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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through July 28, 2018

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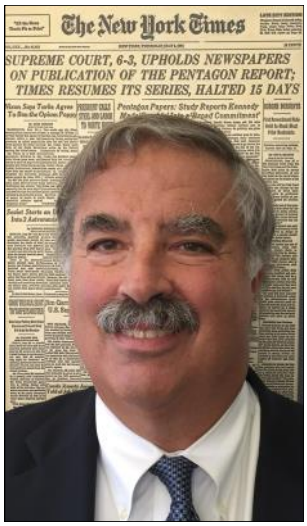
From the Executive Director's Desk

MLRC Institute Partners with Knight to Train Journalists in Legal Fundamentals

And a Fond Farewell to a Colleague

As readers of this column are aware, a few years ago the MLRC Institute, the MLRC's charitable c(3) sister entity, changed its mission entirely: rather than run a Speakers' Bureau where we would match groups looking for First Amendment speakers with our member lawyers, we initiated a program whereby we would present one-day legal workshops to journalists, mainly bloggers, freelancers and others who do not have ready access to a lawyer or to a corporate legal department.



George Freeman

The workshop included sessions on Libel, Invasion of Privacy, Newsgathering, Subpoenas and Relationships with Sources, Copyright and Digital Law, and the like. We made these presentations in New York, Boston, Washington, Chicago, Miami, LA and San Francisco. They were promoted through the efforts of my colleagues at the MLRC, Jake Wunsch and Andrew Keltz, who used social media channels and worked with local journalism groups – efforts which were very successful, as for these one-off sessions we had 200 attendees in New York (at the Times building) and between 65-110 at the other six cities. We were supported by a generous grant from the MacArthur Foundation which offset our costs and a sponsorship from Mutual Insurance. In addition to Jeff Hermes, Dave Heller and me, we had the assistance of many of our members from those areas who made up the faculty for our sessions. The programs got rave reviews: not only were they very well received, the attendees said they were most worthwhile and really fulfilled a compelling need.

Last year we were the recipients of an even greater 3-year grant from the Knight Foundation. Essentially, they were excited about what we had done, and wanted us to continue doing these workshops – but as part of major national journalism conferences and conventions, of which Knight was a big sponsor. One advantage appeared to be that we would no longer have to self-promote our programs; there would be a captive audience of over a thousand journalists at each of the conferences at which Knight asked that we present.

We now are halfway through our 2018 schedule. We presented at the IRE (Investigative Reporters and Editors) Conference in Orlando in June; the National Association of Hispanic Journalists Conference in Miami in July; and at the very beginning of August at the National Association of Black Journalists Conference in Detroit.

In a few days we will be in Houston for the Asian American Journalists Association Conference; in mid-September in Austin for ONA; and the day after the MLRC's Media Law Conference in Reston, Va we'll be in Baltimore for the RTDNA Convention; and we'll round

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Jeff Hermes, right, and Robin Luce-Herrmann lead session on Copyright and Digital Law at NABJ conference in Detroit.

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out the set with the Local Independent Online News (LION) Conference in Chicago in October. (To the extent I once had a reputation as one who was the beneficiary of nice business trips to lovely locales, Houston in August and Orlando in June has pretty much undercut that rep.)

Since we're now being scheduled at the behest of the conference organizers, each convention has given us differing time slots and varying ground rules. At IRE we only had time to put on our Libel/Privacy and Copyright/Digital workshops. On the other hand, at the Hispanic Journalists Conference, we had time to put on our full slate of sessions. At both we were immensely aided by many of our members from Florida law firms and media companies. And then in Detroit at the Black Journalists Conference, we were given time for the two basic sessions and an extra hour for a timely and engaging session on the threat the Trump Administration poses to the press and the First Amendment.

While there certainly is a little more excitement about appearing at a huge journalism convention and it's nice not being responsible for putting fannies in the seats, so far we have had somewhat fewer attendees than we had at our self-promoted one-off events. Indeed, the number of attendees have varied widely and, at least at this point, is largely unpredictable. Thus, for example, in Miami we had a healthy crowd of maybe 40 for the Libel/Privacy program but only a handful for Copyright/Digital, while in Houston we had only a handful for the former and about 60 for both the Copyright/Digital and Trump sessions. The problem seems to be that many folks come to these conventions to hobnob, network and job search; even those that attend programs have many other programs to choose from, including sometimes sexier plenary sessions which are scheduled for the same time as our presentations.

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Thus, on the one hand, we believe – and our evaluations show – that our workshops are well-presented, practical and very worthwhile – audiences are thankful to get legal training that they don't anymore receive from any other source. But, on the other hand, we're doing a lot of work and drawing on the time of many of our member lawyers for sometimes too small audiences. As just one example, in Miami, Sandy Bohrer and Lynn Carrillo gave a wonderfully nuanced, eminently practical and useful, truly sophisticated and professional presentation on relationship with sources. They discussed every ethical and legal step in the reporter-source relationship in lovely detail. But the bummer was that the audience for this marvelous presentation was in the single digits.

Our plan is to put our heads together with Knight to figure out what we can do to amass bigger audiences. We remain confident that are programs are very worthwhile to the journalistic community – particularly the growing number of reporters, editors, photographers and documentarians who don't have the benefit of an in-house legal department. We would just like more journalists to take advantage of the opportunity we are affording them.

* * *

This Friday we say goodbye to our assistant administrator Andrew Keltz. Andrew has worked for the MLRC for the past five years, and although only part-time, he greatly contributes to the work and morale of our small office.

If you've authored a chapter for one of our 50-States Surveys, you've probably received a polite email (or several) from Andrew, who rides herd on our many contributors to ensure we publish on schedule. He also helps with bookkeeping, the MLRC website, the MediaLawDaily, research projects and dozens of other tasks big and small.

In addition to an admirable work ethic, Andrew is an unusually upbeat and joyous colleague. A professional actor, for the past several years he's organized our annual holiday outing to a Broadway show – arranging discount tickets and, one year, a private post-show Q&A with his friend, the

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On the water with the MLRC staff. Front row, left to right: Jeff Hermes, Liz Zimmermann, Andrew Keltz, Debby Seiden, and Michael Norwick. Back row: Jake Wunsch, Dave Heller, and George Freeman.

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Broadway star Jessie Mueller.

Taking over for Andrew is Jill Seiden, whose last name may look familiar as she's the daughter of our recently-retired administrator Debby Seiden. She's been training for the past few weeks and we look forward to her joining us in September.

We celebrated Andrew on Wednesday with a lunchtime cruise around Manhattan. He'll work through the end of the week, and on Monday, start courses at New York Medical College towards a degree in speech and language pathology. I envy the employer who eventually gets him.

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.

New York Limits Reporters' Right to Challenge Subpoenas

By David McCraw

It's a question every news organization faces at some time: how to quickly get in front of an appeals court when a trial judge has denied a reporter's motion to quash a subpoena. The answer for New York news organizations is no longer clear in the wake of a recent decision by the state Court of Appeals. People v. Juarez (Frances Robles non-party respondent), (N.Y. June 27, 2018)

In a case involving an infamous murder and a jailhouse interview by a New York Times reporter, the court held that non-parties, including journalists, have no right to appeal from an order denying a motion to quash in a criminal proceeding.

Background

The underlying case dates back to July 1991, when the New York police discovered the body of small girl in an ice chest. Unidentified, she was buried with a tombstone that read "Baby Hope," the name given to her by the police. More than two decades later, police were able to identify the child as Anjelica Castillo and in 2013 arrested a relative, Conrado Juarez, on murder charges. Juarez gave police a videotaped confession.

The court held that non-parties, including journalists, have no right to appeal from an order denying a motion to quash in a criminal proceeding.

A few days later, Frances Robles of The Times went to the Rikers Island jail and interviewed Juarez. In a story Robles later published, Juarez denied killing Anjelica and said his confession was coerced. The Manhattan District Attorney subsequently issued two subpoenas to Ms. Robles seeking her testimony about the jailhouse interview and her notes. Robles moved to quash under the New York shield law – a commonplace step for any journalist in Robles's shoes, but one that ended in a procedural morass that only a lawyer could love.

The trial court initially granted Robles's motion to quash, saying her testimony and notes were not needed for Juarez's pre-trial hearing on whether the confession was voluntary. But after the judge ruled that the confession was admissible, the District Attorney again subpoenaed Robles, this time for trial. The prosecutors made exactly the same argument they had made at the suppression hearing to compel Robles to testify. This time it worked. The judge reversed course and denied Robles's new motion to quash.

Robles filed an immediate appeal to the Appellate Division, and a five-judge panel unanimously ruled in her favor. The court found that because the prosecutors had a videotape of Juarez's confession that they could show to the jury to evaluate, there was no need for Robles's testimony. The court said that quashing the subpoena was "in keeping with the

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consistent tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events."

Court of Appeals Decision

The DA then sought leave to appeal to the Court of Appeals – without ever questioning that Robles had been within her rights to appeal the trial judge's ruling to the Appellate Division. The Court of Appeals had other ideas. It granted the DA leave to appeal and then asked the parties to brief the question of whether a non-party has the right to appeal when a motion to quash is denied in a criminal matter.

The district attorney's office quickly abandoned the position it had consistently taken for decades – that there is an appeal from an order deciding a motion to quash – and argued that Robles had no right to appeal after losing in the trial court. The Court of Appeals in a 4-3 decision agreed. The majority cited the long-standing proposition that the right to appeal is solely the creation of statute. Because the Criminal Procedure Law contains no provision allowing appeals by non-parties challenging a subpoena, the Appellate Division should have declined to hear Robles's appeal, the court ruled. The majority rejected earlier decisions that had allowed non-parties to appeal on the theory that such appeals were actually civil in nature and authorized by the Civil Practice Law and Rules.

The majority cited the long-standing proposition that the right to appeal is solely the creation of statute.

A dissent written by Judge Jenny Rivera and joined by a second judge lacerated the majority for basing its decision on a "superficial and ultimately irrelevant consideration." Judge Rivera noted that the majority's position left citizens without a right to appeal – a result that was especially harsh for journalists. "A nonparty journalist is irrevocably aggrieved by the denial of a motion to quash a subpoena, and is forced either to comply with the order and jeopardize the journalist's reputation or to refuse and risk being held in contempt. Those outcomes are completely avoidable by adhering to this Court's traditional treatment of motions to quash as civil in nature," she wrote. She went on to say that the court should have reached the merits and affirmed the Appellate Division's decision that the DA had failed to make a case for compelling Robles to testify or provide her notes under the shield law.

Justice Fahey, in a second dissent, said that in light of the state's constitutional provisions protecting the press, the appeal should have been allowed no matter what the Criminal Procedure Law said.

The decision by the Court of Appeals left Robles in a position no litigant would hope to find herself: All seven appellate judges who reached the merits – five at the Appellate Division and two at the Court of Appeals – concluded that the motion to quash should have been granted. Yet, Robles finds herself back before the trial court facing an order to testify and provide evidence.

The decision left media lawyers trying to figure out what alternatives for appellate review exist now in New York State. One possible avenue is the filing of a so-called Article 78 civil

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petition with the Appellate Division – in effect, seeking an order to prohibit the trial judge from forcing the journalist to testify. The Court of Appeals in a footnote declined to say whether that procedural mechanism was proper. A second option might be for the reporter to go into contempt and then appeal from the contempt order – a strategy that may get the lawyers to the appeals court but leave their reporter-client heading off to jail.

In the wake of the Robles ruling, media law groups have begun drafting a legislative proposal to amend the law and allow non-parties to appeal. Because the Robles ruling would apply to lawyers who lose a motion to quash while trying to protect the attorney-client privilege, the effort may find some powerful allies.

As for Robles, she will be back before the trial court at some point, looking for a new way to invoke the state shield law.

David McCraw is Vice President & Deputy General Counsel The New York Times Company. Frances Robles is represented by Kate Bolger of Davis Wright Tremaine. Diane Princ of the New York County District Attorney's Office argued the appeal for the district attorney.

Once More Unto The Breach: An Update On The Reporters' Shield Bill

By Mara Gassmann

Amidst cries of fake news, violence against journalists, and stripping reporters of press credentials and the ability to ask questions, the media bar knows well that this is a uniquely challenging time for our clients. Yet one glimmer of hope may be a Reporters' Shield Bill recently reintroduced in the U.S. House of Representatives. The sponsors of the legislation, who held a hearing on the bill in July, assert they are committed to moving the legislation forward.

The Legislation

In November 2017, Rep. Jim Jordan (R-OH) and Rep. Jamie Raskin (D-MD) introduced the Free Flow of Information Act of 2017 (H.R. 4382). Those who have been tracking shield legislation for some time will remember that then-Rep. Mike Pence introduced an identical bill in the 110th Congress (H.R. 2102) that was overwhelmingly passed by the House in 2007. That same bill was re-introduced (H.R. 985) in the 111th Congress and passed in 2009. Both times the legislation died in the U.S. Senate.

The sponsors of the legislation, who held a hearing on the bill in July, assert they are committed to moving the legislation forward.

The bill creates a qualified privilege in any matter arising under federal law for journalists to withhold testimony or documents obtained in the course of reporting. To overcome the privilege, a party seeking to compel disclosure must show that it has exhausted all reasonable alternative sources of the information; that the information is critical to prosecution, defense or other resolution of the underlying criminal or civil matter; and that the public interest in disclosure outweighs the public interest in news reporting. Additionally, where the information sought could reveal the identity of a confidential source, or include any information that could reasonably lead to the discovery of a source, it must be shown that disclosure is necessary to prevent an act of terrorism or identify the perpetrator thereof; to prevent imminent death or significant bodily harm; or to identify an individual who disclosed properly classified information and who at the time of such disclosure had authorized access to such information, if such a disclosure has caused or will cause significant and articulable harm to national security. The exceptions to the privilege against revealing source-identifying information also contain a provision by which the privilege can be overcome if it would identify a person who has disclosed, in violation of federal law, a trade secret, certain individual private health information, or nonpublic personal consumer information.

Further, requests for information or documents compelled under the statutory exceptions described above cannot be overbroad, unreasonable, or oppressive and where "appropriate"

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must be limited to "verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information." They must also be narrowly tailored in subject matter and time period to avoid intrusion into peripheral and speculative matters.

The provisions outlined above also apply to federal court subpoenas issued to communications service providers. Moreover, compulsory process to a service provider must be preceded by notice and an opportunity to be heard by a journalist-subscriber whose records are sought, unless the court finds "by clear and convincing evidence" that advance notice would substantially threaten the integrity of an underlying criminal investigation.

So who is shielded from compelled testimony under this bill? By its terms, it covers any person or entity that regularly gathers or publishes news or information for public dissemination "for a substantial portion of the person's livelihood or for substantial financial gain." Student journalists are therefore not necessarily covered under the bill.

Efforts to enact the bill over the years have been endorsed by the Society of Professional Journalists and other media groups. Writing for *The New Yorker*, Steve Coll, the dean of the Graduate School of Journalism at Columbia University, described the legislation as "politically plausible" and "much, much better than the status quo."

The Hearing

On July 24, 2018, two subcommittees of the House Oversight and Government Reform Committee held a joint hearing on the legislation. Three witnesses testified about the need for a Reporters' Shield Bill. From the media bar, Ballard Spahr senior counsel Lee Levine testified about the necessity of confidential sources to public spirited journalism and provided examples of investigative reporting made possible in part by the use of unnamed sources. These examples included several deeply-reported stories – many award-winning and history-changing – that never would have come to light absent promises of confidentiality. He also discussed the current disarray in the state of the law among the federal circuits and the ongoing use of compulsory process for records of reporters like Ali Watkins, James Risen, and James Rosen. Levine, who testified on the identical House bill in 2007 and on a shield bill before the Senate Judiciary Committee in 2005, observed that as legislative efforts have repeatedly died in Congress, the drumbeat of subpoenas has continued. Nor have the DOJ guidelines issued under the Obama Administration, its *mea culpa* after its own targeting of journalists, eased the situation. As Levine testified, not only have the guidelines been deemed non-enforceable in federal court, it is unclear whether the current DOJ follows them at all. Based on his experience representing journalists and media coalitions in federal actions seeking the identities of reporters' sources, Levine urged action on this legislation now.

These sentiments were shared by Rick Blum, policy director of the Reporters Committee of The Reporters Committee for Freedom of the Press, who emphasized that 49 states and the

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District of Columbia recognize some privilege for journalist-source communications, and that law enforcement and criminal justice have not been undermined as a result. Blum testified both for RCFP and the News Media for Open Government, a press freedom and transparency coalition of news organizations. He explained that the coalition supports the House bill as "a commonsense approach that sets out clear legal standards recognizing that the need to protect sources can co-exist with the government's responsibility to protect human life and enforce the law."

Finally, journalist Sharyl Attkisson testified that, during her career, she has relied on confidential sources to break important stories, such as her Emmy-winning reports on fraud at the Red Cross following the September 11 attacks and cover-ups of deadly tire defects, as well as reports on the BP Gulf oil spill, misdeeds by companies such as Enron and Halliburton, Chinese espionage, and others.

For their part, the Representatives present at the hearing asked questions that manifested support for the effort and a desire to ensure the legislation was viewed by the news media as a true protection for reporting. In particular, Rep. Jordan (one of the subcommittee Chairman) appeared to share the view of then-Congressman Pence, who in 2007 described the earlier, identical version of the Reporters' Shield Bill as good government legislation that should be embraced by anyone who favors of limited government.

The Bill's Future

It is currently unclear whether the legislation has the backing to pass the House Judiciary Committee, before which it is pending. However, the support among politically diverse members present at the hearing provided some reason for optimism. Rep. Gary Palmer (R-AL), the other subcommittee Chairman, described the federal shield law as "critical." Ranking Member Raskin – echoing then-Representative Pence's belief that the qualified privilege is not a Republican or Democratic issue – asserted that passage of the bill was "long overdue," and given the support it has achieved across party lines, the time is ripe for its enactment. Rep. Mark Meadows (R-SC) also praised the bipartisan effort on the bill and suggested that the members present together "use a little leverage" to make sure it gets a floor vote in the House.

Mara Gassmann is an associate at Ballard Spahr LLP in Washington, D.C.

Mexican Journalist Seeking Asylum Finally Free From Detention

By Chuck Tobin, Steven D. Zansberg and Mark Flores

Under pressure from a federal judge to rebut well-grounded charges that it jailed the Mexican journalist for speaking out against the Trump Administration's policies, the U.S. Department of Homeland Security has released Emilio Gutiérrez-Soto from detention. He and his son Oscar, also released, continue their fight to remain in the United States.

Emilio and Oscar had been detained in an El Paso, Texas facility for more than seven months, after they were arrested at a routine check-in last fall with Immigration and Customs Enforcement (ICE) officials while their asylum case remained pending.

The timeline of Emilio's and Oscar's immigration experience became critical in winning their release from detention:

- In 2008, Emilio and Oscar, who was then 15 years old, crossed into the United States after Emilio received credible death threats as a result of his newspaper reporting on corruption in the Mexican military. After entering lawfully at a port of entry, they were processed by immigration officials, found to have a credible fear of persecution, and placed on a docket for an administrative hearing on their asylum claim.

- For the next nine years, the Gutiérrez-Sotos lived peacefully, operating a food truck in Las Cruces, New Mexico, where they also forged strong ties to the community.

- In July 2017, immigration Judge Robert S. Hough in El Paso denied the Gutiérrez-Sotos' asylum claim. Judge Hough found that Emilio's claim of death threats as a result of his reporting was not credible, and ordered the two men deported. Hough relied, in part, on the lack of actual clippings provided in support of Gutierrez-Soto's claim that he worked as a journalist. The Gutiérrez-Sotos appealed that ruling, and they remained free pending the appeal.

Under pressure from a federal judge to rebut well-grounded charges that it jailed the Mexican journalist for speaking out against the Trump Administration's policies, the U.S. Department of Homeland Security has released Emilio Gutiérrez-Soto from detention.

- In October 2017, the National Press Club awarded its prestigious John Aubuchon Freedom of the Press Award to Emilio on behalf of the entire Mexican press corps. During his acceptance speech, he sharply criticized U.S. immigration policy, saying the nation had "bartered away international law."

- In December 2017, the Gutiérrez-Sotos were taken into custody by ICE officials. While the Gutiérrez-Sotos were literally being driven to the border near El Paso, the

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> Department of Justice Board of Immigration Appeals (BIA) stayed their deportation pending the appeal. But the men remained in detention in El Paso.

The Gutiérrez-Sotos pursued their administrative appeal, and, at the same time, filed a *habeas corpus* petition in the U.S. District Court for the Western District of Texas. The Media Law Resource Center, the National Press Club and the National Press Club Journalism Institute, among more than a dozen other journalism nonprofit organizations, filed *amicus* briefs in support of the Gutierrez-Sotos before both the BIA and in the federal habeas case.

As reported in last month's *Media Law Letter*, in May, the BIA ordered that the Gutierrez-Sotos are entitled to re-open their asylum hearing before the immigration judge, to introduce additional evidence concerning Emilio's work as a professional journalist and the current conditions for reporters in Mexico, which the Committee to Protect Journalists has declared the most dangerous place to be a journalist outside of an active war zone. Nevertheless, ICE continued to detain Emilio and Oscar continued in El Paso.

The Media Law Resource Center, the National Press Club and the National Press Club Journalism Institute, among more than a dozen other journalism nonprofit organizations, filed amicus briefs in support of the Gutierrez-Sotos before both the BIA and in the federal habeas case.

In the *amicus* brief filed in support of the two men's *habeas* petition, the press organizations pointed to the closeness in time between Emilio Gutierrez's public criticisms in October 2017, and his detention in December 2017, as evidence of retaliatory animus:

> As important is the ultimate resolution of their asylum petitions, so too is the manner in which our Nation treats these lawfully present asylum seekers during the pendency of those petitions. It would be an affront to this nation's founding principles to deprive Emilio and Oscar Gutiérrez-Soto of their freedom for one more day.

In a pivotal July 10, 2018 Order, the federal judge held that Emilio and Oscar had established a prima facie case that their detention resulted from Emilio's public comments and his profession as a journalist, and the court denied the government's motion to dismiss their *habeas* petition. The judge cited email traffic among ICE officials about a list of people marked "non-detained targets" for detention (which included Emilio) and the "temporal proximity between Mr. Gutierrez-Soto's criticism of ICE" and Emilio and Oscar being taken into custody by ICE. The judge also cited an ICE official's comment to National Press Club Executive Director Bill McCarren – who flew to El Paso to plead for the men's release – to "tone it down." The federal court agreed that ICE's admonition to McCarren "could be taken as evidence that ICE disapproves of negative publicity" about immigration policies.

U.S. District Judge David Campos Guaderrama held:

> Taking all of this evidence into account, Petitioners have offered enough evidence to create a genuine issue of material fact regarding whether Respondents violated their First Amendment rights. Petitioners have offered

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> evidence that allows for an inference that they were targeted before their asylum case was denied and ICE officials did not approve of the negative press that Petitioners were generating. Drawing these inferences in favor of Petitioners, the nonmoving party, there is support for Petitioners' claim that Respondents retaliated against them for asserting their free press rights. This is also sufficient evidence for the trier of fact, drawing all reasonable inferences in favor of Petitioners, to conclude that Respondents' reason for set of strategic detaining Petitioners is a pretext.

The judge ordered ICE to appear in court for an evidentiary hearing on August 1 and further ordered that the two petitioners be physically present at the hearing. ICE immediately moved for a continuance, which the judge, finding that "time is of the essence," denied.

In brilliant moves immediately after these rulings, Emilio and Oscar's counsel sent ICE probing discovery seeking more documents and information about their case and about targeted immigration enforcement in general. The government filed a motion challenging that far-reaching discovery, but the judge ordered ICE to produce some of the requested information. The government and the Gutiérrez-Soto's lawyers also engaged in intense settlement negotiations.

In brilliant moves immediately after these rulings, Emilio and Oscar's counsel sent ICE probing discovery seeking more documents and information about their case and about targeted immigration enforcement in general.

Faced with the impending deadline to produce potentially embarrassing ICE records, the government agreed to release the men. On the evening of July 26, Emilio and Oscar walked out of the detention facility greeted by an array of journalists waiting to cover their release.

Key to both the immigration and *habeas* proceedings are 130 pages of news reports, appended to the *amicus* briefing, that Emilio had prepared and that were published in the *El Diario del Noroeste of Nuevo Casas Grandes* in Ascension, Chihuahua, before he fled Mexico in 2008. The articles were not put before the immigration judge by the Gutiérrez-Sotos' previous immigration lawyer at the time of his original asylum hearing. Emilio's journalism, however, is now firmly in the record for the remanded asylum proceeding.

It is believed that Judge Guadarrama set the August 1st hearing in recognition of an impending deadline: Emilio had been awarded the prestigious Knight Wallace Fellowship for Journalists at the University of Michigan for the academic year 2018-19. The program begins in September. Now that he is free, he will perform that fellowship while his asylum proceedings continue.

The complete list of the amici supporting the Gutiérrez-Sotos are: the National Press Club; the National Press Club Journalism Institute; the Media Law Resource Center; The Reporters Committee for Freedom of the Press; American Society of News Editors; Association of Alternative Newsmedia; Radio Television Digital News Association; American Society of

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Journalists and Authors; Society of Professional Journalists; Reporters Without Borders; PEN America; The Alicia Patterson Journalism Foundation;, Knight-Wallace Fellowships for Journalists, Wallace House, University of Michigan; Society of American Business Editors and Writers; National Press Foundation; Pulitzer Center on Crisis Reporting; and Fundamedios, Inc.

The 17 amici are represented by Chuck Tobin in Washington D.C. and Steve Zansberg in Denver, both partners with Ballard Spahr LLP, and Mark Flores of Littler Mendelson, P.C. in Dallas, Texas. The United States Department of Homeland Security is represented by Stephany Miranda, Assistant Chief Counsel of the U.S. Department of Homeland Security. Emilio and Oscar Gutiérrez-Soto are represented by Eduardo Beckett of El Paso, Texas and Penny M. Venetis, Professor of Law and Director of the International Human Rights Clinic at the Rutgers University College of Law in Newark, New Jersey.

Texas Appeals Court Affirms Dismissal of Libel Case over Dallas Morning News' Reporting on Arson Murder of Lawyer

Anti-SLAPP dismissal was properly granted to A.H. Belo Corporation in a libel suit over articles published in *The Dallas Morning News* on the police investigation of the arson murder of a Dallas lawyer, according to a ruling by the Texas 5th District Court of Appeals. Vodicka v. A.H. Belo Corporation et al., No. 05-17-00728-cv, 2018 WL 3301592 (Tex. App. – Dallas, July 5, 2018).

Background

The suit was brought by a Dallas attorney who claimed the newspaper defamed him in articles that allegedly implicated him in the 2016 death of Ira Tobolowsky. The court of appeals held that the newspaper articles did not contain any false statements of fact.

Among other things, the newspaper accurately reported that while police were investigating the suspicious death, a judge recused himself from presiding over a civil case, stating in open court that it was because of "implications" of one of the litigants "in the death of Mr. Tobolowsky."

On July 5, 2018, the Dallas court of appeals affirmed the trial court's dismissal of the libel case against Belo, the parent company of the newspaper, under the Texas Citizen Participation Act, which permits dismissal of a case relating to "a party's exercise of the right of free speech."

The court found that the libel plaintiff did not establish clear and specific evidence that any of the statements were false.

Examining nine specific statements from the articles in *The News*, the court found that the libel plaintiff did not establish clear and specific evidence that any of the statements were false. Additionally, the court held that the "gist" of the articles considered on the whole was not false.

According to the opinion, the gist included "that Ira Tobolowsky died under suspicious circumstances, law enforcement were investigating his death, [the libel plaintiff and another] were being investigated but that [the persons under investigation] had not been charged with a crime."

The judge who recused himself was also named as a defendant in the libel case. The court of appeals affirmed the dismissal of claims against the judge.

The appeals court also affirmed the award of sanctions by the trial court against the libel plaintiff. The court granted sanctions, mandatory under the Texas anti-SLAPP statute, in favor of Belo in the amount of $25,000.

A. H. Belo Corporation was represented by partner Paul C. Watler and associate Lindsey Marsh of Jackson Walker LLP. The plaintiff, a Texas lawyer, represented himself.

D.C. Circuit Prescribes a "Double Dose of Deference" for Reviewing Decisions on FOIA Attorney's Fees

By Max Mishkin

On July 9, 2018, a divided D.C. Circuit panel issued the latest ruling in a fifteen-year odyssey of FOIA litigation, affirming the district court's decision not to award attorney's fees to a journalist who sought records from the CIA related to the assassination of President Kennedy. Morley v. CIA (Morley XI), 2018 WL 3351383 (D.C. Cir. July 9, 2018) (per curiam).

Background

In July 2003, author and editor Jefferson Morley submitted a FOIA request to the CIA seeking records related to George Joannides, a former CIA officer who served as the agency's liaison to the House Select Committee on Assassinations. The CIA referred Morley to the records that it had transferred to the National Archives pursuant to the President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act"). Morley filed suit in response, after which the CIA produced documents that had not been transferred, issued a *Glomar* response as to certain records, and withheld other material as classified. Morley filed a new complaint challenging those withholdings and the adequacy of the agency's search.

A divided D.C. Circuit panel issued the latest ruling in a fifteen-year odyssey of FOIA litigation related to the assassination of President Kennedy.

The district court granted summary judgment for the CIA, *Morley v. CIA (Morley I)*, 453 F. Supp. 2d 137 (D.D.C. 2006), and the D.C. Circuit affirmed in part and reversed in part, *Morley v. CIA (Morley II)*, 508 F.3d 1108 (D.C. Cir. 2007). The CIA then released hundreds of additional records to Morley, and the district court thereafter granted the CIA's renewed summary judgment motion. *Morley v. CIA (Morley III)*, 699 F. Supp. 2d 244 (D.D.C. 2010). Following that decision, Morley sought an award of attorney's fees and costs, which the district court denied. *Morley v. CIA (Morley IV)*, 828 F. Supp. 2d 257 (D.D.C. 2011). The D.C. Circuit affirmed the district court's summary judgment decision in part and reversed in part, *Morley v. CIA (Morley V)*, 466 F. App'x 1 (D.C. Cir. 2012), and the district court subsequently dismissed the case as moot. *Morley v. CIA (Morley VI)*, 2013 WL 140245 (D.D.C. Jan. 9, 2013).

The D.C. Circuit vacated the district court's fees decision, *Morley v. CIA (Morley VII)*, 719 F.3d 689 (D.C. Cir. 2013) (per curiam), and on remand the district court once more denied fees, *Morley v. CIA (Morley VIII)*, 59 F. Supp. 3d 151, 153-54 (D.D.C. 2014). That, too, was vacated. *Morley v. CIA (Morley IX)*, 810 F.3d 841, 842 (D.C. Cir. 2016). On remand, the

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district court yet again denied Morley's request for fees, which by then amounted to more than $700,000. *Morley v. CIA (Morley X)*, 245 F. Supp. 3d 74 (D.D.C. 2017). Morley appealed.

The D.C. Circuit's Decision

The majority opinion – issued *per curiam* by Judges Kavanaugh and Katsas – explained that the "sole question" after fifteen years of litigation was whether Morley was entitled to an award of attorney's fees and costs. (Eagle-eyed court watchers spotted that while the D.C. Circuit typically releases published opinions on Tuesdays and Fridays, *Morley XI* was issued on the afternoon of Monday, July 9, 2018, hours before Judge Kavanaugh was nominated to the Supreme Court.)

FOIA provides that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). In the D.C. Circuit, this discretionary award turns on four factors: "(i) the public benefit from the case; (ii) the commercial benefit to the plaintiff; (iii) the nature of the plaintiff's interest in the records; and (iv) the reasonableness of the agency's withholding of the requested documents."

In dissent, Judge Henderson wrote that her "colleagues pile their deference far too high."

The court noted that it will review for abuse of discretion both the district court's analysis of each factor and the district court's balancing of those factors, writing that "when the four factors point in different directions, the district court has very broad discretion in deciding how to balance those factors and whether to award attorney's fees," and thus "if the four factors point in different directions, assuming no abuse of discretion in the district court's analysis of the individual factors, it will be the rare case when we can reverse a district court's balancing of the four factors and its ultimate decision to award or deny attorney's fees."

The district court found in *Morley X* that factors one, two, and three favored Morley, but that factor four favored the CIA. The D.C. Circuit noted that, on appeal, factor four analyses should receive "a double dose of deference," or "[d]eference piled on deference," because the appellate court must decide "whether the District Court *reasonably* (even if incorrectly) concluded that the agency *reasonably* (even if incorrectly) withheld documents."

The court then addressed Morley's arguments for why the CIA acted unreasonably in responding to his request. Of particular note, the court held that while the CIA failed to respond to the request within 20 days as required by statute, "that is true of a vast number of FOIA requests," and "some delay past the 20-day mark is not necessarily so unreasonable in and of itself as to *require* an award of attorney's fees to an ultimately prevailing plaintiff." Moreover, although *Morley II* rejected the CIA's interpretation of the statute exempting from disclosure

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"operational files," the D.C. Circuit held that the CIA had reasonably relied on "the only opinion by a circuit court of appeals to address the relevant provision."

Next, the D.C. Circuit affirmed the district court's weighing of the four factors in deciding not to award fees. The court advised that "[t]here are many reasonable approaches a district court might take in balancing the factors, and it is difficult for an appellate court—with our deferential standard of review—to second-guess that balancing." The D.C. Circuit opined that, under its deferential standard, it would have affirmed even if the district court had decided that a fee award *was* justified.

In dissent, Judge Henderson observed that "[b]ut for the district court's repeated misapplication of FOIA precedent, this case could have ended as early as 2006," and wrote that her "colleagues pile their deference far too high." Judge Henderson argued that "the CIA's decision to refer Morley to [the National Archives] instead of producing any documents" was "entirely unreasonable" in the face of the Supreme Court's decision in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), as well as a "common-sense interpretation of the JFK Act." Judge Henderson concluded that the district court "erred in evaluating each of the four factors individually and abused its discretion in weighing them against one another."

Max Mishkin is an associate at Ballard Spahr in Washington, D.C. Plaintiff/Appellant Morley was represented by James H. Lesar of Silver Spring, Maryland.

Pennsylvania Appeals Court Unseals Records in Prosecution of Penn State Officials

By Dana Green and Michael Berry

A Pennsylvania appeals court delivered a significant victory to The Associated Press in its efforts to challenge the extensive sealing of court records related to the scandal surrounding Pennsylvania State University and Jerry Sandusky, a prominent football coach at the university. *Commonwealth v. Spanier,* No. 637 MDA 2017, 2018 PA Super 147 (June 4, 2018).

In a unanimous decision, the court reaffirmed the importance of both the First Amendment and common law rights of public access to judicial documents in Pennsylvania, emphasized that courts must make specific, on-the-record findings prior to closure, and clarified that the attorney -client privilege is not a basis for continued sealing once the substance of the privileged information becomes public.

Background

In 2011, allegations emerged that dozens of boys had, for years, been sexually abused by a well-known football coach at Penn State. The coach, Jerry Sandusky, ultimately was convicted of 45 counts of sexual abuse. The Sandusky scandal was the subject of intense public interest and media attention and raised important questions about the power and influence of college sports.

The court reaffirmed the importance of both the First Amendment and common law rights of public access to judicial documents in Pennsylvania.

Prosecutors alleged that three senior University officials—University President Graham Spanier, Vice-President for Finance and Business Gary Schultz, and Athletic Director Tim Curley—were aware of credible allegations against Sandusky as far back as 1998, but either took no action or tried to conceal the allegations from authorities and the public. As a result, the men were charged with a number of crimes, including perjury, obstruction of justice, and endangering the welfare of children. *See Commonwealth v. Spanier*, 132 A.3d 481, 482 (Pa. Super. 2016); *Commonwealth v. Schultz*, 133 A.3d 294, 300 (Pa. Super. 2016); *Commonwealth v. Curley*, 131 A.3d 994, 994 (Pa. Super. 2016). In 2017, Curley and Schultz each pled guilty to reduced charges and testified against Spanier, who proceeded to trial and then was convicted of child endangerment.

Throughout the criminal proceedings against the three men, the trial court placed a vast number of records under seal, including motion papers, hearing transcripts, and court orders. Over 200 records were sealed across the three criminal cases. The secrecy surrounding the cases was compounded by the fact that each sealed record was identified on the public docket simply as a "Sealed Entry," with no information provided to the public as to the nature of the record.

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Many of the sealed records appeared to concern former Penn State general counsel Cynthia Baldwin, who previously served as a Pennsylvania Supreme Court Justice. Baldwin provided legal counsel to Spanier, Schultz, and Curley in the early stages of the Sandusky scandal and accompanied them in their appearances before the grand jury. Later, when the state Attorney General's office suspected that the men had perjured themselves and sought to obstruct justice, it subpoenaed Baldwin, who then testified against the men before the grand jury. This testimony became a matter of significant controversy during the men's prosecution, as they claimed she represented them personally and her testimony violated the attorney-client privilege. That issue was the subject of substantial litigation in the trial court and then on appeal before the Superior Court, which held that Baldwin's testimony violated the attorney-client privilege. That holding resulted in the dismissal of some of the most serious charges against them.

Trial Court Denies Access

During the trial court proceedings, several media entities, including the AP, intervened and challenged the extensive sealing in the case. In their motion, the media intervenors sought to unseal the records and their corresponding docket entries so that, at a minimum, the public could know the nature of each filed document. Multiple factors militated against sealing. For example, the substance of Baldwin's grand jury testimony already appeared to have been made public, had been the subject of extensive briefing, and was the basis for several court rulings. None of the parties opposed unsealing most of the records at issue, or the docket entries themselves. And, to the extent that the records quoted privileged and confidential materials, redaction offered a more narrow remedy than wholesale sealing.

During the trial court proceedings, several media entities, including the AP, intervened and challenged the extensive sealing in the case.

The trial court granted the motion in part, but refused to unseal most of the documents – including many documents the defendants themselves did not ask to remain sealed. In ordering the documents to remain sealed, the court did not issue any individualized findings, instead broadly asserting that the public's right of access was overcome because "an attorney-client privilege existed between each Defendant and Ms. Baldwin" and "numerous filings . . . contain citation to privilege[d] evidence or reference to related filings." The trial court also refused to unseal the docket entries themselves, apparently on the basis that it would be technologically difficult for the Clerk to do so using the court's electronic docketing system.

The AP then appealed from the trial court's decision.

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Superior Court Reverses; Attorney-Client Privilege Cannot Justify Sealing Once Privileged Materials Are Made Public

On appeal**,** the Superior Court ordered the unsealing of almost all of the records at issue. The court ruled "there is no question" that the majority of the documents were subject to both First Amendment and common law rights of access. The appeals court sharply criticized the trial court for not making "individualized, specific, particularized findings on the record that closure is essential to preserve higher values and is narrowly tailored to that interest." This was clear error.

The appeals court then turned to the issue of whether the attorney-client privilege could overcome the public right of access. The court recognized the importance of maintaining the privilege. But, in this case, "much of the substance" of the information under seal – including summaries and quotes of Baldwin's grand jury testimony – had been disclosed in prior public filings. Thus, continued sealing could not be justified: "once evidence has been disseminated to the general public, it cannot be resealed; the cat is out of the bag, so to speak." The fact that some privileged materials would be disclosed against the defendants' requests did not alter the analysis. The appropriate remedy for Ms. Baldwin's violation of the attorney-client privilege was to quash the charges, as already had been done. As the court explained, "no further justice . . . may be served by attempting to reseal documents whose substance has been public for years." The court also ordered the corresponding docket entries to be unsealed.

The Superior Court ordered the unsealing of almost all of the records at issue.

The appeals court kept a small category of documents under seal: letters that the defendants' attorneys had sent to the trial court providing proffers of potential witness testimony for a hearing relating to Baldwin's role in the case. According to the Superior Court, the trial court did not formally accept the letters into the record or docket them, and the trial court stated that it would make a decision without use of them. On that basis, the appeals court did not consider them to be "public judicial documents" and no right of access attached. As the appeals court explained: "[B]ecause the proffers were never docketed, formally filed with the court, or required by any rule of criminal procedure, they are not considered 'public judicial documents' subject to the right of First Amendment or common law access."

Michael Berry, Paul Safier, Dana Green, and Jeremy Kutner of Ballard Spahr LLP worked on behalf of The Associated Press. Defendant Gary C. Schultz was represented by Thomas J. Farrell of Farrell & Reisinger, LLC. Defendant Graham B. Spanier was represented by Timothy K. Lewis, Samuel W. Silver, Bruce P. Merenstein, and Emily J. Hanlon of Schnader Harrison Segal & Lewis LLP. Defendant Timothy M. Curley was represented by Caroline Roberto and Brian W. Perry. The Commonwealth of Pennsylvania was represented by Carson B. Morris of the Office of the Attorney General.

Maine To Follow Federal PACER Model for Access to State Court Records Online

Rejects "Practical Obscurity"

By Sigmund Schutz, Benjamin Piper, and Katie Graichen

The Maine Judicial Branch received a $15 million appropriation to create a state-of-the-art electronic case management system capable of providing 24/7 public access over the internet to all public court records in Maine—a federal PACER system for Maine state courts. But whether to allow the public remote access to public state court records has been the subject of controversy in the Pine Tree State. A blue-ribbon panel appointed by the Court to study the issue decided that making many public court records too readily available to the public would undermine "privacy" interests. To protect those interests and maintain the so-called "practical obscurity" of public court records the panel recommended that the court block online access to many public court records. Those records would remain public, but at the courthouse only.

In a surprise reversal—and resounding victory for the news media and government transparency watchdog groups—the Chief Justice of the Maine Supreme Judicial Court announced at a June 7, 2018 public hearing that the Court "likely" would reject its own panel's recommendation. Instead, the Court would follow the same public-is-public approach to court records used in federal court. Maine Chief Justice Leigh Saufley made clear that the court now plans to allow public access online to *all* public court records. Her announcement followed a concerted effort by the news media and government transparency watchdog groups to push for maximum public access to court records online.

Maine Chief Justice Leigh Saufley made clear that the court now plans to allow public access online to all public court records.

Background: Judicial Branch Transparency and Privacy Task Force

Last year, the Maine Supreme Judicial Court established a Judicial Branch Transparency and Privacy Task Force to "recommend a comprehensive set of rules . . . and suggestions for any necessary statutory changes" regarding online access to court records. The Task Force included one media representative, and no representatives of government transparency watchdog groups. In September 2017, the Task Force issued a recommendation that public access be limited only to court-generated information, such as docket entries, with access to pleadings and other filings available only at the courthouse.

As justification for prohibiting online access to many public court records, the majority cited the purported benefits of maintaining the "practical obscurity" of public court records—primarily that making court records hard to find and review preserves the privacy of litigants. The lone media representative on the Task Force, Mal Leary (a veteran Maine state politics

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reporter and the President of the National Freedom of Information Coalition), filed a vigorous dissent.

Open government advocates built a coalition of print and broadcast media, lawyers, watchdog groups, and others to advocate in favor of a public-is-public approach to online access to court records. This effort generated nearly twenty comments favoring public access, including comments by the Reporters Committee for Freedom of the Press, the New England First Amendment Coalition, the Maine Freedom of Information Coalition, the Maine Press Association, the Maine Association of Broadcasters, and the Maine Chapter of the Society of Professional Journalists. The Task Force's recommendation and all the comments are available on the Court's website.

The Court also granted a request for a public hearing, an unusual step in court rulemaking in Maine.

June 7 Public Hearing: The Surprise Reveal

As she began her introductory remarks at the June 7 public hearing, Chief Justice Saufley pointed out that the hearing was being held in an 1829 courtroom listed on the National Register of Historic Places. The courtroom featured an ornate wood burning fireplace to her right and a 90-inch flat screen television to her left. Justice Saufley identified three key considerations: (A) the need for care but readiness to adapt to new options and changes in light of rapid technological advances; (B) that the courts are here to serve the public and that "transparency of the court's own work is critical to the public trust;" and (C) that individual members of the public should not have to give up all personal privacy as the price of accessing the court.

Open government advocates built a coalition of print and broadcast media, lawyers, watchdog groups, and others to advocate in favor of a public-is-public approach to online access to court records.

Upsetting expectations that Justice Saufley would then summarize the recommendation made by the Judicial Branch Transparency and Privacy Task Force, she instead surprised the audience by "alerting" those present that the Court has concluded that it is "not likely" that the court system will maintain any non-internet based public access to court records. The Maine system is "likely to be similar" to the federal PACER system, she said. Access to court records will be online or not at all. She explained that the critical issue narrows to identifying which records are public and the extent to which there will be a cost to inspect or copy them. Mr. Leary called the outcome "a victory for common sense." A recording of the hearing is available on the same Court website referenced above.

If the Judicial Branch follows-through on the approach announced by Chief Justice Saufley, Maine will have the most public-access-friendly and transparent court records system of any state in New England. Maine also will be following the National Center for State Courts' recently announced Best Practices in Court Privacy Formulation. The National Center for State

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Courts rejected "practical obscurity" as a viable principle justifying limiting access to public court records and instead advocates "harm" as the standard for determining whether court records should be made confidential.

Although the Judicial Branch seems to have accepted a public-is-public approach to online access to court records as the way forward, the news media and the public will have further opportunities to weigh in rulemaking and proposed legislation this fall. The court will consider whether some categories of now-public records or specific now-public information in certain records should be closed. The court will also address fees. With plenty of time before the system is fully implemented (the electronic case management system is not scheduled to be complete before 2021), the news media and watchdog groups will stay engaged.

Sigmund Schutz is a partner, Benjamin Piper is an associate, and Katie Graichen is a summer associate at Preti Flaherty, LLP, in Portland, ME.

From the MLRC State Legislative Committee

Update on State Legislation Affecting the Media

One of the primary functions of the Media Law Resource Center is to serve as a resource for media lawyers in terms of dealing with common problems. Dealing with case law issues is just one facet of that role. Members of the MLRC's State Legislative Committee realize how quickly proposed laws spread across the nation within state legislatures and how helpful it can be for our members who monitor that activity to have the MLRC resources available.

Committee members actively track activities within their individual states' legislatures and discuss during calls tactics and strategies for manipulating bills to our clients' benefit. Topics that have been discussed in monthly committee meetings since January have included whether cell phone texts, emails and social messages are "public records" subject to public records laws, challenges to requirements of public notices being published, the need for stronger anti-SLAPP laws, concerns about advertising taxation bills, potential laws relating to access to police records and body-cam footage, efforts to limit the degree to which lawmakers must follow state open records/meetings laws, and states considering whether they need their own "net-neutrality" bills.

Recent Developments in Colorado

In Colorado, the session ended recently with several significant losses for the media. Senate Bill 18-223, which passed the General Assembly, would close autopsy reports on minors, making it harder for journalists to report on suspicious deaths of children, including those who die from abuse while in the care of the government system that is supposed to protect them. And earlier in the session, lawmakers passed Senate Bill 18-156, which would phase out the required publication of county financial information in newspaper public notices. Beginning in 2022, counties would instead be permitted to "conspicuously" publish the financial reports on their official websites if they also publish links to them in at least one newspaper. Newspapers have encouraged Gov. John Hickenlooper to veto the bill.

Meanwhile, the Governor has signed Senate Bill 18-014, which requires the Colorado Department of Corrections to let crime victims and prosecutors know the locations of inmates who are incarcerated out of state. The measure was introduced partly in response to DOC's unwillingness to reveal the prison where James Holmes, the Aurora movie theater killer, had been kept behind bars. And among bills killed in this session are ones that would have stopped law enforcement agencies from encrypting all of their dispatch radio communications, a bill that would have required the Colorado Public Utilities Commission to keep written and audio records of commission proceedings and post them online.

New York Right of Publicity Bill Fails

A coalition of free speech groups, including the Motion Picture Association of America, worked to convince the New York state senate not to bring up for a vote a SAG-AFTRA-

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sponsored right of publicity bill, causing it to die when the legislature adjourned on June 20. The bill, which passed the Assembly, would have added a new section on post-mortem rights of publicity to the state's Civil Rights ("privacy") sections 50-51, prohibited certain types of avatars and prohibited an undefined "pornography" known as "fake porn."

Missouri Public Notice Bills

In Missouri, battles were fought on two fronts this session. Several bills were introduced this session that would have moved real estate foreclosure notices from newspapers to websites maintained by third parties (primarily foreclosure law firms). Several of these bills never were forwarded from committees after hearing to the legislative floor for consideration. Only one passed one chamber and moved to the second, but it died in the second chamber. This is the second year these measures have created a hard-fought battle to preserve a public notice and more battles are expected in coming years.

Fallout from Gov. Greitens Scandal

Of course, the political climate in Missouri created its own issues that were directly tied to bills that generated significant media concern. Former Governor Eric Greitens, who was caught up in allegations of blackmail of a romantic interest through a nude photo taken by a cell phone camera, was no doubt partly responsible for the passage this session of a bill creating the offense of nonconsensual dissemination of private sexual images as a class D felony. And the state's Attorney General drafted and supported a bill that would have given his office subpoena power for investigating open meeting/records violations. It also would have created in Missouri an Office of Transparency within the AG's office, instituting a separation between lawyers in that office handling sunshine matters and lawyers who defend state agencies for all allegations made against them.

This bill moved through the House extremely quickly, despite a late filing of the original bill, but never received a hearing in a Senate committee. Legislative activity in the state came to a halt about three months into the session, as a bipartisan committee began impeachment activities for the Governor, while he was at the same time involved in legal maneuvers over the criminal charges filed against him, ultimately leading to his resignation.

California Enacts Consumer Privacy Act

On the west coast, state legislators scrambled to pass The California Consumer Privacy Act in June, which was in print for about a week before it was signed by Gov. Jerry Brown. The new law gives Californians the right to see what information businesses collect on them, request that it be deleted, get access to information on the types of companies their data has been sold to, and direct businesses to stop selling that information to third parties. The bill was passed due to pressure from a pending ballot measure deadline; a similar proposal would have been put to a statewide vote and if passed, the law would have been effective immediately and incorporated into the state constitution, which is much more difficult to amend.

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The Privacy Act that was passed will go into effect in 2020, giving companies the opportunity to prepare for implementation. Legislators are working on "clean-up" legislation to pass this year, which is expected to include clarification that newsgathering activity is not captured by the Act.

When the legislature returns in August for its final month of session, it will be considering several access bills including SB 1421 that would require disclosure of police personnel records when there is a serious use of force or a sustained charge of misconduct against an officer. There is another bill that would require the release of body camera footage in similar circumstances. There is also a measure to strengthen the attorney fee recovery provision under the California Public Records Act.

Kansas Enacts Transparency Laws

Meanwhile, the Kansas Legislature enacted three noteworthy transparency measures in this year. First, House Substitute for Senate Bill 336 amended a statute that governs disclosure of information regarding children in need of care and child fatalities. Because of the amendment, the Secretary of the Department for Children and Families (DCF) may now release the date of a child fatality and the age and sex of the child. The Secretary also may release a summary of any previous reports of abuse or neglect involving the child and any DCF recommended services provided to the child. Gina Meier-Hummel, DCF Secretary, said, "This measure strikes the correct balance between being sensitive to the need for privacy for families and ensuring that we are being transparent and getting the appropriate information out to the public."

In addition to increasing DCF transparency, House Substitute for Senate Bill 336 somewhat expanded access to audio and video recordings made by police with worn video cameras and dash cameras. The law originally allowed disclosure to very few persons. But now, persons eligible to gain access to the recordings include the spouse of a victim of a recorded police shooting, as well as an adult child or parent of the deceased. This bill also adds a provision that requires a police agency release a recording to an eligible requester within 20 days.

In general, recordings made by police are classified as criminal investigation records in Kansas, and police agencies are not required to disclose such records, although they may do so at their discretion in the public interest.

One other Kansas bill, Senate Substitute for Senate Substitute HB 2386 pertained to public agencies' processing of applications for employment that include a license, certification, or registration. As the governor's office noted in a statement, the law now requires the agencies "to list not just the qualifications, but also the specific civil and criminal records that would disqualify an applicant from receiving that license, certification, or registration."

Political Advertising Bills

Finally, a significant number of states considered "Dark-Money" Legislation during early 2018. In apparent response to the aftermath of Citizens United and on-going revelations about

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foreign infiltration of social media in the U.S., states are taking steps to open to public view the money being spent to influence election campaigns by interests other than candidates and political parties. These states have subjected or propose to subject online media to significant disclosure, record-keeping and even enforcement obligations. While nominally limited to "online platforms," these measures could catch broadcast and print news media in their nets if those media maintain Web sites in conjunction with their primary operations. The states' efforts also show no recognition that the FCC has already preemptively occupied the field of political advertising in broadcasting.

In Connecticut, the legislature considered a "dark-money" bill that would, among other features, require online platforms to disclose purchasers of political ads and keep extensive public records on the advertising. The bill further would have banned political expenditures by "foreign-influenced entities" and imposed the obligation to enforce this ban on broadcast radio and TV, and satellite and cable TV, as well as online platforms ("Electronic Media"), by establishing "policies, procedures and controls reasonably designed to ensure that communications for which foreign nationals or foreign-influenced entities are prohibited from making expenditures ... are not broadcast, distributed or otherwise made available to the public in" Connecticut. That bill, H.B.5526, was narrowly voted out of committee but was not brought for a vote in either chamber of the legislature before adjournment.

In New York, in February of this year, via the "Democracy Protection Act," the election law was amended to require electronic media to obtain the political advertiser's registration form filed with the N.Y. board of elections (N.Y. Elec. Law § 14.107-B). Pursuant to that law, the board of elections has proposed regulations imposing affirmative obligations on the Electronic Media, including possible fines (which the statute limits to online platforms), that go well beyond that of obtaining the registration certificate. The broadcasters and other media interests are endeavoring to persuade the board of elections to drop the objectionable provisions from its proposed regulations.

In California, the pending Social Media Disclose Act, AB 2188, having a stated intent to impose political advertising disclosure obligations on online social media, would also include Web sites operated by broadcast and print media by virtue of the broadness of its definition of online platform. The bill would require the online platform to provide a hyperlink to a site giving specified disclosure about the purchaser of the advertiser and to maintain detailed public records about the ad, including indentifying information about the purchaser, the audience reached by the ad, and the average rates charged for the ad.

As perhaps as harbinger of what could come in states still devising their political-advertising regulation, since 2013, the State of Washington has required the advertising media to keep pubic records of political advertising in detail similar to that described above. According, however, to the state's attorney general, Facebook and Google have failed to do so. Consequently, on June 4, the AG filed campaign finance lawsuits against the two. See https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-campaign-finance-lawsuits-against-facebook-google

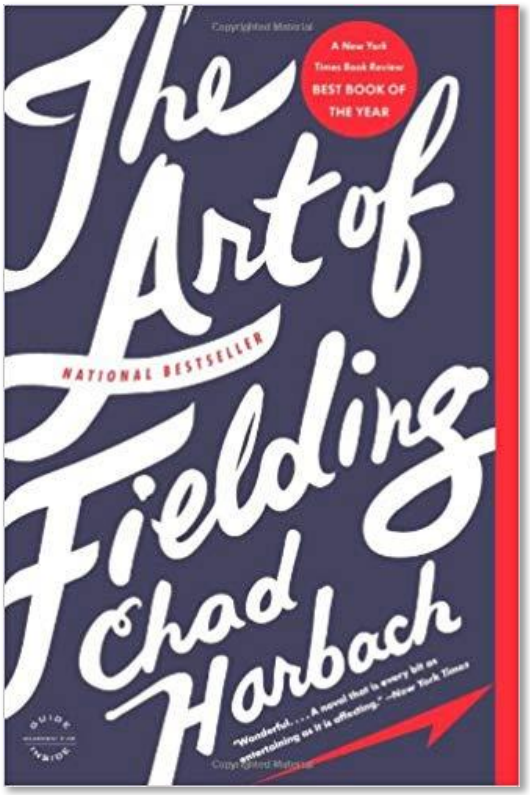
The MLRC State Legislative Committee is co-chaired by Jean Maneke, Maneke Law Group, Kansas City, MO., and Steve Zansberg, Ballard Spahr, Denver, CO.

Swing and a Miss for Copyright Claim Against The Art of Fielding

By Elizabeth McNamara and Adam Lazier

A federal judge in New York has dismissed a copyright infringement lawsuit against the author of the bestselling novel *The Art of Fielding*, finding there to be no substantial similarity between that book and *Bucky's 9th*, an unpublished novel written by the plaintiff. The decision is an important reminder that, even at the motion to dismiss stage, a viable copyright claim requires much more than superficial similarities between the works at issue. *Green v. Harbach*, 2018 WL 3350329 (S.D.N.Y. July 9, 2018).

Background



Chad Harbach published *The Art of Fielding*, his first novel, in 2011, and the book quickly became a critical and commercial success. The book tells the story of Henry Skrimshander, a skinny kid who becomes the star shortstop of his small-college baseball team before suffering a crisis of confidence just as the team challenges for the championship. More than six years later, Charles Green sued for copyright infringement, claiming that "a desperate and economically strapped Harbach" copied *The Art of Fielding* from *Bucky's 9th,* which is also about the star shortstop of a small-college baseball team. The main character of Green's novel, Kenesaw "Bucky" Bucks, feigns deafness to join the baseball team at fictional Hill College for the Deaf, where he leads the team to the championship game. Bucky struggles to keep his real identity a secret while trying to learn about his father's suicide from Hill College's baseball coach, his father's longtime friend.

Green's complaint contained dozens of pages listing alleged similarities between the two works – asserting that these are the only two novels ever written about Division III college baseball teams, that they share mundane details like female characters wearing blue underwear, and that each have subplots about things like father-son relationships, ragtag teams experiencing newfound success, and college administrator-student affairs. But Green focused his claim on the books' climactic championship games, each of which feature the main character coming to the plate as a pinch-hitter in the ninth inning and getting "beaned" – hit in the head by a pitch. He argued that this "idiosyncratic resolution of the hero's journey" established improper copying. At one point, he even attempted to file

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expert evidence purporting to show mathematically that the odds of a batter in a real baseball game getting hit in those circumstances twice was more than 7 sextillion to one.

Harbach moved to dismiss the case for lack of substantial similarity, arguing that works did not share any protectable material. All of the supposed similarities cited by Green, Harbach argued, either mischaracterized the works or were nothing more than unprotectable ideas and common tropes found in stories about sports and college life. The two works express these ideas, themes, and *scenes à faire* in entirely different ways.

Judge Hellerstein's Decision

Judge Hellerstein agreed with Harbach that "[w]hen read in the context, the portions or features of *TAOF* that are alleged to be similar to *Bucky's* are either abstract ideas, *scenes à faire*, or trivial details insignificant to either of the two works," and he dismissed the case. "True," he noted, "both works are about a struggling Division III baseball college team, and both works track the baseball team's changed fortunes after the arrival. But that is the extent of the similarities." He went on to cite numerous key differences between the plots and characters of the two works, highlighting the fact that the supposed plot similarities relied on by Green "fail to accurately capture either of the works, and represent rather a strained attempt to impose structure where none is salient, evident, or important to the works on the whole." While both books had coming-of-age plots, for instance, "Bucky and Henry do not 'come of age' in any similar way. Bucky's development is in learning about his father's death and in the saga surrounding his feigned deafness; Henry's development (and regression) is in navigating college campus life and in coming to terms with the notoriety, fame, and life incident to his blossoming baseball talent." And the sheer volume of purported similarities cited by Green in the dozens of pages of appendices attached to his pleadings made no difference, because "the vast majority of the remaining supposed similarities are random similarities scattered throughout the works, adding little to Plaintiff's claim of substantial similarity."

The decision is an important reminder that, even at the motion to dismiss stage, a viable copyright claim requires much more than superficial similarities between the works at issue.

Nor was Judge Hellerstein persuaded by Green's emphasis on the books' climactic final games – Green's "self-proclaimed strongest argument." In fact, he found, "there is little in common between how the two beaning scenes function in each novel's respective plot. Any similarities are either not copyrightable abstract ideas, or, when understood in context, not actually similar." Henry, for instance, has not played for weeks at the time of the championship game because of his loss of confidence, and pinch hits only because of an emergency. Bucky, on the other hand, arrives as his team's best player, having missed only part of one game because he was reconciling with his girlfriend. And while Henry's team ultimately wins their

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game, Bucky's team loses, which Judge Hellerstein noted "further highlights the significant difference in meaning and importance of the beaning scene in each respective work."

This case is not unique – it has become commonplace for successful authors to face copyright suits from plaintiffs convinced that superficial similarities must be stolen from them. Judge Hellerstein's opinion vindicates the originality of Harbach's work and places this claim squarely in that long line of cases. But Green has not given up yet – he has already filed a Notice of Appeal.

Elizabeth McNamara and Adam Lazier of Davis Wright Tremaine LLP represented defendant Chad Harbach. Plaintiff was represented by Pieter van Tol of Hogan Lovells LLP.

Brammer v. Violent Hues Productions, LLC: Long Live the Right-Click License?

By Scott J. Sholder

On June 11, 2018, the U.S. District Court for the Eastern District of Virginia threw the copyright bar a curveball, issuing what many on both sides of the proverbial "v" consider a bizarre and potentially troubling ruling on fair use. The opinion in Brammer v. Violent Hues Productions, LLC (which has already been appealed), quite simply, flies in the face of some fundamental advice copyright lawyers routinely give their digital media clients based on well-established law: no, you can't use an image you find online without paying for it even if you thought it was free and you didn't see a photo credit. In just those circumstances, at least in the opinion of one federal judge, a copyright defendant may successfully avail itself of the fair use defense. While this opinion is likely an outlier, it has certainly sparked conversation and concern.

Background

Photographer Russell Brammer had posted a photograph he took – a time-lapse depiction of Washington D.C.'s Adams Morgan neighborhood – on his website and on various image-sharing platforms. Defendant, the organizer of a Virginia film festival, found the photograph online without any attribution, cropped it, and used it on a website it had created to provide information about the neighborhoods surrounding the festival. Brammer sued Violent Hues for copyright infringement, and the defendant moved for summary judgment on fair use grounds. The court granted the motion.

The court threw the copyright bar a curveball, issuing what many on both sides of the proverbial "v" consider a bizarre and potentially troubling ruling on fair use.

Fair Use Analysis

The most significant aspect of the court's ruling was its discussion of "transformative use" and other miscellaneous elements it placed under the first fair use factor (purpose and character of the defendant's use of the work). Citing the Fourth Circuit**, the** court noted that transformation "need not alter or augment the work," but rather "can be transformative in function or purpose." Finding the latter type of transformation had occurred, the court explained that Brammer's "purpose in capturing and publishing the photograph was promotional and expressive" whereas Violent Hues used the photograph for "informational" purposes "to provide festival attendees with information regarding the local area."

This distinction is belied by many rulings against defendants who have claimed that using a copyrighted image to illustrate a factual publication is transformative fair use akin to news reporting. Indeed, unless the photograph itself is the story, illustrating a factual or even newsworthy article using a copyrighted work without permission is generally not seen as fair

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use. Here, Violent Hues, like Brammer, had used the photograph to depict the Adams Morgan neighborhood, and obviously believed it to be aesthetically pleasing, and the image, itself, does not convey much hard data beyond a handful of hard-to-read neon signs. This court's version of transformative use goes well beyond what other courts have tolerated.

The court also opined that this purportedly transformative use was non-commercial in that it was "not used to advertise a product or generate revenue." However, this rationale, too has holes. The defendant was in the business of hosting a film festival – a commercial enterprise – that it hoped to make more appealing and convenient for attendees. There is at least an indirect, if not direct, link between this allegedly non-profit use and a for-profit end-game.

One of the most talked-about aspects of the court's first-factor ruling was that the defendant's use was in good faith because the owner of Violent Hues saw no indicia of ownership on the photo, believed it was publicly available, and removed it immediately upon receiving notice of his mistake. Normally the good faith of the defendant and the circumstances behind his procurement of the photograph are relevant to damages – *i.e.*, whether the infringement was willful – not to liability. As any demand letter from a copyright plaintiff's lawyer will tell you, removal of the image alone does not right the alleged wrong. But the *Brammer* court upgrades good faith to a panacea for infringement, which is not only contrary to the very nature of a strict liability tort like copyright infringement, but also opens the door for significant abuse, including exaggerated or self-serving (if not fabricated) testimony regarding the circumstances of discovery and the witness's state of mind or beliefs.

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As to the second fair use factor (the nature of the copyrighted work), the court held that Brammer's photograph was more factual than creative (and therefore deserving of less protection) because it depicted a real-life neighborhood. While courts have held that spontaneous paparazzi photographs of celebrities and basic still images of food are factual and therefore less deserving of copyright protection, to place a facially artistic long-exposure time-lapse photo like Brammers into this category is a stretch and has also drawn criticism. The image clearly took more planning and involved more creative decisions than your average celebrity candid.

Taking the second factor a step further, the court noted that the balance tipped in Violent Hues' favor also because this purportedly factual photograph had been previously published. Logically, though, unless the infringer somehow scoops (or steals) the photo at issue before it is ever used publicly, most copyrighted photographs present in the digital world of 2018 will be, in some sense, previously published (whether in the legal or colloquial sense). Such a conclusion provides even more fodder for the "I found it on the Internet, so it must be free" fallacy.

Under the third factor (amount and substantiality of the portion of the work used), the court found that Violent Hues' cropping of the photograph favored fair use. Once again, this conclusion runs contrary to many other rulings indicating that mere cropping is not sufficient to tip the balance of fair use in favor of a defendant, and flies in the face of the copyright owner's

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exclusive right under the Copyright Act to crop his own photographs in order to create "derivative works."

Finally, under the fourth factor (market harm), the court held that no evidence was presented indicating harm to Brammer's market for the photo. While the court stated that the fourth factor was the "most important" and spent the most space in its three-page opinion discussing Brammer's post-infringement sales and his conceded lack of effort in marketing the photo, the first and third factors bled through, with the court noting that the purportedly "transformative" nature of the defendant's use undercut the potential for market harm. Specifically, the court said "Violent Hues did not sell copies of the photo or generate any revenue from it. There can be no legitimate argument that Violent Hues has 'usurp[ed] the market' by providing a market substitute for the photo, especially since Violent Hues only used approximately half of the photo on its website." For the reasons previously stated, these rationales do not hold water in light of extensive prior case law.

Even for one who, like the author, more often than not litigates on the defense side of copyright infringement actions, the *Brammer* court's ruling is unsettling. The implications of an appellate affirmation of such a decision – unlikely as that would seem – would be staggering for copyright owners, but even in its current form, the ruling could be seen as judicial approval of a head-in-the-sand approach to online copyrights and licensing, and an "oops, sorry" approach to risk management. Neither is a good thing for copyright owners trying to protect their content or digital media companies looking for consistent, predictable, and reliable image-use guidelines

For digital media companies hoping *Brammer* is the answer to their licensing or litigation woes, and for lawyers advising media clients new and old, this is a dangerous assumption and should be eschewed especially pending appeal.

Indeed, *Brammer* stands in stark contrast to the Southern District of New York's bombshell ruling in *Goldman v. Breitbart*, which held that mere embedding of photographs from third-party sources would not insulate a publisher from infringement liability for unlicensed public display. Purveyors of digital media who had been spooked by *Goldman* might now believe that the embedding workaround is not even necessary and that the "right-click license" is alive and well under *Brammer*. For digital media companies hoping *Brammer* is the answer to their licensing or litigation woes, and for lawyers advising media clients new and old, this is a dangerous assumption and should be eschewed especially pending appeal. And content owners who are now as alarmed as habitual embedders post-*Goldman* should not despair just yet, as this case is likely an anomaly and an example of "what not to do" in a fair use analysis; but courts can be unpredictable, so until the negatives are fully developed and the image becomes clear, the only thing to do is to stay tuned.

Scott J. Sholder is a partner at Cowan DeBaets Abraham & Sheppard in New York. Plaintiff was represented by The Law Office of David C. Deal PLC. Defendant was represented by Paul Jarrett Weeks, Kirkland & Ellis LLP.

Cliff's Law: Judge Rules That BBC Should Not Have Filmed the Search of Cliff Richard's Apartment

By David Hooper

On 18 July 2018 Mr Justice Mann of the High Court of England & Wales awarded damages of £190,000 on the grounds of misuse of personal information to Sir Cliff Richard, the 77-year old crooner and all round national treasure against the BBC for its coverage of a police search of his property. Cliff Richard v The BBC and South Yorkshire Police (2018) EWHC 1837.

On top of that he added £20,000 aggravated damages for the BBC's attempt to secure an award from the Royal Television Society for Scoop of the Year for their coverage of the incident. The BBC did not in fact receive the award. South Yorkshire Police (SYP), the police force which carried out the raid, had earlier paid Sir Cliff £400,000 damages for their breach of Sir Cliff's privacy plus £300,000 in legal costs.

The BBC argued its 2014 coverage of the police search of Cliff Richard's unoccupied apartment was in the public interest.

The BBC has been ordered to pay £875,000 in legal costs to Sir Cliff, acknowledging they had breached Sir Cliff's privacy by sharing details of the investigation and proposed raid with the BBC. This represents only the general damages awarded to Sir Cliff. He also has a claim for special damages in respect of the £3.4million he is said to have spent on the case. This covers matters such as the use of public relations consultants to repair the damage to his reputation and to deal with various social media stories that followed the BBC coverage plus legal expenses incurred in relation to separate issues arising out of the BBC coverage but not directly incurred in the current litigation.

There were also claims for damage to Sir Cliff's earnings as a singer and loss of recording contracts and appearance opportunities. In respect of those items the judge held that legal causation was established and the judge left it to the parties to endeavour to reach a settlement on those figures. As between the BBC and SYP the judge has apportioned 65% of the damages and costs to be paid by the BBC with the remaining 35% being paid by SYP. The BBC has to pay 100% of the £20,000 aggravated damages.

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Richard in a 1973 photograph by Allan Warren

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The lion's share of the costs and damages falls upon the BBC and when one takes into account the net payment the BBC is likely to have to make to SYP plus the special damages to be agreed it is difficult to see the BBC getting very much change out of £3million. Sir Cliff had also brought a claim for damages under the Data Protection Act 1998 but the judge having found in his favour on the privacy claim did not feel it necessary to proceed with Data Protection Act claim.

What Caused This Disaster and Was the Judge Right to Rule as He Did?

The gaols in the United Kingdom have been filling with people convicted of historic sex offences involving young boys and girls, but with these accusations have come a number of demonstrably false accusations. The accusations against Sir Cliff fell into the demonstrably false accusations category. A young boy apparently alleged that he had been assaulted by the singer at a Billy Graham rally in Sheffield in 1985. This led to a raid on Sir Cliff's flat in August 2014. It was not until June 2016 that the police announced that there would be no charges against Sir Cliff and in fact at no stage was he arrested or interviewed under caution.

A BBC reporter, Dan Johnson, had learned of the police investigation and subsequently of the proposed raid of Sir Cliff's property through a source, probably in the Metropolitan Police (as opposed to SYP) who were involved in Operation Yewtree which concerned the investigation of historic sex offences. When Johnson approached SYP and informed them that he knew about the investigation into Sir Cliff, he was told that his publicising the matter at that stage would jeopardise the investigation and in particular a proposed raid on Sir Cliff's property.

The deal that was brokered between SYP and the BBC was that the BBC could exclusively film the raid. How this deal was brokered was a matter of dispute but the judge firmly rejected as untrue the BBC account of a collaborative agreement with SYP welcoming the fact that the investigation was being publicised. Instead the judge found that the police were shanghaied into agreeing to give the BBC exclusive rights and to be able to film the raid from their helicopter in return for not putting the kybosh on the SYP's plans to arrive unannounced and unexpectedly in the early hours to raid and search Sir Cliff's property. Mr

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Justice Mann, a judge who sat in the Chancery Division was appalled by the BBC's behaviour and by the intrusive and in his view sensationalist view of the BBC coverage. It appeared that the BBC's behaviour reinforced the distaste the veteran judge had formed for the media during the Mirror phone-hacking litigation.

The BBC did not help itself by the various internal communications which embarrassingly surfaced during the trial. Not least among these was one from a BBC news editor who when he learned of the story pithily used the words of one of Sir Cliff's earlier songs in his email "congratulations and jubilations, I want the world to know I'm happy as can be." SYP had not named Sir Cliff as the subject of their investigation. His publicist was contacted very shortly before the first news broadcast at 1pm when the item was a 2½ minute lead item with 3.2 million viewers. By the time of the evening news the coverage in this lead story had expanded to 4½ minutes. Sir Cliff watched the footage with horror at his property in Portugal whither the BBC had despatched a film crew having sent one also for good measure to another of his properties in Barbados, a somewhat profligate use of licence feepayers' money by a publicly funded broadcaster.

What is striking about the Cliff Richard case is that it was a case where a balance had to be struck between Cliff Richard's Article 8 Privacy Rights and the BBC's Article 10 Freedom of Speech Rights. The English Courts have set up a specialist Media and Communications list for such cases to be heard by Judges who have practiced in the area throughout their career and in particular by the two specialist High Court judges who are experts in this field and in the Article 8 and 10 balancing exercises and the related European Court of Human Rights cases.

The judge found that the police were shanghaied into agreeing to give the BBC exclusive rights and to be able to film the raid from their helicopter

This case however went in accordance with an increasing practice on the part of claimant lawyers to the Chancery Division which predominantly deals with corporate, commercial, intellectual property and trust matters although traditionally it has also dealt with breach of confidentiality matters. There it was allocated to the senior Chancery judge Mr Justice Mann. He had dealt with the phone hacking cases concerning Mirror Group Newspapers where he had demonstrated a very strong disapproval of the Mirror's misconduct and wrongdoing and where he had awarded very substantial sums in the bracket of £40,000 to £250,000 to the victims of the Mirror's wrongdoing. His rulings were upheld and attempts to reverse his Judgment and damages awards in the Court of Appeal and Supreme Court in that litigation were unsuccessful.

It is difficult however to escape the conclusion that his view of the law was in some measure conditioned by his disapproval of the conduct of the BBC and by his acceptance of the widely held view that people should not be named when they are the subject of investigations or even when they are arrested until they have actually been charged. This it

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might be thought is essentially a political decision for legislators. There is no easy solution. There is a wide spectrum of approach from the laissez-faire approach favoured in the United States to the German Press Code Guidelines which prohibit save in exceptional circumstances the publication of information in reporting crimes, investigations or trials which would enable the identification of victims or the alleged perpetrators till the conclusion of the trial.

There is, however, overwhelming sympathy for persons such as Cliff Richard who suffer enormous reputational damage as a result of it becoming known that they are under investigation for serious sex offences particularly when they remain under investigation, as was the case with Cliff Richard, for two years only for it to accepted that there was no substance in the allegations. At one stage in the United Kingdom it was unlawful to name persons who were suspected with or charged with the offence of rape until they had been convicted. This was found to give rise to a number of practical difficulties not least that it meant that a person accused of murder and rape could not be named until conviction whereas a person simply accused of murder could be named. The right of the accused rapist to anonymity was removed and the question of whether there should be anonymity is essentially a matter for the legislature to decide.

The judge was highly critical of the BBC. He considered that there had been a breach of Cliff Richard's rights of privacy without justification in a serious and somewhat sensationalistic way. He felt that much of the BBC coverage was coloured by breathless sensationalism. Of the various BBC witnesses he castigated them as being "capable of letting (his) enthusiasm get the better of (him) and of the evidence of another witness that it "needed to be approached with caution."

The judge was highly critical of the BBC. He considered that there had been a breach of Cliff Richard's rights of privacy without justification in a serious and somewhat sensationalistic way.

Another witness was described as "unduly defensive and to a degree evasive" and the judge could "not always rely on him as a reliable witness." The judge found the public interest defences of the BBC spurious and that the BBC were more interested in entertaining and attention-grabbing journalism. The judge was prepared to accept that the investigation under Operation Yewtree was a matter of public interest, but he felt that the naming of suspects at an early stage was simply of interest to gossipmongers. Certainly, the BBC had not helped themselves by the unattractive threat to disclose the investigation of Cliff Richard unless they were given privileged and exclusive access to the raid on his flat. Some of the over-enthusiastic internal communications about the story would have been better not reduced to writing. The judge also felt that the BBC had not complied with the ethical requirements of its journalism so that they could maintain the exclusivity of their scoop and

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he also felt that the BBC had unfairly truncated Cliff Richard's opportunity to reply to the allegations before the first broadcast.

The issues in the case were whether Cliff Richard had a legitimate expectation of privacy in relation to the fact of the investigation and the search and whether the BBC was nevertheless entitled to publish these facts by virtue of its right of freedom of expression. The issue was then whether there was an infringement of his rights of privacy and, if so, what damages should be awarded.

It was accepted that as between Cliff Richard and SYP there was a duty of confidentiality in the conduct of the investigation and that Cliff Richard did have a reasonable expectation of privacy in relation to the fact of the investigation and of the search. The question was whether the right of privacy as regards the police and their investigation extended to the BBC as a media organisation which had received a tip-off that there was to be a police raid and search of Sir Cliff's premises. This was not a case where, for example, the BBC had got hold of some highly confidential document; they simply wanted to film a raid that was going to take place publicly. They were proposing to film and broadcast a public act, namely a police search of a very prominent public figure where the accusation concerned a serious allegation of a sexual offence and followed a line of cases in the United Kingdom where prominent figures including a number in the music industry had been accused and on occasion convicted of sexual offences.

The judge was prepared to accept that the investigation under Operation Yewtree was a matter of public interest, but he felt that the naming of suspects at an early stage was simply of interest to gossipmongers.

The judge's view on the fact that the raid was taking place in public was that it nevertheless fell within the privacy zone as many would not see it or know what was going on. The BBC were not of course proposing to suggest that Sir Cliff was guilty of any offence and indeed, although legal privilege was not waived in the case, it did appear that the BBC's principal legal concerns were to avoid defaming Sir Cliff or of reporting a matter which might at a later stage give rise to allegations of contempt of court. It does not appear that the BBC were overly concerned about a privacy claim. It was, they felt, a matter of massive public interest and although the BBC were ahead of the rest of the field as a result of their tip, it was a matter which would and indeed did receive massive coverage in the rest of the media. No doubt they also had it in mind that often the role of the media is to publish that which people would prefer to keep under wraps and that which they had learned about through an unauthorised disclosure.

The view of Mr Justice Mann was very different. He did not have any difficulty in equating the position of the BBC in regard to privacy with that of SYP. He noted that in PNM v Times (2014)EMLR 30 Lady Justice Sharp noted “there is a growing recognition that as a matter of public policy the identification of those arrested or suspected of crime

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should not be released to the public except in exceptional and clearly defined circumstances."

Mr Justice Mann also noted that Sir Brian Leveson in his report on the media had recommended that the names and identifying details of those arrested or suspected of crime should not be made public. Indeed the Authorised Professional Practical Guidance issued by the College of Police recommends that police should not name those arrested or under investigation save in exceptional circumstances.

There had been a number of unfortunate cases where newspapers had published articles such as those concerning a Mr Christopher Jeffries whose tenant had been murdered which suggested that he was either guilty or strongly to be suspected of being guilty of the murder after he had been arrested. In fact, he was entirely innocent and never charged and received substantial libel damages. Mr Justice Mann took the view that Cliff Richard had a reasonable expectation of privacy regarding the police investigation and his privacy right was not dependent upon whether the information fell into the hands of the media.

The right of privacy could be lost for other reasons such as operational reasons where the police might decide to disclose the information, but the judge took the view that simply because the media had got to hear of the police raid did not remove the basic right of privacy. It was perhaps the classic view of a Chancery judge applying the duty of confidentiality to those into whose hands confidential information was passed. It was not unfortunately the reality of how the press works. The judge did apply a balancing exercise but due in some measure to his distaste for the way in which the BBC had behaved the scales were already significantly depressed in favour of Article 8 as opposed to Article 10.

The judge made it clear that even a lower key report of the search and investigation by a measured report in a studio of the raid on Sir Cliff's property would still have seriously infringed Sir Cliff's reasonable expectation of privacy.

The judge did not accept the BBC's argument about their having a duty to publish or that it was in the public interest for this matter to be published. The judge in his 122 page and 450 paragraph judgment came back to his impression that the BBC were not interested in the public interest so much as in what he viewed to be their desire to publish a sensational and exclusive story which he appeared to view as a somewhat disreputable activity. The fact that the search would be carried out in public, albeit in a gated community and that there would be other reporters and television crews filming and reporting the search did not remove Sir Cliff's reasonable expectation of privacy in the judge's view. With the benefit of hindsight the BBC's coverage of the story might have been viewed by some as being unduly intrusive in the footage taken from the helicopter of Sir Cliff's apartment but that might be thought to be matters of editorial judgment and taste.

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Sir Cliff speaking to the press after the verdict.

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In any event the judge made it clear that even a lower key report of the search and investigation by a measured report in a studio of the raid on Sir Cliff's property would still have seriously infringed Sir Cliff's reasonable expectation of privacy. In the judge's view the BBC had added drama and a degree of sensationalism to the story.

The judge had no difficulty in concluding that it was a matter of judgment for the courts to decide whether there was in effect a prohibition of the right to cover the search of Sir Cliff's property rather than this being a matter for parliament to decide. In the view of many the judge's judgment appeared to prohibit such coverage, see for example what he said about the extent of Sir Cliff's right of privacy and his observation that even moderate studio coverage would have infringed Sir Cliff's right of privacy. However somewhat unusually and defensively the judge after delivering his judgment indicated that the judgment had been misinterpreted in various reports and that he was not laying down such a wide principle and those future cases would be fact-sensitive.

The way that the judge approached it was to examine the criteria laid down by the European Court of Human Rights in the Axel Springer case. The problem with this approach is that the judge in effect applies his editorial judgement in place of the media editor and does so after the event rather than in the heat of the moment**.** The problem with that is that questions of taste and disapproval of journalistic methods inevitably creep in. Was it a contribution to a debate of public interest? There was an emphatic no from the judge. The actions of the BBC had immensely serious consequences for Sir Cliff and the public interest justifications were spurious. The BBC, the judge said, went for an invasion of Cliff Richard's privacy rights in a big way.

On the criterion of how well known is the person concerned and what is the subject of the report, the judge's view was that public figures were not fair game for an invasion of privacy. This was after all simply an allegation and the fact that there could to a limited degree be a diminished expectation of privacy for public figures in this instance the public standing of Sir Cliff did not reduce his right of privacy. The judge did not feel that the prior conduct of Sir Cliff was relevant to the inquiry. The fact that he was a well-known Christian with established religious beliefs did not come into the balancing exercise. The judge also considered the methods of obtaining the information and its veracity. He noted that this was

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simply at this stage an allegation which the police were investigating and in the judge's view the behaviour of the BBC counted against them. The methods of the BBC were questionable and the journalist had received information which he knew was confidential and sensitive. The use of threats to obtain exclusive coverage weakened the BBC's position in the judge's view and additionally they had allowed Sir Cliff an insufficient right of reply.

The judge therefore found in favour of Sir Cliff. In assessing damages he noted the world-wide publicity which had flowed from this coverage. Damages could in the judge's view include damage to reputation. The protection of reputation was part of the function of the law of privacy. Additionally Sir Cliff's professional life had been disrupted by the disclosure of the investigation. For example, an album and an updated autobiography had had to be put on hold.

In the judge's view this was a much more serious case than Max Mosley had received £60,000 for the disclosure by the News of the World of his Saturday afternoon sado-masochistic activities. Damages for privacy could take account of distress, damage to health, the invasion of Cliff Richards' privacy, damage to his dignity and status and the general adverse effect on his lifestyle. The judge also took account of the sensationalist treatment of the story. The damages awarded in the phone hacking cases were not entirely comparable, as they were assessed on the basis of repeated acts of invasion of privacy. The judge awarded £190,000 general damages plus the aggravated damages of £20,000. Special damages and the ultimate bill for legal costs remain to be assessed as does the apportionment as between the BBC and SYP.

The BBC has indicated that they are likely to appeal. The judge has refused permission to appeal, as he was satisfied he was right on the law whereas the BBC was not and therefore the BBC will have to apply to the Court of Appeal for such permission.

David Hooper is a lawyer with Howard Kennedy in London. Cliff Richard was represented by Justin Rushbrooke QC, Godwin Busuttil and Simkins LLP. The BBC was represented by Gavin Millar QC and Aidan Eardley.

Missouri Restrictions on Media Alcohol Advertising Struck Down

By Mark Sableman

A commercial speech ruling in Missouri means that Missouri consumers can learn about sales and discounts on beer, wine, and other alcoholic beverages — and Missouri retailers can get out the word about their sales and discounts — through media advertising. The court held unconstitutional two state regulations, and one statute, all of which banned or restricted truthful media advertising relating to alcoholic beverage prices.

The case, Missouri Broadcasters Association v. Taylor, began in 2013 and followed a tortured path under the first two federal judges assigned to it – including a *sua sponte* dismissal by one judge that was subsequently reversed by the Eighth Circuit. On remand after that ruling, however, the third assigned judge, Judge Douglas Harpool of the Western District of Missouri, took charge of the case through trial.

After a two-day bench trial, Judge Harpool ruled in favor of plaintiffs, the Missouri Broadcasters Association and three other entities, on all grounds.

As to the two Missouri regulations, which prohibited media advertising of discount and below-cost prices for alcoholic beverages, Judge Harpool found that they failed both the third and fourth prongs of *Central Hudson*. The regulations didn't directly advance the state's interest in preventing alcohol abuse, because the state allowed discount and below-cost prices to be promoted on premises—where alcohol abuse was most likely to occur—and only prohibited them from being included in media advertising. The state had also allowed discounts to be promoted indirectly (using phrases like "happy hour" and "ladies night") and the inconsistency between that and the ban on use of prices was also fatal to direct advancement.

The court held unconstitutional two state regulations, and one statute, all of which banned or restricted truthful media advertising relating to alcoholic beverage prices.

And the regulations weren't narrowly tailored, as required under the fourth *Central Hudson* prong, because of the availability of many non-speech suppressive means (including educational programs, higher alcohol taxes, and targeted restrictions on promotions).

Professor Gary Wilcox, the John A. Beck Centennial Professor in Communication in the Stan Richards School of Advertising & Public Relations at the University of Texas at Austin, testified at trial for plaintiffs. He explained research that he has conducted over the last 30 years that showed no correlation between price advertising restrictions and reductions of alcohol abuse. The court noted in its decision that Professor Wilcox provided data showing that during the last 30 years, while alcoholic beverage advertising expenditures increased fourfold, alcoholic beverage consumption in the United States has noticeably decreased on a per capita basis.

As to the Missouri statute at issue, a holdover from post-Prohibition efforts to prevent "tied houses" in which alcohol manufacturers controlled retail outlets, the court found

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unconstitutional Missouri's statute restricting vendors from funding advertisements for retailers. Missouri law's numerous other exceptions to the separation of vendors and retailers showed that the statute did not directly advance the state's objectives, and plaintiffs also showed that those objectives could be met without prohibiting funding of truthful advertising.

The challenge to the statute also involved a compelled speech argument, because the statute contained an exception, allowing vendor funding of retail advertising on certain conditions, including that a second unrelated retailer be promoted as well as the intended retail partner. The court found this provision unconstitutional as compelled speech and association.

Mark Sableman and Michael Nepple of Thompson Coburn LLP in St. Louis represented MBA and the other plaintiffs. Missouri Assistant Attorney General Emily Dodge represented the defendant state officials.

10 Questions to a Media Lawyer: Lee Williams, CNN

Lee Rivera Williams is Vice President & Assistant General Counsel at CNN in Atlanta.

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

I took a pretty circuitous route to being a media lawyer. I attended Emory University law school on the advice of a family friend and U.S. District Court Judge Thomas Hull. Among the many pieces of invaluable advice he gave me over the years, he advised that I attend a law school in the area I wanted to start my career and live. I'm from Tennessee and had spent a lot of time in Atlanta with my family and loved (what at least I considered) the big city.

Williams with Anderson Cooper

After my first year of law school, I summer clerked at a trusts and estates firm, which most definitely confirmed I had absolutely no interest in that type of legal work. When I started as an associate at Alston & Bird upon graduation, I joined the bankruptcy group. I loved the motions practice and even as a young associate argued weekly on behalf of mostly bank clients and creditors in Chapter 11 bankruptcies. I enjoyed arguing the law against another attorney, to a judge, and not having to pander to a jury. However, my long term goal was always to go in house. Being in Atlanta, my preference was Coke, Delta or Turner Broadcasting.

Early in my fourth year at Alston & Bird, a former colleague who had gone to Turner called and asked if I wanted to interview for an open position. I wasn't really ready to leave the firm, but I knew this was an opportunity I couldn't pass up. At the time, the media and entertainment legal industry was pretty concentrated in NY, LA and DC so the general counsel at the time, a former litigator himself, took the position that he wouldn't look for experienced media or entertainment lawyers, but rather just hire people he thought he could train and who could be independent and assertive enough to serve as mini general counsel to their designated Turner entities. I was hired on the spot.

This was 1992, Ted and his sailing buddies ran the show, and the Turner legal department was

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small; we were all a little bit of a generalist. I handled work from licensing agreements with local broadcast networks for programming packages, and license agreements for carriage of the networks TNT and Cartoon Network in Latin America, to satellite lease agreements, and negotiations with the 1996 Atlanta Olympic Committee for access to the Omni hotel which Turner owned at the time.

After a couple of years, I moved on to servicing what was then called Turner Original Productions (TOP). It was a documentary unit that hired outside production companies to produce programming to air primarily on TBS (at the time, the Superstation). Ted Turner would throw money at these programs and we would engage A-list talent to host or voice over the programs. I handled both the production agreements and talent deals with the likes of Alec Baldwin, Ben Stiller, Liam Neeson, Kenneth Branagh, and Alicia Silverstone, among many others.

In 1997, Rick Kaplan became president of CNN. At the same time, TBS decided it's Nascar watching audience wasn't a good fit for the highbrow, culturally conscience documentaries TOP was producing. Happily, TOP was scooped up by Kaplan and began producing for CNN as CNN Productions. Kaplan also launched other magazine shows for CNN which I handled, and my work at CNN continued to grow as a media lawyer.

I now, and have for years, handled the international work for CNN, as well as the investigative unit since its inception about 15 years ago, and CNN's flagship program, AC360.

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

Since I began my work at CNN before digital was even a "thing," my heart is with TV and video programming versus digital writes. I love when CNN breaks news instead of simply covering it. I enjoy rolling up my sleeves on long-term, investigative stories and reading all the interview transcripts and back-up documents, and then having long script vetting and screening sessions with reporters and producers to get it all right. I really enjoy advising on newsgathering. Not FOIA-type newsgathering, but analyzing whether and what to use from leaked documents or information, and advising on use of hidden cameras and ride alongs. I also love my international work. Honestly, I think that's what's really kept me challenged the most during all these years at CNN.

What I like the least are fair use questions, which have multiplied a thousand fold with social media.

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

The biggest blunder occurred while at Alston & Bird. I filed a motion in a bankruptcy outside

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of Atlanta and I assumed the service requirements were the same as in Atlanta and didn't consult local regs – very bad assumption! Also very embarrassing to make the three hour drive with the bank client to the court, only to turn around and go right back home after the debtor's counsel moved to reschedule the hearing due to my service blunder. That mistake is something that has stuck with me all these years, and keeps me OCD when it comes to vetting stories at CNN and making sure I'm completely read in on every story I work on.

As a consequence, I've never had a story I worked on be the subject of a lawsuit, and only a couple of minor necessary clarifications/corrections. I've had plenty of saber rattling from parties involved in stories, but never had an actual lawsuit filed.

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

The way the CNN legal department is organized, I don't handle litigation at all. However, at Alston & Bird, just before I left, I argued a case of first impression in the Eleventh Circuit. It was a wonderful experience and a fabulous swan song to my litigation practice.

You're probably wondering why they'd let a third year associate argue in the Eleventh Circuit. That's because it was a true dog of a case – a loser from the get go. The partners knew that and didn't want their names and reputations tarnished with a loss, so they threw their young associate to the wolves. In reality, I happily accepted the challenge as an opportunity I may never get again. Of course, the partners were right in that the case was a loser, and my client and I didn't win, but I'll never forget the incredible red light/green light experience!

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

I'll name a few, although most are probably not very surprising. I have lots of family photos which remind me to keep my priorities straight; a piece of UT's Neyland Stadium artificial turf

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when they removed it in 1993; the American flag; 5/10/15/20/25 year glass Turner anniversary paper weights; three framed Peabody Awards for my contributions to CNN's reporting on the 2008 Presidential Campaign, 2010 Gulf Oil Spill, and 2011 coverage of the Arab Spring; two TV's always tuned to CNNI and CNN; framed artwork of Emory law school; One Atlantic Center building where Alston & Bird is housed in Atlanta; and a framed photo from Corcovado, Brazil when I took my first international business trip working at Turner. I also have a fun piece of artwork I bought at a fundraiser for Georgia Lawyers for the Arts. It's a painting of Lady Justice…she's pink!

Lee Williams and Jim Acosta

Finally, I keep my way cool CNN Air drone unit bomber jacket on the back of my door for chilly days. The drone team was given these with our names on them for our work getting CNN licensed to fly drones for newsgathering around the world.

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

CNN, of course, although I call into the 9am CNN daily editorial meeting so I pretty much know what we're up to for the day. I check the New York Times, and always read the MLRC's daily report (not sucking up to George – I really do!). I usually peruse Facebook for a few minutes, too, to see what everyone else is up to in their lives.

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

I've always wanted to be a lawyer, and I think my inherent skills and personality mesh well with being a lawyer, so if someone feels similarly, I'd encourage it. But I'd also encourage it for anyone who really doesn't know what exactly they want to do – if they're willing to pay the fiscal and time price. Law school teaches great life skills for any profession.

I do a lot of mentoring of Emory law students, and one thing I always try to impress upon them is that most people can graduate from law school, but not everyone can graduate top of the

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class. It was true when I was in law school way back when, but it's even more true now that to get the good job, you absolutely must work as hard as you can and get the best grades possible. It's only three years of life, and it will dictate the remaining many years to come.

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

I have this conversation often with young lawyers and students. I tell them to take as many on point classes as possible. First Amendment is a given, but also copyright, patent, trademark courses. If their school offers more in-depth electives in these areas (or even media law itself as Emory does where I guest speak), definitely take them. Then get involved in schools' media and communications law sections, join the ABA media law section, join the anti-defamation league, the local press club, and be aggressive in reaching out to and keeping in touch with media lawyers who are willing to mentor, especially alums from their schools.

9. What keeps you up at night?

Most reading this may not agree, but I worry about the media's role in contributing to the extreme divisiveness in the US and abroad. I'm an "agree to disagree person" so it's just my personality to want to hear and understand all sides. For all stories I work on, I push hard to not just report the story accurately, but to also report it completely. Sometimes I don't think the latter always occurs and that can be seized upon by the other side as a basis for the ubiquitous "fake news" moniker.

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

I honestly don't know. I've wanted to be an attorney since I was in Seventh grade and I never wavered. It's an interesting story, and one I've told my mom I'll tell at her funeral (yeah, I know, kinda morbid!). Anyway, one day in 7th grade, my stay-at-home mom was watching Divorce Court. I started watching with her, and when it was over and the judge gave his opinion, her independent and bossy daughter said to her "I want to be a judge when I grow up." Without hesitating, she said, "Well, you know you have to be a lawyer first." I said, ok, and that was that; I never considered anything else. What's so remarkable about this story is that I grew up in a small east Tennessee town. The same town both my parents were born and grew up in and where they had been high school sweethearts before my dad when to the Navy and my mom went to the University of Tennessee. There, she was a majorette (during the time Johnny Majors played for UT and who she briefly dated), and where she was a "Vol Beauty" with actress Dixie Carter from the show, Designing Women. She was a country club wife in the south who was smart and witty, but who really had received most accolades in her life based upon her looks. So it would have been perfectly reasonable in 1976 for her to have responded to my career proclamation with something like "oh honey, you just go to college, get married, have kids, and spend your days playing golf, tennis and bridge." But she didn't, which is one reason I've had such an amazing career and fulfilling life experiences.