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MLRC Media Law Resource Center

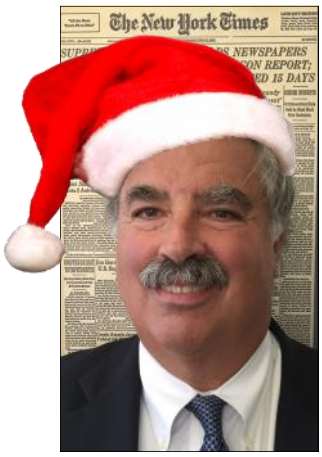
MEDIALAWLETTER

Reporting Developments Through December 30, 2019

FIRST AMENDMENT

From the Executive Director's Desk

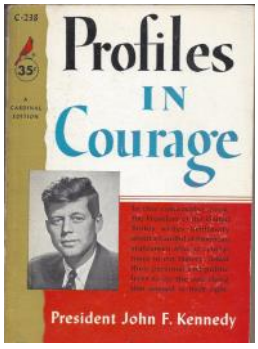
Santa's Gift List for Media Players Naughty & Nice



By George Freeman

To Donald Trump – Bobblehead dolls of Robespierre, Goebbels, Stalin, Lenin and Mao, all of whom called their foes "the enemy of the people," as he terms the press

To Mitch McConnell and Lindsey Graham – JFK's Profiles in Courage, for some out-of-the-box reading



To Ruth Bader Ginsberg – At least one year and twenty days of good health

To Justice Breyer – Tea and crumpets, to thank him for his MLRC London Conference appearance

To Fake News – An undistinguished burial

To Donald Trump – The Bill of Rights, since he obviously lost the copy we gifted to him last year

To Donald Trump – The Constitution, with the first three Articles in different colors so that he can learn about the concept of Separation of Powers

To Fact Checkers – Computers with greater capacity, since the President is at over 10,000 lies and/or inaccuracies in his three years as President

To Justice Roberts – A gavel to run a fair impeachment trial

To Clarence Thomas – Justice Brennan's opinion in *Times v. Sullivan*, which he can put under his pillow (with his Coke can) after reading before bed

To Justice Kavanaugh – A 2020 calendar, to replace his beer-stained 1982 one

To Rudy Giuliani – Grimms' Fairy Tales, so he can get ideas to continue to make stuff up

To Donald Trump – Pinocchio's nose

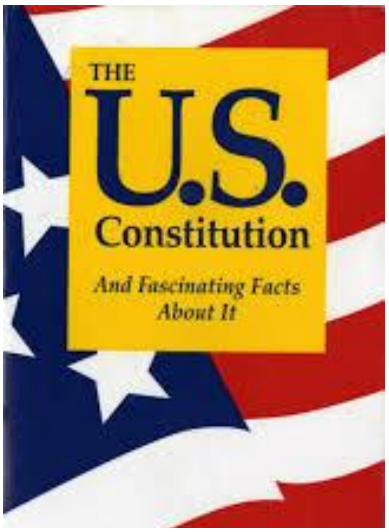
To the Press – Warm mittens and parkas, for spending the next two months tromping through Iowa and New Hampshire

To Maria Ressa – Not guilty verdicts in the many trumped up cases against her, so that she can spend her unbridled energy on important journalism in the Philippines

To Future Debate Moderators – A question about the candidates' belief in the First Amendment

To Elon Musk – A slower Twitter finger

To Nicholas Sandmann, the Covington high school plaintiff – A new MAGA cap and drum lessons



To Bill Barr – A SAT manual on how to precis the meaning of passages, after he failed dismally at it in summarizing the Mueller Report

To Hallie Jackson, Maggie Haberman, Susan Zirinsky, Jenna Johnson and Jennifer Epstein – As thanks for their great performance at our Annual Dinner, a broken alarm clock, so they can get some sleep on the campaign trail

To Melania Trump – A job as an online content moderator, preferably with Twitter

To Kellyanne and George Conway – Either new spouses or new political views

To Devin Nunes – More Anti-SLAPP statutes, to block his ridiculous libel cases

To Alan Dershowitz – A mute button

(Continued from page 4)

To Sarah Huckabee Sanders, Sean Spicer and Anthony Scaramucci – The right to be forgotten

To Section 230 – Another year of existence, despite simplistic attempts to "fix" social media

To The New York Times and The Washington Post – Congratulations on great journalism, but a post-Trump business plan

To Bill Barr – A copy of his predecessor John Mitchell's memoir, aka his rap sheet

To CNN, Fox News and MSNBC – A continuation of the Trump reign and a Democratic primary battle that goes to the Convention

To Mike Pence – Photos of him at the 2005 MLRC Dinner speaking out in favor of a federal shield law, when he was in favor of the press

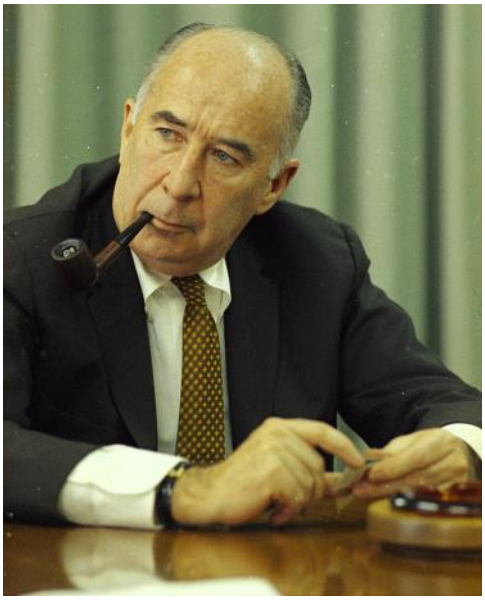
To College Administrators – Backbones, to defend controversial speech on campus

To our members traveling this holiday season – No suspicionless searches of your digital devices at the airport

To Truth – A comeback

To the MLRC Staff – My heartfelt thanks for all your work, effort and dedication in producing Daily Reports, LawLetters, Bulletins, 50-State Surveys, Conferences and Committee work every day, and without which we would not be able to give the benefits we do – professional, intellectual, social and fun – to our members

And, finally, I wish our loyal readers and members a very happy and healthy new year.



Top: Nixon's attorney general John Mitchell, whose rap sheet is bequeathed to Bill Barr. Below: Rep. Mike Pence at the 2005 MLRC Dinner, speaking in favor of a federal shield law

Supreme Court Allows Defamation Suit by Climate Professor to Proceed, Over Alito's Dissent

By Dori Hanswirth and Jesse Feitel

On November 25, 2019, the United States Supreme Court announced that it would not review a 2016 decision by the D.C. Court of Appeals denying an anti-SLAPP motion to dismiss a defamation lawsuit by Pennsylvania State University Professor Michael Mann.

Professor Mann sued after two columnists published articles questioning the quality and veracity of his research on climate change. Despite the Petitioners' efforts to seek high court review, which were backed by several notable amicus briefs—including one filed on behalf of 21 sitting U.S. Senators and another filed on behalf of former U.S. Attorneys General Edwin Meese III, Michael B. Mukasey, and Jeff Sessions—the lawsuit now returns to the D.C. Superior Court over Justice Alito's vigorous dissent.

In his dissent, Justice Alito suggested that the Court's decision not to hear this appeal is inconsistent with its recent enforcement of the First Amendment in other cases where the challenged speech was less critical to "our Nation's system of self-government" than the debate over climate change at issue here.

The articles "employed pungent language" and accused Mann of committing "misconduct" and "wrong-doing," and of engaging in the "manipulation" and "tortur[e]" of data.

Background

Professor Mann is a well-known climate scientist who, along with two other colleagues, is responsible for creating the prominent "hockey stick" climate change graph, which illustrates a small drop in global temperatures between the years 1050 and 1900, followed by a sharp rise in temperature readings over the last century. Because only limited historical temperature data is available during those earlier years, Mann and his team extrapolated global temperatures from past centuries by referencing growth rings of ancient trees and other objects found in nature. The hockey stick graph is often cited as proof that human activity has led to global warming. The quality of Mann's work on the hockey stick graph and the underlying historical data used to create the graph has been the subject of controversy, particularly following the release of thousands of Mann's emails in 2009, which some argued included proof that Mann had manipulated historical climate data used in the graph (this claim was later rejected following an investigation by the U.S. Department of Commerce and the U.S. Environmental Protection Agency).

In 2012, two columnists published articles criticizing the accuracy of the hockey stick graph and the methodology underlying Mann's scientific research. The articles "employed pungent

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language" and accused Mann of committing "misconduct" and "wrong-doing," and of engaging in the "manipulation" and "tortur[e]" of data. One article even observed that "Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in service of politicized science that could have dire consequences for the nation and planet."

Mann filed a defamation suit in D.C. Superior Court against the columnists and the publications where these articles were posted, and the Petitioners moved below to dismiss Mann's complaint pursuant to the D.C. anti-SLAPP statute. The D.C. Superior Court denied that motion, and the D.C. Court of Appeals affirmed the Superior Court's order. *See* 150 A.3d 1213, 45 Media L. Rep. 1419 (D.C. 2016), *as amended* (Dec. 13, 2018). After the Petitioners moved for rehearing *en banc* before the D.C. Court of Appeals, which was denied in March 2019, they turned to the high court for review. On November 25, 2019, the Supreme Court issued a short order denying the petitions for certiorari.

Justice Alito's Dissent

Justice Alito, the sole justice to dissent from the Court's November 25 order, wrote that the D.C. Court of Appeals' decision goes "to the very heart of the constitutional guarantee of freedom of speech and freedom of the press: the protection afforded to journalists and others who use harsh language in criticizing opposing advocacy on one of the most important public issues of the day." In reviewing the two questions presented on appeal, Justice Alito questioned why the Court declined to hear the Petitioners' appeal when the Court in recent years has accepted appeals in order to confirm that statements involving less politically controversial topics were protected by the First Amendment, including an effort to register a trademark in the word FUCT and a lie someone told about being awarded a Congressional Medal of Honor.

Justice Alito wrote that the D.C. Court of Appeals' decision goes "to the very heart of the constitutional guarantee of freedom of speech and freedom of the press.

"Provably False": Question of Fact, or Question of Law?

First, Justice Alito considered whether, in a defamation action, the judge or the jury should consider if a factual connotation is "provably false" or whether that connotation is protected as opinion. Federal and state courts have not been consistent in determining who should evaluate this critical component of a defamation claim. While federal courts generally hold that this is a question of law for the court to decide, Justice Alito observed that some state courts, including those in Virginia, Massachusetts, and California, have come down differently and decided that whether an ordinary reader would have understood a statement to be a factual assertion is a question of fact that the *jury*, not the court, must decide. In this case, the D.C. Court of Appeals joined those state courts in observing that it was for the jury to decide whether in fact Mann had inaccurately treated the climate data in question.

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Justice Alito wrote that this "split in the decisions of the lower courts . . . deserves a place on our docket" because the question of "whether the courts or juries should decide whether an allegedly defamatory statement can be shown to be untrue" is "delicate and sensitive and has serious implications for the right to freedom of expression." In this case, according to Justice Alito, the D.C. Court of Appeals' decision will effectively require jurors to determine whether the Petitioner's assertions about Mann's use of climate data "can be shown to be factually false," which is a "highly technical" question.

Second, given that climate change is a controversial subject, there is an increased risk in this case in particular that the jury's determination could "be colored by their preconceptions on the matter." According to Justice Alito, "[w]hen allegedly defamatory speech concerns a political or social issue that arouses intense feelings, selecting an impartial jury presents special difficulties." This concern is heightened in cases where the allegedly defamatory speech has been circulated nationally, because then "a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiff's point of view."

First Amendment Protection of Politically or Scientifically Controversial Statements

Next, Justice Alito considered the second question presented, which he suggested "may be even more important" than the first: "[W]hether the First Amendment permits defamation liability for expressing a subjective opinion about a matter of scientific or political controversy." The constitutional guarantees of free speech and freedom of expression serve their "most important role" in cases like this one, where those safeguards are invoked to "protect[] robust and uninhibited debate on important political and social issues." Justice Alito explained that the speech at issue in *Mann* falls close to the line between, on the one hand, a "pungently phrased expression of opinion regarding one of the most hotly debated issues of the day" (protected by the First Amendment) and on the other, "a statement that is worded as an expression of opinion but actually asserts a fact that can be proven in court to be false" (unprotected and actionable). This distinction was elucidated in *Milkovich* v. *Lorain Journal Co.,* 497 U. S. 1 (1990), where the Court provided examples of speech that would fall on either side of the line.

To demonstrate the close nature of this case, Justice Alito referred to one example statement relating to academic debate that the *Milkovich* Court held was protected by the First Amendment: "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." Why did the Court believe the First Amendment would apply to this statement? The *Milkovich* Court, according to Justice Alito, was not clear on this point. Was it because the statement was not particularly specific and therefore could not be proven false? Was it because the Court held a particular view about the way the First Amendment treats statements about scholarly theories? Or was it "something else"? The answer to this question would, perhaps, have a substantive impact on the statements at issue in

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Mann. And, according to Justice Alito, the Court's defamation jurisprudence "would greatly benefit from clarification by this Court."

Finally, Justice Alito suggested that the Court's decision not to hear the appeal in *Mann* is inconsistent with its recent First Amendment jurisprudence, where it has "vigilantly enforc[ed] the Free Speech Clause even when the speech at issue made no great contribution to public debate." Justice Alito cited to several examples over the last decade, including the Court's recent rulings that the First Amendment protected the right of a manufacturer of jeans to register the trademark FUCT and the right of the rock group called "The Slants" to register its name with the U.S. Patent and Trademark Office (*Iancu v. Brunetti*, 588 U. S. ___ (2019); *Matal v. Tam*, 582 U. S. ___ (2017)); and older cases, including the Court's decision that a man's false claim that he had won a Congressional Medal of Honor did not violate the First Amendment (*United States v. Alvarez*, 567 U.S. 709 (2012)).

Alito suggested that the Court's decision not to hear the appeal in *Mann* is inconsistent with its recent First Amendment jurisprudence, where it has "vigilantly enforc [ed] the Free Speech Clause even when the speech at issue made no great contribution to public debate."

Had the speech in those cases been held to be unprotected, according to Justice Alito, "our Nation's system of self-government would not have been seriously threatened." Nevertheless, vigilant enforcement of the First Amendment even in trivial cases is important, because "[i]t can demonstrate that this Court is deadly serious about protecting freedom of speech" and serves as a "promise" that the Court will remain vigilant in "cases involving disfavored speech on important political or social issues." To fulfill that promise, according to Justice Alito, the Court should have granted review of this case, where the challenged speech concerned the science of climate change, which "has staked a place at the very center of this Nation's public discourse."

Justice Alito recognized that the D.C. Court of Appeals' decision arrived at the high court at an interlocutory phase, and that the case may return on a new certiorari petition "if the ultimate outcome below is adverse to [P]etitioners." Nevertheless, according to Justice Alito, the Court's decision not to hear the appeal suggests that it is not "serious about protecting freedom of expression." The defendants now return to the trial court to defend against Mann's defamation complaint, where Justice Alito recognized they are likely "shoulder all the burdens of difficult litigation" and perhaps even "be faced with hefty attorney's fees" before the Supreme Court has another opportunity to weigh in on this dispute.

Dori Hanswirth is a partner at Arnold & Porter and co-leads the firm's Technology, Media and Telecommunications industry group. Jesse Feitel is an associate at Arnold & Porter.

Ohio Court Considers Whether a "Suspect" Is a "Robber"

By Jack Greiner and Darren Ford

The Ohio Supreme Court recently granted relief (although perhaps only temporary) to a Columbus television station when it vacated a court of appeals decision that had revived defamation claims against the station. Anderson v. WBNS-TV, Inc., Slip Opinion No. 2019-Ohio-5196 (Dec. 18, 2019).

At issue in the case, was whether the television station, WBNS-TV, Inc. ("WBNS"), libeled three siblings by publishing law enforcement –provided surveillance camera images of them while stating that the two men depicted in the images (who were as-of-yet unidentified) had "robbed" an 8-year-old girl at gunpoint.

The majority found that the court of appeals had applied an erroneous standard in its decision reversing the trial court's grant of summary judgment, and sent the case back to the court of appeals, without passing on the merits of the plaintiffs' claims. The decision to send the case back to the court of appeals drew criticism from a dissenting justice, who opined that the court should have resolved the case on the merits and affirmed the trial court's original decision disposing dismissing the case on summary judgment.

The events giving rise to this case are familiar to any regular consumer of local news broadcasts.

Background Facts

The events giving rise to this case are familiar to any regular consumer of local news broadcasts. According to the Ohio Supreme Court's opinion, on January 20, 2016, the Columbus Police Department sent an information sheet to WBNS, as well as other media outlets, describing a robbery of a hoverboard from an eight-year-old girl that took place in the parking lot of an indoor waterpark on November 26, 2015.

The information sheet stated that "suspects * * * put a gun to the eight-year-old's head and demanded the hoverboard." The police department's information sheet asked for help identifying three individuals depicted in one of two accompanying photographs, who the information sheet described as people "who may have been involved" in the robbery. The photograph that accompanied the information sheet (taken by a surveillance camera) showed plaintiffs Aaron, Aaronana, and Arron Anderson entering the waterpark where the robbery occurred shortly before the hoverboard robbery occurred, but the image at issue did not show them committing the robbery.

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During its 5:00 a.m. broadcast the next day, WBNS aired a segment during which WBNS employees showed the image of Aaron, Aaronana, and Arron Anderson, while stating that "a 'girl was riding her hoverboard when robbers went up to her, put a gun to her head and took it. Columbus Police say suspects—seen here—took off in a PT cruiser.'" During the next broadcast at 6:00 a.m. the same day, WBNS again broadcast the surveillance camera photo of the three plaintiffs, and WBNS employees stated: "'Columbus Police hope you recognize these two men who robbed an 8-year-old girl at gunpoint!' WBNS also posted the image to their website with the caption: "The suspects put a gun to the 8-year-old girl's head * * *."

The plaintiffs' mother saw the report and immediately took her children to the Columbus police, who determined that none of the three plaintiffs was involved in the robbery. The police then promptly released a statement clearing the plaintiffs of any involvement in the robbery. Upon learning that the police had cleared the three plaintiffs, WBNS removed the photo of the three plaintiffs from their website, and made no additional statement about them.

The plaintiffs asserted several claims against WBNS, including defamation. The gist of the plaintiffs' defamation claims was that by posting the surveillance camera photograph of them, and describing them as the "robbers," rather than "suspects," WBNS libeled them. WBNS sought summary judgment on the defamation claims, arguing that plaintiffs could not establish the fault element of their claims. The trial court agreed, and granted summary judgment against the plaintiffs.

The plaintiffs appealed the trial court's dismissal of the defamation claims to the Ohio Tenth District Court of Appeals, which reversed and remanded those claims for further proceedings. In doing so, the court of appeals held that there was "no question that WBNS defamed some of the [Plaintiffs]" and that a genuine issue of material fact existed as to whether WBNS acted with the requisite degree of fault in publishing the statements at issue. The court of appeals framed the issue as to the fault element as whether

> broadcasting an accusation that the [plaintiffs] were robbers without investigation by WBNS and based on a set of police documents which claimed only that some of the Andersons were suspects is sufficient proof of a violation of a duty of care to allow the lawsuit to survive a motion for summary judgment.

In reaching this holding, the court of appeals asserted that "merely publishing a false, defamatory statement is sufficient to establish a traditional defamation claim."

Ohio Supreme Court Decision

WBNS sought, and the Ohio Supreme Court granted, discretionary review of the court of appeals' decision. In its opinion, the majority confined its analysis to whether the court of appeals had correctly applied the fault standard set forth in the Ohio Supreme Court's 1987 decision in *Landsowne v. Beacon Journal Publishing Co.* for defamation claims brought by

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private figures based on a statement about a matter of public concern. Although the majority noted that the court of appeals correctly recited the *Lansdowne* standard, it held that the court of appeals had erred in applying it in two respects.

First, the majority held that the court of appeals' statement that "merely publishing a false defamatory statement is sufficient to establish a traditional defamation claim" was contrary to *Landsowne*, which requires a defamation plaintiff to demonstrate that the media defendant was at least negligent, and do so by clear and convincing evidence. Second, the majority took issue with the court of appeals' statement that "a media outlet has a stronger duty to research the facts in such cases than it did when the *Landsowne* case was decided," finding that the court of appeals improperly created a "new standard" and failed to "explain what constitutes compliance with the 'stronger duty.'"

What is most notable about the decision though is the majority's refusal to address the question whether the statements at issue were defamatory, despite the fact that both the trial court and court of appeals offered opinions appearing to address this issue. With respect to the trial court, the majority explained that although the trial judge opined in its decision that a reasonable reader or viewer would not interpret the three WBNS publications as defamatory, such language was merely dictum because the trial court had previously stated that its decision was based solely on the fault element of the claim. Likewise, the majority concluded that the court of appeals' statement that there was "no question that WBNS defamed some of the [plaintiffs]" was dictum, because the parties had "confined their arguments on appeal to the fault element."

What is most notable about the decision though is the majority's refusal to address the question whether the statements at issue were defamatory.

To avoid any doubt about whether the majority intended to weigh in on the defamatory meaning issue, Justice Donnelly (the majority opinion's author) added that the court was expressing "no opinion on the merits of this case" in vacating the court of appeals' judgment and remanding for further consideration. Indeed, the majority's only instruction to the court of appeals on remand was to "apply the standard set forth in *Landsowne*," and offered no indication as to how the majority believed that standard should apply to the facts of the case.

Justice Sharon Kennedy filed a strongly worded dissenting opinion. In her view, the court had

> a holding by the trial court that as a matter of law the publications are not defamatory, an appellate-court decision overruling that holding, and a proposition of law calling on this court to address that determination. But the majority avoids issuing a dispositive decision by focusing on a nonissue— the appellate court's supposed tinkering with the standard of fault in defamation cases.

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She explained that although the trial court did base its ruling on the fault element, and found that the plaintiffs failed to satisfy the *Lansdowne* standard, the *Lansdowne* standard necessarily required the trial court to address whether the statements were defamatory. Specifically, she opined that "[i]f there is no defamatory content in the publications, there is no reason to employ the *Lansdowne* test," which instructs a trier of fact "to determine whether the publisher of the material reasonably attempted to discover the defamatory character of the publication."

For Justice Kennedy, whether the statements were defamatory was central to the trial court's decision. In support, she pointed to the trial court's opinion, in which it reasoned:

> It is true that the broadcast contained the word "robbers" and the internet story had "robbers" in the headline. However, the morning show used both the Parking Lot and Hall Photographs. It also characterized plaintiffs as suspects while showing the Hall Photograph. And, the posting also used "suspects" throughout the body of the story. Within this complete context, the Court cannot conclude that a reasonable reader or viewer would interpret the stories as defamatory."

Justice Kennedy also criticized the majority for focusing its opinion on the appellate court's comment about a "stronger duty." In her view, it was this portion of the court of appeals' decision that constituted dicta, deeming it "an incidental and collateral opinion." In a harsh rebuke of the court of appeals, she referred to comments about WBNS's duties as "gavel-rattling" and "pontificating," and criticized the majority for attaching jurisprudential significance to "bloviation."

Ultimately, Justice Kennedy agreed with the trial court's apparent determination that the statements were not defamatory, and would have reversed the court of appeals and affirmed the trial court's decision on that ground. In her view:

> [a] reasonable person reading the Web reports in their entirety and considering their context—crime-stoppers reports—would not interpret the publications to be defamatory. The overriding conclusion to be drawn from the story is that the two men were suspects. Viewing the entire publication—its plain text, its composition, its neutral thrust, its factual accuracy, its intent and purposes, and its implications and connotations—reasonable minds can come to but one conclusion and that conclusion is that the publication is not defamatory.

Justice Kennedy also expressed concern about the potential First Amendment issues raised by allowing the case to continue, arguing that that the majority's refusal to put an end to litigation that had gone on for three years would have a chilling effect on the media's use of "Crime Stopper" reports. She noted that since 1976, "crime-stoppers programs have aided in the arrest of more than one million criminals and the recovery of more than $2 billion in stolen property." She further noted that even the State of Ohio had filed an amicus brief in support of WBNS

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highlighting the "invaluable service" media organizations provide by publicizing law enforcement requests for tips—a view with which she agreed.

Although WBNS's win in the Supreme Court saved it from having to defend the case at trial in the immediate future, the ultimate outcome remains uncertain despite several years of litigation at all three levels of the Ohio court system. And although the majority's opinion did not offer any new guidance or clarification regarding Ohio defamation law, the court's unwillingness to follow Justice Kennedy's roadmap for resolving the case may provide some insight into those justices' views on the public policy and First Amendment concerns she raised in her dissent. But let's hope that's not the case.

Jack Greiner and Darren Ford are partners at Graydon Head & Ritchey LLP in Cincinnati, OH. Plaintiff was represented by the Calig Law Firm, L.L.C. and Sonia T. Walker; Jones Law Group, L.L.C. WBNS was represented by Marion H. Little Jr. and Kris Banvard, Zeiger, Tigges & Little, L.L.P.

Florida Court Dismisses Pastor's, Mega-Church's Defamation Suit Against Univision Under Anti-SLAPP Statute

By Lauren Russell

A Florida state court dismissed a defamation action based on statements in a series of news reports that Pastor Carlos Enrique Luna Lam accepted money from a convicted drug trafficker to fund his Guatemalan mega-church, Iglesia Cristiana Casa de Dios. This is one of the first decisions to dispose of an action pursuant to Florida's anti-SLAPP statute at the motion to dismiss stage rather than at summary judgment. Lam v. Univision, (Fla. Cir. Nov. 2, 2019).

Background

Luna, who goes by "Cash," is a charismatic Guatemalan pastor who believes in the "prosperity gospel"—that his church's and his personal success are due to hard work in service of the Lord. His church, Casa de Dios, has 25,000 members and has a following throughout Latin America and Spanish-speaking communities in the United States. Despite its location in one of South America's most poverty-stricken countries, the church's Temple Fraijanes is, according to Casa de Dios, one of the largest churches in the world, featuring an auditorium that seats 11,000, "two theaters, two sports centers, landscaped pedestrian pathways, seven acres of greenspace and more than 1,500 trees." Luna has likewise prospered, and travels in private jets and lives in a mansion.

This is one of the first decisions to dispose of an action pursuant to Florida's anti-SLAPP statute at the motion to dismiss stage rather than at summary judgment.

Starting December 2018, Univision published a series of reports on the "earthly factors" contributing to Luna's financial success. The reports were the product of a months-long investigation by Univision reporters and were published as part of its program *Aqui y Ahora* and online. The reports included that Luna had accepted money from Marllory Chacón, a prominent Guatemalan cocaine trafficker known as the "Queen of the South" who was convicted in the U.S. of drug trafficking in 2015, to fund his ministry.

The Univision reports featured interviews with a Colombian pilot named Jorge Mauricio Herrera Bernal, who claimed he was part of the U.S. DEA's infiltration into Chacón's organization around 2010. Herrera told Univision that he transported cocaine for a Colombian cartel and recorded meetings he attended with Chacón in which she discussed delivering money to Luna. Another source spoke to Univision anonymously but on camera and told Univision that Chacón and Luna lived in adjacent properties in Guatemala City, and Luna "constantly asked Chacón for money." Following the publication of Univision's reports, Guatemala's Attorney General Office opened an investigation into Luna and his links to Chacón.

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The Lawsuit

In June 2019, Luna and Casa de Dios sued Univision and two reporters who worked on the story in the Eleventh Judicial Circuit of Florida, alleging that 68 statements pertaining to Luna's acceptance of money from Chacón were defamatory. Plaintiffs alleged actual malice in defendants' reliance on Herrera Bernal as a source and in publishing his account despite the plaintiffs' denial of wrongdoing. The lawsuit largely attacked Herrera Bernal's credibility by focusing on his questionable background as an admitted drug smuggler and on an unrelated criminal action against Herrera Bernal. In 2017 Herrera Bernal was charged with attempted murder and false imprisonment, and while the charges were pending he filed nine *pro se* lawsuits containing what plaintiffs referred to as "outrageous" allegations. The plaintiffs emphasized that the Herrera Bernal's lawyer and the trial judge presiding over the unrelated criminal case "questioned" his competency.

The defendants moved to dismiss the action pursuant to Florida's Anti-SLAPP Statute, Fla. Stat. § 768.295, and argued the plaintiffs failed to plead facts that would amount to actual malice. In addition to pointing out the depth of their investigation and that the news reports relied upon multiple sources, defendants emphasized that Herrera Bernal was twice held competent to stand trial in the unrelated criminal case and was ultimately acquitted of all charges. The plaintiffs responded that they had sufficiently pleaded actual malice through the articulated reasons to doubt Bernal's mental stability and reliability. The parties disagreed as to pleading standards imposed by the Anti-SLAPP statute and one of the few Florida appellate cases analyzing application of the statute at the motion to dismiss stage, *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019).

The Opinion

The court granted defendants' motion and issued an order dismissing the case with prejudice on November 2, 2019. In its dismissal order, the court concluded that the reports at issue were "precisely the sort of speech the Anti-SLAPP statute was enacted to protect" and that the Anti-SLAPP statute—and the *Gundel v. AV Homes* opinion that "controls this Court's analysis"—placed the burden on the plaintiffs, not the defendants, to prove their claims were not without merit.

The court went on to conclude that publishing despite plaintiffs' denials of wrongdoing was not actual malice as a matter of law, and in any event, the reports included plaintiffs' denials. Regarding reliance on Herrera Bernal, the court noted (1) that he was twice adjudicated competent by two experts and the court, (2) he was ultimately acquitted in the unrelated criminal case, and (3) the *pro se* complaints and other filings "repeat his claims that, among other allegations, he was a DEA informant (which claims Plaintiffs do not dispute) and that

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Chacón gave money to Luna." Therefore, "the totality of these records—especially the two judicial findings of competency, supported by two experts—completely undermine any determination that Defendants subjectively doubted Herrera Bernal's story, yet published it anyway."

Finally, the court noted that defendants' news reports were not "single source stories" but rather were intensively researched over the course of many months and that Herrera Bernal's accusations against plaintiffs were corroborated. The court also took judicial notice of another report by a reputable publication that Luna had received expensive gifts from Chacón, and that Luna "has a reputation for associating with powerful, but corrupt politicians" as evidence that that Herrera Bernal's account was not so "inherently improbable" that they could not give it credence. Ultimately, the court determined that reliance on an imperfect source is not actual malice, particularly where, as here, the source's statements are corroborated and that the plaintiffs "have not met either their burden under the Anti-SLAPP statute nor the 'overwhelming burden under the actual malice standard.'" The court further concluded that permitting the plaintiffs to amend the complaint would be futile.

Luna and Casa de Dios have filed a notice of appeal, and the defendants have filed a motion for fees pursuant to the Anti-SLAPP statute.

Defendants are represented by Ballard Spahr attorneys Leita Walker in Minneapolis, Lauren Russell in Washington D.C., and Leslie Minora, who is now completing a Third Circuit clerkship, as well as Peter Prieto and Alissa Del Riego of Podhurst Orseck P.A. in Miami. Plaintiffs are represented by Charles Harder of Harder LLP, and Mark Raymond and Amy Steele Donner of Nelson Mullins Broad and Cassel in Miami.

Recently Published

Interesting Times in Glass Houses: Internal Investigations for the Media Employer
A collaborative effort of several authors, all attorneys who represent media companies, to address both the basic steps and guidelines for internal employment issue investigations but with the goal to do so with an eye to the special issues faced by a media industry employer.

MLRC Digital Review
A landmark revenge porn ruling in Illinois | A pile of federal privacy bills | The Supreme Court delves into copyright | Microtargeting in election advertising | Crackdowns on selling likes and followers | Maneuvering in antitrust investigations | Border searches of digital devices | and much more

Bada Bing: Insufficient Actual Malice Allegations Doom Defamation and False Light Claims

By Eli Segal

In December 2017, the New York *Daily News* reported on the government-ordered shuttering of Satin Dolls, the New Jersey strip club where "The Sopranos"—HBO's show about fictional mafia-boss Tony Soprano—frequently filmed. This *Daily News* article described the club's connection to "The Sopranos" and explained that the state had closed down the club because the man running it in real life was a convicted racketeer and, therefore, was not permitted to have a liquor license. Accompanying the article was a photograph of two women who worked at Satin Dolls, smiling and posing on either side of a "Sopranos" license plate and hat and a picture of James Gandolfini—the actor who played Tony Soprano.

The New York Daily News reported on the government-ordered shuttering of Satin Dolls, the New Jersey strip club where "The Sopranos" frequently filmed.

One of the two women in the photograph, New Jersey resident Diana LoMoro, sued the *Daily News* in the Eastern District of Pennsylvania (apparently because that is where her lawyer was located). In her operative amended complaint, Ms. LoMoro contended that the article—which never mentioned her by name or otherwise referred to her in any way—defamed her and painted her in a false light in two different ways. First, as the primary focus of her case, Ms. LoMoro maintained that, for unexplained reasons, the *Daily News* intentionally "doctored" the photograph that it published, making her appear "fatter, larger, uglier, blotchier, discolored, disproportionate and grotesque." Second, Ms. LoMoro asserted that, by implication, the article falsely linked her to criminal conduct.

Under New Jersey law, which governed Ms. LoMoro's claims, actual malice is the standard of fault for any publication about a matter of public concern. *See Durando v. Nutley Sun*, 37 A.3d 449, 458 (N.J. 2012). And the *Daily News* article was about a matter of public concern—specifically, a strip club featured on a popular fictional television show about the mafia being shut down by the government due to the club's real-life connections to organized crime. Therefore, to state a claim for defamation or false light invasion of privacy, Ms. LoMoro needed to plausibly allege that the Daily News published the article with actual malice.

The *Daily News* moved to dismiss for, among other reasons, Ms. LoMoro's failure to meet this actual malice pleading obligation. The *Daily News* argued that, while Ms. LoMoro did plead that the *Daily News* "intentionally altered and doctored" the photograph so as "to disparage and diminish her appearance," this allegation of knowing falsification was conclusory (not to mention absurd) and therefore was entitled to no presumption of truth even at the motion to

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dismiss stage. Put differently, in the words of the Supreme Court in *Iqbal v. Ashcroft*, Ms. LoMoro pleaded no "factual content that allow[ed] the court to draw the reasonable inference" that the *Daily News* had in fact knowingly falsified the photograph. To the contrary, it would have defied common sense for the *Daily News* to have done so. After all, what possible reason would there have been for the *Daily News* to have "doctored" the photograph as Ms. LoMoro claimed? What benefit could there have been to the *Daily News* in altering a photograph of a woman who is never mentioned in the associated article so as to allegedly make her look "fatter" and "uglier"?

In response, rather than attempting to show how her amended complaint sufficiently alleged actual malice, Ms. LoMoro submitted and relied upon a one-page "preliminary expert report" from a photographer. Without explaining his expert qualifications or methodology, the photographer opined that the photograph at issue was "intentionally" "altered to depict Ms. Diana LoMoro as ugly and grotesque." He asserted, among other things, that the "[l]egs have been changed by either replacing Ms. Diana LoMoro's legs with others that are largely bigger or her legs were scaled up to be larger than they actually are." Moreover, the photographer claimed that "[a]ll of my opinions are expressed within a reasonable degree of photographic and visual artistic certainty"

In a one-page order, the Court explained that actual malice was an element of Ms. LoMoro's defamation and false light claims given that the article was about a matter of public concern.

The Court was not persuaded. On March 8, 2019, it dismissed Ms. LoMoro's amended complaint with prejudice. In a one-page order, the Court explained that actual malice was an element of Ms. LoMoro's defamation and false light claims given that the article was about a matter of public concern; that "Plaintiff has failed to plead actual malice on the part of the Defendant with respect to her defamation and false light claim; and that "[t]his failure requires dismissal of Plaintiff's claims." Ms. LoMoro filed a motion for reconsideration, which the Court ultimately denied. Ms. LoMoro did not appeal.

Defendant Daily News, L.P., the publisher of the New York Daily News, was represented by Eli Segal of Pepper Hamilton LLP and Matthew Leish of Tribune Publishing Company. Plaintiff Diana Lomoro was represented by Simon Rosen of the Law Office of Simon Rosen, PLLC.

Nevada Shield Law Protects Online Journalists

By Leo Wolpert

In Toll v. Wilson et. al, 135 Nev. Adv. Op. 58 (Dec. 5, 2019), the Nevada Supreme Court recently addressed the scope of Nevada's broad news shield statute, NRS 49.275. The Court, in keeping with a history of reading the shield law broadly, held that authors of digital media such as bloggers are reporters, that a media source does not have to be physically printed in order to qualify as a "newspaper," and therefore bloggers may be protected from mandatory disclosure of confidential sources.

The *Toll* case was a writ proceeding concerning Sam Toll, who runs The Storey Teller, an online blog that reports on current events in Virginia City, Nevada. Toll published articles critical of Storey County Commissioner Lance Gilman, specifically alleging that Gilman did not actually live in Storey County.

Gilman sued Toll for defamation per se. Toll moved to dismiss the suit under Nevada's anti-SLAPP statute, NRS 41.660. The district court allowed for limited discovery, resulting in Gilman deposing Toll. When questioned as to why he believed Gilman did not live in Storey County, Toll relied on information provided to him by anonymous sources. When asked to reveal those sources' identities, Toll refused to do so, invoking Nevada's news shield statute (NRS 49.275). That statute protects any "reporter, former reporter or editorial employee." However, to be protected, a journalist must also be affiliated with a "newspaper, periodical or press association or … radio or television station"

Gilman filed a motion to compel Toll to reveal his sources. The district court granted this motion, reasoning that while Toll is a reporter, he was not a member of a press association at the time he made the comments, and that his blog did not alternatively qualify as a newspaper because it is not printed in physical form and therefore the news shield statute did not apply to him. Toll moved for writ relief from the Nevada Supreme Court, arguing that the district court erred by both allowing for discovery in the first place and by granting Gilman's motion to compel. (Although this is not the focus of this article, the Nevada Supreme Court upheld the district court's decision to allow discovery pursuant to Nevada's anti-SLAPP statute under an "abuse of discretion" standard.)

Nevada Supreme Court Decision

In a unanimous decision, the Nevada Supreme Court reversed the district court's grant of the motion to compel.

First, the Nevada Supreme Court agreed with the district court that Toll was a reporter, noting that Toll "reports various public events, opinions, and current news in Virginia City" and that "[t]his qualifies him as a reporter."

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Second, the Nevada Supreme Court held that a reporter who publishes on a blog "should not be disqualified from the news shield statute under NRS 49.275 merely on the basis that the blog is digital, rather than appearing in ink-printed, physical form." The Nevada Supreme Court looked to analogous Fourth Amendment precedent to interpret the news shield statute in a way that comports with technological advances. In *Kyllo v. United States*, 533 U.S. 23 (2001), the United States Supreme Court held that thermal imaging—a technological advance the Constitution's framers could never have imagined—constituted an unreasonable search without a warrant.

Similarly, in *Toll*, the Nevada Supreme Court reasoned that while the Nevada legislators who crafted the news shield statute in 1975 "knew what a newspaper was, they likely did not contemplate it taking digital form." Thus, the Nevada Supreme Court held that online newspapers were protected by the shield statute.

Broadly reading the news shield statute is consistent with its underlying purpose and broad scope. The Nevada statute "confers upon journalists an absolute privilege from disclosure of their sources and information in any proceeding in order to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution*." Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 129 Nev. 878, 882–83, 313 P.3d 875, 878 (2013) (citations and internal quotation marks omitted).

A reporter who publishes on a blog "should not be disqualified from the news shield statute under NRS 49.275 merely on the basis that the blog is digital, rather than appearing in ink-printed, physical form."

The story is not over in the underlying litigation. While reversing the district court's grant of Gilman's motion to compel and determining that publishing an online-only publication did not, in and of itself, take a reporter outside the protections of the shield statute, the Nevada Supreme Court remanded the case to the district court for further proceedings regarding other factors of the NRS 49.275 test. For instance, the district court could still hold that the news shield statute does not apply to Toll because his sources were not "obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public."

Regardless of the eventual outcome of this case, the Nevada Supreme Court's ruling is a victory for Nevada's news shield statute and the First Amendment. It is heartening that our courts are willing to advance along with technology by reading statutes in a way that broadens rather than circumscribes the First Amendment rights of journalists.

Leo Wolpert is an associate at McLetchie Law in Las Vegas, NV. Margaret A. McLetchie of the firm represented Nevada Press Association, Reporters Committee for Freedom of the Press, News Media Alliance, Online News Association, Media Institute, Society of Professional Journalists, and Reporters Without Borders as Amici Curiae.

Developments in FOIA Litigation

Measuring the Bounds of Exemption 4 After *Argus Leader* and the FOIA Improvement Act of 2016

By Victoria Baranetsky and Rachel Brooke

On December 5, *Reveal* from The Center for Investigative Reporting ("CIR") was successful in challenging the government's withholding of records under Exemption 4 of the Freedom of Information Act ("FOIA"), in the first case after the Supreme Court's decision in *Argus Leader* to find Exemption 4 did not apply.

In 2018, reporter Will Evans, in the course of his reporting on the lack of diversity in Silicon Valley, requested from the Department of Labor ("DOL") records, called EEO-1 Reports, documenting the overall gender and racial demographics of personnel at large companies. The requested forms are submitted to the DOL in order to ensure compliance with federal anti-discrimination laws, but the agency withheld the records pursuant to FOIA Exemption 4, claiming the records were "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). After DOL failed to release the withheld records in response to an administrative appeal, CIR filed suit, but the Supreme Court's decision to grant certiorari for Food Marketing Institute v. Argus Leader ("*Argus Leader*") resulted in the case being stayed until the resolution of that case.

In June 2019, the Supreme Court decided Argus Leader, which substantially relaxed the standard the government must meet in order to withhold records as "confidential" under Exemption 4. Previously, courts found records to be "confidential" only when their release would cause "substantial competitive harm" to the party from whom they were obtained. Natl. Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Under Argus Leader, the Court eliminated that requirement. In the opinion authored by Justice Gorsuch, the Court decided that information can qualify as confidential as long as it is customarily and actually *treated* as confidential *by its owner*, regardless of whether any harm would result from its disclosure.

The *Argus Leader* decision came in the wake of another important development in FOIA: the FOIA Improvement Act of 2016 ("FIA"), an amendment that created a new and independent hurdle for the government. FIA requires that agencies seeking to withhold documents under a discretionary FOIA exemption show a "foreseeable harm" would result from disclosure, on top of showing that an exemption applies. There has been much uncertainty about how *Argus Leader* will interact the foreseeable harm standard, as FIA seems to reimport a harm requirement which *Argus Leader* erased. The confusion over the interaction of the two legal

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precedents stems in part from the fact that *Argus Leader* itself did not address FIA, as it concerned a pre-FIA request, and so FIA did not apply.

The answer to this confusion was somewhat resolved in the United States District Court for the Northern District of California's decision in CIR v. Department of Labor. At issue in the case were three questions: first, whether EEO-1 Reports could fairly be described as "commercial;" second, how far "confidential" could be stretched under the expanded *Argus Leader* standard for confidentiality; and finally, whether the government had met the foreseeable harm standard.

In its opening brief for summary judgment, the government argued that the records were both commercial and confidential, as the records amounted to an organizational chart. The government also argued that foreseeable harm could result, citing to declaration from a company representative that attested that reputational harm could result from disclosure. CIR replied that none of these requirements were met. CIR argued that the records were clearly not commercial as they did not fulfill a business function and were not commercial in nature. Unlike records that disclosed intimate aspects of a business, like sales statistics, research data, or business plans, these records simply ensured compliance with federal law about a nonbusiness-related activity.

Moreover, CIR argued the records were not confidential, even under *Argus Leaders'* more lenient standard because DOL had released identical records from a prior calendar year to CIR. Also, CIR highlighted to the Court that the much of the data was made public on the companies' websites and was also visible to many employees' within the companies—even the Supreme Court stated it was meaningful that that in *Argus Leader*, the companies did not "disclose store-level SNAP data or make it publicly available 'in any way' and "[e]ven within a company…only small groups of employees usually have access to it." 139 S. Ct. 2356, 2363 (2019).

The Court sided with CIR on all three questions, finding the reports were not commercial in nature, were unlikely to be confidential under *Argus Leader*, and that the government failed to meet the foreseeable harm standard.

District Court Decision

In a decision written by Magistrate Judge Kandis A. Westmore, the Court sided with CIR on all three questions and ordered the DOL to produce the withheld EEO-1 Reports, finding the reports were not commercial in nature, were unlikely to be confidential under *Argus Leader*, and that the government failed to meet the foreseeable harm standard, making withholding under Exemption 4 inappropriate.

First, Judge Westmore held that the Diversity Reports were not commercial. While acknowledging that "commercial" was defined broadly for the purposes of Exemption 4, Judge Westmore emphasized that not *all* information submitted by private companies to the government could be deemed commercial in nature. While the government argued that the number of personnel in each of the categories *related to* a business's commercial enterprise and

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was thus commercial, Judge Westmore found that this was not enough, noting that the reports did not contain salary information, department staffing levels, or sales figures. This part of the decision might presage that Exemption 4 cases will increasingly be decided on the "commercial" prong of the test, especially as *Argus Leader* did not discuss this prong and little caselaw exists compared to the confidential prong. In fact, the only other decision deciding Exemption 4 since *Argus Leader*, in the Northern District of California, *Am. Small Bus. League v. U.S. Dep't of Defense*, C 18-01979 WHA, 2019 WL 4416613 (N.D. Cal. Sept. 15, 2019), similarly decided to disclose portions of the records under the commercial prong.

Second, while Judge Westmore declined to determine whether the EEO-1 Reports were confidential, she suggested that they were unlikely to be, even under the *Argus Leader* standard. Judge Westmore observed that the fact that all but one of the objecting companies publish diversity data on their public websites, much of which was duplicative with the EEO-1 data, weighed against characterizing the information as confidential. As such, this data is arguably "actually public" under *Argus Leader*. This holding provides some guidance on applying the *Argus Leader* test going forward: even *partial* disclosure of similar or duplicative information by private companies will make it difficult for the government to successfully argue that the information at issue is actually confidential.

Finally, Judge Westmore held that the DOL had failed to meet the foreseeable harm standard, which calls into question the impact of *Argus Leader* moving forward. Judge Westmore observed that the government had failed to address this requirement, and instead attempted to use *Argus Leader* to argue that it need not meet the foreseeable harm standard. The government had argued that, because *Argus Leader* eliminated the "substantial competitive harm," requiring a "foreseeable harm" showing in Exemption 4 cases would improperly reimpose the "substantial competitive harm" requirement. Judge Westmore disagreed, emphasizing that the foreseeable harm requirement was an independent requirement which must be satisfied even where an exemption otherwise applies.

Prior to Judge Westmore's decision, there was a concern about how far *Argus Leader* could extend, but the court's decision makes clear that Supreme Court's decision has not transformed Exemption 4 into a catchall provision for any and all information submitted to the government by a private company. While many business records like contracts and business plans may still be withheld, this case imposes some limits on the extent of that ruling. Moreover, it affirms that the "foreseeable harm" standard is an independent hurdle which the government must address, even in Exemption 4 cases.

In an age where key government functions are increasingly performed by private contractors, ensuring the propriety of the government's FOIA withholdings under these standards is more important than ever.

Victoria Baranetsky is general counsel at The Center for Investigative Reporting. Rachel Brooke is a First Amendment fellow with the Center for Investigative Reporting and a 2019 graduate of NYU School of Law.

Federal Court Orders Disclosure of Former AG Matt Whitaker's Ethics Disclosure Forms

By Matt Topic

When Jeff Sessions was finally berated into resigning the Attorney Generalship by the president whose candidacy he supported long before other establishment Republicans had detected the seismic shift in what was electable in 2016 America, a void was left in the Department of Justice. Bill Barr eventually filled that void with precisely the sycophantic brilliance called for by a Trump AG, but for 99 days before that, Matt Whitaker, Sessions's Chief of Staff, sat atop Justice. His qualifications included his previous criticism of the Mueller investigation and, earlier in his career, using his status as a former U.S. Attorney to threaten unhappy customers of a patent company that promoted time-travel cryptocurrency and a toilet designed for men with large genitals, and that was eventually fined tens of millions of dollars by the Federal Trade Commission.

As a high-ranking Justice official, both as Sessions's Chief of Staff and Acting Attorney General, Whitaker was required by the Ethics in Government Act of 1978 to complete and submit both "new entrant" and annual ethics disclosures known as Form 278e to the Departmental Ethics Office, which is the corner of the DOJ that processes the forms, certifies their compliance with the statute, and publishes them online for all to see. But due to "administrative error," DEO did not process or publish any of Whitaker's forms for a full year, and then published his new entrant and annual reports together in bulk with an indication that each of the forms had been revised five separate times before they were certified.

Connoisseurs of federal FOIA violations will appreciate the bold creativity of the DOJ FOIA team in its effort to keep this information secret.

Acting on the apparently radical idea that the public ought to know more about how and why it took the highest ranking law enforcement official in the country, and one with such colorful business experiences, five tries to satisfy his ethics disclosure obligations, BuzzFeed News reporter Zoe Tillman submitted a Freedom of Information Act request for all the earlier failed iterations of the forms.

DOJ first "misunderstood" the request and tried to produce only the final report, then blew well past the statutory deadlines while the "request was under review," forcing BuzzFeed to file suit in D.C. federal district court. As it often finally does once it has been sued, DOJ eventually got around to processing the request, but refused to produce the failed iterations of Whitaker's ethics disclosure forms.

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Connoisseurs of federal FOIA violations will appreciate the bold creativity of the DOJ FOIA team in its effort to keep this information secret. Headlining the bill was Exemption (b)(5) for deliberative process, relying on the remarkable theory that these various legally inadequate "drafts" rejected by DEO were "internal policy-related considerations" that were "at the very heart of the deliberative-process privilege." DOJ also claimed that releasing any of the information would be a clearly unwarranted invasion of personal privacy under Exemption 6.

Judge Trevor McFadden found that Whitaker's privacy interests in any "extra" unnecessary financial information he disclosed and removed from later attempts with the blessing of DEO outweighed the public interest in disclosure under Exemption 6, but not the information that was added to each successive submission and ultimately disclosed to the public once Whitaker's forms were eventually certified as legally compliant. BuzzFeed v. Department of Justice, No. 1:19-cv-00070 (D.D.C. Dec. 4, 2019).

This means that the public can determine what Whitaker improperly failed to disclose, for whatever reason, by comparing each of the successive submissions.

The court also rejected DOJ's avant-garde and potentially far-reaching view of Exemption (b)(5). As we saw it and argued it, there was no deliberation to be found in these submissions, and notably, we had not requested DEO's internal discussions about them; rather, we asserted, "each time Mr. Whitaker made a submission, it was necessarily with the understanding that if he—the Acting Attorney General of the United States, and previously Chief of Staff to the Attorney General—had complied with applicable law, the information would be certified and made public. And, each time DEO found that Mr. Whitaker did not comply with his legal obligations and required that he make revisions, DEO undertook a final action on that submission, not any "deliberation.'" Indeed, we argued, "by DOJ's logic, the IRS could claim the deliberative process exemption over discussions with a taxpayer about the legal compliance of a tax return or guidance on a future return."

Judge McFadden agreed. "To be clear, the draft forms at issue here are fill-in-the blank standardized forms that seek purely factual information about the filer's financial situation," no different from the factual information that is almost always found to be outside the scope of the exemption under abundant case law. Further, "DOJ was not formulating policy at all. Its ethics officials were merely trying to assist in the accurate completion of Whitaker's financial disclosure forms in compliance with the Ethics in Government Act and [agency] policy." And "DOJ's concerns about the chilling effect of disclosure" were "unfounded and unconvincing," not least of which because DOJ officials are required by law to make these disclosures fully and accurately. The court was not required to address our argument under the "foreseeable harm" provision added to the statute in the 2016 amendment specifically to clamp down on these kinds of abuses of the deliberative process exemption, which had come to be known as the "withhold it because you feel like it" exemption.

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Our FOIA team at Loevy & Loevy is currently litigating over 200 federal and state FOIA cases for a variety of clients. BuzzFeed News continues to fight aggressively for access to public records, having filed 20 FOIA lawsuits in 2019 alone, including a wide variety of challenges to secrecy around the Mueller investigation and report. Unfortunately, the Trump administration has taken the terrible transparency record of the Obama administration (and those before it) to new lows, frequently asserting the kind of absurd, bad-faith arguments it used to shield its Acting Attorney General from public scrutiny. (Cough….swamp…cough cough cough.) And DOJ in particular has mastered the art of backlogging itself so badly, while refusing to seek additional funding from Congress or to reallocate money from things like tens of millions of dollars in office furniture, that any request requiring more than a handful of pages now can take years to be released, long after the implicated issues have passed from public attention, with some relief found in the courts but not nearly enough. But each time a court rejects a preposterous abuse of the FOIA statute by our nation's leading law enforcement agency, we chip away at the unfounded deference the government enjoys in FOIA litigation and get one step closer to the transparency we all deserve.

Matt Topic runs the FOIA and Transparency practice at Loevy & Loevy from its Chicago office.

Why We Are Suing California Over A 'Labor' Law

'Gig Economy' Law Raises Constitutional Issues for Journalists

By Mickey H. Osterreicher and Alicia Calzada

The National Press Photographers Association (NPPA) expends a great deal of time and energy advocating for and defending the First Amendment rights of its members. But we know that if visual journalists can't earn a decent living, the ability to gather and disseminate news will be greatly diminished. That's why we also put so much effort into protecting and improving copyright law. It's also why, in 2019, a California bill related to independent contractors caught our attention. The bill, called AB5 (Assembly Bill 5, codified at Cal. Labor Code § 2750.3, et seq.), codifies and expands the independent contractor test established in Dynamex Operations West, Inc. v. Superior Court of Los Angeles, 4 Cal. 5th 903 (2018).

Under *Dynamex*, independent contractors must be classified as employees under certain California wage orders unless the hiring entity satisfies a new three-part test: (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. *Id*. at 964. *See also* Cal. Labor Code § 2750.3(a)(1). Failure to prove any element of the *Dynamex* ABC test results in the independent contractor being classified as an employee.

The NPPA expends a great deal of time and energy advocating for and defending the First Amendment rights of its members. But we know that if visual journalists can't earn a decent living, the ability to gather and disseminate news will be greatly diminished.

The *Dynamex* ABC test overruled a prior multi-factor balancing test that considered the economic realities of the employment relationship. *See S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

Under *Borello*, freelancers like NPPA members represented in the recently filed lawsuit are classified as independent contractors and have been for decades.

Dynamex was limited to the "suffer or permit to work" standard in California wage orders and "equivalent or overlapping non-wage order allegations arising under the Labor Code." *Gonzales v. San Gabriel Transit, Inc*., 2019 WL 4942213, *14 (Cal. Ct. App. Oct. 8, 2019). Wage orders govern issues like minimum wage, overtime pay, meals, and lodging. Professionals engaged in

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"original and creative" work, like NPPA members, are largely exempt from wage orders, and thus *Dynamex* had little direct effect on their work.

AB 5 applies the strict *Dynamex* ABC test to the entire Labor Code, the Unemployment Insurance Code, and wage orders. Cal. Labor Code § 2750.3(a)(1).

This expansion of the ABC test means that freelancers, like writers, editors, photographers, and videographers, must be classified as employees of the publishers for which they produce content because content creation is "the usual course of the hiring entity's business." Cal. Labor Code § 2750.3(a)(1)(B).

AB 5 also contains several exemptions to the ABC test, including people who work pursuant to "a contract for 'professional services.'" Cal. Labor Code § 2750.3(c)(1). These exempt professionals remain subject to the existing *Borello* independent contractor test. Under AB 5, "professional services" are defined as those provided by marketers, human resources administrators, travel agents, graphic designers, grant writers, fine artists, IRS enrolled agents, payment processing agents through an independent sales organization, estheticians, electrologists, manicurists, barbers, and cosmetologists (see: Cal. Labor Code § 2750.3(c)(2)(B)(i)—(viii), (xi).

Under the terms of AB 5 a freelance visual journalist would be classified as an employee, even if they do not want to be. An automatic conversion to employee status would jeopardize copyright ownership of the work created.

Still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists are also included in "professional services," but with important limitations: (1) these speaking professions are limited to 35 "content submissions" per client, per year, Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x); and (2) video is expressly excluded from the still photography and photojournalism exemption. Cal. Labor Code § 2750.3(c)(2)(B)(ix). AB 5 does not exclude audio recording from the definition of professional services. The 35-submission cap in Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x) limits freelancers' ability to record, sell, or publish audio content. The 35-submission cap in Cal. Labor Code §2750.3(c)(2)(B)(x) only applies to "items or forms of content by a freelance journalist" that meet the other requirements of § 2750.3(c)(2)(B)(x).

Concerns with AB5

Under the terms of AB 5 a freelance visual journalist would be classified as an employee, even if they do not want to be. An automatic conversion to employee status would jeopardize copyright ownership of the work created, which photographers and writers often relicense for additional income. The default in copyright law is that an employer owns the copyright to the images made by their employees (such a staff newspaper photographers). *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). On the other hand, an independent contractor

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usually retains their copyright by law, unless they relinquish or transfer it by written agreement. *Id*.

Other concerns for those impacted in California are significant new costs and disadvantages for both freelancer-turned-employee and their client-turned-employer. For one thing, there is a drastic shift in the ability of the former freelancer to deduct their business expenses on their federal income taxes. Independent contractors can deduct business expenses including professional memberships, educational and networking conferences, travel, equipment, home offices, insurance, and other expenses, which an employee is not able to deduct. They are also able to maintain benefits like healthcare and retirement accounts, regardless of the number of clients they produce content for or the frequency and quantity of their work. Additionally, the client is now faced with unemployment taxes, workers' compensation taxes, state disability insurance, paid family leave, and sick leave. While some of these costs are borne by the now-employer, others are an additional burden on the journalist. These all make the freelancer's work more expensive to the client-turned-employer. As a result, clients are reducing the amount of work given to California journalists, and some have stopped doing business with California journalists entirely.

For many journalists, control over their workload and lives as well as the flexibility and safety in not being tied to any one employer or set schedule helps to minimize risk for freelancers in an uncertain and tumultuous industry that continues to lay off employees.

Additionally, many publications have simply stopped using California photographers and videographers, either entirely, or after 35 assignments. We have heard from members whose clients are doing exactly that. One NPPA member told us that he is going to lose two-thirds of his revenue from one client. Another will face more than $10,000 in lost assignment work. NPPA members impacted by the law range from retirees who will be losing extra income to mid-career professionals whose journalism clients are part of their overall business model. One told us that the flexibility of freelancing allowed him to stay at home with his young children instead of putting them in daycare. All the impacted members we spoke with are experienced journalists, trained in ethics and professional standards, who keep their local community informed on matters of public concern. Their voices will be silenced, and the public will have its right to receive information impaired when the impact of AB 5 hits their businesses.

Legal Challenge

While it is unusual for NPPA to address state labor laws, we decided it was extremely important to deal with our members' concerns by becoming plaintiffs along with American Society of Journalists and Authors (ASJA) in a challenge to some of the terms of this onerous law. Represented by Pacific Legal Foundation, we filed a civil rights lawsuit in Los Angeles federal court on December 17, 2019, that "seeks to vindicate the constitutional rights to free speech, the press, and equal protection for our members" which are "impaired, threatening the livelihood of

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those who work as freelancers" in "violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983." Because AB 5 treats journalists differently than other speaking professionals, and limits the amount, manner and type of speech, we believe it abridges the Equal Protection Clause of the Fourteenth Amendment and the Free Speech and Press Clauses of The First Amendment.

Under the AB 5 scheme, exempting some speakers who freelance while not exempting journalists is a content-based restriction, subject to strict scrutiny (see: *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). Likewise, exempting still photographers and photojournalists who provide up to 35 still-image submissions per publisher per year while allowing no exemption for those who provide their clients with even a single video, is not narrowly tailored nor rationally related to any compelling or legitimate governmental objective.

The complaint further alleges that AB 5 singles out ASJA's and NPPA's members who are writers, editors, still photographers, and visual journalists by drawing unconstitutional content-based distinctions about who can freelance, thus expressly disfavoring journalistic speech.

For example, under AB 5, writers of marketing materials, such as press releases, can freelance without restriction; but if they write articles from that same press release, they are subject to the 35-submission limit. Similarly, a photographer may submit an unlimited number of images of a product to a client for marketing purposes, but if that photographer submits photographs to a newspaper to illustrate a story about that same product, they are subject to the 35-submission per client/per year limit. And, if instead of a still image the photographer submits video (often using the same camera with dual capabilities), they must be immediately classified as an employee rather than a freelancer.

The lawsuit seeks a prospective declaratory judgment that "the challenged provisions (35-submission limit and the video recording restrictions under Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x)) of AB 5 are invalid, unenforceable, and void" as well as a "permanent and preliminary injunction against any further enforcement of the challenged provisions; plus costs and reasonable attorney fees." On 12/31/19, after the state refused to stipulate to a stay of enforcement of the provisions of AB 5 challenged in this case, an application for a temporary restraining order, as well as a motion for a preliminary injunction, was filed. The state filed its opposition on 1/1/20 and a reply in support of the TRO was filed on 1/3/20. Later that same day the court denied the TRO application even though a different judge hearing another AB 5 challenge granted that TRO (*See*, *e.g.*, *California Trucking Ass'n v. Becerra*, No. 3:18-cv-02458-BEN-BLM (S.D. Cal. Dec. 31, 2019). A hearing has been set for March 9, 2020.

Mickey Osterreicher is NPPA General Counsel and Alicia Calzada is NPPA Deputy General Counsel. NPPA and ASJA are represented in the lawsuit by Jim Manley and Caleb Trotter of the Pacific Legal Foundation.

Fourth Circuit Rules Maryland Online Political Ad Law Unconstitutional

By Max Mishkin

The United States Court of Appeals for the Fourth Circuit has affirmed a victory by a coalition of newspapers that publish in Maryland in their challenge to a state law that would have placed significant burdens on them as platforms hosting online political advertisements. In a 3-0 published decision, the court held that the obligations the law imposes on the news organizations' websites are contrary to the First Amendment. Washington Post v. McManus, No. 19-1132, 2019 U.S. App. LEXIS 36245 (4th Cir. Dec. 6, 2019).

Background

In the wake of the 2016 election, out of concern over efforts by foreign countries – particularly Russia – to influence U.S. voters through digital misinformation, Maryland passed the Online Electioneering Transparency and Accountability Act (the "Act"), which took effect in July 2018. Unlike traditional regulation of political advertising, the Act regulates the platforms hosting political ads in addition to the ad purchasers themselves. In particular, the Act requires newspapers and other organizations that host online campaign and issue ads to (1) publish information about political ads within 48 hours of the purchase of an ad, including proprietary details about ad pricing; (2) undertake complex and costly new recordkeeping obligations, with the State being able to demand records on 48 hours' notice; and (3) face the risk of injunctions and possible civil or criminal sanctions for hosting noncompliant ads, with no guaranteed notice or opportunity to object.

In the wake of the 2016 election, out of concern over efforts by foreign countries – particularly Russia – to influence U.S. voters through digital misinformation, Maryland passed the Online Electioneering Transparency and Accountability Act.

In August 2018, a coalition of news organizations filed a lawsuit in the United States District Court for the District of Maryland to block enforcement of the Act. The plaintiffs ranged from publishers of large newspapers like *The Washington Post* and *The Baltimore Sun* to publishers of smaller papers throughout every region of Maryland, as well as the Maryland-Delaware-DC Press Association, which represents most of the newspapers in Maryland. The coalition challenged the Act on several grounds, but principally under the First Amendment.

The District Court's Ruling

The key legal issue in dispute before the district court was how it should analyze Maryland's law. The publisher plaintiffs invoked a line of cases holding that statutes that compel speech, restrict political speech, or regulate speech because of its content generally must satisfy "strict scrutiny," such that they must advance a "compelling interest" and be "narrowly tailored to

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achieve that interest." Maryland and its amici instead characterized the statute as a routine campaign disclosure regulation that was subject to more relaxed review under a lower standard, called "exacting scrutiny." Under that standard, which emanates from cases dealing with the funding of political campaigns, such as *Buckley v. Valeo* and *Citizens United v. FEC*, the government must show that the law is "substantially related" to an "important" interest.

On January 4, 2019, the district court agreed with plaintiffs that strict scrutiny should apply, and found that the Act could not survive that test. *Washington Post v. McManus*, 355 F. Supp. 3d 272 (D. Md. 2019). For good measure, the court also found that, even if exacting scrutiny applied, the statute would fail that test as well. Although the court recognized that Maryland had legitimate concerns about foreign election interference, the court found that the burdens imposed by the law were not a good fit in achieving that goal.

Specifically, the district court observed that foreign bad actors have relied principally on unpaid social media, not paid ads, and have focused on stoking outrage through divisive social issues rather than directly promoting candidates or political parties. In addition, because the Act requires advertisers to self-identify to publishers, it would be ineffective at combatting foreign influence because any "self-respecting foreign operative" would easily circumvent the Act's identification requirements.

As the district court concluded, "While there is no denying that states have a strong interest in countering newly emerging threats to their elections, the approaches they choose to take must not encroach on First Amendment freedoms that are the hallmark of our nation. Maryland's statute appears to overstep these bounds."

The district court accordingly blocked Maryland from enforcing the Act against the publisher plaintiffs. Maryland appealed.

The appeals court held that "the lodestar for the First Amendment is the preservation of the marketplace of ideas" and that "each banner feature of the Act poses a real risk of either chilling speech or manipulating the marketplace of ideas."

Fourth Circuit's Decision

The Fourth Circuit unanimously affirmed the district court in a ruling issued December 6, 2019. In a 30-page opinion authored by Judge J. Harvie Wilkinson III, and joined by Judges Diana Gribbon Motz and Henry F. Floyd, the appeals court held that "the lodestar for the First Amendment is the preservation of the marketplace of ideas" and that "each banner feature of the Act—the fact that it is content-based, targets political expression, and compels certain speech—poses a real risk of either chilling speech or manipulating the marketplace of ideas."

The court further explained that, because the Act imposes obligations on third-party publishers of political ads—and not only on the political speakers themselves—it differs from regulatory regimes that have been held to be constitutional in the past. That is because the Act creates a

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disincentive for platforms to publish political ads, as opposed to other kinds of advertising content, at great potential cost to political debate.

Unlike the district court, which concluded that the Act is subject to "strict scrutiny" rather than "exacting scrutiny," the Fourth Circuit opted "not to decide whether strict or exacting scrutiny should apply" because "the disparity between Maryland's chosen means and purported ends is so pronounced" that "the Act fails even the more forgiving standard of exacting scrutiny." The court emphasized, however, that "neither standard is deferential—both place high hurdles before the government," observing that "strict scrutiny, in practice, is virtually impossible to satisfy, while exacting scrutiny is merely difficult."

The court noted its "respect" for "how states choose to carry out their responsibilities" in overseeing campaigns and elections. But, the court concluded, "that respect has bounds—and here, Maryland has crossed them. Despite its admirable goals, the Act reveals a host of First Amendment infirmities: a legislative scheme with layer upon layer of expressive burdens, ultimately bereft of any coherent connection to an offsetting state interest of sufficient import."

The plaintiff news organizations were represented by Seth D. Berlin, Paul Safier, and Max Mishkin of Ballard Spahr LLP. Maryland was represented by Assistant Attorney General Andrea W. Trento.

DCS 2019 Annual Meeting

Leadership Election and Review of Committee Accomplishments and Plans

The annual meeting of the MLRC Defense Counsel Section was held on Thursday, November 7th at Carmine's Restaurant on West 44th Street in New York City.

DCS President Jay Brown led the meeting. The first matter of business was the election of a new executive committee member. Toby Butterfield of Moses & Singer in New York was elected as Treasurer beginning in 2020. The other members of the 2020 DCS Executive Committee are: President Robert Balin; Vice President Robin Luce Herrmann; Secretary Rachel Matteo-Boehm.

Jay Brown will continue to serve as President Emeritus during the coming year. He warmly thanked outgoing President Emeritus Jack Greiner for his years of service and leadership on the DCS Executive Committee.

George Freeman delivered the Executive Director's report on MLRC's projects and plans. That was followed by reports from Committee Chairs on Committee accomplishments and plans for 2020.

Committee Reports

Advertising and Commercial Speech Committee
Co-Chairs: Brendan Healey and Terri Seligman
Vice-Chair: Robin Luce-Herrmann

In 2019, we 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 2019 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Of course, this year everyone's focus has turned from GDPR to CCPA. Recently, David Zetoony from Bryan Cave Leighton Paisner, gave a presentation on CCPA and its implications for AdTech. The presentation was our first joint presentation—we did it with the Data Privacy committee—and we hope to do more joint presentations in the future. The committee also hosted presentations by Christine Walz from Holland & Knight on website ADA lawsuits and by Tyler Maulsby from Frankfurt Kurnit Klein & Selz on cannabis advertising. We hope to have one more presentation before the end of the year.

The headline of 2019, though, is that the new and revised "Checklist on Advertising Content" is nearing completion. More than a dozen committee members have contributed to the checklist,

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and we are now basically in the editing stage. We didn't start from scratch. We have great source documents—the "Advertising Clearance Checklist" (created by Nancy Felsten) and the "Checklist on Advertising Content" (created by Alice Lucan and Jack Greiner). Look for the new (I won't say "improved" because the prior outlines are excellent) checklist soon. 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. We welcome suggestions for speakers and topics.

Finally, we note that Terri Seligman is transitioning out of committee leadership. As those who practice in this area know, Terri is one of the real superstars in the field, and we appreciate her many contributions to the committee in her years as co-chair. We also welcome back Faiza Javaid as co-chair. Faiza previously served as co-chair when she was at Forbes, but she took a hiatus from the committee when she left Forbes to do inhouse stints at non-media companies. Faiza has returned to our bar with an inhouse position at G/O Media, and we are delighted to have her back in committee leadership.

Anti-SLAPP Committee
Co-Chairs: Bruce Johnson and Laura Prather

The MLRC SLAPP committee meets quarterly and focuses its attention on recent SLAPP rulings, passage and defense of anti-SLAPP bills in state legislatures, possible model SLAPP statutes, and advice and counsel on securing federal anti-SLAPP protection. We have guest speakers who are at the heart of the issues present on their personal experiences both in the courtroom and at the legislature.

For instance, during 2019, from a judicial standpoint, we discussed the increasing trend to not apply anti-SLAPP statutes in federal diversity cases with the recent rulings from the 11th Circuit in *Carbone v. CNN* and the 5th Circuit in *Klocke v. Watson*. We also discussed the California Supreme Court's significant ruling on the scope of its anti-SLAPP commercial speech exemption in the FilmOn case.

From a legislative standpoint, we discussed how Colorado and Tennessee were able to get new anti-SLAPP statutes passed; how Texas defended against attempt to gut their anti-SLAPP statute; and the proposed bills recently filed in New York and Ohio.

Finally, we share significant tactical information about how to build coalitions to support the passage of anti-SLAPP statutes and briefing to defend the constitutionality of such statutes and argue for their protection in federal court.

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California Chapter

Co-Chairs: Sarah Cronin, Tami Kameda-Sims, Dan Laidman

The California Chapter engaged in vibrant discussions this year on (1) the California Consumer Privacy Act of 2018 (CCPA); (2) the intersection of the First Amendment and breach of contract law; (3) litigating trademark infringement claims in different parts of the country where courts apply different First Amendment tests on the trademark side; (4) what California's new independent contractor law means for the entertainment and news industries; and (5) the effect of California Supreme Court's important new anti-SLAPP decisions.

The Chapter's first meeting, held on December 18, 2018, discussed the California Consumer Privacy Act of 2018 (CCPA). Dominique Shelton Leipzig, co-chair of Perkins Coie's Ad Tech Privacy & Data Management group, discussed the CCPA, a sweeping new law that introduces a host of privacy rights for California consumers and creates robust obligations for many businesses that collect personal information about California consumers. David Aronoff, partner at Fox Rothschild, discussed key developments in California's anti-SLAPP law in 2018.

The Chapter's second meeting, held on April 3 at Davis Wright & Tremaine's Los Angeles office, discussed the line between aggressive negotiation and extortion. Professor Laurie Levenson, of Loyola Law School discussed the ethics of negotiation, with the dispute between Jeff Bezos and the National Enquirer as a focus point. Kevin Vick, partner at Jassy Vick Carolan LLP, discussed the California Supreme Court's anti-SLAPP decision in Rand Resources, LLC v. City of Carson, which addressed a developer's suit against the city of Carson over a proposed NFL stadium.

The Chapter's third meeting, held on July 25 at Venable discussed the First Amendment and when a non-disparagement clause can trump First Amendment considerations. Aaron Moss, chair of Greenberg Glusker's litigation department, and Ricardo Cestero, entertainment litigation partner at Greenberg Glusker, discussed the recent spate of contract related claims being brought against productions related to the obtaining and disclosing of information about the subject of the production. The discussion also touched on the similar issues as the lawsuit brought by the Michael Jackson estate over HBO's documentary Leaving Neverland, in which the estate alleged that the film constitutes a breach of a non-disparagement clause in a 27-year-old agreement related to the right to air a televised concert following the release of Jackson's album Dangerous.

Also at the Chapter's third meeting, Jonathan Segal, partner at Davis Wright Tremaine, discussed litigating trademark infringement claims in different parts of the country where courts apply different First Amendment tests on the trademark side.

The Chapter's fourth meeting, held on October 30 at NBCUniversal, discussed new developments in media and employment law and what California's new independent contractor

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law means for the entertainment and news industries. Shannon Alexander, Senior Vice President, Litigation at NBCUniversal, discussed California's hotly-debated Assembly Bill 5, which Governor Gavin Newsom signed into law last month. Jean-Paul Jassy and Kevin Vick, partners at Jassy Vick Carolan, discussed the California Supreme Court's recent decision in Wilson v. CNN. The case involved a CNN producer who alleges he was wrongfully terminated and subject to discrimination.

The next meeting will take place in January.

Criminal Law Committee
Co-Chairs: Jacquelyn Schell and Kaitlin Gurney
Presenting: Kaitlin Gurney

The Criminal Law Committee, now in its second year, aims to monitor and report on criminal law issues that impact journalists, sources, and the broader media sphere. The Committee held three major events in the past year and worked with the Litigation and Newsgathering Committees to prepare MLRC's recently-released Espionage Act Prosecutions Against the Press, available at http://www.medialaw.org/espionage, contributing sections on the criminal law elements of *mens rea*, vagueness, and overbreadth.

In September, the committee hosted an all-MLRC event on the Espionage Act, "The Assange Prosecution: Will It Affect the Press, and What Should We Do About It?" The panel, organized by George Freeman and Jeff Hermes, discussed the history of the Espionage Act, WikiLeaks founder Julian Assange's prosecution, and the concerns it raises for media outlets moving forward. The two-hour event drew fifty attorneys in-person in New York and nearly the same amount by webcast.

Last winter, the Committee hosted a panel webinar discussing Newsroom Safety & Security. In April, we presented a panel, both live in New York and webcast, to discuss best practices in responding to government Search Warrants, Subpoenas & Seizures involving members of the media. The April meeting was co-hosted with MLRC's Next Gen committee and followed by a happy hour.

Data Privacy Committee
Co-Chairs: Daniel Goldberg, Ed McAndrew, and Jena Valdetero
Presenting: Ed McAndrew

This new committee launched in May 2019. The committee's purpose is to monitor domestic and international developments in the law governing the collection, maintenance and use of data concerning individuals and entities as relevant to MLRC's media members, and to educate members regarding those developments, their impact on both the business of and the content produced by members, and areas of legal risk and best practices for reducing that risk. The committee holds quarterly meetings and has a current roster of more than 120 members.

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The committee's activities began with a cocktail party! A small group of interested members held an impromptu side-gathering at the Legal Frontiers in Digital Media Conference in May 2019.

On June 27, 2019, the committee held its first meeting by telephone. We began by introducing the committee's substantive scope and logistical plan for meetings and events. We then held a substantive discussion of the quickly evolving and groundbreaking California Consumer Privacy Act, which takes effect on January 1, 2019. We also provided an update on the new Nevada Privacy Act, which took effect on October 1, 2019.

On September 19, 2019, the committee held its second meeting by telephone. We spent most of that meeting covering amendments to the CCPA and the then-forthcoming regulations to be proposed by the California Attorney General's Office. We also discussed the CCPA's private cause of action for data breaches resulting from the failure to implement reasonable cybersecurity procedures and practices, and steps that companies can take to mitigate litigation risk. We closed with a discussion of the FTC's COPPA settlement with Google relating to children's privacy issues on YouTube.

On October 22, 2019, the committee and the Commercial Speech and Advertising Committee hosted a joint webinar entitled, "AdTech, Cookies, and the CCPA." David Zetoony, Co-Chair of Bryan Cave Leighton Paisner's Data Privacy & Security Team, gave a great presentation on the impact of the California Consumer Privacy Act on third party behavioral advertising cookies and strategies for compliance with CCPA privacy provisions. Approximately 40-50 participants joined for a substantive and practical discussion of the issues.

Looking forward to 2020, the committee anticipates tackling new legislative, regulatory and litigation developments in both digital privacy and cybersecurity. We hope to host or co-host special events and to participate in the MLRC's events throughout the year. We welcome members' ideas for making the most of this committee.

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

The Employment Committee addressed the changing landscape of government agencies that impact the workplace including the NLRB, EEOC and OFCCP. How these agencies have engaged with media employers through changes in political appointments and even a government shutdown was a hot topic that carried us through the first part of the year. The use of arbitration agreements between media employers and employees has become more controversial. We addressed how media employers should consider the pros and cons of such agreements including the interest of the media in transparency and how that interest does or does not fit with maintaining a mandatory employment program for employment issues.

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The Committee continued to work with other Committees on overlapping topics including the Advertising & Commercial Speech and the Litigation Committees on the topic of accessibility to online content under the Americans With Disabilities Act.

Finally, the Committee is putting the finishing touches on a paper that discusses best practices for media employers doing internal investigations. This will be the swan song for the current Co-Chairs of the Committee as we pass the baton to the next team. It has been great for both of us and an honor to lead this Committee.

Entertainment Law Committee
Co-Chairs: Lincoln Bandlow and Jessica Davidovitch
Presenting: Lincoln Bandlow

The mission of the Entertainment Law Committee is to keep its members apprised of key cases and the latest legal developments in the world of entertainment. The Committee meets via a group conference call that is usually held on the first Wednesday of every month. In preparation for each meeting, the Committee Chairs review a variety of publications and assemble approximately 10 items of interest. About a week ahead of each meeting, the Chairs circulate a list of these items to the Committee, from which members can select which items they would like to volunteer to present. A final meeting agenda 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.

Even when volunteers are not available to cover all the topics compiled for each call, the compilation and circulation of those matters in the monthly pre-call email is a helpful resource for members of the subcommittee to review in their own time.

Some of the specific topics discussed this past year included:

- “Hamilton” Producer Fights Copyright Claims to Alexander Hamilton’s Life
- Showtime, Sacha Baron Cohen Ask Court to Toss Roy Moore's “Who Is America?” Lawsuit
- How Hollywood Can (and Can’t) Fight Back Against Deepfake Videos
- California Supreme Court Analyzes Lawsuit by Ex-CNN Producer
- Ariana Grande Sues Forever 21 for Using a "Look-Alike Model" on Social Media
- 9th Cir.: NFL, DirecTV Face Revived Antitrust Suit Over “Sunday Ticket” Telecasts of Out-of-Market Games
- N.Y.: Photog sues Steven Spielberg for blocking his view of “West Side Story” film set
- Netflix Sued For Defamation By “Afflicted” Subjects Who Say Docuseries Painted Them As “Crazy Hypochondriacs”

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- Bobby Brown's failed ROP claim shows some of the cracks in the current ROP tests
- Cayuga Nation tribe sues Showtime's 'Billions' for defamation
- 5th Circuit holds that Texas Anti-SLAPP Law does not apply in federal court
- Proposed Reform to New York's Anti-SLAPP Laws May Bring Big Changes
- InfoWars Headed to Copyright Trial Over Use of "Pepe the Frog"
- Assange/Espionage Act and Implications for Documentarians
- C.D. Cal.: Disney Wins "Pirates Of The Caribbean" Script Copyright Suit
- Elon Musk Faces Trial Over 'Pedo' Tweet
- CNN files motion to dismiss $275M Sandmann suit, says reporting was factual, not defamatory
- SCOTUS to Decide Whether Copyright Infringement Claim Over Pirate Ship Can Be Sunk by Sovereign Immunity Defense

Insurance Committee
Co-Chairs: Betsy Koch, Eric Brass, Jim Borelli
Presenting: Jim Borelli

The purpose of the Insurance Committee is to bring together in-house counsel, defense attorneys, and insurance professionals to consider issues that will result in greater understanding of the nuts and bolts of insurance coverage, the media insurance marketplace, and the risk management challenges faced by media and entertainment clients today. In our second year in existence, we have continued to grow and now have 58 members.

We intend to have committee meetings once a quarter, either in person or via conference call. On February 1, we had an in-person meeting in Miami Beach during the Cocktails, Conversation & Connections segment of the ABA Forum on Communications Law. The session was facilitated by four committee members – Edward Copeland, Evynne Grover, Michelle Worrall Tilton and Jim Borelli - and included presentations about (1) insuring video games (2) privilege concerns over communications within the tripartite relationship (3) burdensome discovery requests in "scorched earth media litigation," (4) adequacy of limits in the age of mega verdicts and (5) the benefits and drawbacks of combined coverage packages.

On June 27, we held a call-in committee meeting that covered two topics. The first topic considered dealt with issues arising from panel counsel used by "non-media" insurers in defending media and entertainment cases. A discussion on the MLRC Listserv that took place on May 17 – 20 under the subject of "A generalized rant…." was a primary reason for considering this timely topic at our meeting. The initial post was made by a prominent in-house counsel and long-time MLRC member who was concerned and frustrated by his company's

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insurer's retention of a panel counsel who wasn't experienced in defending media cases and who was filing an answer instead of a well warranted 12(b)6 motion. The second topic involved the GDPR and its potential impact on the insurance programs and risk management practices of media and entertainment companies. The discussion was led by Eric Brass, and Dan Shefet, a human rights and data privacy lawyer, was invited to participate as a special guest.

The committee also generates articles on issues and developments concerning insurance and risk management relevant to the media & entertainment community for publication in the MediaLawLetter and elsewhere.

In the coming year, the Insurance Committee intends to hold quarterly meetings to discuss such topics as claim trends, emerging exposures, claims attorney's role in defense/litigation strategy, reporting requirements, unique coverage needs of particular media classes of business, and risk management procedures.

International Media Law Committee
Co-Chairs: Gillian Phillips and Julie Ford
Vice-Chair: Peter Canfield
Presenting: Peter Canfield

Our committee conducts conference calls to discuss current issues of concern to lawyers representing international publishers and journalists. We usually have one or more guest speakers on each call to describe recent media developments in their respective countries.

We started out the year by looking at our own southern border, where an award-winning Mexican journalist publicly criticized U.S. immigration policy and was arrested by ICE because he failed to "tone it down." We also received an update on press freedom and human rights in Brazil under populist President Bolsonaro.

We had a compelling session on disturbing events in Southeast Asia: the trial and appeal of Reuters reporters in Myanmar and the challenges faced by Maria Ressa in the Philippines, whose publication Rappler has been highly critical of President Rodrigo Duterte.

Our colleagues in Australia continue to be good sports by staying up all night so they can report on events down under. This year we got an account of the Australian Federal Police raids on a journalist's home and news organization, and learned of a legal decision finding media organizations liable for alleged defamatory comments by third parties on the organizations' public Facebook pages.

Other topics reported on this year include how recent events in Hong Kong have affected journalists, the role of the UN Special Rapporteur on the Right to Freedom of Opinion and Expression, and UK Parliament's scathing report on Facebook.

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We plan to round out the year with two more sessions. In November we will hear from a panel of copyright experts who will compare copyright laws in the US, UK and Europe. In December, we look forward to having Randy Shapiro and Adam Cannon recreate their discussion from the London conference on the challenges of cross-border prepublication review. As for 2020, we plan to go wherever current events take us. The world is our oyster.

Internet Law Committee
Co-Chairs Judy Endejan & Matt Leish
Presenting: Judy Endejan

The Internet Law Committee interacts primarily through quarterly conference calls. The first 2019 call occurred on April 1, 2019 on the topic of "Captain Marvel Beats Back Trolls and Memes for Control of the Internet: A Conversation with Professor Eric Goldman about His Predictions for 2019." The speaker, Professor Eric Goldman, is a professor of law at Santa Clara University School of Law. He writes the blog "Technology & Marketing Law Blog," which has been inducted into the ABA Journal's "Blawg Hall of Fame." Many of his articles are linkedin the daily MLRC bulletin. "Managing IP" magazine twice named Professor Goldman to a shortlist of "IP Thought Leaders" in North America. He shared some of his thoughts, ranging from the future of Section 230 to "emoji law" to the Supreme Court's ruling requiring registration prior to litigation.

The Committee's second call, on September 12, 2019 discussed "'Blocking and Tackling"-Recent Developments in Controlling Content on the Internet Highway" examining some of the hot issues *de jour* in controlling both access to, and the content of, speech posted on platforms like Twitter and Wikipedia. Jacob Rogers, from Wikimedia, discussed how the Wikipedia community functions and how the Wikimedia Foundation decides to remove certain types of postings or uploads and its strategy on where to go in the future. Pat Carome, from Wilmer Hale, discussed recent lawsuits he has handled for Twitter in which the plaintiffs claimed that Twitter wrongfully suspended or blocked their accounts. Katie Fallow, Senior Attorney for the Knight First Amendment Institute at Columbia University discussed *Knight Institute v. Trump* in which the Second Circuit held that Trump's Twitter Account is a public, government account and he could not block access to it from his critics due to the First Amendment prohibition on viewpoint discrimination.

The Committee hopes to schedule a third call before the end of 2019, to discuss the top two or three cases addressing important legal issues regarding the internet, based upon a survey of Committee members.

In addition to our quarterly calls, we sent Committee members a short, informal questionnaire to help us develop programs, topics, tasks for the Committee in April of 2019. We did not receive an overwhelming response, so we plan to re-send it for the same purpose for 2020. One

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"action item" that has surfaced is the construction of a "checklist" of considerations for removing content from an internet platform and volunteers will be sought for this task.

In 2018 the Committee published an updated version of the Practically Pocket-Sized Guide to Internet Law, available on the MLRC website. The Guide offers a series of concise articles on a wide range of Internet law questions that come up in day-to-day media law practice. We will explore the frequency for updating this guide.

Joshua Kolton has produced an updated version of the section that he wrote for the Guide on Online Anonymity available through **MLRC Bulletin: Legal Frontiers in Digital Media.**

The Committee is exploring additional activities for 2020, and we welcome input from Committees members and the MLRC membership for ideas for projects related to the Internet.

Litigation Committee
Co-Chairs: James Hemphill, Steve Mandell
Vice-Chair: Thomas Curley
Presenting: Steve Mandell

The Litigation Committee concerns itself with all aspects — pre-trial, trial and post-trial — of defamation and invasion of privacy lawsuits brought against the media, including discovery, dispositive motions and strategic matters. In 2018, we focused our efforts on developing the committee as a resource on media law litigation issues. We used committee meetings to discuss current developments and issues of particular concern to defense litigators, including a presentation with the Employment and Newsgathering Committees regarding the joint representation of journalists and media companies in the same litigation. Together with the Criminal Law and Newsgathering Committees, committee members authored sections of the forthcoming MLRC white paper on the Espionage Act pertaining to its legislative history and interpretation, and the potential application of the Bartnicki case to the Act's prohibitions. For the new year, the Litigation Committee plans additional phone meetings and conferences and will be reaching out to other Committees to explore cooperative projects.

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

This year the Media Copyright and Trademark Committee grew to approximately 120 members. We held conference calls at 1 pm EST on the fourth Wednesday almost every month, with about 40-50 attendees each time.

As before, we heard from invited speakers and some committee members about recent court decisions, legislative developments and practice pointers. Examples of topics addressed this year include recent U.S. Supreme Court jurisprudence, European legislative developments, data

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-mining, copyright and trademark fair use cases, Trademark Office practice amendments, and various members' litigation experiences.

By way of example, last month, we discussed the potential impact of the CASE Act on how parties litigate small copyright claims; heard from in-house counsel concerning their defense of the *Otto v. Hearst* copyright trial about use of amateur photographs taken at the Trump National Golf Club in Bedminster, NJ; and discussed other effective defense mechanisms in such cases.

Meetings in upcoming months will address the plethora of high profile music infringement cases; and update members on pending litigation over the legality of "LoCast," the latest streaming service to rebroadcast over-the-air television, this time claiming a not-for-profit exemption. We welcome new members each month. Please let any of our co-chairs know if you would like to join us or to contribute.

Newsgathering Committee
Co-Chairs: Cynthia Counts and Edward Fenno
Vice Chair: Rachel Matteo-Boehm
Presenting: Edward Fenno

The Newsgathering Committee made a major contribution to the MLRC's Espionage Act Guide this year, with several Committee members contributing significant time and effort to research and draft several sections of the Guide. The Newsgathering Committee also hosted two topical conference calls during the year. The first (in conjunction with the Employment and Litigation Committees) concerned joint representation of journalists and media companies in the same matter. The second concerned whether President Trump and other public officials can block public access to their Twitter feeds and other social media accounts. The Committee is planning a third conference call before the end of the calendar year.

Next Generation Media Lawyers
Co-Chairs: Al-Amyn Sumar, Amy Wolf, Matthew Schafer
Presenting: Matthew Schafer

Last year, the Next Gen committee laid out several goals, chief among them: encouraging committee members to connect with members of the bar, learn from each other, and plan for career advancement. This year we worked toward this goal in a number of ways.

First, with MLRC and George's help we made a push to enlist more young lawyers for the committee. In total we added fifty new members this fall, bringing total membership to 170. Second, we are rolling out a mentor/mentee program that pairs Next Gen members with experienced members of the bar for candid career advice. If you have interest in being a mentor to a Next Gen member, please let me know after the lunch. Third, we hosted a panel with Katie Townsend of the Reporters Committee for Freedom of the Press, who was interviewed by Max

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Mishkin of Ballard Spahr about her career trajectory, her current role, and advice for young lawyers.

We also had two in-person roundtable events where a smaller subsection of the committee gets together to informally discuss current issues in media law, and, in December, we'll be having a "Oh the Places You'll Go" panel discussions with four lawyers who each took different career paths in media law, which we hope will give our membership insight into different opportunities in the media bar.

Pre-Publication/Pre-Broadcast Committee
Co-Chairs: Alexia Bedat and Anna Kadyshevich
Vice-Chair: Eric Feder
Presenting: Alexia Bedat and Anna Kadyshevich

Our committee convenes monthly conference calls to engage with speakers on timely information for lawyers who vet content. We program a mix of topics to inform our members on recent developments in the law, and how those developments may affect the pre-publication and/or pre-broadcast review process. This past year we have been fortunate to have attorneys directly involved in many of the cases discussed below present their first-hand experiences to the committee. Calls this past year have covered topics including:

- The fair report privilege, including in the "Steele Dossier" case against BuzzFeed and the libel lawsuit from former Trump campaign strategist Jason Miller against Gizmodo Group, both in Florida;
- Recent legislative efforts that aim to regulate misinformation from hyper realistic (but fake) videos (i.e., "deepfakes");
- The decision in *hiQ Labs, Inc. v. LinkedIn Corp.,* regarding automated scraping of public accessibly data and the Computer Fraud and Abuse Act (CFAA);
- Copyright, right of publicity and trademark issues in video games, with focus on the litigation surrounding characters' dance routine in the game Fortnite;
- Copyright litigation over photographs from serial plaintiff's lawyers like Richard Liebowitz;
- Implied contract in claims over allegedly stolen ideas, with focus on litigation over the Netflix series *Stranger Things*;
- Right of publicity in documentary films (with focus on the recent decision in a case filed against Showtime over a documentary about Whitney Houston); and
- Vetting from the client's perspective, featuring among a producer and in-house lawyers for Vice News.

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Through all the calls, we have discussed how these new trends and issues could come into play in the vetting context. We also discuss new technologies in the newsroom and how these are changing the role of in-house counsel. In the next year, we plan to continue to host monthly calls on a variety of topics, including, unique challenges in vetting podcasts, libel in fiction, and the impact of European privacy and copyright laws. We encourage anyone interested in these topics to join the committee and participate in the calls.

State Legislative Affairs
Co-Chairs: Eric Kemmler and Leita Walker
Vice-Chair: Joseph Martineau
Presenting: Leita Walker

Over the past year, the committee held eight conference calls and helped ensure updates in the MediaLawLetter on anti-SLAPP laws in Tennessee, Texas, and Colorado. The committee also hosted presentations/discussions on various legislative developments, including in May when Ben Sheffner, SVP & Associate General Counsel at the MPAA, discussed the movement in state legislatures to criminalize "deep fakes;" in September when Phil Yannella, Ballard Spahr partner, gave a presentation on data privacy laws and legislation to watch outside of California, including especially in Nevada; and in October when Jim Ewert of the California News Publishers Association, gave a presentation on California's new labor law, AB 5, and the collateral impacts it is having on the media industry and its use of freelancers in particular.

Starting this summer, and largely due to poor attendance of monthly calls, the committee turned its focus to ensuring that we have active members in key states to assist with monitoring legislative developments. We have added seven new members since July and attendance at the monthly calls is significantly up—with at least a couple of dozen people attending calls in September and October. We hope to have presentations on substantive topics on a semi-regular basis. The next call, at the end of November, to be held in conjunction with the Employment Law Committee, will feature Paul Mersino from Butzel Long. He will discuss how state non-compete laws impact the media industry. The committee is also in the process of identifying major trends that it should be tracking and more systematically reporting upon to the larger membership. One leading contender is laws surrounding the issue of transparency in law enforcement—states continue to grapple with press and public access to body cam footage (Iowa, Wisconsin and Tennessee, to name a few) and police personnel records (New York), while others are moving to encrypted radio for police dispatch calls, making it difficult for the press to monitor law enforcement activity via scanner (Minnesota).

The committee holds monthly calls at 10 am central on the fourth Friday of each month.