520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through June 28, 2018

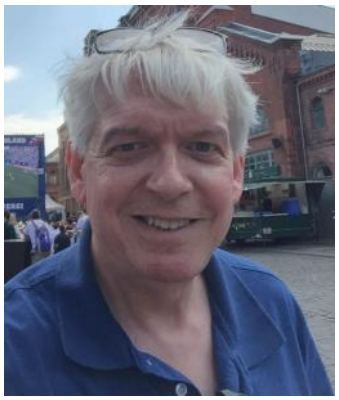
From the Executive Director's Desk

MLRC's European Media Lawyers Conference in Berlin

By Dave Heller (Guest Column)

George is taking a well-deserved break from column writing this month so the pleasure falls to me to report on MLRC's most recent foray into Europe – our 4th Annual European Media Lawyers Conference held on June 18th in Berlin.

By way of quick background, the European Media Lawyers Conference was started in 2015 to reach out to media lawyers in Continental Europe. Our goals were threefold: to learn more about each other's law; to promote First Amendment values and to encourage lawyers from throughout the EU to work cooperatively to promote those interests; to expand our membership and the spirit of comradery in the media law bar. The model for this effort was MLRC's very successful London Conference, but on a smaller scale with a focus on European media lawyers and more attention to developments on the Continent.



Dave Heller in Berlin

From 2015-17, the event was held in Paris at the offices of Jones Day, situated in the historic Hôtel de Talleyrand (former home of legendary French diplomat Charles Talleyrand and, more recently, headquarters for the Marshall Plan). With expert input from the Parisian media bar and local judges, we debated a wide-range of topics, from the legal, political, and ethical issues surrounding Charlie Hebdo to the media business landscape in Europe.

Conference session at Raue LLP, Potzdamer Platz 1

This year with the enthusiastic support of four of our German members – Jan Hegemann, Ulrich Amelung, Roger Mann and Ralph Graef – we moved the conference to Germany, the largest media market in Europe and the source of some of the more controversial regulations of online speech in Europe. The law firm of Raue LLP in Berlin generously hosted the event at their offices at Potzdamer Platz 1, which includes a rooftop deck with panoramic views of the city. I would be remiss not to add a note of thanks and remembrance to Ulrich Amelung. Uli

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Fake news panel, left to right: Marc Sundermann, Nani Jansen Reventlow, and Jens van den Brink

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lobbied to bring the conference to Berlin and was helping to organize it when he passed away in January at the age of 45 after a battle with cancer. Some readers may remember him as a regular at the London Conference. Others had the benefit of his legal expertise as outside counsel on German media law matters. He was a good man and talented lawyer. His colleagues at Raue dedicated the conference to his memory.

About 60 lawyers from across Europe were in attendance, most from German law firms and publishers, including Bertelsmann, Bauer and Axel Springer. I would have liked to share the list of attendees with readers, but I am told that would violate the GDPR!

We tackled an array of timely issues, beginning with a debate on the question "Should Hate Speech Be Regulated?" featuring Dr. Daniel Holznagel of the German Ministry of Justice and Mark Stephens. Prof. Dr. Jan Hegemann moderated. Dr. Holznagel was the primary drafter of Germany's controversial Network Enforcement Act (the "Netzwerkdurchsetzungsgesetz") which requires online platforms to delete hate speech, defamation and fake news or face massive fines. He stressed that the law merely eases the enforcement of pre-existing German substantive law. Mark Stephens parried that the law failed the European test of necessity and proportionality and was ripe for misuse.

The next session dissected the European Commission's Independent High Level Group Report on Fake News and Online Disinformation. The Report, prepared by a group of experts from civil society, social media platforms, the media and academia, recommended enhanced transparency, education and self-regulation. But in the event these efforts fail, the EC stands ready to impose regulations. Nani Jansen Reventlow moderated a discussion with Marc Sundermann, a senior government relations expert for Bertelsmann and a member of the High

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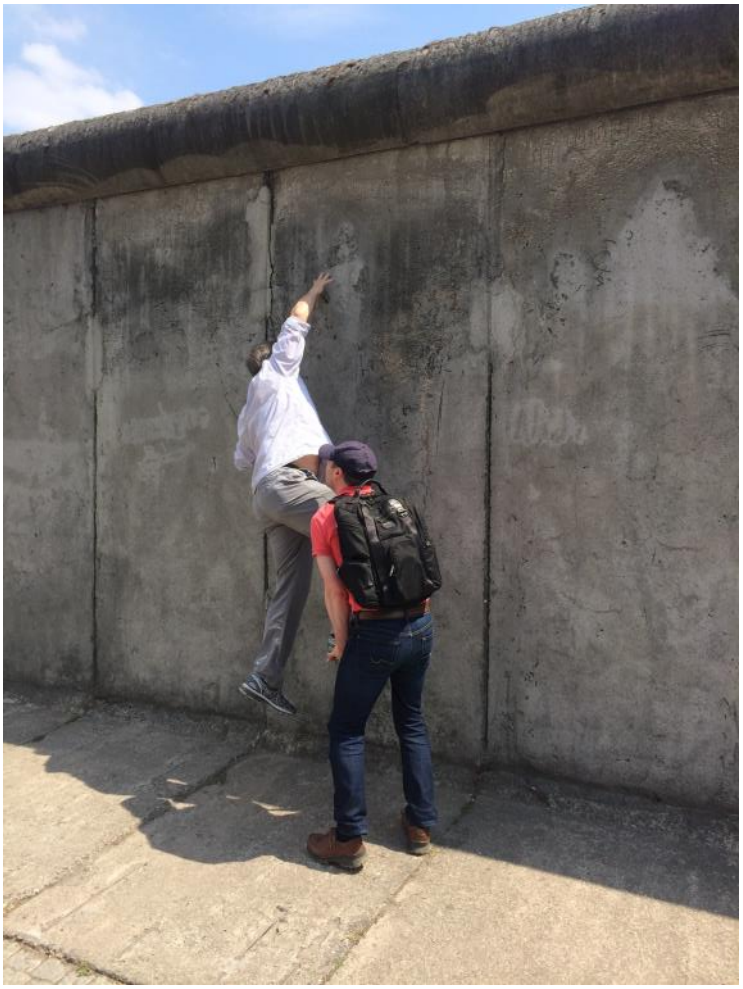
Level Group, and Jens van den Brink, who represented Dutch publishers wrongly labeled as providers of "fake news" by the European Commission – an incident that inspires little confidence in the prospect of government regulation to combat the problem.

Next was a session on "How Copyright Law May Block News Coverage?" featuring Dr. Jan Tolkmitt, the Presiding Judge of the copyright chamber of the county court of Hamburg, and Adam Cannon, senior in-house lawyer for The Sun, moderated by Dr. Ralph Oliver Graef from Hamburg. The session surveyed recent German and EU case law involving copyright claims to stop the publication of confidential and leaked documents.

A bump in the conference program came when our lunch time speaker Melissa Eddy, Berlin Correspondent for the New York Times, had to cancel her appearance to cover a hastily called press conference by German Chancellor Angela Merkel. George stepped in to discuss one of the issues she was to address, the fractured relationship between Trump and the press. The press conference Eddy was called on to cover was important. As her paper reported later that same day "On Monday, facing a mutiny over the immigration issue, Ms. Merkel, anchor of the Continent's centrist establishment, narrowly avoided the collapse of her government." While we view our Conference as important, it was hard to argue with Ms. Eddy's priorities.



A daring escape over the Berlin Wall - actually orchestrated by our Tim Pinto and Bob Latham

A session on The Right to Be Forgotten was moderated by Dr. Jan Sorge, and featured Julie Warendorf, a lawyer for Google Germany, and privacy lawyer Dr. Christian Mensching. They discussed the challenges Google faces in implementing the European Court of Justice's Google Spain judgment and balancing take-down requirements with recent German case law on the right of publishers to archive news.

The conference concluded with a group vetting exercise led by Prof. Dr. Roger Mann and our own George Freeman. Coinciding with the start of the real 2018 World Cup, the group discussed a hypothetical article about the arrest of "FIFA Chairman Seth Blather" and compared how different jurisdictions regulate reporting about criminal investigations and the private lives of public figures.

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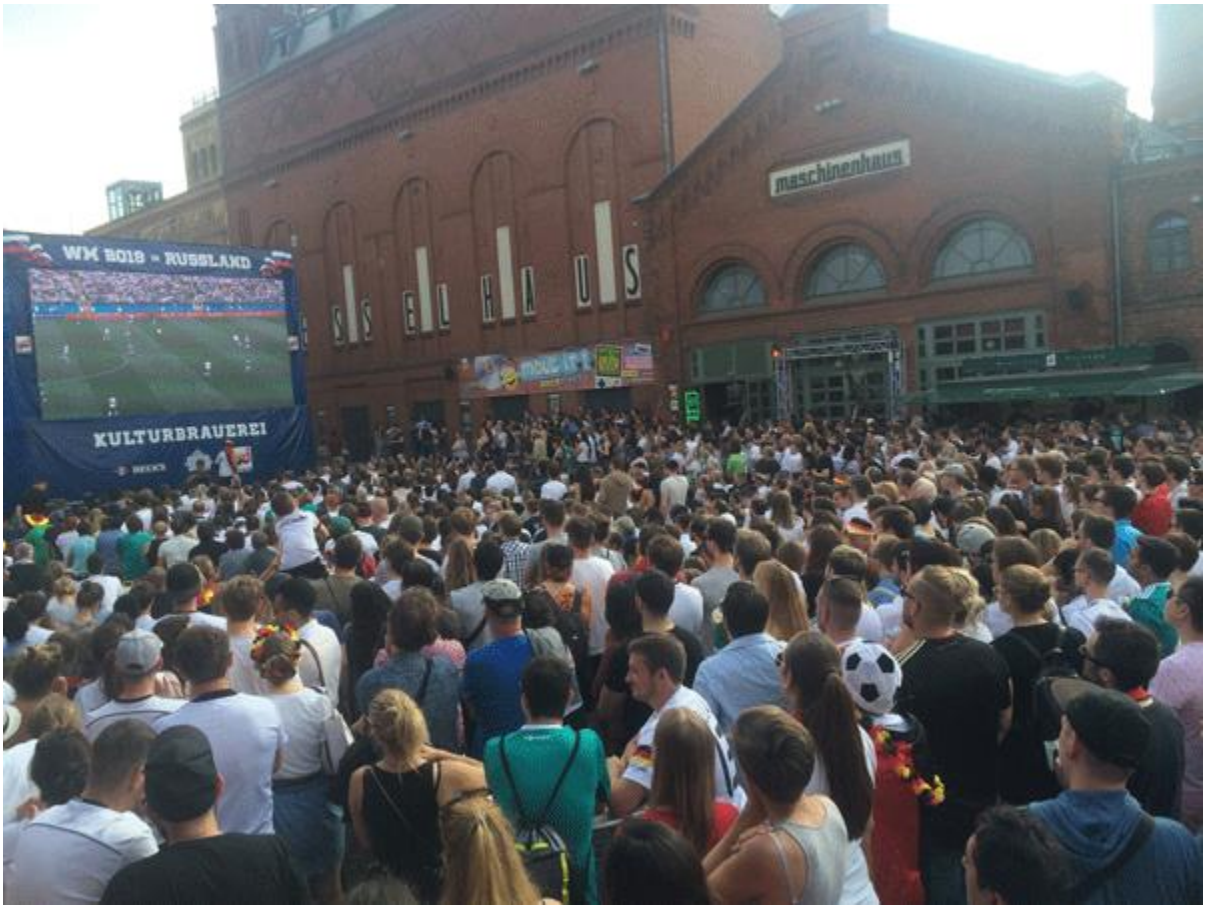

Watching the World Cup match, Mexico 1 Germany 0, in a beer garden with 3,000 Berliners

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After the conference concluded, we were back on the rooftop deck to mingle with food and drink and strategize about post-conference sightseeing.

Hemingway famously called Paris "a moveable feast" – the same can be said about Berlin if you mean a place of lingering memory. A "city of excitement and hope" in the 1920s, the failed capital of the Thousand Year Reich, a divided city during the Cold War, a haven for refugees today. On the Sunday before the conference, about 10 of us toured the Berlin Wall Memorial, an open-air exhibition featuring remnants of the rebarbative Wall. The memorial asks visitors to approach the evidence of the past, but that's a task the city itself asks of every visitor.

After the trip to the Berlin Wall Memorial we visited the Kulturbrauerei, an art and food complex, to watch a World Cup match on a giant outdoor screen. There in close quarters with 3,000 passionate (and somewhat drunken, but well-behaved) fans, we watched Mexico unexpectedly defeat Germany 1-0. Amidst a sea of German fans, an exuberant contingent of Mexican fans erupted in peaceful celebration. It was an apt illustration of the adage that sports can sometimes accomplish more in 90 minutes than politicians can in years.

We hope to return to Germany next year to build on this year's success and tackle whatever novel issues arise in the year ahead.

Technology at the Supreme Court

South Dakota v. Wayfair and Carpenter v. United States

By Jeff Hermes

On back-to-back days in late June of 2018, the U.S. Supreme Court released opinions in a pair of cases testing how changes in technology affect the Court's interpretation of constitutional principles: South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018) and Carpenter v. United States, No. 16-402 (June 22, 2018).

While the underlying legal issues in these cases were different—the application of the Commerce Clause to e-commerce in *Wayfair*, and the application of the Fourth Amendment to cell-site location data in *Carpenter*—the decisions nevertheless present an interesting contrast with respect to the role technology and digital communication played in the Court's reasoning.

South Dakota v. Wayfair

In *Wayfair*, the Supreme Court considered a South Dakota statute requiring all retailers whose sales into the state exceeded a certain threshold to collect sales taxes from purchasers. Notably, the statute was intended to apply to e-commerce businesses selling into South Dakota and thus did not depend on whether a retailer had a physical presence in the state; South Dakota was concerned with what it believed to be vast amounts of tax revenue lost because its citizens were underreporting their online purchases.

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Thus, on its face, the statute ran afoul of the Commerce Clause of the U.S. Constitution as interpreted by the Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, the court held that while a state could tax sales to its residents regardless of source, it could not compel retailers without a physical presence in the state to collect such taxes without running afoul of the Commerce Clause.

With the rise of e-commerce, this "physical presence" rule significantly benefited online retailers of all sizes by relieving them from the obligation to calculate and collect sales tax from more than 10,000 different taxing jurisdictions at the state and municipal levels where they had no physical presence. Some e-retailers advertised their sales as tax-free despite the fact that consumers were responsible for sales tax themselves, discouraging payment of taxes due and disadvantaging brick-and-mortar retailers on cost.

In *Wayfair*, the Supreme Court found in an opinion written by Justice Kennedy that the physical presence rule was an awkward proxy for the types of connections to in-state commerce that could justify a requirement to collect sales tax. Rather than ensure equitable treatment of in-state and out-of-state retailers, as demanded by the Commerce Clause, the Court held that the physical presence rule in fact unconstitutionally tilted the balance against in-state businesses. *Wayfair*, slip op. at 12-13.

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Moreover, the Court found that "when the day-to-day functions of marketing and distribution in the modern economy are considered, it is all the more evident that the physical presence rule is artificial in its entirety." Id. at 14. The Court first pointed out that a brick-and-mortar presence might be trivial in contrast to physical aspects of internet commerce:

> [I]t is not clear why a single employee or a single warehouse should create a substantial nexus while "physical" aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones. Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota. … The dramatic technological and social changes of our increasingly interconnected economy mean that buyers are closer to most major retailers than ever before— regardless of how close or far the nearest storefront. Id. at 15.

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But rather than attempt to salvage the physical presence rule by extending it to the physical aspects of electronic media, a process that the Court described as "likely to embroil courts in technical and arbitrary disputes about what counts as physical presence," id. at 20, it concluded that focusing on physical presence was a mistake in the first place:

> [T]he real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age. … Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.
>
> The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans had Internet access. … Today that number is about 89 percent. … When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller[.]
>
> The Internet's prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled $180 billion. … Last year, e-commerce retail sales alone were estimated at $453.5 billion. …

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> Combined with traditional remote sellers, the total exceeds half a trillion dollars. … Last year, e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace.
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> This expansion has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes. In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. … Now estimates range from $8 to $33 billion. Id. at 18-19.

Accordingly, the Court overruled *Quill*, holding that the physical presence rule was "unsound and incorrect." Id. at 22. It bypassed the argument that lifting the physical presence rule would unfairly tilt the in-state/out-of-state balance against smaller online retailers without the resources to calculate, collect and remit sales taxes, noting that the South Dakota law at issue only imposed a collection requirement on sellers whose business exceeded a statutory threshold and that other doctrines might protect sellers in other circumstances. Id. at 21-22. The Court also suggested that the *Wayfair* decision itself could lead to the development of affordable software solutions for processing sales taxes, which could in the future ameliorate the burden. Id. at 21.

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Justice Kennedy's commentary on the importance of e-commerce in the "Cyber Age" is reminiscent of his comments on the importance of social media to public information and civic discourse in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), despite the fact that in *Packingham* the Court protected public access to the digital sphere while the Court's opinion in *Wayfair* will result in additional burdens on e-commerce. In neither case was Kennedy concerned with the protection of particular online business models; rather, he was focused on the impact of electronic communication and commerce on society as a whole.

In contrast, Chief Justice Roberts (joined by Justices Breyer, Sotomayor, and Kagan) wrote in dissent that the importance of e-commerce to the United States economy and the role of the physical presence rule in the growth of online businesses militated in favor of leaving *Quill* in place. *Wayfair* (Roberts, C.J., dissenting), slip op. at 1. Any tinkering, believed the Chief Justice, should be left to Congress under the theory that the Commerce Clause primarily vests the legislature with the ability to regulate interstate commerce. *Id.* at 7.

Carpenter v. United States

Carpenter dealt with law enforcement techniques used to identify the members of a group responsible for a series of robberies in Michigan and Ohio. One man arrested in connection with robberies in Detroit identified fifteen accomplices; between his confession and further

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investigation into the man's telephone call records, the FBI was able to assemble a collection of telephone numbers associated with potential suspects.

The FBI then obtained court orders under § 2703(d) of the Stored Communications Act directing the wireless carriers associated with those phone numbers to disclose historic cell-site location information ("CSLI") for those accounts. This included information held by MetroPCS and Sprint that was associated with the cell phone of petitioner Timothy Carpenter.

CSLI consists of time-stamped records that are generated when a cellular device connects with a network antenna, and thus reflects the location of the device within the range of a particular antenna at a particular time. These records are generated continuously when a device is powered up regardless of whether the owner of the cellular device is actively using it.

Carpenter involved historic CSLI, i.e., data regarding a cellular user's past movements (in contrast to current CSLI, which tracks a user in real time and might be used to locate a suspect not yet in custody). In total, the FBI obtained 127 days' worth of data comprising 12,898 location points reflecting the movements of Carpenter's cellular device. This data was presented at Carpenter's trial as evidence that he was in the location of four of the robberies at the time they occurred. He was convicted on all but one charge and sentenced to more than 100 years in prison.

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Carpenter appealed his conviction on the basis that the FBI failed to obtain a search warrant before accessing the historic CSLI. Notably, the § 2703(d) orders obtained by the FBI did not require probable cause as per a search warrant; rather, such an order only requires a showing of "specific and articulable facts showing that there are reasons to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Nevertheless, the federal district court, and the Sixth Circuit after it, held that a showing of probable cause was not necessary because the records at issue were not Carpenter's property but that of the wireless carriers. Citing to the Supreme Court's precedents in *Smith v. Maryland*, 442 U.S. 735 (1979) and *U.S. v. Miller*, 425 U.S. 435 (1976), the lower courts held that Carpenter lacked a reasonable expectation of privacy in information that he shared with the third-party carriers.

The Supreme Court, in an opinion written by the Chief Justice, reversed. Acknowledging the ongoing validity of the "third-party doctrine" derived from *Smith* and *Miller*, the Court wrote:

> [T]he fact that the individual [using a cellular device] continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers [per *Smith*] and bank records [per *Miller*], it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes

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> wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.
> We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. *Carpenter*, slip op. at 11.

Critically, the Court tied the existence of an expectation of privacy not to control or ownership of particular property, but to the nature of the information at issue and societal understandings as to when and how the government can access that information:

> Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so for any extended period of time was difficult and costly and therefore rarely undertaken. ... For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.
> Allowing government access to cell-site records contravenes that expectation. ... Mapping a cell phone's location over 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations. ... [C]ell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools.
>
> ...
>
> Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. ... With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers[.] ... Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. ... [P]olice need not even know in advance whether they want to follow a particular individual, or when. Id. at 12-14.

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Accordingly, it rejected the rote application of *Smith* and *Miller* to historic CSLI, stating,

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> The Government's position fails to contend with the seismic shifts in digital technology[.] ... Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. Id. at 15.

The Court also rejected the argument that CSLI is voluntarily disclosed to third parties, thus waiving privacy interests:

> Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society. ... Second, a cell phone logs a cell-site record ... without any affirmative act on the part of the user beyond powering up. ...[I]n no meaningful sense does the user voluntarily assume the risk of turning over a comprehensive dossier of his physical movements. Id. at 17.

Because Carpenter had a reasonable expectation of privacy in his historic CLSI, the Court concluded that in the absence of some other exception the government was required to obtain a warrant before accessing that data; the § 2703(d) order did not satisfy that requirement. Id. at 18 -19. Accordingly, the Court reversed and remanded.

Just as in *Wayfair*, Justice Kennedy and the Chief Justice were on different sides of *Carpenter* – this time with the Chief in the majority and Kennedy writing in dissent (joined by Justices Thomas and Alito). In this case, however, Kennedy rejected the idea that the changes in the nature of available information due to technological advances should affect the Fourth Amendment analysis; rather, he focused on the fact that the that information was in the physical control of third parties:

> Cell-site records ... are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.
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> ...
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> In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains to these cases.

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Carpenter (Kennedy, J., dissenting), slip op. at 2. Kennedy strongly objected to the idea of recognizing Fourth Amendment rights arising from concepts of informational privacy as opposed to concepts of property and physical privacy: "Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no." Id. at 7.

Moreover, while Kennedy did not believe it appropriate to look beyond questions of physical control, he nevertheless challenged the argument that the information contained in historic CSLI was qualitatively more comprehensive than that which could be derived from the bank and telephone records at issue in *Miller* and *Smith*:

> The records at issue here ... revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. ... These records could not reveal where Carpenter lives and works, much less his "familial, political, professional, religious, and sexual associations." ...
>
> By contrast, financial records and telephone records do reveal personal affairs, opinions, habits and associations. ... What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.
>
> ... And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone.

The pas de deux performed by the Chief Justice and Justice Kennedy in *Wayfair* and *Carpenter* is fascinating. Overnight, they apparently swapped positions on whether the impact of advances in communications technology required a departure from previous understandings of constitutional principles tied to the physical world.

Id. at 18-19. Ultimately, he concluded (as the Chief Justice concluded in *Wayfair*) that dealing with the impact of changes in technology should be left to Congress. Id. at 19.

Finding Consistency

The *pas de deux* performed by the Chief Justice and Justice Kennedy in *Wayfair* and *Carpenter* is fascinating. Overnight, they apparently swapped positions on whether the impact

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of advances in communications technology required a departure from previous understandings of constitutional principles tied to the physical world. To understand the reversal, it is important to note the differences in the nature of the questions presented to the Court in the two cases.

In *Wayfair*, the Court was specifically asked to overrule one of its precedents, namely *Quill.* The premise of Kennedy's opinion for the majority was that the reliance on physical presence was flawed and had always been; advances in technology merely cast the problem into sharp relief. Thus, the Court was not called upon to articulate qualitative differences between e-commerce and other kinds of cross-border commerce, or to engage in fine line-drawing exercises as to when the physical presence rule should apply and when it should not.

Compare Kennedy's earlier opinion in *Packingham*, in which he decried a law banning sex offenders from social media as blocking access to the "modern public square." 137 U.S. at 1736 -37. In that case, the invocation of technology was colorful, but the result would likely have been the same had the law barred its target group from speaking in public parks or on sidewalks; indeed, his comments on social media were largely intended to illustrate the ways in which online communication mirrored the role played by traditional public fora. Similarly, in *Wayfair* the nature of e-commerce had little to do with the underlying legal doctrine at stake, which Kennedy viewed as broken from the start; it mattered to the majority's opinion only to the extent that it illustrated why the application of *stare decisis* to *Quill* was inappropriate.

With Justice Kennedy's announcement of his retirement, his particular approach to changes in technology will be less relevant to future cases. The reverse is true of the Chief Justice.

The Chief Justice, however, was concerned that e-commerce was different enough from earlier forms of commerce and important enough for the economy that it should be handled with special care. Thus, he advocated leaving *Quill* alone as a mechanism to foster online marketplaces and letting Congress make such modifications to adapt to technology as it saw fit.

Meanwhile, the Court in *Carpenter* was not asked to overrule *Smith* and *Miller*; rather, it was asked to find an exception to the third-party doctrine for the specific case of historic CSLI. Thus, the Court was faced with the question of whether cellular technology should receive special treatment under the Fourth Amendment. The Chief Justice and the rest of the majority proved willing to draw a line between CSLI and other records subject to the third-party doctrine, largely by introducing concepts of informational privacy that counterbalanced a lack of physical control.

In that sense, the Chief Justice's position in *Carpenter* is not wholly inconsistent with his position in *Wayfair*. In both cases he could see leaving an underlying rule in place (whether the physical presence doctrine or the third-party doctrine) with tailored carve-outs from the underlying rule to deal with technological advances (judicially recognized in the case of *Carpenter*, potentially legislatively created in the case of *Wayfair*).

On the other hand, Justice Kennedy writing in dissent in *Carpenter* argued that a distinction specifically for historic CSLI was flawed based on the depth and breadth of information that the government could obtain from other kinds of records. The cautious manner in which Kennedy

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approached claims about the unique nature of CSLI might seem strange given his broad commentary on social media in *Packingham* or his pronouncements on e-commerce in *Wayfair*. But as discussed above, in *Packingham* he was relying on similarities (not claimed differences) between electronic communication and traditional public fora; and in both *Packingham* and *Wayfair*, his recognition of technological advances did not directly drive his analysis of the substantive legal issue. It was not necessarily inconsistent for Kennedy to take a more skeptical approach to technological change as a basis for special treatment.

That said, it is interesting to note that the fact that Kennedy did not see a meaningful distinction between CSLI and other kinds of records could have led him to argue, as he did in *Wayfair*, that pre-existing doctrine was flawed. If access to bank records, phone records, and CSLI—all of which we have no real choice but to submit to the control of third parties—all provide the government with far-reaching data on the most intimate aspects of our lives, and if the Fourth Amendment takes into account informational privacy concerns as the majority argued, then the logical conclusion is that the third-party doctrine which grants that access is itself fundamentally unsound.

However, the continuing validity of *Smith* and *Miller* was not presented to the Court as an issue. More importantly, Kennedy did not agree that informational privacy presented a legitimate concern under the Fourth Amendment, at least not as articulated by the majority. Instead, he cited the language of the Fourth Amendment itself, "[t]he right of the people to be secure in their persons, houses, papers, and effects," to argue that the Amendment must remain grounded in concepts of property and physical security. *Carpenter* (Kennedy, J., dissenting), slip op. at 9. Thus, he argued that even if the majority's distinction between CSLI and other data was accurate it was nevertheless irrelevant.

Conclusion

With Justice Kennedy's announcement of his retirement, his particular approach to changes in technology will be less relevant to future cases. The reverse is true of the Chief Justice, as he is positioned to take on a new role as the Court's swing vote given the likelihood that any new justice will be farther to the right. *Carpenter* itself might be a preview of that, with the Chief Justice joining the liberal wing of the Court in a 5-4 decision that locks down law enforcement access to a powerful surveillance tool.

Regardless of the politics, however, these two cases present an interesting contrast of judicial approaches to technological change. When is technology a lens to reveal flaws in existing law versus a subject for *sui generis* exceptions? How closely should we examine claims that technology has changed the world, and what are the consequences of finding one way or the other? Understanding how judges approach these questions will assist media counsel to craft persuasive arguments as new technology reveals new legal challenges.

Jeff Hermes is a Deputy Director of MLRC.

Federal Court Applies New York Fair and True Report Privilege to BuzzFeed's Publication of Trump Dossier

By Adam Lazier

A Florida federal court has ruled that BuzzFeed's publication of the controversial "Trump Dossier" may be protected by New York's fair and true report privilege. Gubarev v. BuzzFeed, Inc., Case No. 1:17-cv-60426-UU (S.D. Fla. June 4, 2018). The ruling comes less than a month after a New York state court reached the same conclusion in a different case, *see* "Publication of Trump Dossier May be Protected by Fair Report Privilege" MediaLawLetter (May 2018), but it goes further than the New York decision in important ways.

Background

BuzzFeed faces two pending lawsuits arising out of its January 2017 publication of the Dossier, a series of intelligence reports documenting alleged connections between Russia and the Trump presidential campaign. Last month's article focused on a case in New York state court brought by three Russian businessmen, but there is also a case pending against BuzzFeed and its editor-in-chief Ben Smith in the Southern District of Florida. The plaintiffs in the Florida case are Aleksej Gubarev, a Russian entrepreneur based in Cyprus, and two of his companies, XBT Holding SA and Webzilla, Inc.

A Florida federal court has ruled that BuzzFeed's publication of the controversial "Trump Dossier" may be protected by New York's fair and true report privilege.

They complain about the second-last paragraph of the entire Dossier, which says a source reported that "a company called XBT/Webzilla and its affiliates had been using botnets and porn traffic to transmit viruses, plant bugs, steal data, and conduct 'altering operations' against the Democratic Party leadership," and described Gubarev as a "significant player[] in this operation."

As in the New York case, BuzzFeed raised the fair and true report privilege as a defense, arguing that it entitled to publish the Dossier because it had become the subject of government activity – including an FBI investigation, a briefing of President Obama and President-elect Trump, and Senator John McCain's actions passing the document to the FBI.

The Plaintiffs' Motion for Judgment on the Pleadings

In January 2018, in the midst of discovery, the plaintiffs moved for partial judgment on the pleadings, asking the court to dismiss the fair and true report defense. In a decision released on June 4, Judge Ursula Ungaro refused to dismiss the defense, holding that "the Court cannot

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conclude as a matter of law that [BuzzFeed's] Article is other than a fair and true report of an official proceeding."

Choice of Law

Judge Ungaro began by holding that New York law applied, at least on the question of whether the fair and true report privilege was available**.** Relying on the usual presumption in favor of applying the law of the plaintiff's domicile, the plaintiffs had urged the court to apply Florida law since Webzilla is incorporated there. But Judge Ungaro noted that different considerations applied in multistate defamation cases, where "there is little reason in logic or persuasiveness to say that one state rather than another is the place of injury." Gubarev has no connection to Florida and, while Webzilla and XBT claim to have offices there, both are headquartered elsewhere. And all three plaintiffs seek global damages.

She also suggested that any presumption in favor of applying the law of the plaintiff's domicile might not apply to defenses like the fair and true report privilege, which "[e]xists to protect speakers, not to provide Plaintiffs a remedy." This gave New York – the state where both defendants were domiciled, and where BuzzFeed decided to publish the Dossier – "a strong interest in determining the applicability" of the privilege.

Judge Ungaro began by holding that New York law applied, at least on the question of whether the fair and true report privilege was available.

Application of the Privilege

The first issue in applying the privilege was whether it applied to reports on confidential government activities. Judge Ungaro rejected the plaintiffs' argument that it only applied to reports on public activities, holding that New York's fair and true report privilege "should be broadly interpreted to apply to any official action." Citing cases holding that that the privilege is intended to allow people to "monitor the conduct of [the] government," she wrote that "[a]pplying the privilege to classified intelligence briefings accords with both the purpose of the privilege and New York case law." She therefore held that reports on both "[a] confidential briefing to the President and the President-elect by the four most senior intelligence directors in the country" and an FBI investigation into the Dossier were subject to the privilege.

The privilege also requires that the defendant's report describe the official actions to readers, and the plaintiffs argued that the privilege could not help BuzzFeed because its article did not give enough information about official activities involving the Dpssoer. Although BuzzFeed's article linked to a CNN article that described the official activity in greater detail, the plaintiffs argued that this hyperlink was not enough.

The Nevada Supreme Court decided last fall that, at least as a matter of Nevada law, a defendant could rely on hyperlinked documents to establish the privilege. *See Adelson v. Harris*, 402 P.3d 665 (Nev. 2017). Although that case attracted a great deal of attention, until

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now no other courts had squarely addressed the issue. Judge Ungaro agreed that *Adelson*'s acceptance of hyperlinks "is aligned with modern journalistic principles and the way information in consumed in the digital age." This meant that BuzzFeed's hyperlink to the CNN article could support the privilege – according to Judge Ungaro, "when BuzzFeed published the Dossier, it explained (via the hyperlink) that the Dossier was the subject of official actions in the form of classified briefings by four intelligence directors to the President and President-elect, and an FBI investigation."

Finally, Judge Ungaro rejected the plaintiffs' argument that the privilege did not apply because BuzzFeed could not tie the official activity to the specific allegations about them in the Dossier. She noted that the Dossier's claims about the plaintiffs were in fact part of its report on co-ordination between Russia and the Trump campaign – exactly what BuzzFeed and CNN said were at the heart of the investigation and briefings. But in any event, she held, "it would undermine the privilege to require that one who reports on official action tie every specific allegation in the report to a specific instance of official action."

Looking Ahead

Judge Ungaro concluded her decision by noting that it did not dispose of the case: "At this stage, the Court takes as true that the official actions described in the CNN article (the classified briefings and FBI investigation) actually occurred. If discovery reveals that they did not, then there was, in fact, no official action" and the privilege would not apply.

It is therefore one thing to accept in principle that the fair and true report privilege applies to confidential government activities; it is quite another to apply it in practice, where that very confidentiality can stand in the way of discovery. In late June 2017, BuzzFeed issued subpoenas to the government agencies and directors involved in the alleged briefings and investigations, seeking admissible evidence proving the existence of the official activities at issue. The government resisted the subpoenas, and last September BuzzFeed brought a motion to compel in DC federal court. That motion remains pending.

But unlike most confidential government activity, the investigation and briefings at issue in this case have been extensively documented in public for the last eighteen months through congressional testimony, public statements and media interviews from the people involved, and now even memoirs from central figures like James Comey and James Clapper. The President has even declassified congressional memoranda describing the role of the dossier in the government's investigation into the Trump campaign. At a hearing in the motion to compel shortly after he did so, the court noted that "this isn't the ordinary case" and said that the government's reliance on confidentiality is "going to be a hard sell, given what the President has done. He has now agreed to declassify an entire national security investigation, right?"

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

Fourth Circuit Affirms Directed Verdict for TV Station

Opinion Offers Guidance on Public Official Status; Protection for Confidential Sources

By Conrad M. Shumadine and Brett A. Spain

The Fourth Circuit's opinion in Horne v. WTVR, 2018 WL3014903 (4th Cir. June 18, 2018) contains an excellent discussion of the requirements necessary to prove actual malice and a clear affirmation of a reporter's ability to protect a confidential source. Unfortunately, the Fourth Circuit did not address the question whether the broadcast was protected by the fair report privilege.

The broadcast concerned the fact that a Virginia school system had hired and then fired a felon in violation of Virginia law. Virginia law prohibits any school system from hiring a felon for any position of any kind. The law had been in effect for almost 20 years.

The factual background was largely undisputed. Wayne Covil, WTVR's reporter, received a tip from a long-standing, confidential source that an unidentified employee had been hired by the Prince George County school system in spite of a felony conviction. The employee had been fired. Based on the tip, Mr. Covil contacted the Superintendent of the school system with whom he had a long-standing relationship. It was undisputed that the Superintendent was the official spokesperson for the school system. The Superintendent advised that he could not comment about the specific hiring and firing because it was a personnel matter, but that he would discuss the hiring process.

WTVR's reporter, received a tip from a long-standing, confidential source that an unidentified employee had been hired by the Prince George County school system in spite of a felony conviction.

Mr. Covil arranged an on-camera interview. The Superintendent said that the hiring process was governed by Virginia law and provided Mr. Covil with a copy of a Deskbook containing the laws of Virginia relating to school systems. He specifically reviewed the relevant statute with Mr. Covil. He said that a background check occurred after the application had been received and that the results often are not received until after a person has been hired. He also said that having a felony was a disqualifying factor. He provided Mr. Covil with an old copy of the Deskbook which Mr. Covil utilized on air in the broadcast.

Mr. Covil referenced the statutory requirement that to obtain a job in a Virginia school system, an applicant must certify that he or she has never been convicted of a felony and that any false certification was a Class 1 misdemeanor. Plaintiff claimed that this reference to the statute created an inference that she had falsely certified when in fact she had revealed the fact of her felony conviction to the Superintendent. Discovery revealed, and the Superintendent conceded, that Plaintiff had, in fact, disclosed and explained her felony conviction in her application.

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The Superintendent never suggested in the interview that he had been aware of the felony conviction at the time of the hiring. He discussed the background check requirements on camera. In his trial testimony, he acknowledged that a background check would be irrelevant if he knew of the felony because there would be no reason to proceed since a felon could never be hired.

Plaintiff's name, position and felony conviction for conspiracy to distribute methamphetamine were not mentioned in the broadcast. Plaintiff did not ask for a correction and, in fact, waited almost a year to file suit. Plaintiff claimed that anyone who knew her would have been aware that she was referenced. Plaintiff admitted that since personnel records were confidential, she was the only person who could have told Mr. Covil that she did reveal her felony conviction

WTVR filed a motion to dismiss on, among other grounds, the argument that the broadcast was protected by the fair report privilege. The trial court denied the Motion to Dismiss saying that discovery would illuminate the issues. The parties then conducted extensive discovery. The station then moved for summary judgment on the ground that the broadcast did not contain the inference claimed by Plaintiff, was an otherwise accurate account of what the reporter was told, was protected by the fair report privilege and that Plaintiff could not establish actual malice by clear and convincing evidence.

The trial court held that the Plaintiff's apparent authority was sufficient to generate public interest and made her a public official.

The trial court denied the motion for summary judgment, finding that the broadcast could be understood to convey the defamatory implication alleged by Plaintiff and that by using a graphic that a felon had been hired and then fired, the station exceeded the scope of the report and prevented the fair report privilege from being applied.

During the deposition of the reporter, the reporter testified about the tip he had received from a confidential source but refused to identify the source. Plaintiff moved to compel the identity of the source. The reporter testified that the only information received from the source was the fact that a felon had been hired and fired and that information was completely true.

The trial court ruled that the law recognizes a privilege for confidential sources, that this source was confidential, and that Plaintiff had produced no information that would justify revealing the name of the source. There was no indication that the source had any knowledge of whether Plaintiff had revealed her felony conviction prior to the time she was hired. The court expressly rejected Plaintiff's argument that she had established a compelling interest in the identity of the source given that WTVR was arguing that Plaintiff was a public official and public figure and that the actual malice standard applied.

Prior to trial, WTVR moved that Plaintiff be declared a public official and a public figure. As Director of Budget and Finance, Plaintiff was the chief financial officer of the school system dealing with a budget of more than $50 million. The trial court held that the Plaintiff's apparent authority was sufficient to generate public interest and made her a public official. The trial court did not address the question whether Plaintiff's actual authority was sufficient to make her

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a public official and did not address the question whether by becoming involved in a controversy involving her hiring and firing, Plaintiff became a public figure.

Defamation Trial

The court bifurcated the liability and damage portion of the trial and ruled that during the liability portion Plaintiff's conviction of conspiracy with intent to distribute methamphetamine could not be utilized. The court did, however, instruct the jury that the station was in no way responsible for Plaintiff's firing and that any damages associated with that could not be recovered.

At trial, Plaintiff admitted that every statement in the broadcast was accurate, that the information had come from the Superintendent of schools, and that the Superintendent was the best source for any information about the school system. Plaintiff called as witnesses the reporter, the news director, and a producer at the station. All said they did not know that Plaintiff had accurately reported her felony conviction to the school system. Each said that it would have been a better broadcast if they had known the fact that a Superintendent of a public school system had knowingly hired a felon in violation of Virginia law.

Plaintiff rested and the station moved for judgment under Rule 50, and the trial court granted the motion holding there was no evidence of constitutional actual malice. Plaintiff appealed and WTVR cross-appealed, asserting that the trial court erred in rejecting the fair report privilege.

The opinion's clear recognition that the confidential source privilege applied to the facts of this case is helpful.

Appeal to Fourth Circuit

On appeal, Plaintiff continued to assert that identification of the confidential source was necessary because the source might have information that would have indicated that the reporter should have known that Plaintiff had revealed the felony conviction. Plaintiff never explained why any reporter would have ignored that information. In the Fourth Circuit's opinion, the court observed that it would be unusual for a reporter to ignore information that would allow a better and more newsworthy broadcast than the broadcast being prepared.

The opinion's clear recognition that the confidential source privilege applied to the facts of this case is helpful. The testimony established that the source had over the years provided information relating to events occurring in the county that would otherwise not be known to WTVR, which allowed WTVR to provide better coverage of the county. Had the source's name been revealed, the source would have been subject to retaliation from those whose misdeeds had been identified.

The trial court's and the Fourth Circuit's recognition that the public official status applies to anyone who appears to the public to have substantial responsibility for the control of governmental affairs without regard to whether there is any proof that the official's

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responsibilities actually justify such an interest is significant. It has, of course, been clear law that the "public official" designation applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966). But many cases involve a detailed analysis of the official's actual responsibilities and duties to make the determination whether the official is a public official for purposes of defamation law when such an analysis is unnecessary in light of the official's apparent authority.

Recognizing that it had infrequently faced the issue of when apparent substantial responsibility makes an official a public official for defamation purposes, the Fourth Circuit carefully supplemented its opinion to provide guidance to lower courts in making this determination**.** The opinion references prior decisions within the Fourth Circuit and elsewhere and articulates how to determine when an official's apparent responsibility is sufficient to make the official a public official for defamation purposes. The opinion should be a starting point for the analysis of public official status in the Fourth Circuit.

The opinion references prior decisions within the Fourth Circuit and elsewhere and articulates how to determine when an official's apparent responsibility is sufficient to make the official a public official for defamation purposes.

In light of the fact that the trial court was plainly correct in granting the Rule 50 motion, it is understandable that the Fourth Circuit did not address the fair report privilege. This is, however, still regrettable. If ever there was a case where the fair report privilege should have applied it would be a case where the plaintiff admitted that every statement in the broadcast true, every statement came from the official spokesperson for the government, and that the official spokesperson was the best person to ask about the information. WTVR argued vigorously that it would be rare for any government spokesperson to admit fault and that a holding that a trial was necessary in a situation where there was no showing of anything other than accurately reporting what the official spokesperson said raised First Amendment concerns of the highest order.

The *in terrorem* effect of these types of lawsuits should not be underestimated. The local newspaper which had prepared a similar story opted to enter into a confidential settlement with Plaintiff. It is hard to criticize that decision if it is necessary to go through a full-blown trial to obtain vindication. We also note that Plaintiff generated a great deal of sympathy because she did nothing wrong except rely upon the fact that the Superintendent should have known the law. But WTVR felt it was important to stand behind its reporter when he acted in a way that was totally appropriate, and this is commendable.

City Hearing Officer a Public Official

Plaintiff Has Responsibility and Control Over Conduct of Governmental Affairs

By Martin R. Esquivel

Ruling in favor of a local television station, the New Mexico Court of Appeals held that a city-employed administrative hearing officer is a public official for purposes of a defamation claim. Reina v. Lin Television Corp, d/b/a KRQE and Larry Barker A-1-CA-36351 (N.M. Ct. App., June 4, 2018).

Background

The plaintiff, Anita Reina, worked as an administrative hearing officer for the City of Albuquerque, pursuant to a city ordinance. She also worked part-time as a judge for a tribal court. Questions over the time she was spending on her second job during her working hours with the City caught the attention of a local TV station and CBS affiliate, KRQE News. The station aired a report about plaintiff, in which plaintiff was purportedly referred to as "The Cheating Judge." Plaintiff sued KRQE and its reporter for defamation based on this and other statements regarding her performance of her work as a hearing officer.

KRQE moved for summary judgment, claiming (1) Plaintiff was a public official; (2) the matter reported was true; and (3) Plaintiff could not meet her burden of proof, which required her to establish that the defendants acted with actual malice. The district court concluded that plaintiff was not a public official as a matter of law, but stated that it lacked guidance in New Mexico's case law for this determination. Upon request of KRQE, the district court certified its order determining that plaintiff was not a public official for interlocutory review, which was granted by the state Court of Appeals.

The "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Court of Appeals Decision

In a unanimous decision, the three-judge panel for the Court of Appeals reversed the district court's holding and found that plaintiff was a public official for defamation purposes. The Court applied the test for public officials first set forth in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) and adopted in New Mexico in *Furgason v. Clausen*, 1989-NMCA-084, ¶ 26, 109 N.M. 331, 785 P.2d 242, which states that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs employees

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who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

In applying this test, the court focused in detail on the plaintiff's job duties. Among the factors it considered were that 1) plaintiff was appointed by the state district court, pursuant to ordinance; 2) she worked for an independent hearing office, adjudicating disputes over city ordinances, which are governmental affairs, and as such the position carried with it such weight and responsibility that the city council undertook specific measures to ensure fair and impartial hearings to ensure public confidence in the proceedings; and 3) plaintiff was required to preside over hearings and to make decisions in areas of public importance such as land use, zoning, liquor licenses, and personnel matters.

The Court determined that the number of hearings, the breadth of the subject matter of the hearings, and the attendance of and participation by the public in these hearings bolstered the importance of plaintiff's position such that the public had an interest in her qualifications and performance of the work, and evinced plaintiff's responsibility for and control over the conduct of governmental affairs. The Court rejected plaintiff's arguments that hearing officers cannot be considered public officials because they are unelected, and because a New Mexico statute defined "public official" (in another context) as a person elected to an office in an election covered by the state campaign reporting act.

Martin R. Esquivel, Esquivel & Howington, LLC, of Albuquerque, N.M. represented KRQE and its reporter.

Judge Tosses Libel Suit Based on Environmental Activists' Facebook Post

By Steve Zansberg

On June 20, 2018, a Colorado state court trial judge granted summary judgment to defendant Pete Kolbenschlag in a libel case filed against him by a Texas oil and gas company (SG Interests, or "SGI") on grounds that Kolbenschlag's Facebook post - stating the company was "fined" for colluding with another company to rig bids on oil leases - was substantially true. SG Interests I Ltd v. Kolbenschlag.

Oil Company SLAPPS an Outspoken Critic

Kolbenschlag is a professional community organizer and environmental activist in Paonia, Colorado (pop. 1425) on Colorado's Western Slope. He posted his comment on the website of *Glenwood Springs Post Gazette* in response to a November 2016 news article reporting that the Bureau of Land Management had cancelled leases for oil exploration on BLM lands that had been let to SGI. The article quoted a spokesperson for SGI declaring that the company planned to sue BLM over the decision, citing "evidence of collusion between the Obama administration and environmental interests to reach a 'predetermined political decision.'"

Kolbenschlag's reader comment, posted below the news article, stated: "While SGI alleges 'collusion' let us recall that it, SGI was actually fined for colluding (with Gunnison Energy Corporation) to rig bid prices and rip off American taxpayers. Yes, these two companies owned by billionaires thought it appropriate to pad their portfolios at the expense of you and I and every other hard-working American."

SGI claimed Kolbenschlag's reader comment defamed the company by falsely insinuating that SGI had illegally rigged bids.

The reader comment quoted from a September 2012 press release of the U.S. Department of Justice's Anti-Trust Division, announcing the filing of its federal lawsuit against SGI and the other oil company for having "entered into a written agreement under which they agreed that only SGI would bid at the [BLM oil lease] auctions and then assign an interest in the acquired leases to GEC." The DOJ's press release confirmed, "As a result of the agreement between GEC and SGI, the United States received less revenue from the sale of the four leases than it would have had SGI and GEC competed at the auctions."

In its complaint, SGI claimed Kolbenschlag's reader comment defamed the company by falsely insinuating that SGI had illegally rigged bids, and that it had been found to have engaged in unlawful action for which it had been "fined." In truth, SGI said, it had voluntarily agreed to settle the DOJ's anti-trust case, paying $275,000 in civil damages and it had expressly denied any wrongdoing or liability.

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Activist Fights Back Against the SLAPP Action

As a professional public advocate, Kolbenschlag responded to the suit by launching a GoFundMe campaign (great video) to raise defense funds to fight the suit and to call attention to the SLAPP. That online campaign raised $24K in one week.

Keeping with this theme, Kolbenschlag's motion to dismiss began: "This lawsuit is a classic, textbook example of a 'SLAPP' action – the Plaintiff, a large Texas-based oil company, pleads a single libel claim against an outspoken critic of that company, in a transparent attempt to silence him, and other concerned citizens."

Colorado does not have an anti-SLAPP statute. However, the filing of a motion to dismiss under Rule 12 automatically bars any discovery, and if the motion is granted the defendant is legally entitled to an award of his/her attorney's fees. Kolbenschlag filed a motion to dismiss the single libel claim on alternative grounds that his challenged publication was substantially true (as shown by filed pleadings in the federal court anti-trust action, of which the court could take judicial notice), and, alternatively, inadequate pleading of actual malice (that is required in Colorado on any matter of public interest or concern).

Judge Steven Schultz declined to take judicial notice of the federal court pleadings, and instead converted the motion to one for summary judgment, setting an expedited briefing schedule for the parties to submit any additional evidence. In response, Kolbenschlag limited his motion exclusively to the issue of substantial truth (to avoid all actual malice discovery) and he did not submit any supplemental evidence, beyond the previously-filed federal court pleadings, as the grounds for his motion.

Kolbenschlag responded to the suit by launching a GoFundMe campaign to raise defense funds to fight the suit and to call attention to the SLAPP.

Further demonstrating its transparent effort to harass Kolbenschlag, SGI sought leave to take his deposition, first on the withdrawn issue of actual malice, and then on the issue of substantial truth. The judge denied SGI's efforts to take discovery.

Truth May Hurt, But It Isn't Actionable

In a thorough, 21-page opinion, Judge Schultz granted Kolbenschlag's motion for summary judgement on grounds that his posting was substantially true.

Relying exclusively on the federal court pleadings on file in the DOJ's anti-trust case, judge Schultz determined that the U.S. government had proven, conclusively, that SGI and another oil company had, in fact, entered into a written agreement by which the two companies agreed, in secret, to submit joint bids at the BLM oil lease auction and to thereafter split 50/50 the revenues from such extraction. To maintain the false impression that they were competitors, each company sent its own representative to BLM's bid unsealing event.

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SGI obtained one lease through this fraudulent process for $2 per acre, the minimum permissible bid price. SGI's vice president conceded in an earlier deposition that the purpose of the joint bidding scheme was to save money by avoiding higher fees that would have resulted from competitive bidding. In rejecting the original settlement proposal from SGI and DOJ, the federal judge found the amount of monies SGI had agreed to pay was too small to have the "deterrence effect" necessary to dissuade others in the industry from engaging in such unlawful bid-rigging. Ultimately, SGI agreed to pay twice the original proposed settlement amount, which the federal judge approved.

Rejecting SGI's argument that labeling its settlement payment a "fine" was materially false, the court stated, "the term 'fine' is commonly defined as 'a sum imposed as punishment for an offense; or 'a forfeiture or penalty paid to an injured party in a civil action.' . . .The Court is aware that SGI settled the cases by paying a specific sum without admitting liability. That is a common practice for companies for a variety of reason. The Court just does not find that the distinction between paying a settlement and paying a fine is of sufficient difference to the average reader to support a defamation action on those grounds."

Moreover, the judge questioned SGI's motivation for suing Kolbenschlag for use of that term. The judge noted that five years earlier, when the government's anti-trust case against SGI was resolved, numerous press outlets, industry blogs, and law firm commentators had described SGI's payment as a fine, yet "the Plaintiff never brought any defamation actions against [any of] those entities."

Recognizing that Colorado law requires that a statement must be "materially false," not merely less than100% accurate, to be actionable in libel, regardless of the means of communication, the court particularized its discussion to the facts of the case:

"The Court just does not find that the distinction between paying a settlement and paying a fine is of sufficient difference to the average reader to support a defamation action on those grounds."

> The Court would also note that the Plaintiff disregards the full context of the Defendant's statement. It was made in the comments section of a newspaper article. It was not part of any official publication, nor was it even subject to the same journalistic standards as the information in the article above [it]. It was a comment by a member of the public to other members of the public on the equivalent of a chat board about a matter of newsworthy interest. To hold it to the exacting standards that the Plaintiff is proposing would not only be unwarranted, but would be chilling to protected speech.

In addition, the Court ruled that Kolbenschlag's technical legal error in describing SGI's payment as a "fine" did not cause reasonable people to "think significantly less favorably about the plaintiff than they would if they knew the truth." Reviewing all the facts as set forth in the anti-trust action papers, the court concluded **"**the accurate facts in the federal actions are far

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more damaging to SGI's reputation than the vague commentary made by the Defendant in his newspaper posting."

Because SGI had failed to show, by the requisite clear and convincing evidence, that Kolbenschlag's posting was "materially false," the court granted his motion for summary judgment. The court again formerly denied SGI's motion seeking to take Kolbenschlag's deposition on the issue of material falsity, because he was not a competent witness to offer testimony about SGI's collusive agreement in 2005 or the 2012 U.S. DOJ anti-trust action.

Fees and Possible Appeal to Be Determined

Kolbenschlag will be filing a motion seeking an award of his attorney's fees under the "groundless, frivolous, or vexatious" discretionary standard, which will note that the court's ruling on his converted motion for summary judgment was premised exclusively on the exhibits he had filed in support of his motion to dismiss. SGI has not yet determined if it will appeal the trial court's ruling dismissing its libel suit.

Steve Zansberg, Ballard Spahr LLP, Denver, CO, represented Kolbenschlag. SGI was represented by William E. Zimsky of Abadie & Schill, PC, in Durango, CO.

Colorado Supreme Court Holds There Is No Constitutional Protection for Public Access to Court Records

By Steve Zansberg

In a stunning ruling that has attracted widespread criticism, on June 21, 2018, the Colorado Supreme Court held that the First Amendment provides no protection for the public's right to inspect or copy records on file in state courts. People v. Owens.

The ruling came in a completed capital murder case. Owens is one of three convicts on Colorado's death row. The sealed records at issue are four documents that address serious and confirmed allegations of prosecutorial misconduct.

Owens was convicted in two separate trials of three murders. The second murder victim was a witness scheduled to testify against Owens at his first murder trial. Because the first murder was a gang-related killing and the second one was of a trial witness (and the witness' fiancé), the vast bulk of the court file is sealed.

After his second murder conviction, Owens moved to disqualify the prosecutor's office from his case on grounds of prosecutorial misconduct and conflict of interest. In a 1500+ page ruling, a newly appointed trial judge found multiple instances of prosecutorial misconduct (including the DA's withholding of evidence from Owens' defense team that could have been used to impeach prosecution witnesses). However, the judge found none of those misdeeds were sufficiently prejudicial to Owens' defense to warrant reversing the jury's verdict or the death sentence.

The only reason cited in the order for withholding the judicial records above was "countervailing interests," but none were identified.

No Explanation For Continued Sealing

The *Colorado Independent*, an online news organization that covers the criminal justice system, among other beats, asked the trial court to unseal:

1. Owens' Motion to Disqualify the District Attorney and appoint a special prosecutor;
2. the People's Response;
3. the transcript of the hearing conducted behind closed doors on that motion; and
4. the court's ruling (order) denying Owens' motion.

After briefing was completed, the trial court issued a cursory, 2-page order unsealing only the portions of Owen's disqualification motion that recited his factual allegations of prosecutorial misconduct. The court, without citing a single judicial precedent or any other source of law, denied unsealing of the legal arguments in Owens' disqualification motion, the People's Response to that motion (including exhibits), the hearing transcript, and the court's

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order denying Owens' disqualification motion. The only reason cited in the order for withholding the judicial records above was "countervailing interests," but none were identified.

Petition for Discretionary Emergency Review Granted

The *Colorado Independent* filed an emergency petition for an extraordinary writ to the Colorado Supreme Court, urging it to order the trial court to enter record findings that satisfy the standards set forth in the two *Press Enterprise* cases (*Press-Enterprise Co. v. Superior Ct.,* 478 U.S. 1 (1986) & 464 U.S. 501 (1984)) in which the U.S. Supreme Court recognized a qualified First Amendment right of the public to attend judicial proceedings for which there is both a "tradition" and "logic" of public access.

The petition pointed to a 1966 Colorado Supreme Court case in which a newspaper had challenged the constitutionality of a state statute that restricted "the right" of access to pleadings on file in state court only to the parties to a case and their attorneys. Colorado's Supreme Court held that the statute must be interpreted to permit access to the newspaper because a contrary interpretation (imposing an absolute bar on public access) "would raise serious constitutional questions regarding freedom of the press. . ." Subsequently, Colorado's Supreme Court described its holding in that 1966 case as the court's having applied "the constitutional interpretation" of the statute.

The Colorado Independent filed an emergency petition for an extraordinary writ to the Colorado Supreme Court.

Colorado's Supreme Court granted the *Colorado Independent*'s petition and set a briefing schedule on its "Rule to Show Cause," ordering the District Court to explain why the emergency writ requested by the *Colorado Independent* should not be granted.

Colorado Supreme Court Ruling

On June 21, 2018 the Colorado Supreme Court issued a 5-page ruling in which it categorically rejected the proposition that the First Amendment (or the more expansive free speech provision of the Colorado Constitution) provides any protection for the public to access judicial records.

> The *Colorado Independent* contends that the federal and state constitutions grant a presumptive right of access to documents filed in criminal cases. While presumptive access to judicial *proceedings* is a right recognized under both the state and federal constitutions, neither the United States Supreme Court nor this court has ever held that records filed with a court are treated the same way. We decline to conclude here that such unfettered access to criminal justice records is guaranteed by either the First Amendment or Article II, section 10 of the Colorado Constitution.

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Misconstruing the nature of the relief sought in the Petition, the Court wrote "We find no support in United States Supreme Court jurisprudence for Petitioner's contention that the First Amendment provides the public with a constitutional right of access to any and all court records in cases involving matters of public concern." Repudiating its own prior rulings, the Court continued, "Moreover, we have never recognized any such constitutional right—whether under the First Amendment or Article II, section 10 of the Colorado Constitution."

Thus, in short order, and without providing any explanation for rejecting its own prior precedents, the Colorado Supreme Court discharged its Rule to Show Cause and affirmed the trial court's order keeping the four judicial records at issue under seal.

On June 21, 2018, the *Colorado Independent* filed a Petition for Rehearing to the Colorado Supreme Court, in which it pointed out that in both *Press-Enterprise* cases, the United States Supreme Court held that the trial court's denial of access to the entire transcripts of closed judicial proceedings independently violated the First Amendment. The Petition for Rehearing also notes that all eleven of the twelve federal courts of appeal that have resolved the issue have recognized a qualified right, arising under the First Amendment, of the public to inspect judicial records in criminal cases.

On July 2, 2018, the Colorado Supreme Court denied the Petition for Rehearing. The *Colorado Independent* is considering filing a petition for certiorari to the United States Supreme Court.

Steve Zansberg and Greg Szewczyk of Ballard Spahr's Denver office represent the Colorado Independent. Matthew Grove of the Colorado Attorney General's Office in Denver represents the Arapahoe County District Court.

Georgia Court Confirms Government Discretion to Release Records Exempted from Open Records Act

By Meredith Kincaid

> "Owners of vehicles that are exempt from emissions testing requirements are not prohibited from testing their vehicles' emissions. If a teacher tells his students that an extra credit assignment is not required, a student who completes the work would be quite annoyed if the teacher rejected it as prohibited. And a daughter surprising her father with a birthday visit after he had told her that a visit was not required would be rather confused if she found the door barred by her angry father shouting that she should have understood that her visit was prohibited."
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> *Campaign for Accountability v. Consumer Credit Research Found.*, No. S17G1676, 2018 WL 3014283, at *3 (Ga. June 18, 2018)

In November 2013, the Consumer Credit Research Foundation ("CCRF") commissioned Kennesaw State University ("KSU") to study the effects of payday loans on the financial health of consumers. As part of this project, the KSU professor conducting the research signed a confidentiality agreement with CCRF agreeing not to disclose any information "relating in any manner to CCRF or CCRF's contributing sponsors."

With this opinion, the Supreme Court removed any doubt that Georgia's Open Records Act operates as practitioners have long assumed and similarly to how the vast majority of other states' open records statutes operate.

After the professor published her findings, watchdog group Campaign for Accountability filed a request under the Georgia Open Records Act seeking all correspondence between the KSU professor and a number of organizations and individuals, including CCRF. After KSU notified CCRF that it intended to disclose the requested records, CCRF filed a lawsuit against the Board of Regents of the University System of Georgia ("the Board") seeking a declaratory judgment that the records requested fall within an exemption to the Open Records Act and a permanent injunction prohibiting disclosure, because the records fell within one of the general Open Records Act exemptions.

Without deciding whether the requested records actually were exempted from disclosure, the superior court held that the Board could choose to disclose the requested records even if disclosure was not required by the Open Records Act. The Georgia Court of Appeals then vacated that order, relying on a broad reading of Georgia Supreme Court precedent to hold that all records exempted under the Open Records Act are prohibited from disclosure.

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In a June 18, 2018 unanimous decision, the Georgia Supreme Court reversed the Court of Appeals, holding that "the Court of Appeals erred in holding that all records that are exempted from the Open Records Act's general disclosure requirement [ ] are prohibited from disclosure to the public." Although some Open Records Act exemptions specifically state that the documents in question cannot be disclosed, the vast majority of exemptions begin simply:

"Public disclosure *shall not be required* for records that are: [over 50 enumerated exemptions]." O.C.G.A. § 50-18-72 (a) (emphasis added). The Supreme Court explained, "read naturally and reasonably, O.C.G.A. §§ 50-18-71(a) and 50-18-72(a) do not prohibit disclosure of records simply because those records are not required to be disclosed by a specific exemption from the ORA's general disclosure duty." *Campaign for Accountability*, 2018 WL 3014283, at *3. In addition to rejecting CCRF's contrary statutory interpretation and surplusage arguments, the Supreme Court clarified that a narrower reading is necessary for the precedent that the Court of Appeals relied on.

The Supreme Court also explained that, if "every public record covered by an exemption listed in OCGA § 50-18-72 (a) were prohibited from disclosure, then many government agencies have been blatantly and routinely violating the ORA for years without any apparent concern." *Campaign for Accountability*, 2018 WL 3014283, at *6. "For example, in an effort to obtain the public's assistance in identifying and apprehending criminals, Georgia's law enforcement agencies regularly disclose sketches of and other information about suspects in ongoing investigations, even though § 50-18-72 (a) (4) exempts from ORA's disclosure requirement '[r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports.'" *Id.* Similarly, "[a]gencies announce public birthday congratulations to employees, even though subsection (a) (21) exempts from ORA's disclosure requirement '[r]ecords concerning public employees that reveal the public employee's . . . day and month of birth.'" *Id.* "And public universities commonly release names and other information about donors, even though subsection (a) (29) does not require the disclosure of 'records maintained by public postsecondary educational institutions . . . that contain personal information concerning donors or potential donors to such institutions or foundations.'" *Id.* CCRF did not identify any case in which a party complained about, much less obtained relief for, discretionary disclosures of this type.

Presumably to avoid these absurd results, CCRF took the remarkable position of arguing that a governmental agency could release information otherwise exempted from the Open Records Act, *as long as the release was not made in response to an Open Records Act request.* The Court rejected this untenable view, observing that, "it appears that the interpretation of the Open Records Act that CCRF claims we must continue to follow to keep the heavens from falling has never *actually* been followed." *Campaign for Accountability*, 2018 WL 3014283, at *6; *see also* Feb. 5, 2018 Oral Arg. at 34:30 (Blackwell, J.) ("[I]f that's what the law means, it is the dumbest law I have ever heard of."). The Court expressed no opinion on whether a governmental entity can contract away its discretion to release records that the Open Records Act does not oblige it to release.

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With this opinion, the Supreme Court removed any doubt that Georgia's Open Records Act operates as practitioners have long assumed and similarly to how the vast majority of other states' open records statutes operate: as long as there is no independent basis for prohibiting disclosure of the records, a governmental agency is not prohibited from disclosing records that fall within a general exemption to the Open Records Act.

Henry Chalmers and Megan Mitchell of Arnall Golden Gregory LLP represented the Campaign for Accountability. Attorney General Chris Carr, Jennifer Colangelo, Russ Willard and Annette Cowart of the Georgia Department of Law represented the Board of Regents. Thurbert Baker, Nathan Garroway and Mark Silver of Dentons US LLP represented the Consumer Credit Research Foundation.

Peter Canfield, Jason Burnette, Alex Potapov and Meredith Kincaid of Jones Day represented amici Reporters Committee for Freedom of the Press, Georgia Press Association, Georgia First Amendment Foundation and the Atlanta Journal-Constitution.

MLRC Criminal Law Committee

The MLRC's newest Committee is off and running! The MLRC recently announced the formation the Criminal Law Committee, which will address the growing intersections between criminal and media law, from protecting journalists and sources from criminal liability to navigating search warrants and government subpoenas. Kaitlin Gurney of Pepper Hamilton and Jacquelyn Schell of Ballard Spahr will co-chair the Committee and expect to begin with quarterly, topic-focused calls and consider publications or additional projects as the Committee develops.

At the Kick-Off webinar, held on June 12, 2018 three experienced panelists offered their advice about how to train and protect journalists reporting on protests, active crime scenes, and developing emergency situations. Drew Shenkman, senior counsel for CNN, Mickey Osterreicher, general counsel for the National Press Photographers Association, and Richard Zack, a former Assistant U.S. Attorney with Pepper Hamilton's White Collar Litigation and Investigations practice group offered practical guidance on preparing reporters to avoid conflicts with police and best practices for lawyers in the event of arrest. For those who were unable to attend, the webinar is available on the Pepper Hamilton website.

Topics the Committee expects to address in the next year include:

- Espionage Act/Threats to Sources & Leaks – August 2018.
- Search Warrants, Subpoenas, & Other Government Information Requests – How do the risks, responses, and defenses to criminal, grand jury, and other government subpoenas differ from standard civil practice when media entities are involved? Date TBD.
- FOSTA & Criminal Carve-Outs to the CDA – What does the new law do and how has it played out in its first few months? Date TBD,

To sign up for the committee, please email Liz Zimmerman, lzimmermann@medialaw.org.

If you have questions or suggestions for future topics, feel free to reach out to Kaitlin at GurneyK@pepperlaw.com, or Jacquelyn at SchellJ@ballardspahr.com.

10 Questions to a Media Lawyer: Dale Cohen

Dale Cohen is Director of the Documentary Film Legal Clinic at UCLA's School of Law and Special Counsel at PBS's FRONTLINE documentary series.

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

I grew up in New York, a great newspaper city. Like so many others, I held a romantic view of journalism: Woodward and Bernstein, Tom Wolfe, Pete Hamill, Jimmy Breslin, Hunter Thompson. But EVERYONE told me I was born to be a lawyer due to my habit of questioning authority. While I was in j-school, one of my profs suggested I would make a fine media lawyer. (I still believe this was his polite feedback on my writing skills.) The idea clicked. Law school followed, and I sought a job at a firm with media clients. Fortunately, I landed at a boutique firm in Chicago, Reuben & Proctor, counsel for Tribune Company and many other media companies.

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

As counsel for FRONTLINE and Founder/Director of the Documentary Film Legal Clinic at UCLA's School of Law, I fill several different roles. The common denominator is the opportunity I share with my colleagues, students and clients to learn about the world, the media and the impact of the law on our collective work. Helping journalists and filmmakers tell important stories to their audiences is clearly the best part of the job. Great journalism in all its forms makes an impact and it is very satisfying to help make it happen.

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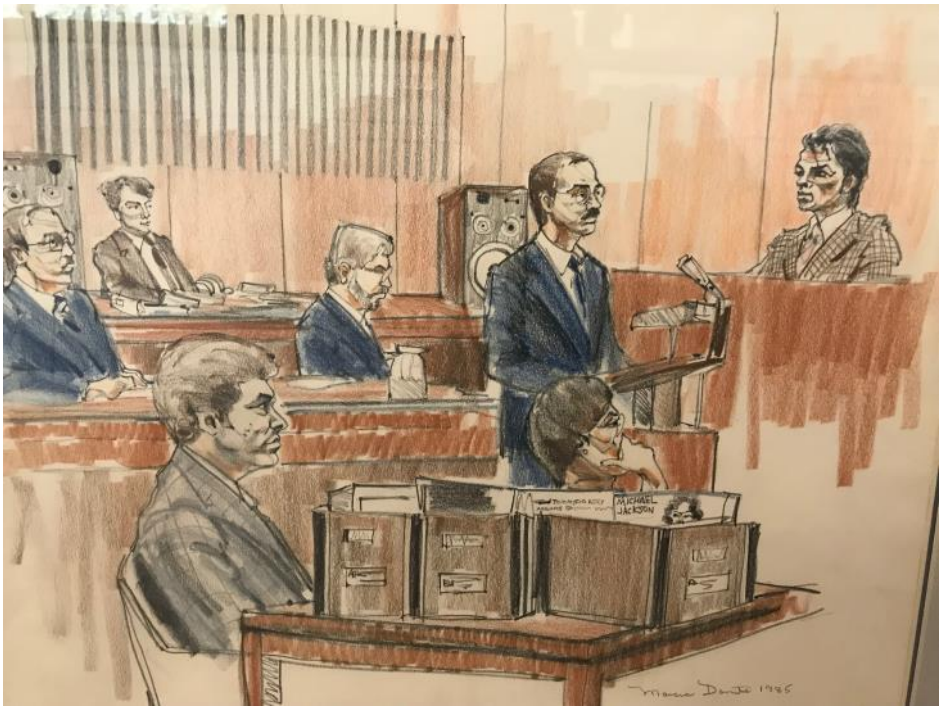

Courtroom sketch from the Michael Jackson trial. Cohen is in brown by the stereo on the left.

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The worst part of the job: fighting with people who misconstrue (intentionally or not) the purpose and value of journalism.

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

Like many young lawyers, I found the legal issues we confront fascinating and occasionally forgot that our highest priority is to achieve the client's objectives. I once told a client that their matter was the most interesting case of its sort and that it would likely make important new law. The senior partner rightly chewed me out later that day, explaining that the client hired us to get the case dismissed, not to satisfy our intellectual curiosity. It's a lesson I frequently share with my students to this day.

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

On my first day at Reuben & Proctor, the partner who hired me asked "Do you like music?" My enthusiastic yes led me to two years of work for Michael Jackson and CBS Records on a music copyright case based upon the single "The Girl Is Mine" (from that obscure little disk called *Thriller*). I had the good fortune to work on that case from the filing of initial motions through a two-week jury trial. And I even "rehearsed" with Michael since my role included not only legal research and drafting: I was responsible for playing all the music at the trial.

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

I have a Chicago Cubs wall clock in my office at UCLA. I'm a Cubs fan for life after many, many days spent at that slice of baseball heaven, Wrigley Field.

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

Twitter. While I don't tweet very often, I follow an eclectic bunch of loquacious friends and journalism sites. The first pass of the morning usually leads me through dozens of interesting tales.

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

Wrong answer. And it's often based upon a lack of context. I always try to find out: why the person is thinking about law school; what they think they want to do after law school; and what their other alternatives are. I still believe this to be a noble profession and many of the lawyers I know have had remarkable and fulfilling careers. But people who are going to law school without any real desire to practice law may well be making a mistake.

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

Expect the unexpected. The media industries are constantly subject to dramatic technological, demographic and financial changes. Legal developments typically follow and careers change. When I graduated law school, I naively thought I would spend my career at my first firm. But, as Kurt Vonnegut would say, "I've been the victim of a series of accidents" that led me to three law firms, several commercial media companies, a few non-profits and several universities. I've worked with newspapers, magazines, television, radio, documentaries, websites, podcasts and apps. I've lived in multiple cities, all three coasts (another shout-out to my adopted hometown of Chicago) and in Prague. Be prepared!

9. What issue keeps you up at night?

Fact-checking. Legal vetting is a high-wire act and it's often only as good as the information you can gather from your colleagues and in your own research. I'm thankful for the skill and diligence of the many great professionals I have worked with over the years.

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

I would have ignored my j-school prof and pursued a career in journalism. One way or another, I believe I was destined to be a newsperson.