as an "elaborate and dangerous hoax" was "'loose, figurative, or hyperbolic' commentary" and as such, was not actionable.

On appeal, Defendants were supported by a brief by amici curiae The Reporters Committee for Freedom of the Press and 35 Media Organizations.

Defendants James Risen, Houghton Mifflin Harcourt Publishing Company and Houghton Mifflin Harcourt Company were represented by Laura Handman, Lisa Zycherman and Eric Stahl of Davis Wright Tremaine, Micah Ratner, formerly of Davis Wright Tremaine, now of National Public Radio, Sandy Bohrer and Brian Toth of Holland and Knight, and Sharon Burger, Sr. Vice President and Associate General Counsel, Houghton Mifflin Harcourt Publishing Company. Plaintiff Dennis Montgomery was represented by Larry Klayman.

MLRC's 2017 Forum: "Is Libel Back?"

Have more plaintiffs been bringing (or threatening) litigation against the media in recent years, or does it just feel that way? That was the question debated at this year's annual Forum, held immediately before MLRC's annual dinner on Wednesday, November 8, 2017.

The Forum discussed the possible impact of, among other things, mega-recoveries in the Gawker and "Pink Slime" cases, President Trump's frequent attacks on the media, deep-pocket litigation funders like Peter Thiel, and changes in the news industry that is increasingly moving coverage online.

The Forum was sponsored by Microsoft and Prince Lobel. Joining our panel discussion were: Eriq Gardner, The Hollywood Reporter; Robert Lystad, AXIS Insurance; David McCraw, The New York Times Company; Elizabeth A. McNamara, Davis Wright Tremaine LLP; Lynn Oberlander, Gizmodo Media Group, and the session was moderated by MLRC Executive Director, George Freeman.

Approximately 130 MLRC members attended the Forum and also participated in the discussion. As George explained at the beginning of the session, to encourage open and frank dialogue among the panel and our members in attendance, MLRC held the meeting under so-called, "Chatham House Rules" where those in attendance could repeat what was said at the meeting, but not attribute comments to any particular speaker. For this reason, we'll report here on the gist of some comments made without attribution, to give readers a flavor of the response to our question, "Is Libel Back?"

- There does seem to be a noticeable rise in the number of libel claims being filed against the media, but nothing "meteoric."
- It seems that plaintiffs' lawyers are feeling emboldened by the huge recoveries in Gawker and the "Pink Slime" cases. This has given them the encouragement to go after major news organizations (not just tabloids) and this is also causing them to increase their settlement demands.
- A new class of plaintiffs lawyers, like Charles Harder and Tom Clare are emerging, and some are making more sophisticated legal arguments in pre-trial proceedings.
- Generally, there was skepticism among our participants that there was a "Trump effect," i.e., that Trump's attacks on the media were encouraging more suits and/or influencing judges or juries. It was noted that juries have always been skeptical of the media.

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Left to right: George Freeman, Robert Lystad, Elizabeth McNamara, David McCraw, Lynn Oberlander and Eriq Gardner

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- Short summaries of articles on social media, and less-trained social media staff, can lead to more mistakes.
- The purported $177 million settlement (plus insurance) in the ABC “Pink Slime” case is a disaster for the media because it involved an important, constitutionally protected food safety report that hasn’t been retracted. This will impact the media and media lawyers throughout the process of reporting future stories: the investigation process, the decision to publish, and at the settlement stage after a claim has been brought.
- We’re seeing more claims lacking in merit that arise when claimants have a personal vendetta or are simply thin skinned.
- It’s too early to say whether the media will see more cases funded by billionaire backers like Peter Thiel with an agenda to destroy media outlets.
- The media needs to do a better job of explaining to the public the value and importance of an independent media.

Court Affirms Dismissal of Defamation Suit Over Models' Online "Blacklist"

Plaintiff Failed to Adequately Deny Accusations of Sexually Inappropriate Behavior

The California Court of Appeal this month affirmed dismissal of a defamation suit against two professional models who created and distributed a list of photographers accused of sexually inappropriate and dangerous behavior in the workplace. *Brenner v. Hill*, No. A149758 (Nov. 21, 2017) (unpublished).

The defendants started their so-called online "blacklist" as a Facebook page and then invited other models to add to the list. They defined inappropriate behavior as "groping, soliciting sex, sending dick pics, extreme limit pushing, and the like." Dangerous was defined as "assault, and anything physical" or "verbally abused and physically threatened." Plaintiff was listed in the "inappropriate" category.

Plaintiff sued for defamation, intentional infliction of emotional distress, intentional interference with prospective economic advantage and conspiracy. Defendants successfully moved to strike the complaint under California's anti-SLAPP statute. The Superior Court held that the list was a matter of public interest and plaintiff failed to demonstrate a probability of prevailing on his claims. The court held the description of plaintiff's behavior as "inappropriate" was nonactionable opinion. Moreover, he failed to satisfy the element of falsity by failing to expressly deny engaging in appropriate conduct.

Court of Appeal Decision

The Court of Appeal affirmed. The panel had no doubt that the list concerned a matter of public interest – sexual harassment in the workplace. This was amply demonstrated by the voluminous responses and contributions to the Blacklist by other models.

On the probability of success prong, the Court agreed that plaintiff failed to satisfy the falsity element. While plaintiff denied making "overtly sexual comments in a professional setting," claiming such behavior was "inconsistent with his habit and custom of conduct," he did not expressly deny engaging in "groping, soliciting sex, sending dick pics, extreme limit pushing, and the like."

Thus by failing to unambiguously deny the import of the Blacklist, plaintiff failed to show a probability of success on the merits of his defamation claims. And because of this failure to deny the defamatory implications of the list, plaintiff failed to show a probability of prevailing on his other causes of action.

First Circuit Affirms Dismissal of Cosby Accuser Defamation Suit

California Court Allows Similar Suit to Go Forward

In October, the First Circuit affirmed a lower court ruling dismissing Katherine McKee's defamation case against comedian and actor Bill Cosby. McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017) (Lynch, Stahl, and Thompson, JJ). McKee's suit for defamation and related claims is one of a number brought in the past five years against Cosby in connection with his denial of sexual assault allegations made against him.

The following month, on November 21, 2017, a California appeals court, considering Cosby's anti-SLAPP motion against Janice Dickinson, briefly discussed McKee's case before denying Cosby's motion and allowing Dickinson's defamation case against Cosby and lawyer Marty Singer to proceed. Dickinson v. Cosby, No. No. B271470 (Cal. App. Nov. 21, 2017).

These cases raise interesting questions about whether and how denials of allegations can create defamation liability.

Background and Discussion

These cases raise interesting questions about whether and how denials of allegations can create defamation liability.

In the past few years Cosby has been publicly accused by numerous women of sexual assault. In a December 2015 interview with the *New York Daily News*, McKee, a longtime member of the entertainment industry, accused Cosby of raping her in 1974. On December 22, 2014, the same day the *Daily News* published the article, Cosby's attorney, Martin Singer, e-mailed a six-page letter to the paper castigating it for publishing the article. Singer wrote, among other things, that the *Daily News* "maintains virtually no journalistic standard[s] or credibility threshold" for its stories, as illustrated by its publishing McKee's "never-before-heard tale" that "lacks credibility." The First Circuit's summary of Singer's missive includes the following description:

> The letter lists, in a string of bullet points, statements that McKee allegedly made pertaining to her social relationship with Cosby, as well as her past life as a Las Vegas showgirl. Each set of attributed statements is accompanied by a footnote with a citation to a news article or other source. Then, asserting that 'the Daily News is not alone,' the letter goes on to more broadly bemoan the 'reckless[ness]' of 'irresponsible media' that 'blindly ignores the dubious background of sources,' including inter alia the 'criminal backgrounds of various accusers.' In closing, the letter demands 'publication of a retraction and correction' of the *Daily News*' 'malicious defamatory article.' *McKee v. Cosby*, 874 F.3d 54, 58-59 (1st Cir. 2017).

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Singer's letter, which bore prominent "Confidential Legal Notice" and "Publication or Dissemination is Prohibited" disclaimers, was quoted in news outlets around the world. According to McKee, Singer leaked copies of the letter. McKee brought a defamation suit against Cosby in December 2015, in federal court in Massachusetts, later amending her complaint to assert twenty-four defamation counts corresponding to specific portions of Singer's letter. Cosby moved to dismiss for failure to state a claim.

In February 2017, the district court, applying Michigan law, granted Cosby's motion. The court decided that Singer's letter did not actually deny McKee's allegations—namely, that Cosby raped her. Rather, the court concluded, the "gist" of Singer's letter was his opinion that McKee lacked credibility and that the *Daily News* was remiss in not considering certain publicly available information undermining McKee's claim. The court held that Singer's letter contained opinionated statements that are not capable of being objectively verified, and that the letter adequately disclosed the non-defamatory facts underlying those opinions. McKee appealed.

The First Circuit affirmed, though noted one significant point of departure from the lower court's analysis. According to the First Circuit, Singer's letter impugned not only McKee's credibility, but also implied that her allegations of rape are not credible. Nevertheless**,** the First Circuit concluded, Singer disclosed the non-defamatory facts underlying his assertions and thereby immunized them from defamation liability.

The First Circuit concluded Singer disclosed the non-defamatory facts underlying his assertions and thereby immunized them from defamation liability.

California Case Goes Forward

On November 21, 2017, one month after the First Circuit released its opinion, a California appeals court considering a Singer-authored press release and demand letter in the context of an anti-SLAPP motion reached a different conclusion. Dickinson v. Cosby, No. B271470 (Cal. App. Nov. 21, 2017).

The California case followed former supermodel Janice Dickinson's statement, during a televised interview with *Entertainment Tonight* in November 2014, that Cosby drugged and raped her in 1982. The day the interview aired, Singer, on behalf of Cosby, sent a demand letter to several media outlets. The letter stated, among other things, that Dickinson's rape allegation was false, and warned that to repeat her story would amount to "constitutional malice" and would expose their companies to substantial liability. The following day, Singer issued a press release that began, "Janice Dickinson's story accusing Bill Cosby of rape is a lie." Dickinson filed suit against Cosby for defamation and related claims, to which Cosby responded with an anti-SLAPP motion.

To defeat Cosby's anti-SLAPP motion, Dickinson was required to demonstrate a probability of prevailing on her defamation complaint. This, the court concluded, she had done. Dickinson demonstrated, the court held, that the demand letter may be judged to contain actionable statements of fact, not just opinions. (The lower court had denied the anti-SLAPP motion with respect to the press release, so the California appeals court did not address it.)

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Applying a totality of the circumstances test, the California court ruled that a reasonable fact finder could conclude that the letter both stated and implied a provably false assertion of fact—namely, that Cosby did not rape Dickinson, and that Dickinson is lying when she says he did. The court further stated that even if it were to assume Singer's statements were mere opinion, Singer did not sufficiently disclose the non-actionable facts on which he based his opinion because, among other reasons, Singer's letter both implies and explicitly states what may reasonably be deemed a provably false assertion of fact: that "the alleged rape never happened."

The court also emphasized that Singer sent the demand letter on Cosby's behalf. According to the court, the agency relationship means that Singer's denial of the rape allegation is a factual one, and not a matter of opinion—or, at the very least, the letter was susceptible to that interpretation:

> When a man is publicly accused of raping a woman and responds with a public statement claiming the accusation itself is false, it is reasonable that a member of the public hearing the statement would not think the denial means, "I'm neither affirming nor denying that I raped her, but look at all this evidence challenging her credibility." That the speaker making the denial is himself the accused rapist strongly implies that the denial includes a denial of the rape itself. Here, the speaker was the accused's attorney, speaking with presumed agency. We see no reason the result should be different.

Dickinson v. Cosby, 2017 Cal. App. LEXIS 1031, *59 n.17.

In a footnote, the court criticized the *McKee* district court for failing to give "sufficient weight" to the fact that Singer was acting as Cosby's agent at the time he sent the letter at issue in that case.

Interestingly in this case, Dickinson added Singer as a defendant, following a submission by Cosby that suggested Singer issued the demand letter without first asking Cosby if the rape accusations were true. Cosby and Singer both argued that the claim over the demand letter should be dismissed under California's litigation privilege, which "protects communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." Under California case law the privilege is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior to litigation such as demand letters.

Here, however, the privilege did not apply because Singer did not have a good faith intention to bring a lawsuit. Instead, the "facts suggest that [Singer's] demand letter was a bluff intended to frighten the media outlets into silence (at a time when they could still be silenced), but with no intention to go through with the threat of litigation if they were uncowed."

Janice Dickinson is represented by Lisa Bloom, The Bloom Firm. Marty Singer is represented by Horvitz & Levy and Lavely & Singer. In the Massachusetts case, the plaintiff is represented by F. William Salo. Cosby is represented by Alan Greenberg, Greenberg Gross, in both actions.

Michigan Court of Appeals Affirms Dismissal of Defamation Suit Brought by White Supremacist

"A Man is Known by the Company He Keeps"

By Andrew M. Pauwels

In a decision published October 31, 2017, the Michigan Court of Appeals upheld the dismissal of a suit brought by radio host James Edwards against The Detroit News and its columnist, Bankole Thompson. James Edwards v. Detroit News, Inc., No. 334058.

The Court found that the reference in Thompson's opinion column to Edwards as a "leader" of the Ku Klux Klan constituted non-actionable opinion. The Court's opinion hinged on the context of the piece and the "ambiguous" nature of the term "leader."

Background and Trial Court Proceedings

The background of this case is crucial, as the Court recognized by dedicating roughly half of its opinion to the underlying facts. Edwards hosts *The Political Cesspool* radio show and website, the latter declaring that it represents a "philosophy that is pro-White" and displaying a picture of Edwards with David Duke, the former Grand Wizard of the Knights of the KKK. Elsewhere, "Edwards characterizes his show's listeners as 'pro-Confederate supporters,' and he maintains that as host, he has 'an unapologetically pro-White viewpoint' and his is 'the premier voice for European Americans.'" *The Political Cesspool* is broadcast by Stormfront.org, a website founded by another former Grand Wizard of the Knights of the KKK, Don Black.

The decision serves as a new touchstone for political commentators to rely on when they use ambiguous, subjective terms like "leader" to describe political figures.

Thompson is the former editor of the Michigan Chronicle, a newspaper with a long history of serving the African-American community in Detroit. Thompson now writes opinion pieces for The News, often commenting on issues facing Michigan's minority populations. In March 2016, Thompson wrote a series of pieces about then-candidate Donald Trump's supporters, including Edwards. In a March 10 column, Thompson noted that Edwards had obtained press credentials from Trump's campaign. That column quoted a representative of the Southern Poverty Law Center, who referenced Edwards in describing Trump as "appealing to the same constituents that the [KKK] has historically appealed to."

The following week, Thompson published a column entitled "Jewish leaders fear Trump presidency." Thompson discussed concerns raised by members of the Jewish community about Trump, writing: "Of particular note to some in the Jewish community is the unprecedented

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support the Trump campaign has received among white supremacist groups like the Ku Klux Klan and its leaders like James Edwards, David Duke, and Thomas Robb, the national director of the Knights of the Ku Klux Klan in Arkansas."

Edwards filed suit, alleging claims for defamation, defamation by implication, and false light invasion of privacy, all stemming from the allegedly "false and defamatory statement of fact that Plaintiff is a leader of the [KKK]." The trial court granted the defendants' motion for failure to state a claim, holding that the statement constituted protected opinion. Edwards appealed.

Court of Appeals Decision

The Court of Appeals affirmed the trial court in a published and precedential opinion, holding that the assertion that Edwards was a leader of the KKK constituted non-actionable opinion. Citing Edwards's website, information from the parties' briefs, and its own research, the Court discussed the history of the KKK, its recent leadership by Duke and Black, Edwards's radio show and website, and Edwards's connections to Duke, Black, and others who share his "strong ideological viewpoint."

The Court then set out the defamation standard and emphasized that "[n]ot all defamatory statements, even those made with actual malice, are actionable." Context matters here because "the First Amendment provides maximum protection to public speech about public figures with a special solicitude for speech of public concern." The Court declared: "[I]f the statement can be understood both to be objectively verifiable but also to mean different things to different people—in other words, the statement is subjective and therefore open to several plausible interpretations—then the statement is not actionable."

These are promising developments for media defendants in the age of Trump and his attacks on the media.

The Court then turned to the heart of Edwards's claim: that the statement that he was a leader of the KKK was factually false given his lack of formal affiliation with the organization. The Court once again emphasized that, given its context, readers would have understood Thompson's piece as offering his opinions. The Court then looked to the meaning of the term "leader," finding that it has multiple definitions, several of which do not "necessarily imply official affiliation with a particular group."

Examining Thompson's use of "leader," the Court held that the sentence does not necessarily imply a formal role in the KKK. Instead, "another interpretation could be that Edwards was an opinion leader." The Court, again looking to context, found that Edwards's "own words and deeds lend plausibility" to this interpretation. This reading was bolstered by a decision from the Southern District of New York, which found that the assertion that the plaintiff was a "leader" of a Russian political party was an expression of non-actionable opinion because the term had a meaning that was "debatable, loose, and varying. *See Egiazaryan v. Zalmayev*, 880

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F. Supp. 2d 494, 512 (S.D.N.Y. 2012). The Court of Appeals also found support for dismissing Edwards's claim in less orthodox authority, citing Aesop's warning that "A man is known by the company he keeps."

The opinion is important for three reasons. First, it reiterates the fundamental principle that allegedly defamatory statements must be read in context and cannot be taken in isolation. Second, the decision serves as a new touchstone for political commentators to rely on when they use ambiguous, subjective terms like "leader" to describe political figures. Third, the Court decided to publish the opinion, giving it precedential weight.

These are promising developments for media defendants in the age of Trump and his attacks on the media. In the face of an attempt by someone with white supremacist views to silence his critics, the Michigan Court of Appeals sent a stirring reminder that, even in this political environment, the First Amendment protects the journalists who choose to shed light on this controversial president and his supporters.

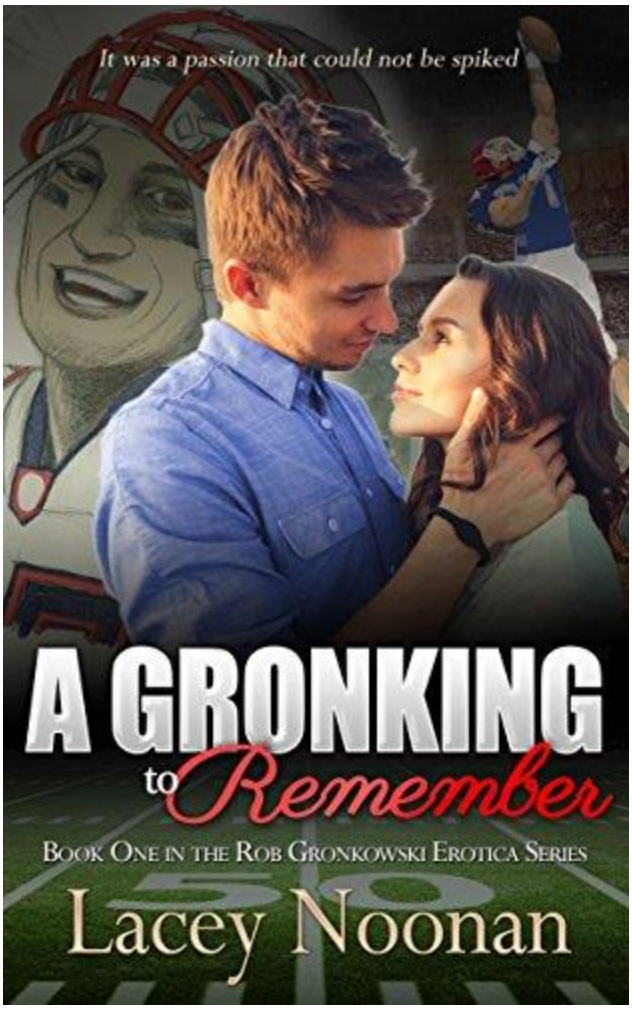
Defendants-Appellees The Detroit News and Bankole Thompson were represented by James E. Stewart, Leonard M. Niehoff, and Andrew M. Pauwels of Honigman Miller Schwartz and Cohn LLP.

Sixth Circuit Affirms Dismissal of Publicity Claims Against Online Book Publishers

Plaintiffs Image Had No Commercial Value to Sustain Claim Under Ohio Law

In an unpublished decision, the Sixth Circuit affirmed dismissal of publicity and false light claims against Amazon, Barnes & Noble and several online publishing platforms for distributing a self-published book of erotic fan fiction devoted to New England Patriots all-star tight end Rob Gronkowski. Roe v. Amazon, No. 16-3987 (Nov. 21, 2017).

At issue was the cover of a book entitled *A Gronking to Remember* - ambitiously subheaded "Book One in the Rob Gronkowski Erotica Series." The defendant took plaintiffs' engagement photograph off the web and used it without permission for the book cover. The plaintiff, however, had warranted to the online companies that he had all legal rights to his book, including the cover.



Defendant's book now apparently sold with a licensed stock image on the cover.

The book gained public attention when Gronkowski and the Patriots played in the 2015 Super Bowl. The book cover was shown during skits on The Tonight Show, Jimmy Kimmel Live, and at media day for the Super Bowl. Plaintiffs became aware of the book through these disclosures and filed suit against the author, Amazon, Barnes & Nobel and several online services: Smashwords (a distributor of self-published e-books), Kindle Direct Publishing and CreateSpace (self-publishing companies owned by Amazon), and NOOK Press (Barnes & Noble's e-book platform).

An Ohio federal district court allowed the case to go forward against the author, but granted summary judgment to all the other defendants. Roe v. Amazon.com, 170 F. Supp. 3d 1028, 1035, 1040 (S.D. Ohio 2016). In a lengthy analysis of the differences between traditional publishing and online self-publishing, the district court concluded that these on demand publishing services are book sellers not book publishers.

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> Just as Xerox would not be considered a publisher and held responsible for an invasion of privacy tort carried out with a photocopier, Corporate Defendants will not be liable as publishers for the tort allegedly committed using their technology. … States may not impose criminal or civil liability against booksellers or other distributors for distribution where the distributor neither knew nor had any reason to know of alleged wrongdoing pertaining to specific content. Smith v. California, 361 U.S. 147, 153 (1959).

Because the court held the online companies were not "publishers" it found it unnecessary to consider their Sec. 230 arguments.

Sixth Circuit Decision

The Sixth Circuit affirmed. The court stated: "We question the district court's First Amendment analysis" – presumably meaning the district's court reliance on an obscenity case – *Smith v. California* – but Court offered no further explanation. Instead it went on to affirm on statutory and common law grounds, finding that under Ohio law plaintiffs failed to demonstrate that their name or likeness had any commercial value. "While plaintiffs need not be national celebrities to assert a right of publicity claim, they must at least "demonstrate that there is value in associating an item of commerce with their identity."

The Court also affirmed summary judgment to the defendants on the false light claim since plaintiffs offered no evidence to show that the online book companies knew or had reason to know that the author used the photograph of plaintiffs without permission.

Recently Published

The Monthly Daily
October media law round-up from MLRC Deputy Director Jeff Hermes. In this issue: J.S. Mill doesn't care if he loses this round | Does Trump understand what his campaign said about privacy suits? | ICE would like you to forget everything you saw, please | Sheriff Terry Buchanan: Overcharging for public records is bush league | Бедá никогдá не прихóдит однá | Greg Gianforte is still a jerk

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Challenges and Solutions for Media Companies and Their Journalist Workforces in Harnessing the Internet's Power While Avoiding Its Pitfalls
A report from the Employment Committee addressing two very timely issues: (1) How to encourage journalist employees' use of social media while attempting to reasonably limit that use through policies and workplace rules; and (2) How to deal with the increased frequency with which journalists are subjected to abuse and harassment due to works published online.

FISA Court Rules ACLU and Yale Information Clinic Have Standing to Seek Access to Redacted Opinions

By Naomi Sosner

Sitting *en banc* for the first time in its history, the Foreign Intelligence Surveillance Court concluded, in a 6-5 opinion, that the American Civil Liberties Union and Yale Law School's Media Freedom and Information Access Clinic ("movants") had established standing to bring a First Amendment claim for access to redacted portions of certain of the Court's opinions. In Re Opinions & Orders Addressing Bulk Collection of Data Under FISA, (Nov. 9, 2017).

The decision, which was accompanied by a lengthy dissent, vacated a prior opinion concluding movants had inadequately alleged an injury-in-fact for standing purposes.

Background

On June 6, 2013, *The Guardian* and *The Washington Post* separately published articles revealing the existence of a secret National Security Agency program, codenamed PRISM, which collected internet communications from certain United States companies. Both articles contained classified information. Within a day, the Director of National Intelligence declassified additional details about the bulk-date-collection program. Shortly thereafter, movants filed suit in the Foreign Intelligence Surveillance Court ("FISC" or "FISA Court"), asking that the Court unseal its opinions evaluating the meaning of Section 215—the "business records" provision—of the Patriot Act, 50 U.S.C. § 1861, and the legal basis by which FISC authorized PRISM activities.

Taken together, Collyer and Saylor's rulings constituted an intra-court split on the standing issue. The Court sua sponte granted en banc review to consider whether movants had asserted a sufficient injury-in-fact for standing purposes.

Movants argued that, because officials had revealed the essential details of the program, FISC no longer had a legitimate interest in continuing to withhold its legal justification. Asserting their First Amendment right of access to court proceedings and documents, recognized by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) movants requested FISC release its relevant rulings; or, in the alternative, that FISC request the government review the opinions' classification, as provided in FISC's Rules of Procedures, FISC Rule of Procedure 62 (a), and publish any declassified portions. Judge Saylor, the presiding judge, granted the latter request. Before doing so, however, he determined that movants had standing to pursue their First Amendment claim.

At around that time, the government released further details about PRISM, including a white paper discussing how FISC judges had approved directives to telecommunications providers to produce bulk telephonic metadata for the government's counterterrorism program. In light of

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the disclosures, FISC asked the Executive Branch to review several FISC opinions, and ultimately released two redacted opinions addressing the collection of bulk telephonic metadata under Section 215. Movants then filed a second action requesting FISC unseal classified sections of opinions deciding the legality of the data collection. This motion, like the one prior to it, alleged the classified portions were "subject to the public's First Amendment right of access," and requested that the Court exercise its discretion to ask for a second classification review by the government and then verify that its response complied with the First Amendment.

During briefing, the government released two more redacted FISC opinions. It then took the position that FISC should dismiss movants' second action because, among other reasons, the four opinions released constituted all of FISC's relevant rulings. Judge Rosemary Collyer, the FISC judge presiding over the second action, instead dismissed the case after raising a specific standing issue *sua sponte*: whether movants had alleged the invasion of a "legally and judicially cognizable" interest sufficient to establish injury-in-fact, one of three requirements for standing. (Standing requires, as a constitutional minimum, that a plaintiff establish 1) an injury-in-fact that is 2) caused by the conduct complained of and 3) likely to be redressed by a favorable decision. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, dated November 9, 2017, Docket No. Misc. 13-08 ("*In re Opinions & Orders*")).

Collyer assessed, under *Richmond*, whether the qualified First Amendment right of access protected movants' asserted interests, and determined it did not. Movants, according to Collyer, had not alleged a cognizable interest protected by law, and therefore lacked standing to bring their claim. Movants moved for reconsideration.

Taken together, Collyer and Saylor's rulings constituted an intra-court split on the standing issue. The Court *sua sponte* granted *en banc* review to consider whether movants had asserted a sufficient injury-in-fact for standing purposes. Six of the eleven judges concluded movants had.

Discussion

Whether a plaintiff has standing to bring a claim and whether a claim, once brought, has merit are two distinct inquiries. Courts do not have jurisdiction over cases brought by plaintiffs without standing, and so a standing analysis precedes a merits analysis while assuming that the plaintiff's claim is legally valid. Or, in other words, that "in deciding whether Movants have alleged a sufficient injury-in-fact for standing purposes, we must be careful not to decide the question on the merits for or against [Movants], and must therefore assume that on the merits the [Movants] would be successful in their claims." *Id.* at 7 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (internal quotation marks omitted)).

"Injury-in-fact," a term of art, refers to the "invasion of a legally protected interest which is both (a) concrete and particularized; and (b) actual or imminent, not conjectural, or hypothetical." *Id.* at 7 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560). The majority and dissent's fundamental disagreement turns on whether the prefatory "invasion of a legally protected interest" is satisfied, and, by extension, whether Collyer's analysis concluding that

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movants did not allege an invasion of a "legally protected interest" went to the merits of movants' claims, rather than to their standing.

Generally, for purposes of standing courts assume that a movant's claim asserts an injury to a legally protected interest so long as that interest is "cognizable"—meaning, that it is capable of being known or recognized by courts. The movants in this case, according to the majority, have a recognized interest in a First Amendment right to access judicial proceedings — a right that courts have repeatedly recognized.

In asserting this right, movants have asserted a cognizable constitutional right. It is, the majority states, the "sort of" interest protected by law, and that is all that is required for purposes of standing. The scope of the First Amendment's right of access, in contrast, is a question of merits. Judge Collyer erred in dismissing the case for lack of standing because her lengthy analysis of whether movants' First Amendment claim alleged an invasion of a legally protected interest went to the law's scope, rather than to the movants' standing, and therefore belonged to a merits analysis.

The dissent's view is that the majority significantly mischaracterizes movants' claims and so blends a qualified First Amendment right of access with the more generous common law right of access. The majority's description of movants' claimed legal interest as "access to judicial proceedings" is overly broad; movants in fact assert specific rights, under the First Amendment, to access information in FISC judicial opinions that the government has classified as confidential information and to challenge the constitutionality of those classification decisions by requiring the government to defend them. The constitutional basis of movants' claims is critical because standing, the Supreme Court has remarked, is "'gauged by the specific common -law, statutory or constitutional claims that a party presents.'" *See Dissent, In re Opinions & Orders* ("*Dissent*"), at 4-5 (quoting *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991)).

According to the Dissent, the First Amendment right of access is distinct from the common law right of access in important ways the majority's opinion elides. The common law provides a right of access to "judicial proceedings." In contrast, the general rule under the First Amendment is that there is no right to access government proceedings. *Richmond* and its progeny establish exceptions to this rule for judicial proceedings that satisfy the so-called experience and logic tests: "'whether the place and process have historically been open to the press and general public' (the experience inquiry) and 'whether public access plays a significant positive role in the functioning of the particular process in question' (the logic inquiry)." *In re Opinions & Orders*, at 6. The First Amendment, unlike the common law, provides a qualified right of access.

The majority and dissent agree that to assess movants' standing, the Court must analyze whether movants' interest is "the sort" protected by the First Amendment. The dissent characterizes the interest as "an interest in accessing classified information in FISC judicial opinions," *Dissent*, at 10, and would decide, because "FISC proceedings and judicial documents are distinctly not public and required by law to not be public," *Id.* at 13, that the movants' interest is not cognizable. The majority, which views movants' claim as a variation on the well-

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established First Amendment right of access to judicial proceedings, disagrees. It therefore holds that movants have sufficiently alleged the invasion of a legally cognizable interest to establish an injury-in-fact.

After vacating Collyer's opinion, the FISA Court has remanded the matter to her for further consideration of movants' motion to unseal the court records.

Naomi Sosner is MLRC's 2017-18 Legal Fellow.

District of Columbia Court Restricts Government Access To Website Used by Trump Protesters

By Cindy Gierhart

The District of Columbia Superior Court on October 10, 217, limited the scope of data the government is allowed to collect from a website used by anti-Trump protesters, ensuring "innocent" users' identities will be protected. In the Matter of the Search of www.disruptj20.org, No. 17 CSW 3438 (D.C. Super. Oct. 10, 2017).

The U.S. Department of Justice issued a broad search warrant on July 12, 2017, to DreamHost, a web hosting company, for users' information from the DreamHost account disruptj20.org. The government alleges the website was used to organize protests on Inauguration Day that led to the arrests of more than 200 people on charges of property damage and assault.

The search warrant broadly requested "all files" related to the website. If left unchecked, the warrant would allow the government to "rummage through the information" on the site, including the information of those who did not participate in potentially criminal activities and "who were engaging in protected First Amendment activities," according to Chief Judge Robert E. Morin, who issued the order.

The order permits DreamHost to redact *all* identifying information from the documents it produces the government. Based on its review of the redacted materials, the government may then file with the court a list of information the government believes constitutes evidence of criminal activity, along with an explanation of why the information is relevant to the government's investigation. Upon a finding a probable cause, the court may then order non-redacted identifying information of subscribers believed to have engaged in criminal activity be provided to the government.

All non-subscriber identifying information will remain redacted, as the court determined it falls outside the scope of the narrowed search warrant.

The order also instructs the government to permanently delete any data that falls outside the scope of the warrant and to not share with anyone, including other law enforcement or government agencies, information that falls outside the scope of the warrant.

DreamHost lauded the court's action, assuring DisruptJ20 visitors, "The contact information of simple website visitors, journalists, historians, and any other users who may have interacted with the DisruptJ20 website with innocent intentions is now *explicitly protected*." *See* https://www.dreamhost.com/blog/the-end-of-the-road/.

Cindy Gierhart is an associate with the Washington, D.C., office of Holland & Knight LLP. DreamHost was represented by Raymond O. Aghaian of Kilpatrick Townsend & Stockton LLP, Beverly Hills, CA.

DCS Annual Meeting Reviews Accomplishments and Plans for 2018

The annual meeting of the MLRC Defense Counsel Section was held on Thursday, November 9th at Carmine's Restaurant on West 44th Street.

DCS President Laura Prather led the meeting. The first matter of business was the election of a new executive committee member. Robin Luce Herman of Butzel Long, was elected as the DCS Treasurer for 2018. The other members of the 2018 DCS Executive Committee are: President Jack Greiner; Vice President Jay Ward Brown; and Secretary Robert Balin. Laura will continue to serve as President Emeritus during the coming year. She thanked outgoing President Emeritus Chuck Tobin for his years of service on the DCS Executive Committee.

George Freeman gave the Executive Director's report on MLRC's projects and plans, followed by reports from Committee Chairs on Committee accomplishments and plans for 2017.

2017 DCS COMMITTEE REPORTS

Advertising and Commercial Speech Committee

Co-Chairs: Brendan Healey and Terri Seligman
Vice-Chair: Robin Luce-Herrmann

In 2017, we re-built the committee leadership (Brendan Healey, Terri Seligman, and Robin Luce-Hermann) and then continued to focus on developing the committee as a practice resource and forum for exchanging knowledge among MLRC members who advise clients on advertising and commercial speech issues. We used committee meetings in 2017 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Presenters and topics were as follows: Hannah Taylor and Daniel Goldberg of Frankfurt Kurnit spoke on chatbots, in particular the privacy implications of sharing information with chatbots; Kristen Strader from Public Citizen spoke on spoke on the FTC's Endorsement Guides and the FTC's recent enforcement push with regard not only to brands but also to the influencers themselves; and Lystra Batchoo from BuzzFeed spoke on native advertising. We also have a presentation scheduled for November 16. Holly Grochmal, who is in-house at Pandora, will be speaking on the programmatic advertising ecosystem.

In 2018, we intend to continue to keep our members abreast of new legal and regulatory developments relating to social media and online advertising. We hope to have presentations every other month, and we also intend to update the "Checklist on Advertising Content." The update would focus on advertising of marijuana (and related services and products), e-cigarettes, guns, hard liquor, Internet gambling (including daily fantasy leagues and Internet betting on horse racing), pharmaceutical drugs from other countries, as well as native advertising and business issues such as rate cards. We say this every year, but this time we really mean it. Our committee continues to stay nimble and, as quickly as technology is changing and creating new legal issues, our committee follows topics as they develop and attempts to find speakers at the core of these issues to talk about them.

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ALI Task Force

Chair: Thomas Leatherbury

The ALI continues to be fairly quiet with respect to issues affecting the media. The working group on the Restatement of Torts (Third) has released Council Draft No. 4 (covering battery, fraud causing physical or emotional harm, and participation in an intentional tort). The working group is not now considering those portions of the Restatement on libel and privacy. Moreover, the working group on Privacy is focusing on data privacy and consumer privacy rather than privacy issues that regularly crop up in representing media companies and journalists. Finally, the project concerning the Restatement of the Law of Copyright has released a third preliminary draft that will be discussed at a meeting next month. The subjects covered by this third preliminary draft are scope of protection and ownership. If you are interested in ALI membership, I would be pleased to walk you through the process. It has been my pleasure to serve as the Chair of this Committee that sprang into action back when the ALI was studying the enforcement of foreign judgments, and I look forward to working with my successor.

Anti-SLAPP Task Force

Chair: Bruce Johnson

The MLRC SLAPP task force meets every other month via conference calls, or more often when needed. The purpose of the group is to discuss, and coordinate on, new developments in anti-SLAPP protections, including state anti-SLAPP bills, recent SLAPP cases, and federal developments (such as a possible federal anti-SLAPP law and the application of state anti-SLAPP laws in federal diversity cases).

California Chapter

Co-Chairs: Jeff Glasser, Sarah Cronin, Tenaya Rodewald

The MLRC California Chapter engaged in vibrant discussions this year on (1) the Computer Fraud and Abuse Act ("CFAA") and the government's subpoena to journalist Mark Boal (2) copyright and profit participation cases, and (3) idea submission claims and the anti-SLAPP statute and key compliance concerns with the Children's Online Privacy Protection Act ("COPPA").

The Chapter's first meeting, held on April 13 at Sheppard Mullin's Century City offices, looked at whether the CFAA makes it a crime to visit publicly available websites after being told not to do so and creative approaches to protecting raw footage and outtakes from government and civil subpoenas. James Chadwick, partner at Sheppard Mullin, discussed the implications of Facebook, Inc. v. Power Ventures, Inc., where the Ninth Circuit found that when a website operator specifically instructed an individual or company to cease accessing its password-protected website, any continued accessing and/or scraping can give rise to liability for "hacking" under the CFAA. Jean-Paul Jassy, partner at Jassy Vick Carolan LLP, gave a rundown of the case involving journalist Mark Boal, in which the United States Army threatened to subpoena 25 hours of recordings, including confidential material, from his interviews with then-Sgt. Bowe Bergdahl, who faced desertion charges for walking off his Army base in Afghanistan.

The Chapter's second meeting, held on June 27 at NBCUniversal's Universal City offices, delved into substantial similarity cases, copyright "trolls," and the Spinal Tap profit participation case. Andrew Thomas, partner at Jenner & Block, focused on a case dismissed at the pleading stage where plaintiff accused the creator of the Fox television series Empire of stealing the idea for the hit drama, and surveyed the circuits that are more likely to grant a motion to dismiss at the pleading stage based on a lack of substantial similarity after comparing the subject works. Ben Sheffner, senior vice president and associate general counsel of the Motion Picture Association of America, reviewed a bevy of cases brought by copyright "trolls" and how the mass filings are affecting the way federal courts are deciding

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copyright cases. Bobby Schwartz and Victor Jih, partners at Irell & Manella, covered the $400 million profit participation case filed against Vivendi SA over the cult classic Spinal Tap, including why calling these cases "profit" participation cases is really a misnomer and talent's continued demands to structure deals with complicated formulas even though lawsuits over the calculations keep getting filed.

The Chapter's third meeting, held on October 20 at Sheppard Mullin, provided a primer on COPPA compliance and enforcement and a breakdown of a key case (Jordan-Benel v. Universal City Studios, Inc., et al.) in which a Ninth Circuit panel refused to apply the California anti-SLAPP statute in an idea submission case. Julie Rubash, associate at Sheppard Mullin, gave an overview of recent class-action complaints filed against studios and large children's brands regarding data collection practices involving young kids. She discussed a suit against a major studio for allegedly "spying" on kids in violation of COPPA through 42 different mobile apps and games and recent enforcement actions by state attorneys general. Kelli L. Sager, partner at Davis Wright Tremaine LLP, went through Judge Pregerson's ruling that the anti-SLAPP statute did not apply to a claim that defendants infringed plaintiff's copyright in a screenplay and used his ideas in the films "The Purge" without compensation. She also discussed the prospects for rehearing in light of subsequent decisions by California state courts.

The fourth meeting will take place in December.

Employment Law Committee
Co-Chairs: Thomas Wilson and Tanya Menton

Our big achievement this year was on October 10, 2017, when the MLRC published our report titled Challenges and Solutions for Media Companies and Their Journalist Workforces in Harnessing the Internet's Power While Avoiding Its Pitfalls. The report addresses two very timely issues: (1) How to encourage journalist employees' use of social media while attempting to reasonably limit that use through policies and workplace rules; and (2) How to deal with the increased frequency with which journalists are subjected to abuse and harassment due to works published online. The Committee thanks Gary Fowler of Jackson Walker and Jacob Ecker and Tom Wilson of Vinson & Elkins for authoring this report. During the Committee's meetings this year, we addressed a number of timely topics beginning with immigration issues related to sending journalist to certain countries and asking journalist of certain national origins to travel outside the U.S. We then had a series of meetings on how to conduct internal investigations for media employers. In these meetings we discussed both practical issues related to investigations and also legal issues such as attorney-client and attorney work product privileges. We also had extensive discussion of the issue of how a media company self-reports in its own publications on such investigations. When the storms hit, we switched to the topic of assisting media company employees in times of crisis.

Entertainment Law Committee

Co-Chairs: Lincoln Bandlow, Savalle Sims (Jan.-Sept. 2017), Jessica Davidovitch (Oct. 2017 to present)

The mission of the Entertainment Law Committee is to keep its members apprised of key cases and the latest legal developments in areas of interest to our membership. To that end, the Committee meets telephonically for an hour the first Wednesday of every month. In preparation for each meeting, the Committee Chairs review a variety of publications and assemble approximately 20 items of interest. About a week ahead of each meeting, the Chairs circulate a list of these items to the Committee, from which members can select which items they would like to volunteer to present. A final meeting agenda

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with links and attachments is distributed 3-5 days before the call. Agenda items are selected with an eye toward currency, significance, balance and entertainment value.

Some of the specific topics discussed this past year included:

- Judge Tells Star Trek Infringement Defendants They Have To Boldly Go To Trial
- What's My Age Again Not Only A Great Blink 182 Song, But Subject Of Interesting First Amendment Lawsuit By IMDB About Ban On Listing Ages
- When You Die, Do You Take Your Libelous Tweets With You?
- Company That Takes Movie Smut And Cuts It Out Doesn't Get Relief From Order Telling Them To Cut It Out
- "The Grinch Who Stole Christmas – And Whose Work Contained Elements That Evidenced Substantial Similarity In Copyrightable Expression" Is A Terrible Title For A Children's Book, But Darn Interesting Litigation
- Judge Trying To Make Prenda … Enda – Copyright Trolls Arrested
- Get Back, Get Back, Get Back To Where You Once Belonged: Paul McCartney Sues Sony to Regain Rights to Beatles Songs
- Finding No Need To Klingon To Scheduled Trial, Star Trek Fan Film Makers Settle.
- Some Really Offensive Things Are Being Considered In Washington: [Insert Own Trump Joke Here] And The Supreme Court Deals With Offensive Trademarks
- Who Gets Sued For A Pineapple Under The Sea?: Spongebob Restaurant! Infringing On Someone's IP Rights Are Thee: Spongebob Restaurant!
- "I Started A Joke" Not Just An Awesome Bee Gees Song, It's A Lawsuit Against Conan O'Brien: Can Coco Escape A Copyright Popo For Alleged Stealing Of Comedy Mojo?
- Plaintiff Is A Master Debater: Another "Life Rights" Case Heads To Court Over Man Depicted In Film "The Great Debaters."
- Are "All Party Consent" Recording Laws Unconstitutional? O'Keefe Of *Project Veritas* Takes Aim In Massachusetts
- 2, 4, 6, 8, Who Do We Appreciate? Clothing Design Copyright Holders, Clothing Design Copyright Holders, Clothing Design Copyright Holders! Yeah!: U.S. Supreme Court Holds Cheerleader Outfits Warrant Copyright Protection
- Did Creators Of "Zootopia" Have Total Recall Of Somebody Else's Work?: Disney Sued For Copyright Infringement By Total Recall Writer
- Another Avatar Appeal: James Cameron's latest *Avatar* victory.
- College Athletes Tackled For A Loss: Claims About Images of Athletes Preempted By Copyright Law.
- Supreme Court Told To Ignore The Dancing Baby: Solicitor General Says Cert Should Be Denied In Lenz Case.

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- Who's On First, What Has Standing? Copyright suit involving Abbott and Costello's iconic "Who's on First" skit involves an intriguing question of standing.
- Supremes Sanction Slants' Salacious Service Mark: Court Holds That Prohibition Of "Disparaging" Marks Violates The First Amendment
- Court Purges Anti-SLAPP: Ninth Circuit Says Idea Submission Claims Not Subject To Anti-SLAPP Statute.
- An Indecent Proposal: PBS Asks FCC To Reexamine Indecency Policy.
- Flame War Is Hell, So Keep Me Out Of It!: Discovery Communications Trying To Remove Itself From Social Media Flame War Between TV Stars.
- Dr. Seuss Does Not Want Star Trek Parody To Live Long And Prosper: Estate Goes After Star Trek Parody.
- In Feud Between Bette Davis And Joan Crawford, Somehow Only Olivia de Havilland Emerges Upset: Actress Sues Over Her Portrayal In FX Series.
- Not Sure About A Canary, But Is There A Claim In A Coalmine?: Segment Of HBO's *Last Week With John Oliver* Sued Over Piece About Coal Mining Company.
- Big Girls Don't Cry (When A Judge Overturns A Jury Verdict)?: Plaintiff Donna Corbello's Jury Verdict In *Jersey Boys* Case Thrown Out By Trial Judge.
- FilmOn Flame Out: Court Of Appeals Affirms Grant Of Anti-SLAPP Motion Against Company That Classified FilmOn Website As Copyright Infringer And Having "Adult Content."
- YouTubers Replay Video Of Other YouTuber To Tear It To Shreds, Hilarity and Fair Use Ensues: Important Fair Use Ruling Out Of New York District Court.
- "Dude Looks Like A Lady" = Great Aerosmith Song, "Dude Is Becoming A Lady" = Defamation?: Richard Simmons v. National Enquirer.
- What If You Cross A Pitbull And Lipstick And A Hockey Mom and … Aw, Screw it, Palin Gets Hosed: New York Times Beats Palin's Defamation Action After Unusual Early Evidentiary Hearing By Court.
- With Age Comes A Sag: Actors Union Tries To Save Age-Censorship Law.
- Cut Out The Naughty Bits, How Dare You!: Appeals Court Upholds Injunction Against VidAngel.

Plus, there is often a Reality Television or other production-based matter to fill out the agenda (and remind us that people really are crazy). We also monitor previously discussed items and provide updates as warranted. We welcome members to share issues regarding Entertainment Law cases on which they are working or have had some involvement.

The Committee is comprised of approximately 65 lawyers, both in-house and outside counsel, from around the country, and includes many of the leading lawyers in the entertainment and media arenas. Approximately 20 Committee members actively participate on each month's call. The monthly calls create opportunities for broad participation, foster in depth analysis and discussion, and allow Committee members to get better acquainted with each other.

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Federal Affairs Committee

Co-Chairs: Leita Walker and Shaina Jones Ward

In 2017, the Legislative Affairs committee changed its name to Federal Affairs, to better capture its new, expanded focus that will include administrative agencies. It partnered with the National Press Club to launch an effort to monitor day-to-day impediments facing journalists covering federal, state and local government. Through reporter crowd-sourcing the MLRC and the NPC Journalism Institute created a mechanism for reporting and quantifying denials of access to public information — whether that information comes in the form of an expert, paid by the taxpayers, who is not permitted to speak to the press, a database of publicly paid-for information that is not being made available to the public, a refusal by a public official to respond to inquiries, or a closed door in a courthouse or government office. The effort involved development of a questionnaire that journalists and their lawyers can access online to report "micro-argressions" by government officials that might otherwise fly under the radar. The hope in launching the tracker was that media lawyers will use this information, where appropriate, to guide their efforts and to support legal cases demanding more transparency in government and public access and that journalists will use it to raise public awareness. Unfortunately, however, the response has been muted, and the committee hopes to work with NPC in the next few months to revisit the effort and consider how to better publicize it. In addition, the committee continued to keep an eye on federal legislative and regulatory developments that might impact DCS members, in particular the Stop Enabling Sex Trafficers Act, which may have unintended effects on Section 230.

Insurance Committee

Co-Chairs: Betsy Koch, Eric Brass, Jim Borelli

This is the inaugural year for the Insurance Committee, which was first proposed by co-chair Jim Borelli. Much of 2017 has been devoted to developing and refining the purpose, formation and intended activities of the Committee, including adding Eric Brass and Betsy Koch as co-chairs. The three co-chairs then proceeded to plan the Committee in more detail and to recruit members.

The purpose of the Committee is to bring together, through regular meetings, in-house counsel, defense attorneys and insurance professionals to consider issues and developments of importance in media defense and insurance that will result in greater knowledge and understanding of the nuts and bolts of insurance coverage, the media insurance marketplace and the risk management challenges faced by media clients in the 21st century.

The inaugural meeting of the Insurance Committee was held via a conference call on September 13, 2017, and was a great success. Over 40 committee members joined the call. Following introductions by all Committee members on the call, featured speaker Chad Milton of Media Risk Consultants spoke on "Insuring the Media in the 21st Century." The Insurance Committee will close out its first year with a social hour meeting on November 8, 2017, from 2:30 to 3:30 pm in The Lounge at New York Central at the Grand Hyatt New York.

In 2018, the Insurance Committee plans to hold one hour meetings approximately every other month, either via conference call or in conjunction with the major media conferences. Conference call meetings will include a combination of one or two presentations and general discussions about recent developments of interest. Some of the topics the Committee plans to consider are:

- Claims Trends

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- Emerging Exposures
- Hot Clauses in Insurance Policies/Key Policy Provisions
- Unique Insurance Coverage Needs of Particular Media Business Classes, such as Film & Entertainment
- Privacy and Data Security Coverage
- Drones
- Selection of Counsel and Insurance Company Panels

The Committee also intends to contribute articles to MLRC publications and programs and to grow its membership.

International Media Law Committee
Co-Chairs: Gillian Phillips, Julie Ford and Peter Canfield

Our committee conducts regular monthly conference calls that focus on a variety of current "hot" topics across the globe. We try to invite a range of external guest speakers - including journalists, regulators, lawyers and professors - to speak on recent media developments in their respective countries.

This year our meetings included a discussion of press issues in Turkey, updates on the state of the law in Canada and Mexico and a session on cross-border vetting and the impact of insult, libel and privacy laws in faraway places. We also had a compelling session on overseas abductions and on lessons learned and best practices around protecting reporters in hostile international environments. From Europe, we had updates on the current state of media law in Germany, the Netherlands and France, including various initiatives on hate speech on the internet and the continuing impact of the right to be forgotten in Europe.

We also feature regular reports and updates on legal and political developments in the UK with regular updates from our committee members. Topics this year have included the anticipated effect of Brexit on the media, the General Data Protection Regulation, the Investigatory Powers Act summary section 40 of the Crime and Courts Act 2013 to foreign/US media companies and proposed changes to the UK Official Secrets Act.

For 2018, in addition to covering as many national updates as we can co-ordinate, we are thinking about sessions on Asia and reporting on disasters and violence, as well as covering developments in Australia and Ireland.

Internet Law Committee
Co-Chairs: Jeremy Mishkin and Matthew Leish

2017 has been quite a momentous year for the development of media law in the context of the Internet. In addition to sharing numerous funny hashtags, members of the committee have given presentations and shared resources about some twists and turns in these key areas:

- The Communications Decency Act, ten years after: protecting the medium from ‘publisher liability’ - Jack Greiner and Darren Ford (Graydon) and Jeff Barron (Barnes & Thornburg)

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- What does 'protection from publisher liability' look like?: Hassell v. Bird (California, cert. granted) (sometimes referred to as 'the worst Section 230 decision of 2016'): Can a court order Yelp to remove user-generated content where Yelp was not a party? - Thomas Burke (Davis Wright Tremaine)

- The Future of Net Neutrality – a change in administration leads to a change in the make-up of the FCC, and different policy objectives. - Stephen Goodman (Butzel)

Committee members are hard at work on updating the ever-popular "Practically Pocketsized Guide to Internet Law," which will also include sections dealing with new topics such as "The Right to be Forgotten" and "The Americans with Disabilities Act online – a necessary accommodation and/or new tool for censorship?" We expect to be publishing the 2017 edition in the very near future.

Litigation Committee
Co-Chairs: James Hemphill and Amelia Brankov

The Litigation Committee plans to continue periodic phone meetings to promote more interaction among committee members, and to provide a forum for more immediate exchanges of ideas and news. Subjects can include brief presentations on recent cases or current issues relating to media litigation topics. The calls also offer an open forum to discuss the presentations and to raise any practical or theoretical issues related to media litigation. We also might discuss the status of ongoing larger projects, such as reports and white papers for the entire DCS membership, and kick around ideas for future projects. We encourage participation in these calls and solicit feedback on how to make them more user-friendly (as well as ideas for other committee projects). The committee continues to work on the long-overdue update to the MLRC expert witness bank, but help from members would still be welcome to close out this project.

Media Copyright and Trademark Committee
Co-Chairs: Scott Sholder, Toby Butterfield, Lauren Fisher

MLRC's Media Copyright and Trademark Committee was established in 2013 to keep the MLRC membership current on cases and trends in copyright and trademark law, particularly for those who do not practice in these specialties day-to-day. The Committee has traditionally held one-hour teleconference meetings every other month, with meetings open to all MLRC members. Discussion areas in 2017 included topics such as the Supreme Court's decision in Star Athletica regarding copyrightability of cheerleading uniforms, protectability of jokes per the Kaseberg v. Conaco decision, developments in copyright attorney's fee-shifting as set forth in the Kanongataa decisions (the "Facebook live-birth video" cases), and preemption of trademark claims brought by a photojournalist as seen in the Fioranelli decision. In the past, the Committee chairs also circulated a bi-monthly email outlining other "recent developments" in the field, generally with links and cites to recent cases of interest or relevant articles. The plan for 2018 is to continue this format for meetings and other communications, with a specific focus on counseling clients that have business interests on both sides of these IP issues. This format appears to be successful, as the bi-monthly calls are well-attended with lively discussion. Our next call is scheduled for November 15 at 1pm EST at which we will discuss the recent Goldman litigations alleging that distributing an in-line link to infringing material constitutes contributory infringement, and a discussion of methods members have used to deal with copyright "trolls." Let us know if you wish to join our committee's mailing list.

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MediaLawLetter Committee
Co-Chairs: Russell Hickey and Michael Berry

The MediaLawLetter Committee serves as a resource for Dave Heller and the MLRC staff. The committee works to identify topics and write articles for the monthly MediaLawLetter and provides advice as needed about the MediaLawDaily. Over the past year, the MediaLawLetter has launched a new feature posing ten questions to prominent members of the media law bar, and it has continued to feature articles from NextGen Committee members and a regular column written by the MLRC's Executive Director George Freeman. The MLRC staff has continued to take the lead in providing content to MLRC members in useful formats, including Jeff Hermes' popular "Monthly Daily" and the weekly "In Case You Missed It" emails. In the coming year, the MediaLawLetter Committee is being retired as a formal committee and will be reconstituted as an Advisory Board with the same mission of informing MLRC about significant legal developments and keeping MLRC's publications fresh and useful.

Next Generation Media Lawyers
Co-Chairs: Matthew Schafer, Drew Shenkman, Christine Walz

The Next Gen committee had a great 2017. We hosted a very successful webinar on criminal law basics for media lawyers, which is archived and available for viewing. We continued our efforts to get new committee members write for the Media Law Letter. We held a NYC summer happy hour at Buzzfeed.

Looking ahead to 2018, we will continue our webinar tradition, encourage new members to write for the Media Law Letter, and also host the biennial happy hour in conjunction with the MLRC Virginia conference, among other efforts to reach out to the next generation of media lawyers.

Newsgathering Committee
Co-Chairs: Cynthia Counts and Mark Flores

The MLRC Newsgathering Committee has had an outstanding year. Following months of outstanding contributions from various members, the committee drafted the first-ever MLRC Model Brief on Access to the Executive Branch. We have also held meetings throughout the year that have included guests such as a television news reporter that recently obtained his FAA drone license to gain insight into the process and other issues facing drone operators. Finally, the committee continues to update the Model Brief on Newsgathering and expects to have a final product within the next six months.

Pre-Publication/Pre-Broadcast Committee
Co-Chairs: Collin Peng-Sue and Lisa Zycherman
Vice-Chair: Alexia Bedat

The committee held a timely live event this May in the New York offices of Davis Wright Tremaine, simulcast as a webinar. Natalie Krodel, General Counsel at Wenner Media and Liz McNamara of Davis Wright Tremaine presented on their then-recent experiences defending Rolling Stone in the UVA trial.

In its monthly conference calls, the committee had speakers who led discussions on a variety of legal issues and current cases, such as:

- The D.C. Court of Appeals' decision in Competitive Enterprise Institute v. Mann concerning statements alleging that Penn State University failed to adequately investigate the alleged misconduct of climatologist Michael Mann. The posts accused Mann of "molesting" data to

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produce the infamous "hockey stick" graph and compared Penn State's investigation of his alleged improprieties to its inquiry into the child-molestation accusations against Jerry Sandusky.

- Virginia Citizens Defense League v. Couric, a decision by the Eastern District of Virginia dismissing all claims arising out of the documentary film Under the Gun brought against Katie Couric, as well as producer and distributor, by a gun-rights advocacy organization and two of its members. The plaintiffs alleged they were defamed by a scene in the documentary that featured Couric's interview with some members of the organization which plaintiffs claimed was unfairly edited to appear as though they were unable to answer a question posed by Couric. The court held the challenged scene was neither false, nor defamatory, and that it was not "of and concerning" the organization.

- Hosseinzadeh v. Klein, a Southern District of New York decision. The Kleins posted a reaction video mocking Hosseinzadeh's parkour/pick up videos and Hosseinzadeh sued for copyright infringement, a DMCA violation based on defendants' counter notification, and defamation. The court rejected all three of plaintiff's claims, holding that the defendants' video was fair use, there was no DMCA violation, and that the complained-of statements were either substantially true or protected opinion.

As well as presentations on current vetting trends, including:

- A review of U.S. and European law and recent developments in link liability in both the copyright and defamation contexts. We discussed a checklist of questions an attorney (or editor) ought to ask before deciding, prepublication, whether a proposed link may lead to liability in the U.S. and/or the EU.

- A discussion on vetting stories based on leaked documents. The committee discussed examples that may cross our desks in the weeks and months ahead, including whether to publish newsworthy tax returns or reality TV outtakes. We enjoyed a lively conversation on the very thorny hot zone around speech and privacy in this era of seemingly never-ending and controversial, breaking news.

- Potential Lanham Act or right of publicity claims that may arise in the context of promoting and marketing content, which has elements of commercial usage to consider beyond the issues that arise when vetting the content itself.

State Legislative Committee
Co-Chairs: Jean Maneke and Steve Zansberg
Vice-Chair: Nikki Moore

The MLRC State Legislative Committee is now in its seventh year of existence and continuing to grow in membership and strength.

During the last year, the State Legislative Committee grew to include more than forty-five of the nation's leading government relations attorneys who represent First Amendment interests in thirty-five jurisdictions in the United States. We have identified and tracked legislative trends impacting the media and have exchanged ideas for how

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to most effectively combat legislative attempts to encroach upon the First Amendment and how to most persuasively get new legislation adopted to expand upon First Amendment protections.

Some of the areas of legislation we are working on include: Drone regulation, "ag-gag", anti-SLAPP, open government, public notice, right of publicity, and more. We are also maintaining the Committee's website page on the MLRC's website, which contains draft legislation from the various states where our members work, current model bills, existing statutes, talking points and articles to assist the entire MLRC membership.

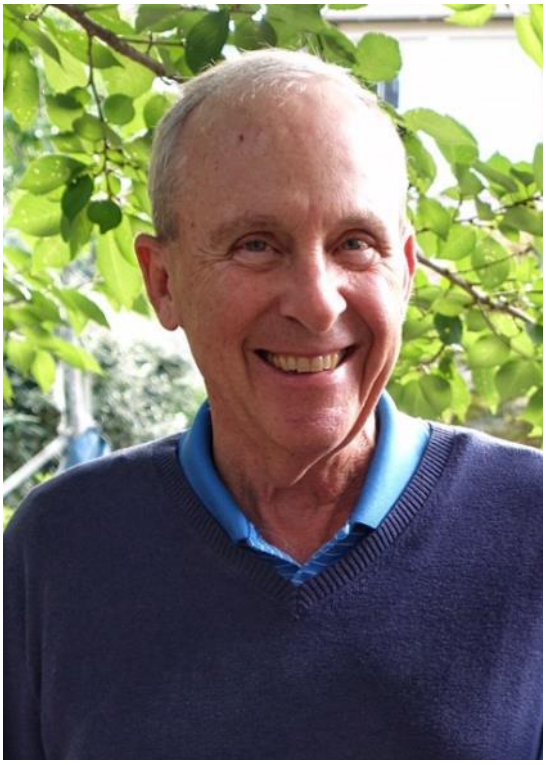
This past year, we also had members participating with other MLRC committees on the report to be issued shortly regarding Drone use and regulation.

We typically meet once a month during the winter and spring legislative sessions, and continued our meetings almost every month this past summer. On our monthly calls, we keep each other informed on what is going on in the various states. Between monthly meetings, we exchange emails with inquiries, draft legislation and calls to action. Our committee also worked with Paul Heintz in Vermont in helping the Vermont Press Association successfully enact a new state shield law. (See at https://tinyurl.com/y8o85r8v).

In the coming year, we will continue efforts to seek member representation in every state, and to partner with other national organizations who are monitoring state legislative activities. Our committee also intends to begin contributing periodic articles to the monthly publication of MLRC that will relate to legislative concerns our members are addressing. Additionally, we are beginning to organize a member group that will compile research and resources relating to a model anti-SLAPP bill that we will generate and offer for adoption in other states, basing this work on the strong legislative foundation one of our members, Laura Prather, worked on in Texas.

We invite any and all folks with an interest in such topics to join our committee; contact one of the three committee chairs to express your interest.

Ten Questions to a Media Lawyer: Jon Fleischaker



Jon Fleischaker is an attorney at Kaplan & Partners LLC in Louisville, KY.

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

I grew up in Louisville where I went public schools, including a great high school. While academic pursuits were always important to me and my family, I was also actively involved in sports and had the good fortune of being a starting guard on a state champion basketball team, still considered one of the best teams ever in Kentucky. Sports taught me a lot about being part of a team, discipline, and working over a period of time to achieve a goal. I continued to play b-ball at Swarthmore College, right outside Philadelphia. After college, I went to the University of Pennsylvania Law School.

I came back to Louisville and joined a firm (today Wyatt, Tarrant & Combs) that happened to represent the Binghams, a major media family in the state. They owned a newspaper, a television station, and several other media outlets.

I didn't have my sights set on being a media lawyer. Actually, I couldn't have told you for sure what a media lawyer did. But shortly after joining the Wyatt firm, the Courier-Journal got involved in a major source privilege case – *Branzburg v. Hayes* – and I got to work a lot on it. I collaborated on the brief to the Supreme Court, then sat second chair at the argument. After that, I realized how much I liked media law and decided I was going to do what I could to get as much of that type work as possible in Kentucky.

Since the firm represented major media outlets, I started working with reporters very quickly. I also started going around the state making speeches on media law to various small press groups just to get my name out there. Fairly quickly, I became one of the go-to people. I was asked to participate in writing the Kentucky's first open meetings law, which became law in 1974, and in 1975 wrote the state's first open records law, which was enacted in 1976.

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A younger Fleischaker at Wyatt Tarrant and Combs in the early 1990s.

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

I like being in the mix of things and working on deadline. I'm a contrarian so I like challenging authority and investigative reports. I especially like the feeling of winning cases that deal with access to public records, public meetings and courts.

But what I like best is working with good reporters. Early on, many of my best friends were journalists with whom I established a real trusting relationship.

I'm not sure what I like least, but what I'm finding difficult these days is the lack of financial commitment on the part of many media outlets. There's been a real change in the economic situation over the years, especially the last ten years, which I understand, but it's frustrating. You'd like to get involved in a particular case or a particular controversy and the client can't pursue it because of the expense involved. (Generally speaking, these are FOIA-type cases.)

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

Close to 30 years ago, I was asked to review a long series for the Courier-Journal. Reading it over, I picked up some contradictions and holes. The day before the first article was to run, I called the editor and said, "We need to go over all the stories. There are problems."

The next day, we met for hours. We looked at records and the reporter's notes and cleaned up a lot. The one thing we didn't do was listen to the recorded interviews. We asked if tape recordings were there and if the reporter was comfortable that they supported what was written. The answer was yes, but it turned out the reporter misstated things. There were lots of problems that resulted in numerous retractions.

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There was no lawsuit, but it taught me that when somebody says "I've recorded a conversation," I should listen to it.

4. Highest court you've argued in or most high-profile case?

I have argued well over 100 cases in Kentucky's appellate courts, including 20-25 in our Supreme Court, and 35-40 in the federal appellate system (many dealing with issues not involving media law).

In 2003 or 2004, I argued a major case on access to court records in the Catholic Church pedophilia scandal. This was big-time in Louisville – maybe 300 lawsuits filed – and the Church made efforts to seal them. The Church also attempted to hold the newspaper in contempt for publishing information contained in the sealed records. The Supreme Court of Kentucky rejected that effort.

I argued another case in the Kentucky Supreme Court to successfully open the records of the University of Louisville Foundation, which controlled the University's funds and endowment. The University took the position that it was not a public agency, but the court disagreed. We were extremely successful, not only at opening up the records, but at making the names of donors public.

In 2016, I won a case in trial court and in the Court of Appeals against the Kentucky Cabinet for Health and Family Services dealing with access to records relating to abused kids under the supervision of the Cabinet. That case lasted seven years. We ended up winning our attorney's fees, which amounted to over $400,000, as well as penalties of several hundred thousand dollars.

5. What's a surprising object in your office?

A handmade dulcimer from the hills of Eastern Kentucky. I had gone down there many years ago to represent the president of Alice Lloyd college who was sued for some allegedly defamatory statements. We got the case dismissed. In addition to the usual fees, he sent me the dulcimer. I'm not a musician so I can't play it.

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

The Courier-Journal and the New York Times.

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

I disagree. I think law school is an incredibly valuable education, even if you don't end up practicing law. I know a lot of businesspeople for whom the discipline of law school was a terrific education.

Practicing law can be tough, but I've been very lucky. I tell younger lawyers all the time, "Find something that you're passionate about." It doesn't have to be your full practice, but if you find something you're passionate about, it rejuvenates you. For me, that's the First Amendment.

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

It's really difficult these days, especially if you're not on one of the coasts. If you're out where I am, it's a really hard to thing to aim for because there's just not that much work. I would say go someplace where you have aggressive media outlets. If you can't get media work directly, take other free expression matters where you can get a reputation for being a First Amendment person. You may have to do some of that pro-bono or at cut-rates, but if you get a reputation for that, the media work will probably come.

9. What issue keeps you up at night?

The political environment we live in today: the barrage of fake news and the continuing effort to downgrade and degrade constitutionally protected speech and press and freedom of expression. When you couple that with the increasing economic uncertainty of traditional media outlets so that they don't have the wherewithal to challenge things like we used to, it really worries me.

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

I probably would've gone to business school. I took four or five tax courses in law school and did great. I haven't practiced a tax case in my life, but I do like business. That said, I don't know that I would've had the same kind of success as I've had in media law, at least emotionally. I was made to be a lawyer.

If you'd like to participate in this ongoing series, let us know: medialaw@medialaw.org.