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MEDIA LAW LETTER

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From the Executive Director's Desk

February Was the Worst Month for the First Amendment, But A Great Month for Journalism: Trump and Weinstein

I have taken the position for three years that while President Trump's media bashing has been unprecedented, unpresidential, and extremely dangerous and damaging, at least he really hasn't done anything to harm or endanger media law. While he still hasn't directly altered the law, it is hard not to agree with the proposition that in February the president caused more harm to the First Amendment than any other president in any similar period in history.

Day after day we have seen attacks on basic First Amendment protections, threats to our First Amendment freedoms, and attempts to debase and devalue First Amendment values. The hope of some timid Republicans that impeachment would teach Trump a lesson was within days found to be a pipedream; to the contrary, it seems to have taught him that he can get away with running roughshod over the Constitution for his personal and political ends.

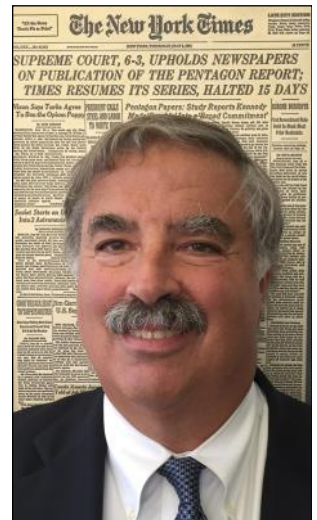
The month started with his peculiar State of the Union address, capped by Speaker Pelosi's provocative ripping up of the text of the speech at its



A doctored and misleading video of speaker Pelosi, ripping up a speech she called "a manifesto of mistruths," was retweeted to millions by Trump.

conclusion. But to make matters worse, the White House quickly tweeted a manipulated video purporting to show Pelosi ripping up the text not at the speech's conclusion, but while Trump was honoring a Tuskegee airman, military families and praising other worthy guests. While nasty campaign ads are part of our history and tradition, having the incumbent president distribute to an audience of millions a totally misleading video must be viewed as another affront to the truth and to our principles of free speech.

To compound the difficulty, social media platforms declined Pelosi's request to remove the misleading video. While I fully understand the burdens on free speech in asking platforms to arbitrate which ads are



George Freeman



Lt. Col. Alexander Vindman was essentially stripped of his job at the National Security Council for complying with a subpoena to testify before the House Intelligence Committee

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truthful and which are not, and the administrative burdens as well, it's hard to see the problem when the content at issue was intentionally doctored and clearly deceptive.

The response that the events depicted actually happened, although not in the temporal sequence portrayed in the video, is only an additional degradation of any commitment to truth and free speech.

The next episode was worse. Lt. Col. Alexander Vindman was essentially stripped of his job at the National Security Council for complying with

a subpoena to testify before the House Intelligence Committee, and then committing the sin of telling the truth. There was no Administration attempt to portray his sacking as due to anything other than retaliation.

The Administration's strategy seems aimed not only at punishing Vindman but, as well, to chill any other government employees who might find themselves in a similar position. Such a maneuver is blatantly offensive to basic First Amendment values.

What choices did Vindman have to show loyalty to the president, the only quality Trump seems to hold dear? Well, he could have refused to show up and gone to jail for non-compliance with a Congressional subpoena, or he could have perjured himself and gone to jail for lying under oath. Instead he acted in a way that exemplified three principles – all of which, in the president's view, are trumped by fealty:

- Telling the truth
- Complying with the rule of law
- And adhering to the First Amendment, speaking out truthfully and, as a government employee, informing the public as to what he knew as to the administration's actions towards Ukraine.

The Supreme Court has said that government employees don't give up their rights under the First Amendment and otherwise when they accept a government job. They described a public employee's testimony on a matter of public concern as a "quintessential example" of First Amendment protected speech.

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As the Abrams Institute for Freedom of Expression concluded:

Friday's actions are a cause for great concern. This is not just because they run roughshod over the protection extended to Col. Vindman by the First Amendment, but also because of their broader implications for the ability of the American public to know what transpires in the executive branch. Simply stated, Col. Vindman's firing strikes at the heart of the critical First Amendment interest in protecting government transparency, accountability, and the exposure of misconduct at the highest levels.

The retaliation against Col. Vindman reflects a dangerous impulse to punish speech that is at odds with the personal preferences and interests of the President — an impulse utterly inconsistent with the First Amendment.

Within days came the next attack, not so much on the First Amendment as on the rule of law. As I set forth in a [recent column](#), Trump's blasts at the press and the judiciary are strategic: the Third and Fourth Estates are the institutions which can hinder his agenda, and thus it serves his purposes to demean and debase them so as to weaken their impact.

So it came as no great surprise when Trump struck out against Federal District Judge Amy Berman Jackson, the judge in his friend Roger Stone's trial, prior to the sentencing of that scam artist. Trump's tweet suggested that Judge Jackson harbored bias against Stone, falsely describing and linking the Judge's handling of prosecutions of his campaign allies and civil claims against Hillary Clinton.

As 21 past Chairs of the ABA's Litigation Section wrote in a powerful letter, these attacks "must be called out for what they are: inappropriate and destructive of the rule of an impartial judiciary in our constitutional democracy ... Degrading and denouncing a judge, particularly when seeking to affect the outcome of a pending case involving the attacker's ally, has no place in our society; the more so when it comes from the president."

And, of course, that was followed days later by the President's ill-advised statement that Justices Sotomayor and Ginsburg should recuse themselves from all Trump related cases. While RBG's years old comments to the New York Times about the horrors of a potential Trump presidency were unwise, Justice Sotomayor's was a rather routine comment on Administration strategy in a recent cert opinion, hardly the stuff on which to base a recusal. But more to the point, while this is the President's First Amendment protected speech, such broadsides against the judiciary are a flagrant flouting of the separation of powers.

Vindman could have refused to show up and gone to jail for non-compliance with a Congressional subpoena, or he could have perjured himself and gone to jail for lying under oath. Instead he acted in a way that exemplified three principles – all of which, in the president's view, are trumped by fealty.

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To cap the month off, in late February Trump highlighted his anti-First Amendment instincts by having his campaign organization file a libel suit against – guess who? – The New York Times.* Predictably, it was a suit borne of pure ideological vengeance, claiming defamation in an op-ed piece by former Executive Editor Max Frankel about Trump’s actions toward Russia – a piece seemingly easily defensible on grounds of opinion or lack of actual malice. (To my knowledge, it was the first libel suit ever filed by a sitting president, let alone one against the press.)

But as we know from Trump’s history of flimsy libel lawsuits, they generally are not prosecuted with a realistic goal of winning. Rather, they – like this one – are commenced to try to chill the defendant’s speech, to squeeze the defendant financially or to get back at the defendant politically or personally. This was underscored by [an article](#) Susan Seager wrote in the fall of 2016 which surveyed all the libel suits Trump had filed, and found that he lost six of seven (the single victory was an arbitration won by default). But in many cases he claimed victory by proclaiming that one of those nefarious purposes had been achieved – an excellent argument for the need of a federal anti-SLAPP law.

(I would be remiss in not reminding you of the bizarre publication history of Susan’s article. It was written for the Communications Lawyer, the magazine of the ABA’s Communications Law Forum. But, notwithstanding it was to be published by a First Amendment organization, the ABA, cowed by Trump’s reputation as a libel plaintiff, censored the piece and didn’t allow it to be published. MLRC stepped into the breach and ran it in this publication.

Ultimately, the ABA relented and agreed to publish it after some perfunctory editing to make it less political – though it was a legal study, not a political screed, in the first place.)

Especially given the high public interest on Trump’s relationship with Russia – the piece was written after AG Barr’s misleading summary of the Mueller Report and before the release of the Report itself – it’s hard to see how an op-ed based on known facts and opining that there was an implicit quid pro quo of campaign help for Trump in return for a pro-Russia foreign policy would not be considered protected opinion, let alone evidencing actual malice.

Making plaintiff’s task even more difficult, Max Frankel is a brilliant journalist, former Pulitzer Prize winner (for his coverage of Nixon’s trip to China) and fearsomely intelligent defendant. (Although I would be surprised if the case gets to discovery, I would like to see the deposition of Mr. Frankel. I once defended him a deposition and his answers were like a well-crafted essay, elegant sentences forming well organized paragraphs one after another.)

As we know from Trump’s history of flimsy libel lawsuits, they generally are not prosecuted with a realistic goal of winning. Rather, they are commenced to try to chill the defendant’s speech, to squeeze the defendant financially or to get back at the defendant politically or personally.

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* As we went to publication, we learned that his campaign had just filed a very similar libel suit against another nemesis, The Washington Post.

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In any event, starting with intentionally and blatantly misleading false ads, moving to the reassigning of a long-serving member of the military for truthful testimony, and culminating with a frivolous, politically-based libel suit against the “liberal” New York Times, it was a harrowing month for the First Amendment. Steps can be taken to undercut two of these three actions: social media platforms can take down deliberately misleading ads and judges can dismiss frivolous lawsuits brought for political motives. But what can be done about a President who fires government employees for testifying truthfully is a harder question. Perhaps action taken by the populace in November is the only answer.

Of course, the above deals primarily with Trump’s undermining First Amendment values. As to his respect for the rule of law generally, it’s hard to improve on this excerpt of a recent [New York Times editorial](#), answering the question of what he understands the law to be:

Well before the events of the past week, Mr. Trump supplied a pretty good idea: The law is something that applies to his adversaries, not to himself or his friends. He regularly turned to the courts to harass and intimidate employees, critics and contractors. But when it has come to his own perceived advantage — whether he was violating federal fair-housing laws to keep black renters out of his apartment buildings, playing shady games with his tax returns, sexually assaulting women, defrauding students of his “university,” raiding his own charity, buying the silence of alleged mistresses on the eve of an election, running his global business empire out of the White House, or thwarting the will of Congress by using foreign aid to advance his re-election — Mr. Trump has always seen the law as just another set of rules to be bent, if not broken.

The Weinstein verdict can be explained by the journalism which changed the culture and which ultimately affected the jury. It also started a conversation leading to the cultural conclusion that transactional sex was not only wrong, but could be illegal as rape.

On the other hand, last week was a great one for journalism. And that was because of the verdict in the Weinstein case.

One must start with the proposition that as vile, disgusting and abusive as Weinstein was, from a purely legal point of view this was a hard case for the prosecution. The evidence clearly showed that some of the victims had consensual sex and continuing relationships with Weinstein after his attacks on them. Several involved career moves, giving credence to the defendant’s position they were consensual and transactional, consistent with the Hollywood tradition of casting couch sex. In addition, the case was lacking in corroborating forensics or direct third-party witness testimony. Indeed, most predictions I heard of those following the trial were that, sadly, there would be a “not guilty” verdict.

How then to account for the split verdict which found Weinstein guilty on two counts with the possibility of 25 years of jail time? The answer, I would submit, is in the journalism which

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Jodi Kantor and Ronan Farrow with their lawyers and editors at the 2018 MLRC Forum

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changed the culture and which ultimately affected the jury. As one juror poignantly explained, “It was one instant, not a relationship, that we were analyzing.”

We all are aware of the doggedness of Times reporters Jodi Kantor and Megan Twohey and the New Yorker’s Ronan Farrow, who broke the Weinstein story and jumpstarted the #MeToo movement. But their work did more than that: It also started a conversation leading to the cultural conclusion that transactional sex was not only wrong, but could be illegal as rape, that sex between people of wildly different levels of power can under certain circumstances be considered illegal.

As such, the verdict showed how journalism affects the culture, a jury, and ultimately even the legal system all by doing what journalists are supposed to do: by, as Jon Allsop wrote in the Columbia Journalism Review, “shining a public spotlight on the misdeeds of powerful people, but also, as importantly, by scrutinizing iniquities and limitations of the system itself.”

Of course, while Kantor, Farrow and Twohey deserve the plaudits they received – and we thank the first two again for their terrific presentations at the 2018 MLRC Forum – we should also thank to an even greater degree the courageous women who come forward to tell the journalists their stories. Without their bravery and sense of social responsibility, none of this would have happened.

So I suppose Dickens was right that these are both the best of times and worst of times. Amidst a worldwide virus, a mess of possibly catastrophic proportions in the Democratic Party, a looming disaster in the Electoral College, and a president’s beat down of the First Amendment, it’s good to see that strong journalism had a global effect and made us all proud.

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month’s MediaLawLetter.

Fair Report Privilege Applied to Reverse \$250,000 Libel Verdict

Plaintiff Alleged “To Catch a Predator” Broadcast Falsely Labeled Him a “Sex Offender”

By Dennis R. Bailey

The Alabama Supreme Court has reversed and rendered a \$250,000 libel verdict based upon the application of the state’s statutory fair report privilege in a case involving a “To Catch a Predator” public interest broadcast. [Birmingham Broadcasting \(WVTM-TV\) LLC v. Hill](#), No. 1180343 (Ala. Feb. 28, 2020).

Background

Leslie Wayne Hill filed suit against Birmingham Broadcasting (WVTM-TV) LLC and members of the Jefferson County sheriff’s office in 2014. He alleged that that in 2013 WVTM-TV (Channel 13) broadcast two “To Catch a Predator” segments authored by the sheriff’s office which referred to him as a “sex offender.” The first segment reported the issuance of two warrants for the arrest of the Plaintiff for failing to register as a sex offender and for living too close to a school. The second segment, broadcast one week later, stated the charges were “dropped” after the first broadcast. The complaint included claims for defamation claims against all defendants.

The trial court granted summary judgment for the law enforcement officers on immunity grounds. However, the motion for summary judgment for Channel 13 was denied as to the defamation claims although the court found an absence of malice by Channel 13.

The case was tried before a twelve-person jury in October 2018 with Channel 13 as the only defendant. Motions for judgment as a matter of law were timely filed at the close of the plaintiff’s case and at the close of all the evidence. Both were denied. The jury returned a unanimous \$250,000 verdict for the Plaintiff against Channel 13. Post-trial motions were also denied and Channel 13 timely appealed.

In 1992 the Plaintiff plead guilty to five misdemeanor counts of distributing obscene adult films and paid a \$900 fine. Over twenty years later he was detained by Jefferson County sheriff’s deputies on an unrelated matter and his criminal record was researched. The sheriff’s office determined that because of the 1992 convictions, the plaintiff was required to register pursuant to the Sex Offender Registration and Notification Act (“SORNA”). After being advised by a deputy to register, the plaintiff refused to register and a magistrate issued warrants for his arrest for failing to register as a sex offender and for living too close to a school.

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During this timeframe Channel 13 aired a weekly segment called “To Catch a Predator” as a public interest broadcast. The purpose was to encourage sex offenders to register. The sheriff selected the individuals to feature in each program. The segments were written and produced by members of the sheriff’s office and voiced primarily by the sheriff himself. The news reader for Channel 13 lead off the segment with: “A local sex offender is back in trouble with the law tonight and investigators need your help in tracking him down.” During the bulk of the segment, the sheriff stated the plaintiff was a “convicted sex offender” because of his prior distribution of obscene materials convictions. During the broadcast Hill’s mugshot appears under the words “To Catch a Predator.” At the close of the segment, the news reader concludes: “Take another look at this convicted sex offender. If you’ve seen him call [the sheriff’s department]. Your call will remain anonymous.” The first broadcast lasted about a minute and a half.

After the first broadcast and before the warrants were served, the Hill and his lawyer convinced an assistant district attorney that Hill was not required to register under SORNA and, as a result, the warrants were withdrawn.

The sheriff’s office contacted Channel 13 and advised the station that the warrants for Hill’s arrest had been withdrawn. That same evening, Channel 13 broadcast that week’s episode of “To Catch a Predator” featuring a different person. Channel 13 added a note at the end of the broadcast stating that charges against the subject of the prior week’s episode—Hill—were recalled. Above the mugshot of Hill were the words: “Charges Dropped.” That segment lasted about 30 seconds.

Importantly, neither Hill nor his lawyer ever contacted Channel 13 to request any further explanation or retraction. Indeed, Plaintiff said when he saw the second broadcast he felt “a great relief.” The first time the Plaintiff contacted Channel 13 was when the lawsuit for defamation was served.

The trial judge denied a motion for summary judgment on the theory that the privilege could be defeated if negligently failed to broadcast the withdrawal of the charges “in the same manner” as the original broadcast.

Trial Court’s Fair Report Privilege Analysis

The primary defense asserted by Channel 13 was Alabama’s statutory version of the fair report privilege which provides in part:

“The publication of a fair and impartial report of...the issuance of any warrant...shall be privileged unless it be proved...that the defendant refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable explanation or contradiction thereof by the plaintiff...”

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Although the circuit court of Jefferson County, Alabama, found the broadcasts were fair and impartial reports of official action and were made without malice by Channel 13, the trial judge denied a motion for summary judgment on the theory that the privilege could be defeated if the Defendant voluntarily undertook to publish an explanation and, by doing so, negligently failed to broadcast the withdrawal of the charges “in the same manner” as the original broadcast. The trial court reasoned that because the second “Charges Dropped” broadcast lasted only 30 seconds compared to the 90-second initial “convicted sex offender” broadcast there existed a jury question as to whether the voluntary second broadcast was made “in the same manner” as the first broadcast.

Alabama Supreme Court Opinion

Justice Sarah H. Stewart, writing for a unanimous Alabama Supreme Court, essentially held that in order to lose the protection of the fair report privilege for a fair and impartial summary of official action published without malice, the words “by the plaintiff” in the statute required a plaintiff to request an explanation or contradiction which the defendant then refuses or negligently fails to publish in the same manner of the original offending publication. Since Hill never requested nor supplied an explanation or contradiction to Channel 13 and the second broadcast was substantially true, the second broadcast could not support a defamation claim. As a result, the verdict was reversed and rendered for Channel 13.

In doing so, the Alabama Supreme Court relied heavily upon cases from Kentucky and Ohio, states with very similar fair report privilege statutes. Under Alabama law and statutes similar to Alabama law, a plaintiff who never requests an explanation or clarification cannot defeat the fair report privilege unless they can show actual malice. The Alabama Supreme Court also affirmed the summary judgment entered for the sheriff’s deputies involved on immunity grounds.

Under Alabama law and statutes similar to Alabama law, a plaintiff who never requests an explanation or clarification cannot defeat the fair report privilege unless they can show actual malice.

Dennis R. Bailey, Katie Davis and Evans Bailey of Rushton, Stakely, Johnston & Garrett, P.A., represented Channel 13. The sheriff’s office was represented by Bruce Gordon, John Dana, Jason Gilmore and James Stewart of Gordon, Dana & Gilmore, LLC. Plaintiff was represented by John C. Robbins of the Robbins Law firm.

Texas Appeals Court Confirms Substantial Truth Can Be Asserted as a Defense

By Catherine Robb

The First Court of Appeals in Houston, Texas recently confirmed that a defendant *can* assert the affirmative defense of substantial truth in a defamation case, even after a plaintiff has met its burden under the Texas Anti-SLAPP statute to present a *prima facie* showing of falsity. [Propublica v. Frazier](#), No. 01-19-0009 (Tex. App. Jan. 23, 2020).

Distinguishing the Texas Supreme Court decision in *Dallas Morning News v. Rosenthal*, the Court held that, notwithstanding a defamation plaintiff's satisfaction of his burden under the state's Anti-SLAPP statute to demonstrate a *prima facie* case of falsity by clear and specific evidence, a defendant may still move for dismissal by demonstrating an affirmative defense, such as substantial truth, by its (then-current) burden of establishing the defense "by a preponderance of the evidence." (Due to a recent amendment to the statute, for cases filed after September 2019, the moving party must establish an affirmative defense or other grounds on which the moving party is entitled to judgment "as a matter of law.").

Background

Plaintiff, Dr. "Bud" Frazier, sued *ProPublica*, *The Houston Chronicle*, and reporters for both (collectively "ProPublica") for a May 2018 online and print article titled, "A Pioneering Surgeon's Hidden History of Research Violations, Conflicts of Interest and Poor Outcomes." The article was part of a larger series focused on the heart transplant program at St. Luke's Episcopal Health System/Texas Heart Institute (where Frazier worked).

While acknowledging Frazier's status as a pioneer in the field of cardiology and mechanical heart pumps, the article also focused on questions and concerns that had been raised about, among other issues; findings of research protocol violations; allegations in a prior federal lawsuit concerning the practice of medicine by an unlicensed doctor who worked with Frazier; allegations by several of Frazier's colleagues about Frazier's conduct regarding experimental research; Frazier's failure to disclose conflicts of interest; and, the high rate of mortality among Frazier's patients. The online version of the article included links to numerous cited sources.

In his Petition, Frazier alleged that the article included false and defamatory statements about him and discussed several allegedly defamatory "false impressions" created by the article. He

Notwithstanding a defamation plaintiff's satisfaction of his burden under the state's anti-SLAPP statute to demonstrate a prima facie case of falsity by clear and specific evidence, a defendant may still move for dismissal by demonstrating an affirmative defense, such as substantial truth.

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also included claims for intentional infliction of emotional distress (“IIED”) based on the reporter’s efforts to reach out to a medical journal in an attempt to obtain more information about whether Frazier had properly disclosed conflicts of interest. After answering, ProPublica filed an Anti-SLAPP Motion requesting dismissal of all of Frazier’s claims.

With respect to the claims for defamation, ProPublica asserted that (1) Frazier could not establish material falsity for any of the complained of statements, (2) the article was privileged as a fair report of official proceedings and fair comment on matters of public concern, (3) the article accurately reported third-party allegations on matters of public concern, and (4) that many of the statements were nonactionable opinion. ProPublica also asserted that Frazier’s IIED claim should be dismissed because it was a “gap-filler” under Texas law and barred by the First Amendment and because ProPublica’s conduct was not “extreme and outrageous” as a matter of law.

To avoid a protracted fight over discovery (which Frazier had requested, despite the general stay of discovery pending a decision on an Anti-SLAPP Motion), ProPublica stipulated for purposes of the Anti-SLAPP Motion and hearing only, that they would not contest actual malice at the Anti-SLAPP stage. Thus, the main issue at the hearing concerned the alleged falsity of the complained of statements. In arguing that the complained of statements were false and defamatory, Frazier introduced an expert report on allegedly “false impressions” created by the article and the expert’s opinion of how an ordinary reader would view the allegedly false statements and/or false impressions. ProPublica moved to strike the expert report (which included, among other things, “survey findings” based on a survey of 12 persons), but the trial Court denied the request, instead stating that it would give it “the weight it deserve[d].”

Frazier introduced an expert report on allegedly “false impressions” created by the article and the expert’s opinion of how an ordinary reader would view the allegedly false statements and/or false impressions

ProPublica introduced considerable evidence of substantial truth, including hospital records concerning the research violations, pleadings from the underlying lawsuit reported on in the article, statements by Frazier’s former colleagues, evidence showing the failure to disclose conflicts of interest, and Medicare data regarding mortality rates. In addition to arguing substantial truth, ProPublica also argued its defenses of privilege and the third-party allegation rule.

On the issue of falsity/substantial truth, after arguing that he had met his burden to establish falsity, Frazier argued to the trial court that substantial truth was not a proper defense to be raised at the dismissal phase and that the trial court should, therefore, ignore ProPublica’s evidence and arguments demonstrating substantial truth. In arguing his position, Frazier directed the trial court to the Texas Supreme Court opinion, *Dallas Morning News v. Rosenthal*, which Frazier asserted supported his position that, once he met his burden to

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establish falsity, the trial court could not consider ProPublica's affirmative defense of substantial truth. The trial court ultimately agreed with Frazier (as seen by subsequently-filed Findings of Fact and Conclusions of Law) and did not even consider ProPublica's evidence or defenses.

Similarly, with respect to Frazier's IIED claim, Frazier argued that ProPublica could not raise their affirmative defense that the claim was barred by the First Amendment. (Frazier and the trial court both ignored ProPublica's other argument that Frazier also did not prove "extreme and outrageous conduct" and should lose for that additional reason.). Again, the trial court agreed with Frazier's interpretation of the statute and the law, ultimately denying ProPublica's Anti-SLAPP Motion in its entirety. As alluded to above, at Frazier's request, and despite ProPublica's opposition, the trial court entered Findings of Fact and Conclusions of Law, adopting wholesale (with one minor exception) Frazier's requested Findings and Conclusions. The Findings and Conclusions referred to the objected-to expert report four times as evidence it relied on in reaching its decision. The Findings, which only referenced evidence presented by Frazier, also specifically stated that ProPublica "*cannot* raise the 'substantial truth' defense at this stage of the proceedings as a matter of law." (emphasis added).

ProPublica appealed the denial of the Anti-SLAPP Motion, arguing that the trial court refused to consider its arguments and evidence establishing that the Article was substantially true, refused to consider its arguments and evidence establishing the fair report and fair comment privileges, refused to consider its arguments and evidence establishing a complete defense to the IIED claim, and relied on the legally irrelevant and flawed expert report and survey.

Ruling from the Court of Appeals

Although both sides requested oral argument, the First Court instead took the case under submission after the briefing was concluded.

In its Opinion, issued on January 23, 2020, the First Court of Appeals agreed with ProPublica that ProPublica was entitled to present their defense of substantial truth (and privilege) as to the claims for defamation, and the First Amendment as to the IIED claim. As the Court found, "[i]t is clear from the Findings of Fact and Conclusions of Law that the trial court disregarded, as it was urged to do so by Frazier's counsel, all of ProPublica's evidence and arguments about substantial truth. ProPublica contends this is error. We agree."

The First Court of Appeals clarified that the trial court had read *D Magazine* too broadly and that the case should not be read to prevent a defendant from raising substantial truth as an affirmative defense. Rather, the Court found that "even if the plaintiff makes a *prima facie* showing of falsity with its own evidence, the defendant should be given an opportunity to meet its higher burden of proof ... on the falsity/substantial truth issue."

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The Court of Appeals also looked to more recent cases where media entities had asserted affirmative defenses, including another recent Texas Supreme Court case, *Dallas Morning News v. Hall*, in which the Court noted that it did not need to consider the defendant's affirmative defense of truth because the plaintiff—in that instance—had not met his burden to establish falsity, finding that the clear implication of the Court's finding was that the supreme court *would have* considered whether the defendant had proved its substantial truth defense, if plaintiff had actually met its burden to prove falsity. The First Court also looked at the words of the statute itself, which make it clear that “a defendant's ability to put on evidence of its substantial truth defense is not affected by the plaintiff's *prima facie* showing of falsity.” Because the trial court refused to consider ProPublica's defenses, the First Court also found that the trial court erred in failing to consider ProPublica's statutory privileges.

Looking at the IIED claim, which the trial court had also refused to dismiss, the First Court found that the trial court had similarly failed to consider ProPublica's legal and factual defense to the IIED claim. The First Court was unpersuaded by Frazier's argument that legal defenses, such as the protections of the First Amendment, could not be raised in an Anti-SLAPP Motion and found that Frazier's interpretation would “run afoul” of the Anti-SLAPP statute's admonition that it “does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law rule or provision.” The First Court also noted the trial court's error in not considering ProPublica's fact defense (that Frazier had demonstrated no extreme and outrageous conduct by ProPublica).

After deciding that the trial court had incorrectly refused to consider ProPublica's affirmative defenses as to Frazier's claims for defamation and intentional infliction of emotional distress, the First Court decided against ProPublica's request that the Court make a ruling on the underlying TCPA Motion and, specifically, grant the motion on its merits. Instead, because it had found that the trial court failed to consider ProPublica's substantial truth defense, its privileges, or its IIED defenses when ruling on the Anti-SLAPP Motion, the First Court remanded the case to the trial court to give it an opportunity to do so. (In an interesting side-note, although the First Court remanded the case back to the trial court to give the judge another chance to rule on the Anti-SLAPP Motion and consider ProPublica's affirmative defenses (and other issues), the judge who initially heard the Anti-SLAPP Motion was voted out of office in the interim, meaning a new judge will be responsible for deciding the motion on remand).

Laura Prather and Catherine Robb of Haynes & Boone represented Pro Publica, Inc. Jonathan Donnellan and Stephen Yuhon, Hearst, represented The Houston Chronicle. Plaintiff was represented by David Howard and Ronald D. Krist.

Court Dismisses Virginia Lieutenant Governor's Defamation Suit Against CBS

By Emmy Parsons and Matthew E. Kelley

In mid-February, a judge in the Eastern District of Virginia granted CBS's motion to dismiss a defamation lawsuit filed by Virginia Lt. Gov. Justin Fairfax over the broadcast of interviews with two women who accused him of sexually assaulting them. [Fairfax v. CBS](#), 1:19-cv-01176 (E.D. Va. Feb. 11, 2020).

The court held that, because CBS presented both the allegations and Fairfax's denials of them, a reasonable person would not understand the broadcasts as an adoption by CBS of the truth of the allegations, part of a growing number of decisions holding that a balanced report of a controversy is not reasonably understood in a defamatory sense – without any reliance on the so-called neutral report privilege. And the court also held that Fairfax had failed to adequately plead actual malice.

Background

On February 1, 2019, media reports began circulating about a photo from Virginia Governor Ralph Northam's medical school yearbook page that showed a white man in blackface and another person dressed as a Ku Klux Klansman. Northam immediately began receiving calls for him to resign from office. Although Northam ultimately denied that he was one of the two men in the photograph, he admitted to having worn blackface in the past.

Two days later on February 3, the same online publication that first reported on the Northam yearbook photo reported that Virginia Lieutenant Governor Justin Fairfax had been accused of sexually assaulting a woman at the 2004 Democratic National Convention in Boston. Fairfax issued a public statement denying the claim and threatening legal action against those who repeated it. On February 8, a second woman came forward and accused Fairfax of raping her in 2000 when both were students at Duke University. Fairfax also denied these allegations, and asserted that both women had consented to sexual activity. Fairfax called the women's allegations part of a "vicious and coordinated smear campaign" being orchestrated against him.

Media outlets around the country, including CBS, immediately began reporting on these allegations. Nearly two months later, between March 31 and April 2, *CBS This Morning* aired several segments of interviews between co-host Gayle King and the two women who accused Fairfax of sexual assault, Vanessa Tyson and Meredith Watson.

The court held that, because CBS presented both the allegations and Fairfax's denials of them, a reasonable person would not understand the broadcasts as an adoption by CBS of the truth of the allegations.

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Fairfax declined to be interviewed by CBS, but he provided statements denying the allegations and summarizing the results of two polygraph tests he took that he claimed showed that he was telling the truth about the encounters with the women. CBS included these denials, including the results of his polygraph test, in the segments.

The Lawsuit

On September 12, 2019, Fairfax sued CBS in the U.S. District Court for the Eastern District of Virginia, alleging that CBS, acting with actual malice, defamed him and intentionally inflicted emotional distress on him by publishing interviews with the two women.

Fairfax's complaint maintained that both encounters were "entirely consensual," and that the women released their allegations just as Governor Northam was set to resign and Fairfax was in line to become the second African-American governor of Virginia. He described the women's allegations as a "political hit job" and a "deliberate and calculated effort to permanently harm [his] political and professional career."

Fairfax alleged that CBS chose to air the interviews in order to rehabilitate its image in light of several #MeToo allegations involving high-ranking employees at the network. Fairfax also alleged several categories of conduct that he claimed established that CBS acted with actual malice, including:

- CBS allegedly failed to investigate four sources for whom Fairfax's team provided the name and contact information to CBS who could have allegedly corroborated his assertion that Watson's allegations were false;
- CBS allegedly failed to interview unnamed "relevant witnesses" about the encounter between Fairfax and Tyson;
- King allegedly failed to ask specific questions of Watson provided to CBS by Fairfax's team that allegedly would have revealed that there was an eyewitness to the encounter between Watson and Fairfax;
- King's co-hosts made on-air comments after the interviews aired that allegedly suggested they believed the two women's allegations and "vouch[ed] for the credibility" of their stories;
- CBS allegedly conducted a "pre-interview" of Watson to be sure that her comments fit a "preconceived narrative";
- CBS edited the interviews to ensure the stories fit its preconceived narrative;

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- CBS failed to report on new information revealed by Fairfax in July 2019, four months after the stories ran, regarding the presence of an allegedly exculpatory eyewitness to Fairfax’s encounter with Watson; and
- CBS aired the interviews at a time “calculated to maximize the ratings for CBS.”

On November 1, 2019, CBS filed a motion to dismiss Fairfax’s claims, and a motion for attorney’s fees pursuant to Virginia’s anti-SLAPP statute. In its motion to dismiss, CBS argued (1) that the broadcasts did not reasonably convey a defamatory meaning, and (2) that Fairfax did not, and could not, adequately plead actual malice.

Regarding defamatory meaning, CBS argued that the reasonable viewer would not understand the broadcast to be an assertion *by CBS* that Fairfax was guilty of the alleged sexual assaults. Rather, the challenged broadcasts objectively presented the women’s allegations and Fairfax’s version of those same events. And CBS argued that none of Fairfax’s allegations, either standing alone or in combination, were sufficient to plausibly establish CBS aired the interviews knowing they were false or being aware they were probably false.

CBS argued that the reasonable viewer would not understand the broadcast to be an assertion by CBS that Fairfax was guilty of the alleged sexual assaults.

The Court’s Opinion

In granting CBS’s motion to dismiss, Judge Anthony Trenga first ruled that the CBS *broadcasts* did not convey a defamatory meaning. Although acknowledging that the women’s statements, if false, would be defamatory *per se*, reasonable viewers would not interpret the broadcasts as assertions by CBS that Fairfax had in fact sexually assaulted the women, Judge Trenga ruled. Because CBS included Fairfax’s denials in each broadcast and King “probed inconsistencies and shortcomings in both women’s statements,” when viewed as a whole and in context the broadcasts did not convey a defamatory meaning. Although the co-hosts’ comments when viewed in isolation could imply they believed the women’s accounts, none of the journalists explicitly said they believed the women were telling the truth or asserted that Fairfax committed sexual assaults.

Judge Trenga ruled in the alternative that Fairfax did not plausibly actual malice because he did not plead sufficient facts to support any of his multiple theories regarding why CBS purportedly knew or strongly suspected his accusers were lying. CBS had no heightened duty to investigate the women’s claims both because they had been widely reported for months and Fairfax acknowledged having sexual encounters with them, albeit while insisting they were consensual. CBS reached out to the individuals Fairfax had suggested could contradict the women’s statements and could not be faulted for the fact that those sources did not agree to speak with journalists. CBS did not violate journalistic standards; rather, its journalists were in frequent contact with Fairfax’s spokeswoman and aired his denials of wrongdoing. CBS’s post-

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broadcast conduct was irrelevant to whether it had actual malice at the time of the broadcasts, the judge ruled.

Judge Trenga dismissed Fairfax's intentional infliction of emotional distress claim because Fairfax acknowledged that the claim failed to the extent his defamation claim failed.

The court denied CBS's motion, pursuant to Virginia's anti-SLAPP statute, for an award of its attorney's fees, holding that the statute requires a finding of frivolousness or bad faith on the part of the plaintiff and that, given what the women in fact stated about him, his claims did not meet these standards despite lacking merit.

CBS was represented by Lee Levine, Jay Ward Brown and Matthew Kelley of Ballard Spahr LLP. Fairfax was represented by Sara Kropf and Daniel Portnov of Kropf Moseley LLP; Jane Reynolds of the Law Offices of J.M. Reynolds, PLLC; and Kiah Spinks of Spinks Law PLLC.



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\$40 Million Libel Suit By “Teletherapy” Platform Talkspace Dismissed

No Personal Jurisdiction Based on Letters & Emails to D.C.

By Dori Hanswirth and Jesse Feitel

On January 21, 2020, Chief Judge Beryl Howell of the United States District Court for the District of Columbia dismissed a libel lawsuit brought by “teletherapy” platform Talkspace against Psychotherapy Action Network (“PsiAN”) and its co-founders. Chief Judge Howell ruled that there was no personal jurisdiction over the defendants, even though they maintained an interactive website accessible within D.C., PsiAN has members in D.C., and the defendants targeted their allegedly defamatory statements to persons and entities within D.C., including the American Psychological Association (“APA”). [Groop Internet Platform Inc. v. Psychotherapy Action Network](#), 2020 WL 353861 (D.D.C. Jan. 21, 2020).

Background

PsiAN is an Illinois-based educational advocacy group dedicated to promoting psychotherapies of depth, insight, and relationship. Starting in 2018, PsiAN’s co-founders engaged with their members and other mental health professionals and D.C.-based organizations, lobbying heavy criticism of Talkspace’s business model and ethical practices. These criticisms were posted on PsiAN’s website, on a listserv maintained by the D.C.-based APA, and in letters to D.C.-based mental health organizations. In those communications, PsiAN’s co-founders said that the Talkspace platform violates ethical precepts for psychotherapists and that Talkspace engages in consumer fraud by leading the public to believe that its spokesperson, Olympian Michael Phelps, has used the Talkspace platform, when in fact he received intense, in-person therapy. In response, Talkspace filed a \$40 million lawsuit against PsiAN and its co-founders personally, alleging that these and other statements were false and defamatory.

Chief Judge Howell agreed that the court lacked personal jurisdiction over the defendants, finding that PsiAN and its co-founders had not engaged in a “persistent course of conduct” in D.C.

A New York and D.C.-based Arnold & Porter team filed a motion to dismiss, arguing both that the court lacked personal jurisdiction over the defendants and that the complaint failed to state a claim for libel because the statements were nonactionable opinion and privileged.

Court: No Specific Personal Jurisdiction over PsiAN or its Co-Founders

In a 20-page memorandum opinion, Chief Judge Howell agreed that the court lacked personal jurisdiction over the defendants, finding that PsiAN and its co-founders had not engaged in a

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“persistent course of conduct” in D.C. necessary to satisfy the District’s long-arm statute. Talkspace did not argue that the defendants were subject to general personal jurisdiction in D.C., so the court’s analysis was limited to whether exercising specific jurisdiction over any of them would be appropriate.

D.C.’s long-arm statute sets out two requirements for the exercise of specific jurisdiction: first, a plaintiff must allege that the defendant “caus[ed] tortious injury in the District of Columbia by an act or omission outside the District,” and second, a plaintiff must demonstrate that each defendant (1) “regularly does or solicits business” in D.C.; (2) “engages in any other persistent course of conduct” in D.C.; or (3) “derives substantial revenue from goods used or consumed, or services rendered” in D.C. 2020 WL 353861, at *4.

Tortious Injury in D.C. Caused by Act Outside D.C.

The court first concluded that Talkspace “easily” met the “threshold” tortious injury requirement. According to the court, the allegedly defamatory letter “was authored and signed by the three individual defendants on behalf of PsiAN while they were in Illinois, constituting the requisite out-of-District act”—and the letter was then allegedly “mailed . . . to the APA’s Washington, D.C. headquarters[,]” which “constitute[ed] the requisite in-District injury.” *Id.* at *5.

No Plus-Factor Justifies Specific Jurisdiction over Any Defendant

The court then turned to the second requirement for specific jurisdiction, which it explained “calls for a defendant-by-defendant review of whether each ‘regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.’” *Id.* (quoting D.C. Code § 13-423(a)(4)). The “thrust” of Talkspace’s arguments in favor of jurisdiction, according to the court, was that “each defendant has ‘engaged in a persistent course of conduct’” in D.C. *Id.*

PsiAN

The court first turned to PsiAN and the “laundry list of facts” that Talkspace argued “establish [es] the propriety of personal jurisdiction” over the Chicago-based non-profit. *Id.* The court first considered whether PsiAN’s “D.C.-based trade association membership” in a mental health advocacy group was sufficient to confer jurisdiction. This was the “simplest” issue to evaluate, according to the court, because “[s]ubjecting a party to the jurisdiction of this Court by dint of its membership in an organization whose purpose is communicating with lawmakers and other government officials would” inappropriately subject an organization to specific jurisdiction for the routine act of contacting lawmakers, most of whom are based in D.C. *Id.* at *6. The court stated that “D.C.’s unique role as the seat of the federal government means that countless trade associations are located here[,]” and cited to precedent where “courts in this

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District have flatly refused to consider trade association membership in the jurisdictional inquiry.” *Id.*

Next, the court considered whether PsiAN’s website or its communications with D.C.-based politicians and D.C.-based members of the APA were sufficient to confer jurisdiction. With respect to the website, Talkspace argued that PsiAN operated an “interactive” website that subjected the organization to jurisdiction because it encouraged visitors to “subscribe to PsiAN’s daily emails,” to sign a “PTSD Petition,” and to donate to the organization. *Id.* Taken together, according to the court, the website was not interactive; it contained an assortment of “basic interactive features” which, “without more, [] cannot properly be thought to create a ‘persistent course of conduct’ in the District” without awarding “plaintiffs a jurisdictional windfall.” *Id.* In so ruling, the court distinguished two defamation cases cited by the plaintiff, *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) and *Lewy v. S. Poverty Law Ctr., Inc.*, 723 F. Supp. 2d 116 (D.D.C. 2010), where “the websites addressed in those cases each had a level of interactivity with the District that far outstrips that presented by PsiAN’s website.” *Id.*

In *Blumenthal*, where the plaintiff sued over an allegedly defamatory article posted on the “Drudge Report” website, the court found that personal jurisdiction over Matt Drudge was appropriate because while Drudge’s “website did allow for subscription to and receipt of a newsletter and solicited donations like PsiAN’s does, it also allowed visitors ‘to directly e-mail defendant Drudge.’” *Id.* The *Blumenthal* court also found that Drudge “knew that D.C. residents represented a substantial portion of his website’s devotees because the goings-on in this District were its near-exclusive focus.” *Id.*

Likewise, in *Lewy*, the defendant (the Southern Poverty Law Center) operated a website that “created a network of contacts in the District to facilitate the distribution of thousands of copies of its magazines and [to] solicit millions of dollars in donations.” *Id.* at *6 (citation and alterations omitted). Unlike the websites operated by the defendants in *Blumenthal* and *Lewy*, which did support a finding of specific jurisdiction in those cases, “the evidence presented thus far shows that PsiAN has collected two donations for a total of \$350 from D.C. residents, and not even plaintiff suggests that the website’s content is aimed at this District any more than at any district where there are psychotherapists.” *Id.*

Finally, the court observed that the *Blumenthal* and *Lewy* cases made “crystal clear” that “even if PsiAN’s website were sufficiently interactive with D.C. residents, plaintiff would also need to show ‘substantial’ non-internet contacts.” *Id.* at *7. Here, “apart from its website and its membership in a trade association, the only non-internet contacts Plaintiff alleges PsiAN has with the District are a string of letters and emails sent to District residents.” *Id.* According to the court, those contacts were insufficient to confer specific jurisdiction over the non-profit.

For one, the “handful of communications between PsiAN and District residents identified by the plaintiff can hardly be described as ‘persistent.’” *Id.* More fundamentally, though, these

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communications were written in Illinois and sent into D.C.—therefore, according to the court, the communications cannot constitute conduct “*in the District.*” *Id.* “It would be passing strange to call a defamatory letter written outside the District an out-of-District act for purposes of” the long-arm statute, “only to turn around and characterize other letters written outside and sent to the district as part of a persistent course of conduct ... *in the District.*” *Id.* (citation omitted).

Taken together, the court concluded that none of Talkspace’s allegations of “in-District conduct, on their own or taken together, is sufficient to establish that PsiAN has engaged in a ‘persistent course of conduct’” in D.C. necessary to satisfy the jurisdiction’s long-arm statute. *Id.*

Individual Defendants

Moving right along, the court observed that Talkspace’s arguments in favor of jurisdiction over the individual defendants “fare[] no better.” *Id.* After the court disregarded the letters and emails that the individual defendants sent from Illinois to D.C. residents, which were irrelevant following the court’s ruling as to PsiAN, the only facts remaining were that one individual defendant visited D.C. over a decade ago to attend an academic conference and had visited the District for a wedding 17 years ago and twice in recent years for personal trips. These facts were insufficient to constitute a “persistent course of conduct” in the District. *Id.*; *see also id.* (“If ‘persistent’ is to have any meaning, four trips over twenty years falls far short of coming within the long-arm statute’s ambit.”).

Likewise, the fact that another individual defendant served as a guarantor on her daughter’s D.C. lease did not constitute a property interest in the leased property and was insufficient to confer specific jurisdiction over that specific defendant.

Jurisdictional Discovery

Finally, the court rejected Talkspace’s request to conduct jurisdictional discovery to try and determine, *inter alia*, who specifically controls PsiAN’s website and to learn all of the defendants’ efforts to solicit donations to D.C. residents, and to generally “[a]scertain the full extent of the business PsiAN transacts in the District.” *Id.* According to the court, “several of these proposed routes for discovery will lead nowhere.” *Id.* The court also credited PsiAN’s candor for the “admission” in its reply brief that it had recently received a \$6,000 grant from the APA for a project that “does not anticipate any future activity in Washington, D.C.[.]” which the court held “cannot be considered persistent in-District conduct.” *Id.* Likewise, the defendants’ “memberships in trade or professional associations located in D.C. and their communications with D.C. residents made from outside the District are also irrelevant to the jurisdictional inquiry” and were insufficient to support the imposition of jurisdictional discovery. *Id.*

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Taken together, Talkspace’s requested discovery into “‘the individual Defendants’ contacts with the forum’ and the ‘extent of the business PsiAN transacts in the District’ are founded on little more than speculation[,]” and “Plaintiff has pointed to no good faith reason to believe jurisdictional discovery will achieve anything other than prolonging the pendency of this lawsuit and concomitant annoyance to the defendants.” *Id.* at *9.

PsiAN and two of the three Individual Defendants were represented by Dori Hanswirth, Theresa House, Stanton Jones, and Jesse Feitel of Arnold & Porter. Talkspace was represented by Thomas A. Clare and Daniel P. Watkins of Clare Locke LLP. The third Individual Defendant was represented by Peter Lawrence Scherr and Todd Perry Forster of Futrovsky, Forster, & Scherr, Danielle D. Giroux of Harman, Claytor, Corrigan & Wellman, P.C., and Mark C. Nanavati and G. Christopher Jones, Jr. of Sinnott, Nuckols & Logan, P.C.



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City Teacher Sues Media and City for Defamation, Learns Lesson About Fair Report Privilege and the First Amendment

By Amanda Levine

On February 24, 2020, Judge McMahon of the United States District Court for the Southern District of New York issued a decision dismissing various claims brought by former Bronx middle school teacher Patricia Cummings against the *New York Daily News* (the “*Daily News*”), the *Hechinger Report*, Larry McKelvey (a/k/a “Charlamagne Tha God”), and numerous city and state employees and entities. [Cummings v. New York](#).

On February 1, 2018, the *Daily News* published an article reporting that Plaintiff, in teaching her students about the Middle Passage, had black students sit in the front of the classroom and put her feet on them, mimicking the conditions on a slave ship. The article interviewed various students who were familiar with the lesson and quoted a Department of Education official, who explained that an investigation into Plaintiff was ongoing. The article noted that parents and students believed that Plaintiff needed a lesson in “racism.”

Following the *Daily News*’ report, other media organizations and government officials commented on the story—Dr. Andre Perry, in his column in the *Hechinger Report*, referenced the *Daily News* story, referred to Plaintiff’s lesson as “cruel,” and explained that she had “not reckoned with what it means to oppress.” Charlamagne Tha God featured Plaintiff in his “Donkey of the Day” segment on his radio show and referred to her as a “racist,” “bigot,” “cracker,” and “white devil.” Mayor Bill de Blasio, Public Advocate Jumaane Williams, and Councilman Daniel Dromm, each issued public statements in which they advocated for cultural sensitivity training for teachers, and State Senator Kevin Parker called for Plaintiff’s removal and indicated that cultural sensitivity training would not be effective for her.

On July 24, 2018, the Department issued a report in which it determined that although Plaintiff’s actions did not constitute “corporal punishment,” Plaintiff had acted in “poor judgment” in administering the slavery lesson, and the Department never “encourage[s] reenactments of historical events where students take on roles as victimized people.” Following the issuance of this report, Plaintiff was fired from her job as a middle school teacher. Throughout this process, the *Daily News* continued to follow and report on the status of the investigation.

The allegedly defamatory statements in the Daily News articles were either protected as fair and true reports of official proceedings or were non-actionable statements of opinion.

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On September 25, 2018, Plaintiff filed a Notice of Claim on the municipal defendants, expressing an intent to sue for “reverse discrimination.” The *Daily News* similarly reported on this Notice of Claim. On January 10, 2019, Plaintiff filed a Complaint against the municipal defendants and media defendants (a total of over twenty individuals and entities) asserting claims of defamation, infliction of emotional distress, and negligence, as well as alleging violations of various constitutional provisions.

In a thorough opinion, Judge McMahon dismissed each of the claims against all defendants but provided Plaintiff with leave to re-plead within 21 days.

Defamation Claims

Addressing the *Daily News*’ statements first, the Court held that the allegedly defamatory statements in the *Daily News* articles were either protected under New York Civil Rights Law § 74 (“Section 74”) as fair and true reports of official proceedings or were non-actionable statements of opinion.

First, the Court explained that Section 74 provides that “[a] civil action cannot be maintained against any person, firm, or corporation, for the publication of a fair and true report of any ... official proceeding.” The Court noted that “even the announcement of an investigation” is protected as a report of an official proceeding and “reports on allegations that lead to a government investigation are fully protected.” As applied to this case, the Court held that the Department of Education’s investigation, including the allegations from students and parents that spurred the investigation, constituted an “official proceeding.” The Court similarly held that Plaintiff’s Notice of Claim—which is a procedure “prescribed by law” as a “judicial prerequisite to filing of a plenary action against a municipal corporation”—was also an “official proceeding.”

The Court then found that the *Daily News* articles were a substantially accurate report of the proceedings. Specifically, the Court noted that Plaintiff did not claim that the articles presented inaccurate accounts of the *allegations* made against her; she merely referred to the allegations themselves as erroneous. But Section 74 is designed to “immunize reporting on allegations made in proceedings regardless of the veracity of those underlying allegations.” Here, parents and students reported that Plaintiff used her hands or feet to push students together during a demonstration concerning the conditions on a slave ship. The *Daily News* articles contained variations of these allegations, including that Plaintiff “stepped” on, “pressed,” and “put her foot on” students’ backs. Each of these formulations was a substantially accurate account of the statements made students and parents to the Department of Education, which were the subject of the investigation. Therefore, the articles were absolutely privileged.

The Court also held that a statement made by *Daily News* reporter Ben Chapman on a WNYC radio program—that Plaintiff “had asked black students to lie face down on the floor in the

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classroom and then stepped on at least one of those students”— was similarly protected under Section 74. The radio program both mentioned the *Daily News*’ reporting and hyperlinked to it on the station’s website. Citing *Adelson v. Harris*, 973 F. Supp. 2d 467 (S.D.N.Y. 2013), *aff’d* 876 F.3d 413 (2d Cir. 2017), the Court explained that hyperlinking to another article that itself is a fair report signals to the reader that the allegations stem from a proceeding. And, like the statements in the articles, Chapman’s statement was an accurate explanation of the allegations against Plaintiff.

Second, the Court held that references to Plaintiff and her actions as “racist” in the *Daily News* articles were opinions based on disclosed facts. The *Daily News* articles explained that, according to parents, students, and staff, Plaintiff lined black students in the front of the classroom, and, according to one parent, “pushed her knee” into the students’ backs to mimic conditions on a slave ship. While Plaintiff disputed that these allegations were a truthful recitation of the underlying events, she did not deny that these allegations were made and investigated by the Department of Education. Therefore, because the references to Plaintiff and her lesson as “racist” were based on these allegations, they were non-actionable.

References to Plaintiff and her actions as “racist” in the *Daily News* articles were opinions based on disclosed facts.

The Court similarly found that statements by the other media defendants, which themselves were based on the information in the *Daily News* articles, each constituted non-actionable opinion. For example, Charlamagne’s comments that Plaintiff was a “bigot,” “white devil,” and “cracker-ass cracker” were just “loose, figurative, and hyperbolic” language, which were made in a “freewheeling morning radio show dedicated to animated discussion of public controversies.” Dr. Perry’s *Hechinger Report* article was an “opinion column about race and academia,” and the views expressed in the article were explicitly based on his personal views and expertise. While a sub-headline in the article did state that “[a] teacher literally stepped on children to ‘teach’ them about slavery,” the Court held that this headline was not actionable because it did not mention Plaintiff by name and because both the full context of the article and the underlying *Daily News* reporting made clear that this was just an allegation against Plaintiff.

Finally, the Court held that the statements by government officials were also non-actionable. Statements by Mayor de Blasio were protected under an absolute privilege afforded to an “official who is a principal executive of State or local government ... with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties.” Statements made by Public Advocate Williams and Councilman Dromm did not mention Plaintiff by name and instead merely suggested that teachers, as a whole, should be subject to cultural sensitivity training. The Court further held that even if these statements did refer to Plaintiff, they were expressions of opinion incapable of being proven true or false. And although the statements by Senator Parker did mention

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Plaintiff by name, they were also clear expressions of opinion based on his personal experience as an African studies professor.

Emotional Distress and Negligence Claims

The Court briefly addressed Plaintiff's claims for intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress. Citing to numerous other New York state and federal decisions, as well as *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988), the Court held that a plaintiff cannot simply recast his or her defamation claims into claims for torts subject to "less stringent standards." Because the facts underlying her non-defamation claims were identical to the facts underlying her defamation claims, Plaintiff's claims for emotional distress and negligence were dismissed.

Constitutional Claims

The Court held that Plaintiff could not sustain any of her constitutional law claims against the municipal defendants. As an initial matter, the Court held that claims that Plaintiff asserted under the Second, Fourth, and Sixth Amendments were entirely baseless. In addition, Plaintiff failed to plead a violation of her due process rights. As a probationary teacher, Plaintiff had no property interest in her job, and she could not satisfy the "stigma-plus" test for asserting deprivation of a liberty interest in her reputation, since all statements that government employees made about her were true. Similarly, she failed to plead a violation of the Equal Protection clause or *Monell* liability, since these claims were largely based on a musing from a fellow teacher that "a black teacher could have taught the very same lesson, and there would not have been a single complaint from any student's parent." This statement did not prove that Plaintiff was treated any differently than a black teacher, nor did it evidence a "pattern of discrimination against Caucasian teachers."

Amanda Levine is a media associate at Davis Wright Tremaine LLP. Matthew Leish of Tribune Publishing Company; Laura Handman, James Rosenfeld, and Amanda Levine of Davis Wright Tremaine LLP represented Daily News L.P. and Ben Chapman. Defendants Dr. Andre Perry and The Hechinger Report were represented by Richard Rochford, Jr. and Joseph Lawlor of Haynes and Boone, LLP. Defendant Lenard Larry McKelvey was represented by Cynthia Neidl and Michael Grygiel of Greenberg Trauring, LLP. The State and City defendants were represented by the New York State Attorney General and City Law Department. Plaintiff, Patricia Cummings was represented by Thomas F. Liotti.

Federal District Court Grants Partial Release of Historical Grand Jury Records

By Jacob M. Schriner-Briggs

The U.S. District Court for the District of Massachusetts recently ruled for Harvard historian Jill Lepore in her effort to unseal grand jury records related to the leak of the Pentagon Papers. Judge Allison Burroughs held that the government must release many of the records it possesses unless it can demonstrate sufficient rationale for maintaining secrecy. This is the latest in a series of cases addressing questions of inherent judicial authority, grand jury secrecy, and the text of Rule 6 of the Federal Rules of Criminal Procedure (FRCP). [Jill Lepore v. United States](#), 18-mc-91539-ADB (Feb. 4, 2020).

Background

Plaintiff Jill Lepore is the David Woods Kemper '41 Professor of American History at Harvard University, an award-winning author, and a staff writer for the *New Yorker*. She filed her petition in the District of Massachusetts in December of 2018. The petition asked the court to disclose the records of the Boston grand juries convened to investigate the leak of the Pentagon Papers.

Between 1969 and 1971, Daniel Ellsberg, then an analyst for the RAND Corporation, leaked a classified history of American involvement in Vietnam. Major media outlets like the *New York Times* and *Washington Post* began publishing portions of the leaked report shortly thereafter, resulting in high profile Supreme Court litigation between the *Times* and the Nixon Administration. See *New York Times Co. v. United States*, 403 U.S. 713 (1971). The leak also prompted the government to indict Ellsberg. Those charges were dismissed in 1973 after it was revealed the government had wiretapped Ellsberg and broken into his psychiatrist's office. These facts are well known. Less known is that two federal grand juries were empaneled in Boston during this same time period to investigate Ellsberg's leak. The first grand jury was quietly discharged. The second subpoenaed prominent academics like Noam Chomsky, Samuel Popkin, and Richard Falk; then-U.S. Senator Mike Gravel; and at least nine others. It was discharged on November 28, 1972.

Lepore learned of the Boston grand juries while conducting research for a forthcoming book. She filed a FOIA request for the grand jury records with the National Archives at Boston; the Archives cited grand jury secrecy in denying her request. Lepore then petitioned the district court. She argued that the court had inherent authority over the grand jury records and maintained discretion to release them absent an express prohibition under Rule 6 of the FRCP. Lepore contended that, in special circumstances like those presented by the historical significance of the Pentagon Papers, the appropriate mode of analysis for determining whether grand jury records should be released was the nine-factor balancing test established in *Craig v.*

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United States, 131 F.3d 99 (2d Cir. 1997). Finally, she argued that those factors strongly favored disclosure.

The government countered that the list of exceptions to grand jury secrecy enumerated at Fed. R. Crim. P. 6(e) are exhaustive. Because Rule 6(e) did not include an exception for historical significance, the government argued, Lepore's request should be denied. In the alternative, the government claimed that even if courts did retain inherent authority to release grand jury records absent a germane exception to secrecy, the *Craig* factors counseled against release. On this point the government asserted, in part, that Professor Lepore's request was overbroad.

District Court Decision

The court held that it maintained inherent judicial authority to release grand jury records. It concluded, consistent with Supreme Court precedent, that the grand jury was an "arm of the court." *Levine v. United States*, 362 U.S. 610, 617 (1960). As such, grand jury records fall under judicial control. Because the language of the FRCP did not forbid the court from exercising its inherent authority in the instant case, and because the nine factors enumerated in *Craig* favored disclosure, the court ordered the government to release the Boston grand jury records. If the government opposed release of specific documents or information, it was ordered to offer *ex parte* explanations for its opposition and offer proposed redactions within sixty days.

This opinion is consistent with decisions by the Second Circuit (*Craig*) and Seventh Circuit, *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016). The Eleventh Circuit in *Pitch v. United States*, 915 F.3d 704 (11th Cir. 2019) also held that courts have inherent authority to release grand jury records beyond the confines of Rule 6. That decision was vacated and reheard *en banc*. A new ruling has not yet been issued.

The district court's decision also rejected the rationale underpinning the D.C. Circuit's holding in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019). *McKeever* held that the exceptions to grand jury secrecy under Rule 6(e) were comprehensive, denying that courts maintained any residual inherent authority to release records in unenumerated situations. The Supreme Court denied certiorari in *McKeever* just last month and so, for now, a circuit split persists. It is unknown whether the government will appeal the district court's decision to the First Circuit. In the meantime, Jill Lepore has won a case at the intersection of several important legal issues. In an ongoing tussle between appeals to transparency and secrecy, the former has gained important ground.

Jacob Schriener-Briggs is a Yale Law student from Youngstown, Ohio. He is a member of Yale's Media Freedom and Information Access Clinic. Lepore is represented by Yale Law School's Media Freedom and Information Access Clinic, as well as Jonathan Albano and Noah Kaufman of Morgan, Lewis & Bockius LLP.

Fast Company Secures Denial of Motion to Compel Disclosure of Journalist's Confidential Source

By Megan Daneshrad and Toby Butterfield

In a decision seemingly of first impression, Fast Company and its journalist Marcus Baram managed to resist an aggressive and well-funded attempt by Shervin Pishevar to take discovery from journalist Marcus Baram – including by forcing him to disclose his confidential for his reporting – on the grounds that Pishevar intended to use that information in contemplated foreign proceeding(s) pursuant to 28 U.S.C. §1782.

Magistrate Judge Stewart Aaron of the United States District Court for the Southern District of New York denied the application, determining that the discovery sought from Mr. Baram— limited to the name and location of the confidential source—was protected by the federal common law reporter's privilege and that Mr. Pishevar had not established that the information sought was unavailable from other sources. [In re Application of Shervin Pishevar for an Order to Take Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. §1782](#), No. 19-mc-00503-JGK-SDA (Feb. 18, 2020).

Background

Pishevar is a wealthy San Francisco-based venture capital investor. On May 27, 2017, he was arrested at a London hotel on suspicion of rape. He was ultimately never charged.

In the aftermath of his arrest, Pishevar expended vast sums of money and extensive legal proceedings to keep the details of his arrest from becoming public. In June 2017, he obtained a UK gag order preventing *The Sun* from publishing the details of his arrest. He also commenced a lawsuit against Definers Public Affairs, a Washington, DC-based political communications firm, in the San Francisco Superior Court on November 6, 2017, alleging that it had organized a “smear campaign” against him.

Baram is a Senior Editor at *Fast Company*. In July 2017, Baram learned of Pishevar's arrest from a confidential source. In September 2017, Baram received a copy of a purported City of London Police report documenting Pishevar's arrest from the same confidential source. Baram thereafter made an effort to verify the authenticity of the police report.

In a decision seemingly of first impression, Fast Company managed to resist an aggressive and well-funded attempt by Shervin Pishevar to take discovery from journalist Marcus Baram.

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Fast Company published Baram's first article regarding Pischevar's arrest on November 6, 2017, the same day that Pischevar commenced his lawsuit against Definers. In that article, Mr. Baram largely summarized the allegations in the Definer's lawsuit. On November 8, 2017, in light of the coverage by *Fast Company* and other media outlets, Pischevar's spokesperson confirmed the arrest. Thereafter, also on November 8, *Fast Company* published Baram's second article regarding the arrest, which referenced the police report received by Baram but neither quoted it nor confirmed its authenticity. The *New York Post* and *Forbes*, among others, also published articles referencing a police report.

On November 13, 2017, Baram learned from Pischevar's spokesman that the City of London Police had confirmed that the police report was a forgery. Baram thereafter amended his previous reporting to acknowledge the falsity of the police report he had received. Baram refrained from reporting details from that police report in his reporting, although other news outlets subsequently did so, apparently relying on the same false police report. Those reports contained many salacious details derived from the police report, details that Pischevar, via his spokespersons and his counsel in this proceeding, adamantly maintained were false.

On August 6, 2019, almost two years after Mr. Baram's initial reporting, Pischevar filed an ex parte proceeding pursuant to 28 U.S.C. §1782, seeking discovery from *Fast Company* and its owner Mansueto, related to the forged police report. Pischevar contended that he needed this discovery in order to bring his contemplated criminal and/or civil proceedings in the United Kingdom against the creator(s) and distributor(s) of the forged police report. That initial application was granted, and Mansueto complied to the extent that it could, without revealing the identity of Baram's source. And it objected to producing those materials in reliance on the reporters' privilege.

Thereafter, on October 31, 2019, Pischevar filed a second Section 1782, this time against Baram individually, seeking information concerning the forged police report, including the identity and location of Baram's confidential source, directly from Baram, including via a deposition. Baram opposed that application, relying in part on his reporter's privilege under federal, New York and United Kingdom law.

The Court's Decision

Pischevar, via his counsel at Quinn Emmanuel, submitted a vast wealth of evidence, including declarations from three Queens Counsel, multiple alleged witnesses and Pischevar's solicitor, in support of Pischevar's legal and policy arguments. Nevertheless, Magistrate Judge Aaron ultimately determined that while Pischevar had satisfied the three statutory factors of Section 1782, the application would be denied. In doing so, Judge Aaron declined to exercise his discretion pursuant to the Supreme Court's decision in *Intel Corp. v. Advance Micro Devices*,

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Inc., 542 U.S. 241 (2004) and denied Pischevar's application based on the U.S. public policy that undergirds the reporter's privilege.

Specifically, Judge Aaron determined that Pischevar had failed to make a clear and specific showing that the identity of Baram's confidential source was not available from other sources. In so holding, the court referenced sworn statements by Pischevar in support of his long-since withdrawn lawsuit against Definers, in which Pischevar swore that Definers and two individuals affiliated with Definers had fed false information to reporters suggesting that Pischevar had paid money to settle a claim for sexual assault in London. The court noted that Pischevar failed to submit any sworn testimony of his own whatsoever in the instant application, and failed to identify the source from whom he learned that Definers was allegedly circulating false statements about him.

It is worth noting that Section 1782 itself explicitly provides that "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." 28 U.S.C. §1782(a). However, the court's decision did not address Baram's reporter's privilege in the context of Section 1782's statutory language.

Although the court reached the right result relying on the discretionary *Intel* factors, the court could also have also determined that name and location of Baram's confidential source was not discoverable pursuant to Section 1782 on its face because it subject to the reporter's privilege under US law. Judge Aaron's opinion is worth relying on for its careful scrutiny of the evidence submitted in support of the application, but as noted by amicus curiae the Reporters Committee for Freedom of the Press in its brief, and by Moses & Singer in its brief in opposition to the application, there are many ways in which the court have relied on the US reporters' privilege to refuse to grant the application too.

Megan Daneshrad and Toby Butterfield, Moses & Singer, represented Fast Company and journalist Marcus Baram.

Second Circuit Affirms Fair Use Finding in Drake Sampling Case

By Giselle M. Girones

On February 3, 2020, the Second Circuit Court of Appeal upheld the summary judgment awarded to Drake and other music industry defendants, which found the sampling of a 1982 song amounted to fair use. [Estate of James Oscar Smith v. Graham, et al.](#), No. 19-28 (2d Cir. Feb. 3, 2020).

Background

Plaintiffs, the Estate of James Oscar Smith and Hebrew Hustle, Inc., filed a copyright infringement action against Drake and other music publishers and record labels, alleging the defendants sampling of a 1982 “spoken-word recording” titled [“Jimmy Smith Rap”](#) in the song, [“Pound Cake/Paris Morton Music 2”](#) amounted to copyright infringement.

“Pound Cake,” a seven-minute song on Drake’s 2013 *Nothing Was the Same* album, opened with a thirty-five second sampling of “Jimmy Smith Rap.” Though some words were rearranged or deleted, no words were added to the recording. Notably, Smith’s phrase “Jazz is the only real music that’s gonna last,” was altered in “Pound Cake,” by removing the terms “Jazz is the” from the phrase.

The Defendants moved for summary judgment, arguing among other things, that the sampling of the “Jimmy Smith Rap” song was fair use. The district court granted summary judgment, finding there was “no reasonable dispute” that the key phrase in Smith’s song, “Jazz is the only real music that’s gonna last,” which was an unequivocal statement on jazz’s primacy, was transformed by Drake into a statement that “only real music,” with no qualifiers, is going to last.

This use, the district court found, was “precisely the type of use that ‘adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message.’” *Estate of James Oscar Smith v. Cash Money Records, Inc., et al.*, No. 14-cv-2703 (S.D.N.Y. May 30, 2017). Though Plaintiffs argued the use could not be considered transformative because the copied portions did not identify Jimmy Smith or “Jimmy Smith Rap,” the court dismissed this argument noting identification of the object of a parody was not a requirement for a finding of transformative use.

Notably, though Plaintiffs argued that Defendants appropriated an unreasonable portion of the “Jimmy Smith Rap,” because the statement concerning the power of “real” music would necessitate use of that single line, the district court found the amount and substantiality of the portion used was reasonable and necessary to drive home the point.

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Second Circuit Decision

Plaintiffs appealed the district court's decision on December 31, 2018. In affirming the lower court's decision, the Second Circuit opined fair use is necessary to promote the purpose of copyright law. Under this lens, the Court analyzed the four fair use factors.

In analyzing the purpose and character of the use, the Second Circuit agreed the Defendants' use of "*Jimmy Smith Rap*" was transformative. The Court found the message of "*Jimmy Smith Rap*" was one the primacy of jazz and the derogation of other genres of music which "will not last." On the other hand, the Court agreed "*Pound Cake*" sends a counter message; all "real music" regardless of genre, reigns. Beyond the lyrics, the Court found the placement of the thirty-five second sampling at the beginning of a seven-minute long hip-hop song to be indicative of a transformative use. Through both the alteration of the "*Jimmy Smith Rap*" and the rest of the lyrics in "*Pound Cake*", the Court found Defendants' work criticized the jazz-elitism that is championed in "*Jimmy Smith Rap*." The Court declined to elaborate on the second fair use factor, finding it rarely played a significant role in a fair use dispute when a work is transformative.

Beyond the lyrics, the Court found the placement of the thirty-five second sampling at the beginning of a seven-minute long hip-hop song to be indicative of a transformative use.

As to the amount and substantiality of the portion used, the Court agreed with the district court's finding that thirty-five seconds was reasonable and necessary to emphasize the message that the ultimate attribute of music is its authenticity and not the production process that created it. Lastly, the Court found the fourth factor also weighed in favor of fair use. In doing so, it concluded the songs would appeal to very different audiences and there had been no evidence that "*Pound Cake*" had commandeered the demand for "*Jimmy Smith Rap*" or otherwise caused a negative effect on the market.

The affirmance of the fair use finding in a song is notable, as courts primarily focus on ownership issues and discussions of whether the amount of copying was similar and substantial. Rarely does a court parse through the meaning of a song to address the purpose in sampling or to determine whether there was a transformative purpose for the use.

Giselle M. Girones is an associate at Shullman Fugate in Jacksonville, Florida.

State Courts Can't Agree on Whether "Revenge Porn" Laws Violate the First Amendment

By Erik Bierbauer and Michael Cort

Laws targeting reprehensible speech often raise thorny First Amendment issues, and punishments for disseminating non-consensual intimate images, or "revenge porn," fit that mold. State court decisions are split on the constitutionality of "revenge porn" laws, which have been enacted in 46 states, the District of Columbia, and Guam. See <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Jan. 28, 2020).

Defendants have argued that non-consensual pornography laws are overbroad, and that they are content-based speech restrictions subject to (and failing) strict scrutiny under the First Amendment. The latter argument poses a doctrinal quandary: Are "revenge porn" laws content-based because they are aimed only at intimate images, and therefore subject to strict scrutiny? Or are the laws content-neutral, justifying a lower level of scrutiny, because they turn on the victim's lack of *consent* to having her (or his, but victims are disproportionately female) intimate images disclosed? After all, disseminating the same images – that is, the very same content – would not violate the law if the subject gave her consent.

Laws targeting reprehensible speech often raise thorny First Amendment issues, and punishments for disseminating non-consensual intimate images, or "revenge porn," fit that mold.

In December, a criminal defendant successfully pressed the overbreadth argument in a facial challenge to Minnesota's "revenge porn" statute. The Minnesota Court of Appeals struck down the law for violating the First Amendment and reversed the defendant's conviction. [State v. Casillas](#), 2019 WL 7042804 (Dec. 23, 2019).

In other recent cases, courts have analyzed "revenge porn" laws under a strict or intermediate-scrutiny rubric. Last year, the Illinois Supreme Court determined that the state's "revenge porn" law is content-neutral, applied intermediate scrutiny, and upheld the law's constitutionality. [People v. Austin](#), 2019 IL 123910, 2019 WL 5287962 (Oct. 18, 2019), reported in November 2019 MediaLaw Letter.

In contrast, an intermediate appellate court in Texas applied strict scrutiny in striking down that state's "revenge porn" law. *Ex Parte Jones*, 2018 WL 2228888 (Texas App., May 16, 2018) (withdrawing and superseding opinion on overruling of reh'g), reported in the April 2018 MediaLaw Letter. That decision is being reviewed by Texas' highest criminal court. And in Vermont, the state Supreme Court applied strict scrutiny, but found that Vermont's non-consensual pornography law served a compelling government interest and was narrowly tailored so as to survive that demanding First Amendment standard. [State v. Van Buren](#), 214 A.3d 791 (Vt. 2018).

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In *Casillas*, the recent Minnesota case decided on overbreadth grounds, the defendant was charged in 2017 with felony nonconsensual dissemination of private sexual images under Minn. Stat. § 617.261, after his former girlfriend reported that Casillas had obtained and disseminated, without her consent, private sexual images of her. Casillas was found guilty after a trial and appealed his conviction, arguing that the statute is unconstitutionally overbroad and vague in violation of the First Amendment.

As the Minnesota Court of Appeals explained, a “law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *Casillas* at *2 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

In *Casillas*, the court first determined that the statute has a broad sweep. Minnesota’s “revenge porn” statute criminalized the dissemination of a sexual image where “the actor *knows or reasonably should know* that the person depicted in the image does not consent to the dissemination,” and where “the image was obtained or created under circumstances in which *the actor knew or reasonably should have known* the person depicted had a reasonable expectation of privacy.” Minn. Stat. § 617.26. The court determined that the statute has a broad sweep because it criminalizes the dissemination of a sexual image even where a disseminator doesn’t affirmatively know that the subject of the image did not consent to the dissemination, or that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy. *Id.* at *5.

The court also concluded that it could not say, as a matter of law, that every dissemination regulated under the statute is beyond the protection of the First Amendment as an invasion of privacy. *Id.* at *7.

The court finished its overbreadth analysis by holding that the statute prohibits conduct that is beyond its legitimate sweep because it lacks a specific intent-to-harm element. The court said that, although the statute has a legitimate harm-preventing purpose, “its lack of a specific-intent requirement and use of a negligence mens rea allows it to reach protected First Amendment expression that neither causes nor is intended to cause a specified harm.” As a result, the statute’s reach “goes beyond the legitimate state interest justifying the proscription of otherwise protected First Amendment expression.” *Casillas*, at *10.

In reaching its conclusion, the Minnesota Court of Appeals found highly persuasive a dissenting opinion in *Austin*, the Illinois Supreme Court case last year where the majority applied intermediate scrutiny to uphold the Illinois “revenge porn” law. The dissent in *Austin* considered a hypothetical situation where a person receives an unsolicited and unappreciated nude photograph and then shows that photo to someone else. The dissent reasoned that this person would have committed a crime under the Illinois statute, and that this result renders the statute unconstitutional. *Id.* at *11.

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But the majority in *Austin* concluded that the Illinois law survived First Amendment scrutiny. The court held that intermediate scrutiny was proper because the statute is a “content-neutral time, place, and manner restriction,” and it regulates a “purely private matter.”

With respect to time, place, and manner, the court reasoned that the statute was content neutral because it addressed the *manner* of dissemination – that is, dissemination without consent. The *content* of the images was not the operative factor.

Regarding its privacy justification, the court in *Austin* reasoned that “first amendment protections are less rigorous where matters of purely private significance are at issue.” *Id.* at ¶ 54 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)). The court concluded that nonconsensual dissemination of private sexual images was not an issue of public concern, as “the public has no legitimate interest in the private sexual activities of the victim or in the embarrassing facts revealed about her life.” *Id.* at ¶ 56.

The court then held that the Illinois law is narrowly tailored under the intermediate scrutiny standard. It said that the elements of the Illinois law, which require intentional dissemination, reasonable awareness that the victim intended the image to be private, and knowledge that she did not consent to its dissemination, mean that the law does not burden more speech than necessary. *Id.* at ¶¶ 79-85.

The defendant also raised overbreadth in *Austin*. The majority held that the Illinois statute is not overbroad because it prohibits a “certain and limited category of knowing conduct that involves the unauthorized and intentional dissemination of an intensely personal image of another person.” *Id.* at ¶ 93. The court observed that a “statute will not be held to be overbroad simply because some impermissible applications are conceivable.” *Id.* at ¶ 98, citing *New York v. Ferber*, 458 U.S. 747, 772 (1982).

Given the disagreement among state courts, challenges to “revenge porn” laws could percolate up to the U.S. Supreme Court. There are no pending petitions for certiorari. But in a future term, might the Roberts Court add “revenge porn” to the catalog of offensive speech that it has considered over the years? See *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786 (2011) (striking down California restrictions on sales of violent videogames to minors); *Snyder v. Phelps*, 562 U.S. 443 (2011) (holding that First Amendment protected public protesters at a funeral against tort claims for infliction of emotional distress); *Stevens*, 559 U.S. 460 (striking down federal law banning depictions of animal cruelty). Then too, there is the possibility of federal legislation: a non-consensual pornography law titled the ENOUGH Act was introduced in the House and Senate in November 2017, but has not progressed.

Given the disagreement among state courts, challenges to “revenge porn” laws could percolate up to the U.S. Supreme Court.

Erik Bierbauer is Vice President, Litigation, and Michael Cort is the litigation law clerk, at NBCUniversal in New York. They were not involved in the cases discussed in this article.

Letter to a Young Media Lawyer

Dear Future Badass Media Lawyer:

MLRC has asked me to write an advice column for young(er) media lawyers. MLRC is either flattering me or it's shuffling me out the door and wishing me well in retirement. I'm not sure. But I do know that I am in good company with my predecessor columnists, who have supplied a trove of solid advice. Go back and read those columns if you have not already.

I'll try here to cover ground not covered in prior columns (seriously, go read them). My advice may resonate more with women lawyers because, well, I am one. I also happen to own (along with my fantastic partner Rachel Fugate) an all-female media and intellectual property law firm, so I spend most of my time these days training and mentoring other women. That said, what I'm about to say is generally applicable to anyone, so here are the top five things I think all new(er) media lawyers need to know:

1. Your path to success looks like a toddler scribbled on a napkin at the Applebees.

My career in journalism started when I hosted a syndicated talk show while I was in high school, landing such hot interviews as 2 Live Crew's Luther Campbell *before* the *Acuff-Rose* lawsuit made "Pretty Woman" famous in copyright circles. The show was showing some national promise and was picked up by a spattering of stations across the country. But the lure of high school football games caused me to miss a taping. And I was basically fired.

I left undergrad with no job and moved right back into my childhood bedroom. I eventually landed a not-so glamorous gig doing automatic dialogue replacement for shows like *Beavis and Butthead*. ADR, as it's called, is when dialogue is re-recorded post-production and then matched to the pictures on the screen. In my case, the ADR was a means to replace English dialogue with Spanish-language programming. At the time, this audio editing was not done digitally. It was tedious work for pay that guaranteed I'd be sleeping on Duran Duran sheets for the foreseeable future.

When an opportunity to be a weekend news producer at an ABC-affiliate in Gainesville, Florida came up, I took it. I produced the weekend shows for a bit before being promoted to the 11pm newscast. On a particularly memorable night, we ran a story about a local man arrested in a series of sex crimes. As the anchor read the horrific details of the crime, the State Attorney's image was plastered across the screen. The State Attorney clearly was not the sex offender. "Huh," I thought. "That's probably bad."



Deanna Shullman

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And so I went to law school, worked hard, and landed a job in the media team at Florida's then largest law firm. Several years later, rumors swirled that the media department was leaving, but I was oblivious to the plan, having left the media practice's main hub for Ft. Lauderdale a few years before. I was doing some media work and a lot of class action defense, acquiring the different skill set that prior columnists have touted as a means to round you out as a litigator. It's good advice, but I took it only by chance.

When I left Tampa, out of sight meant largely out of mind, and I had to forage for work in a new office of the firm. I found that work by finding the laziest partner in the office, offering to help him on his cases, and eventually leading them. It was a mutually beneficial relationship. But it was also an extended period in my career where the media work dripped like a shower head not quite turned off.

When those rumors turned out to be true, I was invited to join the new firm. It was a no-brainer for me. I was pregnant with my second child and had been held back a year in the associate ranks because I hadn't made my hours in the two years between my first and second children. I didn't think I had any chance of ever being partner at the big firm, so off I went.

This move proved to be transformative. Later that same year, I tried a false light case (Florida has since abolished the tort). Most seasoned media lawyers know defamation and privacy trials are sparse. This was a unique opportunity – and one that came to me only because Rachel, who had been assigned the case before we left the big firm, was tied up in another hot case at the time. She had toiled through discovery and summary judgment to get the case ready, and I got to step in and try it. We won, and I scored the publicity that came along with the win.

I was alone, literally alone, in an office for the entire eleven years I spent with the firm. I was coming off several years of working on all kinds of commercial litigation cases with a sprinkling of media work here and there. If I wanted more media work, it was fairly obvious from the start that I had to go get it myself.

And so I did (more on how to do that later). I spent several years building a practice before defecting for a second time. The truth is, I had thought about leaving the firm for years. I *almost* lateralled or took in-house positions half a dozen times (when I say *almost* left, I mean they ordered me business cards *almost* left). And I don't think I ever would have left were it not for a phone call from Rachel one late-April afternoon.

I was toiling away at my desk when the phone rang. She was on the other end, as she often was. "We have to get out of here," came the voice at the other end. "Like right this second? I have to finish a brief," I responded, not taking her seriously. I had been itching to move on for years, but Rachel had never talked like this before, and I had never directly shared my desire to leave. I think I told her to get back to work and hung up. I gave it little further thought.

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Rachel knew I hadn't taken her seriously. But she had also heard the often not so quiet discontent at partner meetings over the years. So a few days later, she presented me with a chart of all the things we needed to do to launch our own firm. Unable to resist the allure of an Excel spreadsheet, a leap of faith and a coin toss to pick a firm name later, Shullman Fugate was born.

That was almost three years ago, and I am finally content and where I want to be. We have grown to five lawyers and are thriving thanks to a lot of extraordinary clients who believe in and support us. But I didn't set out to launch my own firm. This "success" is not the result of a meticulous or even well-thought out plan. It is the culmination of a series of what I deemed necessary shifts *away* from something that wasn't working for one reason or another. Success is a non-linear path. If it feels like that to you, you're doing it right.

2. Trying to find work/life "balance" is like trying to find a leprechaun in the hollow trunk of a tree.

If you're trying to compartmentalize your work life from your personal life, you're on a fool's errand. There is no such thing for media lawyers, especially litigators.

When I started practicing law, only partners had cell phones and they had to peck out emails by double and triple-tapping keys on truncated keyboards to get to the correct letter. This meant it often was not worth the effort. When I left the office, there was no way for me to log back in remotely. The only way to reach me was to call my house, which was not widely done. Work lives and personal lives were separated by the physical barriers to mixing the two.

If you're trying to compartmentalize your work life from your personal life, you're on a fool's errand. There is no such thing for media lawyers, especially litigators.

As technology advanced, the workday expanded, and adjusting to the demands imposed by excess accessibility freaked us out. I am from the generation of lawyers – particularly women lawyers – who advocated for work life "balance." Back then, balance meant separation. I worked part time, I worked from home, and I watched countless other lawyers (again, mainly women) find novel ways to "balance" their personal lives with their work lives. Invariably, the work time interfered with the personal time or vice versa. Part time hours often meant part time pay for full time work. The balance never seemed balanced, and lawyers ended up resenting both their careers and the demands of family life. It was a recipe for disaster to which the attrition of female lawyers attested.

There's no reason in 2020 to live with the frustration of feeling like you can't be a good lawyer and a good mother, spouse or friend at the same time. Blend your work and personal lives like the protein smoothie you've convinced yourself is healthy. Fill out school forms at the office. Tackle conference calls from the Macy's dressing room because: You. Have. Got. To. Buy. That. Dress. For. Your. Best. Friend's. Wedding. *Today*. Get up and leave your office midday

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Arguing before the Florida Supreme Court in 2014

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to make it to whatever event demands your attention in your personal life. But be fully responsive to your clients' demands and prepared to sit right back down at that computer after 6pm to finish up whatever you didn't get done that day while you were trying to score tickets to the football game or picking Facebook fights with your politically idiotic second cousins.

As long as you are promptly available for your partners and your clients, there is no reason lawyering has to take place from 9 to 5 (or in lawyers' cases, to 6 or 7). As soon as you recognize that, you take the pressure off of feeling unavailable to your work or your personal life, or both. You *can* go to taco Tuesday lunch with your friend Laura, and you *can* finish that article you promised to write for MLRC. And you don't have to do either of those at separately delineated work and personal hours. If you're at a firm, and the firm doesn't recognize the value of work life *blending*, give some thought to whether it's time to push for that change or move on.

3. You won't find clients by trying to find clients.

It should not come as a surprise that law firms sustain themselves on a healthy and steady flow of incoming work. If you are in private practice, you will ultimately need to find clients to sustain your career, unless you work so hard that it doesn't matter that you don't bring in a lick

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of work. Do not write “find clients” on your vision board. If it’s on there already, go erase it. Now! Go on. This article will be here when you get back.

Instead, look around your firm, your community, the media bar, or wherever else you frequent. Find your people. People you look up to. People you respect. People who make you laugh or inspire you or share your passion for home workout routines (hey, Leita). Make friends, and be a good friend. Build relationships, not a client list.

Some of your clients may come from the people you build relationships with, and other columnists here have already covered the joys of vacationing with and sharing other life experiences with your cohorts in the media bar. Build some great memories. But Spoiler alert: fundamentally what will build your client list more than anything else is being a damn good lawyer.

This is more than knowing the area of the law, which you should know so well that you can rise to the challenge of claims presenting real risk as easily as you can spot a bullshit claim. Competently catering to the specific needs of your clients is the secret to retaining them and attracting more of them.

Do not write “find clients” on your vision board. If it’s on there already, go erase it. Now!

It’s about understanding your client’s goals and charting a course to obtaining them. Sometimes, the client’s goal is to prevail in litigation. Sometimes, the goal is to salvage the underlying failed relationship that led to litigation or to meet some business need wholly unconnected to the litigation (like the time I settled a bogus invasion of privacy claim for many times its actual value so the client could clear a \$10-million litigation holdback in its agreement to sell to another company). Do you know the best way to assess your clients’ goals? Ask them.

Building a client base is about communicating with your client in the way that works best for that specific client. This isn’t the difference between emails and text messages or phone calls. This is knowing what level of information your client expects and how you need to communicate that information to meet the functional, intellectual and often psychological demands of each and every client you interact with.

Building a client base is also about providing value to your clients. As an associate, I once won a case a trial. When I asked the client how he felt about it, he said he wanted to win – “but not that badly.” He was saying that the *cost* of winning outweighed the *value* of winning. It’s the old adage that you shouldn’t kill an ant with a hammer. Don’t overbrief, overthink, or overbill.

Know your client’s goals and needs and get the job done in the most efficient means possible. The more you understand those needs and work to meet them, the more clients will return to you time and again and encourage others to do the same.

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The Shullman Fugate law firm. Left to right: Partner Allison Lovelady, Associate Giselle Girones, Partner Deanna Shullman, Office Administrator Katie Stine (the bride), Partner Rachel Fugate, Litigation Manager Alyssa Beene, and Associate Kendall Pfeifer at Katie's wedding on February 22, 2020.

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4. Lawyering is a team sport. Make sure you're the last picked.

Strive to be the dumbest person on the team. Seek opportunities to work with the lawyers you think are the smartest lawyers in your firm, soak up their way of writing or thinking or advocating and aspire to be like them. Get to know the strengths of your teammates and compliment them with your own strengths and skills when you can. If there's a particular partner who is a very effective oral advocate, go watch her in court. Seek opportunities to write for the partner with the best briefing skills so you can improve your writing skills by having your writing evaluated by that partner.

Understand how central your support system is to your success as a lawyer. The very first time I was introduced to my very first legal assistant, she stuck out her hand and told me she was the most important person in my work life. I laughed it off. God, she was right. You need these amazing people, and they can make you look like a hero as readily as they can make you look like a fool.

I am the first to admit my staff is the real brains behind my operation. Over the years my legal assistants, paralegals, associates and office managers have saved me from certain disaster a thousand times. I can probably figure out how to e-file something in the same way a blind rat eventually finds cheese. Alyssa can e-file while standing at the copier trying to get a document

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production out and on the phone with a judicial assistant. Rachel and I refer to our office manager Katie as our “boss” so frequently that at Giselle’s wedding in January, multiple people asked us if we work for Katie. Yes. Yes, we do.

Train these people hard. Respect these people harder. Reward them for their hard work with a steady stream of positive feedback, and (once you’ve become a badass partner yourself) compensate them in a way that reflects their value to your law practice.

5. Know when to fold ‘em

A few years ago, Pat Groshong at AXIS Capital addressed a crowd of media lawyers gathered in the foyer at AXIS’s Kansas City offices. I was in that crowd. He thanked the media bar for its role in defending free speech and a free press. Despite having penned dozens and dozens of briefs touting the press’ role as a public surrogate, it was the first time I had really pondered *our role* as defenders of freedom.

In the ebb and flow of the day to day, don’t forget the larger role you play as a media lawyer. You’re not just solving problems or winning cases. You are shaping the contours of a fundamental right of not just the press – but of every citizen. As Justice Marshall so famously said two hundred years ago in *McCulloch v. Maryland* “it is a constitution [you] are expounding.”

Take that job seriously. You must bring to this profession a passion for First Amendment rights so profound that you *want* to stay up all night writing that brief to overturn a prior restraint. You must *want* to slap on the ill-fitting suit on the back of your office door and hurry down to the courthouse to get a closed courtroom opened up. You must *want* to read a story at 5:53pm on a Friday because it is airing in seven minutes (sidenote: all media emergencies happen after 4pm on Fridays. It’s true. Look it up.)

If a journalist getting kicked out of a courtroom or a judge entering a gag order doesn’t light a fire in your belly, you’re in the wrong line of work. I’ve watched countless lawyers approach this practice with detached interest. It doesn’t end well. You don’t have to do this. If it’s not for you, you shouldn’t. You deserve a career you feel passionate about, and your clients deserve lawyers who feel passionate about their line of work.

But if you are fortunate enough to discover media law is for you, you will find yourself doing rewarding work for truly admirable people among truly remarkable colleagues. Best of luck. Reach out. I, and lots of other great lawyers in this bar, am here for you.

Deanna Shullman is a partner at Shullman Fugate, a media law, intellectual property, and business litigation law firm with offices in Jacksonville, Tampa, and West Palm Beach, Florida.