

MULRC *Media Law Resource Center*
MEDIA LAW LETTER

Reporting Developments Through January 25, 2019

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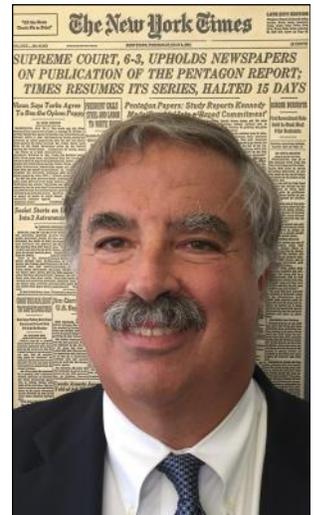
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From the Executive Director's Desk

Entertainment Conference Explores #MeToo, IP, and Social Media Backlash

Last month, the MLRC convened its annual Entertainment & Media Law Conference in Los Angeles. Though to the amazement of those of us expecting the highly touted SoCal weather, it didn't stop raining from the moment we arrived in LA till the minute we left, the Conference was a great success.

As last year, we convened at the National Center for the Preservation of Democracy, part of the Japanese American National Museum in downtown Los Angeles. Our able partners at Southwestern Law School's Biederman Entertainment and Media Law Institute found the venue for us after we lost our prior site at the former Los Angeles Times building due to the sale of the LAT and the evacuation of its historic building. I really like the Museum – it's the right size and an attractive, even dramatic, space, and given the difficulty of finding a spot in Los Angeles that is convenient to everyone we could do a lot worse than a new venue that is just a few blocks from the old one. That's not to say it isn't a constant area of discussion how long it takes to get there – or anywhere in LA – and whether it wouldn't be better to be in Century City, at the studios in the valley, or anywhere that's a shorter drive for the person whom you happen to be talking to.



George Freeman



#MeToo panel with Los Angeles Times reporters kicks off the Entertainment Law Conference



A second #MeToo panel considers training and investigations to prevent and discipline sexual harassment

(Continued from page 3)

More than 150 people registered for the half-day conference, and we had an impressive turnout despite the rain (which was still better than the frigid temperatures that Jeff Hermes and I left behind in New York). Generally at this conference, we try to combine sessions and discussion on First Amendment principles, of course our calling card, media law issues particularly pertinent to the entertainment industry, and a touch of practical business and operational developments of interest to the Hollywood community.

We tried something different for our first session of the day, in which we explored legal issues arising from the #MeToo movement, by splitting the session into two halves to look at the same topic from the perspectives of news and entertainment companies. In the first half, I moderated a panel featuring the legal, reporting, and editorial staff of the Los Angeles Times (including MLRC stalwart Jeff Glasser and his colleagues Kimi Yoshino, Daniel Miller and Amy Kaufman; Kaufman had also written a book entitled *Bachelor Nation* about the eponymous reality show – I’ll take the Fifth as to whether my eyes sometimes might gaze upon that piece of prime-time programming). They discussed LAT’s reporting on #MeToo cases – including accusations that Russell Simmons, Brett Ratner, James Franco and James Toback were serial sex harassers – following the breaking of the Harvey Weinstein story, including the challenges of investigating accusations that could be decades old and the heartbreak of having a credible source who poured her heart out earlier than most other sources, but whose story could not be told under journalistic standards for lack of contemporaneous corroboration. They also talked about the paper’s mad scramble to catch up with The New York Times’ reporting on Harvey Weinstein after they were inadvertently tipped off by a person who confused LAT with its East Coast rival before the story broke.

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Panelists at the copyright and trademark program

(Continued from page 4)

In the second half, our colleague Orly Ravid, the new Director of the Biederman Institute, led a panel featuring attorneys discussing their experience with establishing training sessions and protocols to prevent misbehavior in the studios and the handling of internal investigations of sexual harassment claims at entertainment companies (including Ivy Bierman from Loeb & Loeb, Kate Gold from Drinker Biddle, and Joel Grossman from JAMS). Curiously, part of the

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Attendees during a break



Dialogue at the idea submission panel

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training is devoted to teaching how to avoid a colleague's unwanted hug by putting out one's arm to shake hands, thereby blunting the hug.

We turned from there to two panels on intellectual property. A.J. Thomas, my former colleague at Jenner & Block, led a fascinating session featuring Andrew Hughes from Viacom, Monique Cheng Joe from NBCUniversal, and Eleanor Lackman from Cowan DeBaets, in which they outlined current strategies for protection of IP interests in characters, locations, and other discrete elements of creative works. They talked about cases in which these elements were held to have trademark protection as brands in their own right alongside copyright protection, against the backdrop of older works coming into the public domain en masse at the beginning of the year. They also discussed how trademark protection could apply to elements of public domain works despite a lapse in copyright protection. Whether, and how, Mickey Mouse will remain protected was included in the discussion.

Then, David Aronoff of Fox Rothschild led Bob Rotstein from MSK, Kelli Sager from DWT, Peter Afrasiabi from One LLP, Tammy Godley from Munger Tolles, and Tania Hoff from NBCUniversal through a lively discussion of the current state of idea submission and idea theft claims – including best practices for avoiding such claims, how copyright concepts have seeped into the judicial analysis of idea theft, lessons from other fields such as trade secrets and non-disclosure agreements, and more. Particularly striking was the panel's warning about doing "favors" for friends and family: Introducing your cousin with an idea to a client or a co-worker

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The last panel of the day on celebrity scandals and social media pushback

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might seem like a harmless way to show off your Hollywood connections, but can result in an idea theft claim even when the idea is totally obvious.

Finally, Jeff Hermes moderated a multidisciplinary session discussing the practical and legal challenges of dealing with backlashes on social media against celebrities and entertainment companies. We brought together social psychologist Dr. Karen North from USC, law professor RonNell Andersen Jones from the S.J. Quinney College of Law, and the head of Fox Rothschild's Entertainment Department, Darrell D. Miller, to explore this issue from their respective angles. It turns out that these events are not quite as unpredictable as one might think; the panel explained how social media crises begin, the different events and actions that can trigger, prolong or shorten such a crisis, and the ways in which entertainment lawyers can prepare their clients for these events. The speakers touched on Kevin Hart's removal as host of the Oscars after a Twitter firestorm, the bizarre phenomenon of the most famous egg in the world on Instagram, and other recent events in the course of talking about morality clauses, social media policies, and the dangers of filing a lawsuit in response to an online backlash.

We wrapped up the conference by wandering across the Museum plaza to a reception featuring Japanese cuisine, where it was great to be able to chat with members from the West Coast in person. We'll next be returning to California in May for our Legal Frontiers in Digital Media conference in San Francisco, and we hope to see you there!

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.

Courts Grants BuzzFeed Summary Judgment in Dossier Case

By Adam Lazier

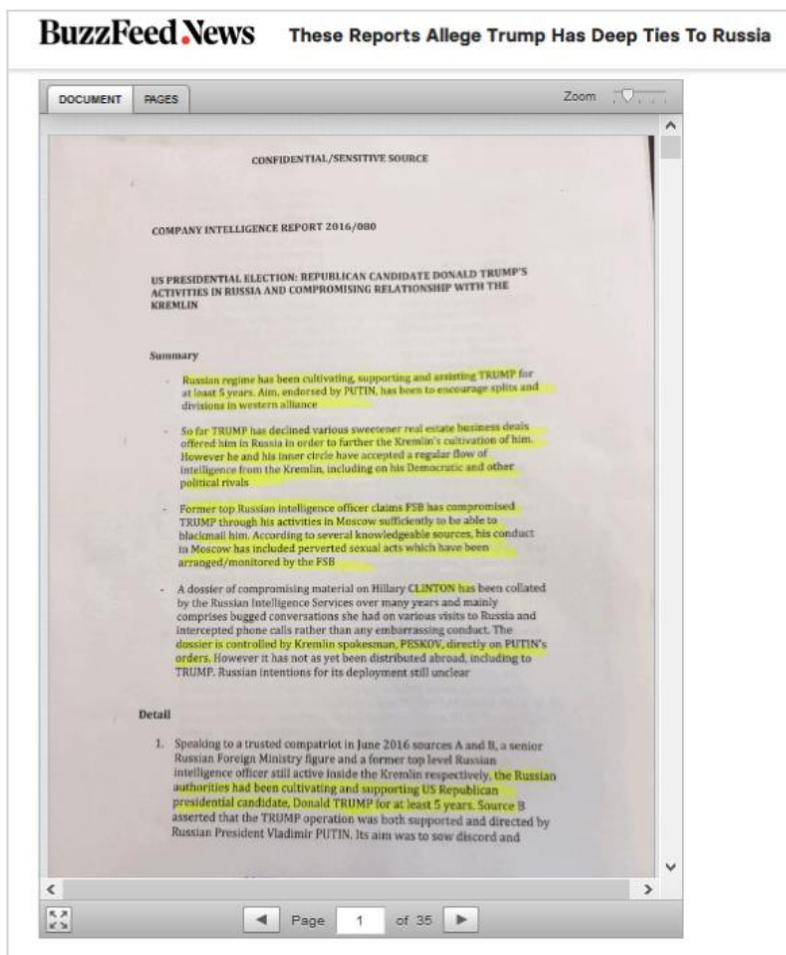
After nearly two years of litigation, on December 19, 2018 a Florida federal court granted summary judgment to the defendants in *Gubarev v. BuzzFeed*, one of the closely-watched defamation lawsuits brought against BuzzFeed over its publication of the so-called “Steele Dossier.” [Gubarev v. BuzzFeed, Inc.](#), No. 1:17-cv-60426 (S.D. Fla. Dec. 19, 2018). The decision came barely a month before the case was scheduled to go to trial in Miami.

Background

BuzzFeed [published the now-famous Steele Dossier](#), a collection of intelligence reports describing alleged connections between Donald Trump and the Russian government, on January 10, 2017. On its very last page, the document alleges that Aleksey Gubarev and his web-hosting companies were involved in Russian efforts to hack the Democratic Party leadership during the 2016 election campaign.

A month later, Gubarev, a Russo-Cypriot businessman, and two of his companies sued BuzzFeed and its editor-in-chief Ben Smith for defamation. Although BuzzFeed raised a number of arguments and defenses, it was clear from the outset that much of the parties’ attention would be devoted to its fair report defense - the argument that it were protected from liability because it published the Dossier as part of a report on the official activity, including an FBI investigation into the Dossier and briefings about the document to President Obama, President-elect Trump, and Congressional leaders.

In June 2018, Judge Ungaro of the U.S. District Court for the Southern District of Florida denied the plaintiffs’ motion seeking judgment on the pleadings on the fair report defense. *See Gubarev v. BuzzFeed, Inc.*, 2018



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U.S. Dist. LEXIS 97246 (S.D. Fla. June 5, 2018). That decision was certainly a hopeful sign for BuzzFeed – among other things, the court held that New York’s expansive version of the privilege applied, that the privilege protected reports on confidential government activity, and that BuzzFeed could rely not only on the official activity involving the Dossier described in its own article, but also the activity described in a CNN article to which it hyperlinked.

Gathering Evidence

Judge Ungaro’s June decision concluded, however, by emphasizing that BuzzFeed would still have to produce admissible evidence proving that the government activities reported on by BuzzFeed actually took place. When the case began, this appeared to be a tall order: details of counter-intelligence briefings and investigations are some of the most highly-classified secrets in government.

Seeking confirmation that the investigation, briefings, and other activities took place, BuzzFeed subpoenaed the FBI and other federal agencies. Not surprisingly, they objected to the subpoenas and forced BuzzFeed to bring a motion to compel. That motion would languish in D.C. federal court for more than ten months as the case moved through discovery in Florida.

Politics interceded, however. By early 2018, the government’s treatment of the Dossier had become a hot issue among members of Congress from both parties. As part of that debate, Congressional committees released a number of reports – including the well-known “Nunes memo” – containing previously-classified information about the Dossier, the Presidential briefings, and the FBI investigation into it.

This release of “an unprecedented amount of information about the Dossier’s origin and its use in an ongoing investigation” then led the court to grant BuzzFeed’s motion to compel. *See BuzzFeed, Inc. v. U.S. Dep’t of Justice*, 318 F. Supp. 3d 347 (D.D.C. 2018). The FBI would eventually provide BuzzFeed with a declaration that, among other things, confirmed it possessed the specific memo from the Dossier discussing the *Gubarev* plaintiffs when BuzzFeed published it.

The motion turned “on the following question: May Defendants claim the privilege’s protection when the record reveals that certain parts of the Dossier were subject to official action but does not reveal whether the specific allegations about Plaintiffs were subject to official action?”

Judge Ungaro’s Summary Judgment Decision

Armed with this evidence, BuzzFeed moved for summary judgment, and – with a January 22, 2019 trial date fast approaching – Judge Ungaro granted the motion on December 19. She accepted that the Congressional reports were admissible evidence of government activity

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involving the Dossier, but the plaintiffs emphasized that none of the evidence indicated whether that the specific allegations about them were part of the briefings or investigations involving the Dossier.

As Judge Ungaro noted, then, the motion turned “on the following question: May Defendants claim the privilege’s protection when the record reveals that certain parts of the Dossier were subject to official action but does not reveal whether the specific allegations about Plaintiffs were subject to official action?” She concluded that “the answer is: yes.”

Judge Ungaro recognized that requiring to tie every one of the forty-or-so people mentioned in the Dossier to specific official action would be inconsistent with the nature of news reporting and make it impossible to rely on the fair report privilege. “To go line-by-line to determine if official action existed with respect to each statement” at issue, she wrote, “would not impose on BuzzFeed a duty to faithfully recount official proceedings, but instead, would impose on BuzzFeed a duty to investigate extensively the allegations of the Dossier and to determine whether the government was investigating each separate allegation.” She concluded that “[d]efamation law does not impose that requirement on the press.” Because BuzzFeed simply published the Dossier “without editorializing,” the privilege applied and the plaintiffs’ claim failed.

The decision was welcome news to the defendants – BuzzFeed’s newsroom reportedly broke into applause when it found out about the decision – but the Dossier litigation continues. The issue of whether BuzzFeed must connect each person mentioned in the Dossier to specific official activity will soon come before New York’s intermediate appellate court in *Fridman v. BuzzFeed*, another Dossier lawsuit. And the plaintiffs in *Gubarev* have not given up – less than an hour after Judge Ungaro issued her summary judgment decision, they appealed to the Eleventh Circuit.

Kate Bolger, Nathan Siegel, Alison Schary, and Adam Lazier of Davis Wright Tremaine represented Defendants BuzzFeed and Ben Smith, along with Roy Black and Jared Lopez of Black, Srebnick, Kornspan & Stumpf. Plaintiffs were represented by Evan Fray-Witzer of Ciampa Fray-Witzer, Val Gurvits and Matthew Shayefar of Boston Law Group, and Brady Cobb and Dylan Fulop of Cobb Eddy.

The issue of whether BuzzFeed must connect each person mentioned in the Dossier to specific official activity will soon come before New York’s intermediate appellate court in *Fridman v. BuzzFeed*, another Dossier lawsuit.

Media Coalition Supports Rehearing En Banc on Applicability of Georgia Anti-SLAPP Law in Federal Court

A media amicus coalition, including MLRC and 24 other organizations, has asked the U.S. Court of Appeals for the Eleventh Circuit to reconsider en banc a panel decision ruling that the Georgia anti-SLAPP statute does not apply in diversity actions in federal court.

The issue of whether state anti-SLAPP statutes apply in federal court is the subject of a widening circuit split and could ultimately be headed to the Supreme Court.

Most federal circuits confronted with the issue—most notably [the Ninth](#)—have ruled that state anti-SLAPP laws do not conflict with federal procedural rules and thus apply in federal court.

But in 2015, the D.C. Circuit, per [an opinion](#) by then-Judge Brett Kavanaugh, held that anti-SLAPP laws conflict with the Federal Rules of Civil Procedure that govern motions to dismiss and for summary judgment and must not be applied.

In December, Eleventh Circuit Judge William Pryor [wrote](#) for an undivided panel that the court found “then-Judge Kavanaugh’s reasoning ... far more convincing.” As [reported](#) in MediaLawDaily, the decision came in *Carbone v. CNN*, a media defamation case filed in the United States District Court for the Northern District of Georgia.

On January 3, CNN petitioned for rehearing en banc, arguing that it was “critical that the judges of this Circuit speak with one voice when an addressing an issue of such fundamental importance to the individual rights of citizens” and that that was “especially important as the Panel’s decision conflicts with holdings from the First, Second, Fifth and Ninth Circuit Courts of Appeals as well as prior holdings of this Circuit,” citing the Eleventh Circuit’s opinions in *Tobinick v. Novella*, 848 F.3d 935 (11th Cir. 2017) and *Royalty Network, Inc. v. Harris*, 756 F.3d 135 (11th Cir. 2014).

By a motion for leave filed January 10, the media amici proffered their [brief in support](#), arguing that the Georgia anti-SLAPP “provides essential protection to the press—and, ultimately, to the society that the press serves—by promoting early dismissal of frivolous speech-related lawsuits”; that that protection has been borne out by experience; and that refusing to apply the statute in federal court “would severely undercut the Georgia General Assembly’s effort to foster vibrant debate on public issues and to encourage media companies to operate in the state.”

En banc review is particularly rare in the Eleventh Circuit. A decision on CNN’s petition is expected within the next few months.

The media brief was written by Peter C. Canfield, Jones Day, Atlanta; and Shay Dvoretzky, Yaakov M. Roth, Anthony J. Dick, and Vivek Suri, Jones Day, Washington, D.C., on behalf of

The issue of whether state anti-SLAPP statutes apply in federal court is the subject of a widening circuit split and could ultimately be headed to the Supreme Court.

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Advance Publications, Inc.; American Broadcasting Companies, Inc.; American Society of News Editors; Association of Alternative Newsmedia; Association of American Publishers, Inc.; Atlantic Media; Bloomberg, LP; Cox Media Group; Dow Jones & Company, Inc.; The Economist Newspaper Limited; Gannett Company, Inc.; The Georgia Press Association; The Media Law Resource Center, Inc.; Meredith Corporation; Motion Picture Association of America, Inc.; The National Press Photographers Association; National Public Radio, Inc.; NBCUniversal; New World Communications of Atlanta, Inc.; The New York Times Company; The News Media Alliance; Online News Association; The Reporters Committee for Freedom of the Press; Univision Communications Inc.; and The Washington Post.

CNN is represented by Charles D. Tobin, Ballard Spahr, LLP, Washington, D.C.

Davide M. Carbone is represented by L. Lin Wood, Jonathan David Grunberg, and George Taylor Wilson of L. Lin Wood, PC, Atlanta, and by Stacey Godfrey Evans, Wargo & French LLP, Atlanta.



Legal Issues Concerning Hispanic and Latin American Media

March 11, 2019 | University of Miami

- Media Coverage of the Caravan and Immigration
- Impact of President Bolsonaro on Press Freedom & Cross Hemisphere Press Freedom Checkup
- Ethics Issues for Media Lawyers
- Digital & Social Media Issues in Latin America
- Cross-Border Production Issues

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D.C. Anti-SLAPP Law: 2018 in Review

By Leslie Paul Machado

In these early days of the new year, I thought it would be useful to take a look back at the 2018 decisions and developments involving the DC anti-SLAPP statute, as they will continue to impact this area of the law in 2019 and beyond.

The Door to Federal Court Remains Closed

Without question, the most significant issue continues to be the unavailability of the statute in DC federal court. Multiple parties have argued the DC Circuit's *Abbas* decision (in which that court held the statute was unavailable in federal court because the likelihood of success standard (which the DC Court of Appeals had not yet interpreted) appeared to be "different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56") is no longer good law following the DC Court of Appeals' *Mann* decision (in which that court held the standard mirrored the standard imposed by Rule 56). Multiple DC federal district judges have rejected this argument.

First, [in late 2017](#), Judge Huvelle became the first post-*Mann* judge to decide if an anti-SLAPP special motion to dismiss could again be filed in federal court. The court held that, while it would defer to a decision from the DC Court of Appeals if that court had "spoken clearly and unmistakably" on a topic, the *Mann* decision did not "clearly and unmistakably" resolve the question, so the court "must follow the clear guidance of the D.C. Circuit and deny the special motion to dismiss."

Judge Huvelle then held the DC anti-SLAPP statute was not applicable to the state law claims in a case [based on federal question jurisdiction](#). (All the other decisions involving application of the DC anti-SLAPP statute in federal court were, to this point, in cases based on diversity jurisdiction).

In May 2018, [Judge Mehta](#) joined Judge Huvelle in holding that, even after *Mann*, the DC anti-SLAPP statute was not applicable in a federal court diversity case. The court held that, despite the *Mann* court's claim that the "likelihood of success standard does, in fact, 'simply mirror the standards imposed by Federal Rule 56,'" there are fundamental differences that make the statute inapplicable in a federal court diversity case.

Then, in June 2018, [Judge McFadden held](#) the statute could not be applied in a federal court diversity case, even after *Mann*. The court held the statute still conflicted with the Federal Rules because it inverted the burdens by requiring the plaintiff to show a likelihood of success on the merits instead of placing the burden on the defendant.

These rulings have led to a bizarre bifurcated legal landscape where parties can successfully utilize the statute in cases filed in Superior Court, while the statute likely is unavailable for virtually identical cases filed in federal court. (Notwithstanding the lack of success to date in

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convincing federal district judges to resume applying the statute in federal court, parties continue filing anti-SLAPP special motions to dismiss).

In December, the Eleventh Circuit held the Georgia anti-SLAPP statute could not apply in federal court, for the same reasons identified by the DC Circuit in *Abbas*. This deepened a circuit split with the First and Ninth Circuits, which have held state anti-SLAPP statutes can be utilized in federal court. Ultimately the issue is going to have to be resolved by the Supreme Court or Congress.

Successful Superior Court Motions

While the DC federal district court remained hostile to anti-SLAPP special motions to dismiss, movants found more success in DC Superior Court. In February, after the defendants (a scientist and scientific journal) filed anti-SLAPP special motions to dismiss a libel suit brought by a scientist upset at criticisms about his paper, the plaintiff voluntarily dismissed his suit.

In July, the Superior Court granted an anti-SLAPP special motion to dismiss filed by PBS in response to a suit filed by several entities owned by Tavis Smiley, alleging that PBS's public statements – that it had received multiple credible allegations of misconduct by Smiley and that it had conducted an investigation into those allegations – were false and defamatory, and led to the alleged cancellation of existing contracts and interference with future business relationships.

The next month, another Superior Court judge granted an anti-SLAPP special motion to dismiss filed by defendants involved in the creation of the “Trump dossier,” filed in response to a suit brought by three “international businessmen” who claimed they were defamed by certain statements contained in one of the reports.

Finally in November, a Superior Court judge granted anti-SLAPP special motions to dismiss filed by a lawyer, his law firm, and his clients, in response to suit brought by parties opposing them in another suit, who alleged statements made by the lawyer to a reporter were false and defamatory.

Unsuccessful Superior Court Motions

While several parties successfully prevailed on anti-SLAPP special motions to dismiss filed in Superior Court, not every movant was successful. In May, a Superior Court judge held a plaintiff could not use the DC anti-SLAPP statute to stop an arbitration the plaintiff believed was a SLAPP.

In August, a Superior Court judge held a subpoena recipient could not use the DC anti-SLAPP statute's special motion to dismiss provision to attack a subpoena. Finally, in November, a Superior Court judge denied an anti-SLAPP special motion to dismiss filed by an

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association and its president in response to a libel suit filed by a competing organization and its president. The court held the challenged statements were about the individual plaintiff and, as such, were not about an “issue of public interest.”

Questions, Questions and More Questions

As we approach the DC anti-SLAPP statute's eighth anniversary, there are still numerous unanswered questions:

- If a plaintiff voluntarily dismisses his complaint after the defendant files an anti-SLAPP special motion to dismiss, but before the court rules on the motion, is the defendant entitled to recover his fees?
- If a defendant denies making the statement giving rise to the suit, can it still utilize the statute?
- If the challenged statement was made in “connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,” is that sufficient to satisfy the “act in furtherance of the right of advocacy on issues of public interest” requirement in the statute?
- When a plaintiff asserts claims that are dismissed under the DC anti-SLAPP statute, and also claims that are resolved on other grounds, what portion of its fees can a defendant recover?

If 2018 is any indication, we should anticipate getting the answers to some of these questions in 2019.

Leslie Paul Machado is Senior Counsel at LeClairRyan PLLC. He blogs regularly about developments under the D.C. anti-SLAPP law at <https://dcslaplaw.com> An original version of this article appeared on that site.

Does the Texas Anti-SLAPP Law Apply in Federal Court? ... Stay Tuned

By Laura Prather

Courts' views of whether state anti-SLAPP statutes apply in federal court continue to be a judicial checkerboard across the country, and the United States Supreme Court again in December declined to take the opportunity to clarify the issue. *See Americulture, Inc. v. Los Lobos*, Docket No. 18-89, *cert. denied* (December 3, 2018).

Since Texas considers itself its own country, not surprisingly, the state has its own judicial checkerboard as to whether the Texas Citizens Participation Act ("TCPA") applies in federal court. The Southern and Northern district courts have applied the TCPA, while the Eastern and Western district courts have refused to do so. This inconsistent approach by the Texas courts was further evidenced in a January decision by Eastern District Judge Amos Mazzant – his third such ruling. *See Star Sys. Int'l Ltd. v. Neology, Inc.*, 4:18-CV-00574, 2019 WL 215933 (E.D. Tex. Jan. 16, 2019) (Mazzant, J.); *see also Thoroughbred Ventures, LLC v. Disman*, No. 4:18-CV-00318, 2018 WL 3472717 (E.D. Tex. July 19, 2018) (Mazzant, J.); *Van Dyke v. Retzlaff*, No. 4:18-CV-247, 2018 WL 4261193 (E.D. Tex. July 24, 2018) (Mazzant, J.).

Williams v. Cordillera was the first case in which a federal court in the Fifth Circuit directly addressed the issue of whether the TCPA applies in federal court, holding that it does. 2014 WL 2611746 at *1. In *Williams*, a high school teacher, who had repeatedly been accused of improper behavior with his students, filed a lawsuit in response to a local television station's investigative series about him. The defendant filed a TCPA motion to dismiss, and the plaintiff responded arguing that the TCPA does not apply in federal court.

In ruling on the motion, the court conducted an *Erie* analysis, determining that, although there were procedural components to the statute, "these procedural features are designed to prevent substantive consequences—the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law." The court then looked to the Fifth Circuit decision in *Henry v. Lake Charles American Press* in which Louisiana's anti-SLAPP law was applied, noting no material differences between the Louisiana and Texas statutes. 566 F.3d 164, 170 (5th Cir. 2009)

Since *Williams*, however, the Fifth Circuit has backpedaled from the ruling in *Henry*. In *Block v. Tanenhaus*, the Fifth Circuit emphasized that the statute's applicability remains "an open question" and entertained the possibility that "*Henry* could be interpreted as assuming the applicability of Article 971 for purpose of that case without deciding its applicability more generally." 867 F.3d 585, fn. 2 (5th Cir. 2017). Prior to *Block*, the Fifth Circuit had repeatedly assumed without deciding that the TCPA applies in federal court. *See, e.g., Cuba v. Pylant*, 814 F.3d 701, 706 (5th Cir. 2016) ("To decide whether the appeals are timely, we first review the TCPA framework, which we assume—without deciding—controls as state substantive law in these diversity suits."); *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015) (*citing NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 753 (5th Cir. 2014)) ("We have not

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specifically held that the TCPA applies in federal court; at most we have assumed without deciding its applicability.”). In the absence of guidance from the Fifth Circuit, many district courts have followed the Fifth Circuit’s lead, side stepping the issue. *See, e.g., Rivers v. Johnson Custodial Home, Inc.*, No. A-14-CA-484-SS, 2014 WL 4199540, at *1 (W.D. Tex. Aug. 22, 2014) (holding that the relevant speech was not protected by the TCPA rather than addressing whether the TCPA applies); *Culbertson v. Lykos*, No. 4:12-cv-03644, 2013 WL 4875069, at *2 (S.D. Tex. Sept. 11, 2013) (electing to dismiss on Rule 12(b)(6) when faced with a TCPA motion and a Rule 12(b)(6) motion to dismiss). Those courts that have addressed the applicability of Texas’s anti-SLAPP statute in federal court have come to differing conclusions, creating a split of authority within the state and in some instances a split of authority within the districts themselves.

In the Northern District of Texas, Judge Sidney Fitzwater granted defendant’s TCPA motion as to several of plaintiff’s claims in *Charalambopoulos v. Grammer*, a defamation suit arising from allegations of domestic violence. No. 3:14-CV-2424-D, 2015 WL 390664, at *28 (N.D. Tex. Jan. 29, 2015). One year later, in *Hammond v. Lovings*, the Western District of Texas dismissed an intentional infliction of emotional distress claim—which had been removed pursuant to the Federal Torts Claims Act—against several defendants pursuant to the TCPA. No. 15-cv-00579-RP, 2016 WL 9049579, at *3 (W.D. Tex. May 25, 2016). In *Haynes v. Crenshaw*, the Eastern District of Texas adopted the reasoning of the *Williams* court, holding that the TCPA applies in federal court. 166 F. Supp. 3d 773, 777 (E.D. Tex. 2016). And, in *Forsterling v. A&E Television Networks, LLC*, Judge Lynn Hughes applied the TCPA to a case in which reality television show participants sued for, among other things, their identity being displayed on a show about human trafficking. No. 4:16-CV-02941, 45 Media L. Rep. 1413 (S.D. Tex. 2017).

Despite this apparent agreement (at one time) from each of the four Texas federal districts that the TCPA applied in federal court, the picture today is not that clear.

Much like the 5th Circuit, more recently, the tide has turned. Taking a different approach than the *Charalambopoulos* court, in *Insurance Safety Consultants LLC v. Nugent*, the Northern District of Texas opined that the TCPA was in conflict with Federal Rules of Civil Procedure 12 and 56; accordingly, the court refused to apply the TCPA to dismiss plaintiff’s claims arising under federal law. No. 3:15-CV-2183-B, 2016 WL 2958929, at *5 (N.D. Tex. May 23, 2016).

In *Nugent*, an employer brought a claim under the two federal statutes, the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act, alleging the employee accessed an email account without permission. The employee responded by filing, among other things, a counterclaim that “reserved her right to request and enforce remedies” under the TCPA. The court acknowledged that the Fifth Circuit had never formally decided whether state

Since Texas considers itself its own country, not surprisingly, the state has its own judicial checkerboard as to whether the Texas Citizens Participation Act (“TCPA”) applies in federal court.

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anti-SLAPP statutes apply in federal court and looked instead to the reasoning of the D.C. Circuit in *Abbas v. Foreign Policy Group*, 783 F.3d 1328, 1333-36 (D.C. Cir. 2015).

In *Abbas*, the D.C. Circuit applied the *Hanna/Shady Grove* two-step test, finding Federal Rule 12 and 56 to be both valid and in conflict with D.C.'s anti-SLAPP statute. Finding the same conflict with the TCPA, the *Nugent* court held that the TCPA could not apply in federal court to federal claims.

In *Rudkin v. Roger Beasley Imports, Inc.*, Western District Judge Lee Yeakel also relied upon the reasoning in *Abbas* in holding the TCPA does not apply in federal court. No. A-17-CV-849-LY, 2017 WL 6622561 (W.D. Tex. Dec. 28, 2017), report and recommendation approved, No. A-17-CV-849-LY, 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018). In denying the TCPA motion, the Court opined: “the TCPA contains procedural provisions setting forth deadlines to seek dismissal, deadlines to respond, and even deadlines for the court to rule, as well as appellate rights, and the recovery of attorney's fees. It is a procedural statute and thus not applicable in federal court. Even if the statute is viewed to be somehow substantive, it still cannot be applied in federal court, as its provisions conflict with Rules 12 and 56, rules well within Congress's rulemaking authority.”

The following year, Western District Judge Nick Pitman took the same approach in *N.P.U., Inc. v. Wilson Audio Specialties, Inc.*, 343 F. Supp. 3d 661 (W.D. Tex. 2018). And, the domino affect continues with the three rulings from Judge Mazzant in the last six months holding the TCPA does not apply in federal court.

In the coming months, the 5th Circuit could resolve this split of authority in Texas' federal district courts in the *Klocke v. UT Arlington* case. No. 17-11320 (pending at the 5th Cir.) The case arises out of the death of a UT Arlington student who was subject to a grievance action after refusing the advances of a fellow student who was gay. The deceased student's father filed a civil rights and defamation lawsuit against both the University and the student who made the advances. Summary judgment was granted in favor of the University, and a TCPA motion to dismiss was granted in favor of the defendant student. Klocke appealed, and the 5th Circuit heard oral argument on September 5, 2018. See http://www.ca5.uscourts.gov/OralArgRecordings/17/17-11320_9-5-2018.mp3.

The panel consisted of former Chief Justice Edith Jones from Texas, Judge Barksdale from Mississippi, and newly appointed Judge Don Willett. Of the three, the judge with the least seniority, Judge Willett actually has the most experience applying the TCPA since he served on the Texas Supreme Court during the first seven years of the statute's existence. Lawyers should keep their eyes out for a ruling in this case in the coming months and for a conclusion to the unanswered question whether the Texas anti-SLAPP statute applies in federal court.

Laura Prather is Co-Chair of Media & Entertainment Practice Group at Haynes and Boone, LLP in Austin.

Judge Willett actually has the most experience applying the TCPA since he served on the Texas Supreme Court during the first seven years of the statute's existence.

WPIX Granted Two Summary Judgments Where No Gross Irresponsibility

By Bruce S. Rosen and Lisa Washburn

Two separate New York state judges have dismissed defamation suits against WPIX -TV in New York, a Tribune Media station, in both cases because the plaintiffs failed to prove the station and its reporters engaged in “gross irresponsibility,” New York State’s intermediate malice standard for private plaintiffs and matters of public concern.

In December, a Brooklyn Supreme Court judge [granted summary judgment](#) to WPIX in a suit over a 2013 story about a landlord’s unusual method of shaming a “deadbeat” tenant. Landlord Mary Nicoletti posted a sign on her brownstone stating: “My tenant FRED GALLIPOLI didn’t pay his rent for three (3) Almost (4) months!!”

The reporter said she tried to speak with Gallipoli, but there was no answer at his door. She also reported that he had gone on record to say Nicoletti declined his check. Discovery showed that tenant Gallipoli was indeed at least three months late with his rent at the time the story aired. WPIX defended the defamation claim based on truth; however, the Court did not reach the merits.

Instead, in the Dec. 3, 2018 ruling granting WPIX’s summary judgment motion, Kings County Supreme Court Justice Paul Wooten applied the gross irresponsibility standard set out in 1975 in *Chapadeau v. Utica Observer-Dispatch*, and held that the WPIX defendants “did not act in a grossly irresponsible manner.” Justice Wooten observed that there appeared to be no reason for WPIX to doubt the Nicolettis’ veracity, and noted that a mention of new graffiti on the property following the posting of the sign was factual and did not state that the plaintiff was to blame. The ruling in [Fred Gallipoli v. Mary Nicoletti et al.](#), was WPIX’s second summary judgment win in six weeks.

The first dismissal concerned a 2014 defamation suit against the station for using an incorrect first name of a teacher who allegedly bullied a student. In that case, a WPIX reporter attended a community activist’s press conference with the mother of the allegedly bullied student and her 12-year-old daughter. The mother incorrectly identified (and the station reported) the teacher’s first name as “Starlight” Rainbow, but the teacher’s name was actually “Cynthia” Rainbow.

In a bizarre coincidence, Starlight Rainbow was also a teacher in a different Brooklyn public intermediate school a few miles away. The Plaintiff did not see the news report for months after it aired; she sued after she felt her pleas to correct the news report were being ignored by the station (the piece was removed from the station’s website upon the complaint being filed).

New York County State Supreme Court Justice Robert D. Kalish ruled on Oct. 22, 2018 that WPIX was not liable for failing to correct the article in a timely fashion, and further held that

In December, a Brooklyn Supreme Court judge granted summary judgment to WPIX in a suit over a 2013 story about a landlord’s unusual method of shaming a “deadbeat” tenant.

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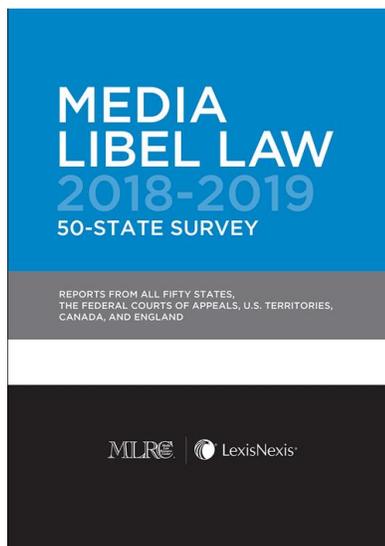
the reporter was entitled to rely on the mother's representations. [Starlight Rainbow v. WPIX, Inc., and Magee Hickey.](#)

Plaintiffs in both matters have since filed notices of appeal.

Bruce S. Rosen is a DCS member at McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, NJ and Manhattan and he was assisted by associate James Harry Oliverio in both cases. Lisa Washburn is Assistant General Counsel at Tribune Media Company in Chicago.

Plaintiff in the Gallipoli matter was represented by Phillip Hines at Held & Hines in Brooklyn, N.Y. and the Nicolettis were represented by George Haboussi, Jr., also of Brooklyn.

Plaintiff in the Starlight Rainbow matter was represented by Daniel Clifton and Julian Gonzales of Lewis, Clifton & Nikolaidis, P.C. in Manhattan.



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Barbara Wall, V.P., Gannett Co., Inc.

Nebraska Court Rejects Newspaper Reporter's Challenge to Coverage of His Scuffle with Parking Attendant

By Tiffany B. Gelott

A Nebraska state judge dismissed a defamation case – brought, ironically, by a newspaper reporter – holding that a television station's coverage of the reporter's run-in with a city parking employee was substantially true and protected by the fair report privilege. See [Cooper v. WOWT-Channel 6 Gray Television Group Inc.](#), Case No. CI 18-2674 (Neb. Dist. Douglass Cty. Nov. 5, 2018). This decision provides much needed recent precedent reinforcing defamation defenses in Nebraska.

The Run-In, the News Reports and the Lawsuit

According to an Omaha Police Incident Report, on March 24, 2017, the Police Department received a radio call to “investigate an assault on a parking enforcement officer.” The incident began when Todd Cooper, an *Omaha World-Herald* reporter who covers crime, heatedly disputed a parking ticket issued by a Park Omaha employee. The parking employee, Timothy Foster, told police that Cooper followed him to his vehicle, prevented him from closing the door to his Park Omaha truck, and grabbed his neck, and that when Foster tried to push Cooper away, both men fell to the ground. The police also took the statement of an eyewitness to the incident.

WOWT-Channel 6 in Omaha, owned by Gray Television Group, Inc., broadcast and posted a news report based on the Police Incident Report and its own interview with the eyewitness. After Cooper pled guilty to disturbing the peace, WOWT aired an update and published a website article in which it recounted that “*Omaha World-Herald* reporter Todd Cooper was accused of attacking a parking officer.”

Cooper sued WOWT for defamation alleging that WOWT's reports were incomplete, inaccurate, and inflammatory. He based his claims on five statements from the reports, many of which quoted verbatim from the Police Incident Report and the eyewitness's statements to WOWT. Cooper also alleged that WOWT omitted material information including Foster's alleged criminal background.

WOWT moved to dismiss Cooper's complaint, arguing that the reports were not actionable because (1) they were substantially true or statements of opinion; (2) they were protected by Nebraska's common law fair report privilege; (3) the incremental harm doctrine applies – *i.e.*, the statements about which Cooper complained in the reports did no greater harm to his reputation than did the unchallenged statements contained in the reports; and (4) Cooper failed to plead special damages as required under Nebraska's retraction statute.

This decision provides much needed recent precedent reinforcing defamation defenses in Nebraska.

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The Court's Decision Dismissing the Case

On November 5, 2018, after a hearing, the court granted WOWT's motion, agreeing the reports were substantially true and protected by the fair report privilege. The court also held that certain statements were not actionable because they were not about the plaintiff.

Specifically, the court found that WOWT's statement that "Cooper faced two misdemeanor counts after the alleged assault" was not materially false – notwithstanding Cooper's contention that he was only charged with one misdemeanor count of disturbing the peace – because "the WOWT reporters did not make any statements about Cooper's guilt or what crimes Cooper was in fact charged with, but merely reported on the alleged incident as reported by the Omaha Police."

The court also held that WOWT's statement that "Cooper was accused of attacking Foster" was substantially true even though the word "attack" was not used in the Police Incident Report or by the eyewitness. The statement was not "wholly false," the court said, noting that "[a] detailed review of the Omaha Police Incident Report and the statements of the witness, Ms. Kleager, show that there was some type of altercation between Cooper and the employee."

With respect to Foster's alleged criminal background, the court found that WOWT had no obligation to include that information in its news reporting because it was not contained in the police report "and does not appear to be relevant to the incident involving Cooper."

Therefore, the court held, "WOWT's omission in its reporting about any criminal background of the employee is not a false statement concerning the Plaintiff."

The court further held that under the fair report privilege, as provided in Section 611 of the Restatement (Second) of Torts, WOWT's reports were protected even if there were "minor inaccuracies" because they conveyed "'a substantially correct account' of the incident between Cooper and the parking employee from the Police Incident Report and judicial records."

In particularly helpful language, the court also acknowledged that early dismissal of meritless defamation claims is appropriate, a point that has not yet been articulated in any published appellate decisions in Nebraska: "[D]efamation/libel lawsuits are particularly amenable to motions to dismiss pursuant to § 6-1112(b)(6) because 'the communication about which the suit has been brought is literally before the court at the pleading stage.'" Order at 3 (quoting 2 Robert D. Sack, *Sack on Defamation* § 16.2.1 (5th ed. 2017)).

WOWT is represented by Ashley I. Kissinger, Charles D. Tobin, and Tiffany B. Gelott of Ballard Spahr LLP and Jill R. Ackerman and Lindsay K. Lundholm of Baird Holm LLP. Plaintiff is represented by George B. Achola, Esq.

The court granted WOWT's motion, agreeing the reports were substantially true and protected by the fair report privilege.

Court Grants Summary Judgment in Public Official Defamation Action

“Now more than ever we depend upon the free press...”

By Andrew Pauwels

In an opinion and order issued on January 18, 2019, Judge Matthew Leitman, District Court Judge for the Eastern District of Michigan, granted summary judgment in favor of Scripps Media, Inc. in a defamation lawsuit brought by a former Detroit public official and his real estate company based on a series of WXYZ TV reports entitled “Secret Severances.” [Odis Jones et al. v. Scripps Media, Inc.](#), No. 2:16-CV-12647.

Background and WXYZ’s Broadcast

Odis Jones was the CEO of the Detroit Public Lighting Authority (the “PLA”) from June 2013 through February 2016. The PLA was responsible for restoring the public lighting system in the City of Detroit, and Jones’s leadership was widely praised. However, as Detroit Mayor Mike Duggan told WXYZ, “I wish the Lighting Authority would accomplish their purpose without staff turnover and without severances.” During Jones’s tenure at PLA, departing executives (including himself) were awarded hefty severances, not provided for in their employment contracts and all under a veil of secrecy.

The short version of the complicated history of PLA severances began in November 2015 after Jones fired the PLA General Counsel and the Head of Government and Community Affairs. In response the terminated employees retained counsel, who presented the PLA with draft whistleblower complaints based, in part, upon allegations of improper conduct by Jones. Those lawsuits were not filed; instead, the PLA agreed to pay the former employees substantial severance agreements totaling \$200,000. Both severance agreements were subject to a non-disclosure clause.

The screenshot shows a news article from WXYZ Detroit. The headline is "\$500K in secret severance deals for PLA execs". Below the headline, it says "Posted: 9:40 PM, Apr 28, 2016 Updated: 9:26 AM, Apr 29, 2016" and "By: Ronnie Dahl". The article content is partially obscured by a video player that has failed to load, displaying the message "The media could not be loaded, either because the server or network failed or because the format is not supported." A large red number "\$540,833.33" is overlaid on the video player. To the right of the video player, there is a logo for the "30th Anniversary North American International Auto Show" and a text box that says "What you need to know for the 2019 Detroit Auto Show".

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One of the issues raised by these complaints involved the departure of COO Adam Troy. Troy was a long-time friend of Jones whom Jones hired as COO in 2014. In August 2015—before he had been in his position for a year—Troy voluntarily resigned his position. Although his employment contract did not include any severance, in his termination letter signed by Jones, he was awarded \$58,000. Within a day of his departure Troy and Jones formed MVP Capital Ventures, LLC, a real estate development company.

All of the whistleblower claims were investigated by the new PLA General Counsel Tiffany Sadek. In what was referred to as the “Sadek Report,” she found no wrongdoing by Jones. This report was somewhat questionable since, prior to becoming the PLA General Counsel, Sadek had represented Troy and had filed the incorporation papers for MVP Capital Ventures.

Finally, in February 2016, Jones abruptly announced his resignation from the PLA. Despite PLA’s public announcements as to how sorry they were to see him resign, Jones retained counsel and received his own severance following a closed meeting of the PLA Board. His severance agreement was also not public and was subject to a non-disclosure agreement. It would later be revealed that Jones had in fact been fired by Mayor Duggan and that his severance was \$250,000 of public money.

While the details of the severances were not known, the turnover and Jones’ abrupt resignation raised questions that WXYZ reporter Ronnie Dahl set out to answer. In the spring of 2016, the PLA responded to her FOIA request for all records concerning severances that had been paid and provided all of the severance agreements notwithstanding the non-disclosure provisions. With this information and the Sadek Report that she had received from a confidential source, Dahl began researching what would become known as the “Secret Severances,” series.

(During discovery in this litigation, the plaintiffs moved unsuccessfully for disclosure of Dahl’s confidential source. WXYZ successfully preserved the confidentiality of Dahl’s source, arguing that the source provided no information other than the Sadek Report itself, which WXYZ reported on and published on its website with the online version of the series.)

Dahl’s three-part series on the PLA raised questions about the propriety and legality of a public body making these large severance payments. Dahl questioned whether the severance payments in response to threatened whistleblower litigation was an improper effort to conceal wrongdoing. She also questioned whether Jones and Troy had improperly received large sums of money to which they were not entitled, and focused on the timeline of Troy’s departure, his receipt of a severance, and the founding (with Jones) of MVP Capital Ventures.

WXYZ’s three broadcasts featured a number of interviews about the PLA and the severance payments. Dahl interviewed Detroit Mayor Mike Duggan and several members of the Detroit City Council. She interviewed Dr. Lorna Thomas, the Chair of the PLA Board, who declined to

Dahl’s three-part series on the PLA raised questions about the propriety and legality of a public body making these large severance payments.

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answer all of Dahl's questions about the severances, claiming that they were "personnel issues." Dahl also interviewed two legal experts for their perspective: Justin Long, Professor of Law at Wayne State University, and Deborah Gordon, a noted employment attorney in the metro-Detroit area. Dahl attempted to interview Jones, Troy, and others affiliated with them but her attempts did not bear fruit.

Litigation & Grant of Summary Judgment

Jones and MVP filed suit against Scripps Media, Inc., the owner of WXYZ. Jones and MVP alleged defamation and other claims arising out of the Secret Severance reports. The claims focused on four general categories of statements in the broadcasts: (1) that the severances were "secret"; (2) that the severances amounted to "buying silence"; (3) that the severance to Troy amounted to Jones giving Troy money; and (4) that Jones, in his actions at the PLA, "violated the law." In granting an initial motion to dismiss, the Court held that Jones was a public figure and dismissed the majority of the claims. The Court did, however, allow the claims related to the "violated the law" statement to survive dismissal.

As mentioned above, WXYZ's reporting featured an interview with Deborah Gordon, a prominent Detroit area employment attorney. In the interview, Gordon said the following about Jones: "If he violated the law, and other people got caught in the crossfire, bring those people back, get rid of him, turn it over to the AG, and don't waste any taxpayer money." Jones alleged that, in the broadcast, WXYZ intentionally edited the interview to remove the word "if" and depict Gordon as affirmatively stating "*he* broke the law." Jones claimed that this editing intentionally and maliciously rendered the statement false: essentially, he argued, WXYZ falsely portrayed Gordon as opining that Jones had broken the law at the PLA. Jones primarily relied on alleged personal animosity directed at him by Dahl as evidence of the malice underlying the intentional misquote.

Following the close of discovery, WXYZ moved for summary judgment, raising a number of arguments. First, WXYZ argued that the statement as presented was true because Jones had, in fact, violated the law while serving as CEO of the PLA. Second, WXYZ argued that, even if the statement were false, Jones could not establish actual malice. Discovery revealed that any obscuring of the word "if" was unintentional. In Dahl's final script she had selected a different part of the Gordon interview. As her camera operator began the final edit on a short deadline, he felt this part of Gordon's interview was not aesthetically pleasing as it showed the back of Gordon's head. He then proposed using the "if he violated the law" quote. He chose the quote from an interview log prepared by Dahl that contained the entire quote, including "if."

In the condensed time frame provided to edit the story, the cameraman closely cut the video in an attempt to preserve the entire statement, including the word "if," but remove completely

The Court held that "no reasonable juror could find by clear and convincing evidence that WXYZ acted with actual malice."

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the preceding word. Any obscuring of the word—as argued by the plaintiffs and troubling to the Court—was thus accidental. Finally, WXYZ argued that MVP Capital Venture’s claims must fail because the remaining statement was not “of and concerning” MVP.

The Court granted WXYZ’s motion for summary judgment. First, as to Jones, the Court held that “no reasonable juror could find by clear and convincing evidence that WXYZ acted with actual malice.” Specifically, the Court found that, at most, Jones had established negligence on the part of the cameraman, and Jones could not rely on Dahl’s alleged dislike without any evidence to connect such malice to the cameraman’s actions. Second, as to MVP, the Court held that the statement at issue was not “of and concerning” MVP. Specifically, the Court ruled that, because the quote addressed alleged misconduct by Jones at PLA, it “did not impugn the manner in which MVP conducted *its* private operations [and thus] did not ‘concern’ or defame MVP.”

The Court’s decision reaffirmed several bedrock principles of defamation law. Notably, the Court’s opinion emphasizes the important constitutional safeguard provided by the actual malice standard. More fundamentally, the Court reiterated the crucial role a free press plays in society and offered words of reassurance:

“Now more than ever, we depend upon the ‘free press’ to ‘awaken[] public interest in governmental affairs’ and to expos[e] corruption among public officers and employees. . . . Indeed, ‘[t]he press plays a unique role as a check on government abuse’ and serves ‘as a watchdog of government activity.’” WXYZ “performed this essential ‘watchdog’ function” in investigating and exposing the severance payments at the PLA.

Andrew Pauwels is an associate at Honigman Miller in Detroit. Scripps Media, Inc. was represented by James E. Stewart, Leonard M. Niehoff, and Andrew M. Pauwels of Honigman LLP, who worked closely with David M. Giles, Deputy General Counsel of the E.W. Scripps Company.

Puerto Rico District Court Declines to Address Preemption Challenge to San Juan Drone Regulation

By John W. Scott and Charles D. Tobin

A federal court in Puerto Rico recognized support for the argument that federal law preempts drone restrictions in local ordinances – an issue of concern for newsrooms that have launched expanded aerial news coverage – but ultimately decided not to reach the issue. [Pan Am v. Municipality of San Juan](#), No. 18-1017 (PAD), 2018 U.S. Dist. LEXIS 208014 (D.P.R. Dec. 10, 2018). The U.S. District Court partially granted a preliminary injunction enjoining other aspects of the local ordinance regulating commercial speech.

Background

To date, only one federal court decision has addressed whether a local drone ordinance is preempted by federal law. The District of Massachusetts in *Singer v. City of Newton* found that while the FAA did not intend to occupy the entire field of drone regulation, local ordinances that directly conflict with federal rules will be preempted. 284 F. Supp. 3d 125, 130 (D. Mass. 2017).

The City of Newton passed an ordinance in 2016, which regulated drone flight within the city. Dr. Michael Singer, a resident of Newton, filed a complaint seeking declaratory and injunctive relief against enforcement of the Newton ordinance. Dr. Singer alleged that he was “certified as a small unmanned aircraft pilot, pursuant to 14 C.F.R. Part 107.” He plead that he was the owner of “two commercial-grade sUAS rotorcraft weighting over .55 pounds,” and that he “has operated sUAS over public and private lands in Newton and Needham, Massachusetts, in accordance with 14 C.F.R. § 101 or § 107.” Dr. Singer challenged four separate provisions of the Newton ordinance, which required drone operators to register with the City Clerk’s Office, and prohibited drone flight without express permission from property owners, within the city. The court found that federal law preempted each of these restrictions in the Newton ordinance.

As to Sections (c)(1)(a) and (c)(1)(e) of the Newton ordinance, which required operators secure permission for flights over both public and private property within the municipality, the court held that these restrictions “certainly reach[] into navigable airspace” and “this alone is grounds for preemption.” The court found these two provisions together operated as a complete “ban on drone use within the limits of Newton.” The court found this restriction conflicted with the FAA’s general obligation to “use navigable airspace efficiently,” as well as

A federal court in Puerto Rico recognized support for the argument that federal law preempts drone restrictions in local ordinances – an issue of concern for newsrooms that have launched expanded aerial news coverage – but ultimately decided not to reach the issue.

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the specific directive from Congress to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft system into the national airspace system.” With regards to the other provisions in the ordinance, requiring registration of drones and prohibiting flights out of visual line of sight of operator, the court held that these provisions also infringed on the FAA’s regulatory authority.

The court left open the possibility that a local municipality could regulate certain other aspects of drone flight. But the court expressly found that municipalities could not regulate drones in such a way as would affect the operation of the national airspace – this, the court stated is the sole province of the federal regulatory system and Congress.

The Puerto Rico Ruling

Since *Singer* was decided in 2017, drone operators and municipalities alike have waited to see if any other court would endorse or challenge the District of Massachusetts’s reasoning on the scope of federal preemption of local drone laws.

The plaintiffs in *Pan Am v. Municipality of San Juan* sought to enjoin a city ordinance that regulated the operations of businesses in Old San Juan during the 2018 San Sebastian Street Festivities, an annual multi-day event showcasing commercial, cultural, and artistic elements of Puerto Rican culture. In general, the challenged provisions sought to regulate the manner in which commercial advertisements could be displayed during the festival, such as restricting “inflatables,” requiring permitting for advertisements in certain areas and preventing property owners from leasing property for advertisements. Section 22 of the ordinance also specifically prohibited “the use of flying items, equipment or objects such as helicopters and drones during the Festivities, except those authorized by government agencies with authority in law, and those belonging to the Municipality, sponsors and parties responsible for production” (emphasis supplied). The plaintiffs were affiliated companies who in previous years had engaged in commercial activities throughout the festival.

The vast majority of the court’s analysis in *Pan Am* focused on whether the restrictions on commercial free speech violated the First Amendment.

The vast majority of the court’s analysis in *Pan Am* focused on whether the restrictions on commercial free speech violated the First Amendment. The court applied the Supreme Court’s test for commercial speech restrictions articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980). This case articulated a four part test the government must satisfy in order to justify restrictions on commercial speech:

- (1) the speech concerns a lawful activity and is not misleading;
- (2) the government’s asserted interest in restricting speech is substantial;
- (3) the restriction directly advances the asserted governmental interest; and
- (4) the restriction is not more extensive than necessary to meet that interest

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Id. at 566.

The court also analyzed the Supreme Courts' decision in *Reed v. Town of Gilbert*, 135 S. Ct 2218, 2226 (2015), and found that under *Reed's* formulation the speech restrictions contained within the ordinance were content-based, and therefore subject to strict scrutiny. Nevertheless, the court declined to apply *Reed*, concluding that the Supreme Court had not expressly extended its holding to commercial speech and several other courts had analyzed the intersection of *Reed* and commercial speech and concluded that *Reed* did not apply because it did not mention *Central Hudson* or its progeny. Ultimately, the *Pan Am* court instead applied the *Central Hudson* test.

Analyzing the record regarding the specific challenged ordinances, the court concluded that the first prong of *Central Hudson* was met. Further, the court concluded that the government had articulated substantial interests the ordinances were intended to advance. The court however, ultimately found that the record failed to show that those interests were real, or linked those interests to the specific restrictions in question. Based upon the factual record, the court granted in part, and denied in part, the motion for injunction as to the discrete sections of the ordinance.

The plaintiffs also argued that Section 22 was preempted by the federal Part 107 regulations for drone flights in the national airspace. This ordinance prohibited use of drones during the festivities, except as "authorized by government agencies with authority in law." The court did note that "there is authority to support" a preemption challenge to local drone laws, and cited to *Singer v. City of Newton*. But the court found that there was no need to reach the issue of federal preemption because the record established that the plaintiffs intended to use drone operators authorized by the FAA. For that reason, the court concluded the plaintiffs' proposed flights would be "authorized by the government agencies with authority in law," as the ordinance requires. The court therefore declined to enjoin the city from enforcing that aspect of the ordinance.

While *Pan Am* decision gave drone operators and municipalities some indication that other courts would follow *Singer's* lead, litigants continue to wait for a more definitive holding on the issue of local drone law preemption.

John W. Scott in Philadelphia and Charles D. Tobin in Washington, D.C. are with Ballard Spahr LLP. The firm represents the News Media Coalition, a collaboration of more than a dozen media companies and nonprofits, in legal issues related to the use of drones in journalism.

While Pan Am decision gave drone operators and municipalities some indication that other courts would follow Singer's lead, litigants continue to wait for a more definitive holding on the issue of local drone law preemption.

Canada's Supreme Court Declines to Change Test for Media Production Orders

By Paul Schabas and Kaley Pulfer

The Supreme Court of Canada has confirmed that production orders against the media will continue to be assessed based on a vague, discretionary test. In a much-awaited decision in [R. v. Vice Media Canada Inc.](#), the Supreme Court upheld an order that Vice journalist Ben Makuch, had to turn over to police online instant messages and metadata between him and Farah Shirdon, a Canadian man who traveled abroad to join ISIS.

Those messages had formed the basis for a series of articles published by Vice in 2014. The Royal Canadian Mounted Police (the "RCMP") argued they were relevant to terrorism charges laid against Shirdon in Canada in 2015. Those charges include participating in the activities of a terrorist group and uttering threats of death for a terrorist group.

The RCMP obtained an *ex parte* order requiring Makuch to produce the messages, which was upheld by courts in Ontario. Vice appealed to the SCC, arguing that the test for granting search warrants and production orders against media established in a 1991 decision, *CBC v Lessard*, was vague, involved too much discretion, and allowed courts to simply rubber stamp police requests for production orders against the media.

While the facts of the case (i.e., no confidential source or promise of confidentiality, publication of the messages had occurred, the gravity of the charges involved) made a successful appeal unlikely, media organizations and other champions of free expression had hoped that the SCC would at least revisit the problematic *Lessard* test, which simply lists a number of factors an issuing judge should consider in exercising discretion without any mandatory requirements beyond those required for a search warrant. Ultimately, the SCC unanimously upheld the production order but split 5 to 4 on the substance of the test to be applied in such cases.

While the facts of the case made a successful appeal unlikely, media organizations and other champions of free expression had hoped that the SCC would at least revisit the problematic *Lessard* test.

While the majority upheld the *Lessard* test, they streamlined it into a four-part analysis:

- (a) consider whether law enforcement has provided evidence to justify proceeding without notice to the media (a welcome, albeit, still inadequate change to the routine practice of obtaining production orders on an *ex parte* basis);
- (b) confirm that all statutory preconditions (i.e., *Criminal Code* provisions for granting a search warrant) are met;
- (c) balance the state's interest in investigating and prosecuting crimes and the media's right to privacy in gathering and disseminating the news, in light of all the



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circumstances, including the likelihood and extent of any potential chilling effects; the likely probative value of the materials (although Crown must not show evidence is “necessary” to secure a conviction); whether alternative sources for the material exist and reasonable efforts have been made to obtain it from those sources; the effect of prior partial publication; and, more broadly, the vital role of the media (usually an innocent third party) in the functioning of a democratic society; and

(d) if granted, consider imposing conditions on the order to ensure the media is not unduly impeded in publishing and disseminating the news.

The majority, in a nod to media concerns, noted that the absence of a confidentiality agreement “does not give the state free rein to compel production of materials in the hands of the media” and that prior publication will not necessarily weigh in favour of granting the order, particularly where the police are seeking access to *unpublished* materials. They recognized that in such situations, compelled production may create a chilling effect. Still, the majority stuck with earlier jurisprudence that s. 2(b) of the *Canadian Charter of Rights and Freedoms*, which protects “freedom of...expression, including freedom of the press and other method of communication”, serves only as a backdrop against which the reasonableness of a production order may be evaluated. The majority declined to consider whether freedom of the press constitutes an independent and distinct constitutional protection that must weigh in the balance.

The four concurring judges upheld the production order, but would have abandoned the *Lessard* test. The minority held that under section 2(b) of the *Charter* the press enjoys distinct and independent constitutional protection, separate from freedom of expression more generally. To that end, the concurring judges would have required a “rigorously protective harmonized analysis” for production orders, balancing the state’s interest in investigating and prosecuting crime against the media’s constitutionally protected rights of freedom of the press and privacy.

Relevant considerations would include the media’s reasonable expectation of privacy, whether there is a need to target media at all, and whether the proposed order is sufficiently

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narrow so as to interfere with the media's rights no more than necessary. Under this approach, the more the state seeks to access confidential or off-the-record communications or journalists' private notes, the greater the harm to the media's privacy rights and the public's right to know. On the other hand, the state's interest will be stronger where the crime being investigated is serious, the evidence being sought is cogent, and the investigative need is urgent.

The minority's approach is more in line with, but still falls short of, protections elsewhere, which recognize distinct press rights and require a showing of necessity including having exhausted all alternative sources, and with robust Canadian free expression jurisprudence in other contexts involving media rights, such as publication bans and sealing orders.

Implications

Ultimately, the impact of the decision may be minimal. The case had facts favouring law enforcement interests. It did not involve confidential sources, which are now protected by the federal *Journalistic Sources Protection Act* which was enacted in 2017. Still, the result is disappointing in failing to provide more protection to the media and clarity as to when such orders should be made.

Vice's battle continues, however, as it is now seeking to have the production order stayed on the basis that Shirdon is dead, having been killed in Syria - something which had not been confirmed until 2017, two years after the production order was issued.

Paul Schabas and Kaley Pulfer are lawyers with Blakes Cassels & Graydon LLP in Toronto. Blakes acted for an international coalition of interveners on the Vice appeal, including the Media Legal Defence Initiative, Reporters Without Borders, Reporters Committee for Freedom of the Press, Media Law Resource Center, International Press Institute, Article 19, Pen International, Pen Canada the Canadian Centre of International, Index on Censorship, Committee to Protect Journalists, World Association of Newspapers and News Publishers, International Human Rights Program.

First Circuit: Juror Names and Addresses Remain Public in the Age of Social Media

By Jeffrey J. Pyle and Sigmund D. Schutz

Nearly 30 years ago, the Court of Appeals for the First Circuit held that judges in the District of Massachusetts must release the names and home addresses of jurors after trial, absent exceptional circumstances justifying impoundment. *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990). The opinion, by then-Circuit Judge Stephen Breyer, was ostensibly based on the text of the Jury Plan for the District of Massachusetts, but it also drew heavily from the Supreme Court’s First Amendment access cases. Applying the “logic” test of *Press-Enterprise II*, 478 U.S. 1, 9 (1986), the court observed that post-trial interviews of jurors can reveal bias, root out misconduct, expose misconceptions, and otherwise improve the quality of the justice system. “In a democracy,” the court concluded, “criminal trials should not, as a rule, be decided by anonymous persons.”

Last month, in *U.S. v. Chin*, No. 17-2048 (Jan. 18, 2019), the First Circuit reaffirmed the rule of access to juror identities, notwithstanding the worries of some district judges about potential threats to juror privacy in the era of social media. The court also held that any delay in releasing the jurors’ identities must be supported by findings of a threat to the judicial system, and that courts must release jurors’ home addresses, in addition to names and hometowns, so that the press can identify and interview them.

Last month, in U.S. v. Chin, the First Circuit reaffirmed the rule of access to juror identities, notwithstanding the worries of some district judges about potential threats to juror privacy in the era of social media.

A Questionable Verdict

In 2016, the Government charged the New England Compounding Center (“NECC”), a compounding pharmacy, and the individuals who ran it with serious criminal charges for distributing contaminated medications that caused a nationwide outbreak of fungal meningitis, killing scores of people. Barry Cadden was NECC’s owner. At Cadden’s trial, the jury heard that he had deliberately avoided safety measures to prevent contamination. It convicted him of numerous offenses, including RICO violations, while marking “not guilty” next to charges of second degree murder.

After the trial, court observers noticed that the jury had written numbers adding up to 12 on the verdict form next to the “not guilty” notations—apparent evidence of non-unanimous votes. Trial judge Richard Stearns had not asked the jurors what the numbers meant before discharging them.

David Boeri, longtime courtroom journalist for public radio station WBUR, wanted to interview the Cadden jurors to see if they understood that their verdicts had to be unanimous. However, despite *In re Globe*, Judge Stearns did not release the jury list after trial, so WBUR filed a motion for it. In response, the judge ruled that he would delay release of the jury list

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until after sentencing, and even then, would release only the jurors' hometowns, not their home addresses.

WBUR moved to reconsider these limitations. The judge summarily denied the motion, asserting that the requirement of *In re Globe* regarding home addresses was mere *dicta*, and even if it weren't, "the opinion was written in a more innocent age. In the turbulent times in which we now live, I would no more consider ordering the public disclosure of a juror's home address than I would my own."

After Cadden's sentencing, the judge released the jurors' names and hometowns. However, despite considerable sleuthing, WBUR was unable to contact all the jurors. Thankfully, the jury foreman decided to attend Cadden's sentencing, where Boeri interviewed him. The foreman confirmed that the jurors erroneously believed that if they weren't unanimous on a charge, they had to find Cadden "not guilty."

An Abortive Prior Restraint

Soon thereafter, WBUR filed a motion in another criminal case in the District of Massachusetts, the terrorism trial of *U.S. v. Wright*. In that case, Judge William Young agreed to release the juror identities, but only if the media submitted to a "protective order" to "secure the jurors' personal identifiers from unnecessary dissemination on the internet." WBUR responded by reminding Judge Young of the law on prior restraints, and arguing that it would be unconstitutional to require the media to agree to one as a condition of receiving court records.

Meanwhile, WBUR moved for the jury list in the trial of Barry Cadden's co-defendant, NECC chief pharmacist Glenn Chin, shortly before the jury went out to deliberate. Judge Stearns denied the motion without prejudice, again ruling that he would delay release until after sentencing, and would not release street addresses. However, inspired by Judge Young's order in *Wright*, Judge Stearns also held out the possibility that he would release juror information earlier in exchange for a protective order.

WBUR filed a notice of appeal. After the notice of appeal, Judge Stearns withdrew the prior restraint offer, (as Judge Young had by then done in *Wright*), but otherwise stuck to his guns, supplementing his order with a 20-page rumination on the history and importance of the jury trial from ancient England to the present.

Friends of the Court

None of the parties in *Chin* took a position on the release of the jury list, but the First Circuit wasn't willing to leave Judge Stearns without a defense. So it named a "Court-appointed amicus," Gregory Dubinsky of Howell, Schuster & Goldberg, to argue Judge Stearns' side. In what the First Circuit characterized as "ably performed" argument and briefing, Dubinsky

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echoed the judge's fears that the world has changed since 1990, and asserted that delaying access to juror lists, and withholding street addresses, could be justified by the prospect of harassment on the internet. He also argued that relevant portions of *Globe Newspaper* were mere dicta.

Wrong, said the media. Led by the New England First Amendment Coalition, a group of media supporters (Gatehouse Media, the Keene Sentinel, Massachusetts Newspaper Publishers Association, MaineToday Media, New England Newspaper & Press Association, New England Society of News Editors, the Reporters Committee for Freedom of the Press, and the Union Leader Corporation) filed what the First Circuit deemed a "helpful amicus brief." The Coalition argued that access to juror information services as a check on the system, allows important insight into the judicial process, and that there is no evidence that jurors have come to harm because their identities are public. It also pointed out that jurors cannot properly be identified with just names and hometowns: just try finding "Michael Murphy" of Boston among the 729 listings of that name in the online white pages.

First Circuit Resolves Jurisdictional Obstacles in Favor of WBUR

Before reaching the merits, the First Circuit navigated three jurisdictional issues—all but one of which the court raised *sua sponte*. First, the Court questioned whether a non-party has a right to intervene in a criminal case and suggested that the appropriate avenue would have been to seek a writ of mandamus, a subject on which the circuits are split. But because the District Court had allowed intervention and that aspect of its decision had gone unchallenged on appeal, the court allowed WBUR to proceed as an intervenor.

Second, the First Circuit raised and then "iron[ed] out" its own concern over the "timing of the appeal relative to the issuance of the District Court's amended order in this case." The parties had not made anything of the fact that the District Court issued its amended order the day *after* WBUR filed its notice of appeal. The parties had treated the amended order as the primary ruling by the District Court on appeal. The First Circuit suggested that a plausible argument could have been made to disregard that order because the filing of the appeal had divested the District Court of jurisdiction. On the other hand, the District Court's amended order arguably did not "alter the substance of the decision" to release juror names and hometowns after sentencing, according to the First Circuit. Nor did the amended order affect the First Circuit's "analysis of the merits[.]" which may have been a disappointment to the district judge given the obvious effort he had put into his historical account.

The Coalition argued that access to juror information services as a check on the system, allows important insight into the judicial process, and that there is no evidence that jurors have come to harm because their identities are public.

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The final and “main jurisdictional obstacle,” per the First Circuit, was Court-appointed amicus’ argument that the appeal was moot “because the District Court released the names and hometowns of the Chin jurors on January 31, 2018,” nearly 12 months before the First Circuit released its decision on appeal. The First Circuit found that the controversy over access to juror addresses was not moot since that information remained sealed and, in addition, WBUR had been unable to contact all of the jurors with names and hometowns only.

The other “not quite so easily resolved question” was whether WBUR’s appeal from the District Court’s delay of access for three months, until after sentencing. The First Circuit found that WBUR’s appeal qualified for the exception to the mootness doctrine that exists for a controversy that is “capable of repetition, yet evading review.” On that basis the court reached the merits.

Access Re-Affirmed

The First Circuit framed the merits question as a two part inquiry, starting with whether *In re Globe*’s requirement of home addresses is mere *dicta* (as Court-appointed amicus argued) or, instead, “controlling precedent” (as WBUR argued). Even if the precedent were controlling, then the First Circuit concluded that it would still consider “Court-appointed amicus’s alternative argument that we should revisit that holding in light of changes in technology over the past thirty years since *In re Globe* was decided.”

On both issues, the First Circuit sided with WBUR. It concluded that *In re Globe* is controlling and that a district court must disclose juror names and home addresses post-trial absent “particularized findings” of “exceptional circumstances” such as “a credible threat of jury tampering, a risk of personal harm to individual jurors, and other evils affecting the administration of justice.” The District Court in *Chin* had made no such findings.

The court also held that *In re Globe* also “requires that any delay in post-verdict disclosure be justified by the requisite ‘particularized findings.’” The District Court’s three-month delay (between the verdict and sentencing) far exceeded any “brief time period that could constitute an acceptable delay” and therefore deviated from *In re Globe*.

In response to the arguments that changes in technology justify a departure from access to juror identities, the First Circuit acknowledged that *In re Globe* “was decided decades ago and thus well before the first tweet was tweeted.” The Court also accepted that “there is now a greater potential for the public release of a juror’s name, and, especially, a juror’s address, to be more intrusive and concerning than would have been the case in an era in which social media was unknown.” But the Court concluded, “these technological changes have by no means

The First Circuit agreed with the media amicus’s argument that judges are unlike jurors, who “are not otherwise sufficiently identifiable to the press and public” without disclosure of addresses.

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diminished the need for accountability and transparency in our system of justice that *In re Globe* treats as relevant in construing the critical provision of the Jury Plan.” The First Circuit described the competing interests this way:

The obligation of jury service is one of the most important that our government imposes on its citizens. It is, therefore, important to ensure that the fulfillment of this obligation is not made so burdensome that it becomes more than a citizen should have to bear. It is important to ensure as well, though, that our system of justice remains accountable to the broader public that it serves.

In a footnote, the First Circuit also responded to a challenge posed by the District Court in its amended order, “The court would also suggest that any judge evaluating this same issue consider whether he or [she] would disclose his or her home address when issuing orders or rulings.” The First Circuit agreed with the media amicus’s argument that judges are unlike jurors, who “are not otherwise sufficiently identifiable to the press and public” without disclosure of addresses. By contrast, the identity and background of judges is well known. The First Circuit added that “[i]t also bears mentioning that it would be impossible for judges to keep their addresses confidential during trials in which they presided if they were required to disclose them post-verdict, given that a judge is, by design, the quintessential repeat player. No equivalent conundrum presents itself with respect to jurors.”

The First Circuit concluded that generalized “concerns for juror privacy” could not provide a justification withholding or delaying juror identities. However, the court remanded the case to the District Court’s to allow it to consider “whether this particular case presents the kind of ‘exceptional circumstances’ that *In re Globe* contemplates.” Under the re-affirmed and reinforced standards set by the First Circuit in *Chin*, no such findings are likely on remand.

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Sigmund D. Schutz is a partner at Preti, Flaherty, Beliveau & Pachios, LLP in Portland, Maine. Along with Nashwa Gewaily, he represented the media coalition that appeared as amici curiae in U.S. v. Chin.

The State of Transparency in the Commonwealth of Kentucky

By Jon L. Fleischaker, Michael P. Abate, and Cassie Chambers Armstrong

Transparency is under attack in Kentucky. Historically, Kentucky has had one of most expansive Open Records Acts in the country. As a result, the press—and the public—have enjoyed broad access to government records. Yet Republican lawmakers—including the current Governor’s administration—are seeking to curtail that access, using both legislative and judicial channels to achieve their goal.

In particular, the administration has taken the view that the public does not have the right to access the disciplinary records of public employees—particularly in cases where it has argued it was unable to substantiate the alleged misconduct. However, in the recent past, records the government was forced to disclose under the law have shown numerous instances where the agency’s finding of “unsubstantiated” was not warranted by the actual facts. Nevertheless, in current cases the government has argued that releasing the records would be an unwarranted invasion of the accused employee’s privacy. Currently, there are several pending lawsuits against various state agencies and universities that involve this issue.

At least three of these pending cases involve disciplinary records specifically related to sexual harassment or sexual assault. In *Commonwealth of Kentucky, Cabinet for Health and Family Services, v. the Courier-Journal Inc.*, Franklin Circuit Court, No. 18-CI-1036, for example, the government refused to disclose the name of an accused harasser, whose actions allegedly caused a senior-level Cabinet official to resign.

The government’s sudden interest in shielding employee disciplinary records from public view may explain the introduction of SB 14, which threatens to eviscerate the Open Records Act. Kentucky State Senator Danny Carroll pre-filed SB 14 just before the start of the 2019 Kentucky legislative session, stating that the bill was intended to shield the personal information of public employees. In reality, though, the bill would close to the public many records about how government agencies are performing their primary functions, and prohibit release of any information about misuse or abuse of government power.

The bottom line is that SB 14 is an attempt to eviscerate the Open Records Law as an effective tool for the public to monitor the actions and activities of large and important parts of state and local government.

About SB 14

SB 14 applies largely to public employees entrusted with the power to sanction, punish, or investigate private citizens—including police officers, judges, and child abuse investigators (among others). The exempted workers perform some of the most sensitive and public-facing functions of government, and records related to these employees are among the most important

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for the public to monitor.

SB 14 would prohibit the public from accessing a broad swath of information about these employees, including records related to financial information, employee performance, and employee discipline. The latter two categories of information are the most troubling, as they would allow agencies to withhold the very kind of information that has produced important systemic reforms—for example, information about misconduct by police officers or whether a Cabinet for Health and Family Services employee accused of turning a blind eye to child abuse had ever received a poor evaluation at work (both actual examples of information previously obtained under the Open Records Act).

Other categories of exempt information are so vaguely defined that it is impossible to identify exactly what types of information would fall into them, or how a court would choose to define them. For example, SB 14 prohibits disclosure of “financial information” but does not elaborate on exactly what type of information falls into this broad category. Would that cover information about a public employee’s salary or accusations that senior officials were paid well above the typical range for their position (another issue that was disclosed multiple times in recent years thanks to the Open Records law)?

In addition to changing the types and categories of records that the public can access, SB 14 also dramatically alters the current enforcement mechanisms of the Open Records Act. For one, the bill imposes personal liability on state officials who disclose information protected by SB 14, making them liable for up to \$500 per violation of the law—a provision that appears designed to encourage records custodians to err on the side of redacting and withholding information.

SB 14 also requires the judge in any case brought under the law to determine *why* someone seeking records is doing so, and whether he is doing so for “an improper purpose.” If a judge determines that an improper purpose exists, the judge can deny the requester fees to which he would otherwise be entitled and *must* impose on the requester the costs and attorney’s fees the government incurred in defending against the request. The bill does not elaborate on what might be considered “an improper purpose” other than to note that actions intended to violate the law or be “frivolous” would fall into this category. This expansive definition would give judges substantial leeway in deciding whether a requestor’s motives were worthy or not. Similarly, this provision would force every-day citizens and media organizations to pick up the government’s legal bills merely for requesting access to public records.

It is also unclear whether SB 14 is meant to change the process of Attorney General review. In Kentucky, those aggrieved by an agency’s decision to withhold records have the option to request the Attorney General issue an opinion regarding whether the government is required to disclose those records. SB 14 may be designed to curtail this process and force those seeking records to automatically turn to the courts for redress—a process that is more expensive and time-consuming than Attorney General review. Such an outcome would be in line with the government’s behavior in other cases, where numerous agencies have refused to hand over

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records to the Attorney General's office for the review process. These agencies are—for the first time in the history of the Open Records Act—advancing the argument that they have a choice regarding whether to comply with the Attorney General review process.

The bottom line is that SB 14 is an attempt to eviscerate the Open Records Law as an effective tool for the public to monitor the actions and activities of large and important parts of state and local government. It effectively would reverse over 40 years of court rulings that have allowed the public to see what its government agencies are actually doing in its name.

Fighting for Transparency

After SB 14 was introduced, the Kentucky Press Association quickly and publicly condemned it. Media outlets across the state began to run stories explaining what the bill was, and how it would eviscerate the protections provided by the Open Records Act. Within a few days, Senator Carroll withdrew SB 14, citing the concerns raised by the Kentucky Press Association as the reason for his decision. See [Kentucky lawmaker to withdraw bill that would gut open records law](#), Louisville Courier Journal, Jan. 9, 2019.

Advocates for transparency have experienced other wins lately, particularly in the courts. Lower courts have ordered the government to release records of unsubstantiated employee misconduct in full—records that the government sought to shield from public view. In *Commonwealth of Kentucky, Finance and Administration Cabinet v. Kentucky Public Radio*, Franklin Circuit Court, No. 18-CI-335, for example, the court held that the government acted improperly when it redacted the names of employees accused of sexual harassment, witnesses to alleged events, and other information from public records. The court is considering fee motions filed in the case, and at least one of the government agencies involved has announced that it will appeal after that final issue is resolved.

The fight to protect the Open Records Act in Kentucky is far from over. Media advocates must continue to challenge the administration's refusal to release public records in the courts. And although Senator Carroll said that he would "take a step back" from SB 14, he has not foreclosed the possibility of reintroducing the legislation in the future. Senator Carroll plans to meet with representatives of the Kentucky Press Association to further discuss the bill, but there is no guarantee that those discussions will lead to agreement. Given the seemingly concerted effort by those in government to limit the Open Records Act, it will be important for the press, media lawyers, and other interested parties to remain vigilant.

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Senator Brian Schatz and Democratic Co-Sponsors Introduce Data Care Act

By Naomi Sosner

In December, the day after Sundar Pichai, Google CEO, testified before the House Judiciary Committee on data privacy issues, Hawaii Senator Brian Schatz introduced legislation that [he later described](#) hopefully as the foundation of a future and “big privacy package on a bipartisan basis.”

[The Data Care Act of 2018](#), a 14-page bill, sketches out fiduciary duties of online service providers to the humans generating the data. Senator Schatz is the Ranking Member of the Senate Communications, Technology, Innovation, and the Internet Subcommittee. The Bill, which has not yet been introduced in the new Congress, introduces several important concepts into the expected 2019 legislative debate over federal consumer privacy legislation.

The Bill proposes three main duties. The first is a duty of care to reasonably secure “individual identifying data” and alert individuals of breaches of their “sensitive data,” as both terms are defined. The second duty is of loyalty: to use neither individual identifying data, or data derived from that data, in a way that benefits the online service provider “to the detriment of an end user” and “will result in reasonably foreseeable and material physical or financial harm to an end user” or would be “unexpected and highly offensive to a reasonable end user.” Third, the duty of confidentiality, forbids an online service provider from disclosing or selling individual identifying data to other parties unless those entities are contractually obliged to abide by the first two duties.

The idea of imposing fiduciary duties on online data collectors was floated earlier by law professor Jack Balkin, including in [an Atlantic article](#) co-authored with Harvard’s Jonathan Zittrain in 2016. There, Balkin and Zittrain discussed the concept of “information fiduciaries,” people and businesses—doctors, for example, and law firms—who are privy to sensitive information by virtue of their positions and obligated, by law, to protect that information in certain ways.

Technology has birthed new entities that are analogous to old-school information fiduciaries, they thought, but legally untethered to the same sort of ethical requirements:

There is an opportunity for a new, grand bargain organized around the idea of fiduciary responsibility. Companies could take on the responsibilities of information fiduciaries: They would agree to a set of fair information practices, including security and privacy guarantees, and disclosure of breaches. They would promise not to leverage personal data to unfairly discriminate against or

The Data Care Act of 2018, a 14-page bill, sketches out fiduciary duties of online service providers to the humans generating the data.

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abuse the trust of end users. And they would not sell or distribute consumer information except to those who agreed to similar rules.

Schatz and the other senators deliberately avoided the term “fiduciary”—to avoid confusion with its existing legal connotations, [he told Mother Jones in late December](#)—but in the main the Data Care Act tracks these broad principles.

An exception is enforcement, and preemption. In the *Atlantic* article, Balkin and Zittrain imagined that companies would be willing to take on the responsibilities of information fiduciaries as part of a federal act that preempted state and common law regulations. Then as now, there was no federal privacy bill; and since 2016 every state has passed a state breach notification law, which frequently joins a diffuse cloud of other state laws impacting business data practices.

California’s Consumer Protection Act, passed in August of 2018, epitomizes, and sharpens, industry’s dilemma. In various ways modeled after the GDPR, the CCPA is the most stringent state privacy law, and its hand, in practice, will stretch out of California. There was no CCPA when Balkin and Zittrain presumed companies would like to trade state checkerboards for a federal game. Faced with the CCPA, companies are lobbying for it. See [Tech Industry Pursues a Federal Privacy Law, on Its Own Terms](#), New York Times Aug. 26, 2018.

The Data Care Act, however, preempts nothing. Schatz, in [an interview in late December with Mother Jones](#), alluded to vectors of pressure on the preemption question.

Tech is not sure what to make of this. But I think that they’re highly motivated to get a federal law. Their initial position was “please do a federal law in order to preempt California law,” and I’ve been loud and clear: we’re not doing non-progressive federal law to preempt a progressive state law. The only thing that will replace and preempt California’s statute is a strong progressive federal privacy framework.

The Data Care Act empowers the Federal Trade Commission to enforce the Act, but explicitly provides a right of action (subject to various caveats) for state regulators. It does not preempt any state law. Based on Schatz’s comments, if it passes its sponsors envision it as one of a few federal laws—a “privacy package”—that interlock.

Naomi Sosner is an associate at Hunton Andrews Kurth focusing on Internet law, privacy and security. She was MLRC’s 2017-18 Legal Fellow.

10 Questions to a Media Lawyer: Ashley Kissinger

Ashley I. Kissinger is Of Counsel at Ballard Spahr in Denver.

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

I stumbled across a job ad in the early days of the internet. Well, actually, my boyfriend did. It was 1998. We were in Austin, Texas, planning a move together to Washington, D.C. He was researching job openings – he was a lawyer, too – and he came across an ad for an associate placed by a little eight-lawyer firm then known as Levine Pierson Sullivan & Koch. The ad was on “www.emplawyer.net.” (I kid you not!) Constitutional law was my passion in law school so I applied. I was thrilled I got the job, and I’ve spent my entire career here. (Through transitions to Levine Sullivan & Koch, then to Levine Sullivan Koch & Schulz, then to Ballard Spahr. In Washington through 2006 and in Colorado since.)



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

What I like most is that I get to work in one of the most interesting areas of law 100 percent of the time. The facts are fun, the law is fun, my client is usually wearing the white hat, we usually win, and when we do the outcome is for the public good.

What I like least is the unpredictability and the overall workload that comes with being a lawyer. We work too much at night, on weekends, and during our vacations, and I have never gotten comfortable with the roller coaster ride aspect of it.

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



Kissinger with LSKS-Denver coworkers during a summer party

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My biggest blunder (that I have not successfully repressed) occurred when I was filing an out-of-state petition for discovery in California state court. Anyone who practices in California courts knows there are a bazillion rules and statutes that can be implicated anytime you so much as breathe. I was dealing with a GI issue that was ... shall we say ... *acute*, a newborn with the flu, and a tight deadline that had me working through the night after days of little sleep. Through the fog, I failed to file a procedurally required yet completely superfluous (thanks, California) document, and the judge did not let me off the hook.

A good follow up question for these 10 Questions would be this: “*What did you learn from this blunder?*” My answer: Don’t be a hero. Raise the white flag and seek help when you get into a bind. That’s far better than making a mistake.

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

I argued a cool case in the United States Court of Appeals for the Fourth Circuit that has become, in a way, high profile of late. In [Rossignol v. Voorhaar](#), 316 F.3d 516 (4th Cir. 2003), the court held that a group of sheriff’s deputies who bought up all of my client’s newspapers on the eve of an election acted under color of law, and violated the paper’s First Amendment rights, even though they used their own money, were off duty, and were in plain clothes.

The court’s holding – that an official’s *motivation* is important to the state action question – is now being cited in cases around the country in which courts hold that government officials who block people from their official social media feeds based on the content of their commentary are violating the First Amendment.

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

I have a speaker’s name card with my name in both English and Arabic. I keep it to remind me of one of the most challenging and rewarding periods in my career. Over five years in the mid-2000s, I spoke many times in the Arabic peninsula about American media law and the international law of freedom of expression. Take advantage of any opportunities like this that come your way. You will not regret it.



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

Hahahahahahahahahahahahahahaha! “Check a website”? That is so cute. At the age of 50, with an eight-year-old, a four-year-old, a working spouse, a career as a litigator, and a desire to spend a couple of seconds with my family each day, I do not find myself “checking websites”

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in the morning. I do get that daily briefing from *The New York Times* delivered to my inbox, though, which I love. When I read it.

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

See "what I like least" in #2 above. Don't underestimate the impact that this career choice will have on your personal life, particularly if you want to have kids. But if you can accept that trade-off, and the law is interesting to you, do it. You will never be bored, every day will be different, and there are enough different paths to take over the course of your career that you can find engaging and fulfilling work for the rest of your life.

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

Try to get a fellowship or internship with a media company or media law nonprofit. You'll get great exposure to the law and will meet lawyers who practice in this area.

9. What issue keeps you up at night?

Nothing. (See answer to #6 – I have no trouble going to sleep at night.) OK, OK. There is no particular subject that keeps me up more than others, just the general sense of foreboding that comes with this job: *Have I considered all of the strategic options that could advance the ball forward for my client? What horrible thing is my opponent cooking up next? Is there anything important in my inbox that has been pushed down so far by the daily onslaught of email that I have forgotten about it?*

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

One of these: Rock n' roll star (if dreams could come true), hairdresser, exotic pet vet, diplomat.



Kissinger dancing with MLRC Executive Director George Freeman at an ABA Annual Meeting

