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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through May 28, 2018

MLRC

LIBEL & PRIVACY

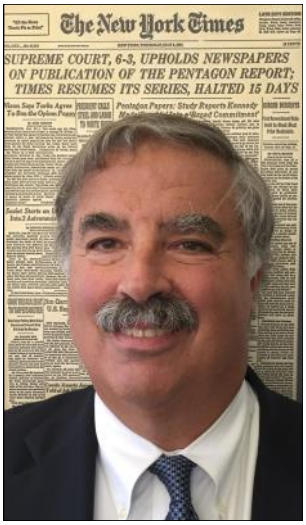
ACCESS

From the Executive Director's Desk

September Media Law Conference:

Michael Avenatti, Hustler v. Falwell, Trump and Juries, Journalism Jeopardy Returns and More

My job here at the MLRC is quite varied: among other tasks, it involves negotiating lease agreements with our landlord and sub-tenants; choosing and inviting speakers to our Annual Dinner – and this November's will be quite a doozy, more on that later; overseeing our great staff; reporting to (and being Secretary of) our Board; writing this monthly column; and watching over all our publications. But one of the responsibilities I enjoy the most is the planning of conferences, particularly our biggest and broadest conference, the Media Law Conference in Virginia, which alternates every year with our very popular global London conference, and will be held this year in Reston, Va. on September 26-28.



George Freeman

I am very excited about this year's conference, which promises to be the best ever. Let me give you a few reasons why.

We decided some time ago that the opening session Wednesday afternoon should be on libel, given the growth in defamation cases lately. We hadn't settled on a specific issue, but then, in a plethora of riches, came up with two great topics, so we're opening with a plenary in two parts.

Our plenary on Hustler v. Falwell will feature Ros Mazer, who wrote the key amicus brief in the case; Len Niehoff, who has written a paper on the legacy of the decision; two Pulitzer Prize winning editorial cartoonists; and a Penn State professor who will compare editorial cartoons with current late night hosts

Part 1 is, I will admit, pure theft. In late April, I was invited to moderate a program as part of a symposium Jane Kirtley put on at the Univ. of Minnesota on the 30th anniversary of the Supreme Court's decision in Hustler v. Falwell. The symposium featured, both as speakers and in the audience, editorial cartoonists – a bawdy, irreverent, smart and sarcastic bunch. It was a very interesting day and a half – so I've taken the best topics and liveliest speakers and condensed that to an hour program during our first plenary. We'll feature Ros Mazer, who wrote the key amicus brief in the case, which contained numerous historic cartoons, and was said to have swayed CJ Rehnquist; Len Niehoff, who has written a paper both criticizing and commenting on the legacy of the decision; two Pulitzer Prize winning editorial cartoonists; and a Penn

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Our Fred Friendly hypothetical will feature at least a couple faces you'll recognize from TV: Judy Woodruff and Michael Avenatti

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State professor, who has written a book on Democracy, Satire and Colbert, and will bring the case to the present day/late night.

Part 2 will be a short session on the recent decision by Judge Rakoff in Palin v. NY Times case in the Southern District of New York. As most of you are doubtless aware, Judge Rakoff held a very unusual evidentiary hearing on the Times' motion to dismiss: he and plaintiff's counsel questioned the Times' Editorial Page editor, who wrote the piece in question, to probe into his degree of actual malice, if any; some limited discovery of the Times was also granted prior to the deposition. In my view, this is a very helpful precedent, as I think it will lead to more 12(b)6 motions being granted in libel cases, especially since I feel judges might otherwise be prone to reject such motions and allow the case to go on in light of the extremely strict Iqbal requirements. Much to my surprise, many practitioners disagreed with me, citing what I dub as "big firm" reasons to be contra: discovery is given too soon, plaintiffs get to question defendants' witnesses this early and then again during regular discovery if the case is not dismissed, and maybe this early questioning will uncover actual malice which would lead to rejection of the motion. At a bar association meeting I attended this led to a loud and contentious debate, so I though these arguments could be replicated in Part 2 of the opening plenary.

Wednesday evening we will have our traditional Laura & George Fred Friendly hypothetical case after-dinner performance. The tentative program entitles it "Stormy Weather" so that might give you some idea where we are coming from. We intend to raise questions such as whether calling someone a liar is defamatory, mirroring issues in a number of the Bill Cosby cases; whether broadcasting the sex tape of a public official constitutes invasion of privacy, a mix of Hulk Hogan and, just hypothetically, our fearless leader; NDAs, and perhaps, a particular annoyance to our President, the use of anonymous sources.

We are still working on our panel, but we already have a great cast. For starters, Michael Avenatti, Stormy Daniels' lawyer, has agreed to be there. He was hard to reach by email, although I did find a more recent email

Our second plenary will feature debate on the recent decision in Palin v. New York Times, allowing an evidentiary hearing on a motion to dismiss

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address on the cover page of a recent complaint he filed for his client; and especially if you watch CNN, he seems to be a pretty busy attorney. But I got his cell phone number from an old colleague at The Times and after a few short calls prevailed on him to join us. In the meantime, Laura Handman, who must have the thickest Rolodex in Washington, successfully garnered PBS' NewsHour anchor Judy Woodruff and the Times Chief White House correspondent Peter Baker. In addition, libel plaintiffs' lawyer Libby Locke will be on the panel as will our good friend, defense attorney Victor Kovner.

Usually, I start working on the hypo about now, but given the changes and developments in all the major stories, from the chaos in the administration to the Mueller investigation, and from the Stormy situation to new and unexpected evildoers in the #MeToo realm, I think I will have to wait till September to come up with a hypo that is timely.

Thursday morning will begin with a breakfast program on the Masterpiece Cakeshop v. Colorado Civil Rights Commission case, pitting LGBT anti-discrimination laws against the claim that cake designing is expression protected by the First Amendment. It is a case where even First Amendment advocates are deeply divided since the Cakeshop refused to make a wedding cake for a gay couple because they were gay. By the time of our Conference the Supreme Court should have ruled on the case, and so we should have a lively discussion among three advocates, all of whom filed briefs in the Court, including David Cole, the ACLU's National Legal Director on the side of the couple, and Robert Corn-Revere of Davis Wright on the side of the Cakeshop. Floyd Abrams will moderate what I am sure will be a fascinating session.

This year's Next Big Thing session will address the end of the Internet honeymoon (personified by Mark Zuckerberg)

The Friday breakfast plenary should be equally engaging. I'm very happy to say that its idea came not at all from us at the MLRC, but totally from a member – unfortunately, I can't remember who- at the Planning Meeting we had in November the day after our Annual Dinner. At that open meeting, someone brainstormed that it would be interesting to have jury consultants tell us about the Trump effect: how should defense lawyers on voir dire tease out potential jurors who have bought into Trump's media as enemy of the people mantra, and whether jury verdicts against the media have gotten worse because of Trump's anti-media bluster. We found some jury consultants who not only are prepared to talk about those issues, but who promised to make some empirical studies on these questions and report their findings at the session. Add some scrambled eggs and bacon, and you have a great way to start the day.

The final plenary, Friday at lunch, also will be superb. Usually we have a session on the Next Big Thing, where panelists predict what the NBT will be and the audience votes on the most likely choices. This year we have a slight adjustment on that theme: we know what the

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NBT is: the Internet, but, more particularly, the end of the Internet honeymoon. So we will have a program on the growing backlash against "big tech." How will concerns over "fake news", offensive content, commercialization of private data, hacking, and digital disruption affect law, journalism, and emerging technology. Are the tech giants becoming too big, and perhaps more important, are they living up to their social responsibilities? While maybe this won't end the conference on an upbeat tone, it should offer plenty of food for thought.

As usual, we will have small workshops – both breakout sessions and boutiques – which will give lots of opportunities for interactive discussions among attendees. Four of the Boutiques will be on brand new topics: Drones, which will feature dramatic and beautiful drone videos; Addressing Scandals: Dealing with HR, PR and Internal Investigations, which will focus on the sexual harassment problems many media companies have faced; Hate Speech and the First Amendment on Campus; and Campaign Finance 101. The latter is one of two 101 boutiques; the other is Data Privacy 101, and I intend to attend both of them. The idea is to have workshops on topics which all First Amendment lawyers should know something about, but which, in truth, few do. So if you understand less about Citizens United than you care to admit or you can talk about data privacy without really knowing its basics, these sessions – which will start with the fundamentals and move on from there- are for you.

Get ready to answer trivia in the form of a question: Journalism Jeopardy returns!

Finally, I would be remiss if I didn't announce that on Thursday at lunch we will play a rousing game of Journalism Jeopardy. As many of you know, this was a tradition at the ABA Forum on Communications conferences for close to 20 years, and when I left that conference's Planning Committee to come to the MLRC, I bequeathed the game to the Forum. But over the last two conferences, they have not played Journalism Jeopardy, so I consider the gift to have been waived. So get ready to answer journalism trivia in the form of a question. See you in Virginia (register here)!

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.

Jury Verdict for Minnesota Media Reinstated

By Tom Curley

A Minnesota appellate court has reinstated a jury verdict in favor of the *St. Cloud Times* and KARE 11 television arising out of news reports of the arrest of a suspect in the ambush killing of a police officer. The murder suspect – who would eventually be exonerated – sued the media defendants for defamation claiming reports of his arrest went beyond what police had said publicly. *Larson v. Gannett Co., Inc.*, No. A17-1068 (Minn. Ct. App. May 7, 2018).

The media organizations won a jury trial in November 2016 only to have the verdict vacated post-trial. The judge, notwithstanding the jury's determination in a special verdict that the allegedly defamatory statements were accurate, held that they were false as a matter of law.

The judge then ordered a new trial limited to the issues of negligence and damages. The media defendants appealed that decision and, in an opinion issued earlier this month, won a victory before the Minnesota Court of Appeals with the support of media amici.

The trial court's decision to throw out the verdict followed a series of rulings adverse to the defendants before and during the trial. Most notably, the trial court held that a news conference held by law enforcement to announce the arrest of a murder suspect was not protected by the "fair report" privilege, nor was a press release similarly publicizing the apprehension.

A Minnesota appellate court has reinstated a jury verdict in favor of the St. Cloud Times and KARE 11 television arising out of news reports of the arrest of a suspect in the ambush killing of a police officer.

"The Post-Trial Order's effects on the press and chilling of First Amendment rights are predictable: Without the privilege's protections and with a strict implication or republication analysis in place, reporting on developing news stories would be seriously inhibited by fear of defamation liability, because with many developing news stories, the ultimate truth or falsity of law enforcement's statements is simply unknown to the press, law enforcement, and public alike," KARE 11 and the *St. Cloud Times* argued on appeal.

The defamation case arose out of the 2012 shooting of a police officer in the town of Cold Spring. Shortly after the shooting, authorities publicly announced the arrest of Ryan Larson in connection with the murder.

According to police, the officer had been on his way to perform a welfare check on Larson at the request of his family who feared Larson was suicidal. The officer was killed just after exiting his car in the parking lot of the building where Larson lived above Winners Sports Bar.

Larson was named by law enforcement as the only suspect through information provided at a news conference, as well as being identified in a media release and jail booking log. He was jailed based upon sworn statements that authorities had probable cause to believe him responsible for the crime.

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However, Larson was released four days after his arrest because of lack of sufficient evidence and he would be exonerated months later.

KARE 11 and the *St. Cloud Times* reported extensively upon Larson's release from jail and the eventual focus of police on a different individual, coverage which they would emphasize during the defamation trial. KARE 11 and the *St. Cloud Times* were both owned by Gannett at the time of the challenged news reports. KARE 11 is now owned by TEGNA.

Although a variety of issues were raised on appeal, the Minnesota Court of Appeals focused on the application of the fair report privilege to the circumstances of the case. Significantly, the appellate court reversed the trial court's determination that the privilege did not apply to news conferences and press releases authorized by law enforcement.

"We conclude that the public interest is served by fair and accurate reports about information conveyed by law enforcement at an official press conferences or in an official news release. While this conclusion leads us to extend the fair-report privilege to news reports of official law-enforcement statements, we also note that this privilege is qualified and does not protect news reports that fail to fairly and accurately reflect official statements."

There were eight allegedly defamatory statements at issue in the case. Without parsing them each individually, the appellate court generally found there was a fact issue presented on whether the privilege had been overcome, *i.e.*, whether the challenged statements fairly and accurately reflected what police officials were saying at the time of Larson's arrest.

The Court of Appeals had little difficulty concluding that there was sufficient evidence for the jury to return a defense verdict.

However, the Court of Appeals had little difficulty concluding that there was sufficient evidence for the jury to return a defense verdict. "[I]f law-enforcement statements from the jail log, press conference, and news release are considered together, a reasonable jury may conclude that statements 1-8 were substantially accurate reports of official statements."

The appellate court rejected various rationales for permitting a new trial, including allowing the plaintiff to re-cast his claim as one for libel-by-implication or to present other, additional statements to the jury which plaintiff alleged to be actionable. Accordingly, the Court of Appeals reinstated the jury verdict in favor of the media defendants.

Steven J. Wells, Timothy J. Droske and Angela M. Porter of Dorsey & Whitney LLP in Minneapolis represented TEGNA and Gannett. TEGNA was also represented by Associate General Counsel Christopher Moeser and Gannett by Associate General Counsel Tom Curley. Plaintiff Ryan Larson was represented by Stephen C. Fiebiger of Burnsville, Minnesota.

Leita Walker of Faegre Baker Daniels LLP, Minneapolis, represented amici Star Tribune Media Company, The Associated Press, Fox/UTV Holdings, LLC, The Minnesota Newspaper Association, Digital First Media, and The Reporters Committee for Freedom of the Press.

Texas Supreme Court: "Cabins" Implied Defamation

Summary Judgment Reinstated in Suit Over Column That Disclosed a Suicide After Misleading Obituary

By Paul C. Watler

A newspaper column was reasonably capable of defaming by implication parents who published a misleading obituary about the death of their 17-year old son. But, applying First Amendment principles, a libel suit by the parents must be dismissed on summary judgment because the column was opinion and true, the Supreme Court of Texas unanimously ruled May 11, 2018. Dallas Morning News v. Tatum, No. 16-0098, 2018 WL 2182625 (Tex. May 11, 2018).

In a 41-page opinion, Justice Jeff Brown surveyed the Court's libel law jurisprudence of the past several decades. Concerned with "cabining the dangers that defamation by implication poses," the Court adopted a First Amendment-based test to evaluate such claims. Following a formulation by the D.C. Circuit, the Court held that to be actionable a publication must objectively convey that a defendant intended or endorsed the defamatory implication alleged by the libel plaintiff.

The column observed that suicide was the only "form of death still considered worthy of deception."

The Column and the Libel Suit

The column, "Shrouding suicide leaves its danger unaddressed," observed that suicide was the only "form of death still considered worthy of deception." It noted that a recent paid obituary in the newspaper reported that a popular local high school student died "as a result of injuries sustained in an automobile accident." When a newsroom colleague inquired for a possible news story, the death "turned out to have been a suicide," the column disclosed.

The column lamented that "we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception." The reason we should be more open, according to the column, is that "the secrecy surrounding suicide leaves us greatly underestimating the danger

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there" and that "averting our eyes from the reality of suicide only puts more lives at risk."

The column identified neither the student nor the parents. But a libel suit by the parents construed the column to mean that they acted deceptively in publishing the obituary, that they ignored mental illness in their son leading to his suicide, and that their deception perpetuates the problem of suicide.

Defamatory Meaning

A central issue for the Court in *Tatum* was the doctrine of defamation by implication. A key question is whether the publication is reasonably capable of the implied defamatory meaning.

This involves a single objective inquiry: whether the publication can be reasonably understood as stating the alleged defamatory implication.

This inquiry is limited by the United States and Texas constitutions to avoid "too great a 'chilling effect' on First Amendment activities." The potential chilling effect is especially strong in defamation by implication cases.

As an embodiment of these considerations, the Court adopted the test from *White v. Fraternal Order of Police,* 909 F.2d 512, 520 (D.C. Cir. 1990). Does the communication itself supply "additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference?" *Id.*

Even though the Court held the column was opinion, "to the extent that the column states that the [parents] acted deceptively, it is true."

The Court emphasized that the evidence that a publisher intended the defamatory implication must arise from the publication itself. The Court identified "myriad considerations" in determining whether the publication on its face evidences endorsement of the alleged defamatory implication. Does the publication clearly disclose the factual bases for the statements it impliedly asserts? Does the allegedly defamatory implication align or conflict with the article's explicit statements? Does the publication accuse the plaintiff in a defamatory manner as opposed to simply reciting that others have accused the plaintiff of the same conduct? Does the publication report separate sets of facts or does it link the key statements together? And does the publication specifically include facts that negate the implications that the defendant conjures up?

The test is objective and rooted in the principle of independent judicial review in order to avoid "endanger[ing] first amendment freedoms."

In analyzing the meaning of the column, the Court found that the text supported the implication that the parents acted deceptively. However, the court rejected the additional alleged meanings that the parents ignored mental illness in their son leading to the suicide and that the parent's deception perpetuates the problem of suicide.

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Texas Supreme Court Opinion

Although the Court found that the column was reasonably capable of a defamatory implication, it held that nevertheless the context of the column indicated that it was protected opinion. A publication is not actionable in defamation when it makes statements that "are not verifiable as false" or, if verifiable, when the entire context discloses it was not intended to assert a fact. In this case, the "column's context manifestly discloses that any implied accusation of deception against the [parents] is opinion." The column as a whole argues the opinion that society ought to be more frank about suicide. "It is an opinion piece through and through." *Tatum*, 2018 WL 2182625, at *17.

Truth

Even though the Court held the column was opinion, "to the extent that the column states that the [parents] acted deceptively, it is true." The obituary by the parents "leads readers to believe something that is not true" because it "states that [their son] died from injuries arising from a car accident when in fact [he] committed suicide." The Court rejected the parents' contention that the column was false because it omitted reasons for their belief that the obituary was true. The parents "cannot argue both that the obituary was true without this background information and that the column is false for failing to include it."

The Court also analyzed whether the alleged implication was at least "substantially true because it is no more damaging to the [parents'] reputation than a truthful column would have been." *Id.* at *18. Finding that the people who knew the parents knew that the death was a suicide before the obituary and thus would not form a worse opinion of the parents from the column, the column was no more damaging to the reputation of the parents than a truthful column. Therefore, it was substantially true.

Conclusion

The newspaper did not escape criticism from the Court. The column was certainly "callous" and "may have run afoul of certain journalistic, ethical and other standards." But, ultimately, it had not fallen below the standards governing Texas defamation law.

Paul C. Watler and Shannon Zmud Teicher of Jackson Walker LLP represented The Dallas Morning News. Co-counsel for The News in the Supreme Court was Wallace Jefferson and Rachel Ekery of Alexander, Dubose, Jefferson & Townshend. Plaintiffs were represented by Joe Sibley, Camara & Sibley. For more information about the case, view articles in The Dallas Morning News *and* Law360.

Publication of Trump Dossier May be Protected by Fair Report Privilege

Buzzfeed Alleged Facts That Dossier Was Part of an Official Proceeding

By Adam Lazier

More than a year and a half after BuzzFeed's decision to publish a controversial "dossier" of intelligence reports about connections between Donald Trump and Russia, a court has finally weighed in. The decision vindicates BuzzFeed's argument that its decision to publish the dossier may be protected by New York's fair and true report privilege. Fridman v. BuzzFeed, *Inc.*, 2018 N.Y. Slip. Op. 30834(U) (N.Y. Sup. May 7, 2018).

Background

In the late summer and fall of 2016, a series of intelligence reports containing allegations of ties between the Russian government and the Trump presidential campaign began to circulate among politicians, government officials, and journalists. Although a couple of news reports in 2016 referred obliquely to the document, it remained mostly unknown to general public until January 10, 2017, when CNN reported that President Obama and President-elect Trump had been briefed by the country's four most senior intelligence chiefs on allegations that Russian operatives had compromising information on President-elect Trump. According to CNN, the allegations "came, in part, from memos compiled by a former British intelligence operative, whose past work US intelligence officials consider credible."

The decision vindicates BuzzFeed's argument that its decision to publish the dossier may be protected by New York's fair and true report privilege.

Later that day, BuzzFeed published the dossier itself, along with an article reporting on the fact that it had been "circulating among elected officials, intelligence agents, and journalists for weeks," and become the subject of official activity. The article itself gave readers some details of that official activity – reporting, for instance, that John McCain passed a copy of the dossier to then-FBI Director James Comey in December 2016. It also hyperlinked to other articles with more information, including a report in the CNN article that the FBI was investigating the document.

Since BuzzFeed published it, the dossier has been at the center of the country's biggest news story. Congress has heard testimony about it and released memoranda describing its role in government investigations. Two Senators have publicly referred its author, former MI6 agent Christopher Steele, to the Department of Justice for prosecution. And the President of the United States has publicly claimed that the sitting FBI director sought to use it to gain "leverage" over him.

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Several people named in the dossier have also sued BuzzFeed. In one case, a Cyprus-based Russian businessman and two of his internet hosting companies are suing in Florida federal court over the Dossier's allegation that they or their networks were involved in the hack of the Democratic Party leadership. The other case was brought in New York state court by Mikhail Fridman, Peter Aven, and German Khan, the billionaires behind Alfagroup, one of Russia's largest business conglomerates. They claim that the Dossier defamed them in everything from calling them "oligarchs" to alleging that they bribed Vladimir Putin when he was mayor of St. Petersburg in the 1990s. A third case, brought by Donald Trump's personal lawyer Michael Cohen, was recently voluntarily discontinued amid Cohen's legal troubles.

One of the BuzzFeed's main defenses in both ongoing cases is the fair and true report privilege. Because the dossier was in government hands and had become the subject of a variety of official activity by the time it was published, this argument goes, BuzzFeed was entitled to publish the document itself as part of its report on those government actions. Although New York courts have long recognized that the privilege extends far beyond the classic examples of court filings and police reports, the plaintiffs in both cases have vigorously contested the notion that it could ever apply to the dossier. Among other thing, they say the privilege cannot apply to a document that was not created by a government body, not filed in court, and not received directly from an official source.

The plaintiffs also argue that BuzzFeed cannot use the privilege because its article accompanying the dossier did not describe the official activity in enough detail, and instead relied in part on hyperlinks to other articles reporting on that activity. This is an issue which has recently attracted a significant amount of attention – in the first appellate decision to address it, the Supreme Court of Nevada held that hyperlinks, as "the twenty-century equivalent of the footnote," could satisfy the fair report privilege's attribution requirement. *See Adelson v. Harris*, 402 P.3d 665 (Nev. 2017). The plaintiffs in the dossier cases argue that other courts should not follow *Adelson*'s lead.

Citing the reported presidential briefings and Senator McCain's actions in giving the Dossier to Director Comey, Judge Bluth wrote that the defendants had alleged facts that would establish "that the Dossier was part of an official proceeding."

The Plaintiffs' Motion to Dismiss in the *Fridman* Case

The fair and true report issue has now come before the court in the *Fridman* case. After the defendants filed their answer, the plaintiffs moved to dismiss, among other things, their fair and true report defense.

In decision released on May 7, Justice Arlene Bluth of the New York Supreme Court held that the fair and true report defense as pled by BuzzFeed was potentially viable as a matter of law, and denied the plaintiffs' motion to dismiss it. Citing the reported presidential briefings and Senator McCain's actions in giving the Dossier to Director Comey, Judge Bluth wrote that the defendants had alleged facts that would establish "that the Dossier was part of an official proceeding." She noted that the plaintiffs had "failed to cite any case law" supporting their

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view that the privilege only applies where the government is "the source of the information." And she rejected in strong terms the plaintiffs' argument that the privilege requires proof that they themselves were being investigated, because regardless of whether the government was investigating every single statement in it, "[t]he fact is that the Dossier itself, according to BuzzFeed, was part of the government's investigation." Although Justice Bluth did not deal directly with the hyperlinking issue, she referred in broad terms to allegations about "the government's investigation" into the dossier supporting BuzzFeed's defense – and many details about that investigation were incorporated in the article via hyperlinks.

The plaintiffs have already appealed, so Justice Bluth's decision may not be the last word on this. But the decision is certainly an important – and useful – indication of the role the fair and true report privilege can play in protecting reporting on what Justice Bluth rightly called "an issue of national public interest."

Kate Bolger, Nathan Siegel, Alison Schary, and Adam Lazier of Davis Wright Tremaine represented defendants BuzzFeed, Ben Smith, Ken Bensinger, Miriam Elder, and Mark Schoofs. Plaintiffs are represented by John Walsh and Alan Lewis, Carter Ledyard & Milburn LLP, New York.

NJ High Court Issues Online Republication Standard

Material and Substantive Change to Original Article Required

By Bruce S. Rosen

The New Jersey Supreme Court has provided long-awaited guidance on what kind of changes to Internet postings are significant enough to trigger the single publication rule. In Petro-Lubricant Testing Laboratories, Inc. v. Adelman, No. 078597 (May 7, 2018), the Court ruled that "republication occurs to on online publication if an author makes a material and substantive change to the original defamatory article."

The Court said that the state's one-year statute of limitations to sue over a defamatory internet article can restart if (1) there has been a material change that relates to the defamatory content of the article at issue that is beyond "a technical website modification or posting on the website of another article with no connection to the original offending article; and (2) it contains substantive change which alters the meaning of the original defamatory article or essentially becomes a new defamatory statement incorporated into the original article, "not the mere reconfiguring of sentences or substitution of words that are not susceptible of containing a new defamatory meaning to the article."

The Court ruled that "republication occurs to on online publication if an author makes a material and substantive change to the original defamatory article."

Analysis

In making the ruling, the justices affirmed an appellate division panel's dismissal of Petro-Lubricant Testing Laboratories Inc.'s suit against eBossWatch.com operator Asher Adelman for publishing a story about an employee's workplace bias lawsuit, but not because of its republication ruling. The high court disagreed with the appellate panel's conclusion that the lawsuit was untimely because the modification at issue was only minor and not a republication and instead found that there were genuine issues of fact as to whether the modification was material and substantive. In doing so, the Court appears to have undercut the incremental harm and substantial truth doctrines in New Jersey without even mentioning them. However, the Supreme Court then found that that the article nonetheless was protected by the fair report privilege.

This lead to a sharp concurrence which warned that "the majority's fine parsing of the term "white supremacist" would have resulted in a trial on the merits of the case" had they not relied on fair report, noting that "This could have a chilling effect on the media where the privilege is not available."

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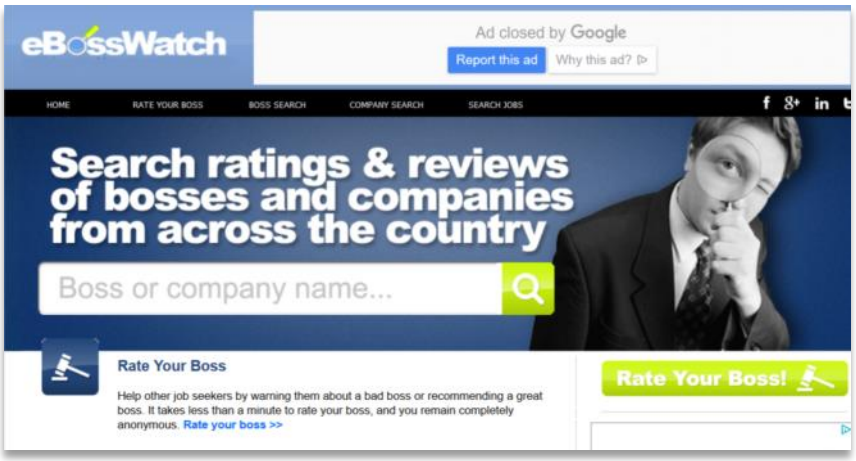
Adelman's original article in *eBossWatch* described a lawsuit brought against Petro-Lubricant CEO John Wintermute which described him as #39 on a list of the worst bosses, pulling from the complaint passages that described him as "a violent bully, a racist, and a womanizer," that he regularly used profanity and referred to women in the most vulgar and degrading terms, and that he had an explosive temper when drunk. Among other allegations Adelman reported was that Wintermute "allegedly forced workers to listen to and read white supremacist materials." After the statute of limitations expired, Wintermute's attorney sent a threatening letter demanding removal of Wintermute from the worst-bosses list and threatening legal action if Adelman did not comply.

Adelman, apparently acting without a lawyer, defended Wintermute's inclusion on the list as an expression of opinion protected by the First Amendment, and said he would make changes to the article making it clearer that the article reflected the filed complaint. He then made minor changes but included a passage saying that Wintermute forced his workers to listen to and read "white supremacist materials," a phrase Adelman modified to say "anti-religion, anti-minority, anti-Jewish, anti-Catholic, anti-gay rants," which was again taken from the complaint.



"The change to the article was material — relating to the article's defamatory content. At the very least, genuine issues of fact are in dispute about whether the modification to the original article was substantive — that is, whether it injected a wholly new defamatory statement into the article," Justice Barry T. Albin wrote for the majority, joined by Justices Jaynee Lavecchia, Anne M. Patterson and Faustino Fernandez-Vina.

The trial court originally found that the modified article constituted a second publication. The Appellate Division reversed, finding the modified article's changes were immaterial, and in addition were intended to diminish the defamatory sting. Amici New Jersey Press Association, Reporter's Committee for Freedom of the Press and the ACLU-NJ argued that changes to an article that soften its defamatory content should not be allowed to become a basis for restarting a limitations period because publishers should not be punished for taking remedial measures. They also argued that the statements were protected by the fair report privilege, which is among the nation's strongest under *Salzano v. North Jersey Newspapers Group, Inc.*, 201 N.J. 500 (2010)

As to republication, the Supreme Court disagreed and said intent was not a factor in determining defamatory meaning. Then, in a rather remarkable departure from the substantial truth and incremental harm doctrines, the justices determined the modified statements

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concerning white supremacists were made with too broad a brush and not every white supremacist believed in anti-religion, anti-minority, anti-Jewish, and anti-gay terms. "A reasonable person might not believe that all white supremacists hold anti-religious or anti-gay views. However, a Catholic, a Jew, a minority, and a gay person will almost certainly take offense when they are the specific target of a hateful rant."

However, the Court failed to say how reporting a person as a white supremacist could be made worse by referring to them as anti-gay, anti-Semitic, anti-minority (which is virtually synonymous for being a white supremacist) or anti-Catholic. The concurrence by Justice Lee A. Solomon, joined by Chief Justice Stuart A. Rabner and Justice Walter Timpone, also took issue with that point, criticizing the majority's parsing of the term "white supremacist"

"The modifications specifying the kinds of rants that plaintiffs' employees were subjected to do no more than further define 'white supremacists' by setting forth its subsets," the concurrence said. "I do not agree with the majority that setting forth subsets of white supremacist views in Adelman's later blog post further defamed Wintermute." The concurrence pointed out that the idea that white supremacists are have other prejudices along the lines of Ademan's modified article are "part of a widely-held, well-supported understanding of the term white supremacy."

Although amici, rather than the parties, had raised the fair report argument before the high court, the Court made clear that "any reasonable person reading the modified article would understand that it was reporting on the facts alleged in a civil complaint."

Nevertheless, although amici, rather than the parties had raised the fair report argument before the high court, the Court made clear that "any reasonable person reading the modified article would understand that it was reporting on the facts alleged in a civil complaint." And while this is not at all the standard under *Salzano*, the Court reiterated that "The fair report privilege applies to a report of a court-filed complaint regardless of the truth or falsity of the initial allegations and defenses because citizens have a right to know what has been filed in court and how the judicial system responds to it," and then concluded along the standard set forth in *Salzano* that the modified article "is a full, fair and accurate account of a court-filed complaint alleging gender discrimination, workplace harassment, and retaliation and is protected by the fair report privilege."

Bruce Rosen is a partner at McCusker, Anselmi, Rosen & Carvelli in Florham Park, NJ and was counsel for North Jersey Newspapers Group in the Salzano case. Plaintiffs were represented by James Prusinowski of Trimboli & Prusinowski of Morristown, NJ and Mark Clark of the Michigan bar. Defendant Adelman was represented by Garen Meguerian of Paoli, PA Amici included Eugene Volokh and the UCLA First Amendment Clinic for the Reporters Committee, CJ Griffin of Pashman Stein Walder Hayden of Hackensack, NJ and ACLU attorneys Edward L. Barocas, Jeanne LoCicero and Alexander R. Shalom for ACLU-NJ, and Thomas J., Cafferty , Nomi I Lowy and Lauren James-Weir of Gibbons in Newark N.J. for the NJ Press Association.

Sarah Palin Asks Second Circuit to Reinstate Libel Suit Over NYT Editorial

Appeal Challenges Unusual Iqbal Hearing Conducted by Judge Rakoff

By Naomi Sosner

Last summer, Judge Jed Rakoff dismissed with prejudice Sarah Palin's defamation suit over a *New York Times* editorial, concluding her allegations of actual malice failed to meet the *Iqbal* plausibility standard. Palin v. The New York Times Company, 264 F. Supp. 3d 527 (S.D.N.Y. 2017). Judge Rakoff reached that conclusion after conducting an unprecedented factual hearing featuring the testimony of the *Times'* editorial page editor and background documents surrounding the editorial.

On appeal, Palin is asking the Second Circuit to rule that the unusual *Iqbal* hearing and the denial of her subsequent request to amend her complaint was in error. Her legal team now includes as lead counsel Elizabeth Locke, who successfully represented University of Virginia administrator Nicole Eramo against *Rolling Stone,* together with Ken Turkel and Shane Vogt, counsel for Hulk Hogan in his suit against Gawker. *Palin v. The New York Times Company*, Case No. 17-3801 (2d Cir.).

Last summer, Judge Jed Rakoff dismissed with prejudice Sarah Palin's defamation suit over a New York Times editorial, concluding her allegations of actual malice failed to meet the *Iqbal* plausibility standard.

Background

Sarah Palin's one-count complaint against *The New York Times*, filed in district court in June of 2017, alleged that the *Times* defamed her in an editorial published on June 14, 2017, and edited the following day to correct the statements at issue. The Editorial, titled "America's Lethal Politics" and signed "By the Editorial Board," responded to a shooting that had taken place earlier that day in Virginia, when James Hodgkinson opened fire on Republican members of the United States Congress and congressional aides playing softball, wounding Congressman Steve Scalise and three others. It framed the Virginia attack as part of a "sickeningly familiar pattern" that had arisen within the context of America's virulent political atmosphere and its resistance to gun control, linking it to a 2011 mass shooting in Tuscon, Arizona, when Jared Lee Loughner shot nineteen people, killing six and injuring thirteen, including Congresswoman Gabrielle Giffords.

The Editorial revived a discredited allegation that Loughner's attack was inspired by a Palin campaign flyer, published by SarahPAC, Palin's political action committee, depicting crosshairs over congressional districts of certain Democrats including Giffords. Ultimately,

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articles in the *Times* and elsewhere stated that no connection between the SarahPAC map and the Arizona shooting had been established.

The *Times* published the Editorial online on the evening of June 14, 2017, and in print on June 15, 2017. These original versions referenced the SarahPAC map as "political incitement" directly linked to the Arizona crime; it is on these statements that Palin's defamation suit lays. The relevant passages are as follows:

> Was this attack [by Hodgkinson] evidence of how vicious American politics has become? Probably. In 2011, when Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl, the link to political incitement was clear. Before the shooting, Sarah Palin's political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.
>
> Conservatives and right-wing media were quick on Wednesday to demand forceful condemnation of hate speech and crimes by anti-Trump liberals. They're right. Though there's no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right.

The Editorial revived a discredited allegation that Loughner's attack was inspired by a Palin campaign flyer.

(The word "circulated" in the Editorial linked to ABC News reports, including one which states that "[n]o connection has been made between [the SarahPAC map] and the Arizona shooting.")

Shortly after the Editorial was published, readers disputed the characterization of the SarahPAC map as "political incitement." The *Times* itself published a news article the same night it posted the Editorial noting that Palin "drew sharp criticism" following the map's publication but that "no connection to the crime was established." The *Times* ultimately revised the Editorial twice, deleting the phrases "the link to political incitement was clear" and "though there's no sign of incitement as direct as in the Giffords attack," and adding the sentence "But no connection to that crime was ever established." The *Times* also published a series of corrections, which, in final form, stated the following:

> An editorial on Thursday about the shooting of Representative Steve Scalise incorrectly stated that a link existed between political rhetoric and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established. The editorial also incorrectly described a map distributed by a

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political action committee before that shooting. It depicted electoral districts, not individual Democratic lawmakers, beneath stylized crosshairs.

The Case in District Court

Palin filed her defamation suit on June 27, 2017, less than three weeks after the Editorial was published, alleging it falsely accused her of inciting Loughner's attack. At the Initial Case Management conference, the *Times* informed the court it intended to move to dismiss Palin's complaint on several grounds, including for failure to plausibly allege actual malice, and requested discovery be stayed until the court decided that motion. The court granted the stay. On July 14, 2017, the Times moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6) on three grounds: (i) the challenged statements are not "of and concerning" Palin as a matter of law; (ii) they do not constitute provably false statements of fact; and (iii) Palin failed to plausibly allege actual malice.

The nature of the Editorial—specifically, its joint byline attributing it to the Editorial Board generally—complicated the court's assessment of the complaint. In its opinion, the court stated that the complaint, on its face, was materially deficient because it failed to identify an individual who allegedly acted with actual malice—meaning, with the requisite knowledge and intent. (The complaint instead lodged its allegations against the *Times* and its "Editorial Board and staff," which the court described as "positing instead a kind of collective knowledge unrecognized by the law in this area." 264 F. Supp. 3d at 530.)

Neither party objected to the hearing, or objected to the court's considering undisputed facts.

Rather than dismiss the complaint on that ground, however, Judge Rakoff ordered an evidentiary hearing on August 16, 2017, to identify the author(s) of the Editorial "and other basic facts that would provide the context for assessing the plausibility or implausibility of the complaint's allegations." *Id.*

The court convened the hearing pursuant to Federal Rule of Civil Procedure 43(c), which provides that "[w]hen a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions." The "facts outside the record," in this case, comprised the background facts—the context—of the Editorial. At the hearing, *Times* editorial page editor James Bennet, whom the *Times* identified as the author of the statements at issue, testified about how the Editorial came to be. Elizabeth Williamson, an editorial writer at the *Times*, suggested the general topic; reviewed, at Bennet's suggestion, *Times* editorials from 2011 discussing the Arizona shooting; and, wrote the first draft of the Editorial. Bennet extensively revised the draft without himself reading those 2011 editorials.

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Neither party objected to the hearing, or objected to the court's considering undisputed facts revealed by Bennet. After the hearing, the parties, complying with the court's instruction, briefed how, if at all, the hearing affected whether Palin could plausibly allege actual malice.

The court dismissed Palin's complaint with prejudice on August 29, 2017. The opinion noted that the court's analysis encompassed facts developed during the August hearing:

> Although, therefore, if the Court were to solely limit its evaluation to the face of the complaint, it would readily grant the motion to dismiss, the Court has instead evaluated the plausibility of the complaint in light of such background facts developed during the evidentiary hearing that, as shown by the parties' post-hearing briefs, were either undisputed (at least for purposes of the instant motion) or, where disputed, are taken most favorably to plaintiff.

264 F. Supp. 3d at 530.

The court swiftly rejected the *Times'* first two grounds for dismissal—that the challenged statements are not "of and concerning" Palin as a matter of law, and they do not constitute provably false statements of fact—but ruled that Palin failed to plausibly allege actual malice.

According to the Times, Palin's theory is premised on several legal mistakes, the most fundamental being her claim that the district court must accept her allegations as fact.

Palin's theories of actual malice include: the *Times* is hostile to Palin and her politics; attacks on Palin garner page views and revenue for the *Times*; the *Times* failed to comply with its journalistic standards; Bennet knew, or recklessly disregarded, that his editorial statements were false; Bennet has long been associated with liberal publications; and Bennet was personally hostile towards Palin because she opposed his brother's election to the U.S. Senate.

All of these were inadequate to support an inference of actual malice, considered either individually or collectively: "each and every item of alleged support for plaintiff's claim of actual malice consists either of gross supposition or of evidence so weak that, even together, these items cannot support the high degree of particularized proof that must be provided before plaintiff can be said to have adequately alleged clear and convincing evidence of actual malice." *Id.* at 540. The court emphasized that its analysis addressed all additions Palin indicated would be in an amended complaint, so the case was dismissed with prejudice.

Palin moved for reconsideration and to alter or amend the judgment, offering with her motion a proposed First Amended Complaint ("FAC"). The district court denied the motion as futile because the proposed amended complaint's allegations had been addressed by the court in its original decision:

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> Neither added "detail" nor artful "synthesis" is any substitute for substance, and on careful inspection, it is plain that the proposed complaint is simply an extended rehash of the same implausible accusations of actual malice that the Court previously considered and dismissed as insufficient.

Order, dated October 23, 2017, 2017 U.S. Dist. LEXIS 176126. Palin's appeal followed.

The Appeal

Palin argues that the district court committed various legal errors that require reversal. Among them: improperly considering disputed testimony from the *Iqbal* evidentiary hearing; failing to accept Palin's well-pleaded facts as true; and, rejecting Palin's request to amend her complaint. The *Times* denies any such errors, and contends that the Second Circuit may affirm the lower court's judgment regardless of whether it frames the decision as granting a motion to dismiss or one for summary judgment.

The parties' disagreement over the propriety of the evidentiary hearing is entwined with their arguments about how Judge Rakoff used Bennet's testimony. Palin argues that the court erred by holding the evidentiary hearing without converting the *Times*' motion to one for summary judgment because, notwithstanding the court's statements to the contrary, Judge Rakoff improperly considered Bennet's testimony, crediting it even where it directly contradicted Palin's allegations.

Palin vociferously opposes the court's characterization of her FAC as mere embellishments.

According to the *Times,* Palin's theory is premised on several legal mistakes, the most fundamental being her claim that the district court must accept her allegations as fact. To the contrary, the *Times* argues, the district court may decline to accept, for example, allegations that are conclusory or contrary to common sense, just as it may refuse to adopt unreasonable inferences or chains of inferences put forward by a plaintiff. So what Palin asserts are instances in which the court relied on Bennet's testimony to reject "numerous facts pled in Mrs. Palin's Complaint of the type that courts have repeatedly held constitute direct or circumstantial evidence of actual malice," Brief for Plaintiff-Appellant, at 28, the *Times* depicts as the court properly rejecting Palin's allegations that, in the end, are not well-pleaded, and which the court was not obliged to credit. Ultimately, the *Times* argues, a lesson of *Iqbal* is that a complaint's factual allegations should be rejected if there is an obvious alternative explanation, and Judge Rakoff quite clearly identified one:

> If nothing else, Palin's theory must be rejected in light of the "obvious alternative explanation" for the challenged statements' genesis.... the district court properly rejected the equally [as to *Iqbal*'s facts] fanciful scheme that Palin has posited in this case, especially since the facts she pleads yield an obvious

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> alternative explanation—*i.e.*, that [t]he Times and Bennet made an "unintended mistake," which they "very rapidly corrected."

Brief for Defendant-Appellee, at 23-24 (quoting 264 F. Supp. 3d at 537, 540).

Moreover, the *Times* contends, with respect to Bennet's testimony, the court credited only those facts that Palin herself cited in her pleadings, in her supplemental briefs, or in her proposed FAC. Altogether, it asserts, the district court rendered its decision properly under Rule 12(b)(6) and can be affirmed as such.

The *Times* argues in the alternative that the court's decision can be affirmed as one granting summary judgment pursuant to Rule 56. The parties' disagreements over this point go partly to discovery: Rule 12(d), which governs how courts may convert a motion to dismiss into a motion for summary judgment, requires that parties be provided "a reasonable opportunity to present all the material that is pertinent to the motion." Prior to the August evidentiary hearing, Judge Rakoff allowed Palin to make discovery requests but had stayed discovery pending resolution of the *Times*' motion to dismiss. Palin's requests included every internal *Times* communication concerning Palin since 2011, and she sought to subpoena 23 current and former *Times* employees. These discovery requests went unfulfilled. Instead, Judge Rakoff ordered the August evidentiary hearing and limited document production related to it. In Palin's view, this is a violation of Rule 12(d). In contrast, the *Times*, emphasizing the district court's power over discovery, presents the hearing as "a deposition of *the* relevant witness on *the* single issue on which the motion was granted," Brief for Defendant-Appellee, at 42, and so wholly appropriate.

Palin also urges reversal because the district court denied her leave to amend her complaint. When Judge Rakoff granted the *Times'* motion to dismiss, he did so with prejudice because his analysis extended to Palin's pleadings and supplemental briefings—in the words of the court, "all the various additions that plaintiff has even remotely suggested it would include in an amended complaint." 264 F. Supp. 3d at 540. Palin's motion for reconsideration and to alter or amend the judgment included a proposed FAC. In denying the motion, Judge Rakoff stated that the "new" allegations in the FAC had already been considered by the court in its August 29 decision:

> the amended complaint that plaintiff now proffers does not repair the fatal flaws that led to the dismissal of the original complaint. By far the large majority of the supposedly "new" allegations in plaintiff's proposed pleading are merely embellished versions of the same allegations that plaintiff previously made and that the Court found insufficient, viz.: allegations that Bennet knew the statements in the editorial were false because of articles published in the Atlantic while Bennet was editor-in chief and articles published by the *Times* that

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> concluded there was no link between political rhetoric and Loughner's shooting; allegations that Bennet had a preconceived storyline and avoided contradictory information; allegations that Bennet acted from bias and ill will that stemmed from personal political opposition; allegations that the *Times* did not adequately retract the editorial; allegations that Bennet and/or the *Times* failed to adhere to the *Times'* own journalistic policies; and allegations that the supposedly defamatory statements were inherently improbable. These allegations (some of which were wholly conclusory) were all presented to the Court in plaintiff's briefing on the original motion to dismiss, and were all considered in the Court's Opinion dismissing the complaint.

Order, dated October 23, 2017, 2017 U.S. Dist. LEXIS 176126, at *5-6.

Palin vociferously opposes the court's characterization of her FAC as mere embellishments. She asserts that the proposed FAC contained a multitude of truly new allegations regarding Bennet, specifically, and that if she "did not plausibly allege actual malice [in the proposed FAC], then no defamation plaintiff ever will." Brief for Plaintiff-Appellant, at 58. The *Times* echoes the court's conclusion that Palin's proposed FAC was, substantively, a rehash of her other allegations. The *Times* further argues that the issue is effectively moot because the court, in denying Palin's motion to reconsider, explicitly addressed the FAC and ruled that it failed to "repair the fatal flaws that led to the dismissal of the original complaint."

The *Times* devotes the bulk of its Second Circuit brief to the plausibility issue, but briefly argues the court may affirm the judgment on either of the two grounds the district court had rejected: that the Editorial is not "of and concerning" Palin and that the challenged statements cannot reasonably be understood as assertions of provably false fact.

The New York Times is represented by Lee Levine, Jay Ward Brown, and David Schulz of Ballard Spahr LLP; and in-house counsel David McCraw. Sarah Palin is represented by Elizabeth Locke, Clare Locke LLP; Golenbock Eiseman Assor Bell & Peskoe LLP, and Bajo Cuva Cohen Turkel P.A.

2018 MLRC Digital Conference Focuses on Political Blowback Against Tech Companies

From right to left, Regina Thomas, Oath Inc., Lora Blum, SurveyMonkey, Connie Loizos, TechCrunch and Nikki Stitt Sokol, Facebook.

In a year that has seen the tech industry embroiled in controversy, including fallout from Russian interference in the 2016 election, the Cambridge Analytica scandal, and Congress asserting itself in enacting FOSTA – a significant new exception to Section 230 – the 2018 Legal Frontiers in Digital Media conference (May 17-18) focused on the changing social and political climate for digital platforms.

For the fifth straight year, MLRC co-produced the conference with the Berkeley Center for Law & Technology, and this year, the conference was co-chaired by **Kelly Craven**, Intellectual Property Counsel, Facebook, **Aaron Schur**, Deputy General Counsel for Yelp Inc. and **Brian Willen**, a Partner with Wilson Sonsini Goodrich Rosati. Sponsoring the event were **Axis**, **Ballard Spahr**, **CNA**, **Covington**, **Davis Wright Tremaine**, **Kilpatrick Townsend**, **Munger Tolles & Olson**, **Sheppard Mullin**, **WilmerHale**, **ZwillGen**; and special thanks goes to **Microsoft** for sponsoring Friday morning's breakfast and **Google** for sponsoring Thursday evening's reception.

The first panel of the conference – "Under Pressure: Hosting and Unhosting Objectionable Content" – focused on pressure on digital platforms from public officials (and the public at large) to block and moderate unsafe content, like ads that enable human trafficking, message boards containing hate speech, and terrorist propaganda. The session was moderated by **Ari Holzblatt**, WilmerHale, who was joined by **Michael Bloom**, Internet Association, **Evan Engstrom**, Engine, **Corynne McSherry**, Electronic Frontier Foundation and MLRC Deputy Director **Jeff Hermes**.

The panel began with a discussion of the political forces that led to passage of FOSTA, which in large part was a response to the controversy surrounding Backpage.com's facilitation of online prostitution advertising. The panel focused on the potential negative impact of the law, and the dangers of further eroding Section 230. The panel also discussed pressures for platforms to remove hate speech pursuant to European law, as well as social media sites' enforcement of their own community standards to address public concerns. The panel debated the pros and cons of private platforms making decisions on what content to remove – and the implications for free speech in a society where public discourse is concentrated within

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a small number of private internet platforms.

Next up was a discussion of internet misinformation that goes viral – as exemplified by the Russian campaign to interfere in the 2016 presidential election. This session, "Combatting Internet Disinformation Campaigns," was moderated by **Samir Jain**, Jones Day, who was joined by **Dipayan Ghosh**, New America, **Nicole Wong**, Nwong Strategies and **Samuel Woolley**, Institute for the Future. With respect to hostile governments interfering with U.S. elections, the panel agreed that more engagement by the U.S. government on this issue is needed to address the problem, by, e.g., setting up a system in which government and private companies can share information in real-time about disinformation campaigns, particularly in the weeks prior to an election. The Honest Ads Act, a bill that has been introduced in Congress that would extend the broadcast rules for political advertising transparency to internet advertising, was thought to be a good start but not adequate to fully address the problem. The panel also recognized that artificial intelligence has a long way to go before platforms can rely on it to identify and block disinformation campaigns.

Our keynote speaker, Kara Swisher, co-founder of Recode with Sarah Jeong, the Verge (left)

Our next session, titled "Women in Tech: Is Climate Change Coming?," was an effort to discuss – in the #MeToo era – what tech companies can do eliminate bias and promote the advancement of women in an industry that has historically been a boys club. The session was moderated by **Regina Thomas**, Oath Inc., who was joined by **Lora Blum**, SurveyMonkey, **Connie Loizos**, TechCrunch, and **Nikki Stitt Sokol**, Facebook. Included in the discussion were myriad initiatives that companies have increasingly been implementing to promote gender equality at digital companies. Ms. Sokol described programs that have been implemented at many digital companies dubbed "returnships" or "on-ramps," where talented women who have taken a career pause (and are often subject to "maternal bias") are recruited to return to work, at least on a temporary basis, to help reacclimate them to the workforce. Also discussed was the importance of implementing gender-neutral parental leave policies, where both men and women are equally encouraged and enabled to take advantage of family leave, such that any stigma that women might be subject to is ameliorated. It was also mentioned that many companies encourage or require vendors and law firms to have diverse teams working on their matters.

The first day of the conference was capped with a keynote conversation with noted journalist and founder of Recode **Kara Swisher**, who was interviewed by **Sarah Jeong**, writer

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From left to right, Glynna Christian, Orrick, Cass Matthews, Jigsaw, Travis Brooks, Yelp and Jim Dempsey, Berkeley Center for Law & Technology.

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for the Verge. In light of recent developments in the tech world, in which digital companies like Facebook have faced significant backlash over misuse of user data, Ms. Swisher opined that it was time for the industry, and Mark Zuckerburg in particular, to take on more responsibility and to be held to a higher standard. She reflected on the failure of "utterly ignorant" members of Congress to hold Mr. Zuckerburg accountable (allowing him to "skate through" with oversimplified answers during his recent Congressional testimony) with respect to serious concerns posed by Facebook's business model. Swisher said, "It's time to grow up, Silicon Valley," and summed up: "It's time for them to take on the responsibility that they have foisted upon themselves and stop pretending that it's not theirs . . . it's your job, fix it."

A defining aspect of this conference over the years has been the organizers' effort to plan sessions that help explain new technologies to lawyers who will likely have to grapple with legal issues arising out of those technologies. Friday morning's first two sessions followed in that tradition. First up was a presentation by Davis Wright Tremaine's **Jim Rosenfeld**, on the legal implications of face-swapping (and also voice-replicating) technologies that allow even amateur film makers to replicate the images and voices of public figures and celebrities and insert realistic-looking faces and voices into videos and films without their permission. In its most controversial iteration, this technology has been used to place the faces of celebrities into pornographic movies. After showing a few satirical examples of this technology, Mr. Rosenfeld offered a few hypothetical uses of this technology to explore the potential legal liability for the publication of such videos. The potential tort claims discussed included defamation, false light, right of publicity and intentional infliction of emotional distress.

While face-swapping technology is a very specific application enabled by artificial intelligence algorithms, the second session on Friday was a much broader look at how artificial intelligence and machine learning works and how it can be used by digital platforms to solve a wide-variety of problems, such as filtering out undesirable content. This session was moderated by **Jim Dempsey**, the Executive Director of the Berkeley Center for Law & Technology (MLRC's partner in producing this conference). Kicking off this session was

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The Legal Frontiers in Digital Media conference was held this year, for the first time, at the Mission Bay Conference Center in San Francisco.

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Travis Brooks, a data scientist at Yelp, who gave an extended presentation on how machine learning works, using the example of a movie review site that wished to create an automated method of separating positive movie reviews from negative ones. Next up, **Cass Mathews** of Jigsaw demonstrated a machine learning application, called Perspective, which assigns to online comments a "toxicity score," i.e., an assessment of how likely it is that the comment would cause someone to leave an online conversation. It is this particular program that has enabled the *New York Times* to moderate comment sections for all articles that it publishes online without the need for a human moderator to review each and every comment. Finally, **Glynna Christian**, a partner at Orrick, discussed some legal liability issues arising from reliance on AI.

The final session of the conference was devoted to a discussion and debate over enforcement of the 32-year-old federal Computer Fraud & Abuse Act. Originally enacted to provide for criminal prosecutions (and civil enforcement) against hackers who "break into" secure computer systems, its meaning in the modern age of universal internet access and porous digital borders has eluded courts as to what it means to access a computer without authorization, especially when automated bots are utilized to scrape data from publicly accessible websites.

Moderating the panel was **Brian Willen**, a partner at Wilson Sonsini (and a co-chair of the conference). He was joined by **Jonathan Blavin**, Munger Tolles & Olson, **Stacey Brandenburg**, ZwillGen, and **Jamie Williams**, Electronic Frontier Foundation. The panel discussed a variety of inconsistent rulings from courts on what constitutes unauthorized access under the vague language of the statute. The panel discussed, in particular, the Ninth

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Circuit's decision in *Power Ventures v. Facebook*, which held that a company's scraping of user data from Facebook following the platform's issuance of a cease and desist letter, combined with the company's evasion of technical measures meant to block certain IP addresses from accessing its servers, could constitute a violation of the CFAA. By contrast, the Northern District of California, in a recent and seemingly contrary ruling in *hiQ Labs v. LinkedIn*, found that the plaintiff had a right to access and utilize publicly available data on LinkedIn, notwithstanding LinkedIn's cease and desist letter and technical measures taken to block the plaintiff; and went even further by granting an injunction requiring LinkedIn to allow plaintiff to access LinkedIn's data. In addition to debating the merits of the various decisions, the panel discussed approaches to advising clients on navigating this ambiguous area of law.

MLRC expects to publish a podcast of this year's Legal Frontiers in Digital Media conference by mid-June. That podcast, as well as those from past years, are available on Apple Podcasts *and* Stitcher.

Fifth Circuit Suggests Local Rules Limiting Post-Trial Contact with Jurors May Be Unconstitutional

By Emily Rhine and Tom Leatherbury

The Fifth Circuit Court of Appeals affirmed the denial of both plaintiff's motion for new trial and plaintiff's counsel's post-trial motion for leave to interview jurors, following Fifth Circuit precedent and holding that the privacy interests of jurors outweighed any First Amendment interests lawyers may have in interviewing jurors to improve advocacy skills. Benson v. Tyson Foods, Inc., No. 17-40161, 2018 WL 2024557, at *1 (5th Cir. May 1, 2018). However, in dicta, the Court suggested that some federal district court local rules limiting attorneys' post-trial access to jurors may be run afoul of the First Amendment.

Background

Plaintiff Vanity Benson brought disability claims against Tyson Foods, Inc. under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. The jury rendered a verdict in favor of Tyson Foods. Benson's counsel filed a post-trial motion for leave to interview jurors, and Benson moved for a new trial under Federal Rule of Civil Procedure 59 on the basis that the jury "ignored the evidence" in concluding that she was not disabled.

In dicta, the Court suggested that some federal district court local rules limiting attorneys' post-trial access to jurors may be run afoul of the First Amendment.

In the motion seeking leave to interview the jurors, Benson's attorneys claimed that they were not attempting to invalidate the jury's verdict, but rather that their purpose was "improving future trials" by educating themselves on which advocacy techniques were successful and which were unsuccessful. The motion was filed under Eastern District of Texas Local Rule 47(b), which provides, "[a]fter a verdict is rendered, an attorney must obtain leave of the judge before whom the action was tried to converse with members of the jury." The district court denied both motions, and Benson appealed to the Fifth Circuit Court of Appeals.

Analysis

In a per curiam opinion, the Court affirmed the district court's judgment and held that sufficient evidence supported the jury's verdict that Benson was not disabled. Therefore, the Court held that the district court did not abuse its discretion in denying the motion for a new trial.

The Court also affirmed the district court's denial of counsel's request to speak to jurors, finding no error in the court's ruling. The Court relied on *Haeberle v. Texas International*

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Airlines, 739 F.2d 1019, 1022 (5th Cir. 1984), in which the Fifth Circuit had previously held that "[t]he first-amendment interests of both the disgruntled litigant and its counsel in interviewing jurors…are…outweighed by the juror's interest in privacy and the public's interest in well-administered justice."

However, the court noted "flaws" in *Haeberle*, particularly its suggestion that there is a difference between the First Amendment rights of the press and those of the public. While the Court nonetheless found that it was constrained by *Haeberle*, it also said that in the future, district courts should consider whether there is a genuine government interest in preventing attorneys from interviewing willing jurors and whether that interest should be "specifically articulated… to facilitate appellate review" to preserve First Amendment rights.

Judge Graves wrote separately, concurring in part and concurring in the judgment, to emphasize that, although he would also affirm the district court's decision, he did not find *Haeberle* controlling. He found *Haeberle* distinguishable because, while the attorney's petition in *Haeberle* was veiled as an attempt to improve advocacy, it really sought to discover the reasons for the adverse verdict, which is exactly what the Southern District of Texas rule in that case was intended to prevent. He also found this case distinguishable because, unlike the rule at issue in *Haeberle*, Local Rule 47(b) is "very likely impermissibly overbroad[.]" His constitutional concerns arose from the rule's indefinite bar on all speech between an attorney and jurors without seeking leave of court and the district court's "unfettered discretion" to deny leave.

In the future, district courts should consider whether there is a genuine government interest in preventing attorneys from interviewing willing jurors and whether that interest should be "specifically articulated… to facilitate appellate review" to preserve First Amendment rights.

Judge Graves identified various other local rules within the Fifth Circuit that may impermissibly restrict speech, some of which bar communications on all subjects between attorneys and some *nonjurors* without prior leave. *See* M.D. La. L.R 47(e)(1) ("No party or their attorney shall…contact, interview, examine, or question any juror or alternate or any relative, friend or associate thereof, except on leave of court"). He wrote that district courts in the Fifth Circuit should "take a hard look at these juror communication rules" to avoid infringing First Amendment rights.

While Judge Graves would have found that the district court abused its discretion in its swift and brief denial of counsel's motion for leave, he ultimately affirmed the decision below because the complaining party herself (Benson) would not have had her substantial rights affected by a reversal of the request to interview jurors since the Court affirmed the denial of her motion for new trial.

Emily Rhine, J.D. anticipated from Southern Methodist University Dedman School of Law in 2020, is a summer associate and Tom Leatherbury is a partner at Vinson & Elkins, L.L.P. in Dallas. Plaintiff Benson was represented by Brian P. Sanford and David B. Norris of Sanford Firm. Defendant Tyson Foods, Inc. was represented by Brian J. Fisher, Zachary T. Mayer, and Robert L. Rickman of Kane Russell Coleman & Logan, P.C.

North Carolina Court Orders Release of Police Recordings in Beating Incident

Public Access "Necessary to Advance a Compelling Public Interest"

By Michael Tadych

At approximately 10:20 p.m. on Tuesday 3 April 2018, in Raleigh, North Carolina, multiple law enforcement officers from the State Highway Patrol, Wake County Sheriff's Office and the Raleigh Police Department encountered Kyron Dwain Hinton, 29, in a public right of way near the intersection of Raleigh Boulevard and Yonkers Road near the I-440 beltline. Mr. Hinton was in the public right of way, waving his arms and yelling. In all, the encounter lasted more than 12 minutes. Mr. Hinton left the scene badly beaten and in police custody.

Mr. Hinton asserts that he was walking home from a sweepstakes business when an officer approached him. He said that several more officers approached him from behind and he was punched, put against the back of a car and beaten while a police dog began biting him on his arm, side and head. Mr. Hinton says that he was not asked to raise his hands or get on the ground. Mr. Hinton says he suffered a broken eye socket, broken nose, multiple head lacerations, multiple bite marks and memory loss as a result of the encounter.

WRAL-TV, an NBC affiliate, filed a Petition under North Carolina's relatively new statute to gain release all law enforcement recordings related to the incident.

At least two callers to 911 reported that Mr. Hinton had a gun and that radio transmissions to the responding officers indicate that a firearm was involved. According to an arrest warrant, law enforcement said that Mr. Hinton was yelling in the roadway, implying that he had a gun and pointing his hand in the air as if he had a firearm. The arrest warrant also states that Mr. Hinton ignored commands to get on the ground and physically resisted officers when being handcuffed. The warrant also says that Mr. Hinton hit the police dog on the head and face and "willfully did cause or attempt to cause harm to the animal." Mr. Hinton was charged with disorderly conduct, resisting a public officer and assault on a law enforcement animal. Mr. Hinton was brought to the Wake County Jail on 7 April 2018 and was release on bond later that day.

Wake County District Attorney Lorrin Freeman confirmed that her office opened a State Bureau of Investigation investigation into the case. The SBI reviewed law enforcement recordings and medical records and presented the information to the district attorney.

According to court records, the criminal charges brought against Mr. Hinton related to the incident were dismissed on Monday 7 May 2018. The reason for the dismissals said, "District attorney has requested a State Bureau of Investigation investigation into use of force associated with this incident. Investigation pending."

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On Monday 15 May 2018, State Troopers Michael Blake and Tabitha Davis were indicted on charges of felonious assault with a deadly weapon inflicting serious injury and willfully failing to discharge their duties. The same day, Wake County Sheriff's Deputy Cameron Broadwell was also indicted on charges of felonious assault with a deadly weapon inflicting serious injury, felonious assault inflicting serious bodily injury and willfully failing to discharge his duties. The indictments allege Deputy Broadwell beat and kicked Mr. Hinton and Troopers Blake and Davis hit him with their flashlights. All three are accused of violating the Highway Patrol's and the Wake County Sheriff's Office's use-of-force policies, and Deputy Broadwell also is accused of improper handling of his K-9. The last time a Wake County law enforcement office faced criminal charges connected to on-duty actions was more than 12 years ago in 2006.

Media Access Motion

Capitol Broadcasting Company, Incorporated d/b/a WRAL-TV, an NBC affiliate, filed a Petition under North Carolina's relatively new statute (N.C.G.S. § 132-1.4A(g)) to gain release all law enforcement recordings related to the incident. WRAL was later joined in the petition by The News & Observer, WTVD Television, an ABC O&O. The Associated Press and Charter Communications d/b/a Spectrum News were permitted to intervene even later.

Judge Shirley found that the release of the recordings was "necessary to advance a compelling public interest and good cause has been shown to release all portions of the recordings."

In responding to the Petition or transmitting the law enforcement recordings to the Court for *in camera* review, the District Attorney, State Highway Patrol, Raleigh Police Department and counsel for Deputy Broadwell do not object to the release of the recordings. The Wake County Sheriff's Office originally objected to their release but withdrew its objections prior to a hearing on Friday 25 May 2018. Counsel for one of the State Troopers objected on the grounds of pretrial publicity.

On Friday 25 May 2018, after hearing arguments from Petitioners' counsel and the State Trooper objecting to release, the Honorable A. Graham Shirley II, presiding Superior Court Judge, ruled from the bench and granted the Petition. Judge Shirley found that the release of the recordings was "necessary to advance a compelling public interest and good cause has been shown to release all portions of the recordings." In addition to the recordings, Judge Shirley ordered law enforcement to provide the Petitioners with all 911 calls related to the incident and recordings of all radio traffic. A composite of the recordings is available at https://www.wral.com/news/local/video/17593025/

Michael Tadych, a partner at Stevens Martin Vaughn & Tadych, PLLC, in Raleigh, NC, represented WRAL-TV.

Mexican Journalist Seeking Asylum Is Granted New Hearing

By Steven D. Zansberg, Mark Flores, and Chuck Tobin

On May 25, 2018, the U.S. Department of Justice Bureau of Immigration Appeals granted Mexican journalist Emilio Gutiérrez-Soto and his son, Oscar – detained in an El Paso, Texas facility for the past six months – a new hearing at which they can submit additional evidence to establish their entitlement to asylum. The tribunal agreed that the materials submitted with his appeal warranted a new administrative trial.

As reported in last month's *MediaLawLetter*, the National Press Club (NPC) and sixteen other international press freedom organizations filed an *amicus* brief in support of the Gutiérrez-Sotos' appeal of the denial of their asylum petition. In addition to the NPC, the *amici* 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, and Fundamedios, Inc. Appended to the *amicus* brief were 130 pages of articles that Gutiérrez-Soto had prepared and that were published in the *El Diario del Noroeste of Nuevo Casas Grandes* in Ascension, Chihuahua, prior to his fleeing from Mexico in 2008. The articles were not put before the immigration judge by Gutiérrez-Soto's prior immigration lawyer at the time of his asylum hearing.

The National Press Club and sixteen other international press freedom organizations filed an amicus brief in support of the Gutiérrez-Sotos' appeal of the denial of their asylum petition.

In July 2017, immigration judge Robert S. Hough in El Paso, Texas denied the Gutiérrez-Sotos' asylum petition. Judge Hough found non-credible Emilio's claim that he had received death threats as a result of his reporting on the Mexican military.

Thereafter, 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. During his acceptance speech, Guteirrez-Soto criticized current U.S. immigration policy. In December 2017, the Gutiérrez-Sotos were taken into custody by ICE, which initiated deportation proceedings. The Board of Immigration Appeals agreed to hear their appeal and stayed their deportation pending the appeal.

In granting the Gutiérrez-Sotos a new hearing, the Board of Immigration Appeals noted that the appellants "and *amici curiae* have now submitted additional evidence addressing [the immigration judge's concern over 'limited corroborative evidence']." Rather than take judicial

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notice of those materials on appeal, the Board remanded the case back to the immigration judge with directions "to address this new evidence . . . and issue a new decision."

This ruling is excellent news for the Gutiérrez-Sotos, because it bars ICE from deporting the two men, at least until final resolution of the re-opened asylum petition, which their counsel and they hope will be granted. Separately, the two men have filed a petition for a writ of *habeas corpus* in the U.S. District Court for the Western District of Texas.

Two noteworthy developments have arisen since last month's report of this case. First, Emilio Gutiérrez-Soto was awarded the prestigious Knight Wallace Fellowship for Journalists at the University of Michigan for the academic year 2018-2019. The letter to Gutiérrez-Soto from Wallace House director Lynette Clemetson states, "As a program committed to supporting journalists, we deem your work and experience to be of notable significance. The selection committee believes you would benefit greatly from the intellectual and professional offerings of the program and that you would contribute greatly to the cohort of accomplished journalists from around the world joining us as Fellows in the Fall."

This ruling is excellent news for the Gutiérrez-Sotos, because it bars ICE from deporting the two men, at least until final resolution of the re-opened asylum petition,

The second development is far less uplifting: As has been widely reported, fatal assaults against journalists in Mexico have continued to increase, both in number (with six journalists having been murdered in 2018) and in their gruesome brutality. As tragic as these developments are, the grave and worsening conditions for journalists in Mexico should strengthen the Gutiérrez -Sotos' claim for asylum.

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.

From the Next Gen Committee

Goldman v. Breitbart: Court Distinguished "Server Test" on Facts, But Punted on Case's News Reporting Character

By Terence P. Keegan

Internet advocates are understandably troubled by a recent New York federal court ruling in February that "embedding" an image from one web page within another can infringe copyright, regardless of the embedded image's inherent link back to its source. Goldman v. Breitbart News Network, LLC et al., (S.D.N.Y. Feb. 15, 2018). But the ruling poses a special setback for those that constantly cover photos and videos online as news items in and of themselves.

In analyzing embedding technology as the "key issue" in *Goldman,* the court did so in isolation – without considering the news reporting context in which the embedding of a photograph occurred. Consideration of those facts must wait until a later litigation phase, when the court will take up what it acknowledged as the media defendants' "very serious and strong fair use defense."

Even so, in its February grant of partial summary judgment to the plaintiff, the *Goldman* court distinguished the Ninth Circuit's "server test" for determining noninfringement in embedding cases on its facts. So for now, at least – while Instagram, Facebook, Twitter, Periscope and Snapchat enable people all over the world to broadcast the raw facts of news events – the court's ruling heightens the risk of claims against media organizations over embedding such photos and videos, rendering reporting on images as bona fide news items that much harder.

Case Background

The case of Justin Goldman against multiple media companies in the U.S. District Court for the Southern District of New York literally involves a man on the street.

In July 2016, the Boston Celtics basketball team was reportedly seeking to recruit Kevin Durant, an all-star player who that year became a free agent. The Celtics were lobbying hard for Durant: the team even enlisted Tom Brady, quarterback for the New England Patriots football team, to help sell Durant on moving to Boston. (Spoiler: Durant headed to California instead.)

Brady's role came to light in part because of Goldman – or more specifically, because of a photo he took. Goldman snapped a shot of Brady and members of the Celtics' management walking by on a sidewalk in the Hamptons, where the meeting with Durant was set to take place that day.

Goldman alleges he only shared the photo privately on Snapchat, an online network on which users can display photos for 24 hours before they disappear. But the photo didn't

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disappear. Within hours it had leaked from the Snapchat network onto Twitter and other social media platforms. That led to widespread discussion online of Brady's part in the Celtics' recruitment strategy.

Initially at least, the photo seems to have been the only factual evidence of the Brady-Celtics story. And articles accordingly discussed the photo itself and what it appeared to show. But Goldman sued over his rights in the photo in October 2016, and then sued nine more media companies in April 2017 over alleged infringement of his exclusive right to display it.

Partial Summary Judgment for Plaintiff

In August 2017, the court presiding over Goldman's second lawsuit denied defendants' motion to dismiss based on fair use (as well as the argued noninfringing nature of the embedded photo). According to the court, fair use was too categorically fact-bound to decide prior to summary judgment. "Fair use is a defense – and it is most commonly resolved on summary judgment or at trial," the court wrote in that ruling. "[W]hile defendants focus primarily on the first element of fair use – that the use was news reporting – even if the Court were to agree (which it need not decide now), that is not entirely dispositive."

Perfect 10's "server test" was inapplicable to the instant case, the Goldman court stated, because the courts in that case, unlike this one, were considering embedding by search engines such as Google.

With the parties' consent, the court then opted to consider on a motion for partial summary judgment whether unauthorized embeds of the photo infringed Goldman's exclusive display right under the Copyright Act. The court answered that question in the affirmative, adding, "The fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield [defendants] from this result."

The court premised its conclusion on its interpretation of the Copyright Act, as well as the Supreme Court's 2014 decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, which it said likewise "considered the intersection of novel technologies and the Copyright Act." The court pointedly rejected as inapplicable, if not legally wrong, a divergent ruling from the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.* (2007), in which the fact that the images at issue were hosted by third parties essentially precluded the embedding defendant's liability for direct copyright infringement.

Perfect 10's "server test" was inapplicable to the instant case, the *Goldman* court stated, because the courts in that case, unlike this one, were considering embedding by search engines such as Google. "In *Perfect 10*, the district court's Opinion, while not strictly cabining its adoption of the Server Test to a search engine like Google, nevertheless relied heavily on that fact in its analysis," the *Goldman* court wrote. "On appeal, the Ninth Circuit began its statement of the case by saying, "we consider a copyright owner's efforts to stop an Internet search engine from facilitating access to infringing images."

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And yet the *Goldman* court did not consider the news reporting character of the embedding here as part of the "facts at hand." The court attempted to distinguish from *Perfect 10* the character of the blogs and websites at issue by stating that, unlike a search engine, they showed viewers "a full color" copy of the photo whether they "asked for it, clicked on it, or not." But that sells short the plain character of a news page – which viewers visit expecting to be shown, and to judge for themselves, not only what is newsworthy but why it is so. Embedding in this instance fulfills two editorial functions: it enables immediate consideration and analysis of the subject material, and its hyperlink serves to document the source.

The character of embedding an image on a news blog or site seems a far cry from the hypotheticals Goldman and his counsel have posed of billboards, stadium jumbotrons, or bar screens showing the photo of the flag raising at Ground Zero. (That's saying nothing of the differences between Goldman's fleeting sidewalk shot and the 9/11 aftermath image that has gained the status of an icon, if not a meme.)

At any rate, consideration of newsworthiness here must wait until the "defenses" phase of the litigation – even as the court noted in its partial summary judgment ruling that defendants' "very serious and strong fair use defense" may ultimately prevail.

After all, Section 107 of the Copyright Act expressly specifies that "the use of a copyrighted work" for the purpose of "news reporting . . . *is not an infringement of copyright*" (emphasis added). Notably, Congress did not designate its codification of "fair use" in that section as a "defense" to infringement, but rather as an express "limitation" on a copyright owner's "exclusive rights."

Embedding in this instance fulfills two editorial functions: it enables immediate consideration and analysis of the subject material, and its hyperlink serves to document the source.

Aereo*'s* Impact

Even the Supreme Court in the *Aereo* case, whose language the *Goldman* court found "instructive," emphasized the "commercial" character of the defendant's television viewing service in ruling that it performed works publicly within the meaning of the Copyright Act. The *Goldman* court – although it likened embedding to the "behind-the-scenes" technology at issue in *Aereo* – did not quote the *Aereo* decision's reasoning that the technological distinctions "do not render Aereo's *commercial objective* any different from that of cable companies" (emphasis added).

The Supreme Court in *Aereo* was not analyzing the defendant's actions there under Section 107's four "fair use" factors. As in the *Goldman* summary judgment ruling, the question in *Aereo* was whether exclusive rights under the Copyright Act were implicated at all. Yet in finding the Aereo service's "commercial" character significant, the Supreme Court's analysis shared the consideration of the first "fair use" factor: "the purpose and character of the use, including whether such use is of a commercial nature."

Ultimately the majority in *Aereo*, which concerned the Copyright Act's "transmit clause," remarked: "courts often apply a statute's highly general language in light of the statute's basic

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purposes. [But] the doctrine of 'fair use' can help to prevent inappropriate or inequitable applications of the Clause."

If the *Goldman* court was not going to consider the "defense" of fair use simultaneously with the plaintiff's infringement proof, it still should not have omitted the news reporting character of defendants' photo embedding from the factual context in its first summary judgment ruling. Whether or not the news reporting was "commercial" should have informed how the court understood the character of the technology employed here, as it did for the courts in *Aereo* as well as *Perfect 10*.

The court should have recognized reporting – not embedding technology per se – as the "key issue" of the case.

Conclusion

While the *Goldman* defendants seek the Second Circuit's interlocutory review of the district court's partial summary judgment opinion, media companies are stuck with an "inequitable" application of the Copyright Act – one that ultimately could be moot once the court considers fair use, but one that should have considered the character of the news reporting at issue. The news here may have been delivered by means of "embedding," but even in its first litigation phase, the court should have recognized reporting – not embedding technology per se – as the "key issue" of the case.

Terence P. Keegan is an associate at Miller Korzenik Sommers Rayman LLP in New York. A full list of case counsel is available in Judge Forrest's opinion.

Court Compels Arbitration of Claims Arising Under Expired Licensing Agreement

By Al-Amyn Sumar

A decision released earlier this month in the Southern District of New York reaffirmed that arbitration clauses contained in expired license agreements continue to apply to claims alleging that licensed material was infringed after the agreement's expiration. In Watson v. USA Today Sports Media Group, LLC, Judge Naomi Reice Buchwald granted a motion by the defendants – Gannett Company and two of its subsidiaries – to compel arbitration of copyright and state law claims brought by a photographer alleging that the defendants continued to use his work following expiration of a licensing agreement. Significantly, the court rejected the plaintiff's argument that the agreement's expiration rendered the arbitration clause inoperative.

Background

The parties to the agreement at issue were professional sports photographer Jason O. Watson and US Presswire, LLC (USP), a subsidiary of Gannett. The agreement gave USP the right to license and distribute a collection of Watson's photography to third parties in exchange for compensation to Watson. The agreement contained an arbitration clause, providing that "[a]ny dispute arising under [the agreement] shall be" arbitrated. The agreement also included a "survival clause," mandating that provisions of the agreement "that by their nature or as specified hereunder are intended to continue beyond the expiration or termination" of the agreement would so survive.

The court rejected the plaintiff's argument that the agreement's expiration rendered the arbitration clause inoperative.

Watson alleged that after the agreement expired, the defendants – USP, its parent company USA Today Sports Media Group, LLC, and the ultimate parent Gannett – continued to display and distribute his photographs to third parties. Rather than pursue his claims in arbitration, however, Watson sued the defendants in federal court, bringing claims for copyright infringement, breach of contract, unjust enrichment, and unfair competition.

Motion to Compel Arbitration

The court granted the defendants' motion to compel arbitration of the claims. Its analysis began with the scope of the arbitration provision, which it found to be "a paradigmatic 'broad' arbitration clause." Watson contended that language of the clause here, which applies to claims "arising under" the agreement, was meaningfully narrower than that in other kinds of clauses

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(*e.g.*, those governing claims "relating to" an agreement). The court found no "support in law or logic" for those kinds of fine-grained distinctions, and noted that the Second Circuit had repeatedly given "broad construction" arbitration clauses worded similarly to the one here.

Given the broad arbitration clause, the burden fell to Watson to rebut a "presumption of arbitrability" for his claims – and he was unable to do so. The court held that each of his claims fell within the arbitration provision. "Most obvious[ly]," Watson's claim for breach of contract was subject to arbitration; as the court put it, "it is difficult to imagine a hypothetical breach of contract claim that does not 'arise under' the contract in question." Likewise, Watson's other claims – including for copyright infringement – arose under the agreement, because they were all predicated on the allegation that the defendants' use of Watson's photographs was not permitted under the agreement.

On the copyright claims in particular, the court highlighted "closely analogous" cases in the Southern District where courts had compelled arbitration of copyright claims brought by photographers alleging that the use of their photographs was outside the scope of a licensing agreement.

Watson's primary basis for resisting arbitration was that his agreement with USP had expired. He reasoned that because the allegedly wrongful conduct that gave rise to his claims occurred after the agreement's expiration, the arbitration clause no longer applied – particularly to his copyright claims. As he put it, "upon the expiration of the Agreement, Watson and the Defendants became legal strangers when it came to Watson's copyrights in the Photographs." The court disagreed. The U.S. Supreme Court's jurisprudence, the court explained, establishes a "presumption in favor of postexpiration arbitration of matters unless 'negated expressly or by clear implication.'"

That presumption is "particularly potent" where, as here, an agreement contains a survival clause stating that certain of the agreement's provisions would survive its expiration or termination. In light of that clause and other circumstances, the arbitration clause continued to be in force and barred Watson from bringing his grievances in a judicial forum, rather than in arbitration.

Gannett, US Presswire, and USA Today Sports Media Group were represented by Robert Penchina and Al-Amyn Sumar of Ballard Spahr LLP. Jason O. Watson was represented by Sumeer Kakar and Kalpana Nagampalli of Kakar, P.C., and Evan A. Andersen of Evan Andersen Law, LLC.

President Trump Violates First Amendment By Blocking Twitter Users, Judge Rules

Designated Public Forum Analysis Applied to Twitter Responses

By Naomi Sosner

In late May, New York Federal District Court Judge Naomi Reice Buchwald ruled that President Donald Trump violated the First Amendment by blocking several Twitter users from posting responses to the President's tweets. Knight First Amendment Inst. at Columbia Univ. v. Trump, 2018 U.S. Dist. LEXIS 87432 (May 23, 2018) ("*Knight*"). The decision, which has received a fair degree of attention and scrutiny since it was issued, is the most recent, and most prominent, judicial analysis of the application of the First Amendment to social media and the judiciary's power over the President of the United States.

Background

Since taking office, President Trump has made extensive use of his personal Twitter account, @realDonaldTrump, which he established in 2009 as a private citizen. Since Inauguration Day, Trump has posted thousands of tweets that announce, describe, defend, and comment on his policies – from recently announcing a Presidential pardon for Dinesh D'Souza, touting his meeting with Kim Kardashian on prison reform, expressing regret at selecting Jeff Sessions as Attorney General, to regularly lambasting the media.

Trump's tweets routinely elicit thousands of replies, retweets, and replies-to-replies from other Twitter users in comment threads. Asking for declaratory and injunctive relief, the Knight First Amendment Institute at Columbia University ("Knight") sued Trump and three White House aides, all in their official capacities, for violating the First Amendment by blocking seven Twitter users who posted mocking or critical replies to his tweets.

After Knight filed its suit in July 2017, the parties stipulated to certain facts about Trump's Twitter account and how Twitter generally works. See "Disintermediation," Blocking, and the First Amendment: Knight Institute Sues President Trump for Blocking Critical Twitter

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Followers. MLRC Bulletin 2017:3. Among the agreed facts was that the blocked users could still see President Trump's tweets by taking the additional steps of logging out and viewing Trump's Twitter feed. The parties each moved for summary judgement in the fall. On March 8, 2018, the court heard oral argument.

Analysis

The court concluded that a portion of Trump's @realDonaldTrump account is an "interactive space" in which members of the public can directly engage with the President's tweet. This interactive space is a designated public forum, and the government (including the President) is barred by the First Amendment from blocking a person from that space in response to the individual's expressed political views. The court's decision, which rejected the government's alternative contentions that the First Amendment is inapplicable to the case and that Trump's personal First Amendment right to ignore the plaintiffs justifies the blocking, was a narrower result than Knight sought.

The court rejected outright Knight's contention that the @realDonaldTrump account as a whole is a designated public forum. Rather, the court considered whether and how the forum doctrine could apply to several distinct aspects of the @realDonaldTrump account: the content of the tweets sent, the timeline comprised of the tweets, the comment threads woven in response to the initial tweets, and what the court called the "interactive space" associated with each tweet—direct replies and direct retweets to the initial tweet.

The decision is the most recent, and most prominent, judicial analysis of the application of the First Amendment to social media and the judiciary's power over the President of the United States.

The court distinguished between a comment thread—consisting of the initial tweet, direct replies to that tweet, and nested replies-to-replies—and the "interactive space" in which Twitter users reply directly to the President's tweet. (At one point in the opinion Judge Buchwald described it as "the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account," *Knight* at *57, which is a way to picture it: each Tweet opens a space, narrow but deep, like a tunnel, for a potentially great number of direct replies and retweets.)

Only this "interactive space" is sufficiently owned or controlled by the government to constitute a designated public forum because 1) it is a forum for official government speech, and 2) the President effectively controls who can enter the "space" by directly replying to him. Judge Buchwald also rather quickly disposed of the contention that user control is illusionary because Twitter ultimately dictates the platform's design and functions.

This argument, also made by Harvard professor Noah Feldman in op-eds, is that because Twitter, a private entity, controls the platform, the First Amendment and forum analysis is inapplicable, and applying them here is absurd conceptually and probably deleterious in practice, potentially disappearing platforms' free-speech rights just because government

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officials opened accounts. *See* Noah Feldman, If Trump Can't Block Twitter Users, Twitter Can't Either, Bloomberg View (May 24, 2018), *accessible at* https://www.bloomberg.com/view/articles/2018-05-24/trump-twitter-blocking-ruling-is-bad-for-free-speech.

The court's view is that while Trump's control of the platform is not absolute, it is nonetheless sufficient: "[t]hough Twitter also maintains control over the @realDonaldTrump account (and all other Twitter accounts), we nonetheless conclude that the extent to which the President and Scavino can, and do, exercise control over aspects of the @realDonaldTrump account are sufficient to establish the government-control element." *Knight* at *44-45.

After ruling that the interactive space is a designated forum, the court concluded that blocking the individual plaintiffs based on viewpoint violates the First Amendment. *Id.* at *66.

The outcome, it said, is not in tension with the fact that public officials maintain their own First Amendment rights:

> Consideration of Twitter's two features for limiting interaction between users—muting and blocking—is useful in addressing the potentially conflicting constitutional prerogatives of the government as listener on the one hand and of speakers on the other …. Muting equally vindicates the President's right to ignore certain speakers and to selectively amplify the voices of certain others but—unlike blocking—does so without restricting the right of the ignored to speak…. The audience for a reply extends more broadly than the sender of the tweet being replied to, and blocking restricts the ability of a blocked user to speak to that audience. While the right to speak and the right to be heard may be functionally identical if the speech is directed at only one listener, they are not when there is more than one.

The court concluded that a portion of Trump's @realDonaldTrump account is an "interactive space" in which members of the public can directly engage with the President's tweet.

Id. at *68-70.

Because speech in that interactive space reverberates for a larger audience than one, what Trump could lawfully mute he cannot bar.

Judicial Relief

The power of the judiciary over the President is the subject of limited caselaw and, because of special counsel Robert Mueller's ongoing investigation, massive recent speculation. The plaintiffs here sought both injunctive and declaratory relief. The government argued that the case was essentially non-justiciable because it said the court has no authority to enjoin or issue declaratory relief against the President for his official conduct.

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Judge Buchwald disagreed, spurning the government's argument that courts cannot enjoin a sitting President, and stating that ordering the government to obey the Constitution would be a minimal imposition on executive prerogative. S*ee id.* at *71-73. Ultimately, however, the court awarded only declaratory relief:

> …though we conclude that injunctive relief may be awarded in this case—at minimum, against Scavino—we decline to do so at this time because declaratory relief is likely to achieve the same purpose…Because no government official is above the law and because all government officials are presumed to follow the law once the judiciary has said what the law is, we must assume that the President and Scavino will remedy the blocking we have held to be unconstitutional.

Id at *75-76.

For the sake of comity, and with the variously stated presumption that government officials will follow the law as laid down, the court declared that the blocking of the individual plaintiffs from @realDonaldTrump violates the First Amendment. The harm they suffered is minimal, but the First Amendment prohibits it all the same. *See id.* at *70-71.

Naomi Sosner is MLRC's 2017-2018 Legal Fellow.

10 Questions to a Media Lawyer: Stephanie Abrutyn

Stephanie S. Abrutyn is Senior Vice President and Chief Counsel, Litigation, at Home Box Office, Inc.

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

I was one of those people who always assumed I would end up going to law school, at least as far back as junior high school. I never really made the choice to be a lawyer – just to go to law school because I thought it would be interesting and I had no idea what else I might want to do. Only once I was in law school did I start to consider what kind of law I might want to practice. The two things I was most interested in were politics and television. But, I had worked on Capitol Hill for a couple of summers in college and saw up close how hard it was to get anything done, and I knew I would not have the patience to make that a career. So, then what? Not only did I watch a lot of television, but I also was interested in the business side of TV – studying the ratings, reading the trades, etc. So when I started looking at which law firms I wanted to apply to, I honed in on those with some sort of media practice, not entirely sure what that meant. The summer after my 2nd year of law school, I worked in Dow Lohnes and Albertson's DC office, and that is where I discovered there was such a thing as practicing first amendment law. I had a fabulous summer – I met a lot of great people, many of whom are still good friends today, and I found a career.

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

There are so many things I love about my job – that is why I keep doing it. First and foremost, the people. I am privileged to have been part of great teams and to have wonderful colleagues at ever job I have held. And being a part of the media bar is a unique and special experience that most lawyers do not get. I also still get a kick out of contributing, indirectly in a small way, to great content.

On a substantive level, I think the most interesting part of the job is strategy – legal or business. Figuring out the best way to resolve a difficult matter, the right arguments, or the next step in any particular situation is always a challenging exercise. As my role has expanded, I have been more than a little surprised at how much I find that I enjoy when the law seeps into the business side – when the job involves not just analyzing legal risks, but also requires a deep understanding of the business and my role includes figuring out how to balance the legal risks with the business' overall objectives.

I still enjoy writing and – as many of the outside lawyers I work with can attest – editing. As well as some of the things I am able to do beyond my day job. Teaching is a real joy, and the speaking opportunities I have been fortunate enough to have prompt me to think about issues in entirely different ways.

The thing I like least is dealing with lawyers who argue everything just for the sake of argument.

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

It may be a bit strange, but that's a question I am not sure I can answer. I tend to be forward looking – I'm less interested in what happened to put us in a particular situation than I am in figuring out how to deal with it. Plus, I have been fortunate enough to have worked with people who have caught my mistakes before they had significant consequences, or to have gotten lucky and never had them impact the case. So while I have made many blunders, none particularly sticks out in my mind.

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

The highest court I have argued in is the New York Court of Appeals. It was a FOIL case that I handled while in-house, on behalf of Newsday, which was seeking data on traffic accidents at railroad crossings. It was the kind of everyday freedom of information law case that leads to important stories by the local news media, but that do not get pursued very often anymore because of costs. The reporter was someone who I had worked with for several years and respected a great deal. She was being stonewalled, and it was clear that if we pursued the case and won, it would not be a "one off" – there would be stories year after year that could be written based on the type of information she was seeking. It also was clear there wasn't likely

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to be much discovery, so with a little extra time and effort, we could do the case economically – that is, in-house. I'm proud to say we won. Legally, I don't think it was a close call, but every time I see a news story about the need to change or install additional safety measures at a railroad crossing because of the number of accidents, I think of that case.

I've also been behind the scenes, as the in-house lawyer, for a number of high profile cases – at least, high profile if you count the amount of ink (or bytes) taken up by others writing about them. Being a media lawyer on the receiving end of media coverage is a valuable – and sometimes frustrating – experience.

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

I don't know that there is anything too surprising, although if you go digging around, there are probably more toys than there should be. My favorites are the nerf basketball hoop which has been in every office I have had since it hung over the trash can when I was a first year associate, and the *Newsday* "golf ball" game. The latter is a snow globe (without the glitter) containing a tee and a golf ball surrounded by water. The idea is to get the golf ball to land on the tee. Nearly everyone who sits across my desk picks it up at some point. So far, in about 20 years, only two people have succeeded in landing the ball on the tee for more than a second.

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

I don't usually look at the Internet until I get to the office, and the first site I actively go to is usually The Hollywood Reporter Esq. Before that, on my way to the office, I likely will have scanned daily emails from The Washington Post, The New York Times, and a number of industry and trade publications such as Law360 and The Programming Insider. I also skim Twitter, which I use more like a news feed.

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

Like all good questions, the true answer is that it depends. There are so many different types of lawyers, and so many different law school experiences. It is extremely important to do some homework, and make sure the law school you choose is positioned to set you up for the type of career you want. But even more importantly, I tell people in law school to find something they are interested in, and figure out how to connect that to the practice of law. The happiest lawyers I know are the ones who are passionate about what they are doing – not because of the details of the day-to-day work, but because they believe in or are truly interested in the bigger picture around their cases.

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

Focus on the small things, like doing as well as you can in law school and demonstrating a true interest in the subject area. The media bar full of extremely intelligent, thoughtful people.

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When you to apply to join them, no amount of networking can overcome an uninspiring resume.

9. What issue keeps you up at night?

Any issue that is percolating on my desk where there is still a chance for me to think of a way to solve the problem or make the situation better. The specifics change from week-to-week, but it always involves something I think I should have an answer for, and don't (yet).

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

If I could answer that question, I probably would not be a lawyer.