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MEDIALAWLETTER

Reporting Developments Through December 20, 2014

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From the Executive Director's Desk

By George Freeman

George Freeman

This was going to be a typical year-end column: best wishes for the holidays, a review of some of the highlights of 2014, a look ahead as to MLRC activities in 2015, maybe even some joking references as to what certain media companies and law firms would wish to receive under their Christmas tree. But events have taken hold, and it seems far more appropriate to discuss the Sony hacking scandal and the journalistic and ethical – not so much the legal – issues it raises.

At the risk of being impolitic to our last year's Annual Dinner speaker – in a way, then, this is a sequel to last month's column about noteworthy MLRC dinners past – my starting point is Aaron Sorkin's Op-Ed piece in the Times dated Dec. 14. (It was the same day as the last episode of his HBO series The Newsroom, and much as I appreciated the series as a whole, especially this season's scenario of a journalist going to jail for not revealing his source, a chillingly familiar topic, I thought that last episode was a total dud.) Sorkin's Op-Ed really made two points: first, that by publishing the emails revealed by the hacks, the media were somehow complicit in the actions of the alleged North Korean evildoers, and by doing their bidding were "morally treasonous and spectacularly dishonorable"; and, second, that the revelations were not at all newsworthy. I will respond to those points in a moment, but I would start by simply saying how disappointed I was in our dinner speaker: with us, he gave the impression of being an iconoclast and somewhat of a rebel, but in this article he comes across as more of a Hollywood apparatchik.

Freeman takes on Aaron Sorkin as to whether to publish the Sony emails.

As reprehensible as the hackers have been – and in addition to hacking they and their cohorts have threatened physical violence to the degree that Sony and the theater chains have now canceled all showings of the film – the fact is that the press has relied on criminal acts to get information for generations. Thus, it's hard to distinguish these hackers from a Daniel Ellsberg or Bradley Manning who surely committed crimes by leaking classified and sensitive government materials.* It's just that, as the Bartnicki court said, as long as we don't break the law, it doesn't matter how we obtained the documents as long as they are of public concern.

** Ellsberg in all likelihood would have been convicted, but, in a foreshadowing of Watergate, the case against him was dismissed for prosecutorial misconduct: the Nixon Administration broke into his psychiatrist's office to find dirt on him and suggested to the trial judge that he might be offered the job of Director of the FBI upon J. Edgar Hoover's retirement or death.*

My former colleague Dean Ringel posited the hypothetical where the Sony emails would have been loosed by an attack at gunpoint of a Sony IT executive. I suppose morally the media might have more trouble publishing documents which became available as a result of such an assault. But that is not this case – though it does tend to show that how the documents became available is, at the least, a secondary factor to be put in the mix.

This discussion also underscores that the argument against publishing is not really legal; it is ethical or moral. That is why the David Boies letter on behalf of Sony threatening media companies if they publish or distribute the hacked information is without much resonance. To the extent Boies' letter holds any water legally – and the letter really never enumerated a legal claim he would have for restraining or punishing publication – it probably is in its evocation of intellectual property (read copyright) and trade secret violations. But it's hard to see that reporting the content of emails about famous actors in a news context isn't well within the fair use doctrine, and it's even harder to believe that studio salary information would be seen as a trade secret. Indeed, I read Boies' letter as a moral plea.

The Boies letter can't help but propel me to tell a story that seems apropos. In the mid 1980's, while working at the Times, I received a call from a Cravath partner who, with characteristic bombast, threatened that he would go to court that night to prevent the Times from publishing a piece about his corporate client's salaries and other sensitive information which we had somehow acquired. Quickly realizing that logic or law would get me nowhere, I merely suggested that he speak to his partner David Boies, who had just successfully defended CBS in the Westmoreland libel case, and who, I noted, knew something about the First Amendment. We published our story; I never heard from Cravath again. Although David is renowned for his photographic memory, I fear from his letter that he has forgotten something about First Amendment principles.

Jacob Weisberg, writing in Slate, argued that the media should be in solidarity with Sony. I would answer that we all should be in solidarity with First Amendment values.

So legally and ethically as well, the question focuses on whether the information released by the hacking is of public concern. For sure, these are not government documents about a war thousands of miles away which are costing American lives. (Sadly, in line with the tragedy of repeating history's mistakes, you can read that to mean the Pentagon Papers (Vietnam), Wikileaks (Iraq/Afghanistan), or both.) But they do concern an industry to which the American public contributes millions of dollars and whose players – actors, directors, executives – have, as a result, gotten unfathomably wealthy and famous. At the outset, it should be noted that, to my knowledge, nobody – and certainly not the mainstream media – has distributed truly private information such as medical records, social security numbers and the like.

But, to quote a movie script that really is brilliant, Mr. Sorkin is shocked – shocked – that salary information, new ideas for movies and insulting critiques of actors and movies have been

published. He asks how can a studio's notes on a new movie project be newsworthy. To start with the easiest rebuttal, certainly an exchange between a top Sony executive and a producer evincing totally inappropriate, at best, and racist, at worst, comments about the President of the United States is newsworthy.

Certainly salary information about Hollywood stars and execs has been a staple of the business and entertainment press for decades. Isn't it an example of Hollywood hypocrisy for these players to make millions from their movies- and then cry privacy when how much they make from these endeavors are made public?

The snarky emails about Angelina Jolie and other stars is a bit more questionable. In particular, it is doubtful that they come within Bartnicki's tighter definition of what is of public interest than in the Supreme Court cases preceding it, though in Synder v. Phelps the Court defined matters of public concern rather broadly.** Nonetheless, given the stature achieved by these celebrities, the money and interest the public has spent on them, their manipulations to gain fame and fortune, and their outreach to the public from their spouting political views to selling their wedding and baby pictures, it is hard to see how, from a journalistic point of view, distribution of these emails too isn't warranted.

In sum, Jacob Weisberg, writing in Slate, argued that the media should be in solidarity with Sony. I would answer that we all should be in solidarity with First Amendment values.

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

*** Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." (citations omitted) Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).*

"Leave the Gun, Take the Cannoli"

Jurors Reject Ex-Mafia Enforcer's Defamation Claim

By Michael Gay

On December 2, 2014, a Florida state court jury ruled in favor of a newspaper defendant in a defamation lawsuit brought by an admitted associate of New York's Bonanno crime family. *Milano v. Halifax Media Holdings, LLC, Daytona Beach News Journal*, No. 2011 -CA-00790 (Fla. Cir. Flagler Cty, jury verdict 12/2/2014).

Background

The Plaintiff, Joseph Milano, accused the Daytona Beach News Journal of defamation for publishing articles about his mafia past. Milano, formerly known as Joseph Calco, was arrested in Palm Beach, Florida after pistol-whipping customers of his pizzeria who complained about their order. A reporter at the Daytona Beach News Journal discovered striking similarities between Milano and Joseph "Crazy Joe" Calco. Calco was a former member of the infamous Bath Avenue Crew in Brooklyn and was instrumental in the federal conviction of Anthony Spero, one-time acting boss of the Bonanno crime family.

In return for his testimony against Spero and other members of the Bonanno family, Calco had received a new identity and a reduced prison sentence for the four murders in which he had been implicated. After serving his time in New York, Calco (now known as Milano) moved to Palm Coast, Florida to be near his family. He opened the pizzeria, interestingly named Goomba's, and lived in relative obscurity until the evening of the assault.

After the fracas at Goomba's, Milano was convicted of felony gun possession and sentenced to 10 years in prison. (He unsuccessfully argued he needed a gun to protect himself against former colleagues who would try and put him in a "wood chipper.") Milano filed his libel suit from prison. Because of difficulties with discovery, no motion for summary judgment was made. The case proceeded to trial shortly after defense counsel was able to depose the plaintiff.

Libel Trial

Milano, who represented himself at the trial, ultimately claimed that the Daytona Beach News Journal falsely reported that he was a "hitman" and that he was in the federal witness protection program while living in Florida. According to Milano, while he admitted on the stand that he murdered a member of his crew at the ultimate direction of Spero, he was not a "hitman" because he was not paid separately for the murder.

Milano also claimed that while he received a new identity from the federal government, he was not officially in the federal witness protection program. Milano claimed that the reporting by the Daytona Beach News Journal exposed him and his family to danger and resulted in the loss of his pizzeria. He sought $250,000 in damages based upon the lost investment in his pizzeria.

The Daytona Beach News Journal, asserted that the articles were factually accurate. Following a day of testimony and closing arguments, the jury of three men and three women deliberated for 80 minutes before unanimously finding that the News Journal publications were not false in any material respect.

No post-verdict motions have been filed at the time of this report.

Michael Gay is a partner and Sean Smith an associate in the Orlando office of Foley & Lardner, LLP. They represented the Daytona Beach News Journal in this case. Plaintiff acted pro se.

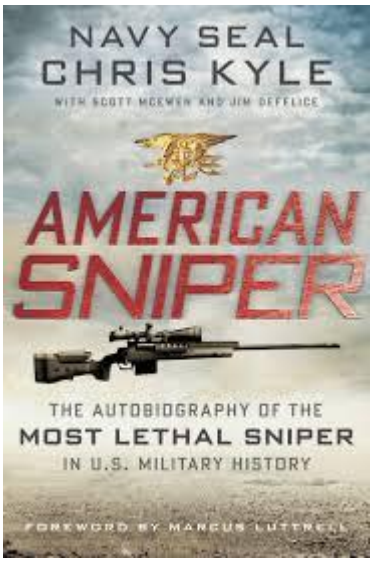
Minnesota Court Denies Defendant's Post-Trial Motions in Jesse Ventura Libel Case

Sufficient Evidence of Actual Malice; Court Allows Unjust Enrichment Damages

The Minnesota federal district court last month denied defendant's motion for JNOV or a new trial in the highly publicized Jesse Ventura libel case. *Ventura v. Kyle*, No. 12-472 (D. Minn. Nov. 26, 2014) (Kyle, J.) The court held there was sufficient evidence of actual malice to support a libel verdict. Moreover, Ventura could recover damages for unjust enrichment to provide a complete remedy for the damages caused by the false statements in the book.

In July, a jury awarded the former Minnesota governor $1.8 million in damages on his claims against the estate of Chris Kyle, a former Navy SEAL and author of the best-selling book, *American Sniper*. The jury awarded $500,000 in defamation damages and an additional $1.3 million for unjust enrichment.

The lawsuit arose out of a chapter of the book called "Punching Out Scruff Face," in which Kyle refers to a 2006 confrontation with an unnamed celebrity during a wake for a fallen Navy SEAL at a California bar. According to the book, the man, referred to as "scruff face," said he hated America, thought the U.S. military was killing innocent civilians in Iraq and that the SEALs "deserve to lose a few." The book claimed that Kyle subsequently "laid ... out" "scruff face." During promotional interviews Kyle stated that scruff face was Jesse Ventura, the ex-Minnesota Governor, actor and former professional wrestling star, who earlier in his life served as part of an underwater demolition team in the Navy.



In 2013, during the pendency of the lawsuit, Chris Kyle was killed at a shooting range and his wife was substituted as the defendant on behalf of the estate.

After a two week trial and five days of deliberations the jury ruled in favor of Ventura. The jury award for unjust enrichment was advisory as the claim was in equity. But the court adopted the jury findings as its own.

Post-Trial Motion

The court first rejected the JNOV motion on the defamation claim, stating the "simple fact that Kyle discussed an unambiguous event ('punching out' Plaintiff) was itself a sufficient basis upon which the jury could predicate a finding of actual malice." The court had previously highlighted the risks surrounding first person accounts. Citing Sack on Defamation, § 5.52, the court had noted that if a defendant is an eyewitness to an unambiguous event (such as a fight), and other evidence establishes a contrary version of events, the factfinder may believe the defendant's report was a fabrication.

(Continued on page 8)

(Continued from page 7)

On the motion for JNOV on the unjust enrichment claim, the court held that defendant waived its legal objections and was foreclosed from raising the issue on a post-trial motion. Defendant argued that as a matter of law Ventura should not be allowed to recover on an equitable claim where he had a separate and actionable defamation claim. "[T]his argument was not contingent on the facts of this case and, hence, could have been raised – and in the Court's view, should have been raised – from the outset."

However, even if not waived the argument would fail, according to the court. "A claim for unjust enrichment is barred only when a plaintiff has an otherwise *adequate* legal remedy," the court noted. Here the jury was instructed that it could award damages for unjust enrichment only if the defamation award was inadequate to compensate plaintiff.

> "Only through unjust enrichment could Plaintiff attempt to force Defendant to yield those improper profits. Under these circumstances, Plaintiff's legal remedy was inadequate to fully ameliorate Defendant's wrongful conduct, and the defamation claim did not preclude the unjust-enrichment claim as a matter of law."

Moreover, there was no First Amendment requirement to limit plaintiff's damages – "defendants enjoy no *carte blanche* to lie with impunity," the court observed.

The court also rejected defendant's motion for a new trial based on alleged errors in the jury instructions and verdict form. Most notable, the court held it properly instructed the jury that proof of falsity need only be established by a preponderance of the evidence – not clear-and-convincing evidence.

The judgment is now being appealed to the Eighth Circuit. On December 15, Ventura filed a new defamation suit against the book's publisher HarperCollins.

Jesse Ventura was represented by David B. Olson and Court Anderson, Henson Efron, P.A., Minneapolis, MN. The Kyle estate was represented by John Borger, Charles Webber, and Leita Walker, Faegre Baker Daniels, Minneapolis, MN.

Libel Claim Over Newspaper Headline Reinstated

Headline Stating Lawyer "Deserts Client" Was False and Defamatory

Reversing summary judgment for the Times-Picayune newspaper, a Louisiana appellate court held that a headline stating "Defense attorney deserts client midtrial," was false and defamatory. *Brown v. Times Picayune*, No. 2014CA0160, (La. App. Nov. 3, 2014) (Kuhn, Pettigrew, Welch, JJ.). The court ruled the headline was an inaccurate description of plaintiff's efforts to withdraw from a case. And accusing a lawyer of "deserting" a client is "exceedingly derogatory."

Background

The plaintiff Claiborne Brown had agreed to defend a man accused of aggravated child rape, a crime punishable by life in prison in Louisiana. According to plaintiff's complaint, he had never before handled such a case and agreed to act as co-counsel under the supervision of a more experienced lawyer.

When the case went to trial, his co-counsel was unavailable. Plaintiff's requests for a continuance were denied. After one day of trial, plaintiff asked for a mistrial stating he was incapable of providing an effective defense. When the court denied the request, plaintiff refused to continue. He was held in contempt and briefly jailed before a mistrial was declared. (Plaintiff was later sentenced to six months of probation and fined $3,000.)

The next day the Times–Picayune published a report on the incident headlined "Defense attorney deserts client midtrial." The online version of the article had a slightly different headline: "St. Tammany Parish Attorney Deserts Rape Suspect Mid Trial." The body of the article accurately explained what happened in court.

Brown sued the newspaper and reporter alleging the headline was "maliciously false and slanderous in the extreme." The trial court granted summary judgment to the newspaper and reporter, holding the article was true. Among other things, the newspaper pointed the court to the dictionary definition of the word desert as "to withdraw from or leave [usually] without intent to return" and "to quit one's post, allegiance or service without leave or justification."

The extreme negative connotations resulting in this case from the use of the term "desert' in the mind of the average person cannot be overlooked.

Appellate Court Ruling

Focusing on the meaning of the word "desert" in the context of the attorney client relationship, the appellate court held that the trial court erred in granting summary judgment. "Beyond any doubt, an attorney's paramount duty is to his client. Consequently, the characterization of plaintiffs conduct as a desertion of his client strikes at the very heart of his ethical duties and obligations to his client." Thus "regardless of the dictionary definition of 'desert,' the extreme negative connotations resulting in this case from the use of the term "desert' in the mind of the average person cannot be overlooked."

As to falsity, the appellate court held that characterizing the plaintiff's conduct as desertion of a client was not accurate.

> Mindful of his paramount duty to his client, plaintiff refused to participate

(Continued on page 10)

(Continued from page 9)

further in the trial, even knowing that he could be held in contempt of court, jailed, and sanctioned for refusing to do so, all of which actually occurred. Under these circumstances, it is clear that rather than deserting his client as stated in the Times–Picayune headline, and further implied throughout the article, plaintiff's actions actually were an attempt to protect his client's interests and to adhere to the paramount fiduciary duty he owed to his client under the Rules of Professional Conduct. Hence, it was grossly inaccurate and defamatory for the headline to characterize plaintiff's conduct as a desertion of his client.

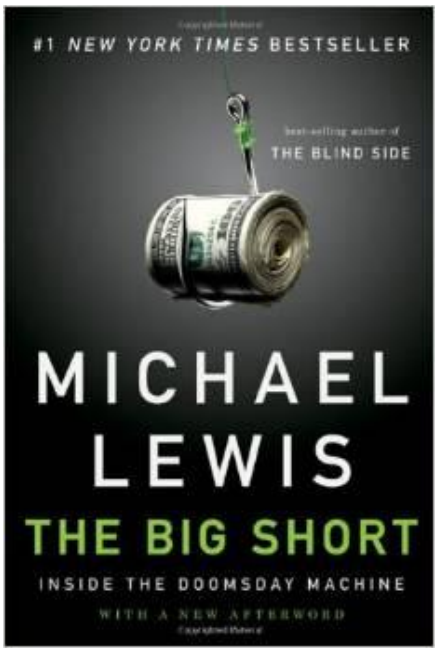
Plaintiff Claiborne Brown represented himself. The newspaper defendants were represented by Loretta G. Mince and Alysson L. Mills of Fishman Haygood, New Orleans, LA.

Second Circuit Affirms Summary Judgment in *Big Short* Libel Case

By Paul J. Safier

On November 14, 2014, the Second Circuit affirmed a grant of summary judgment to all defendants in the libel suit arising out of Michael Lewis's best-selling book on the origins of the 2008 financial crisis, *The Big Short: Inside The Doomsday Machine*. *Chau v. Lewis*, 2014 WL 5904779 (2d Cir. Nov. 14, 2014) (Wesley, Kearse, Winters, JJ.).

The plaintiffs, Wing Chau, a collateral debt obligation (CDO) manager who specialized in mortgage-backed securities, and Harding Advisory LCC, Chau's asset-management firm, brought suit against Lewis, the book's publisher (W.W. Norton & Co.), and Steven Eisman, a hedge-fund manager who was one of the sources for Lewis's book. In their lawsuit, Chau and Harding (collectively, "Chau") challenged 26 statements from a chapter of *The Big Short*. The portions of the chapter at issue recounted the sole encounter between Eisman and Chau, and explained how the conversation between the two men shaped Eisman's sharply negative opinions about the sub-prime mortgage-backed securities industry and the role of CDO managers like Chau in that industry, opinions the book analyzes in great detail.



Writing for the Court, Judge Wesley (joined by Judge Kearse, with Judge Winter dissenting) held that none of the challenged statements was actionable. Specifically, the Court held that each statement lacked defamatory meaning, constituted protected opinion, was not "of and concerning" Chau, and/or was substantially true. Ultimately the Court concluded that the book's starkly negative assessment of Chau's business practices was not actionable, explaining: "The law of defamation in New York is predicated on the free exchange of ideas and viewpoints. That marketplace can wound one's pride – for words can offend or insult – but simple slights are not the stuff of defamation. . . . Chau's feelings may be hurt but his claims were rightly dismissed by the district court." *Id.* at *10.

Background

The Big Short was published in 2010 and represents an attempt to explain the origins of the 2008 financial crisis. The book does that by chronicling the experiences and thinking of "a small group of iconoclasts who 'shorted,' or bet against, the subprime mortgage bond at a time when most investors thought real estate prices would continue to rise (i.e., were 'long')." *Id.* at *1.

One of those "iconoclasts" was Eisman, a New York hedge-fund manager, depicted in the book as an eccentric and outspoken critic of Wall Street conventional wisdom. The portions of the book that focus

on Eisman trace the evolution of his thinking about the sub-prime mortgage market from 1991, when he first started studying that market, to the period between 2006 and 2008, when Eisman acquired a substantial short position on sub-prime mortgage bonds (bonds made up of pools of subprime mortgage loans) and subprime mortgage CDOs (securities made up of pools of subprime mortgage bonds).

The chapter of the book at issue in the lawsuit – Chapter Six, *Spider-Man at the Venetian* – revolves in large part around a conversation that took place during the 2007 American Securitization Forum in Las Vegas between Eisman and Chau. That conversation is presented as a pivotal moment in the evolution of Eisman's thinking about subprime mortgage-backed securities. The chapter explains that what Eisman learned from Chau about his business – most centrally, that Chau was paid based on volume and did not retain equity in the CDOs he managed – ended up convincing Eisman to commit fully to his bet against subprime mortgage bonds and CDOs. That is because, according to the book, Eisman finally understood that the incentives facing CDO managers like Chau were such that it was in their interest to take the other side of the bet regardless of the quality of the underlying home loans.

Accordingly, the section of the chapter in which Chau makes an appearance moves between summarizing Eisman's recollection of their conversation and summarizing Eisman's and/or Lewis's theories about the subprime CDO market and the special importance of CDO managers like Chau in that market. For instance, the chapter includes the following passages, all challenged in the lawsuit:

The incentives facing CDO managers like Chau were such that it was in their interest to take the other side of the bet regardless of the quality of the underlying home loans.

- Later, whenever Eisman set out to explain to others the origins of the financial crisis, he'd start with his dinner with Wing Chau. Only now did he fully appreciate the central importance of the so-called mezzanine CDO—the CDO composed mainly of triple-B-rated subprime mortgage bonds—and its synthetic counterpart: the CDO composed entirely of credit default swaps on a triple-B-rated subprime mortgage bonds. "You have to understand this," he'd say. "This was the engine of doom." He'd draw a picture of several towers of debt. The first tower was the original subprime loans that had been piled together. At the top of this tower was the triple-A tranche, just below it the double-A tranche, and so on down to the riskiest, triple-B tranche—the bonds Eisman had bet against. The Wall Street firms had taken these triple-B tranches—the worst of the worst—to build yet another tower of bonds: a CDO. A collateralized debt obligation. The reason they'd done this is that the rating agencies, presented with the pile of bonds backed by dubious loans, would pronounce 80 percent of the bonds in it triple-A. These bonds could then be sold to investors—pension funds, insurance companies—which were allowed to invest only in highly rated securities. It came as news to Eisman that this ship of doom was piloted by Wing Chau and people like him.

- The guy controlled roughly $15 billion, invested in nothing but CDOs backed by the triple-B tranche of a mortgage bond, or, as Eisman put it, "the equivalent of three levels of dog shit lower than the original bonds."

- As it happened, FrontPoint Partners had spent a lot of time digging around in those loans, and knew that the default rates were already sufficient to wipe out Wing Chau's entire portfolio. "God," Eisman said to him. "You must be having a hard time." "No," Wing Chau said. "I've sold everything out."

- The bond market had created what amounted to a double agent – a character who seemed to represent the interests of investors when he better represented the interests of Wall Street bond trading desks.

- But the CDO manager was also paid a fee of 0.01 percent off the top, before any of his investors saw a dime, and another, similar fee, off the bottom, as his investor received their money back. That doesn't sound like much, but, when you're running tens of billions of dollars with little effort and no overhead, it adds up. Just a few years earlier, Wing Chau was making $140,000 a year managing a portfolio for the New York Life Insurance Company. In one year as a CDO manager, he'd taken home $26 million, the haul from half a dozen lifetimes of working at New York Life. . . .

- "He 'managed' the CDOs," said Eisman, "but managed what? I was just appalled that the structured finance market could be so insane as to allow someone to manage a CDO portfolio without having any exposures to the CDOs. People would pay up to have someone 'manage' their CDOs – as is this moron was helping you. I thought, *You prick, you don't give a fuck about the investors in this thing*."

- "Then he says something that blew my mind," said Eisman. He says, 'I love guys like you who short my market. Without you I don't have anything to buy."

- Between shots of sake he told Eisman that he would rather have $50 billion in crappy CDOs than none at all, as he was paid mostly on volume.

Id. at *2-5.

In February 2011, Chau brought his defamation lawsuit in the United States District Court for the Southern District of New York. On March 29, 2013, the District Court (Daniels, J.) granted summary judgment to all defendants. Chau then appealed.

Second Circuit's Ruling

Defamatory Meaning

The heart of Judge Wesley's opinion was his conclusion that many of the challenged statements were not reasonably capable of defamatory meaning, regardless how poorly they may reflect on Chau in the context of the book's larger argument about the origins of the 2008 financial crisis. For instance, the Court held that statements referring to the fact that Chau did not retain equity in his CDOs, or the fact

that he was paid based on volume, were not defamatory in a context of a business where such practices were acceptable. *Id.* at *6. Similarly, the Court held that it was not defamatory to describe Chau as saying that "he would 'rather have $50 billion in crappy CDOs than none at all, as he was paid mainly on volume'" because the statement "merely conveys a fundamental truth: $10 worth of a lousy security *is* worth more than none at all." *Id.*

In reaching these conclusions, the Court rejected the view expressed in Judge Winter's dissent that such statements must be capable of defamatory meaning because the book makes clear that they are supposed to be bases for condemning Chau and his business practices. *Id.* at *14 (Winter, J., dissenting). That was insufficient because, according to Judge Wesley, statements that are non-defamatory on their face cannot be made otherwise by "the implication, perceived tone, and innuendo" of the challenged writing. *Id.* at *10. Judge Wesley similarly rejected Judge Winter's view that the fact that Chau encountered career difficulties since the publication of books shows that the book defamed him, explaining:

> It is understandable that Chau was displeased by a book that laid a good share of the blame for the financial crisis at the feet of Wall Street banks – and the advisors they chose to manage the CDOs – that collapsed so spectacularly. Before the crash, Chau was a top manager of asset-backed CDOs. By the time the book was published, every CDO managed by Chau was either in default, liquidated, or downgraded to junk status, and his investors incurred substantial losses that would damage any money manager's reputation. Our dissenting brother exploits Chau's fate as context for his view that the Defendants' writing did not have an "innocent meaning[ ]"; our view is that a non-defamatory reflection on this disastrous chapter of our nation's financial history would not necessarily have an "innocent meaning" for those depicted.

"Epithets" such as – "'sucker,' 'fool,' and 'crooks and morons' – are hyperbole and therefore not actionable opinion."

Id. at *11.

Finally, the Court rejected Chau's argument that the statements that attributed quotations directly to him were defamatory based not on the content of the statement, but the implication that he would have said them. The Court held that, because the statements attributed to Chau were not themselves defamatory, Chau could not bootstrap his way to a viable defamation claim simply by denying he said them. *Id.* at *10.

Opinion

The Court also held that many of the challenged statements were protected opinion. Specifically, the Court held that statements in the book containing "epithets" such as – "'sucker,' 'fool,' 'frontman,' 'industrial waste,' 'pilot[]' of the 'ship of doom, and 'crooks and morons' – are hyperbole and therefore not actionable opinion." *Id.* at *8. Similarly, the Court held that the framing of certain statements with

phrases such as "'I had no idea . . .' and 'I didn't know . . .' are particular customs or signals that something is opinion, not fact." *Id.* In concluding that the chapter's starkly negative assessment of Chau was largely protected opinion, the Court noted: "While someone may not appreciate being called a fool, it is an expression of one's view of another . . . . Time may prove the insult misguided, but the insult is not itself a fact – but rather, is one's perception of facts – at the time it is uttered." *Id.*

Of and Concerning

The Court also held that the challenged statements in the chapter that concerned the practices of "'CDO managers' generally" were "not 'of and concerning' Chau," and so were not actionable as to him. *Id.* at *8. The Court included in this group statements such as: "The bond market had created what amounted to a double agent – a character who seemed to represent the interests of investors when he better represented the interests of Wall Street bond trading desks." *Id.* While the Court acknowledged that Chau "is described in the book as a CDO manager," it held that that alone did not provide him with a basis to challenge statements that "are *solely* about the group." *Id.* (emphasis in original).

Substantial Truth

Finally, the Court held that many of the challenged statements were substantially true based on the summary judgment record. For instance, the Court held that "Chau's supposed statement that he 'love [s] guys like you who short my market,'" merely expressed the truism that Chau's ability to take a long position in the subprime mortgage market was dependent on the willingness of others to take a long position. *Id.* at *9.

The Court also held that the book's "characterization of [Chau's] CDOs as backed by nothing but triple-B mortgage bonds" was substantially true even if it was not a literally accurate characterization of the composition of Chau's CDOs. *Id.* That is because, according to the Court, Chau failed to explain how the book's characterization of his CDOs would have a worse effect on the mind of the reader than accurately stating that a third of those CDOs were backed "by securities rated A-/A3 of better," given what turned out to be true about the meaninglessness of those ratings (which is itself a prominent theme in the book). *Id.*

Conclusion

The Second Circuit concluded that none of the statements from *The Big Short* challenged by Chau was actionable, and, accordingly, affirmed the grant summary judgment to all defendants.

David A. Schulz, Michael D. Sullivan, Celeste Phillips and Paul J. Safier of Levine Sullivan Koch & Schulz, LLP represented the defendant Steven Eisman. Celia Goldwag Barenholz, Gabriel Virgil Rauterberg, and Annika Goldman of Cooley LLP represented defendants Michael Lewis and W.W. Norton & Company. Steven Molo, Robert Kry, and Andrew M. Bernie of Molo Lamken, LLP represented plaintiffs Wing Chau and Harding Advsiory LLC.

Illinois Legislature Passes New Eavesdropping Law

Bill Awaits Governor's Signature

By Gail Schnitzer Eisenberg

The Illinois General Assembly passed a new eavesdropping statute December 4th to replace the provisions the Illinois Supreme Court struck down this past March. SB1342 (98th ILGA), *as amended by House Floor Amend. No. 6*. The bill awaits Governor Pat Quinn's signature before becoming law. The statute as amended would criminalize secretly recording private conversations without each party to that conversation's consent, with numerous exceptions for approved law enforcement investigations.

Background

Illinois has criminalized eavesdropping since 1961, and the Illinois Supreme Court had interpreted the state's previous eavesdropping statute such that it would pass constitutional scrutiny, *Illinois v. Hollins*, 2012 IL 112754, ¶ 9, 971 N.E.2d 504, 508 (2012). For instance, the Court held that the statute criminalized only recording conversations under circumstances that entitle the parties to believe that their conversation is private. *See Illinois v. Beardsley*, 116 Ill. 2d 47, 53, 503 N.E2d 346 (1986). The Court further held that "there could be no expectation of privacy where the person recording the conversation is a party to the conversation." *Illinois v. Clark*, 2014 IL 115776, ¶ 16; 6 N.E.3d 154, 159 (Ill. 2014) (discussing *Illinois v. Herrington*, 163 Ill.2d 507, 510-11, 645 N.E.2d 957 (1994)).

In 1994, however, the legislature amended the statute to require that a person obtain consent from all parties to a conversation before recording that conversation, regardless of the reasonableness of the parties' expectation of privacy. *Clark*, 2014 IL 115776, ¶¶ 17, 20; 6 N.E.3d at 159, 160.

The primary change the bill, if signed by Governor Quinn, would make to the statute is that the secret recording of only "private" conversations without all-party consent would be criminalized.

This past March the Illinois Supreme Court invalidated portions of the state's eavesdropping statute in a pair of cases. The defendant in *Illinois v. Clark* was charged with two violations of Illinois' eavesdropping law, 770 ILCS 5/14-2(a)(1)(A) (West 2010), stemming from two nonconsensual, courthouse recordings he made of opposing counsel and the judge in an unrelated child custody case. 2014 IL 115776, ¶¶ 1-4; 6 N.E.3d at 156-57. The circuit court dismissed his indictment, holding that the statute violated both Clark's substantive due process rights and First Amendment rights. 2014 IL 115776, ¶ 5 -7; 6 N.E.3d at 157. The Illinois Supreme Court agreed, holding that section unconstitutional under the First Amendment's overbreadth doctrine. 2014 IL 115776, ¶ 25; 6 N.E.3d at 162.

The defendant in *Illinois v. Melongo* was charged with recording conversations she had with a supervising court reporter and subsequently divulging that conversation by posting the recordings to her website under 720 ILCS 5/15-2(a)(1), (3) (West 2008). 2014 IL 114852, ¶ 7; 6 N.E.3d 120, 122-23 (2014). The circuit court declared the statute unconstitutional under the due process and free speech clauses of both the federal and Illinois constitutions. *Melongo*, 2014 IL 114852, ¶¶ 14, 22; 6 N.E.3d at 123-25.

(Continued on page 17)

(Continued from page 16)

Like it did in *Clark*, the Illinois Supreme Court held that the recording provision was unconstitutionally overbroad. *Melongo*, 2014 IL 114852, ¶ 13, 22; 6 N.E.3d at 126. The Court similarly held the provision criminalizing those who divulge information they "reasonably should know was obtained through the use of an eavesdropping device," 720 ILCS 5/14-2(a)(3) (West 2008), unconstitutionally overboard as a "naked prohibition against disclosure." *Melongo*, 2014 IL 114852, ¶¶ 34-36 (quoting *Bartnicki v. Vopper*, 532 U.S. 415, 526 (2001)).

General Assembly's Revisions

Although the general assembly took no action to revise the bill for many months, once it did, the bill moved through the legislative process quickly. Rep. Elaine Nekritz proposed an amendment to SB1342 on December 2nd. HOUSE FLOOR AMEND. NO. 6 (Dec. 2, 2014). The bill passed the house the next day by a 106-7-1 vote. HOUSE VOTE HISTORY SB 1342 – THIRD READING –WEDNESDAY, DECEMBER 3, 2014.

Many critics find this definition so vague as to chill protected speech, especially the recording of police interactions.

And the senate voted 46-4-1 to concur a day after that. HFA0006 (Dec. 4, 2014). The bill was presented to Governor Quinn December 15th, and he theoretically has until February 13, 2015, to act on the bill (his term ends January 12, 2015). If he does not approve or return the bill to the legislature within that 60-day period, the bill will automatically become law. ILL. CONST., art. IV, § 9 (b) (1970).

The primary change the bill, if signed by Governor Quinn, would make to the statute is that the secret recording of only "private" conversations without all-party consent would be criminalized. 720 ILCS 5/14-2 (a), *as amended by SB1342*. The bill defines "private" based on a party's reasonable expectation that the conversation be kept private. *Id.* at § 14-1(d). "A reasonable expectation" includes "any expectation recognized by law, including, but not limited to, an expectation derived by law, including but not limited to an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution." *Id.*

Many critics find this definition so vague as to chill protected speech, especially the recording of police interactions. *See, e.g.*, Dan Johnson, Illinois New Eavesdropping Law Is A Terrible Idea, THE HUFFINGTON POST (Dec. 10, 2014). But, based on precedent, it does seem clear that the statute would not prohibit secretly recording "(1) a loud argument on the street; (2) a political debate in a park; (3) the public interactions of police officers with citizens (if done by a member of the general public); and (4) any other conversation loud enough to be overheard by others whether in a private or public setting." *See Clark*, 2014 IL 115776, ¶ 21; 6 N.E.3d at 161.

In concluding that the previous statute was unconstitutionally overbroad, the Illinois Supreme Court noted that the statute did not distinguish between recordings "made openly or surreptitiously." *Melongo*, 2014 IL 114852, ¶ 30, 6 N.E.3d at 126; *Clark*, 2014 IL 115776, ¶ 22; 6 N.E.3d at161. The overt recording of a private conversation would demonstrate that the parties implicitly consented, but because that consent would have to be raised as a defense to the criminal charge, the statute would have a chilling effect on protected speech. *Melongo*, 2014 IL 114852, ¶ 30, 6 N.E.3d at 126; 2014 IL 115776, ¶ 22; 6 N.E.3d at161; *accord People v. Ceja*, 204 Ill.2d 332, 349–50; 789 N.E.2d 1228 (2003) (implied consent to surveillance under the statute can be inferred from circumstances).

The legislature took the hint; the proposed statute adds the requirement that the recording be "surreptitious," such that it was "obtained by stealth or

(Continued on page 18)

(Continued from page 17)

deception, or executed through secrecy or concealment. §§ 14-2(a); 14-1(g). Thus, people may still record private conversations without the express consent of all of the parties involved, so long as it is done overtly.

The Illinois Supreme Court also observed that, under the previous version of the statute, people who repeated the contents of a conversation they overheard without the use of a recording device had not committed a crime. *People v. Clark*, 2014 IL 115776, ¶ 23; 6 N.E.3d at 161. That is not the case under the legislation headed to Quinn's desk. The statute as amended would also criminalize secretly transcribing the contents private electronic communications - be it written, oral, or otherwise, to which he or she is not a party without each parties' consent. §§ 14-1(e); 14-2(a)(3).

The Illinois Supreme Court had also struck down the provision of the Illinois Eavesdropping Statute which criminalized the use or divulgence of "any information which he knows or reasonably should know was obtained through the use of an eavesdropping device," regardless of the conversation's content or the legality of the recording. *Melongo*, 2014 IL 114852, ¶ 36, 6 N.E.3d at 127, 124 (quoting 720 ILCS 5/14-2(3) (West 2008)). The proposed legislation attempts to mend the constitutional defect by limiting criminality to using or disclosing information that the offender "knows or should know was obtained in violation" of the statute. § 14-2(5). At the same time, the proposed revisions would expand liability under that provision by criminalizing the disclosure or private electronic communications, like email. *Id.; see* Marty Hobe, *Politics as Usual: Spying on the Proposed Evesdropping Law*, THE REGISTER-MAIL (Dec. 5, 2014).

Moreover, the bill would decrease the potential penalties an offender would face for secretly recording law enforcement officers, government attorneys, or judges performing their official duties. The offense had been a Class 1 felony, punishable by 4-15-years' imprisonment, but, under the revised statute, a first offense would be Class 3 felony (2-5 years) and subsequent offenses would be Class 2 felonies (3-7 years). § 14-4(b). Recording non-public officials is still a Class 4 felony for first offenses and Class 3 felony for subsequent offenses. The discrepancy has caused some commentators to opine that the statute is an attempt to chill citizens from recording their interacts with police officers. *See, e.g., Thomas Halleck, Illinois Passes Bill That Makes It Illegal To Record The Police,* INTERNATIONAL BUSINESS TIMES (Dec. 9, 2014), http://www.ibtimes.com/illinois-passes-bill-makes-it-illegal-record-police-1744724.

The bill would also make several changes to the exemptions for law enforcement recordings. The offenses the investigation of which would qualify for protection under section 14-3(q) are newly limited. *See* § 14-3(q)(7). The statute used to exempt recordings made during all drug offense investigations. The revised statute would also require that conversations intercepted during the course of these investigations be preserved in its original format. *Id.* at § 14-3(q)(9). And beginning in March 2015, the State's Attorneys offices would need to file a report about the use of secret recording devices in such investigations. *Id.* at § 14-3 (q)(3.10).

On all accounts, more work remains to be done. Sen. Kwame Raoul, the bill's Senate sponsor, plans to work with Rep. Nekritz to address recordings made by law enforcement officers wearing body cameras. Chris Fusco and Tina Sfondeles, *State Evesdropping-Law Fix to Head to Governor's Desk,* CHICAGO SUN-TIMES (Dec. 4, 2014), http://politics.suntimes.com/article/springfield/state-eavesdropping-law-fix-head-governors-desk/thu-12042014-1251pm. He hopes to pass legislation early next session exempting such authorized recordings. *Id.*

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Kanas Court Lifts Prior Restraint on "In Cold Blood" Investigation Files

After approximately two years in place, a Kansas district court last month lifted a prior restraint barring publication of information contained in notebooks created by the chief investigator of the 1959 Clutter family murders, a case famously covered in the non-fiction novel *In Cold Blood.* *Kansas v. Nye*, No. 2012-C-1053 (Kan. Dist. Nov. 26, 2014) (Hendricks, J.).

Holding that its initial grant of injunctive relief was in error, the court ruled the injunction was a clear prior restraint.

Background

This case arose in October 2012 when the state of Kansas sued Ronald Nye and related parties to stop publication of information contained in the notebooks. The state also sought a declaratory judgment to assert its ownership of the notebooks and related papers and an injunction barring their sale.

The books and papers were created and/or kept by the defendant's father Harold Nye, the special agent in the Kansas Bureau of Investigation in charge of the 1959 murder investigation. The elder Nye apparently kept the notebooks and papers at home for close to 50 years in violation of KBI policy. After his death the books were ultimately given to defendant Ronald Nye.

Defendants plan to publish an ebook preliminarily titled *The Nye Journals and What Truman Capote Left Out of In Cold Blood.* Defendants claim that their book will shed new light on the murder case and contradict, in part, *In Cold Blood.* They also sought to sell the notebooks and papers at auction.

According the court, the materials "are essentially a collection of facts and personal impressions, observations, conjecture, action plans, lists of suspects, and to-do-lists concerning Harold Nyes investigation of the Clutter murders."

In 2012 the court granted a restraining order. In support of its request for an injunction Kansas argued that the 1) confidentiality of criminal investigations and preservation of case records outweighed the defendants' First Amendment rights; 2) that it was protecting the privacy rights of the Clutter family; and 3) that it owned the materials. In 20014, the defendants moved to vacate the temporary injunction and for summary judgment.

Prior Restraint Analysis

On the motion, the court held that Kansas had failed to articulate a valid legal justification for suppressing the publication of the material. "The state has not articulated why its rights to maintain and preserve the Nye materials requires that the defendant's not be able to use those materials in a book. The state has not explained how the temporary injunction is the least restrictive means of protecting its interest to maintain and preserve the Nye materials."

The court suggested that its initial restraining order was granted on the state's claim that it owned the notebooks and papers. But the court acknowledged that the issue of ownership and publication were not linked – and blamed the state for arguing the contrary.

The court noted that even material that is stolen is subject to First Amendment prohibitions against prior restraint. And the court rejected the state's claim that the material and proposed book were commercial speech subject to lesser First Amendment protection.

Although sensitive to the privacy interests of surviving Clutter family members, there was no basis for a prior restraint. In fact there was no doubt that public interest in the murder case remains high notwithstanding the passage of time.

Federal Court Strikes Florida Lawyer-Advertising Rules

State Bar's "Naked Paternalism" Violates First Amendment

By Charles D. Tobin & Brian J. Goodrich

Finding that "naked paternalism" will not justify "protecting the public from truthful information," a Florida federal court this month held that two Florida Bar rules restricting attorney advertising violate the First Amendment to the United States Constitution. *Rubenstein v. The Florida Bar*, No. 1:14-cv-20786 (S.D. Fla. Dec. 8, 2014).

Judge Beth Bloom enjoined the Bar from enforcing two rules that had banned, unless the attorney could establish the results were "objectively verifiable," all advertising references to the lawyer's past results.

Background

The Supreme Court of Florida, over the objections of a number of law firms, adopted Bar Rules 4-7.13(a)(2) and 4-7.14(a) in January 2013. The rules only permitted attorney advertising to reference past results if the statements were "objectively verifiable":

> A lawyer may not engage in deceptive or inherently misleading advertising. ... Deceptive or inherently misleading advertisements include ... references to past results unless such information is objectively verifiable ....

Rule 4-7.13(b)(2), Rules Reg. Fla. Bar (2013). The rules also restrict lawyers from "engag[ing] in potentially misleading advertising" such as "advertisements that are subject to varying reasonable interpretations ... which would be materially misleading when considered in the relevant context" and "advertisements that are literally accurate, but could reasonably mislead a prospective client regarding a material fact." Rule 4-7.14(a)(1)-(2).

The decision in Rubenstein is the most recent in a series of decisions this year reflecting judicial push-back against state bar regulations that violate lawyers' First Amendment rights.

Plaintiff Robert Rubenstein submitted a series of television advertisements, which the rules require, to The Florida Bar for approval. The ads featured information regarding past recoveries for clients. One, for example, featured a cartoon car accident, a courthouse, and dollar signs drawn on a dry-erase board, and depicted the words:

> COLLECTED OVER $50 MILLION FOR THEIR CLIENTS IN JUST THE LAST YEAR! Gross proceeds. Results in individual cases are based on the unique facts of each case.

The Bar subsequently approved a number of Rubinstein's advertisements like these, finding that they were in compliance with the rules. The court noted that Rubinstein had relied on the rules and undertook "great expense" to produce the ad campaign.

In early 2014, however, the Bar's Board of Governors issued new, even more stringent "Guidelines for Advertising Past Results" implementing the rules. The new guidelines provided that the Bar generally would not approve any indoor and outdoor display, radio or television advertising that included past results. The Bar justified this blanket prohibition by stating that past results are highly likely to mislead members of the public, and that the types of media specified "do not

(Continued on page 21)

(Continued from page 20)

lend themselves to effective communication of such information."

Shortly following the issuance of these guidelines, the Bar notified Rubenstein that it had withdrawn its prior approval of Rubenstein's advertisements. The Bar directed Rubenstein to cease use of the advertisements, or potentially face disciplinary action. Rubenstein sued The Florida Bar and continued to disseminate the advertisements. In June 2014, the Bar referred Rubenstein's conduct to Bar Counsel to initiate disciplinary proceedings.

Summary Judgment Ruling

On Rubenstein's motions for summary judgment, Judge Bloom applied the intermediate scrutiny standard of First Amendment review for lawyer advertising. Judge Bloom first noted that the Bar cited three grounds for its enactment of the regulations: to protect the public from misleading or deceptive attorney advertising; to promote attorney advertising that is positively informative to potential clients; and to prevent attorney advertising that contributes to disrespect for the legal system and thereby degrades the administration of justice.

The court then held that the Bar failed to demonstrate that its restrictions advanced those interests, and that the restrictions it had placed upon protected speech were not properly tailored. The court found critical the fact that the Bar justified the restrictions in the theory that the inclusion of past results could *potentially* mislead consumers, rather than relying on data showing actual past harm experienced by consumers. Indeed, the court found that the Bar presented no evidence whatsoever to demonstrate that the restrictions support the interests its rules were designed to promote.

In fact, the court noted that evidence accumulated by the Bar between 1995 and 1997 showed that 74% of consumers surveyed during that time indicated that they believed past results to be an important attribute in choosing a lawyer – thus demonstrating to the court the public desire for the information the Bar had restricted. The court also noted that the same surveys contained information that showed consumers in fact wanted more information to help them choose an attorney – including information as to attorney qualifications, experience, competence, and professional record.

Notably, the court engaged substantially with the question of whether the best way to off-set any possible misleading of the public is to limit the amount of speech that reaches the public, or rather to allow all speech and permit the public to sort through such advertisements themselves to develop their own conclusions. The court took note of a recent Fifth Circuit case that held unconstitutional a Louisiana prohibition on past results attorney advertising materially identical to the Florida rules at issue. *Public Citizen Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

The court joined in the Fifth Circuit's rationale, noting that while past results may present the risk of being misleading, nonetheless, absent any proof of it occurring, the state could not rely on "mere conjecture and speculation."

Conclusion

The Southern District of Florida's decision in *Rubenstein* is the most recent in a series of decisions this year reflecting judicial push-back against state bar regulations that violate lawyers' and their firms' First Amendment rights. Earlier this year, the Third Circuit, in *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014), found that New Jersey violated the First Amendment in limiting a lawyer's ability to quote judicial opinions in marketing materials. And another Florida law firm in a different part of the state has made significant headway in its challenge, persuading the court that the firm and its individual partners have standing to challenge the new Florida Bar rules. *Searcy v. The Florida Bar*, No. 4:13-cv-664 (N.D. Fla. July 21, 2014).

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The SAVE Act: Will Congressional Efforts to Stem Sex Trafficking Undermine Section 230?

By Jeff Hermes

Two bills directed at stopping the online advertisement of sex trafficking are currently making their way through Congress with the same title: the "Stop Advertising Victims of Exploitation Act of 2014," or "SAVE Act." The House version, H.R. 4225, was introduced in March of this year and passed the House on May 20th by a vote of 392-19. The Senate version, S. 2536, was introduced on June 26 of this year and is still sitting in committee. Both versions have raised concerns among media and civil liberties because of their potential impact on Section 230 of the Communications Decency Act, including the possibility of imposing monitoring requirements for at least some types of third party content.

Background

The SAVE Act, in both versions, is the latest in a long series of government efforts to address the use of the Internet to facilitate sex trafficking, particularly with respect to underage victims.

The SAVE Act, in both versions, is the latest in a long series of government efforts to address the use of the Internet to facilitate sex trafficking, particularly with respect to underage victims. Websites carrying classified advertisements, most notably Craigslist and Backpage.com, came under the scrutiny of state regulators because of their use by prostitution rings. While Craigslist eventually shut down the adult services sections of its various sites in response to government pressure, Backpage.com has so far refused, citing its immunity to state-law liability for third-party content under Section 230.

In response, several states passed laws targeting Backpage.com's activities. Backpage.com's invocation of Section 230 was vindicated in a series of federal district court decisions in 2012 and 2013, enjoining the state laws as inconsistent with federal law and in violation of the First Amendment. *See Backpage.com, LLC v. Hoffman*, No. 13-cv-03952 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

In July of 2013, with two anti-Backpage.com laws stricken and the writing on the wall as to a third, forty-seven state attorneys general sent a letter to Congress citing the problem of online advertisements for sex trafficking and asking that Section 230 to be amended. Specifically, the attorneys general asked that the words "or state" be added to 47 U.S.C. § 230(e)(1), so that it would read "Nothing in this section shall be construed to impair the enforcement of … any other Federal *or state* criminal statute." Granting the request would have allowed state governments to legislate around Section 230 at will by criminalizing particular online content.

(Continued on page 23)

(Continued from page 22)

Fortunately, Congress did not take up this invitation to grant the states broad new legislative authority that would extend far beyond the issue of sex trafficking. However, it did consider federal approaches to the problem of online advertising for sex trafficking, which arguably would carve out certain online content from Section 230's protection.

The House Bill (H.R. 4225)

The House version of the SAVE Act is a relatively straightforward amendment to 18 U.S.C. § 1591, the federal law that currently criminalizes sex trafficking. The bill would add "advertising" to the list of trafficking-related offenses as follows (additions in bold):

> 18 U.S.C. § 1591
>
> (a) Whoever knowingly—
>
> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, **advertises** or maintains by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or**, except where, in an offense under paragraph (2), the act constituting the violation of paragraph (1) is advertising,** in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

See H.R. 4225, 113th Congress, 2d Sess., § 2(a, b) (last updated May 20, 2014). Violations of the statute are punishable by fines and prison terms of at least 10 years, increased to 15 years if the victim was under 14 years old or if the victim was compelled to engage in commercial sexual activity. 18 U.S.C. § 1591(b).

The term "advertising" is not defined, and thus it is not clear whether it would include services like Backpage.com that host third party advertisements. Although Backpage.com spurred the introduction of the bill and can be presumed to be one of its intended targets, it is ambiguous as to whether the drafters of the bill intended website hosts to be subject to direct liability for advertising under § 1591(a)(1), or only subject to indirect liability under § 1591(a)(2) when receiving a benefit as a result of another party's advertising.

The insertion beginning "except where…" (in bold face above) might help to resolve this ambiguity. This amendment was included in H.R. 4225 in response to concerns that the bill would put too strict a burden on online intermediaries, by imposing a recklessness standard that could result in a *de facto*

(Continued on page 24)

(Continued from page 23)

monitoring obligation for third party content. The added clause limits advertising-related liability under § 1591(a)(2) to circumstances where the defendant has actual knowledge that the victim was either underage or compelled to participate (this would still represent a narrowing of Section 230, but not one that imposes a monitoring obligation). The added clause would be meaningless, however, if intermediaries could be subjected to the same penalties under a recklessness standard via § 1591(a)(1).

The Senate Bill (S. 2536)

The Senate version of the SAVE Act takes a different approach. Instead of amending existing legislation to include advertising offenses, the Senate bill would create a new Section 1591A in Title 18 to address these activities. Perhaps in recognition of the constitutional issues raised by state laws on this topic, the text of the bill states that the new section "should be liberally construed to effectuate its remedial purposes to the full extent permitted by the First Amendment to the Constitution of the United States, *including the commercial speech doctrine*." S. 2536, 113th Congress, 2d Sess., § 2(4) (last updated June 26, 2014) (emphasis added).

By recognizing state felony offenses as predicate crimes, the Senate bill would also grant states a degree of much-desired power to limit the reach of Section 230.

Advertising Liability

The new § 1591A would make it unlawful to:

> (A) knowingly sell, commercially promote, place, or maintain an adult advertisement, or any series of adult advertisements in a medium whose predominant purpose or use is to facilitate commercial transactions; and
>
> (B) act with reckless disregard of the fact that the adult advertisement, or the series of adult advertisements, facilitates or is designed to facilitate—
>
> (i) an offense under … section 1591(a) in which the person recruited, enticed, harbored, transported, provided, obtained, or maintained has not attained the age of 18 years at the time of such offense; or
>
> (ii) an offense in violation of any provision of State law prohibiting felony offenses relating to child pimping, child prostitution, child sexual abuse, assault on children, or the sex trafficking of children.

18 U.S.C. § 1591A(b)(1) (as proposed by S. 2536, § 3(a), as of June 26, 2014; further references to § 1591A in this article will likewise be to the section proposed in the June 26 version of S. 2536).
The Senate bill thus eliminates the distinction between direct and indirect liability apparently present in the House version, and applies a recklessness standard in all cases with respect to the criminal nature of the goods or services advertised. Violators are subject to a fine, imprisonment up to 10 years, or both. 18 U.S.C. § 1591A(b)(2).

By recognizing state felony offenses as predicate crimes, the Senate bill would also grant states a degree of much-desired power to limit the reach of Section 230. This power would, however, be indirect

(Continued on page 25)

(Continued from page 24)

and limited; states could not regulate online advertising directly or extend the reach of the statute beyond "adult advertisements," but might modify their felony laws to expand the scope of related adult advertisements covered by the federal statute.

Range of Advertising Covered

As discussed above, the defendant need have no actual knowledge of the unlawful nature of the goods or services advertised. This is reinforced by the definitions of "advertisement" and "adult advertisement" in the new section:

> The term adult advertisement means any advertisement that … is designed, in whole or in part, to induce **a lawful or unlawful** commercial exchange for—(i) a sexual act or sexual contact … ; (ii) sexually explicit conduct …; (iii) a commercial sex act … ; or (iv) the goods or services of an adult escort or erotic performer involving any commercial exchange described in clause (i), (ii), or (iii).
>
> …
>
> The term advertisement includes any written or verbal statement, illustration, or depiction in any medium which is designed, in whole or in part, to induce **a lawful or unlawful** commercial exchange of a good or service for money, property, or another item of value, including another good or service.

The definition of an "adult advertisement" sweeps broadly in terms of the subject matter that triggers the "reckless disregard" standard.

18 U.S.C. § 1591A(a)(1, 2) (emphasis added). Although the interaction of the subsections is not entirely clear, it appears that possessing a subjective belief that one is "selling, commercially promoting, placing, or maintaining" an advertisement for apparently lawful adult goods or services is sufficient to trigger an obligation to avoid "reckless disregard" of the fact that the goods or services are in fact unlawful.

The definition of an "adult advertisement" sweeps broadly in terms of the subject matter that triggers the "reckless disregard" standard. For example, § 1591(a)(1)(iv) extends the definition to "the goods … of an … erotic performer involving any commercial exchange described in clause … (iii)." Clause (iii) refers to "commercial sex acts," defined by reference to 22 U.S.C. § 7102(4) as "any sex act on account of which anything of value is given to or received by any person." Thus, "adult advertisements" would appear to include not only solicitations for sexual services, but also ads for pornographic (but legal) content.

Monitoring and Recordkeeping Obligations

The Senate bill also explicitly creates obligations with respect to third-party content that would override the general rule of Section 230 in certain circumstances.

(Continued on page 26)

(Continued from page 25)

Section 1591A(c) imposes additional recordkeeping duties on anyone who "uses any means or facility of interstate or foreign commerce to sell, commercially promote, place, or maintain an adult advertisement." These obligations include: (1) verifying the identity of any purchaser of the advertisement, the identity of any person depicted in the advertisement, and the age of anyone whose goods or services are thus advertised; (2) maintaining records relating to this verification; and (3) affixing notices to each adult advertisement stating where these records may be kept. 18 U.S.C. §1591A (c)(1, 2, 4).

The Attorney General is also directed to promulgate regulations "to carry out this section," including regulations imposing the following obligations (among others) on entities subject to the recordkeeping requirements above:

- reviewing postings "before they are published to ensure the postings do not offer minors for commercial sex or contain sexually explicit images of minors";
- prohibiting "the use of euphemisms and code words for, or used as part of, a commercial exchange" proposed in an adult advertisement; and
- preventing "the reposting of previously banned or removed postings or postings by persons who repeatedly post inappropriate content."

18 U.S.C. § 1591A(c)(5).

Failure to comply with requirements and regulations under this subsection would be punishable with fines and/or imprisonment separate from the main penalties discussed above. 18 U.S.C. § 1591A(c)(6).

Exceptions to Liability

The Senate bill contains two limitations on liability.

One limitation relates to the monitoring and recordkeeping requirements discussed above. Compliance with these obligations prevents a defendant from being "found reckless as to the fact of the age element of a minor victim of a predicate offense." 18 U.S.C. § 1591A(b)(3)(B). This might be of limited benefit, given that a predicate offense under state law – *see* 18 U.S.C. § 1591A(b)(1)(B)(ii) – might not have the age of a specific victim as an element.

The other is a limitation on liability that applies to a range of online services (the "Internet Service Limitation"):

> An Internet access service provider, Internet browser or mobile browser provider, external search engine provider, external Internet information location tool provider (including a domain name registry or other domain name or root zone service provider), interactive advertising network service provider, common carrier, telecommunications carrier, or other such generic search or utility provider shall not incur any criminal or civil

(Continued on page 27)

(Continued from page 26)

> liability under this subsection or be subject to the recordkeeping requirements under subsection (c) solely based on providing such generic search or utility services.

18 U.S.C. § 1591A(b)(3)(A). The Internet Service Limitation has two primary effects: (1) it precludes liability for selling, commercially promoting, placing, or maintaining an adult advertisement that facilitates an underlying offense; and (2) it states that the covered Internet services are not bound by the recordkeeping requirements of 18 U.S.C. § 1591A(c). The limitation applies only to covered services' provision of "generic search or utility services," a term not defined in the bill.

In addition, the Internet Service Limitation might not affect liability for failure to comply with other obligations imposed by the Attorney General's regulations, such as the pre-publication review and repeat poster requirements. Although the Attorney General's authority to promulgate these regulations is granted by the section of the Senate bill discussing recordkeeping, the contemplated reach of the regulations extends significantly further. *See* 18 U.S.C. § 1591A(c)(5). Note also that while the Attorney General is directed to issue regulations binding on those subject to the bill's recordkeeping requirements, this might not prevent regulation of other entities in order "to carry out this section." *See Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agriculture*, 539 F.3d 492, 500 (D.C. Cir. 2008) (Where Congress has delegated broad regulatory authority to "carry out" a statute, express direction to issue particular regulations does not preclude other regulatory measures). Thus, the statement in the Internet Service Limitation that covered services "shall not … be subject to the recordkeeping requirements under subsection (c)," 18 U.S.C. § 1591A(b)(3)(A), would not necessarily put these services beyond the Attorney General's reach.

Although the protection of the Internet Service Limitation may be limited, the range of services covered is potentially quite broad as a result of its inclusion of "Internet access service" ("IAS") providers.

Although the protection of the Internet Service Limitation may be limited, the range of services covered is potentially quite broad as a result of its inclusion of "Internet access service" ("IAS") providers. An IAS provider is defined by reference to the Child Online Protection Act ("COPA"), which states:

> The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

47 U.S.C. § 231(e)(4).

There is no law interpreting this definition within the context of COPA itself, because enforcement of the substantive provisions of COPA was enjoined due to a likely conflict with the First Amendment. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004). Nevertheless, the COPA definition of an IAS was also incorporated by reference into the CAN-SPAM Act, 15 U.S.C. §§ 7701 *et seq*., and has been interpreted

(Continued on page 28)

(Continued from page 27)

broadly in that context. For example, in *Facebook, Inc. v. CONNECTU LLC*, the U.S. District Court for the Northern District of California stated that:

> Although this definition appears primarily to contemplate services that provide consumers their initial *connection* point to the Internet, the language is broad enough to encompass entities such as Facebook that provide further access to content and communications between users for persons who may initially access the Internet through a conventional "internet service provider."

489 F. Supp. 2d 1087, 1094 (N.D. Cal. 2007); *see also MySpace, Inc. v. The Globe.com, Inc.*, 2007 U.S. Dist. LEXIS 44143, *10 (C.D. Cal. 2007) ("The plain meaning of the statutory language is unambiguous; 'Internet access [service] provider' includes traditional Internet Service Providers …, any email provider, and even most website owners.").

But the fact that the definition of an IAS has been interpreted broadly under the CAN-SPAM Act does not necessarily mean that it must be interpreted the same way in the SAVE Act. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007) (Congress' incorporation of definition from one statute into another does not prohibit interpreting definition differently in new context). The Internet Service Limitation appears to contemplate that IAS providers and the other services covered will be no more than "generic search or utility providers," and limits liability "solely based on providing such generic search or utility services." 18 U.S.C. § 1591A(b)(3)(A). This could militate in favor of narrowly defining either an "IAS provider" or "search and utility services" (for example, by including search engines but not social media sites or advertising-related sites).

Conclusion

The SAVE Act, if passed, would represent the first federal legislative restriction on the scope of Section 230 since its enactment. Both the House and Senate versions of the SAVE Act contain language that limits the protection of Section 230 for websites that knowingly carry advertisements for adult goods and services. The House bill would at least impose liability on online intermediaries who have actual knowledge of the illegal nature of the conduct advertised; moreover, by failing to define "advertising," the House bill leaves open the possibility that websites could be held to a reckless disregard standard that would effectively create a monitoring requirement. The Senate bill, on the other hand, would explicitly create monitoring and other burdensome requirements for those who knowingly carry even legal adult advertisements; however, the bill contains limitations that might insulate at least some online services from certain of those burdens.

Jeff Hermes is a Deputy Director of MLRC.

Appeals Court Prohibits Secret Witness Testimony In Criminal Trial

Court Rejects Murder Defendant's Bid for Closed Testimony

By David J. Bodney and Chris Moeser

The Arizona Court of Appeals recently overturned a trial court's order that allowed secret testimony by an unidentified defense witness during the sentencing re-trial of Jodi Arias, who faces the death penalty after being convicted of the murder of her lover. *KPNX-TV Channel 12, et al. v. Stephens*, No. 1 CA-SA 14-0213 (Ariz. Ct. App. Nov. 26, 2014). Based on the appellate court's November 26 Order, it appears the secret trial witness was the defendant herself, Jodi Arias.

On October 30, 2014, Arizona Superior Court Judge Sherry Stephens allowed one unidentified defense witness to testify for several hours in closed session. The trial court heard argument on defendant's closure request *in camera* at an unnoticed proceeding attended only by the parties; Judge Stephens sealed the transcript of the proceeding and her ruling. Later that afternoon, the trial judge denied an objection to closure made on behalf of *The Arizona Republic*, KPNX-TV, KPHO-TV and KTVK-TV.

Arias' attorneys argued secrecy was necessary because their client's right to present mitigation testimony outweighed the public's interest in attending and watching the trial. The Arizona Court of Appeals disagreed.

Promptly thereafter, the four news organizations were joined by a fifth, KNXV-TV, and they sought immediate appellate review of the closure order and copies of transcripts of the sealed proceedings. On November 3, after oral argument on the news organizations' Special Action, the Arizona Court of Appeals stayed Judge Stephens' closure order, and then vacated it on November 26.

Arias' attorneys sought closure to allow the witness to testify in secret. Arias' lead attorney, Kirk Nurmi, said the witness refused to testify in open court because of concerns about threats and harassment. Nurmi alleged that several defense witnesses, including an expert, were harassed and threatened online during the guilt phase and first sentencing phase trial. Nurmi attributed the alleged harassment and threats to the intense media coverage of the case, although he presented no evidence in open court that any threats or harassment were linked to news coverage.

Nurmi argued secrecy was necessary because his client's right to present mitigation testimony outweighed the public's interest in attending and watching the trial.

The Arizona Court of Appeals disagreed. In a two-page order, the appellate court vacated "the superior court's order of October 30, 2014 closing the courtroom to the public and press during any testimony by Jodi Arias." While not entirely clear, the Court of Appeals' order suggests the secret witness was the defendant Arias. More recently, Nurmi has asserted that additional defense witnesses refuse to testify in open court, and that Arias will appeal the ruling to the Arizona Supreme Court.

A jury convicted Arias in May 2013 of the 2008 murder of Travis Alexander, but deadlocked on whether to sentence her to death. Alexander had been shot in the head and stabbed nearly 30 times, and his throat was slit. Testimony in the case has included graphic images of the grisly crime scene, lurid descriptions of the couple's sexual relationship, a sex tape and allegations by Arias that the victim possessed child pornography.

(Continued on page 30)

(Continued from page 29)

Several local news organizations streamed live video coverage online of the trial and first sentencing proceeding, and HLN provided national coverage of both proceedings.

Arias opposed all camera coverage of the sentencing re-trial. Despite the requests of news organizations to telecast the sentencing re-trial, Judge Stephens prohibited live television coverage but allowed placement of one still camera and one television camera in court. Under Judge Stephens' camera coverage order, all video coverage of the proceeding is embargoed until after the jury delivers its verdict.

Arias' sentencing re-trial was scheduled to end this year, but court observers expect it to continue into 2015.

David J. Bodney and Chris Moeser are attorneys in the Phoenix office of Ballard Spahr LLP, and represent the news organizations in their ongoing efforts to cover the Arias trial.

Florida Appellate Court Holds Open Meeting Law Applies to Collective Bargaining

Voids a Pension Agreement Reached During Federal Mediation

By George Gabel, Tim Conner, and Jennifer Mansfield

In a crucial victory for transparency, a Florida state appeals court ruled on Oct. 21, 2014, that the law will not "condone hiding behind federal mediation" when municipal governments try "to thwart the requirements of the Sunshine Law" by conducting labor negotiations during federal court litigation. With this action, the appellate court affirmed a lower court's order declaring a mediation settlement agreement – which contained substantial changes to pension benefits for police and fire employees – is void because it was negotiated in violation of Florida's open meetings law.

The case, *Brown v. Denton*, Nos. 1D14-0443 and 1D14-0444 (Fla. 1st DCA Oct. 21, 2014), arose in 2013 when the chief negotiators for the firefighters' and police officers' unions filed suit along with several other plaintiffs against the city of Jacksonville and the Jacksonville Police and Fire Pension Fund Board of Trustees, ostensibly to prevent any change to pension benefits. Although the city responded that the federal court lacked jurisdiction, less than one month later it nonetheless joined the other parties in seeking to have the federal court order mediation of the case.

With mediation order in hand, the parties travelled two hours west to Gainesville, Florida to conduct the mediation sessions in private. Although the police and fire unions were not parties to the federal case, they were invited to attend. The result of the mediation sessions was a Mediation Settlement Agreement ("MSA"), signed by the parties and the unions, making substantial changes to pension benefits for police and fire employees. The parties agreed to use their best efforts to obtain approval from their respective public officials, although the MSA itself prohibited any changes to its terms. After the MSA was signed, Mayor Alvin Brown held a press conference announcing an agreement on retirement reform with the unions.

After the mayor's press conference, Frank Denton – an editor at the Florida Times-Union, Jacksonville's daily newspaper – filed a lawsuit in state court challenging the MSA on the grounds that the unions' negotiations with the city violated Florida's Sunshine Law, making the MSA void. The trial court ruled in favor of Denton, holding that the board acted as the unions' representative during the mediation sessions or that the unions themselves participated to some degree in negotiating the MSA.

"By holding closed-door negotiations that resulted in changes to public employees' pension benefits, the appellants ignored an important party who also had the right to be in the room – the public."

The trial court held that the federal mediation sessions violated the Sunshine Law, voided the MSA and enjoined "the parties from conducting further proceedings entailing collective bargaining of the police officer and firefighter pension funds in private outside of the sunshine." The trial court also held that the city and pension fund were required to inform the federal court of their obligations under the Sunshine Law, but if the federal court nonetheless ordered them to negotiate outside of the sunshine, the federal court's order would take precedence.

The city and board appealed the trial court's summary judgment order and argued to the appellate court that the court did not have jurisdiction to make legal determinations regarding collective bargaining, as

(Continued on page 32)

(Continued from page 31)

only the Public Employees Relations Commission has jurisdiction over collective bargaining matters. They also argued that the trial court's order violated the confidentiality of the mediation sessions, principles of comity between courts and the Supremacy Clause.

In the court's opinion, the First District Court of Appeal rejected those arguments, holding that none of the arguments requires reversing the trial court's "well-reasoned and sound order." The appellate court reaffirmed that Florida's Sunshine Law was enacted to protect the public from "closed door" politics and should be construed so as to frustrate all evasive devices. The appellate court held that the trial court had jurisdiction, as "[c]onsidering and determining Sunshine Law violations are within the circuit court's purview." Moreover, the court held that interpretations regarding collective bargaining were necessary threshold determinations in the context of whether the mediation sessions triggered application of the Sunshine Law and were entirely proper.

The appellate court also affirmed the trial court's finding that the board acted as the unions' bargaining agent during the mediation sessions as "a proper finding." It agreed that "the fact that [the] Board had not been formally designated as the unions' bargaining agent did not necessarily mean that it did not function as a representative of the unions so as to qualify as a 'bargaining agent' for purposes of Sunshine Law application." It also held that the trial court "narrowly crafted its remedy to respect the interplay between Sunshine Law principles and federal mediation."

The First District Court of Appeal concluded its opinion with a strong statement in favor of Florida's Sunshine Law: "By holding closed-door negotiations that resulted in changes to public employees' pension benefits, the appellants ignored an important party who also had the right to be in the room – the public." By separate order, the court awarded Denton his appellate attorney's fees.

Frank Denton was represented by George Gabel, Tim Conner, and Jennifer Mansfield, partners in Holland & Knight's Jacksonville office.

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Federal FOIA Reform Bill Fails in Last Days of Congress

Bipartisan Support Gives Hope for Reintroduction in 2015

By Jeff Kosseff

This year, both chambers of Congress passed similar legislation to reform the Freedom of Information Act, but they did not reconcile the bills before Congress adjourned for the year. Their failure to reach a final agreement means that FOIA reform will not occur in 2014. Any effort to take similar steps in 2015 will have to start from scratch in the new Congress, a process that will add significant time and effort to the legislative process.

In February, the House passed H.R. 1211, the FOIA Oversight and Implementation Act of 2014, in a 410-0 vote. The Senate bill, S.2520, the FOIA Improvement Act of 2014, faced a tougher road. Sen. Jay Rockefeller, D-W.V., had placed a hold on the bill, arguing that the legislation would make it more difficult for federal agency attorneys to enforce laws. Rockefeller lifted his hold days in early December, and the bill received unanimous consent.

But Congress adjourned before both chambers were able to reconcile the bills for final passage. Although the bills are similar, members of the House and Senate disagreed on the impacts of each bill on the federal budget, among other issues.

When the new Congress convenes in January, both the House and Senate will need to start over and propose new FOIA reform bills. In light of the strong bipartisan support that both bills received this year, there is a reasonable chance that the legislation will be enacted in the next Congress. Sen. Chuck Grassley, R-Iowa, who will chair the Judiciary Committee next month, is a co-sponsor of the Senate bill.

Although the House and Senate bills have some differences, they contain many similar reforms to FOIA. Each bill is aimed at increasing the availability of government records to the public and improving the FOIA request process.

Both the House and Senate bills contain provisions that address the following issues:

Presumption of Openness: In his first full day in office, President Obama issued a memorandum instructing all federal agencies to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." Both the House and Senate bills would codify this presumption into law by prohibiting agencies from withholding information requested under FOIA unless the agency "reasonably foresees" that disclosing the information would harm an interest protected by an existing FOIA exemption or is prohibited by law.

In light of the strong bipartisan support that both bills received this year, there is a reasonable chance that the legislation will be enacted in the next Congress.

Independent Reports from OGIS: In 2007, Congress created the Office of Government Information Services (OGIS) within the National Archives and Records Administration to assist FOIA requesters. Both the House and Senate bills allow OGIS to submit reports and testimony to Congress without review from other officials, such as the Archivist of the United States and Director of Office and Management and Budget. The bills also require agencies to notify requesters of the right to seek dispute resolution services from OGIS or the agencies' FOIA Public Liaisons.

Improvements to agency FOIA reports: Both bills aim to increase the utility of agencies' annual FOIA reports. The legislation would require agencies to report the number of times that documents have been

(Continued on page 34)

(Continued from page 33)

exempted records under FOIA's law enforcement exception, the number of times that the agencies engaged in dispute resolution with OGIS or the agencies' FOIA Public Liaisons, and the number of records that were made available in an electronic, publicly accessible format.

Fee reforms: The House and Senate bills would prohibit agencies from assessing search and duplication fees if the agencies failed to comply with certain requirements for notice and time limits, though the bills contain somewhat different frameworks for this reform.

Making Records Electronically Accessible: Both bills would require agencies to provide certain records, including final agency opinions, orders, policy statements, and administrative staff manuals, in electronic format.

Chief FOIA Officer Council. Both bills would establish a Chief FOIA Officer Council to recommend improvements in FOIA compliance.

Agency review of FOIA regulations: Both bills would require agencies to annually review their regulations and compliance with FOIA.

The bills do contain some differences. For instance, the Senate bill would amend the FOIA exception that exempts inter-agency and intra-agency documents from disclosure if they would be exempt from discovery. The Senate bill would add a sunset provision that limits this exception to records created less than 25 years before the date of the request.

The House bill would require agency Inspectors General to review compliance and make recommendations for improvement. The House bill also would require the Office of Management of Budget to develop a consolidated online FOIA request portal. The bill also would create an Open Government Advisory Committee, appointed by the Archivist of the United States.

Congress's failure to reconcile the two bills has attracted bipartisan criticism. For instance, in an op-ed published in Roll Call, Sean Vitka, the federal policy manager at the Sunlight Foundation, stated that if House Speaker John Boehner and President Obama "truly care about accountable, transparent government, they will take up the FOIA Improvement Act in 2015 and ensure that this time, it passes."

Jeff Kosseff is a media and technology associate at Covington & Burling LLP in Washington, DC.

UPCOMING MLRC EVENTS

MLRC/Southwestern Entertainment and Media Law Conference
January 15, 2015 | Los Angeles, CA

Legal Issues Concerning Hispanic and Latin America Media
March 9, 2014 | Miami, FL

Legal Frontiers in Digital Media
May 14-15, 2015 | Palo Alto, CA

The Sunshine in the Courtroom Act of 2013

House Hearing on Cameras in Court Bill

By Mickey H. Osterreicher

On December 3, 2014 a hearing was held in front of the House Subcommittee on Courts, Intellectual Property, and the Internet regarding H.R. 917, The Sunshine in the Courtroom Act of 2013. The bill would permit electronic coverage of court proceedings in federal court including the U.S. Supreme Court and I was asked to testify in support of that bill.

House Judiciary Committee Chairman Bob Goodlatte (R-VA) set the tone for most members, who expressed support for such access. "Proponents of the bill believe that the values of transparency, accountability and education will only be enhanced by expanded public access to our federal courts," he said.

Since 1996, a number of bills have been introduced in Congress with bipartisan support which would require federal courts – the Supreme Court, the circuit and district courts, or all federal courts, depending on the bill – to allow electronic coverage of their proceedings.

Since 1996, a number of bills have been introduced in Congress with bipartisan support which would require federal courts to allow electronic coverage of their proceedings.

During that same time the Judicial Conference of the United States voiced strong opposition to those measures despite positive findings by the Court Administration and Case Management Committee and the Federal Judicial Center after reviewing the results from a three-year (July 1, 1991 to June 30, 1993) pilot program permitting "the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media" in civil cases in six district and two appellate courts. See Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals (1994))

The latest of these bills (H.R. 917) would authorize the presiding judge of a federal appellate district court to "at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." It would also allow the Judicial Conference of the United States to "promulgate guidelines with respect to the management and administration of photographing, recording, broadcasting, or televising" of such proceedings.

With widespread bipartisan support it was no surprise that testimony came down favoring such access while the judiciary continued to oppose it. The bill's sponsor, Rep. Steve King (D-IA), testified first by stating he believes "Congress has both the Constitutional authority to act and the duty to use that authority to expand public access to our courts." Rep. Zoe Lofgren (D-CA) expanded on that notion in her testimony by referencing the origins of the bill's title. "Over 100 years ago, Louis Brandeis wrote that 'sunlight is said to be the best of disinfectants.' These now famous words reflect the belief that openness and transparency are key components of a functioning democracy. This is a nation founded on the concept of government accountability, and passage of this bill would ensure that our judicial system is aiming to uphold these ideals," she said.

Opposing the bill was Judge Julie Robinson of the U.S. District Court for Kansas, speaking on behalf of the Judicial Conference of the United States. Accordingly, "the Conference has taken the position that permitting cameras in the federal trial courts is not in the best interests of justice because doing so has the potential to impair substantially the fundamental right of citizens to a fair trial" she said, while also noting that the Conference does not speak for the U.S. Supreme Court, which prescribes its own rules under 28 USC 2071.

(Continued on page 36)

(Continued from page 35)

I testified in support of the bill on behalf of the National Press Photographers Association, noting, "in 1991 the Judicial Conference of the United States commenced a three-year pilot program permitting 'the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media.' At the conclusion of that program and despite favorable reports the Conference declined to approve the continuation of such coverage and the program ended in 1994. In 2010 the Judicial Conference authorized a second pilot project. This time it would be court personnel and not the media operating the equipment."

It is those new guidelines that specifically state, "the media or its representatives will not be permitted to create recordings of courtroom proceedings." See Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts at 5

What is being permitted during this now, four year (it was extended another year with the hope "that the longer period of time will provide additional data for evaluating whether the current policies about cameras in the courtroom could be modified") pilot program is the recording of civil proceedings in certain participating federal courts. That program, now scheduled to end next July, is in effect in 14 district courts around the country. See Judicial Conference Extends Pilot Project To Evaluate Cameras In The Federal District Courts.

Under current guidelines the judges volunteering for the pilot must follow already adopted guidelines that, among other things stated that, "pilot recordings will not be simulcast, but will be made available as soon as possible on the US Courts and local participating court websites at the court's discretion." Judicial Conference Committee Guidelines at 6. The presiding judge makes the case selection which also requires the consent of all parties "of each proceeding in a case." Id. at 2. The judge would also have the ability to instantly stop a recording if necessary. The guidelines also recommended three to four inconspicuously fix-placed cameras focused "on the judge, the witness, the lawyers' podium, and/or counsel tables," along with "a feed from the electronic evidence presentation system." Additionally "the recording equipment should transmit the camera inputs to a switcher that incorporates them onto one screen." Unfortunately it was also stated at the outset of the pilot that funding for equipment or technical support would be limited and the courts were discouraged "from purchasing new equipment." Id. at 3.

Judge Robinson also expressed concerns that "allowing camera coverage of trials could interfere with a citizen's right to a fair trial by affecting witness behavior" and might "create privacy concerns for countless numbers of persons . . . about whom very personal information may be revealed."

This issue will continue to be debated for many years to come and it will be interesting to see what position the Judicial Conference takes regarding such coverage after the conclusion of the pilot program.

But many on the subcommittee argued that court proceedings records are public to be found by visiting the courthouse or court's website. "If someone wants to do them harm, all they have to do is go and get the transcript," said Rep. Ted Deutch (D-FL). Rep. David Cicilline (D-RI.) also noted that witnesses might "testify more truthfully" if they knew that a wider audience (than those in the courtroom) were listening.

Almost all the members of the subcommittee spoke in favor of allowing electronic coverage. Rep. Ted Poe (R-TX), a former prosecutor and judge adding, "the mystery of the courthouse still exists. The more the public sees, the more it understands."

Rebutting the Judicial Conference's objections as "arbitrary and speculative" I asserted that they did not outweigh the "strong societal interest in public access to the courts" and that electronic coverage of federal court proceedings "will bring transparency to the system, provide increased accountability from litigants, judges

(Continued on page 37)

(Continued from page 36)

and the press and educate citizens about the judicial process" and assure the public that judicial proceedings are conducted fairly and that government systems are working correctly.

It appears that this issue will continue to be debated for many years to come and it will be interesting to see what position the Judicial Conference takes regarding such coverage after the conclusion of the pilot program. It will also be worth following how effective Sen. Chuck Grassley (R-IA), the incoming chairman of the Senate Judiciary Committee will be in pushing for cameras in the Supreme Court despite the longstanding opposition by its justices.

Mickey H. Osterreicher is the general counsel for the National Press Photographers Association (NPPA).

DCS Annual Meeting Reviews Year's Accomplishments and Plans for 2015

The Defense Counsel Section's Annual Meeting was held on Thursday, November 13, 2014 at Proskauer Rose.

DCS President Louis P. Petrich called the meeting to order and gave a status report on membership. As of October 31, 2014, the DCS was comprised of 197 full member firms and 11 associate member firms, including firms in the UK, Canada, Germany, and New Zealand. He highlighted the Next Generation Committee, the newest DCS committee, for media lawyers in the first ten years of practice.

He thanked the members of DCS for all their work on publications, including the 50-State Surveys, Bulletins, and Committee Reports. He then introduced Susan E. Weiner, the Chair of the MLRC Board of Directors. Susan Weiner thanked Louis for his service and thanked DCS for all its support.

Election of Treasurer

DCS by-laws provide that every year, Executive Committee officers advance to the next highest office, with the President stepping down. This year marked the end of Louis Petrich's tenure as DCS president. He will serve as Emeritus during the upcoming year. In 2015, Sam Fifer will serve as DCS President; Chuck Tobin, Vice President; and Laura Lee Prather, Secretary.

The DCS nominated and approved John C. Greiner of Graydon Head to join the Executive Committee as Treasurer. Committee Chairs then presented reports on this year's accomplishments and plans for 2015.

Committee Reports

The MLRC Committees presented the following reports:

(Continued on page 39)

(Continued from page 38)

Advertising & Commercial Speech

Co-Chairs: Brendan Healey and Julie Xanders

Vice-Chair: Michelle Doolin

In 2014, the committee leadership (Steven Baron, Brendan Healey and Julie Xanders) 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 2014 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Presenters and topics included: Chuck Washburn, partner at Manatt, Phelps & Phillips LLP, who presented "Spotlight on Recurring Payments: Requirements for Consumer Autopay Programs"; Michelle Doolin and Darcie Tilley from Cooley, who spoke on plaintiff's attorneys' attempts to leverage under-litigated statutes with complex disclosure requirements into class actions against media defendants, focusing on California's Shine the Light Law and Automatic Renewal Law; and Sally Buckman, a partner at Lerman Senter, who recently spoke on advertising of alcohol, e-cigarettes, and marijuana. We also intend to schedule a presentation in November discussing trends in advertising of gambling, particularly sports gambling and one-day or one-week fantasy leagues.

In 2015, we intend to keep our members abreast of new legal and regulatory developments relating to social media and behavioral advertising. We hope to have presentations every other month, and we also intend to update the "Checklist on Advertising Content." The update, consistent with two presentations in late 2014, would focus on advertising of marijuana (and related services), e-cigarettes, guns, hard liquor, and gambling. 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.

ALI Task Force

Chair: Thomas S. Leatherbury

The ALI continues to be very quiet with respect to issues affecting the media. The working group on the Restatement of Torts (Third) is not now considering those portions of the Restatement on libel and privacy. Moreover, the working group on Privacy appears to be focusing on data privacy and consumer privacy rather than privacy issues that regularly crop up in representing media companies and journalists. If you are interested in ALI membership, please let me know, as I would be pleased to walk you through the process.

(Continued on page 40)

(Continued from page 39)

California Chapter

Co-Chairs: Allison Brehm, Jeff Glasser, and David Snyder

The MLRC California Chapter is in the midst of another engaging year dissecting the latest developments in intellectual property and First Amendment law as it pertains to media organizations and entertainment companies.

The Chapter's first meeting, held on March 12 at Sheppard Mullin's Century City offices, explored when and how companies can avoid copyright termination by agreement, and what works are exempt. The panel addressed how courts resolved recent disputes as to copyright termination involving Superman, John Steinbeck, and Lassie. Louis Petrich of Leopold, Petrich & Smith, P.C.; Dan Cooper of Paramount Pictures; and Ed Weiman of Kelley Drye headlined the panel.

The second meeting, held on June 18 in the Community Room of the Los Angeles Times, looked at copyright and First Amendment issues in the time of social media. The panel advised on best practices for repurposing content, including retweeting content and using photos and videos from social media sites. The panel dissected the first libel trial involving Tweets (involving Courtney Love) as well as the risks for media and entertainment companies posed by the Morel v. AFP decision. Adam Hime of Viacom, Alonzo Wickers and Jonathan Segal of Davis Wright Tremaine, and Lincoln Bandlow of Lathrop & Gage led the discussion.

The third meeting, held on September 24 at Kelley Drye's Century City offices, focused on legal issues posed by the use of drones, also known as unmanned aircraft systems (UAS), for newsgathering or entertainment purposes. The panel discussed the FAA's current ban on drone use for commercial purposes and updated the audience on the status of the FAA's anticipated move to allow some drone use by media and entertainment companies. The panel also reviewed the potential conflict between First and Fourth Amendment values, looking at how media and entertainment companies can collect information and create content with drones pursuant to their First Amendment rights without compromising Fourth Amendment and other privacy rights. Lauren Reamy of the Motion Picture Association of America, Peter Bibring of the ACLU of Southern California, and Michael Epstein of Southwestern Law School served as the panel for the meeting.

The fourth meeting in December will cover developments in California anti-SLAPP law in 2014.

Employment Law Committee

Co-Chairs: Tanya Menton and Tom Wilson

In its quarterly meetings this year, the Employment Committee had discussions on several topics pertaining to media employers including the following: (1) The use of anti-SLAPP statutes as a defense to employment discrimination claims; (2) the legal issues related to sending employees into dangerous

(Continued on page 41)

(Continued from page 40)

circumstances either in the United States or overseas; (3) the application of the professional exemption to media employees under the Fair Labor Standards Act; and (4) non-competition agreements in the media industry. The Committee also sponsored a boutique presentation at the annual MLRC meeting in September. During the year, the Committee contacted a number of media companies to encourage membership on the Committee. These recruitment efforts are ongoing. The Committee published a paper, "Non-Competes in the Broadcast Industry." Currently, the Employment Committee is working on an addition to its prior paper related to sending media employees in harm's way with an effort to update it for recent events and to add more information pertaining to legal issues on the topic in the United States including OSHA guidance.

Entertainment Law Committee

Co-Chairs: David Cohen and Brad Ellis

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 members. To that end, the Committee meets telephonically for an hour the first Wednesday of every month. In preparation for each meeting, the Committee co-chairs review a variety of publications, assembling approximately 15 items of interest to present to the Committee for discussion. About a week ahead of each meeting, the co-chairs circulate a list of these items to the Committee, from which members volunteer to present an item or items. A final meeting agenda 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.

Often, we revisit particular cases as developments warrant. Some of the specific topics and cases discussed this past year include: the multiple litigations brought in connection with the Aereo service, the right of publicity as it relates to college athletes and the use of identifiable persons in video games, contract disputes in the entertainment sphere and timely instances of anti-SLAPP litigation. The monthly meetings provide a forum for our members to keep abreast of current developments, share insights and debate potential arguments that best advance the interests of our clients.

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 15-20 Committee members actively participate on each month's call. The monthly calls create opportunities for broad participation by committee members and fostering more in depth analysis and discussion, and getting Committee members better acquainted with each other.

Ethics Committee

Co-Chairs: Leonard M. Niehoff and Nicole Hyland

During 2014, the Ethics Committee continued to publish Ethics Review columns, although considerably fewer than in 2013. The current chair of the committee, Len Niehoff, is stepping down and

(Continued on page 42)

(Continued from page 41)

a new chair is currently being sought. It is Len's recommendation that the role and responsibility of the committee be changed going forward, perhaps moving it away from the routine publication of ethics columns and toward occasional summaries of major court and disciplinary body decisions and ABA ethics opinions as they arise. Len also suggests that the role of the committee in connection with planning the ethics sessions of the mlrc conference be evaluated and formalized.

International Media Law Committee

Co-Chairs: Robert D. Balin, Gillian Phillips, and Julie Ford

This year's Committee calls have provided invaluable insight into media law issues across the world, with developments in Europe dominating discussions. We have kept a close eye on the impact of recent decisions of the European Court of Human Rights on libel and privacy. The efforts of the MLRC (and other organizations) has succeeded in persuading the Grand Chamber of the ECHR to review a controversial ruling (Delfi v. Estonia) that a news portal could be liable for defamatory comments posted by third parties. We discussed the fallout from the European Court of Justice's right to be forgotten decision in the Google Spain case and, related to this, what the proposed reforms/changes to the EU Data Protection Directive portend for the future. These, and other ECJ and ECHR cases, gave us an opportunity to hear from a variety of outside experts.

Co-Chair Julie Ford reviewing the Committee's 2014 projects

With a view to retaining a balanced view of developments across the globe, this year also saw a dedicated insight session on media law and free expression issues in Africa. Our guest speakers (who included the Special Rapporteur on Freedom of Expression for the African Commission on Human and Peoples' Rights) brought us up to speed with the ongoing efforts (by way of campaigns and cases) to decriminalize libel in Africa. The year also saw us consider the Brazilian ban on unauthorized biographies, the Philippine's Cybercrimes Prevention Act 2012 (which extends criminal libel to online communications), and the jurisdictional overreach of the Supreme Court of British Columbia (which ordered California-based Google to remove search results from its worldwide index).

In the coming year, our Committee plans to continue our regular conference call meetings, taking advantage of the expertise of our own international membership and continuing our conversations with outside experts to take us well beyond the usual updates. The impact of the Google Spain/right to be forgotten decision will continue to be felt across Europe and we will keep this high on the agenda. An insight session on media issues in India (which we hope will give our members an insight into the risks

(Continued on page 43)

(Continued from page 42)

they may face in that jurisdiction) is also planned. We will also review the use of drones and other (legal) covert/overt electronic newsgathering tools, and the commercial implications of Cloud computing. Last, our Co-Chair Rob Balin, with assistance from Dave Heller, is putting together a regional European media law conference in Paris to be co-sponsored by the MLRC and the International Bar Association.

Internet Law Committee

Co-Chairs: Katherine Surprenant and Jeremy Mishkin

The Internet Committee continued its quarterly conference call meetings this year to discuss recent developments relating to many of the topics covered in our "Practically Pocket-Sized Internet Law Treatise." We have used these meetings for substantive presentations by a Committee member followed by question/answer/ discussion. For example, recent presentations have addressed challenges faced by Internet companies in complying with the laws of multiple sovereigns, highlighting the CJEU's decision requiring Google to remove search engine results under the EU's "right to be forgotten," and a U.S. Federal Court's order compelling Microsoft to produce emails on servers residing in Ireland. Throughout the year, Committee members have been circulating summaries of new court decisions and other notable developments, which provide the twofold benefit of timely updates to the group and a ready source of information for the next Treatise update. Some of the topics that arise frequently are the scope of ISP and website immunity under Section 230, the application and interpretation of the Computer Fraud and Abuse Act, particularly with respect to the question of what constitutes "authorized access" to a computer, and the explosive epidemic of data privacy breaches.

The Committee is in the process of preparing a fully-updated Treatise in 2015 that we hope will be useful to MLRC constituents. We have refreshed the list of topics, removing some that were no longer relevant, and adding new important areas such as "blogger as journalist," "Internet jurisdiction," and "Net Neutrality."

Legislative Affairs Committee

Co-Chairs: Laurie A. Babinski and James A. McLaughlin

This year the Legislative Committee has tracked federal legislation including the Free Flow of Information Act of 2013 (S. 987/H.R. 1962); the Cyber Intelligence Sharing and Protection Act ("CISPA") (H.R. 624); the PETITION Act (federal anti-SLAPP statute); the Electronic Communications Privacy Act ("ECPA") Amendments Act of 2013 (S. 607); and the FOIA Act (H.R. 1211). We hope for the next year to broaden our tracking of more "traditional" media-related legislation to include legislation and regulatory efforts regarding drones and electronic privacy, among others. We also plan to contribute more articles to the MediaLawLetter and clips to MediaLawDaily and to grow our committee membership. One key effort in both of those goals will be to assign categories or pieces of legislation to committee members for more dedicated and manageable tracking. Joining our committee as a vice chair

(Continued on page 44)

(Continued from page 43)

this year will be Jeff Kosseff of Covington & Burling, who will eventually replace Jim McLaughlin after his many years of service as co-chair.

Litigation Committee

Co-Chairs: Robert C. Clothier and James A. Hemphill

The Litigation Committee -- successor to the Pre-Trial and Trial Committees – released in early 2014 the updated Issue Checklist for Motions to Dismiss and Summary Judgment in a Defamation Action, which was last updated in 2004, to include issues relating to publications in an online world.

The Litigation Committee continues to focus its efforts on two substantial white papers. One white paper – the work of our Expert Database Subcommittee led by Doug Pierce -- is creating a national roster of experts used in libel cases involving the media. We are finalizing the updated roster and expect to have it available to the membership by the end of the year. The other white paper is focusing on settlement agreements in libel cases and intends to create a white paper containing practical tips and suggested template provisions. The Settlement Agreement Subcommittee led by Lizzie Seidlin-Bernstein and Brian Sher is spearheading this effort. They have made great progress gathering sample settlement agreements from media lawyers around the country (and are still taking samples). We hope to finish this white paper in 2015.

We value all assistance from our members on these two projects and welcome any suggestions from others as to white papers, roadmaps, checklists or other projects that might be of interest to the MLRC membership.

Media Copyright and Trademark Committee

Co-Chairs: Maya Windholz and Rebecca Sanhueza

2014 was the first full year of meetings and programming for the Copyright and Trademark Committee, which was established in 2013 to keep the MLRC membership current on cases and trends in the areas of copyright and trademark law, particularly for those who do not practice in these specialties on a day-to-day basis. The Committee holds one-hour meetings every other month, by phone, open to MLRC members. A typical meeting agenda includes two or three brief presentations, followed by discussion, regarding recent key cases in the field or other legal developments of interest to news and entertainment lawyers. Discussion topics in 2014 included topics such as: copyright issues concerning news video clipping services, "intent to use" trademark registrations, Michael Jordan's claim for trademark rights in his name and, of course, the Aereo litigation. In addition to leading these meetings, the Committee circulates a bi-monthly email, prepared by a volunteer Committee member, outlining other "recent developments" in the field, generally with links and cites to recent cases of interest or relevant articles. For 2015, we plan to follow essentially the same format for meetings and other communications, with one enhancement – we will plan a few more discussions of "hypotheticals," to encourage participation among members (all of which tend to have business interests on both sides of these IP issues) and to hear more varied perspectives on the legal challenges shared by members.

(Continued on page 45)

(Continued from page 44)

MediaLawLetter Committee
Co-Chairs: Russell Hickey and Michael Berry

The MediaLawLetter Committee this year continued its principal work -- assisting Dave Heller and the MLRC staff with identifying and preparing content for the monthly MediaLawLetter and providing advice as needed about the MediaLawDaily. The Committee has developed a quarterly column written by in-house counsel called "A View From The Inside." The column is designed to offer in-house attorneys' insights on a wide range of topics. This year, we have published three columns, with a fourth soon to be published. In the coming year, the Committee will be continuing to work on improving the MediaLawLetter and MediaLawDaily, both of which serve as important resources to MLRC members.

MLRC Membership Committee
Co-Chairs: Thomas Burke, Timothy Conner

The Membership Committee met several times over the course of the past year to discuss efforts to increase membership. The Committee explored the various benefits of membership in MLRC, how best to communicate that to prospective members, and how to encourage current members to recommend potential new members. The Committee is considering circulating a short letter to the entire membership to encourage them to recruit new members and that outlines the benefits of membership that can be used in recruitment. The leadership of the Membership Committee is changing in 2015 and new leaders will be announced soon.

Model Shield Law Committee
Chair: Leita Walker

The Model Shield Law Task Force has continued to monitor developments related to federal and state shield laws and is working toward completion of a revised version of the Catalog of Subpoena Decision (first published in March 2010). In the coming months the task force will consider which new projects to undertake.

Newsgathering Committee
Co-Chairs: William L. Chapman and Cynthia L. Counts
Vice-Chair: Mark Flores

The newsgathering committee began the year by suggesting ways in which the Internet could give the public further access to federal trials and ended the year examining expungement statutes that restrict access to criminal records. The committee circulated and approved for further distribution an article and

(Continued on page 46)

(Continued from page 45)

proposed rule change that would require attorneys to submit their trial exhibits for publication on online dockets, allowing easy access to the public. The proposed rule change has been submitted to Kentucky as well as New Hampshire for consideration. The newsgathering committee has also recently completed a 50 state survey project of state expungement laws. The final updates are being made, and the newsgathering committee plans to post this chart on the MLRC website and update it annually. Expungement laws vary in their details, but, as a rule, allow those convicted of crimes to have these records of their crimes permanently removed from court records which creates questions surrounding defenses to defamation as well as complications for background checks and other issues.

Over the next year, the newsgathering committee plans to update the panic book and continue to hold bi-monthly meetings discussing current issues facing news gatherers including issues like drones and forest service photo restrictions.

Next Generation Media Lawyers Committee

Co-Chairs: Drew Shenkman, Rachel Strom, and Christine Walz

This year the MLRC formed the Next Generation Media Lawyers Committee, which is primarily targeted to those within the first ten years of practice. And, the committee has gotten off to a great – and active – start. The Committee already has over 100 members. To kick things off, we hosted drinks at MLRC's Virginia conference, which was attended by more than 60 MLRC members. The drinks were so successful that MLRC had decided to keep the drinks in its budget for future Virginia conferences. In October, the Committee hosted its first webinar on digital security in newsgathering, which had nearly 50 attendees, with others tuning in to watch the recording. In 2015, the Committee plans to keep the activities coming – with more social events and topic-related calls/webinars. We will also work on identifying speaking and writing opportunities for our members – hoping to give our members a greater audience.

Pre-Publication / Pre-Broadcast Committee

Co-Chairs: Shannon Zmud Teicher and Dana Rosen
Vice-Chair: Lisa Zycherman

In its monthly conference calls, the committee had speakers who led discussions on a variety of legal issues and current cases, such as: the summary judgment decision in *Mitre Sports International v. HBO* involving allegations that HBO's distribution of a portion of the "Real Sports with Bryan Gumbel" entitled "Children of Industry" defamed the plaintiff;

Stepanov v. Dow Jones, the first NY appellate decision adopting the *Chapin* standard, which requires plaintiffs to show that an article intends or endorses the alleged defamatory implication;

Cruise v Bauer, which included a discussion on whether a cover headline "Abandoned by Daddy" is false and defamatory when it was admitted that Tom Cruise had not seen his six year old daughter for months following his divorce from Katie Holmes.

(Continued on page 47)

(Continued from page 46)

The committee is also working on two pending projects regarding Occupations and Public Figure Status and the Official Report Privilege (anticipated publication in Q1 2015).

State Legislative Affairs Committee

Co-Chairs: Elizabeth Allen and Robin Luce Herrmann

The MLRC State Legislative Committee is now in its fourth year of existence. During the last year, the State Legislative Committee continued to work with more than thirty-five of the nation's lead government relations attorneys who represent the First Amendment interests in more than half of the jurisdictions in the United States. We have updated Committee membership by ensuring states are typically only represented by a single member and recruiting for unrepresented states and interested stakeholders (e.g., magazine publishers). We have identified and tracked legislative trends impacting the media and have exchanged ideas for how 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. We are also maintaining the Committee's website page and enhanced it in the last year.

Some of the areas of legislation we are working on include: "paparazzi", drone, "ag-gag", anti-SLAPP, open government, public notice, right of publicity, and more. Our committee has set up a webpage on the MLRC's website with draft legislation, current model bills, existing statutes, talking points and articles to assist the entire MLRC membership.

We typically meet once a month during the legislative session and recess for the summer. This summer was so busy, however, that we convened a special call in August. 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. This year we have begun a monthly update on the status of previously discussed legislation. Our goals for the upcoming year include soliciting members from the government relations departments of more on-line organizations as well as some of the more strategic states that are not currently represented on the committee. In addition, we will be naming a Vice-Chair this upcoming year. We will also continue to work on expanding First Amendment protections through adopting and broadening anti-SLAPP and retraction legislation and preventing encroachment of First Amendment protections through expanding open government laws and preserving public notice.

The last committee meeting was a great, and fairly typical of the variety of issues we discuss every month. We covered anti-Slapp, paparazzi, stalking, "revenge porn" and drone bills pending in various states. We are continually seeking ways to build coalitions and identify persuasive arguments to legislatures.