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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through March 28, 2018

From the Executive Director's Desk

San Francisco Digital Conference Will Be Timely, Topical, Tremendous

Also Ahead: MLRC Institute Will Present Media Law Workshops at Industry-Wide Conventions

Increasingly, platforms have been under pressure on a number of fronts to take down, moderate and/or stop hosting objectionable groups and content, such as content originating from white supremacists, alleged sex traffickers, terrorist groups and the like. The pressure is coming from political forces seeking legal reforms, such as the recently passed Section 230 exception for sex trafficking (FOSTA) and EU regulations demanding accelerated removals; as well social and public-relations pressures, e.g., public outrage over Neo-Nazi groups online after the violence in Charlottesville. As a result, platforms are shifting to a more hands-on approach to editorial control, attempting to refine their own values and community standards.

That is the blurb for the first (of six) sessions of our upcoming Digital Media Conference in San Francisco, May 17-18. (Yes, we're moving from Silicon Valley to The City, but more on that later.) In a way, that blurb, penned by my colleague at the MLRC, Michael Norwick, says it all: the program will be timely, topical, in a word, tremendous.

Columnist Freeman, neither porn star nor president, appeared recently on CNN.

Indeed, the discussion at this year's conference could not be more timely -- the biggest news stories of the day all involve the social responsibility of digital companies. Over the past several months, there has been a major shift in attitudes of the public and lawmakers towards digital platforms and social media companies, with increasing calls for greater regulation and social responsibility on the part of the industry. This year's conference will take a deep dive into these concerns and look at how the industry has been, and should be, responding.

The biggest news story of the year, Russian interference in the 2016 election, depended in large part on the promulgation of propaganda on social media. The school shooting in Parkland, Florida, spawned online conspiracy theories and questions of how to manage public discussion in the midst of a crisis. Advances in face swapping technologies have opened a whole new front in the "fake news" battle while also opening a can of worms with respect to digital privacy. And that's before we get to Cambridge Analytica, Congress passing SESTA/FOSTA, and

more. We'll devote a full session Thursday afternoon to this topic, entitled "Combatting Internet Disinformation Campaigns."

Luckily, we'll have Recode's Kara Swisher join us for a keynote to help us pull it all together. Also on tap a tutorial on how algorithms and machine learning work and a presentation on face-swapping from a technological rather than legal angle. And on top of that, we've got a session exploring the repercussions of the #MeToo movement in Silicon Valley, with a particular focus on the experience of women in tech law and tech companies; for example, does the dearth of female founders and executives contribute to the climate of sexual harassment, and why are there so relatively few women in tech companies? We'll also tackle the latest issues under the Computer Fraud & Abuse Act, which pit the right of public access to information on the internet against the right of platforms to control their own data.

We are moving from the Computer History Museum in Mountain View to the Mission Bay Conference Center in San Francisco

As noted, we are moving from the Computer History Museum in Mountain View to the Mission Bay Conference Center in San Francisco, near where the 101 dumps cars into the City from Silicon Valley (and a few Barry Bonds swats away from AT&T Park, where the Giants play). There has been a long-standing debate about whether our Conference should be in Silicon Valley or the City; for reasons of history, cost and convenience, we have been at various sites in the Palo Alto/Mountain View area. But recent polls we've taken have shown a preference for the City; more and more of the big tech companies have offices in the City as well as the Valley; most law firms are in the City; most area attendees either live or work in the City; and hotel rooms in the Valley for our out-of-town attendees have become outrageously expensive, with hardly the same ambience or scenery as in the City. We were able to find a venue which was not much more costly than our prior site, allowing us to keep registration fees modest. So we decided to make this move, and we're anxiously awaiting your response both to the new venue and the switch.

Over the past several months, there has been a major shift in attitudes of the public and lawmakers towards digital platforms and social media companies, with increasing calls for greater regulation and social responsibility on the part of the industry.

On the other hand, we have kept to our two half-day schedule. This might seem a little strange, as generally a one-day conference is on one day. But you have told us that you prefer the Thursday afternoon/Friday morning format because it gives you a chance to both attend the Conference and spend half a day in your office (or get out of town early on

Friday – we won't tell). It also makes it more likely that folks will attend the reception Thursday afternoon after the first half-day of the Conference. If we did the whole schedule in one day, chances are most people would run after the final session of a long day. And this format gives out-of-towners a chance to fly in Thursday morning and fly out Friday afternoon, necessitating only one night away from home. Otherwise, folks might have to spend both the night before and the night of the Conference in SF. Not that that's such a bad thing; we hope people will take advantage of our new location to enjoy the City.

Just in case you're still on the fence as to whether to attend, allow me to quote from Michael's blurb for our second session Thursday afternoon. It might be tacky to say I left my bot in San Francisco, but we hope to see you there. And please be aware that the discount for early-bird registration ends soon, on April 16.

> *Beginning with a tech tutorial on how fake news is created and distributed in an artificially viral way, this session will cover how bots and fake users are employed to manipulate people, and how advertising tools are employed to target particular users. Whether by foreign governments like Russia, or by fraudsters and other individuals wishing to influence opinion and actions on the internet for their own ends, misinformation campaigns have become an acute problem that social media sites are facing calls to address.*

* * *

We decided to embark on a series of one-day legal workshops where we would teach the fundamentals of media law to journalists who otherwise wouldn't get such training.

As followers of this space know, a few years ago the MLRC Institute, the MLRC's charitable sister organization, had a retreat where we reconsidered our mission. Faced with the departure of its administrator and the termination of its financing, we decided to end our Speakers' Bureau function, where we would match organizations – generally school, libraries, etc – who were looking for speakers to talk about the First Amendment and media lawyers in those regions who would then go out and give a talk to that group. We decided that we were not getting a big enough bang for our buck by this plan, and were not achieving enough impact or scale.

Instead, taking cognizance of the ever-increasing number of freelancers, bloggers and independent journalists and the growing number of small media units that didn't have the benefit of a corporate legal department or other kind of legal training, we decided to embark on a series of one-day legal workshops where we would teach the fundamentals of media law to journalists who otherwise wouldn't get such training. With the support of the Institute's Board, led by CBS' Mary Kate Tischler, and the work of my colleagues Jake Wunsch and Andrew Keltz, who promoted these workshops solely through social media, we got a standing room only crowd of over 200 at our first workshop in New York.

Based on that success, we then received some generous funding from the MacArthur Foundation as well as a sponsorship from Mutual Insurance. Over the rest of 2016 and 2017 we then scheduled six more workshops in Washington (at the National Press Club), Boston, Miami

A full house for our journalist training workshop at the Tribune Tower in Chicago.

(at Fusion's sleek new studio), Los Angeles, San Francisco (at the Examiner's offices) and Chicago (at the Chicago Tribune's iconic building). Again, these were one-offs, where all the attendance was garnered from promotion on social media. We had between 65-110 attendees, almost all of whom (according to our evaluation forms) found the seminars to be interesting and educational, but even more important, very much needed and worthwhile.

The workshops included sessions in Libel and Invasion of Privacy; Newsgathering Torts; FOIA; Reporters' Privilege and Relationship with Sources; Copyright; and Digital Law. In addition to an MLRC colleague and me, we recruited faculty from our member organizations in each of the cities we visited. And, I must add, they all were very generous with their time, almost all accepting my invitation to participate, and often coming to the event with fancy power point presentations as well as their eloquent selves.

During this time, and thanks largely to our Board Chair Lynn Oberlander's meeting with Knight Foundation employees, Knight became interested in our work in this regard. They granted us a very generous grant spanning a three-year period, asking that we continue presenting these workshops. But their proposal added one twist: rather than having workshops alone for which we had to build attendance, Knight proposed that our seminars be a part of the big journalistic conventions and conferences, meetings which Knight sponsors around the country. To us this meant that we could keep on presenting similar workshops without having to recruit audiences; we would be part of big conventions with a thousand people attending, a ready- made audience for our programs.

The only rub was to get the conference organizers to focus on our availability and give us rooms and time slots. In the last few weeks, we have made contact with a number of huge conference directors, and a full schedule is being drawn up: it looks like we'll be presenting at the IRE (Investigative Reporters & Editors) conference in Orlando in June; the NAHJ (National Association of Hispanic Journalists) conference in Miami in July; the NABJ (National Association of Black Journalists) conference in Detroit in early August; the AAJA (Asian American Journalists Association) conference in Houston in mid-August; the ONA (Online News Association) conference in Austin in mid-September; and the RTDNA (Radio,

Television, Digital News Association) conference in Baltimore in late September – that last conference coincides with our Media Law Conference in Reston, Va, but we have agreed to present to them on the Saturday following our conference.

In some of these conferences, we will just put on a half-day workshop; in those cases, we will probably just present on Libel/Privacy and Copyright/Digital. In at least one, we might put on a non-workshop type program on a more timely topic, such as Trump and the First Amendment; in some we will present our workshop the day prior to the official beginning of a convention, at their "training day." At all these events, we again intend to call on members in those area to help us out teaching the sessions. I hope you'll welcome our call.

In sum, I believe this is a great opportunity for the MLRC Institute: not only to partner with such important groups in our industry such as Knight and these various journalistic associations, not only to raise the visibility level of the MLRC and its Institute, but, most important, to provide fundamental legal education to those who need it most -independent journalists and editors and reporters of small concerns who otherwise get no legal training or legal counseling. I truly believe we are fulfilling a vital function by doing this, and I'm proud of all those who are contributing and supporting us in this effort.

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

New York Court Declines to Give Effect to UK Privacy Injunction

Court Won't Seal U.S. Proceedings Pursuant to UK Anonymity Order

In what appears to be the first case of its kind, the *New York Post* successfully opposed an effort to seal a U.S. court proceeding pursuant to an anonymity order issued by an English court hearing a related privacy case. *Massel v. Gibbins*, No. 161147/2017 (N.Y. Sup. March 9, 2018) (Jaffe, J.).

The unusual issue arose out of dueling lawsuits in London and New York between billionaire hedge fund manager Robert Gibbins and his ex-mistress Aline Massel, who is a former European beauty queen. Gibbins sued Massel in London in late 2016 seeking to enjoin her from revealing private information. That English case is proceeding under an anonymity order, obtained by Gibbins, which effectively seals the case in its entirety and "injuncts" the disclosure of the parties' identities during the pendency of the case.

In late 2017, Massel sued Gibbins in New York state court for emotional distress and negligence. Her complaint caught the attention of the *New York Post*, *Daily News*, and other tabloids with its scandalous tale of a jilted mistress whose rich married boyfriend promised her an ostrich farm in Uganda but instead gave her a venereal disease.

The London court case was proceeding under the radar until Gibbins tried to extend the cloak of privacy to New York this year. Gibbins asked the London court to modify its anonymity order to allow him to use personally identifying documents in the New York case. The modified English court order provides:

> [Gibbins' lawyers in the New York litigation are permitted], upon applying to seal the court file in New York, to use all documents provided to them as they require and so advise for the purpose of representing [Gibbins] in the said New

> York action whether or not the use of disclosure of such documents identifies either [Gibbins] or [Massel] as parties to this claim.

Massel, No. 161147/2017 at 2.

By order to show cause, filed *ex parte* in New York on February 15, 2018, Gibbins moved to seal the New York action in anticipation of a motion to dismiss Massel's complaint. The sealing application was itself filed under seal, leaving the public and press to guess at the justification for sealing asserted by Gibbins. The New York court granted a temporary sealing pending a February 27, 2018, hearing on the motion. Massel and NYP Holdings, Inc., owner of the *New York Post*, both submitted oppositions to the motion to seal. The hearing took place in open court and on the record; the parties referred to a "British order of confidentiality," without revealing the details behind it.

Massel argued that the British order was limited to that jurisdiction; that Gibbins had forum shopped in London to take advantage of UK privacy law; and – in the spirit of the MeToo movement – that shared stories of sexual harassment and intimidation by powerful men should be aired in open court.

The *New York Post* argued more broadly that the British court order was unenforceable in the United States as repugnant to both the First Amendment and New York Constitution. *Citing, e.g., Bachchan v. India Abroad Publ'ns Inc.,* 154 Misc.2d 228 (N.Y. Sup. 1992) (declining to enforce a British libel judgment on public policy grounds).

In support of his motion to seal, Gibbins argued that there was no public interest in the case; London was the most appropriate forum for the dispute; and that Massel sued in New York to gain media coverage and "frighten" him into paying her to avoid further negative publicity. Moreover, without a sealing order Gibbins claimed he would be unable to defend himself in New York.

The court noted that Gibbins offered no explanation of his scope of privacy rights under English law and why enforcement of those rights in the U.S. would not be repugnant to our First Amendment open court principles.

New York Court Refuses to Seal Case

The court denied the motion to seal on several grounds. First, the court noted that courts do not normally enforce non-final foreign court orders. (The British anonymity order is an interim order pending a ruling on the merits of the case.) But even if the British order were final, enforcement would likely be barred on the public policy grounds raised by the *New York Post*. The court noted that Gibbins offered no explanation of his scope of privacy rights under English law and why enforcement of those rights in the U.S. would not be repugnant to our First Amendment open court principles.

As to the proper forum for the case, the court noted that Gibbins could be viewed as circumventing New York law by bringing an action in London. Moreover, the court flatly rejected his argument that the New York action was not of public interest. And his accusation that plaintiff was trying to extort a settlement was not grounds for sealing.

Finally, the court noted that Gibbins can defend himself in New York with the English case documents without falling afoul of the U.K. anonymity order because the relevant order only required him "to apply" for a sealing order in New York. "Obtaining an order granting sealing was not a condition of the [British] order, nor could it have been." *Massel*, No. 161147/2017 at 2.

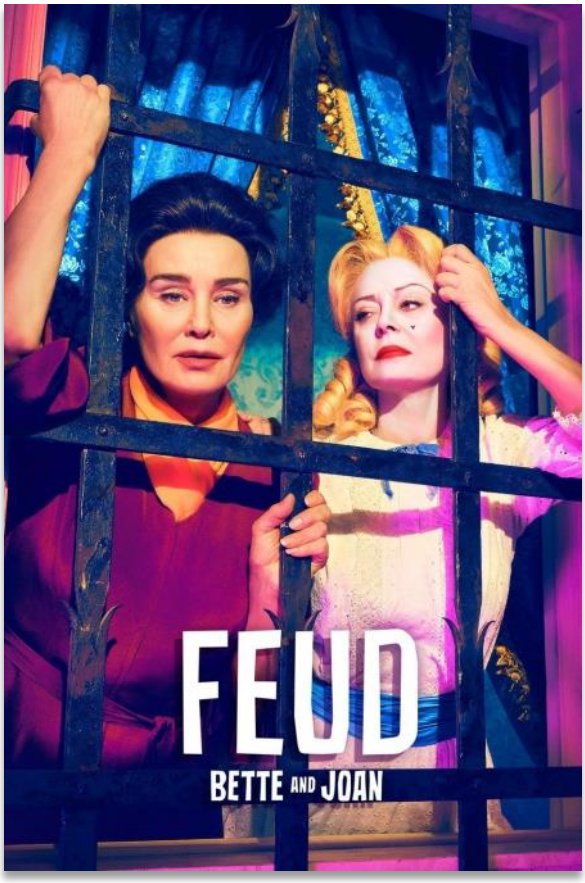
NY Holdings was represented by Robert Balin and John Browning, Davis Wright Tremaine LLP. Massel is represented by Edward Hayes and Elisabeth Conroy. Gibbins is represented by Gerald Lefcourt.

California Court of Appeal Dismisses Olivia De Havilland's Right of Publicity & False Light Suit

Big Victory for the First Amendment and Use of Real People in Creative Works

In a detailed and thorough opinion, the California Court of Appeal dismissed actress Olivia de Havilland's right of publicity and false light suit against the producers of the television miniseries *Feud: Bette and Joan*. De Havilland v. FX Networks, LLC et al., (March 26, 2018).

De Havilland, a movie star for over six decades, now retired and living in Paris at age 101, alleged the producers should have obtained her permission to portray her – and that fictionalized scenes cast her in a false light. To the shock of many, a California Superior Court judge denied an anti-SLAPP motion to dismiss, finding she had a likelihood of success on her claims.



On the right of publicity claim, the Superior Court ruled that the TV drama portrayed her realistically and thus was not transformative. On the false light front, the court ruled that fictionalized scenes portrayed her as "a gossip who uses vulgar terms."

The decision was appealed and was supported by a media and academic amicus briefs urging reversal. The Court of Appeal did so on March 26, delivering a ringing endorsement of the First Amendment right to use real people in creative works. As stated by the Court:

> Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star — "a living legend" — or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.

In analyzing the right of publicity claim, the Court questioned whether the docudrama was a product or merchandise within the meaning of California's right of publicity statute. But even assuming it was within the scope of the right of publicity statute, liability would be barred by

the First Amendment under the California Supreme Court's decision in *Guglielmi v. Spelling-Goldberg Productions* 25 Cal.3d 860 (1979) ("the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity.")

Emphasizing what should have been obvious to the trial court, the Court explained there was no obligation to pay De Havilland for the rights to her story.

> The creators of *The People v. O.J. Simpson: American Crime Story* can portray trial judge Lance Ito without acquiring his rights. *Fruitvale Station*'s writer and director Ryan Coogler can portray Bay Area Rapid Transit officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in *Game Change* without acquiring her rights. There are myriad additional examples.

The Court also reaffirmed that advertisements of expressive works are protected. Thus, the social media campaign for the docudrama was not actionable. It was "merely an adjunct of the protected publication and promotes only the protected publication.'"

Docudrama is Also "Transformative"

The docudrama was also protected because its portrayal of de Havilland was transformative as a matter of law.

The docudrama was also protected because its portrayal of de Havilland was transformative as a matter of law under Comedy III v. Gary Saderup, Inc., 21 P. 3d 797 (Cal. 2001). The Court acknowledged that lower courts, such as the trial court below, have struggled to figure out how to apply *Comedy III* to expressive works, suggesting that the test makes most sense when limited to products and merchandise — tangible personal property.

As applied to the docudrama, it was clear error to hold that its realism cut against a finding of transformative use. *Feud* was a far cry from the T-shirts at issue in *Comedy* III. It was a rich, multi-character portrait of the competition between Hollywood's leading ladies of the day, Bette Davis and Joan Crawford. Moreover, de Havilland's character in *Feud* was just one of the "raw materials" used to create the series and its "marketability and economic value" did not derive primarily from de Havilland's fame.

No False Light

Dismissing the false light claim, the Court expressed doubt that reasonable television viewers would have understood the series as entirely factual. Viewers, the court explained, are generally familiar with dramatized fact-based productions with invented scenes and characters.

Assuming the complained of statements were factual, they were not defamatory, highly offensive, or anywhere close to being made with actual malice. For instance, a fictionalized interview at the 1978 Academy Awards and reference to Frank Sinatra could not be

defamatory. And using the word "bitch" when de Havilland's actual phrase was "dragon lady" was not highly offensive.

Unjust Enrichment

The Court also dismissed a cause of action for unjust enrichment seeking compensation for the use of de Havilland's name and image. The Court explained that under California law there is no free-standing cause of action for unjust enrichment. Instead it is "just a restitution claim." Since there was no actionable wrong, there was no basis in law for an unjust enrichment claim.

Conclusion

Summing up, the Court noted the problem created by the extension of right of publicity law to creative works.

> The trial court's ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22. If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative — even fictitious and therefore "false" — way, they face a false light lawsuit if the person portrayed does not like the portrayal. "[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals."

FX was represented Glenn D. Pomerantz, Kelly M. Klaus, Fred A. Rowley, Jr., and Mark R. Yohalem, Munger, Tolles & Olson, Los Angeles. De Havilland was represented by Don Howarth, Suzelle M. Smith, and Zoe E. Tremayne, Howarth & Smith, Los Angeles.

Defamation Suit Against President Trump Survives Motion to Dismiss

President Can Be Sued in State Court; Denial of Misconduct Can Be Defamatory

Stating that "No one is above the law," a New York trial court declined to dismiss a high-profile defamation suit against President Trump over his denials of sexual misconduct allegations. Zervos v. Trump, No. 150522/17 (N.Y. Sup. March 20, 2018) (Schecter, J.).

The President had argued that under the Supremacy Clause of the Constitution he is immune from state court lawsuits while in office. He also challenged the merits of the defamation case, arguing that his denials were simply "fiery rhetoric, hyperbole, and opinion" in a political campaign and thus not defamatory as a matter of law.

The court rejected both grounds for dismissal, holding that the Supreme Court's decision in *Clinton v. Jones* allows state court claims against a sitting President; and that his statements were sufficiently factual to preclude dismissal. Trump has appealed the decision.

Background

The plaintiff, Summer Zervos, was a 2006 contestant on Trump's reality TV show *The Apprentice*. After the infamous Access Hollywood videotape surfaced in the 2016 Presidential campaign, Zervos came forward publicly to describe an encounter she had with Trump in 2007. In line with Trump's comments on the Access Hollywood tape, Zervos alleged he forcibly kissed, groped, and rubbed himself against her.

"Nothing in the Supremacy Clause of the United States Constitution even suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal executive responsibility."

Trump responded with a statement saying "To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a person and it is not how I've conducted my life." Later at rallies and on Twitter he made broader statements, including: "these allegations are 100% false ... They are made up, they never happened." "It's not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes, or for the simple reason they want to stop our movement." "100% fabricated and made up charges." "Totally made up nonsense to steal the election."

During a Presidential Debate Trump was asked about the many allegations against him of nonconsensual kissing or groping. He stated: "I didn't know any of these women… [Hillary Clinton] got these people to step forward. If it wasn't, they get their ten minutes of fame, but they were all totally--it was all fiction. It was lies and it was fiction."

Zervos sued Trump for defamation in state court in Manhattan in January 2017 just days before his inauguration.

Immunity from Suit in State Court?

Trump's lawyers sought to distinguish the Supreme Court's 1997 decision holding that then-President Clinton was not immune from a §1983 lawsuit for alleged sexual misconduct. *Clinton v. Jones*, 520 U.S. 681 (1997). In a lengthy opinion surveying law and history, the Court rejected Clinton's argument that separation-of-powers principles and the unique powers and responsibilities of the President limit the authority of the federal judiciary to interfere with the Executive Branch.

In dicta, however, Justice John Paul Stevens wrote that state court litigation against a President would raise separate issues of federalism and comity – adding that "Whether those concerns would present a more compelling case for immunity is a question that is not before us."

Trump seized on that dicta, as well as an oral argument exchange in *Clinton v. Jones* raising the specter of a testy state court judge calling a President away from a NATO meeting, to argue that Trump is immune from suit on constitutional and prudential grounds.

The trial court, however, found no distinction between federal and state court actions against a President.

> The rule is no different for suits commenced in state court related to the President's unofficial conduct. Nothing in the Supremacy Clause of the United States Constitution even suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal executive responsibility.

Additionally, there is no danger that a state court would improperly encroach on the President's official powers; and no legitimate fear of local prejudice against the President.

Defamatory Meaning

On the merits, the court held that Trump repeatedly accused plaintiff of dishonesty not just in his opinion but as a matter of fact, citing Trump's comments that Zervos allegations were "totally false" "fiction" "never happened" and "100% false and made up."

"A reader or listener, cognizant that defendant knows exactly what transpired, could reasonably believe what defendant's statements convey: that plaintiff is contemptible because she "fabricated" events for personal gain."

Summer Zervos was represented by Mariann Meier Wang, Cuti Hecker Wang LLP, New York; and Gloria Allred. Trump was represented by Marc Kasowitz, Kasowitz Benson Torres LLP, New York.

Anti-SLAPP Legislation in South Carolina: A Snowball's Chance in Charleston?

By Wallace Lightsey

In the South Carolina House of Representatives, a progressive Democrat and two like-minded Republican colleagues have introduced House Bill 4897, "The Citizens Participation in Government Act of 2018." Introduced on February 8, 2018, the bill is a well-drafted piece of Anti-SLAPP legislation. It includes findings, among others, that:

- The framers of the Constitution recognized citizen participation in government as an inalienable right essential to the survival of democracy and secured its protection in the First Amendment;
- Civil suits and counterclaims have been filed against thousands of citizens based on their valid exercise of the right to seek relief, influence action, communicate and otherwise participate with governmental bodies or the electorate;
- Such "Strategic Lawsuits Against Public Participation" or "SLAPP" are often dismissed, but not before the defendants are subjected to great expense and harassment;
- SLAPPs are an abuse of the judicial process used to chill and intimidate persons for involving themselves in public affairs; and
- The threat of liability and litigation costs diminishes public participation "in government, in public issues, and in voluntary service." (emphasis added)

One could say that the legislation has a snowball's chance in Charleston, but then … it did snow in Charleston this past winter, for the first time since 1989.

While these findings appear to be focused primarily on the right to petition the government or seek to influence governmental decision making, the scope of the legislation is much broader. Importantly, it states that "'[e]xercise of the right of free speech' means a communication made in connection with a matter of public concern," and defines "communication" to include a statement "in any form or medium." In turn, "matter of public concern" is defined to include an issue related to (among other things) health or safety, the government, a public official or public figure, and "community well being." Thus, any publication or broadcast by the media concerning a public official, public figure, or an issue related to "community well being" – *i.e.*, just about anything – would come within the ambit of the bill.

The most important substantive provisions of House Bill 4897 concern motions to dismiss a claim in a judicial proceeding "on the grounds that the claim is based on, relates to, or is in

response to a party's exercise of the right of free speech." When a party files such a motion, the trial court must set a hearing on the motion within 60 days of service of the motion, and must rule on the motion within 30 days of the hearing. If the court denies the motion to dismiss or does not rule on it within the prescribed time, the moving party has the right to an immediate and expedited appeal. As a practical matter, this provision would be highly significant in South Carolina, where traditionally state court trial judges have been quite reluctant to dismiss actions on motion, but where the appellate courts have been very protective of First Amendment rights.

Finally, the bill provides for a mandatory award of attorneys' fees and sanctions against the party that brought the SLAPP when the action is dismissed.

South Carolina is a staunchly conservative, reliably Republican state, and our legislature has not often showed itself supportive of a strong press. House Bill 4897 has been referred to the Judiciary Committee, and it would not be surprising if it died a quiet death there. One could say that the legislation has a snowball's chance in Charleston, but then … it did snow in Charleston this past winter, for the first time since 1989.

Wallace Lightsey is a partner Wyche P.A., Greenville SC.

Judge Orders Release of Exterior Video Recordings in Parkland School Shooting

By Jon M. Philipson

Responding to a petition by twelve media companies, a Florida judge ordered the release of the video recordings showing Broward County Sheriff Deputy Scot Peterson remaining outside the building during the mass shooting at Marjory Stoneman Douglas High school.

On Wednesday, February 14, 2018, Parkland, once designated Florida's safest city, was forever changed, as were the lives of the students, teachers, and families of Marjory Stoneman Douglas High School, when former student Nikolas Cruz arrived in an Uber. Cruz pulled a fire alarm, forcing students out of their classrooms in Building 12, and then proceeded to shoot and kill 17 people (teachers and students) with an AR-15 rifle while wounding many others in the hallways of a school whose motto was "be positive, be passionate, and be proud to be an eagle." Students rushed to capture the scene on social media networks, as they alerted anyone they could for help. After the six minutes of horror, Cruz blended in with the students evacuating the school. Later that day, Cruz was arrested and charged with seventeen counts of first degree murder.

Responding to a petition by 12 media companies, a Florida judge ordered the release of the video recordings showing Broward County Sheriff Deputy Scot Peterson remaining outside the building during the mass shooting.

A week later, Broward County's Sheriff Scott Israel held a press conference to provide "information the public needed to know." That information was that not only did exterior video footage exist from the mass shooting, but that also an armed Broward County Sheriff's Office deputy assigned to the school "was absolutely on campus through this entire [horrific] event. The deputy was armed, he was in uniform" *and* "remained outside for upwards of four minutes," while families lost fathers, sons, and daughters, and a community lost its innocence.

At the press conference, Sheriff Israel announced that these video recordings might never be released. When a coalition of news media parties requested the video recordings, the Sheriff's Office and the Broward County School Board rejected the request, citing three exemptions to Florida's broad public records law: (a) a security system plan (Fla. Stat. § 119.071(3)); (b) an active criminal investigative information (Fla. Stat. 119.071(2)(c)1), and (c) an active internal affairs investigation of Deputy Scot Peterson (Fla. Stat. §112.533(2)(a)).

On March 1, 2018, 12 news organizations (CNN, ABC, Associated Press, Miami Herald, South Florida Sun-Sentinel, Los Angeles Times, Gannett, the Florida First Amendment Foundation, the Florida Press Association, Los Angeles Times, The New York Times, Orlando Sentinel and Bradenton Herald) filed a petition for the release of the video, arguing the exemptions were inapplicable and that good cause existed for their release.

On March 7, 2018, the Honorable Jeffrey R. Levenson held a hearing on the petition, hearing arguments from the news organizations, the Sheriff's Office, the School Board, and the State Attorney's Office.

On March 12, 2018, after conducting an *in camera* review of the video recordings, Judge Levenson ordered the videos to be released, citing three fundamental reasons:

First, Judge Levenson found a lack of evidence that release of these specific recordings would impede an ongoing investigation.
Nikolas Cruz has been charged with 17 counts of murder in the mass shooting. However, Judge Levenson found the videos did not directly relate to the case against Cruz.

Second, the Court found that the recordings did not reveal significant information relating to the school's security system. In making this decision, the Court balanced the public's right to be informed regarding the perceived actions of the armed school resource officer against the potential harm to the current security system. The Court determined that any harm was outweighed by the strong public interest in disclosure.

Third, although the Sheriff's Office cited a Florida Public Records Act exemption concerning the records of an internal affairs investigation, the Court found that law was not a sufficient reason to keep the video confidential, because the sheriff's deputy stationed at the school – Scot Peterson – had resigned.

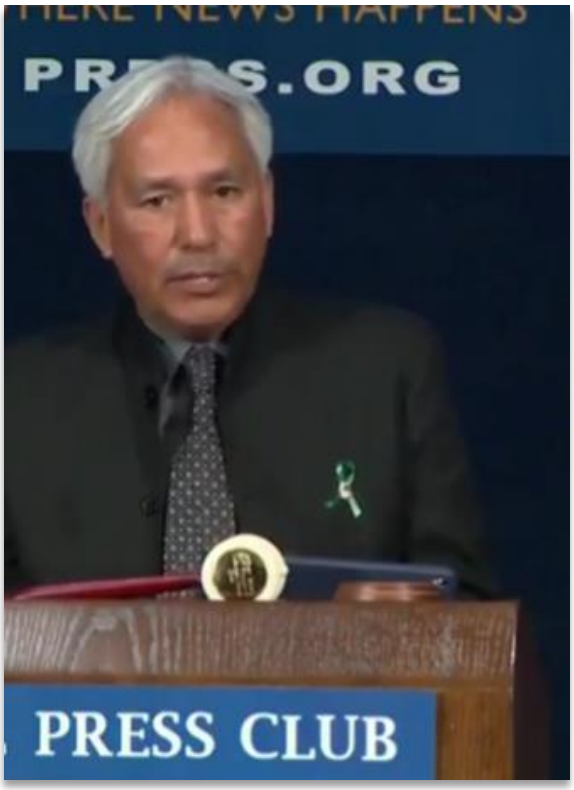
The video was released on Thursday, March 15, 2018.

The petitioners were represented by Dana J. McElroy, Jon M. Philipson, Carol J. LoCicero, and James J. McGuire of Thomas & LoCicero PL.

Seventeen Journalism Organizations File Amicus Brief in Support of Mexican Journalist's Asylum Appeal

By Steve Zansberg, Mark Flores and Chuck Tobin

On March 19, 2018, the National Press Club and 16 other organizations (including the MLRC) that promote press freedom worldwide filed an *amici curiae* brief with the U. S. Department of Justice Board of Immigration Appeals (BIA) in support of asylum for Mexican journalist Emilio Gutiérrez-Soto and his son, Oscar. Emilio, a former journalist for *El Diario del Noroeste of Nuevo Casas Grandes* in Ascension, Chihuahua, and his then 15-year old son fled Mexico in June 2008 following menacing encounters with the Mexican military.



In July 2017, however, an immigration judge in El Paso, Texas denied their asylum petition, finding they had not demonstrated a well-founded fear of persecution stemming from Emilio's prior reporting on corruption and abuses by the Mexican military. The Gutiérrez-Sotos' appeal of that ruling is now before the BIA in Falls Church, Virginia.

Death Threats Cause Gutiérrez-Soto and His Son to Flee Mexico

Having worked for several years as a staff reporter for the local newspaper, in late January 2005, Gutiérrez reported on the Mexican military's assault on guests of the La Estrella Hotel in Puerto Palomas. Gutiérrez-Soto wrote that Mexican soldiers had detained several guests and that others were too frightened to report the attack. Following publication of his report, Gutiérrez-Soto was summoned to the El Miami Hotel where he was insulted, taunted and threatened by a gauntlet of heavily-armed soldiers. He was then berated by two officers and ordered not to publish any further reports critical of the Mexican military's operations. One officer told him: "You have written three articles full of lies. There will not be a fourth."

On February 10, 2005 *El Diario Northwest Chihuahua* published an article, attributed to "Editorial Staff," to protect Gutiérrez-Soto, headlined "Members of the Military Threaten Reporter's Life; High Ranking Officers Warn Journalist After Publication of Assault and Robbery on Hotel in Palomas." That article reported the details ofhis encounter and stated, "The death threats against Emilio Gutiérrez Soto, expressed in a direct manner with the

intention of frightening the reporter and discouraging his journalistic work, constitutes an extreme situation that is just one step away from being carried out in the future . . ."

On February 11, 2005, Emilio filed a formal complaint with the National Commission of Human Rights of Mexico, Violence Against Journalists and Defenders of Human Civil Rights (CDHCR). Subsequently, heagreed to enter into a "conciliation agreement" with the Ministry of National Defense, 5th Military Zone, arranged by CDHCR, in which he committed not to publish any further news reports about the Mexican military's activities in the region.

Nevertheless, three years later, 50 members of the Mexican military surrounded his home in the middle of the night, broke down the front door, despite having no warrant, and ransacked his home while some soldiers pointed their guns at Gutiérrez's head. As they left his home in the early morning hours, soldiers warned Gutiérrez-Soto to "behave."

The Guitiérrez-Sotos Seek Asylum; Their Petitions Languish For Almost a Decade

Shortly after the raid on his home, Emilio was contacted by a close friend, a woman with connections to the Mexican military, who warned him that he was on a "hit list," slated to be killed by the Mexican military. Concluding that this was credible information, particularly given its source, Emilio and his son fled northward, lawfully crossed the border at the Antelope Wells Border Crossing Station, and sought asylum. They were taken to the Port of Entry in Columbus, New Mexico. After U.S. immigration officials there determined Gutiérrez-Soto had a credible fear of reprisal if he returned to his home country, he was allowed to live and work in Las Cruces, New Mexico while waiting for his asylum case to be adjudicated.

The immigration judge ruled that Gutiérrez-Soto's testimony concerning his activities as a professional journalist, and his fear of persecution if he returns to Mexico, were not credible.

DHS Opposes Gutiérrez's Asylum Petition, Initiates Deportation Proceedings

Many national press freedom organizations have recognized Gutiérrez-Soto's heroism for his reporting on corruption by the Mexican military. For example, in 2010, Canadian Journalists for Free Expressions presented him its International Press Freedom Award. And in October 2017, the National Press Club awarded its prestigious John Aubuchon Freedom of the Press Award to Gutiérrez-Soto on behalf of the entire Mexican press corps.

Nevertheless, following several days of hearings before an immigration judge, in July 2017, Gutiérrez-Soto's asylum application was denied. The immigration judge ruled that Gutiérrez-Soto's testimony concerning his activities as a professional journalist, and his fear of persecution if he returns to Mexico, were not credible. In December 2017, and without any advance warning, ICE officials attempted to deport Gutiérrez-Soto and his son. Those efforts were abruptly haulted when the BIA issued an emergency stay. The BIA later agreed to rehear the asylum case on appeal.

The appeal process has dragged on for months, and ICE officials are refusing to release the father and son, holding them in jail cells indefinitely — a decision that Bishop Mark Seitz of El Paso, Texas has called "morally wrong."

In February, Gutiérrez-Sotos' immigration counsel filed a petition for a writ of *habeus corpus* in the United States District Court for the Western District of Texas, seeking their immediate release from U.S. government detention.

Press Groups Rally to Support Gutiérrez-Soto's Asylum Appeal

The amicus brief filed by the National Press Club and 16 other organizations represents the latest step in a four-month effort to by these groups to free Gutiérrez-Soto and his son from government captivity. (The organizations who joined the NPC's brief are the National Press Club Journalism Institute, The Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, Radio Television Digital News Association, American Society of Journalists and Authors, Society of Professional Journalists, Reporters Without Borders, PEN America, The Alicia Patterson Journalism Foundation, Knight-Wallace Fellowships for Journalists, Wallace House, University of Michigan, Society of American Business Editors and Writers, National Press Foundation, Pulitzer Center on Crisis Reporting, National Press Club Journalism Institute, and Fundamedios, Inc.).

To rebut the judge's finding that Gutiérrez-Soto had not credibly established his bona fides as a professional journalist, the brief cites to almost a hundred and fifty published newspaper articles.

The *amicus* brief makes three central points: (1) that the readily available corroborating evidence conclusively demonstrates that Gutiérrez-Soto was a professional journalist who was threatened with death in reprisal for his reporting critical of the Mexican military, (2) that numerous authoritative sources establish that journalists like Gutiérrez-Soto, who have reported on government abuse (and have been physically threatened in the past), have a well-founded fear of persecution should they return to Mexico, and (3) that to deny Gutiérrez-Soto asylum would send a dangerous signal not only to the government officials in Mexico, but to other repressive regimes throughout the world, that America no longer protects the freedom of the press, thereby subjecting American journalists abroad to physical danger.

To rebut the immigration judge's finding that Emilio Gutiérrez-Soto had not credibly established his *bona fide*s as a professional journalist, the brief cites to (and attaches) almost a hundred and fifty published newspaper articles bearing Gutiérrez-Soto's byline that were unearthed by New Mexico State University research librarian Molly Molloy, as well as to the numerous professional accolades that Gutiérrez-Soto has won from his colleagues.

The *amicus* brief also labels "naïve" the immigration judge's contention that Gutiérrez-Soto could avoid reprisals simply by relocating to another part of Mexico or by seeking government protection. The *amici* cite to, and quote extensively from, a February 8, 2018 letter to the BIA from Scott Busby, Deputy General Counsel of the State Department's Bureau of Democracy, Human Rights and Labor, which describes the current "country conditions" for journalists in Mexico and declares that Mexico is "the most dangerous place in the world to be a journalist

outside of war zones." It also says that "journalists are threatened by public and law enforcement officials, including the military, merely for reporting on issues they deem critical."

Both the State Department's letter and the *amicus* brief point to another authoritative source to substantiate the well-founded fear that journalists like Gutiérrez-Soto face after they have reported on corruption in the Mexican government: the preliminary report issued in December last year by David Kaye and Edison Lanza, Special Rapporteurs on freedom of expression for the United Nations and Inter-American Commission on Human Rights:

> Since 2010, 73 journalists have been killed; 12 journalists have been subject of enforced disappearances, while there have been 44 attempted killings. Since 2006, the National Human Rights Commission has registered 52 attacks against media outlets. So far in 2017, at least 11 journalists have been killed.

The *amicus* brief emphasizes that Gutiérrez-Soto and his son face a far greater threat to his safety now than when he and his son fled to the United States in 2008; the Mexican military has recently been empowered to enforce all civil law, rendering it effectively immune from repercussions for violence against journalists, and Emilio's international notoriety in the past ten years has made him a far more prominent target for reprisal.

Three more Mexican journalists have been murdered in 2018. The third murder occurred on the Thursday following the filing of the amicus brief with the BIA.

Lastly, the brief urges the BIA to maintain this nation's "long heritage of providing safe haven for foreign reporters, authors, and commentators who bravely publish truthful information and, as a result, get labeled 'enemies' by those on whom they report and get targeted for reprisal." The brief cites a long line of prior asylum grantees, including Joseph Stalin's daughter (an author) and four refugees from Mexico (Jorge Luis Aguirre, Ricardo Chavez Aldana, Hector Salazar, and Dolores Dorantes) who were recently found to have presented well-founded fears of persecution on account of their publications critical of the Mexican government. "Dispatching Emilio Gutiérrez-Soto and his son to almost certain death upon their return to Mexico would send a clear signal to corrupt government officials around the world, and to the journalists working abroad, that Freedom of the Press is now a diminished public policy in this country."

Notably, three more Mexican journalists have been murdered in 2018, the third murder -- of reporter Leobardo Vazquez, who ran the online news site *Enlace Informative Regional* in Veracruz -- occurred on the Thursday following the filing of the *amicus* brief with the BIA.

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

ACA v. FCC: Close to a Slam Dunk for TCPA Defendants

Decision Will Change the Playing Field of TCPA Litigation

By Blaine Kimrey, Bryan Clark, and Madeline Tzall

On March 16, 2018, just before tip-off in the first round of the NCAA tournament, the D.C. Circuit provided the TCPA defense bar with a new playbook of sorts, in the form of a decision that will surely change the game for TCPA litigation. The case, of course, is *ACA International v. FCC*, and the ruling came down nearly 18 months after oral arguments. *ACA Int'l et al. v. FCC*, No. 15-1211, Doc. No. 1722606 (D.C. Cir. Mar. 16, 2018). It appears to be worth the wait as the D.C. Circuit slam dunked the former definition of automated telephone dialing equipment ("ATDS") and the "one-call safe harbor" rule for reassigned numbers.

Overview of the Ruling

The background of the *ACA v. FCC* case, and the TCPA itself, is well known to those in the field, but a quick refresher is warranted to appreciate the significance of this recent decision. On July 14, 2015, the FCC issued a now-infamous Declaratory Ruling and Order ("2015 FCC Order") in which it addressed 21 separate petitions for rulemaking or requests for clarification. 2015 FCC Order, 30 FCC Rcd. 7961 (2015). In the 2015 FCC Order, the FCC "sought to clarify various aspects of the TCPA's general bar against using automated dialing devices to make uninvited calls." *ACA Int'l* at 4. In reality, the 2015 FCC Order fell far short of clarifying anything, and indeed did nothing to curb what the FCC described as "a surge in TCPA lawsuits (including class actions) in recent years." *ACA Int'l*, at 8 (citing 2015 FCC Order, at 7970 ¶¶ 6-7). As a result, a number of regulated entities appealed the 2015 FCC Order to the D.C. Circuit Court of Appeals.

The Court rejected the broad (and contradictory) definition of an ATDS and also tossed out the "one-call safe harbor rule" as applied to re-assigned numbers.

In the consolidated appeal, petitioners challenged four aspects of the 2015 FCC Order: (i) the definition of an ATDS; (ii) "re-assigned number" issues; (iii) revocation of consent; and (iv) the limitation on the exemption for exigent healthcare calls. *ACA Int'l,* at 4.

On the third and fourth issues—revocation of consent and the healthcare call exemption—the D.C. Circuit upheld the FCC's positions. *ACA Int'l*, at 5. The court sustained the FCC's "approach to revocation of consent," concluding a party may revoke consent through "any reasonable means," and also upheld the FCC's stance on the scope of the TCPA's "exemption for time sensitive healthcare calls." *Id*.

But, the real impact of the *ACA International* decision, and what will inevitably score defense victories in TCPA litigation, is how the court ruled on the first two issues. Namely, the

Court rejected the broad (and contradictory) definition of an ATDS and also tossed out the "one-call safe harbor rule" as applied to re-assigned numbers.

ATDS

The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C § 227(a)(1). The *ACA v. FCC* ruling made a number of important conclusions on this topic as outlined below.

- In defining "capacity," smartphones save the day: In the 2015 FCC Order, the FCC provided a confusing and contradictory ruling on what type of equipment qualified as an ATDS. Specifically, the 2015 FCC Order emphasized the "capacity" of dialing equipment and ruled that "dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of autodialer) even if it is not presently used for that purpose, including when the caller is calling a set list of consumers." 2015 FCC Order at 7974 ¶ 16. As a result, considerable debate and costly litigation ensued over the issue of whether a device had the "present" vs. "potential" capacity to operate as an ATDS. The D.C. Circuit rejected this approach to the definition of an ATDS, concluding simply that "[v]irtually any understanding of 'capacity' contemplates some future functioning state, along with some modifying act to bring that state about." *ACA Int'l*, at 13. Instead, the D.C. Circuit went on to point out that the question of whether equipment has the capacity to perform the functions of an ATDS turned more on considerations of how much is required to enable a device to function as an autodialer. *Id*. at 13-14. The court scrutinized the 2015 FCC Order's conclusions that downloading an app or adding software "and the enhanced functionality they bring about – are appropriately within a device's capacity." *ACA Int'l*, at 14. The D.C. Circuit took the FCC to task on this point, noting that under that definition, nearly any smartphone could be considered an ATDS simply because the user could download an autodialer app. *Id*. at 14-15. Ultimately, such a definition would mean that all smartphones were ATDS devices, resulting in hundreds of millions of smartphone users potentially being placed in the crosshairs of the TCPA. The D.C. Circuit found this interpretation of "capacity" exceeded the authority delegated to the FCC by Congress, particularly because the congressional findings in support of the TCPA included concerns about *hundreds of thousands* of *solicitors* making calls on behalf of *tens of thousands* of *businesses*. *Id*. at 18-19. To include all smartphones would mean to expand the scope of the statute to "hundreds of millions of everyday callers." *Id*. On this basis the D.C. Circuit struck down the 2015 FCC Order's interpretation of capacity as arbitrary and capricious. *Id*. at 23.

- Predictive dialers are TBD: The D.C. Circuit also rejected the FCC's reasoning on the issue of whether a predictive dialer is, by definition, an ATDS. The court found that the 2015 FCC Order basically played both sides of the fence on that issue. On the one hand, the FCC

stated that a predictive dialer could be considered an ATDS only if it had the capacity to generate random or sequential numbers, but on the other hand suggested equipment could be an autodialer even if it lacked that capacity. 2015 FCC Order at 7972-73. The D.C. Circuit found these two positions to be contradictory and untenable, and it set forth a critical question: "A basic question raised by the statutory definition is whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere?" *ACA Int'l* at 25. The D.C. Circuit did not supply the answers to those questions, but it instead suggested that the commission may be entitled "to adopt either interpretation." *ACA Int'l*, at 25.

Reassigned Numbers and the One-Call Rule

The D.C. Circuit gave TCPA defense lawyers a new reason to celebrate by bulldozing the framework of wrong number TCPA claims and abolishing the "one-call safe harbor" rule.

The D.C. Circuit began its analysis of the reassigned number issue by noting that "there is no dispute that millions of wireless numbers are reassigned each year." *ACA Int'l*, at 31. This fact has been the bane of some callers' existence, and arguably a driving force behind the growth of TCPA litigation.

Under the TCPA, it is unlawful "to make any call (other than a call made for emergency purposes or made with the *prior express consent of the called party*) using any automatic telephone dialing equipment or prerecorded voice." 47 U.S.C. § 227(b)(1)(A)(emphasis added). But who is the "called party"? Is it the original subscriber who gave consent? Or is it the new subscriber who didn't?

The 2015 FCC Order ruled that the "called party" meant the person actually reached, i.e. the new subscriber. 2015 FCC Order, at 7999-8001 ¶¶ 72-73. Practically speaking, this meant companies that believed they were calling the owner of a number who had given them prior express consent might only find out, via costly litigation (and smug plaintiff lawyers) that in fact the number was reassigned, and the calls were made in violation of the TCPA. The 2015 FCC Order provided a "one call safe harbor" which allowed callers, who were unaware a number had been reassigned, to make one liability-free call to the new subscriber. *Id*. at 8001 ¶ 73. For that one call, the FCC found that the caller could rely on the prior express consent of the previous subscriber. So on the one hand, the 2015 FCC Order concluded that a caller could "reasonably rely" on the consent provided by a former subscriber, but on the other hand, found that the caller was entitled to just one- liability-free call to the reassigned number. *Id*. at 8009 ¶90. The D.C. Circuit rejected this approach. Essentially, the D.C. Circuit found that it was arbitrary and capricious for the FCC to conclude that one call was likely to provide a caller with reasonable notice that a number had been reassigned. *ACA Int'l* at 37. The D.C. Circuit could not abide this lack of logic, struck down the "one-call safe harbor" rule and concluded "we must set aside the Commission's treatment of reassigned numbers as a whole." *Id*. at 39-40.

Revocation

The D.C. Circuit upheld the FCC's "any reasonable means standard" for revocation of consent. The court agreed with the FCC 2015 Order to the extent that it held that a person who previously provided consent could revoke consent by "any reasonable means" orally or in writing "that clearly expresses a desire not to receive further messages." 2015 FCC Order at 7996 ¶ 64. The D.C. Circuit also upheld the FCC's "totality of the facts and circumstances test," and it agreed that one factor to consider is "whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens." *Id*. Another factor is "whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request .... in that circumstance." *Id*.

In its ruling, the D.C. Circuit rejected petitioners' arguments in favor of standardized revocation, finding that "petitioners' concerns are overstated" with respect to the need to take exorbitant precautions in order to avoid TCPA liability. *ACA Int'l*, at 41. But, the court did acknowledge that parties may mutually agree upon revocation methods. *Id*. at 43.

Healthcare Call Exemption

The court upheld the FCC's approach to the scope of healthcare calls. The arguments in favor of expanding the exemption were brought by petitioner Rite Aid, which sought to include certain non-telemarketing calls that provided vital time-sensitive healthcare information. *Id*. at 43. Rite Aid argued that the 2015 FCC Order, limiting the exigent health care exemption to calls regarding healthcare treatment, conflicted with the Health Insurance Portability and Accountability Act. *Id*. at 44. But the court disagreed, finding that the FCC was within the bounds of its authority not to include billing and debt-collection calls as exempt from the TCPA consent requirements because "healthcare providers could use ATDS equipment to bombard nonconsenting wireless users with calls and texts concerning outstanding charges without incurring TCPA liability." *Id*. at 47.

This decision will change the playing field of TCPA litigation, both in the short and the long term.

Analysis/ Practical Impact

This decision will change the playing field of TCPA litigation, both in the short and the long term. Practically speaking, some developments to watch for include the following:

- *En banc* review: It remains to be seen whether any party will request *en banc* review of this decision.

- Stays may be lifted: A considerable number of TCPA cases, across multiple jurisdictions, have been stayed throughout the country on the basis of the *ACA v. FCC*

case. We can expect many of these stays to be lifted in the near future, along with considerable motion practice on the newly established arguments such as the abandoned one-call-rule and the death of the present vs. potential capacity issue.

- Settlements: Smart plaintiff's attorneys will make moves quickly and refine their business model. We can expect to see attempts to settle quickly and perhaps at a discount in some wrong number cases. By approving the FCC's reasonable reliance standard, the D.C. Circuit has endorsed the fact that callers must be must be allowed to reasonably rely upon the express consent of former subscribers.

- Revised contracts and loan agreements: Financial companies facing TCPA exposure for post-revocation calls may want to revise standard loan agreements to include specific, mutually negotiated methods for revocation of consent, a concept that was expressly endorsed by the court.

Rock Chalk Jayhawk!

Blaine Kimrey is a partner and Bryan Clark and Madeline Tzall are associates at Vedder Price in Chicago. Blaine and Bryan represented one of the intervenors in this case.

MLRC's 2018 Conference on Hispanic and Latin American Media

On March 12, over 50 lawyers from North and South America gathered at the University of Miami School of Communication for a full day of sessions on Legal Issues of Concern for Hispanic and Latin American Media.

The conference began with discussion of the humanitarian crisis in Puerto Rico following Hurricane Maria. Andres Echevarria, Univision News Producer, and Melvin Felix, Univision Immigration Digital Reporter, shared their on the ground experiences and challenges in reporting on the crisis.

Andres Echevarria, Univision News Producer

The next panel, moderated by Ana-Klara Anderson of NBCUniversal's Golf Channel, looked at Fake News in Latin America. Among other things, the panel discussed proposed legislation in Brazil to regulate online platforms; how case law from the Inter American Court of Human Rights could affect new legislation; and the history of populism and anti-press propaganda on Latin American television. The

Fake News Panel, left to right: Paula Mena Barreto, Campos Mello Advogados; Sofia Jaramillo Otoya, Columbia Global Freedom of Expression; Diana Palacios, Davis Wright Tremaine; and Lynn Carrillo, NBCUniversal News Group.

situation in Latin American was contrasted with concerns in the U.S. and how First Amendment principles apply to the problem.

Sofia Jaramillo Otoya, a legal officer at the Columbia Global Freedom of Expression project, also highlighted their freedom of expression case law database. The database surveys freedom of expression law from around the world. It includes a Spanish language database created in consultation with judges from Latin America, as part of a UNESCO program to strengthen the legal protection of freedom of expression on the continent.

Former U.S. Attorney for Miami Wifredo "Willy" Ferrer, Chair of Holland & Knight's Global Compliance and Investigations Team, spoke about Ethics and Compliance issues for media lawyers, including practical guidance on avoiding problems under FCPA, the Foreign Corrupt Practices Act.

Willy Ferrer discussing Ethics and Compliance Issues for Media Lawyers.

Next was a session on the Panama Papers: Liability for Publishing Hacked and Leaked Information. Adolfo Jimenez, Holland & Knight, led a one-on-one discussion with Miami Herald investigative reporter Nicholas Nehamas on his newspaper's Pulitzer Prize winning reporting on the Panama Papers. Among other things they discussed how newspapers around the world cooperated to vet the Panama Papers before publication, as well as the legal and ethical issues reporters considered in using leaked information.

Last was a session on Future of Media in the Americas with Ricardo Trotti of the Inter-American Press Association; Jose Sariego, Bilzin Sumberg LLP; and Professor Ana Francois, University of Miami School of Communication. In an interesting mix of issues, Ricardo Trotti discussed the challenges journalism and democracy faces in the digital environment.

Ana Francois presented research on the spread of over-the-top television services in Latin America. And Jose Sariego looked at the broad impact of the Internet on media business models and legal norms.

Adolfo Jimenez, left, Holland & Knight, led a one-on-one discussion with Miami Herald investigative reporter Nicholas Nehamas on his Pulitzer Prize winning Panama Papers series.

The conference ended with a reception sponsored by the McClatchy Foundation, We thank all our conference sponsors for their support – Davis Wright Tremaine, Greenberg Traurig, Holland & Knight, Thomas & LoCicero, McClatchy and the University of Miami for hosting the event.

10 Questions to a Media Lawyer: David Sternlicht

David Sternlicht is Senior Vice President, Legal, at NBCUniversal News Group.

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

I've always been fascinated by television news. Before law school (and part-time during), I worked as a reporter for KVUE in Austin, Texas. Afterwards, I briefly worked for the FCC, then a law firm in Washington that had an FCC practice. I went from there to ABC, where I did FCC-related things, then eventually moved over to ABC News.

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

I enjoy working with journalists. I find they're incredibly open – willing to accept good ideas from any quarter. In contrast, I worked briefly on the entertainment side, and there the attitude was "we only want to hear from lawyers about legal things." If you made a comment about anything else, they would laugh at you. So on the news side of things, I like being able to contribute, and from time to time to see my contributions on the screen.

What I most dislike is the sanctimonious tone of so many of the lawyers who represent the people we do stories about. When they write us lengthy letters, do they really think that those of us who practice in this area full time don't know what the law is? I recognize that what they're actually trying to do is impress their clients with how tough they are, but if you're really trying to persuade someone to change what they're doing, is hurling insults really an effective tactic? I expect the California lawyer, whose multi-page letters seems to carry the same boilerplate citations, probably charges his celebrity clients as if each letter was an original piece of work. Charles Harder, supposedly the hot plaintiff's lawyer of the moment, spent months trying to block stories about Harvey Weinstein. What is his basis for his moral outrage at the media? I simply never cease to be amazed by the amount of righteous indignation that's available for rent.

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

Years ago, we did an undercover investigative piece about infomercials. We wanted to see if the people who produce infomercials cared about whether the products they advertised actually worked. Would they make an infomercial for a product that was a complete fraud? We created such a product, a pill that would supposedly moisturize skin from the inside, eliminating the need to apply moisturizer.

We found an infomercial producer who told our reporter over a lunch, which we recorded with hidden cameras, that he knew all the tricks to get around FTC requirements. We told him that we had no idea whether our product actually worked, for all we knew it was nothing more than Nestle's Quik in a capsule – which is exactly what it was. The infomercial producer assured us it didn't matter to him. We were so pleased with what we had seen that we decided to take the story to the next level by actually hiring this producer to make an infomercial for our "product."

The dilemma was that we had to enter into a contract with the producers. The goal was to eliminate as many indemnities and warranties as possible from their standard contract. At the time, we were concerned that if we pushed too hard, they would back out. On the other hand, we did want them to them to claim they were relying on our representations. In the end, we eliminated some of the indemnities and warranties, but I don't think we took out enough. When the company found out who we were and what we had done, they brought in lawyers – the infomercial lawyers – who argued that it was on us, we had warranted that the thing would work. I don't think we really had, but nonetheless I wish I had pushed back further during the negotiations to eliminate virtually all the warranties in the contract. In the end, we ran the story, but elected to do it without identifying the producer. We never heard from them or their lawyers afterwards. In retrospect, I think they would have done it without any warranties as all, as long as our checks cleared.

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

I don't do litigation, so I don't handle cases as such. Probably the most high-profile report I worked on was the interview that NBC News did with Juanita Broaddrick, who accused Bill Clinton of rape. This was during the Ken Starr investigation into the Clinton presidency, Monica Lewinsky, and all of that. The allegation was incredibly

controversial, and Broaddrick had not gone public with the story until that time. So we went to great lengths to try to confirm as much as we could – even basic things like that Bill Clinton was actually in Little Rock on the day in question. Because obviously there were no witnesses to the event themselves other than the two of them.

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

I grew up in Houston and I'm a proud Astros fan so I have a lot of Texas-related stuff. Most important is probably a personalized Louisville Slugger, a special bat for the 2005 World Series where the Astros, then still in the National League--were destroyed by the Chicago White Sox. I went to game three of that World Series (the first World Series game ever played in Texas) with my friend Chip Babcock, the terrific media lawyer. I remember having dinner before the game with Chip and his client, Wayne Docefino, then a local reporter, who Chip and others have defended in several libel cases.

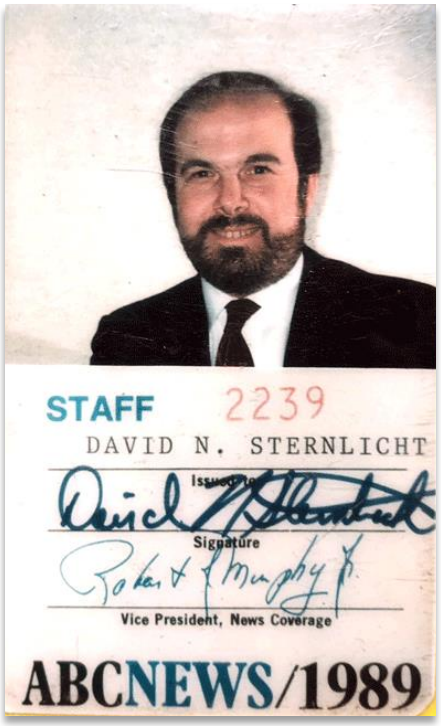
6. What's the first website you check in the morning?

Memeorandom. It's a political news aggregator. I think a lot of journalists use it as well.

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

A lawyer's answer to a general question often begins, "Well, it depends. . ." and I think that's certainly the case here. If you really want to be a lawyer, of course you should go to law school. But my sense is that a lot of people make the decision without clearly answering that question. If you vaguely think, "This could be a good career," you may be disappointed with some of the actual work. I was incredibly lucky in that I was able to get into an area of the law that I really enjoy, that's truly satisfying and does some good. But not all lawyers can say that.

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



You should demonstrate a real commitment to the field. When I look at resumes, I'm not interested in the person who's gone to a top law school, practiced securities law for a big firm eight years and decided "This is boring – maybe media law would be fun." I want someone who early on has demonstrated a real interest in this area of the law, who believes in what we do as much as I do.

For in-house jobs, we generally hire people who have worked in media law previously – at a law firm or at nonprofits like MLRC or the Reporters Committee. We also look at people who have worked in journalism. The main thing is we want people who show that this is a long-standing interest as opposed to something they'd just like to try.

9. What issue keeps you up at night?

I tend to sleep pretty well, but if you're looking for an answer, it's how political division in this country is influencing the way people view the news and the people who report it. Virtually all of us who work in the "mainstream media" are committed to telling the truth, to helping people make more informed decisions. It's frightening to me that there is a substantial portion of the public that rejects what we do and that they think we're just engaged in carrying out some sort of political agenda. There is a saying, often attributed to the late Senator Moynihan, "everyone is entitled to their own opinion; they're not entitled to their own facts." We no longer seem to be able to agree on what the facts are.

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

I would've liked to have given being a television reporter more of a try, but an early experience turned me off it. I was working part-time for a television station in Austin, while I was studying to take the bar exam, and I had applied for a job with a station in San Antonio. The news director said he was impressed by the fact I went to law school. (At the time, reporters with legal backgrounds were unusual.) The news director said he was going into the hospital for minor surgery, but promised he'd be in touch. I never heard back. Apparently another candidate came in after me, an attractive blonde flight attendant, who had no journalism experience whatsoever, who suddenly decided she wanted a career in television, and he hired her on the spot. I thought, "I don't need this," and decided to pursue a career practicing law. Luckily I managed to find my way to a place where the two paths meet.