

MLRC
Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through May 31, 2019

MLRC

From the Executive Director's Desk: Will Trump Soon Be Prosecuting the Mainstream Media? 03
Despite the Assange Indictment, the Sky is Not Falling

Concern About Internet Regulation Brings Huge Crowd to Legal Frontiers in Digital Media Conference 82

Letter to a (Newer) Media Lawyer: Be Patient - And Nine Other Tips from Victor Kovner 88

10 Questions to a Media Lawyer: Kelli Slade..... 91

LIBEL & PRIVACY

Tenn.: Lessons Learned in Getting a Robust SLAPP Statute Passed Unanimously in Tennessee 08

Tex.: Making Lemonade Out of Lemons: Changes to Anti-SLAPP Statute Benefit the Media 12

Hot Topics Roundtable: The Fair Report Privilege and the Trump Dossier..... 15

Second Circuit Affirms Dismissal of Lawyer's Libel Suit vs. New York Post 23
Fair Report Privilege Applies to Press Coverage of Public Custody Trial
Zappin v. NYP Holdings

Courts Consider Scope and Application of Fair Report Privilege 25

Fla. Cir.: Florida Prosecutor's Libel Complaint Barred by Fair Report Privilege and Lack of Actual Malice 29
Russell v. Waterman

N.Y. Sup.: Trial Court Grants Staten Island Advance's Motion to Dismiss Libel by Implication Complaint 31
DiMauro v. Advance Publications, Inc., et al.

N.Y. Sup.: Court Dismisses Libel By Implication Claim Over Wall Street Journal Article 38
Court Rejects Market Survey Purporting to Show Meaning
Aboutaam v. Dow Jones & Co.

10th Circuit Affirms Summary Judgment for Sports Illustrated and Reporters in False Light Suit ...	42
Talley v. Time, Inc. d/b/a Sports Illustrated Magazine	
Texas Supreme Court Dismisses Pharmacy’s Libel Claims Against The Dallas Morning News.....	48
The Dallas Morning News, Inc. v. Hall	
7th Circuit Upholds Dismissal of Defamation, False Light & Lanham Claims on Opinion Grounds...	52
<i>War of Experts Best Resolved By Rebuttal, Not Defamation Suit</i>	
Board of Forensic Document Examiners v. American Bar Association	
S.D.N.Y.: You Lose, Fake News: Court Grants BuzzFeed Summary Judgment Dismissing Libel Suit from “King of Bullsh*t News”	54
Leidig v. BuzzFeed, Inc	

INTELLECTUAL PROPERTY

S.D.N.Y.: <i>Goldman v. Breitbart</i> (‘Embed’) Case – Continued and (Not Quite) Ended.....	58
California Supreme Court Limits Anti-SLAPP Protection	63
<i>Adds “Contribution To The Public Conversation” Requirement Not Found In The Statute</i>	
Filmon.com, Inc. v. DoubleVerify, Inc.,	

ACCESS

S.D.N.Y.: Court Allows Glomar Response to FOIA Requests Regarding the President’s Allegations of Campaign Surveillance.....	75
Gizmodo Media Group, LLC v. Department of Justice	
Texas Lets The Sunshine In	78



MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & Free Expression Law

- **A Conversation with U.S. Supreme Court Justice Stephen Breyer**
- **Hate Speech**
- **Reporting on #MeToo**
- **The Trial of Julian Assange**
- **And more**

www.medialaw.org/london

From the Executive Director's Desk

Will Trump Soon Be Prosecuting the Mainstream Media?

Despite the Assange Indictment, the Sky is Not Falling

Reaction to the recent superseding indictment of Julian Assange by MLRC members and friends has been alarming. “A bombshell that poses grave dangers for freedom of the press”, “criminalizing journalism” and “the journalistic process”, “a direct assault on the First Amendment”, and making “journalism a felony” were among the calmer responses. I am not sure that saying “the sky is falling” is particularly helpful, nor do I believe that the heavens are on their way down because of this indictment against a nihilist who appears to have been entwined with his source far more than the typical journalist.

As readers of this column know, I yield to nobody in my antipathy to this President, his inane and inappropriate attacks on the press as “enemy of the people”, and his meaningless mantra of “fake news” invoked at any perceived slight or criticism. Indeed, in the very first month of this Administration, I wrote in this space:

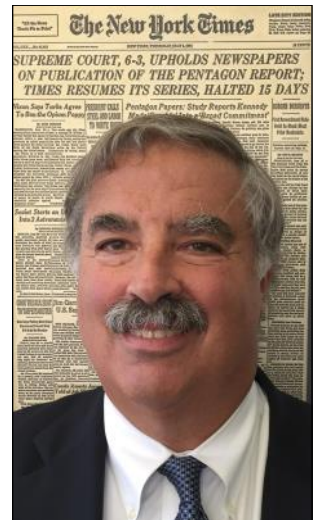
“What scares me most...are legal investigations and prosecutions certainly against our sources, but, more frighteningly, perhaps against journalists as

well...The real scare, in my view, is if the Administration goes beyond these steps [against sources and subpoenas on reporters] to actually prosecute journalists under the Espionage Act – even where they are passive recipients of the leak and therefore should be constitutionally protected by Barnicki and its forerunners.”

And I agree that the Assange charges are an unwelcome development. Yet because of a number of factors, I don't think it's the disaster which some believe it to be. Rather, it's a one-off, which hopefully will not change the calculus of prosecutorial discretion which this or future administrations will bring to the issue.

First, the person and the matter he is being charged with are decidedly *sui generis*. The charges have nothing to do with the 2016 election and Assange's involvement with Russia and Hillary's emails. They deal

with what was at the time the largest document dump in our history – documents about the wars in Iraq and Afghanistan as well as State Department documents and cables. And the indictment is against a man, accused of rape and sexual assault in Sweden, who appears to have no cogent



George Freeman

I don't think it's the disaster which some believe it to be. Rather, it's a one-off, which hopefully will not change the calculus of prosecutorial discretion which this or future administrations will bring to the issue.

(Continued from page 3)

ideology other than the tweaking of governments by gaining access to and then publicly disseminating their sensitive documents.

This is undoubtedly one reason why the Government chose to go after him – a man with few allies is clearly an easier target. But one could as well argue that this is why the indictment poses less of a threat than the naysayers fear: government will go after the easy pickin's, but not the NYT or the WaPo. Indeed, if the fear is that this will lead to similar indictments against mainstream journalists and publishers, why didn't the Government – at the same time – seek to indict the New York Times, which published, albeit with a much more careful filter than



This is a case where the Government, in the original indictment, took pains to establish how the leakee, Julian Assange (above), was in bed with the leaker.

Assange himself, many of the documents contained in Assange's original dumps? Part of the answer must be that even this Administration is loathe to criminally prosecute the mainstream media for publishing even national security information which is of public interest – and go against over two centuries of tradition, one century of life under the Espionage Act (enacted in 1917) and nearly half a century of Supreme Court law (Smith v. Daily Mail, 1979).

Second, this is a case where the Government, in the original indictment, took pains to establish how the leakee, Assange, was in bed with the leaker, Manning. Though that relationship is not so much highlighted in the superseding indictment, it still is a premise for the whole case. While many of the commentaries in the past few weeks contend that the new indictment charges Assange with “encouragement” of Manning to leak and disseminate, and that this is no different from what journalists, particularly national security reporters, do every day, the fact remains that, as set forth primarily in the original indictment, Assange aided and abetted Manning to take illegal actions far more than the typical reporter would. And, significantly, some of the details of their entanglements are largely repeated, in Count 18 and elsewhere, of the new indictment.

This leads inexorably to a discussion of Bartnicki, and whether the indictment seeks to charge Assange for activities generally thought protected by the Supreme

(Continued on page 5)

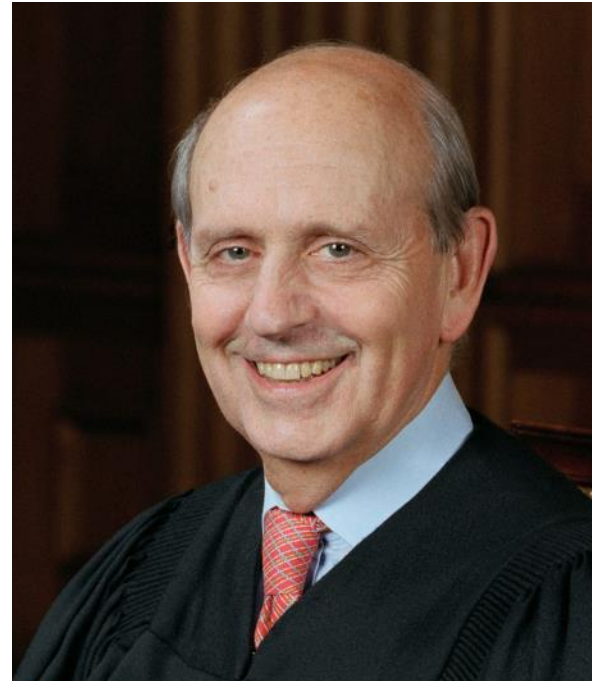
(Continued from page 4)

Court and the First Amendment. What *Bartnicki* means and how we, as media counsel, should guide our reporter clients in these instances has been a subject of just about every MLRC and PLI conference since the case was decided in 2001. (I suppose we can ask that very question to Justice Breyer, author of its critical concurrence, when he appears at our London Conference in September.) Generally, there has been agreement that even if the reporter knew the leaker/source committed illegal acts to get the information, the reporter can go ahead and accept and publish the documents. At the other end of the scale, media lawyers have agreed that one can't pay for illegal newsgathering and that a reporter shouldn't work side-by-side in illegally acquiring sensitive documents.

Gently "encouraging" the source, the operative word in the new indictment, is commonplace; soliciting specific documents by specific illegal means, which seems to have been the underlying scenario, has generally been disapproved on these media lawyer panels. So it is unclear how this case would come out under this *Bartnicki* prong. But before we get too frightened, it should be noted that Counts 15-17, which are the only counts based solely on publication of information, all specifically allege the disclosure of sensitive U.S. sources, which identification placed them in grave danger. No legal distinction there, but still...

And it also is wholly untested how a court would rule on the Government's likely argument that none of the three *Bartnicki* prongs are applicable because protection to the press need not be given if a government interest of the highest order is at stake. That may well become a vital issue - - but because such a case against the press has never been brought, there are no precedents. But my point is that based on the care media lawyers have espoused in giving counsel to their clients under *Bartnicki*, it is very unlikely that our reporters will, in some future case, be as entangled in the sources' illegal actions as Assange was.

Finally, while this Administration does not specialize in truth-telling, it is instructive to listen to what the Assistant U.S. Attorney said while announcing the new indictment. While most attention has been paid to his statement that "Julian Assange is no journalist," under the Espionage Act and the First Amendment, that oft-debated question is really immaterial. More important, he took pains to underscore the DOJ's respect for the role of the media and to note that Assange was being charged for more than the mere receipt and publication of classified information. He said the DOJ "takes seriously the role of journalists in our democracy" and doesn't target journalists for their reporting. On the other hand, since neither Trump nor former

(Continued on page 6)

What *Bartnicki* means and how we, as media counsel, should guide our reporter clients in these instances are questions we can put to Justice Breyer, author of its critical concurrence, when he appears at our London Conference in September.

(Continued from page 5)

AG Sessions ever said this – and, indeed, refused to do so – one could rightfully question the strength and credibility of the administration’s recent statement.

But if the Assange case is to be the beginning of a legal assault on the press, why did an Administration that on a daily basis calls us the enemy of the people go out of its way to assure us that we were not being lumped in with Assange? Much as I hesitate to believe anything an Administration whose leader has made over 10,000 falsehoods in 2 1/2 years says, it’s hard to see this as a deliberate lie calculated to put our dukes down. In this regard, it’s worth remembering that the past Administration backtracked on its anti-press initiatives after the AP phone subpoena and Rosen co-conspirator fiascos, and that The Washington Post reported that two veteran federal prosecutors who worked on the Assange case, one of whom was involved in the Jeffrey Sterling/James Risen matter, argued against the DOJ’s charges against Assange because of First Amendment concerns.

In any case, laying out the horrors that are likely to ensue from Assange’s indictment seems self-defeating. To say how shocked we are now – and I use “shocked” not in a Casablancon way – would only make a legal attack on the press less startling and more acceptable in the public’s eye, should it happen. Taking the Government at its word that this is not a harbinger of a First Amendment attack on ordinary journalism would make it a bit harder for Government to eventually charge the mainstream media in the way it has charged Assange.

Now much of the above argues that it is unlikely that even this hostile Administration will prosecute the mainstream press for the mere receipt and publication of classified information. But it is true that if this case is litigated to a conclusion, it might well lead to bad precedent which could be threatening to journalists and publishers in the future. And the likelihood of a bad precedent is certainly enhanced by litigating against such a bizarre character as Assange. Yet, I would submit that for all the reasons set forth above, such a prosecution is no more or less likely to be brought against WaPo or NBC than before – and it is certainly improbable that a bad precedent in this case will change the political equation and encourage this Administration to bring such a case.

That is partly because nothing here will happen quickly. First, the U.S. would have to successfully extradite Assange. Sweden, of course, is trying to do the same thing – and its odds are far better than ours because the US-UK extradition treaty does not permit extradition for political offenses, which is pretty much what the claims against Assange are. That, of course, would delay an American Assange case for many years. Even if he were extradited here before Sweden, which I believe is unlikely, it would be years before a definitive ruling in the case – certainly beyond 2020, and maybe even beyond a second Trump term (gasp) in 2024. This just

But if the Assange case is to be the beginning of a legal assault on the press, why did an Administration that on a daily basis calls us the enemy of the people go out of its way to assure us that we were not being lumped in with Assange?

(Continued on page 7)

(Continued from page 6)

underscores how imperative it is to remove the current inhabitant of the White House next year, but by my calculus it's unlikely that a Supreme Court ruling in this case would even occur by 2024.

One final thought: we decry the increase in these types of prosecutions against government leakers in the Obama and Trump Administrations. But I believe this is a direct outgrowth of the Internet Age. That is, in the "good old days" a leaker could not disseminate the sensitive government information himself. S/he needed to transmit it through the mainstream media. And that legacy media, as befitting its worthy traditions, would carefully filter that information to ensure no materials dangerous to individuals or the country's security were included. With the coming of the internet, going to a responsible media outlet was no longer necessary: a leaker can put whatever information s/he wants on a website or give it to an entity like WikiLeaks, which doesn't care to do the balancing and screening the media traditionally had performed. The newfound ability of irresponsible actors to widely disseminate sensitive information has inevitably changed the delicate balance between government and the press, and has made the government, both the executive and legislative, evermore vigilant about protecting its information.

All this to the side, the MLRC is not standing idly by. As you know, MLRC Deputy Director Jeff Hermes and I began a project earlier this year – before any Assange indictment – to have three of our standing committees, Litigation, Newsgathering and Criminal Law, draft a brief or guidelines regarding the defenses by a source or publisher to an Espionage Act prosecution similar to the one at issue here. First drafts are coming in, and we hope to have a completed work product in a few months. In addition, we plan to organize a meeting to discuss what further steps we should do about this perilous situation in New York sometime over the summer which all members will be invited to. And, of course, we will continue writing about developments, strategies and legal theories pertaining to this issue on a regular basis. Despite my less pessimistic take than most, this is obviously a critical issue, one which we intend to be totally engaged in. We welcome your thoughts.

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.

The newfound ability of irresponsible actors to widely disseminate sensitive information has inevitably changed the delicate balance between government and the press, and has made the government, both the executive and legislative, evermore vigilant about protecting its information.

Lessons Learned in Getting a Robust SLAPP Statute Passed Unanimously in Tennessee

By Robb Harvey, Todd Hambidge, John Williams, and Braden Boucek

Effective July 1, 2019, Tennessee will have a robust SLAPP statute, arguably one of, if not *the* broadest such statute in the country. The Tennessee Public Participation Act was passed unanimously by the Senate and House of Representatives, and signed by Governor Bill Lee on April 23, 2019. It required a lot of blood, sweat, tears, worry, and anticipation by a small, but stalwart, group of volunteers. Ultimately, it all paid off, and we are looking forward to using this statute.

We studied statutes from all around the country, and drew upon portions of several. Our goal was to pass a robust statute which incorporates three essential elements that we described as the tripod structure - (1) a stay of discovery upon the filing of a SLAPP “petition,” subject to the trial court permitting limited, defined discovery upon a compelling need demonstrated by the plaintiff, (2) a right to appeal the denial of the petition (copied from the State’s Shield Law, so we could state that we had precedent); and (3) mandatory attorney’s fees granted to the prevailing petitioner along with other sanctions at the trial court’s discretion. Our original bill was passed without a single amendment.

Our story is actually one of perseverance and planning, with some luck and good breaks. This was our second attempt to pass a decent SLAPP statute - with our first effort ending in a silent death two years ago, with nary a committee hearing or vote. We learned some harsh but valuable lessons from that defeat, so this story starts there.

Effective July 1, 2019, Tennessee will have a robust SLAPP statute, arguably one of, if not *the* broadest such statute in the country.

In the summer of 2016, a couple of us who were running the tiny Communications Law Section of the Tennessee Bar Association (TBA) cooked up the idea of convincing the TBA to endorse a SLAPP statute, make it part of the TBA’s legislative “package” for the 2017 Session, and watch the bill slide gracefully through the legislative process with the assistance of “free” TBA lobbyists. We mostly copied the Texas statute (figuring that, since Tennessee has a legitimate claim to being responsible for the Republic of Texas (thanks, Davy Crockett, Sam Houston, *et al.*), legislators would be more impressed with a Texas facsimile than its California parent). We got the proposed legislation passed through the TBA Board of Governors and House of Delegates, facing considerable opposition. We then had the bill introduced in the General Assembly. At the first House Judiciary Committee meeting, a “legislative liaison” for the Administrative Office of the Courts rose from the back of the room and asked for a two-week deferral. [Government agencies have “liaisons,” while private entities have lobbyists.] During

(Continued from page 8)

that two weeks, we learned that a **very** influential appellate judge (who shall remain nameless for the telling of this tale) claimed to have been surprised by the bill and strongly opposed it. Since that judge had been present for one of the TBA votes, we didn't buy that explanation. When we tried to explore the real reason for the opposition, what we got was a claim that the proposed statute violated the separation of powers clause (i.e., legislature intruding into the province of the judiciary). In addition, as this judge's thinking went, why should the First Amendment get "special" protection? Next, he/she thought, the gun lobby would be looking for special Second Amendment protection. [They've got it, believe us.]

We were shocked. We also were dead in the water. The TBA, seeing that the judiciary had opposed the effort, instantly jettisoned us and forbade us from mentioning SLAPP and the TBA in the same breath. So, we retreated. We'd like to say that it was an organized retreat, but it actually was a rout, like the defeat of the Confederate Army at the Battle of Nashville. We took a year off.

Fast forward to mid-2018. Wiser, and still eager, we started the process again, but without the TBA. Here are some of the other things we learned, which we recommend for your consideration:

1. **Start early.** At least earlier than we did. Getting started in earnest four months before the legislative session, and not getting funding lined up until six weeks before, means you're always playing catch-up.
2. **Put a professional face on your effort.** In 2017, it was a couple of volunteers who were relying on seasoned TBA lobbyists - for whom this was merely one more bill, and **not** one that those lobbyists appeared to especially care about. In 2019, we changed that.

We'd like to say that it was an organized retreat, but it actually was a rout, like the defeat of the Confederate Army at the Battle of Nashville. We took a year off.

3. **Make sure your professional face is a well-known and highly regarded pro who actually cares about your SLAPP bill.** We interviewed several lobbyists to see how they would approach the campaign. Mostly, we got "that's interesting" and "let me know if/when you raise the money to pay my fee." One exception was the lobbyist we chose - the long-time lobbyist for the Tennessee Association of Broadcasters (and several other entities). Dan Haskell (Gullett Sanford) was a great quarterback/coach and door-opener. He introduced us to legislative leadership and committee chairs, patiently explaining what the bill would do.

4. **Keep your drafting team small.** We limited it to four. Don't negotiate your bill with the entire state open records board.

5. **What you name your bill matters.** An early draft called it "Anti-Bullying." Then we called it "Anti-SLAPP." A wise MLRC hand recommended we call it "SLAPP." Less confusing.

(Continued on page 10)

(Continued from page 9)

6. **Don't be afraid to ask for input.** We received valuable input from several on the MLRC SLAPP committee and from other state press organizations.

7. **Don't be afraid to experiment.** One of our drafters is with a well-regarded think-tank, and he was aware of a SLAPP motion filed by a labor union against a nonprofit think-tank in Texas. So, we drafted around the issue. Also, because we had learned that the Oklahoma SLAPP Act (a copy of Texas) was passed primarily through the efforts of religious groups, we added a nod to First Amendment religious liberties (which we believe are already covered in the Texas statute) in hopes of getting additional backing. Unfortunately, the religious groups we contacted for support did not come through, probably because we started so late.

8. **Go "lite."** We stripped out nearly all procedural requirements from the Texas bill. We had learned that Texas trial and appellate courts had complained about the statutory demands for decisions in a compressed time period. So, we decided to let the trial courts take their time because discovery is stayed.

9. **Find your funders.** We could not have gotten the bill passed without a lobbyist. Josh Pila, Meredith Corporation's General Counsel for the Local Media Group, recruited a coalition of several media companies, each was asked to contribute less than what one general counsel described as "the e-discovery expense in one lawsuit." One funder spread it across three television stations in Tennessee. Another spread it across several newspapers. Some media companies with Tennessee properties declined to contribute. Maybe the next time - perhaps in your state - the free-riders will see value.

10. **Identify and organize your allies.** By the time the legislative session began, we had about 25 organizations which were willing to be identified as "public supporters. You will be surprised at the diversity you can get. Our most prominent and vocal supporter was Americans for Prosperity. We had managed to hook up with AFP through the Koch Free Expression project. The AFP's state director, Tori Venable, was a force of nature and had the confidence of many legislators. We had many other supporters, including The Beacon Center of Tennessee, ACLU, League of Women Voters, Common Cause, SPJ, and multiple media groups. Don't be afraid to ask for favors - our lobbyist obtained the support of some of his other clients, including the heavy-hitting Tennessee Hospitality and Tourism Association.

11. **Find out who will invest shoe leather.** We had active support from AFP, League of Women Voters, Tennessee Coalition for Open Government, and Tennessee Association of Broadcasters. Because Tennessee is such a "red" state, we weren't quite sure whether to ask our dynamic state ACLU director to tell legislators that she was "for" it or "against" it. Tennessee Press Association agreed to be a "public supporter" but did not lobby in support.

12. **Trade favors.** This being a labor of love and all, we persuaded a couple of Waller's tax partners to help us set up a non-profit corporation to which the supporters could make non-deductible contributions, and we then could pay the lobbyist.

(Continued on page 11)

(Continued from page 10)

13. Anticipate opposition, but don't go looking for it. We decided to engage only with groups that expressed opposition and demanded changes. Nothing serious surfaced.

14. "Message" matters. We strove to drive home the message that the bill protected regular folks and was pro-business because it discourages frivolous, expensive litigation. It was never portrayed as a "media" bill. We found a surprising number of recent non-media cases, including two young moms who got sued after defending their daughters on Facebook. Don't focus on Yelp! customer reviews or big media companies.

15. Expect to be disappointed by groups who don't come through with promised support or opinion pieces. Enough said.

16. Watch your back/misinformation. Before the legislative session began, and anticipating opposition from the courts, we contacted some trial judges about the bill to explain how it would promote judicial efficiency and give them another tool to discourage frivolous litigation. We also took the draft to the Administrative Office of the Courts with a request that it offer suggestions for "improvements." Not long after, one of the drafters got a call from a leading trial judge, which was more or less perceived to be a friendly warning, coupled with a message from an appellate judge that "this wasn't a good year" for the bill. We persevered. Later, we received the welcome news that the courts and the TBA would officially remain "neutral," which was the best we could have hoped for.

Later, we learned that the courts' position (shared with some legislators) had morphed from "neutral" into "neutral with strong reservations." We learned that someone from Texas had even contacted the AOC and raised a false flag, claiming that over 75% of civil cases in Texas involved some SLAPP filing. (We checked with Laura Prather's team - their back of the envelope figure, based on appellate cases, is more like 0.4%).

We need to win the first several SLAPP petitions, and get trial courts accustomed to the new statute. We have to anticipate appellate challenges, and eventually face our primary opponent.

17. Unanimity isn't what it is cracked up to be. As thrilled as we were to achieve a unanimous vote in the Senate and House of Representatives, we learned it is not that uncommon if you have avoided organized opposition.

18. What's next? We need to win the first several SLAPP petitions, and get trial courts accustomed to the new statute. We have to anticipate appellate challenges, and eventually face our primary opponent.

Robb Harvey and Todd Hambidge are partners at Waller Lansden Dortch & Davis, LLP in Nashville. John Williams is a partner at Tune Entrekin White in Nashville. Braden Boucek is Vice President of Legal Affairs for The Beacon Center of Tennessee.

Making Lemonade Out of Lemons: Changes to Texas Anti-SLAPP Statute Benefit the Media

By Laura Prather

On Sunday, June 2, 2019, Governor Greg Abbott signed [HB 2730](#) into law. [HB 2730](#) is the bill that makes changes to the Texas Citizens Participation Act (Texas' Anti-SLAPP statute). It goes into effect on September 1, 2019 and applies to actions filed on or after that date. During the legislative process the original bill changed substantially for the better and especially so for the media. Under the new law, the media does not even have to establish that it is discussing a matter of public concern to gain the protection of the TCPA.

As originally filed, HB 2730 would have effectively gutted the Texas law. Among other things, it would have: (1) permitted defamation and business disparagement cases from being carved out of the Act's protections, (2) prevented the Act from applying in federal court, and (3) allowed plaintiffs to nonsuit their case 3 days before a hearing with no repercussions and no payment of attorney's fees. Another bill aimed at the TCPA filed this session would have removed the mandatory fee award and the stay of proceedings during an interlocutory appeal. All of these proposed changes would have had a devastating impact on the effectiveness of the TCPA.

As originally filed, HB 2730 would have effectively gutted the Texas law.

In response to these unfavorable bills, the Protect Free Speech Coalition (www.protectfreespeechcoalition.com) was built consisting of more than 620 organizations advocating for responsible reform to the law and preserving its integrity. More than 3 dozen citizens, organizations, and members of the media came forward to testify about the benefits of the law in a 4 ½ hour hearing before the House Judiciary & Civil Jurisprudence Committee. Their voices were heard, and the new law will continue to provide critical protections from meritless lawsuits, including: (1) a discovery stay during the pendency of the motion and appeal, (2) mandatory attorney's fees for a movant who prevails on their Anti-SLAPP motion, and (3) the right to an immediate interlocutory appeal.

The changes to the law are generally constructive and approach reform from three different directions: changes to when the TCPA can be used, how it can be used, and who can use it.

Changes to When the TCPA Can Be Used

One of the chief complaints about the existing Anti-SLAPP law was the breadth of the definitions resulting in its application to trade secret and employment disputes and attorney disciplinary proceedings. The TCPA currently defines "matter of public concern" with a non-exhaustive topical list of areas of discussion that had previously been determined by the courts

(Continued on page 13)

(Continued from page 12)

to be of public concern. The new definition, taken in part from the United States Supreme Court case *Snyder v. Phelps*, provides a more generalized approach. It expressly expands the definition of “matter of public concern” to include “activity” not just communications, and it protects statements or activities about public officials, public figures, or other persons who have drawn substantial public attention due to their official acts, fame, notoriety, or celebrity; matters of political, social, or other interest to the community; and subjects of concern to the public.

The new law, however, narrows the protection for exercising one’s “right of association” by tying its protection to matters relating to a governmental proceeding or a matter of public concern. The new law also narrows the scope of the TCPA by removing the current provision that the action need only “relate to” a party’s right to petition, free speech or right of association as defined by the TCPA. Instead, now, the action must be “based on” or “in response” to a party’s exercise of those rights.

In addition to modifying the definitions, stakeholders concerned about the strict constructionist approach taken by the Texas Supreme Court, insisted on adding a laundry list of exemptions to the TCPA including for: trade secret misappropriation and enforcement of non-disparagement agreements or covenants not to compete in an employment or independent contractor relationship; family code cases and applications for protective order; claims under the Texas Deceptive Trade Practices Act; medical peer review cases; eviction suits; attorney disciplinary proceedings; and common law fraud claims.

Changes to How It Can Be Used

Another chief complaint about the existing Anti-SLAPP law was the way in which lawyers were using the law as a sword in litigation rather than for its intended purpose. Lawyers were filing Anti-SLAPP motions in response to Anti-SLAPP motions, motions for sanctions, and various purely procedural matters. The new law modifies the definition of “legal action” to prevent this sort of gamesmanship by clarifying that one cannot file an Anti-SLAPP motion in response to a procedural action, in an alternative dispute resolution proceeding, or in a post-judgment enforcement action. It also clarifies that the law *does* apply to lawsuits seeking declaratory relief – an issue about which Texas appellate courts are currently in conflict.

Changes to Who Can Use the TCPA

Finally, as the result of some troubling offensive uses of the TCPA by governmental entities, the new law expressly states that a governmental entity, agency, or an official or employee acting in an official capacity does not qualify as a party who can invoke the law’s protections.

The new law narrows the protection for exercising one’s “right of association” by tying its protection to matters relating to a governmental proceeding or a matter of public concern.

(Continued on page 14)

(Continued from page 13)

From an evidentiary standpoint, the new law makes clear that courts may consider the type of evidence that would be admissible in a summary judgment proceeding. It also provides a filing framework timeline that is consistent with Texas and local rules regarding other dispositive motions, including a movant providing 21 days' notice for a hearing and a nonmovant's response being due no later than 7 days before the hearing. In addition to the more structured framework, the new law provides some much needed flexibility for litigants to be able to agree to file an Anti-SLAPP motion beyond the current 60-day deadline.

When applying the law, Texas has removed all references to "preponderance of the evidence" and now merely requires a movant to demonstrate that the legal action in question is covered by the TCPA. When a movant seeks to prevail on an affirmative defense, it requires a party show they are entitled to judgment as a matter of law. Finally, although the new law will maintain the mandatory attorney's fees award, it now makes the award of sanctions discretionary.

For media defendants and online business reviewers, the best part about the new law is that the media can invoke it any time the claim arises from the gathering, receiving or posting of information to the public in conjunction with the creation or dissemination of dramatic, literary, musical, political or journalistic works. It expressly covers motion pictures, television or radio programs, newspaper, website or magazine articles and provides the same protection for claims against those who communicate or post consumer opinions or commentary, evaluations of consumer complaints or reviews or ratings of businesses. None of the claims arising out of these communications have to be related to matters of public concern. For these same groups, the new law also exempts them from the commercial speech exemption and the new exemptions for DTPA and fraud claims.

All in all, the legislative fight to protect Texas' Anti-SLAPP statute showed how when strong voices come together to stand up for what they believe in, we can truly make lemonade out of lemons.

Laura Prather, Co-Chair of Media & Entertainment Practice Group at Haynes and Boone, LLP. and the principal creator of the Protect Free Speech Coalition.

All in all, the legislative fight to protect Texas' Anti-SLAPP statute showed how when strong voices come together to stand up for what they believe in, we can truly make lemonade out of lemons.

Hot Topics Roundtable

The Fair Report Privilege and the Trump Dossier

May's hot topic is whether the fair report privilege should apply to BuzzFeed's publication of the Trump Dossier – an issue now on appeal to the 11th Circuit in Gubarev v. BuzzFeed. The appeal raises several interesting issues surrounding the privilege, including what is or isn't an official proceeding for purposes of the privilege.

Our panelists: Jane Kirtley, Silha Professor of Media Ethics and Law, Hubbard School of Journalism and Mass Communication at the University of Minnesota; Joel Kurtzberg, partner Cahill Gordon & Reindel LLP, who together with Floyd Abrams wrote a [media amicus brief in support of BuzzFeed](#); and Alan Lewis and John Walsh, Carter Ledyard & Milburn, who filed an [amicus brief in the 11th Circuit in support of the plaintiff](#), and who represent plaintiffs suing BuzzFeed over publication of the Trump Dossier in another lawsuit in New York State court.

Should the fair report privilege protect BuzzFeed's publication of the Steele aka Trump Dossier?

Kirtley: Yes – certainly once the FBI began investigating the allegations made in the Dossier. Journalists report on investigations all the time, and those investigations frequently include statements that may or may not be accurate. But the fact that the investigation is taking place is, itself, newsworthy, even if the allegations being investigated ultimately turn out to be unfounded. Given the public interest and controversy over the Steele Dossier and the Mueller report, providing the Dossier to the public for their review should be protected by the privilege.

Kurtzberg: Yes, the fair report privilege should protect BuzzFeed's publication of the Dossier. BuzzFeed's publication of the Dossier after it became the subject of investigation at the highest levels of government was the type of reporting that the fair report privilege was designed to cover. BuzzFeed published the Dossier to let the public know about the government's investigation into the allegations of the Dossier. That serves the rationales underlying the fair report privilege, which allows the public to know what the government is doing — a newsworthy topic in itself — and hold officials accountable for conducting a fair and thorough investigation. The fair report privilege protects reporting on unverified accusations as long as they are true and fair reports of the accusations, and BuzzFeed's publication was a fair report of the Dossier's allegations because it republished the Dossier

Given the public interest and controversy over the Steele Dossier and the Mueller report, providing the Dossier to the public for their review should be protected by the privilege.

(Continued from page 15)

in full. Significantly, not only did BuzzFeed publish the Dossier without endorsing its allegations, but it highlighted that the Dossier's allegations were unverified and contained errors.

Lewis & Walsh: No. The fair report privilege, where applicable, is limited to immunizing the publication of statements alleged to be defamatory, and therefore no court has the power to decree as privileged the publication of *the entirety* of the so-called Dossier.

In any event, in defending against two distinct lawsuits, including that brought by our clients, Messrs. Fridman, Aven and Khan, BuzzFeed has sought to invoke the privilege as a shield against liability for publishing the parts of “the Dossier” that defame the individual Plaintiffs. We believe that BuzzFeed's invocation of the privilege in both cases is fatally flawed, for one fundamental reason: Neither BuzzFeed's article nor the CNN article to which BuzzFeed's article supplied a hyperlink *reported* that the statements defaming the Plaintiffs were part of any government proceeding.

Although the CNN article mentioned two governmental activities – an FBI investigation and an intelligence briefing that used or was based on a synopsis of “some of” the Dossier – the CNN article did not describe either governmental activity as involving *the entire* Dossier generally or its specific sections containing the statements that defame any or all of the individual Plaintiffs.

Judge Sack's treatise underscores why BuzzFeed's attempt to invoke the fair report privilege in the two “Dossier” cases should fail. “The publication at issue must clearly attribute the statement in question to the official proceeding...” Without attribution it “does not fulfill the function of conveying to the public information about what went on in the courthouse, [or other official proceeding] which is the principal reason for according such a privilege.” *Sack on Defamation*, Fifth Ed., Sec. 7.3.5. Here, BuzzFeed did not attribute any of the statements that defame the Plaintiffs to the FBI investigation, intelligence briefing or any other proceeding.

Judge Sack's treatise underscores why BuzzFeed's attempt to invoke the fair report privilege in the two “Dossier” cases should fail. “The publication at issue must clearly attribute the statement in question to the official proceeding...”

Should/Does our fair reports privilege apply to official documents of a foreign nation?

Kirtley: I don't think the Steele Dossier qualifies as an “official document of a foreign nation.” The fact that the author was a former MI6 officer does not, in and of itself, give his report that status. I remember when the British government banned the domestic publication of *Spycatcher*, the autobiography of Peter Wright, a retired MI5 agent, in the mid-1980s. I am sure that the intelligence community did not consider Wright's book to be an “official document,” even though they were apoplectic about its publication because it included a

(Continued on page 17)

(Continued from page 16)

variety of embarrassing and scandalous details about surveillance techniques and alleged plots against officials like Prime Minister Harold Wilson. (The book was ultimately published throughout the world, selling more than two million copies, and the Law Lords eventually lifted the ban.)

As Judge Robert Sack notes in his treatise *Sack on Defamation*, there isn't a lot of case law on this issue. Certainly international documents can shed light on, and inform, US government policy. But I think it would be a stronger case if the Dossier were, in fact, an official report prepared by British intelligence — although publishing it might then bump up against the strictures of the Official Secrets Act. I do worry, a bit, about a wholesale privilege for republishing documents generated by a foreign nations, though, because we are learning more every day about the reach of disinformation campaigns by foreign actors. I'm not saying that the fair report privilege shouldn't apply to such documents, but journalists should, as an ethical matter, be very careful about how they characterize them, making clear that the allegations have not been, and really can't be, authenticated. That's not to say they aren't a matter of public interest, but care should be taken not to tacitly endorse them as stating the truth.

Kurtzberg: Yes, the fair report privilege should apply to official documents of a foreign nation. The same rationales that support application of the fair report privilege to documents from domestic government proceedings — including exposing information about government conduct so that the public can oversee the government — also support extension of the privilege to documents from foreign government proceedings. This is especially the case now, when reporting is conveyed instantaneously to international viewers and readers over the internet, and transnational public pressure plays an increasing role in the affairs of foreign governments. Even though Americans are not citizens of foreign nations, the American media can still play an important role in holding foreign governments accountable, particularly if what they are doing will impact Americans.

The fair report privilege should apply to official documents of a foreign nation. As to whether it does, it depends on the jurisdiction.

As to whether the fair report privilege *does* apply to official documents of a foreign nation, the answer is that it depends on the jurisdiction. One of the earliest courts to reach this issue declined to extend Virginia's fair report privilege to all reports on the activities of foreign governments. And twenty-five years ago, a federal court in New York opined in a footnote that it was unclear whether the fair report privilege should apply to foreign documents because the policy concerns underlying the fair report privilege are different when foreign proceedings are involved. But the very next year a New York appellate court ruled that the fair report privilege applied to a report issued by the Dutch Ministry of Justice. Since then, at least four other courts have recognized that the fair report privilege applies to reports of foreign official proceedings, including Israeli government press releases, UN investigations

(Continued on page 18)

(Continued from page 17)

and proceedings, a whistleblower complaint filed with a Russian government investigative body, and formal investigations undertaken by Nigerian commissions. Other courts, however, continue to reach the opposite result and hold that the fair report privilege does not encompass reports of foreign proceedings.

Lewis & Walsh: No, for precisely the reasons expressed by the Fourth Circuit in *Lee v. Dong-A Ilbo*, 849 F.2d 876 (4th Cir.1988). As explained by that Court, while “[w]e are familiar with the workings of our government and consider it to be open and reliable,” by contrast many foreign governments “are not necessarily familiar, open, reliable, or accountable” and to apply the privilege in a “piecemeal fashion” to some foreign governments but not others would place courts “in the untenable position of attempting to determine whether a foreign state exhibits the “openness and reliability that warrant an extension of the privilege.”

Should/Does the privilege extend to foreign or unofficial documents that come under U.S. or state government review? Does it matter if that review is informal, i.e., the document is just sent to an American government official, or must it be in connection with a formal government hearing or investigation?

Kirtley: The more attenuated the connection to “official action,” the more problematic invoking the fair report privilege will be. Government agencies, just like journalists, receive all kinds of unsubstantiated materials, and simply because a document has crossed an official’s desk doesn’t necessarily trigger “official action” that would clearly fall within the fair report privilege. To me, it is analogous to the question of the point at which the privilege attaches in a court case: is it upon filing of the complaint, or when a response is filed, or when the court first takes action on it? The standards vary in different jurisdictions.

Another way to look at it might be as the Chief Justice of the Minnesota Supreme Court recently suggested, during oral argument in *Larson v. Gannett*, a pending libel case where the plaintiff contends that the fair report privilege does not extend to statements made at law enforcement press conferences. Justice Gildea asked whether the privilege should be limited to information that would be public under the Minnesota Government Data Practices Act (the state’s open records law). Although I think it would be a terrible idea to circumscribe the privilege in that way, it does seem to me that if a foreign or other “unofficial” document would be treated as a public record under the applicable state or federal FOIA – even if it might otherwise be exempt from disclosure – then publication of it should certainly be protected by the fair report privilege.

If a foreign or other “unofficial” document would be treated as a public record under the applicable state or federal disclosure, then publication of it should certainly be protected by the fair report privilege.

(Continued on page 19)

(Continued from page 18)

Kurtzberg: The fair report privilege should extend to reporting on any document that becomes the subject of an official investigation, even if it contains unverified allegations. The public's knowledge of unverified allegations is just as crucial to their watchdog function as when officials ultimately determine that the allegations are corroborated, because it is just as important to be sure that officials deal with allegations appropriately and ethically (i.e., without favoritism) when they find them to lack merit. Reporting on a document that has merely been sent to an American government official, however, does not, on its own, allow the public to know anything about what the government is doing. Thus, the rationales for the fair report privilege arguably do not apply until an official government investigation commences, whether it be formal or informal.

In practice, however, the application of the fair report privilege depends on the jurisdiction. Some states have rigidly applied the common law approach and have only extended the fair report privilege to documents that are not only a part of a government proceeding, but also authored by a government official. Other states, including New York, have applied the fair report privilege much more broadly to cover reporting on documents that become the subject of an official investigation.

Lewis & Walsh: Where a document containing defamatory statements is genuinely part of an American governmental proceeding, even where it was initially prepared by a private person or foreign government, the publication of the defamatory statements *may* nevertheless be privileged. However, the mandatory conditions for invocation of the privilege are *always* that the publisher accurately reports that the document is part of a genuine, official proceeding. To report that a document was simply "sent to an American government official" will not suffice because sending a document does not describe an official proceeding as to that document. For this reason, our strongly held view is that BuzzFeed's report that "the Dossier" was sent to the FBI is not enough to afford BuzzFeed with a privilege for the publication of every and any defamatory statement in the Dossier.

BuzzFeed's report that "the Dossier" was sent to the FBI is not enough to afford BuzzFeed with a privilege for the publication of every and any defamatory statement in the Dossier.

In the absence of the fair report privilege applying, are the defenses of substantial truth and actual malice sufficient to protect publication about such information; or is there a gap in the law? Would recognition of the neutral report privilege or some other exception to the republication principle be the solution?

Kirtley: The actual malice defense might help, but I think the difficulty would be with determining whether publication of an otherwise unsubstantiated report like this was "reckless." Reasonable people could differ on the answer to this question, and I think you must always consider the source. If it is a Russian document, for example, I'd be very

(Continued on page 20)

(Continued from page 19)

skeptical about embracing it as presenting “substantial truth.” We are all aware of the false allegations contained in, for example, KGB and Stasi files during the Soviet era. It’s a tricky question that the former Soviet-dominated countries in Eastern and Central Europe struggled with, because the public has a right to know that such allegations were being made, collected, and relied upon. But if made public, they could also damage the reputations of innocent people. It would be very important to make clear that the “truth” of such allegations contained in reports like this is unknowable. I don’t see neutral reportage as being particularly helpful here, given the reluctance of most jurisdictions to accept it, even when the documents are generated by far more authoritative and transparent entities.

Kurtzberg: The fair report privilege already serves as the broadest exception to the republication principle, and in the absence of its application, I believe there *is* currently a gap in the law. The substantial truth defense will not protect reporting on allegations that turn out to be materially false — as seems to be the case with at least some allegations in the Dossier — even when the reporter indicates that the allegations are unverified and even erroneous. Nor will the substantial truth defense offer protection unless a defendant is able to show proof of the veracity of the underlying allegations. But in this case, BuzzFeed reported that the Dossier contained erroneous and even “potentially unverifiable allegations,” and proving the truth or falsity of the allegations may be costly and time consuming, if not impossible. While the actual malice standard may provide some protection for reporting on public figures or officials, it will not offer protection from all potential plaintiffs. And even in defamation actions where the actual malice standard does apply, the protection is not automatic and still may open up a publisher to costly discovery. Application of the neutral reportage privilege may help bridge some of the gap, but it has not achieved much acceptance by courts. Even in jurisdictions where the neutral reportage privilege is recognized, it has been applied narrowly to protect reporting on allegations made by a responsible, prominent person about issues of public concern. Ultimately then, the neutral report privilege faces similar hurdles as the actual malice standard.

Even in jurisdictions where the neutral reportage privilege is recognized, it has been applied narrowly to protect reporting on allegations made by a responsible, prominent person about issues of public concern.

Lewis & Walsh: No. U.S. Defamation law is already highly protective of the First Amendment and the interests of the media, without imposing a neutral report privilege or some other exception to the republication principle. Recognition of a neutral report privilege would create a virtual license for the dissemination of uncorroborated and reputation damaging statements whose harms, in the digital era, are exceedingly difficult to extinguish and hence often permanent. Justice Potter Stewart, in a famous concurrence that we think rings even truer today, called the right to protect one’s reputation a concept of constitutional dimension — one involving “the essential dignity and worth of every human

(Continued on page 21)

(Continued from page 20)

being” at the “root of any decent system of ordered liberty.” In short, we believe neutral reportage will not be resurrected in New York and is experiencing a well-deserved, albeit slow, death in the Second Circuit where it originated.

Separate from the legal issues, should BuzzFeed have published the Dossier?

Kirtley: This issue was widely debated in media ethics circles, with Kelly McBride of Poynter and Margaret Sullivan in the *Washington Post* condemning BuzzFeed’s action as the equivalent of the “document dump” WikiLeaks was accused of – posting unvetted material online without attempting to verify its accuracy or provide context for it.

We could also compare it to [when Matt Drudge published unverified spousal abuse allegations about Clinton White House staffer Sidney Blumenthal](#), arguing that because “everyone was talking about” these rumors, he was entitled to report them.

From an ethical perspective, the fundamental question should be: what best serves the public interest? The media need to be cautious when presented with documents like the Steele Dossier, and to be clear about the motives of those who make them available. And they need to be as transparent as possible about what their thought processes were and their rationale for their decision. But as a general proposition, I believe that the media should be in the business of reporting the news, not withholding it.

Kurtzberg: BuzzFeed faced a difficult editorial decision at the time, and reasonable minds can differ on whether BuzzFeed should have published the Dossier. Of course, hindsight is 20/20, and we’ve since learned that many of the allegations in the Dossier were not true. But I believe the veracity of the allegations in the Dossier were closely examined at least in part due to BuzzFeed’s publication of the Dossier, and the public pressure that publication put on the government to investigate thoroughly. And I believe that, aside from its editorial decision, BuzzFeed was prudent in its publication by including repeated disclosures that the Dossier contained unverified allegations and even errors, and by providing its readers with a full copy of the Dossier.

The media need to be cautious when presented with documents like the Steele Dossier, and to be clear about the motives of those who make them available. But as a general proposition, I believe that the media should be in the business of reporting the news, not withholding it.

Lewis & Walsh: No. BuzzFeed was roundly and appropriately criticized by various other responsible media voices for choosing to publish an entirely uncorroborated set of reports that were created as part of a political opposition research project. The publication of the Dossier spread harmful and likely false statements about various people to millions or billions of readers, for no redeeming journalistic or other social reason. To be sure, the circulation of a document containing scandalous personal allegations about the President-

(Continued on page 22)

(Continued from page 21)

elect was newsworthy, but several other media outlets such as CNN ably reported that story without publishing the uncorroborated reports that have come to be known as the Dossier.

Going forward , how would you advise a client interested in publishing an unofficial document of obvious public interest?

Kirtley: I’ve now read multiple articles comparing the contents of the Steele Dossier with the Mueller report, so I think the case has been made that the Dossier is of obvious public interest. Whether that fact, alone, should or would provide legal cover is not an easy question. My advice would be to do as much as you can to verify the authenticity of the document – in the sense that you satisfy yourself that it is what it purports to be, not necessarily that the allegations contained in it are true.

Many years ago, when the *DOJ v. Reporters Committee* FOIA case was being litigated, I remember talking to law enforcement records custodians who insisted that computerized criminal history databases should not be released to the public because they were full of errors, and the public would misinterpret them. When I protested that law enforcement relies on those erroneous databases, they replied that “WE know how to handle it.” In other words, they trusted themselves, but not the public, to be able to distinguish between truth and falsity. In the “fake news” era, I suppose it is tempting to assume that readers and viewers do not have sufficient critical thinking skills to draw these distinctions. But I think the media need to provide documents like this so the public can evaluate them for themselves – again, with appropriate context and caveats included.

If advising a media client, we would advise against publishing uncorroborated and potentially harmful accusations, no matter how interesting to the public.

Joel Kurtzberg: If the client intends to seek protection under the fair report privilege, I would advise the client to hold off on publishing the document until it has become the subject of an official investigation. Even then, jurisdiction matters, and not all fair report privileges are created equal. Some jurisdictions do not protect reporting on documents even after they become the subject of an investigation in so far as it is not authored by a government official. But assuming the client is reporting in a jurisdiction with an expansive fair report privilege, such as New York, I would advise the client to clearly disclose to its readers the official proceedings upfront, to be certain that the reader is able to understand from the context of the publication that it is reporting on an official proceeding.

Lewis & Walsh: If advising a media client, we would advise against publishing uncorroborated and potentially harmful accusations, no matter how interesting to the public, whether contained in a “document” or expressed in another format, because the spreading of rumor and innuendo is not and should not be seen as the role of a responsible media watchdog.

Second Circuit Affirms Dismissal of Lawyer's Libel Suit vs. New York Post

Fair Report Privilege Applies to Press Coverage of Public Custody Trial

A New York Post article headlined “Hostile mega-lawyer accused of abusing pregnant wife,” was a fair report of a bitter custody trial, the Second Circuit ruled recently. [Zappin v. NYP Holdings](#), (2d. Cir. April 24, 2019) (unpublished) (Katzmann, Walker, Cabranes, JJ.).

The article was part of the press coverage of a divorce case between two big law associates in New York that attracted public attention. The *New York Post* covered the first day of the custody trial, which was held in open court, including reporting that plaintiff “beat his pregnant wife ... according to testimony by a court-appointed therapist.” An accompanying photograph showed plaintiff on the courthouse steps next to a New York City police officer.

Plaintiff sued the *Post* alleging the article and photograph falsely portrayed him as an abuser. He also alleged the article defamed him by saying he was fired from the Quinn Emmanuel law firm.

Last year, Judge Katherine Failla granted the *Post*'s motion to dismiss, finding the article was a fair report of the custody trial. The article was substantially true notwithstanding the mistake in reporting that plaintiff was fired by Quinn Emmanuel, where he was fired by the Mintz Levin firm.

In addition, the photo depicting plaintiff next to a police officer was not defamatory as a matter of law since it could not be reasonably interpreted as suggesting plaintiff had been arrested. [Zappin v. NYP Holdings](#), (S.D.N.Y. Feb. 2, 2018). Judge Failla also held that the complaint was separately barred by collateral estoppel since the abuse allegations were proven in the divorce court proceedings.

Second Circuit Decision

On appeal, plaintiff argued that New York State's fair report law did not apply to the custody proceeding, relying on a 1970 New York Court of Appeals decision that categorically carved

‘Hostile’ mega-lawyer accused of abusing pregnant wife

By Julia Marsh

November 13, 2015 | 12:39am



Plaintiff sued the *Post* alleging the article and photograph falsely portrayed him as an abuser. He also alleged the article defamed him by saying he was fired from the Quinn Emmanuel law firm.

(Continued from page 23)

out matrimonial proceedings from the privilege. See [*Shiles v. News Syndicate Co.*, 27 N.Y.2d 9 \(1970\)](#). *Shiles*, however, involved a news report about sealed matrimonial records and Judge Failla, conducting a more nuanced inspection of the 1970 decision, ruled the case posed no bar to applying the fair report privilege to the open court public proceedings at issue here.

The Second Circuit affirmed that New York's fair report privilege applies to reports of matrimonial proceedings conducted in open court. The *Post* article was also substantially accurate, notwithstanding the mix up over which firm had fired plaintiff. Quibbles over other alleged misconduct, such as stealing cable service, were of little consequence given the main allegation that plaintiff beat his wife while she was pregnant.

The court also rejected plaintiff's argument that the *Post* article was inaccurate because it reported on only one day of proceedings in a multi-day trial. Plaintiff offered no evidence that he was vindicated in the other days of the trial. Moreover, the Second Circuit agreed that he was barred by collateral estoppel from relitigating the divorce case where the courts determined plaintiff had abused his wife.

Robert Balin and Eric Feder, Davis Wright Tremaine, New York, represented the New York Post. Plaintiff represented himself.

A New Way to Communicate With Your Media Bar Colleagues

MLRC has launched a listserv for members to write informally among themselves on issues large and small.

Recently we've had interesting discussions about:

- newly issued federal court rulings on access to voir dire and prior restraint in political campaigns;
- strategy in copyright cases;
- defending against grand jury subpoenas for the identity of anonymous users.

To join, email medialaw@medialaw.org

Courts Consider Scope and Application of Fair Report Privilege

By Josef Ghosn

Several recent cases have highlighted the role of the fair report privilege in protecting the press when reporting on government activity. The fair report privilege encourages public scrutiny of governmental activities by protecting fair and accurate reports of governmental proceedings from defamation and related claims challenging the underlying truth of those proceedings. The privilege generally applies to reports about statements made at official government meetings or in government documents and reports, such as court documents and testimony, as well as official executive or legislative documents and meetings.

The main question in applying the privilege is usually whether the information the press relied on was an “official” document or proceeding. For example, in *Gubarev v. BuzzFeed, Inc.* 340 F.Supp. 3d 1304 (S.D. Fla. 2018), the court was tasked with determining whether BuzzFeed’s 2017 publication of the Trump Dossier was protected under the fair report privilege. Applying the New York fair report privilege, the court focused on whether the Dossier, created by former MI6 intelligence officer Christopher Steele, should be treated as part of an official proceeding. BuzzFeed argued “that their decision to publish the Dossier is protected because the record shows that the President and President-elect were briefed on the Dossier, and that the FBI investigated the truth of the Dossier and Carter Page’s alleged connection to Russian intelligence. Intelligence community officials including Directors Brennan, Rogers, Clapper, and Comey briefed the President and President-elect about allegations in the Dossier.” *Id.* at 1315.

The main question in applying the privilege is usually whether the information the press relied on was an “official” document or proceeding - for example in *Gubarev v. BuzzFeed*.

The Plaintiffs argued that that BuzzFeed must show that the particular statements about them were subject to official proceedings. But BuzzFeed responded that New York law does not require that level of granularity and that they satisfied their burden by showing that the Dossier was subject to official action. Alternatively, BuzzFeed argued that they satisfied their burden because they had shown that parts of Report 166 were subject to official action (namely, those portions concerning Carter Page, and those concerning Russian connections with the Trump campaign) and that was sufficient to protect their publication of the whole Report. *Id.* at 1316.

Report 166 discussed two issues that were indisputably the subject of official action. First, the Report discussed allegations of cooperation between Trump’s “team” and Russian operatives. The FBI was investigating those connections. Second, Report 166 referenced earlier reports in the Dossier about Carter Page’s alleged relationship with Russian intelligence. The FBI was

(Continued from page 25)

investigating whether Carter Page was recruited by Russian intelligence, the DOJ obtained a FISA warrant to surveil him, and, in January 2017, the DOJ sought renewal of that warrant based, in part, on information contained in the Dossier. *Id.* Those portions of Report 166, therefore, were plainly covered by the privilege. And in accordance with Section 74's broad construction and the degree of liberality which a media report is afforded, so too, by extension, was the remainder of the Report. *Id.*

This ruling is an expansion of the privilege as the Dossier was not an official report, per se, but it fell under the privilege because it was subject to official action and an ordinary reader of the Article would conclude that the Dossier was subject to official action because the official action was further described in a hyperlinked CNN article, and the hyperlink was conspicuous.

The case is now on appeal to the 11th Circuit Court of Appeals which will continue to address the fair report privilege issue.

In another case involving the Trump Dossier, *Fridman v. BuzzFeed Inc.*, 2018 N.Y. Slip. Op. 30834(U) (N.Y. Sup. May 7, 2018), several Russian business people named in the dossier have also sued BuzzFeed. They claim that the Dossier defamed them by naming them as "oligarchs" and alleging that they bribed Vladimir Putin when he was mayor of St. Petersburg in the 1990s. Buzzfeed once again raised the defense of the fair report privilege and the plaintiffs moved to strike that defense.

The trial court adopted the reasoning of *Gubarev* in holding the privilege could apply and the New York Court of Appeals affirmed the decision. Affirming that the privilege could apply, the New York Court of Appeals wrote: "an ordinary reader of the publications at issue here, a BuzzFeed article, which hyperlinked a CNN article and the embedded dossier compiled by Christopher Steele, which included a confidential report containing the alleged defamatory statements about plaintiffs, would have concluded that there were official proceedings, such as classified briefings and/or an FBI investigation concerning the dossier as a whole, including the confidential report relating to plaintiffs."

The court in *Larson v. Gannet* 915 N.W. 2d 482 (Minn. App. 2018) also broadly applied the fair report privilege. In *Larson*, Ryan Larson sued Gannett Company, Inc., for defamation in Minnesota after a local television station and newspaper reported on the police investigation into the killing of a police officer. After the officer's death, law enforcement officials held a news conference and issued a press release stating they had arrested Larson in connection with the death. Journalists from KARE 11 and the St. Cloud Times reported on Larson's arrest. Police later cleared Larson as a suspect.

The trial court denied Gannett's motion for summary judgment under the fair report privilege reasoning that, "to the extent the news conference and news release only communicated the fact of Mr. Larson's arrest or the charge of crime made by the officer in making or returning his

(Continued on page 27)

(Continued from page 26)

arrest, these sources are entitled to the privilege” but the privilege did not extend to media statements that went beyond Larson's arrest and anticipated charge. The district court denied summary judgment finding “genuine issues of material fact existed regarding whether [appellants] abused the privilege.” *Id.* at 490.

Gannett appealed for discretionary review to the Minnesota Court of Appeals. The court of appeals held that the fair report privilege protected the news reports that accurately summarized statements made by law enforcement at an official press conference and in an official news release. The court stated that the official press conference was covered by the fair report privilege because a law-enforcement press conference is a meeting open to the public that deals with matters of public concern. The press conference was an official proceeding because law enforcement from the state, county, and municipality jointly convened the conference to inform the public about an ongoing investigation.

In *Folta v. New York Times Co.* 2019 U.S. Dist. LEXIS 34533, the court broadly applied the privilege again, applying it to statements made by a professor at a public university. In September 2015, Defendant, The New York Times Company, published an article about relationships cultivated by both biotechnology and organics companies with public university academics. It focused especially on the effects of these relationships in debates about the safety and regulation of genetically modified organism food products. The article discussed and quoted plaintiff Kevin Folta, Ph.D., professor and former chairman of the Horticultural Sciences Department at the University of Florida, in the article. He brought a defamation suit over numerous statements in the article.

The New York Times moved for summary judgment by asserting a range of affirmative defenses. Among them were that the statements complained of are true or substantially true; are not susceptible to a defamatory meaning; are not “of and concerning” Plaintiff; are protected speech, either under the fair report privilege or as pure opinion; and/or are barred by the applicable statute of limitations.

The court found that 31 of 32 statements that Plaintiff claimed defamed him were covered under Florida’s Fair Report Privilege. The privilege gives the news media a qualified privilege to “report accurately on information received from government officials.”

As a professor at a public university Plaintiff was deemed a public official, and his emails were considered public records as defined by Florida public records law. The court expressed sympathy toward Folta in his attempt to protect his reputation as an independent, impartial scientist in seeking a narrow interpretation of the state’s public record law and fair report doctrine. “This case is not one cooked up by billionaire opponents of a free media. Plaintiff seeks only a remedy for the reputational damage he alleges he suffered because of Defendants’ publication. Plaintiff would have this Court apply a narrow understanding of the fair report privilege—either through exempting his emails from the definition of public records or by

(Continued on page 28)

(Continued from page 27)

applying a considerably harsher “fair and accurate” reporting standard. Despite this Court’s sympathy for and understanding of Plaintiff’s case, it cannot act as Plaintiff suggests. A cramped reading of the privilege would undercut its very purpose. It would open the door to far less meritorious suits by far less scrupulous plaintiffs, and it would contribute to the ongoing chipping-away of the rights and privileges necessary to the press’s ability to play its intended role as government watchdog. This Court will not do so.” *Id.*

Addressing whether the article was a fair summary of the information in the emails, the court stated that “Protection of the privilege is not lost, for example, by colorful language or a failure to look beyond the government documents for verification. Editorial style is expected, and news media can phrase their coverage to ‘catch ... the readership’s attention.’” *Id.*

“Truth” is an absolute defense against defamation. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Time Inc. v. Hill*, 385 U.S. 411 (1967). Consequently, a plaintiff must provide convincing evidence of a defamatory statement’s falsity in order to prove defamation.

The law does not require that a statement must be perfectly accurate in every conceivable way to be considered “true.” Some false statements must be protected for the wider purpose of allowing the dissemination of truthful speech. This doctrine is known as the substantial truth doctrine and under it, minor factual inaccuracies will be ignored so long as the inaccuracies do not materially alter the substance or impact of what is being communicated. Simply put, only the “gist” or “sting” of a statement must be correct.

In contrast to these broad applications of the privilege, a recent Massachusetts case offers a cautionary note on the privilege.

In contrast to these broad applications of the privilege, a recent Massachusetts case offers a cautionary note on the privilege. *Butcher v. University of Massachusetts*, 111 N.E.3d 294 (Mass. App. 2018). In *Butcher*, the court determined that a police blotter item referencing a witness statement to the police was not within the purview of the privilege as the police did not make an arrest, no formal charges were filed, there was not official police statement, and no search warrant was issued. The court determined that absent an official police action, such as an arrest, the fair report privilege did not protect publication of the police blotter item.

Josef Ghosn is MLRC’s 2018-2019 Legal Fellow.

Florida Prosecutor's Libel Complaint Barred by Fair Report Privilege and Lack of Actual Malice

By Jon M. Philipson

On May 29, 2019, a Florida judge granted Waterman Broadcasting Corp. (“Waterman”) and reporter David Hodges’ (“Hodges”) motions for summary judgment against former State Attorney Stephen B. Russell, a public official, in a defamation action arising out of their news report referencing a U.S. Department of Justice report that concluded State Attorney Russell’s policies contributed to the lack of homicide prosecutions in Fort Myers. [Russell v. Waterman Broadcasting](#).

Background

After seven months of investigation and analysis, reporter David Hodges and Waterman Broadcasting Corp., relying on a U.S. Department of Justice report, other public and judicial records, and the statements of community leaders and law enforcement, published and broadcasted on November 17, 2016 a news report on the high rate of unsolved homicides within the city of Fort Myers and Lee County and whether State Attorney Russell’s office should shoulder some of the responsibility because of his prosecution policies. Specifically, the report addressed whether State Attorney Russell would only authorize arrest warrants for cases that have been proven beyond a reasonable doubt, versus the lesser standard of probable cause. In the broadcast, Hodges interviewed Russell about the accusations within the community and Russell’s overall prosecution policies.

State Attorney Russell claimed the news report was defamatory and that but for the broadcast he would have run for re-election and won another term as state attorney. The focus of Russell’s claim was the introduction to the broadcast and its conclusion:

- a. “Serious accusations tonight against the Local State Attorney. A new report finds he should shoulder the blame for the number of violent crimes that actually end up in front of a jury. A Department of Justice report on the homicide rate in the City points the blame at Steve Russell—saying his policies are keeping murderers on the streets.”
- b. A statement directing viewers to the station’s website for “a truly unprecedented look at what happens to homicide suspects in our area.”

Reporter David Hodges and Waterman Broadcasting Corp published and broadcasted a news report on the high rate of unsolved homicides within the city of Fort Myers.

(Continued from page 29)

On March 14, 2019, Defendants separately moved for summary judgment, arguing that these statements were protected by the fair report privilege, were substantially true, were not defamatory, and were not made with actual malice.

Motion for Summary Judgment

On May 2, 2019, the Honorable Charles E. Williams held a lengthy hearing on the motions for summary judgment. On May 29, 2019, the Court granted summary judgment for the Waterman and Hodges, citing three fundamental reasons:

First, Judge Williams found that “[n]othing in the broadcast amount[ed] to a defamatory statement of fact” and that the “‘gist’ of the broadcast was that the report mentioned criticisms against Plaintiff,” a public official. Further, the Court held that the context of the broadcast, when viewed in its entirety, was that the DOJ Report “cited stakeholder’ s beliefs that Plaintiff would not authorize arrest warrants in murder cases unless that case could be proven beyond a reasonable doubt, rather than the probable cause standard for arrests,” which was an accurate statement of what the DOJ Report said.

Although news report was slanted, it did not render the statements false.

Second, the Court found that at summary judgment, Plaintiff, as a public official, failed to carry his burden “to present record evidence sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant[s].” In short, the Court concluded, “Bias or negative comments, or failure to fully verify, do not constitute actual malice.”

Third, the Court found that although news report was slanted, it did not render the statements false. The Court explained that Florida’s fair report privilege is broad and that the fair and accurate bar is a low standard, and that the media defendants could add color to their broadcasts. Further, the Court noted that the statements in the broadcast were not substantially and materially false. Based on these findings, the Court granted summary judgment for Waterman and Hodges.

Gregg D. Thomas and Jon M. Philipson of Thomas & LoCicero PL represented David Hodges.

NY Trial Court Grants Staten Island Advance's Motion to Dismiss Libel by Implication Complaint

By Michael J. Grygiel and Cynthia E. Neidl

It is often said that a picture is worth 1,000 words – but that aphorism is not to suggest, of course, that an archival photograph may serve as the predicate for a defamation claim when used to illustrate a true and accurate news report on a matter of legitimate public interest, as New York State Supreme Court, Richmond County ruled on April 23, 2019, in [*Kevin DiMauro v. Advance Publications, Inc., et al.*](#) (Index No. 153162/2018) (Hon. Kim Dollard).

The Court's decision affirmed the value of a pre-answer motion to dismiss as a vehicle for obtaining expeditious dismissal of various publication-related claims against a press defendant. In this case, the Complaint was rejected for failure to state a viable cause of action, without the costs and distractions of discovery, a mere five months after it was filed.

Factual Background

The Complaint arose from publication of the following two-decades-old photograph by the *Staten Island Advance*, a community newspaper of record published in Richmond County:



The photograph illustrated an accompanying news article reporting that Monsignor Francis Boyle (featured at the far right of the photo), a local clergy leader and pastor at Blessed Sacrament parish, had been removed from the priesthood based on a determination by the New York Archdiocese Lay Review Board that allegations of sexual abuse against him had been substantiated. The Article reported information posted in a parish bulletin, and mentioned that the bulletin did not “provide any details about when, where and how the alleged abuse occurred.”

Neither the Article nor the photo's caption named or referred to Plaintiff Kevin DiMauro, who was included in the group photo and was a student at the Blessed Sacrament parish school at the time the photo was taken. Notably, the Complaint did not allege that anything written in the Article or depicted in the photo was false.

(Continued from page 31)

Complaint Failed to State a Claim Based on the Disfavored Theory of Libel by Implication

In asserting a false light invasion of privacy claim – a theory of recovery not recognized under New York State law – masquerading as a libel by implication claim, Plaintiff alleged that the church processional photograph’s juxtaposition with the Article defamed him by falsely implying that he was one of Monsignor Boyle’s victims. The *Staten Island Advance* argued that Plaintiff’s libel by implication claim was subject to dismissal under the rigorous standard governing such claims in New York, which requires a showing that the language of the communication as a whole (1) can reasonably be read to impart the alleged defamatory inference, and (2) affirmatively suggests that the publisher intended or endorsed that inference. *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 44 (1st Dep’t 2014); *Udell v. NYP Holdings, Inc.*, 169 A.D.3d 954, 957 (2d Dep’t 2019); *Kavanaugh v. Zwilling*, 578 Fed.Appx. 24, 25 (2d Cir. 2014).

This test derives from the central concern of the First Amendment to protect the dissemination of true and newsworthy information, which carefully constrains libel claims premised on unstated “inferences” or “implications.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (“[B]ecause the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true.”) (footnote omitted); *Rappaport v. VV Publ’g Corp.*, 163 Misc.2d 1, 5-6 (Sup. Ct., N.Y. Cnty. 1994) (referring to “significant obstacles” in establishing claim for libel by implication), *aff’d*, 223 A.D.2d 515 (1st Dep’t 1996). As an intermediate appellate court in New York has emphasized, the application of this “objective” test presents a question of law for the court. *Stepanov*, 120 A.D.3d at 44 (“The standard at issue here is the threshold question of whether a statement is capable of a defamatory implication.”).

In a faithful application of the controlling constitutional standard, the court had little difficulty dismissing the Complaint’s defamation by implication claim for failure to state a cause of action:

In applying this standard to the photograph and article at issue, the Court finds that there are no defamatory statements either direct or by implication. The photograph depicts Monsignor Boyle, together with a congregation of parishioners at Blessed Sacrament Church, and does not reference or imply that plaintiff or others in the photographs are victims of sexual abuse. The written article specifically states that information concerning victims of alleged sexual

In asserting a false light invasion of privacy claim masquerading as a libel by implication claim, Plaintiff alleged that the church processional photograph’s juxtaposition with the Article defamed him by falsely implying that he was one of Monsignor Boyle’s victims.

(Continued on page 33)

(Continued from page 32)

abuse are not being disclosed so as to protect their anonymity. Moreover, the plaintiff fails to make a “rigorous showing” that the photograph and article, as a whole, reasonably imparts a defamatory inference or suggests that the Advance endorses such an inference.

The Alleged Implications Failed to Convey a Defamatory Meaning

The *Staten Island Advance* further argued that the implausible inferences alleged in the Complaint to arise from the Article’s concededly truthful reporting were incapable of conveying a defamatory meaning. First, the Complaint’s allegation that the group photo’s publication with the Article “outed and portrayed” Plaintiff “as a victim of sexual abuse” – although it did no such thing – was not injurious to his reputation, but presented him in a manner that readers would find sympathetic. *Sarwer v. Conde Nast Publs., Inc.*, 237 A.D.2d 191, 191 (1st Dep’t 1997) (affirming grant of motion to dismiss defamation claim based on magazine’s statements because “the effect of the article as a whole [was] to leave the reader with only sympathy for plaintiff as a victim of child abuse”).

Second, even indulging the Complaint’s fanciful claim that the photo’s illustration of the Article suggested that Plaintiff had “engaged in homosexual activity” with Monsignor Boyle, such a portrayal is not defamatory. The law of defamation has evolved with respect to statements concerning sexual orientation, as recent decisions have recognized that “a statement implying that an individual is a homosexual is hardly capable of defamatory meaning.” *Albright v. Morton*, 321 F.Supp.2d 130, 133 (D. Mass. 2004); *see also Stern v. Crosby*, 645 F.Supp.2d 258, 274 (S.D.N.Y. 2009) (contemporary public opinion “does not support the notion that New Yorkers view gays and lesbians as shameful or odious”). In departing from earlier authority to the contrary, these cases reject the “flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual.” *Yonaty v. Mincolla*, 97 A.D.3d 141, 144 (3d Dep’t 2012). As Justice Mercure elaborated:

Even indulging the Complaint’s fanciful claim that the photo’s illustration of the Article suggested that Plaintiff had “engaged in homosexual activity” with Monsignor Boyle, such a portrayal is not defamatory.

In light of the tremendous evolution in social attitudes regarding homosexuality, . . . and the considerable legal protection and respect that the law of this state now accords lesbians, gays and bisexuals, it cannot be said that current public opinion supports a rule that would equate statements imputing homosexuality with accusations of serious criminal conduct or insinuations that an individual has a loathsome disease.

Id. at 146; *see also Stern*, 645 F.Supp.2d at 274 (“prejudice on the part of some does not warrant a judicial holding that gays and lesbians, merely because of their sexual orientation, belong in the same class as criminals”).

(Continued on page 34)

(Continued from page 33)

In apparent acceptance of this reasoning, Judge Dollard determined that “neither the photograph nor article is defamatory in nature toward the plaintiff” because he “is not portrayed in a negative manner and [they do] not expose plaintiff to public contempt, ridicule, aversion or disgrace.” This holding is consistent with New York law and public policy, which recognize the dignity of gay individuals and their right to equal treatment under the law. *See, e.g., Godfrey v. Spano*, 13 N.Y.2d 358, 380-81 (2009) (Ciparick, J., concurring) (detailing statutes and court decisions reflecting public policy acceptance of lesbian, gay and bisexual individuals).

Photo Published in Connection With News Report On Matter of Public Interest

The Complaint also alleged that publication of the church processional photograph violated New York Civil Rights Law §§ 50-51 by using Plaintiff’s picture without authorization for commercial purposes. In opposing this contention, the *Staten Island Advance* argued that the publication of a photograph of a parish priest standing amidst members of his congregation to illustrate a news article reporting on his ban from the priesthood based on substantiated allegations of sexual abuse was immune from statutory liability based on the well settled “newsworthiness” exception recognized by New York courts to a commercial misappropriation claim. *Messenger v. Gruner + Jahr Printing and Publ’g*, 94 N.Y.2d 36, 41 (2000) (Section 51 “do[es] not apply to reports of newsworthy events or matters of public interest. This is because a newsworthy article is not deemed produced for the purposes of advertising or trade.”); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 439 (1982); *Creel v. Crown Publishers, Inc.*, 115 A.D.2d 414, 416 (1st Dep’t 1985) (“The focus of inquiry in applying the ‘public interest’ exception is not only upon the particular photograph, but also upon the article or book within which the photograph appears.”); *Dominguez v. Vibe Mag.*, 21 Misc.3d 1122 (A), **6-7 (Sup. Ct. N.Y. Cnty., 2008) (“Although the statute does not define the terms ‘purposes of trade’ or ‘advertising,’ courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or matters of public interest.”). This exception “reflects Federal and State constitutional concerns for free dissemination of news and other matters of interest to the public.” *Myskina v. Condé Nast*, 386 F. Supp. 2d 409, 417 (S.D.N.Y. 2005).

Judge Dollard determined that “neither the photograph nor article is defamatory in nature toward the plaintiff” because he “is not portrayed in a negative manner and [they do] not expose plaintiff to public contempt, ridicule, aversion or disgrace.”

Adhering to this longstanding case law, the Court summarily rejected the Complaint’s statutory claim:

In the present case, the article clearly reports newsworthy events. The story of Monsignor Boyle, a local pastor and prominent religious figure, facing sexual abuse allegations, is a newsworthy event. The photograph of Monsignor Boyle at

(Continued on page 35)

(Continued from page 34)

Blessed Sacrament Church, also has a relationship to the article and is not an advertisement in disguise. Furthermore, the photograph does not bring the article into the category of “trade purposes”, even if it were used to perhaps increase circulation.

Plaintiff claims that an action lies under the Civil Rights Law because the photograph juxtaposed with the article creates a false implication that he was a victim of sexual abuse. However, an unauthorized use of the plaintiff’s photograph to illustrate a newsworthy article that bears a relationship between the photograph and the article and is not an advertisement in disguise does not state a Civil Rights violation under Civil Rights Law §§ 50, 51.

Court Rejects Ancillary Emotional Distress Claims

The Complaint also asserted ancillary claims sounding in intentional (“IIED”) and negligent infliction (“NIED”) of emotional distress. The *Staten Island Advance* argued that the former could not withstand dismissal because it (1) represented an impermissible attempt to circumvent the First Amendment defenses and limitations requiring dismissal of Plaintiff’s defamation claim (*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215-17 (2011)); (2) was predicated on a subjective “outrageousness” standard incompatible with the First Amendment (*Hustler*, 485 U.S. at 55); (3) sought to recover prohibited parasitic damages based on the same publication giving rise to its defamation claim by the simple expedient of relabeling the cause of action (*Brancaleone v. Mesagna*, 290 A.D.2d 467, 468-69 (2d Dep’t 2002); *Sweeney v. Prisoners’ Legal Servs. of N.Y., Inc.*, 146 A.D.2d 1, 7 (3d Dep’t 1989)); and (4) failed to satisfy the strict requirements of an IIED claim, which make it “nearly impossible in New York for a plaintiff to state a viable claim for intentional infliction of emotional distress.” *Idema v. Wager*, 120 F.Supp.2d 361, 370 (S.D.N.Y. 2000), *aff’d*, 30 Media L. Rep. 1349 (2d Cir. 2002); *see also Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121-22 (1993).

The Staten Island Advance took the position that simple negligence is a constitutionally insufficient fault standard on which to impose liability for emotional distress allegedly attributable to the publication of newsworthy information.

With respect to the NIED claim, the *Staten Island Advance* took the position that simple negligence is a constitutionally insufficient fault standard on which to impose liability for emotional distress allegedly attributable to the publication of newsworthy information and, further, that it owed no duty to Plaintiff. *Virelli v. Goodson-Todman Enters., Ltd.*, 142 A.D.2d 479, 485-86 (3d Dep’t 1989); *Rubinstein v. New York Post Co.*, 128 Misc.2d 1, 4-5 (1985); *Glendora v. Marshall*, 947 F.Supp. 707, 713 (S.D.N.Y. 1996); *aff’d*, 129 F.3d 113 (2d Cir. 1997).

(Continued on page 36)

(Continued from page 35)

The Court followed the above principles in determining that the Complaint's emotional distress claims were not actionable as pleaded:

Plaintiff alleges that the defendants improperly published a photograph of the plaintiff together with Monsignor Boyle in their story about allegations that the pastor committed sexual abuse, when there was no reason to publish plaintiff's photograph since he had not been abused.

This nor other conduct pled by the plaintiff can be said to be so extreme and outrageous as to go beyond all possible bounds of decency. Thus, dismissal of the plaintiff's cause of action for intentional infliction of emotional distress is mandated.

Plaintiff has not plead a claim for negligent infliction of emotional distress. Under New York Law, negligent infliction of emotional distress requires the same "extreme and outrageous" conduct as does intentional infliction of emotional distress (see *Murphy v. Am. Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 1983; *Dawkins v. Williams*, 413 F.Supp.2d 161, 2006). Since defendant's conduct does not rise to the requisite level, this cause of action must be dismissed.

Under New York Law, negligent infliction of emotional distress requires the same "extreme and outrageous" conduct as does intentional infliction of emotional distress.

Court Declines to Impose Sanctions on Plaintiff

Prior to engaging in dispositive motion practice, the *Staten Island Advance's* in-house counsel had sent a comprehensive letter to opposing counsel replete with extensive case citations painstakingly detailing the reasons the Complaint was defective and requesting its voluntary withdrawal in lieu of a motion for sanctions pursuant to CPLR 8303-a and/or 22 NYCRR 130. Plaintiff's counsel responded with a terse statement that he disagreed with Defendants' view of the controlling case law, without coming forward with any court decisions or other authority in support of his client's allegations. Thus, when Plaintiff persisted with the litigation, the *Staten Island Advance* requested an award of sanctions in its motion to dismiss the Complaint's frivolous claims. Without explanation, and although it "decline[d] to accept the plaintiff's position and analysis of case law" cited in his briefing, the court denied Defendants' motion for sanctions.

There may be more to come in this case from the Appellate Division, Second Department, as Plaintiff appealed from the Complaint's dismissal on April 29, 2019. On May 20, 2019, Defendants filed a Cross-Notice of Appeal on the sanctions issue, and have also notified Plaintiff's counsel that they will pursue an additional award of sanctions for legal costs incurred in defending the appeal as authorized by 22 NYCRR 1250.1(h).

(Continued on page 37)

(Continued from page 36)

Defendants Advance Publications, Inc., et al. were represented by Michael J. Grygiel, Co-Chair of Greenberg Traurig's National Media and Entertainment Litigation Group, and Cynthia E. Neidl, a shareholder in the firm's Albany office, along with Patricia A. Clark, Associate General Counsel of Advance Publications, Inc. Plaintiff Kevin DiMauro was represented by Daniel Perrone of Jaroslawicz & Jaros PLLC in New York City.



520 Eighth Avenue, North Tower, Floor 20, New York, NY 10018
212-337-0200 | medialaw@medialaw.org | www.medialaw.org

BOARD OF DIRECTORS

Chair: Randy Shapiro

Jonathan Anschell, Lynn Carrillo, Benjamin Glatstein,
Ted Lazarus, David McCraw, James McLaughlin,
Lynn Oberlander, Gillian Phillips, Regina Thomas

DCS President: Jay Ward Brown

STAFF

Executive Director: George Freeman

Deputy Directors: Dave Heller, Jeff Hermes

Staff Attorney: Michael Norwick

Production Manager: Jake Wunsch

Administrator: Elizabeth Zimmermann

Assistant Administrator: Jill Seiden

Legal Fellow: Josef Ghosn

NY Court Dismisses Libel By Implication Claim Over Wall Street Journal Article

Court Rejects Market Survey Purporting to Show Meaning

By Abigail Everdell

On March 26, 2019, Justice Kalish of the Supreme Court, New York County issued [a decision](#) dismissing defamation claims by prominent antiquities dealer Hicham Aboutaam against Dow Jones, publisher of the Wall Street Journal. *See* Case No. 156399/2017. Plaintiff's claims – for defamation and defamation-by-implication – were based on a June 1, 2017 article reporting on international investigations into whether Hicham and his brother Ali had traded in antiquities looted from ISIS-controlled archeological sites in Syria and Iraq.

Without explicitly denying several such investigations existed, Plaintiff claimed the article defamed him by misreporting the details of various official actions directed at the Aboutaams and their associates, omitting details that would have painted the Aboutaams in a better light, and otherwise reporting true facts in a way that implied a direct association between the Aboutaams and ISIS.

In an amended complaint, Plaintiff also attached a market survey purporting to show that readers of the Article understood it to imply actual guilt and/or wrongdoing by plaintiff, in an attempt to meet the onerous pleading threshold for defamation-by-implication claims.

In a lengthy, thorough opinion, Justice Kalish dismissed both the defamation and defamation-by-implication claims.

Defamation Claim

Justice Kalish considered each of the alleged inaccuracies in the article, and found all were either immaterial, not defamatory, and/or were protected by the Section 74 fair report privilege. Plaintiff had first claimed that the article's reporting on the arrest of his brother Ali's driver and wife (in separate incidents) contained inaccuracies. On this point, Justice Kalish noted that defamation law does not support an "overly technical or exacting conception of truth" (quoting the Second Circuit's *Tannerite* decision). He characterized the alleged inaccuracies as "minor detail[s]" in an otherwise "substantially truthful reporting." Order at 10, 12.

Judge Kalish also easily rejected Plaintiff's claim that the article described the lighting, labeling, and pricing of objects in his New York gallery inaccurately, thereby depicting it as a

In a lengthy, thorough opinion, Justice Kalish dismissed both the defamation and defamation-by-implication claims.

(Continued from page 38)

“den of iniquity.” Justice Kalish held that the article’s description of the gallery was “not defamatory on its face” as the alleged inaccuracies involved only “minor detail that do not produce a different effect on the mind of the reader than the pleaded truth.” *Id.* at 20.

Justice Kalish also spent significant time on Plaintiff’s allegation that the article’s statement that U.S. Immigration and Customs Enforcement was also investigating whether the Aboutaam brothers trafficked in looted antiquities – Plaintiff claimed this was false because there was no ICE investigation, and certainly not one involving ISIS-looted antiquities. Justice Kalish first noted that the article did not actually say the ICE investigation was *related to ISIS*, so that detail alone could not support a libel claim. He went on to hold that the Article’s actual statement that ICE was “scrutinizing” the brothers “to determine whether they trafficked in looted material” was protected by the Section 74 fair report privilege, on the basis of criminal court filings submitted by defendant relating to a repatriation proceeding involving a “Bull’s Head” sculpture that had been sold through Plaintiff’s gallery. Justice Kalish delved deeply into these documents for numerous pages, and concluded that “the evidence clearly shows that, at the time that this article was published, ICE ... was investigating ... whether the Bull’s Head” had been looted. *Id.* at 19.

Defamation by Implication Claim

Justice Kalish next considered Plaintiff’s argument that eight factors – including the article’s headlines, its placement of a photo of the Aboutaams next to one of an archeological site looted by ISIS, Twitter posts by one of the article’s contributors, the reader survey, and various other factors – together created a defamatory inference, whereby “a reasonable reader would infer that Plaintiff and his family business, in fact, traded in ISIS-looted antiquities, thereby funding ISIS.” *Id.* at 22. Justice Kalish cited *Stepanov v. Dow Jones*, 120 A.D. 3d 28, 987 N.Y.S. 2d 37 (1st Dep.’t 2014), as setting out the correct standard for implication claims, and then examined each of Plaintiff’s arguments in turn. His analysis included numerous instances of very thoughtful, direct, and helpful reasoning. The key holdings from this section are below:

First, Justice Kalish found that the article’s headlines were “fair indices” of the underlying reporting “and therefore non-actionable,” and went on to articulate a very helpful governing principle that reports of *investigations* should not be construed as reports of *wrongdoing* for purposes of a libel claim:

“[A]lthough some readers may believe that these investigations into Plaintiff’s family business indicate Plaintiff is guilty, that belief is not because of the headlines or because

Justice Kalish delved deeply into these documents for numerous pages, and concluded that “the evidence clearly shows that, at the time that this article was published, ICE ... was investigating ... whether the Bull’s Head” had been looted.

(Continued on page 40)

(Continued from page 39)

the language of the article as a whole can be reasonably read to impart such an inference. Rather, it is only because some readers may believe that one would not be investigated by law enforcement in four different countries if one were not guilty. However, this Court—which must uphold the constitutional protection that one is presumed innocent until proven guilty in a court of law—will not endorse such a reading as reasonable.” *Id.* at 23-24.

Second, Justice Kalish strongly rejected Plaintiff’s argument that the proximity of a photo of Plaintiff and his brother to photos of looted sites and objects in the print article created a defamatory inference, even going so far as to reject nearly wholesale the idea that the placement of a relevant photo in an article can *ever* support a defamation claim. He reasoned as follows:

“The Court rejects this theory of defamation liability as being wholly without merit. Plaintiff would essentially hold that newspapers can be liable for defamation because they place a picture of a person too closely to a certain photograph which somehow conjures up negative emotions in the reader even though the individual's picture and the other picture are relevant to the subject matter of the story. Such a rule has absolutely no basis in this state's law, and such a rule would have a chilling effect on the inclusion of photographs in newspapers articles.” *Id.* at 26.

Third, Justice Kalish also rejected evidence of a contributor to the article’s twitter postings about it, holding that tweets must be read in concert with the article linked therein, and should not be the basis for liability simply because they are less “precise” in their wording:

“Although the tweets are not written with the same careful and precise language as the article, the overwhelming message conveyed by the tweets is that the Aboutaam family business is under investigation for connections to ISIS-looted antiquities—not that the Aboutaams are guilty of having such connections. In addition, the tweets provide links to the article and are intended to get the reader of the tweets to read the article which provides a more nuanced discussion of the investigation than the tweets themselves.” *Id.* at 27.

Tweets must be read in concert with the article linked therein, and should not be the basis for liability simply because they are less “precise” in their wording.

Fourth, and perhaps most importantly, Justice Kalish rejected Plaintiff’s attempt to plead defamation by implication by commissioning and attaching to his complaint a “reader survey” purporting to show that readers understood the article as implying Plaintiff’s guilt. Justice Kalish first questioned the survey itself on the grounds that it “appears to this Court to be highly prejudicial,” and then more broadly rejected any use of survey evidence to plead defamatory meaning, holding as follows:

(Continued on page 41)

(Continued from page 40)

“Most critically, however, this Court rejects the idea that a plaintiff should be allowed to keep his defamation lawsuit alive by simply commissioning a survey that indicates that certain people have a negative opinion of him based on the allegedly libelous article. To allow such would effectively end the rule—for such wealthy defamation plaintiffs—that it is the job of the court to determine in the first instance “[w]hether particular words are defamatory.” (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985].)” *Id.* at 28.

This holding is particularly valuable, as Plaintiff’s attempt to use a survey was highly unusual, if not unprecedented, in libel law. Justice Kalish’s firm ruling on this point will provide valuable ammunition should any libel plaintiff attempt the survey approach in the future.

Finally, Justice Kalish examined four other points Plaintiff raised in support of his implication claim, rejecting each in turn. In particular, Justice Kalish repeatedly rejected Plaintiff’s attempts to focus on the omission of “minor detail[s]” or “explanations” from Plaintiff that might have “cast Plaintiff in a more favorable light,” noting that such omissions are “a protected exercise of the WSJ’s editorial judgment.” *See id.* at 31-32, 36-37, 38. Justice Kalish also found no defamatory implication in the article’s discussion of an unrelated civil forfeiture case relating to items that were alleged to have been looted by ISIS, focusing in particular on the article’s clear disclaimer that “No dealers have been implicated in the case.” *Id.* at 34.

The decision closed with the following summary, reiterating the principle that a report on an investigation should not be read as alleging wrongdoing.

“It may be that being subject to an investigation by law enforcement carries a stigma. Here, Plaintiff alleges that this stigma has caused a 96% drop in sales at his gallery. By no means does this Court’s decision seek to undermine the serious consequences that sometimes follow a news organization’s decision to publish details of an ongoing investigation by law enforcement. However, the decision to truthfully report on an ongoing law enforcement investigation is ultimately a question of journalistic judgment. Unless the reporting on such an investigation is materially false or affirmatively creates false suggestions, it is not for the courts to question an editorial judgment to report on an ongoing investigation.” *Id.* at 40.

In sum, Justice Kalish’s decision covered numerous commonly raised defamation arguments, as well as some more novel ones, and put each firmly to rest. It should prove useful in future defense of defamation and defamation-by-implication claims.

Hicham Aboutaam has filed a notice of appeal of the decision to the First Department.

Defendant Dow Jones & Company, Inc. was represented by Laura R. Handman, Rachel F. Strom, and Abigail B. Everdell of Davis Wright Tremaine LLP. Plaintiff Hicham Aboutaam was represented by Richard D. Emery, Daniel J. Kornstein, and David A. Lebowitz of Emery Celli Brinkerhoff & Abady LLP.

Tenth Circuit Affirms Summary Judgment in Favor of Sports Illustrated and Its Reporters in False Light Suit

By Jon Epstein

In 2013, *Sports Illustrated* (“SI”) published a five-article series about the Oklahoma State University (“OSU”) football program. It explored questionable practices OSU allegedly used to recruit and retain top players. The first article in the series described boosters and coaches who made direct payments to players or “funnel[ed] money to players through dubious work arrangements.” It briefly profiled John Talley, a booster who “had been close to the football program since at least 2002” and who some former players claimed overpaid them for jobs they did or compensated them for jobs they did not do.

Talley sued Time, Inc., which publishes *SI*, and *SI* reporters Thayer Evans and George Dohrmann claiming that the article placed him in a false light and invaded his privacy. On September 21, 2018, the district court granted summary judgment for the Defendants, finding the plaintiff could not demonstrate a genuine dispute of material fact regarding the falsity or actual malice elements of his false light claim. *Talley v. Time, Inc. d/b/a Sports Illustrated Magazine*, No. CIV-14-853 -D, 2018 WL 4558993, at *5-6 (W.D. Okla. Sept. 21, 2018).

In Oklahoma, false light plaintiffs must prove three elements:

1. “the defendant gave publicity to a matter concerning the plaintiff that placed the plaintiff before the public in a false light,”
2. “the false light in which the plaintiff was placed would be highly offensive to a reasonable person,” and
3. “the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”

A five-article series about the Oklahoma State University football program explored questionable practices OSU allegedly used to recruit and retain top players.

Mitchell v. Griffin Television, LLC, 60 P.3d 1058, 1061 (Okla. Civ. App. 2002). Oklahoma courts have specified that the third element is identical to the actual malice standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

(Continued from page 42)

On May 8, 2019, the United States Court of Appeals for the Tenth Circuit affirmed that decision finding that Talley has not demonstrated a genuine issue of material fact as to whether the Defendants acted with actual malice. [Talley v. Time, Inc. d/b/a Sports Illustrated Magazine](#). The Court determined that it need not address whether there was any actionable dispute regarding the falsity element because its decision on the actual malice element was dispositive.

The Court examined and commented on an extensive record from *SI*'s 10-month investigation into OSU's recruiting and retention practices. The investigation involved dozens of interviews with OSU players, coaches, and boosters (including Talley).

Dohrmann and Evans co-authored "The Dirty Game." The first article of the series – a roughly 5,000-word piece titled "The Money" – described gratuities and inducements that were allegedly used to attract and retain players. It detailed financial benefits that coaches purportedly offered to players and described how several "boosters" allegedly "funnel[ed] money to players, by paying them "for little or no work." "Money" contained a 442-word passage about Talley that included the following:

. . . John Talley, an area director of the Fellowship of Christian Athletes, had been close to the football program since at least 2002, when his son, Saul, was a walk-on long snapper. "John Talley was the hot name around campus," [player Rodrick] Johnson says. "If you needed a job, call John Talley."

[Players Fath'] Carter, [Brad] Girtman, [Rodrick] Johnson and Thomas Wright each say that Talley either grossly overpaid them for jobs they did or compensated them for jobs they didn't do. They allege that numerous other players benefited from Talley's generosity too. Girtman says Talley paid him \$1,500 to \$2,000 every two weeks during one summer to work on his horse ranch, far more than the job was worth. Talley could also be counted on to set up speaking gigs for players, paying \$100 for a 15- to 20-minute talk. "You might get more depending on who you were," says Shaw. . .

Quarterback Aso Pogi (1999 to 2002) says he and another player lived at Talley's ranch one summer rent- free. In retrospect Pogi says, "It's a big deal. I was the starting quarterback." (Talley says that Pogi lived at his ranch and had to work to cover his rent; Pogi denies that he did any work.)

Talley says that he sometimes paid players a fee for speaking engagements and that they frequently did work on his ranch, noting he always paid an hourly wage. He also says he cleared the speaking fees and the hourly employment through the university's compliance office. "I have paid lots of

(Continued on page 44)

(Continued from page 43)

players to work on my ranch,” Talley says. “But I would never pay someone not to work.”

OSU compliance director Kevin Fite says of the speaking engagements arranged by Talley, “They were not cleared through our office as paid speaking engagements. In fact, two of my staff members indicated to me that they had had conversations with John and told him you cannot pay for speaking engagements. If you want to employ our student-athletes for other things, that’s fine, but you cannot pay them for speaking engagements.”

Talley argued that he was placed in a false light because he claimed (1) he did not pay players for speaking engagements [he claimed that he only reimbursed them for expenses]; (2) he did not overpay players for jobs; and (3) it was misleading to say that he allowed Aso Pogi to live at his home rent-free because he contends that he required Pogi to perform labor in exchange for room and board.

The reporters recorded the interviews they used to write the passage about Talley. Some of these interviews were discussed by the Court in great depth:

- Brad Girtman revealed that Talley paid him “fifteen hundred, a thousand” dollars to perform “ranch hand” tasks. Girtman said that he believed he was overpaid.
- Seymour Shaw reported that Talley “always paid [players] to go talk” and that “if you needed some money, you’d go to John Talley.”
- Rodrick Johnson reported that Talley overpaid him for work. When Evans asked about “jobs that you guys got paid crazy amounts for,” Johnson immediately interrupted and said, “John Talley, John Talley. Oh, he owes me, still to this day.” Mr. Johnson then added, “He used to pay very well. I would work for about three hours and I would get paid probably about 400 bucks.” Additionally, Johnson said that Talley paid him for speaking engagements and that “one time I went to speak at a school and he paid me 100 bucks, and it was, like, for 20 minutes” and that “[t]here were guys that did that almost every day.”
- Aso Pogi told Mr. Evans that he frequently participated in Talley’s speaking engagements but insisted he was never paid to speak. He also described living on Talley’s ranch one summer:

Mr. Evans: You worked at his ranch, too.

Mr. Pogi: I did a lot.

(Continued on page 45)

(Continued from page 44)

Mr. Evans: You worked at his ranch.

Mr. Pogi: I—I lived there.

Mr. Evans: You lived there, but you never, you never worked—

Mr. Pogi: I ne—I didn't, I didn't do anything like—

* * *

Mr. Evans: I mean, you lived with John [Talley], right? I mean, what was the arrangement?

Mr. Pogi: I had no arrangement. That's the thing that's throwing me off. I'm like, "Arrangement?" I-I-I didn't make, you know, any money.

The Actual Malice Standard

To establish the third element of a false light claim, a plaintiff must show the defendant made or published its statements "with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard to whether [they were] false or not." *New York Times*, 376 U.S. at 280. Both the Supreme Court and Oklahoma state courts have held that the plaintiff must prove actual malice with "convincing clarity."

The Court noted that actual malice is a subjective standard that requires proof of a "mental element." The actual malice inquiry thus "rests entirely on an evaluation of [the publisher's] state of mind when he wrote his initial report, or when he checked the article against that report." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 494 (1984). It then explained that a plaintiff does not create a jury question of actual malice by showing that a publisher failed to investigate before publishing. Nor does a plaintiff do so by showing that a publisher misinterpreted the source material or omitted details favorable to the plaintiff.

The reporters and editor responsible for the article all stated they believed the series was truthful and substantiated. In his deposition, Dohrmann explained "[i]t's very difficult to get players to [admit to NCAA violations]" and that "[f]ive players is a significant number [of sources] with a story like this." Because "a number of sources . . . told [the reporters] a similar or same story about Oklahoma State and John Talley," he felt "absolutely certain about what we were writing."

The court also held that prohibiting the sketch artist from sketching certain people in the public courtroom would be an unconstitutional prior restraint.

(Continued on page 46)

(Continued from page 45)

The Court held that these Defendants did not deliberately ignore sources that might have disputed their account. Rather, they interviewed multiple sources around the country who substantially corroborated each other. They also verified the information they published by re-interviewing their sources and fact-checking the final piece. Talley provided no evidence that the Defendants fabricated their story, based their claims about him on an unverified anonymous telephone call, or published allegations that were so inherently improbable that only a reckless man would have put them into circulation. He thus “proffers no evidence indicating that [the Defendants] entertained doubts regarding the truth of the statements in [the publication].”

The Court also noted that the reporters had ample evidence to support the statements in the article about Talley. Pogi and Talley told the reporters that Pogi lived on Talley’s ranch without paying rent; four players said Talley paid them or others they knew for speaking engagements; and three said Talley overpaid them for work. At least two of these sources brought up Talley’s name without prompting. In addition, Pogi made statements in his interview that the Defendants could reasonably have interpreted to mean he did not work at Talley’s ranch. The Court held that even if the Defendants misinterpreted the statement by Pogi, a defendant’s misinterpretation of source material that “bristle[s] with ambiguities” does not constitute actual malice.

The Court noted that while some players claimed they did not receive money to speak, multiple players reported that Talley arranged paid speaking engagements. Further, notes from the interview with Talley suggest that Talley admitted to paying speaking fees. In publishing these allegations, the Defendants did not show reckless disregard for the truth. Rather, they reported information that multiple sources confirmed and corroborated.

The Court held that these Defendants did not deliberately ignore sources that might have disputed their account. Rather, they interviewed multiple sources around the country who substantially corroborated each other.

Talley argued that the Defendants demonstrated actual malice by “[seeking] out non-credible, untrustworthy, and troubled sources,” and by interviewing and quoting OSU players of “suspect veracity.” He noted that some of the players featured in the article had “troubled histor[ies] . . . including drug usage, scholastic problems with OSU, and criminal issues.” Although the Defendants interviewed and quoted some OSU players who used drugs or had criminal records, the Court noted that “[s]ources need not be paragons of virtue for journalists safely to rely on them.” 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* §5:5.2(C) at 5-109 (5th ed. 2017).

Here, the series reported on drug use, financial misconduct, and academic dishonesty in the OSU football program. The Court recognized that in order to prepare this report, the Defendants necessarily had to rely on sources who may have participated in these activities.

(Continued on page 47)

(Continued from page 46)

Thus, Talley failed to show the Defendants' use of "troubled" sources demonstrated actual malice.

Talley then argued the Defendants showed actual malice by "omitting material statements" of players who said they were not improperly paid. However, Courts have noted that "the author of an article will have to choose which facts to include and which to omit," because "[i]t is impossible to print all of the facts on which an opinion or belief is based, especially when an article comprises a critical analysis." Accordingly, "recovery for a false light tort may not be predicated on . . . [a defendant's failure] to include additional facts which might have cast the plaintiff in a more favorable or balanced light." *Machleder v. Diaz*, 801 F.2d 46, 55 (2d Cir. 1986).

The Court concluded that (1) the 'actual malice' standard is a formidable one; (2) the Defendants were thorough in their investigation, editing, and review; and (3) Talley presented no evidence that they published with "knowledge that [their statements were] false or with reckless disregard of whether [they were] false or not." *New York Times*, 376 U.S. at 280. Thus, the Court held that Talley simply could not show "with convincing clarity" that the Defendants acted with actual malice.

"The 'actual malice' standard is a formidable one ... the Defendants were thorough in their investigation, editing, and review..."

The defendants Time, Inc. dba Sports Illustrated Magazine, George Dohrmann and Thayer Evans are represented by Robert D. Nelon, Jon Epstein, and Lindsey Kistler of Hall Estill, Oklahoma City, Oklahoma. The plaintiff is represented by Gary L. Richardson, Raymond Allred, Charles Richardson, Alisa Hopkins and Lia Rottman of Richardson Richardson Boudreaux, PLLC of Tulsa.

New MLRC Committee: Data Privacy

The Data Privacy Committee's purpose is to monitor developments in the law governing the collection, maintenance and use of data concerning individuals and entities as relevant to MLRC's media members, and to educate members regarding those developments, their impact on both the business of and the content produced by members, and areas of legal risk and best practices for reducing that risk. Join the committee by sending an email to lzimmermann@medialaw.org.

Texas Supreme Court Dismisses Pharmacy's Libel Claims Against The Dallas Morning News

By Marc Fuller

The Texas Supreme Court dismissed libel claims against The Dallas Morning News, Inc. and reporter Kevin Krause over a series of articles on local and national controversies surrounding compounding pharmacies. [The Dallas Morning News, Inc. v. Hall](#), No. 17-0637, 2019 WL 2063576, *5 (Tex. May 10, 2019).

The plaintiffs, Fort Worth-based Rxpress pharmacy and two of its co-owners, claimed that *The News* falsely reported that they were under criminal investigation for—and guilty of—healthcare fraud. The case involved novel procedural issues under the Texas anti-SLAPP statute relating to plaintiffs' reliance on false and misleading testimony, which was discovered only after the trial court denied *The News's* motion to dismiss and the court of appeals affirmed. But the Texas Supreme Court did not address these issues, holding instead that plaintiffs' evidence was inadmissible and applying established statutory protections for the news media's accurate reporting on official proceedings and third-party allegations.

The News Reports on an Active Criminal Investigation into Compounding Pharmacies

On February 5, 2016, U.S. Department of Defense agents executed a search warrant for the residence of a Dallas-based pharmaceutical marketer, Nathan Halsey. The warrant identified several crimes being investigated, including healthcare fraud. Investigators sought “all communications” of Rxpress and its associates related to “insurance reimbursements ... [and] the facilitation of payment to recruiters, marketers, doctors, beneficiaries or others for referral to Rxpress.”

They also sought records that “show or demonstrate connections or relationships such as ownership, control, responsibility, direction, or authorization within Rxpress.”

The criminal investigation of Rxpress was one of several controversies surrounding compounding pharmacies, which produce special medications for specific patient purposes. As Rxpress and others got rich by billing the government and private insurers for compounded drugs, they began to face increasing legal scrutiny. Federal authorities investigated several pharmacies for fraudulently billing Tricare, the Defense Department's healthcare program, and for paying improper kickbacks to marketers and physicians.

The case involved novel procedural issues under the Texas anti-SLAPP statute relating to plaintiffs' reliance on false and misleading testimony, which was discovered only after the trial court denied *The News's* motion to dismiss.

(Continued from page 48)

In addition to the criminal investigation, Rxpress became embroiled in civil lawsuits against former employees and business partners. Rxpress's former tax advisor alleged that Rxpress paid kickbacks to doctors and attempted to circumvent "anti-kickback" laws by making those doctors shareholders. And plaintiffs Lewis and Richard Hall alleged that their co-owners had caused Rxpress to violate "anti-kickback" laws.

In early 2016, *The News* published a series of articles by reporter Krause covering criminal investigations and other proceedings involving compounding pharmacies. The main article, published the day after the search warrant of Halsey's residence, reported that Rxpress was the subject of a federal criminal investigation. Referring to allegations in the civil lawsuits against Rxpress, *The News* also reported that the pharmacy had been "accused of paying illegal kickbacks to physicians for writing prescriptions." Subsequent articles continued to report on the investigation into Rxpress in the context of other developments in the broader controversies surrounding compounding pharmacies.

Trial Court and Court of Appeals Deny Anti-SLAPP Motion to Dismiss

In March 2016, Rxpress filed suit. *The News* moved to dismiss under the Texas anti-SLAPP statute on grounds of truth and privilege. *The News* submitted the court documents on which its reporting was based, including the February 2016 search warrant. In opposing *The News*'s motion, Rxpress offered testimony of its owner, plaintiff Richard Hall, that it was not under investigation:

- "[We] have not seen any documentation that suggests that [we] are specifically under investigation for use of TriCare money,"
- "[We] specifically offered to the Justice Department and Defense Department that if it had questions, ... [we] would quickly and completely open their books, offices, and records to accommodate every request. No such request was ever made and none ha[s] been made to this day."
- "In short, there is not and was not an investigation of our pharmacies relating to TriCare."

On the day of the hearing on *The News*'s motion to dismiss, plaintiffs also submitted the signed affidavit of a local criminal defense attorney, Michael Heiskell, who offered his "expert" opinion that, based on his review of the search warrant, Rxpress was not under investigation and *The News*'s reporting was false. *The News* objected to the admissibility of the Hall and Heiskell affidavits on various grounds. The trial court took the matter under advisement.

Several days after the hearing, Rxpress made what its counsel described as a "seemingly unusual request." Rxpress stated that it had become aware of new information that "would directly impact the decision that the Court is currently considering" and requested ten days to investigate. Rxpress then filed an "Advisory to the Court and Parties," blaming the February

(Continued on page 50)

(Continued from page 49)

2016 search warrant on a purported conspiracy between *The News* and federal investigators and admitting that the warrant created the “appear[ance] that there was an ‘investigation.’” Rxxpress asked the trial court to deny *The News*’s motion to dismiss so that it could conduct discovery into this alleged conspiracy. The next day, the court denied *The News*’s motion and overruled all of its evidentiary objections.

On appeal, Rxxpress switched tactics again. Rxxpress abandoned the Advisory’s conspiracy theory and reverted to its claims that there was no investigation. In May 2017, the Fort Worth court of appeals affirmed the trial court’s orders, expressly relying on Richard Hall’s testimony that it was not aware of any investigation.

New Evidence Supports *The News* and Reveals Plaintiffs’ Misconduct

As Rxxpress was litigating its libel claims against *The News*, the Defense Department’s criminal investigation continued. Trying to block the government’s subpoena of its accounting firm, an affiliate of Rxxpress filed a federal declaratory judgment action. In that action, the affiliate admitted that Rxxpress was under criminal investigation and revealed, for the first time, what had actually precipitated the Advisory: on September 15, 2016, the same day as the trial court’s hearing on *The News*’s motion to dismiss, the federal government had raided Rxxpress’s headquarters, executing a search warrant and seizing 148 boxes of evidence. The September 2016 search warrant further confirmed that Rxxpress was under investigation for healthcare fraud. But instead of withdrawing its owner’s testimony that there was no search and no investigation, Rxxpress allowed that testimony to stand and repeated those false assertions on appeal.

The News filed this new evidence in the court of appeals, asking the court to take judicial notice and rehear the appeal en banc. A split panel denied both motions.

The News then sought review by the Texas Supreme Court, arguing that the court of appeals’ judgment should be reversed regardless of whether the new evidence was considered. More judicial notice motions followed. While the case was pending before the Court, Richard Hall and other affiliates of Rxxpress were indicted for federal healthcare fraud. In one of the recent filings in the criminal case, “expert witness” Heiskell was revealed to have been criminal defense counsel to Rxxpress in September 2016. In short, Rxxpress had secretly used its own criminal defense attorney as its “expert witness” to offer sworn testimony that the investigation for which he had been retained did not exist.

Rxxpress had secretly used its own criminal defense attorney as its “expert witness” to offer sworn testimony that the investigation for which he had been retained did not exist.

Texas Supreme Court Reverses

The Texas Supreme Court reversed without considering the new evidence, thoroughly rejecting plaintiffs’ claims and the court of appeals’ analysis of them. The Court held that there were two

(Continued on page 51)

(Continued from page 50)

“gists” at issue: (1) *The News*’s statements that Rxpress was “under investigation” and (2) an alleged implication in the articles that plaintiffs were actually guilty of the crimes being investigated. [The Dallas Morning News, Inc. v. Hall](#), No. 17-0637, 2019 WL 2063576, *5 (Tex. May 10, 2019)

As to the “under investigation” gist, the Court did not decide whether the February 2016 search warrant, standing alone, established that Rxpress was under investigation, but it did reject the court of appeals’ holding that the warrant was evidence that Rxpress was *not* under investigation. *Id.* at *5 (“We struggle to see how a search warrant seeking documents and communications on Rxpress’s owners and operation ... is clear and specific evidence that Rxpress was not “under investigation”).

Turning to the Richard Hall affidavit, the Court held that Hall’s testimony that he was not *personally aware* of any investigation was not clear and specific evidence that there was no investigation. *Id.* (“Even an executive ‘with his ear to the ground’ is unlikely to have personal knowledge of a sealed Department of Defense investigation.”). The Court similarly rejected Heiskell’s affidavit, holding that the search warrant did not require any specialized knowledge and thus was not a proper subject of expert testimony.

The Court’s analysis of the second gist focused on whether *The News*’s reporting implied that Rxpress was guilty of healthcare fraud. The Court noted that Texas law provides a statutory fair report privilege and also protects the accurate reporting of third-party allegations on matters of public concern, and it held that plaintiffs have the burden under both doctrines to prove falsity. The Court cited *The News*’s “pervasive sourcing language” carefully attributing the allegations against Rxpress to the third parties who made them. *Id.* at *8 (“Rxpress does not cite, nor can we find, any statements in the News’s articles implying that Rxpress is actually guilty of anything.”).

The Court also rejected Rxpress’s argument that, by reporting on civil allegations of fraud against Rxpress and on criminal prosecutions of other pharmacies in the same series of articles, *The News* had somehow implied that Rxpress was guilty. As the Court recognized, “[t]he media does not simply report on individual events in isolation. Commonly, reporting involves investigating, tracking down stories, and providing context for readers.” *Id.* at *9.

Having concluded that Rxpress failed to satisfy its burden under the anti-SLAPP statute, the Court reversed the court of appeals’ judgment and remanded to the trial court for a determination of fees and other relief under the statute.

Tom Leatherbury, Marc Fuller, Kim McCoy, and Margaret Terwey of Vinson & Elkins represented The Dallas Morning News, Inc. and reporter Kevin Krause. Plaintiffs were represented by Robert Myers and John Shaw of Myers Law.

Seventh Circuit Upholds Dismissal of Defamation, False Light and Related Lanham Act Claims on Opinion Grounds

War of Experts Best Resolved By Rebuttal, Not Defamation Suit

By Steven P. Mandell

Observing that “context is key,” the Seventh Circuit affirmed the dismissal of defamation, false light and related Lanham Act and state-law unfair competition claims against an author and publisher on the grounds that the allegedly defamatory statements were constitutionally-protected opinion. [Board of Forensic Document Examiners v. American Bar Association](#), (7th Cir. May 1, 2019) (Wood, Scudder, St. Eve, JJ.).

The Board of Forensic Document Examiners (the “BFDE”) and eight of its members sued the American Bar Association, publisher of *The Judges’ Journal*, and Thomas Vastrick, a prominent forensic scientist, over an article Vastrick wrote for the *Journal* in which he advised judges how to best qualify expert witnesses in cases involving handwriting comparison and forgery. In his article, Vastrick contended that judges could distinguish between “true professionals” and “lesser qualified” forensic document examiners by looking for examiners who have completed a certain training regimen, and who (like himself) are certified by the BFDE’s principal rival, the American Board of Forensic Document Examiners, as opposed to other certifying organizations.

The BFDE claimed that Vastrick’s allusion to “lesser-qualified” examiners, certified by “other certifying organizations” was a not-so-veiled false and defamatory reference to its members.

Although the District Court had dismissed all claims on alternative, “of and concerning” and opinion grounds, the Seventh Circuit side-stepped complicated choice-of-law issues associated with the “of and concerning” issue and, on May 1, 2019, affirmed on opinion grounds alone. In finding that all of the allegedly defamatory statements were constitutionally-protected opinion, the Seventh Circuit focused on the context in which the statements appeared. Specifically, the court noted the scholarly nature of *The Judges’ Journal* as a whole, its disclaimer that the articles therein “represent the opinions of the authors alone” and the lack of precise or verifiable language in Vastrick’s article, all of which signaled to the reader that the article represented one expert’s own view on what makes an adequately-qualified forensic document examiner.

The court noted the scholarly nature of *The Judges’ Journal* as a whole, its disclaimer that the articles therein “represent the opinions of the authors alone” and the lack of precise or verifiable language.

(Continued from page 52)

The Seventh Circuit reiterated that, in the context of a scholarly dispute, it is more natural to read an allegedly defamatory statement as a critique of the plaintiff's theory rather than an attack on his reputation and that judges are not well equipped to resolve academic controversies as to which the more appropriate remedy is the publication of a rebuttal.

Steven P. Mandell of Mandell Menkes LLC in Chicago represented defendants American Bar Association, Thomas Vastrick, Stephanie Domitrovich, and the American Board of Forensic Document Examiners. On appeal, Plaintiffs Board of Forensic Document Examiners, Inc., M. Patricia Fisher, Lynda Hartwick, Andrew Sulner, J. Michael Weldon, Emily J. Will, Vickie L. Willard, and Robin D. Williams were represented by Evan Louis Frank of Alan L. Frank Law Associates, P.C.

MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & Free Expression Law

- **A Conversation with U.S. Supreme Court Justice Stephen Breyer**
- **Hate Speech**
- **Reporting on #MeToo**
- **The Trial of Julian Assange**
- **Press Freedom Under Siege**
- **Libel, Privacy and the Press**
- **European Response to Fake News, Disinformation, Violent Material and the Responsibility of Tech Companies**
- **Contempt, Hacks and Leaks**
- **A Gala Reception (Sponsored by Hiscox)**
- **And more!**

www.medialaw.org/london



You Lose, Fake News: SDNY Grants BuzzFeed Summary Judgment Dismissing Libel Suit from “King of Bullsh*t News”

By Katherine Bolger, Rachel Strom and John Browning

The specter of fake news has haunted the media landscape in recent times, but reporting on the phenomenon has produced a reassuring and helpful decision for news organizations seeking summary judgment of libel claims on substantial truth grounds. [Leidig v. BuzzFeed, Inc.](#), 16 Civ. 0542, 2019 U.S. Dist. LEXIS 55672 (S.D.N.Y. Mar. 21, 2019) (Marrero, J.). In a meticulous opinion, the court reaffirmed the American rule that defamation plaintiffs bear the burden of proving the falsity of the statements in suit and cannot survive summary judgment by relying solely on their own “self-serving and discredited testimony” that these statements are false.

Background

The English journalist Michael Leidig founded Central European News (“CEN”), which is a Vienna-based newswire service that specializes in outlandish tabloid news stories, often originating from far-flung corners of Eastern Europe or China. For example, CEN has produced stories about a Russian man who survived a bear attack after his Justin Bieber ringtone scared off his grizzly assailant and a series of articles about men being castrated by an angry mob, jealous wife or unhinged aunt, respectively. These viral news stories are widely published by CEN’s tabloid newspaper clients, including the *Daily Mail*, *Metro* and *The Mirror* in the United Kingdom, apparently because they tend to generate the sort of heavy online traffic that can be converted into advertising revenue.

Three reporters at BuzzFeed News – including Craig Silverman (who coined the term “fake news” to describe the kind of dubious viral content proliferating online) and Tom Phillips (who specializes in debunking online hoaxes) – became suspicious of CEN’s content and spent many months researching the veracity of its viral news stories. On April 24, 2015, BuzzFeed published an article about CEN and Leidig entitled [The King of Bullsh*t News: How a small](#)



(Continued from page 54)

British news agency and its founder fill your Facebook feed with stories that are wonderful, wacky – and often wrong. BuzzFeed identified eleven CEN stories that were “completely false or ... based on images that did not match the stories” and an additional eight articles that “contained suspicious details such as perfect quotes that appeared in no other coverage.” Based on the analysis presented in its article, BuzzFeed concluded that “an alarming proportion of CEN’s ‘weird news’ stories are based on exaggeration, embellishment, and outright fabrication – and that the company has scant regard either for the accuracy of its content or for what happens to the people ... whose names and images are spread across the world.”

Leidig and CEN (“Plaintiffs”) filed a defamation suit against BuzzFeed in the Southern District of New York on January 25, 2016. The lawsuit identified eight allegedly defamatory statements in the BuzzFeed article. Five of these statements reported specific instances in which CEN had fabricated quotes or other important factual details; the remaining three statements were statements drawing more general conclusions about the quality of CEN’s journalistic output. On January 13, 2017 – before the parties had completed any meaningful discovery – CEN and Leidig filed a motion for summary judgment based on nothing more than two self-serving and unsupported declarations attesting that CEN never fabricated any of its reporting. As Judge Marrero wrote in denying the premature motion and declining to hold that the BuzzFeed article was false as a matter of law, “the Motion and supporting papers consist mainly of Plaintiffs insisting upon a tautology that, to paraphrase Lucetta, conveys no other than Plaintiffs’ reason: The Article is false because it is false.” *Leidig v. BuzzFeed*, 16 Civ. 0542 (VM), 2017 U.S. Dist. LEXIS 2303670 (S.D.N.Y. May 9, 2017) (see also William Shakespeare, *Two Gentlemen of Verona* 1.2:171-74 (“Then thus: of many good I think him best. | I have no other, but a woman’s reason; | I think him so because I think him so.”))

Reaffirming the traditionalist view that facts matter, Judge Marrero followed the undisputed evidence to conclude that BuzzFeed’s reporting was substantially true as a matter of law.

As discovery continued, CEN and Leidig were sanctioned by the lower court for spoliation of metadata and content on websites controlled by CEN that published CEN content. *See Leidig v. BuzzFeed*, 16 Civ. 0542 (VM), 2017 U.S. Dist. LEXIS 208756 (S.D.N.Y. Dec. 19, 2017). After discovery concluded, BuzzFeed filed a motion for summary judgment, arguing that all eight of the challenged statements were substantially true. BuzzFeed argued in the alternative that Leidig and CEN were limited purpose public figures, who had injected themselves into the controversy over fake news by publishing extensively on CEN’s role in the viral news environment, and could not establish actual malice by clear and convincing evidence.

In their opposition, Plaintiffs conceded the truth of 215 out of the 216 statements of fact BuzzFeed advanced in support of its reporting, including substantial evidence demonstrating that CEN could not identify the source of fabricated quotations or other information that BuzzFeed concluded to be made up. Leidig and CEN also failed to identify any documentary

(Continued on page 56)

(Continued from page 55)

evidence that demonstrated that CEN's fabricated quotes and dubious reporting was obtained from actual sources. Instead, they resubmitted the same declarations they had filed in support of their premature motion for summary judgment and argued that these self-serving declarations were sufficient to create an issue of material fact.

Summary Judgment Granted

Reaffirming the traditionalist view that facts matter, Judge Marrero rejected Plaintiffs' *ipse dixit* argument and followed the undisputed evidence to conclude that BuzzFeed's reporting was substantially true as a matter of law. The starting point of the trial court's decision was the well-worn rule that "the burden of proof of proving the falsity of a statement [in a defamation case] rests with the plaintiff." Following the Second Circuit's decision in *Celle*, the trial court also recognized that unsupported "blanket denials" of wrongdoing from libel plaintiffs "are inadequate" to prove that a defamatory statement is false. Although such "bland cryptic claims of falsity supported by the credibility of a witness might be sufficient to establish a proposition in other civil cases, the First Amendment demands more." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir 2000). From this firm legal foundation, Judge Marrero methodically analyzed each of the eight statements disputed by Plaintiffs and held that each one was substantially true.

For example, Judge Marrero carefully assessed BuzzFeed's critique of a CEN article claiming that Chinese teenagers kept cabbages as pets as a way of combatting loneliness (the "Cabbage Story") and determined that BuzzFeed's reporting was "at least substantially true." As the court noted, BuzzFeed reported that CEN's story had been "debunked" and thus "impl[ie]d that Plaintiffs' manufactured false quotes of individuals walking cabbages on leashes to combat depression." While Plaintiff asserted "the quotes contained in the Cabbage story are true," the court held that "deposition testimony from Leidig and CEN's employees belie these claims." In other words, a review of the deposition transcripts revealed that Plaintiffs could not substantiate CEN's reporting. As the court noted, "Leidig could not verify the quotes" at his deposition "but claimed that John Feng, a journalist employed by CEN, was responsible for writing and researching the Cabbage Story... Yet Feng admitted that he did not work on the Cabbage Story because he started work at CEN only two months after CEN distributed the story to clients." Even after BuzzFeed's article was published, Feng "was unable to verify the quotes CEN included in their story." Without a scrap of evidence to identify a legitimate source for the quotes in the Cabbage Story, Plaintiffs were left with nothing "[o]ther than Leidig's self-serving and discredited testimony, which is plainly insufficient to [oppose] a motion for summary judgment." Applying the same analysis, the trial

If affirmed, this well-considered opinion will help media organizations seeking summary judgement on substantial truth grounds by precluding a libel plaintiff from creating a material issue of fact simply by denying any wrong doing.

(Continued on page 57)

(Continued from page 56)

court determined that BuzzFeed’s reporting on dubious reporting in four other CEN stories was also substantially true.

Judge Marrero further held that CEN and Leidig had failed to produce any evidence that the three more general statements about CEN’s reporting were substantially false. For instance, the decision noted that the BuzzFeed article “implies that CEN falsifies quotes in part because ‘CEN’s stories frequently contain lines from someone that no one else could persuade to talk.’” But because “Plaintiffs have provided no evidence to refute a single specific instance in the Article where BuzzFeed alleged CEN falsified a quote,” they cannot establish the falsity of BuzzFeed’s general conclusion that CEN fabricated quotes. “Thus, Plaintiffs must rely on self-serving blanket denials that they do not falsify quotes,” but (once again) “such blanket denials are inadequate” to survive summary judgment. Having disposed of the case on substantial truth grounds, the court declined to address BuzzFeed’s actual malice argument.

CEN and Leidig have appealed Judge Marrero’s decision to the Second Circuit and the parties are in the midst of briefing the appeal.

If affirmed, this well-considered opinion will help media organizations seeking summary judgement on substantial truth grounds by precluding a libel plaintiff from creating a material issue of fact simply by denying any wrong doing. In addition, Judge Marrero’s clear-eyed decision – which zeros in on just the facts (ma’am) – provides some reassurance and respite to those feeling disoriented by the fake news vortex.

Katherine Bolger, Rachel Strom and John Browning, in the New York office of Davis Wright Tremaine LLP, represented BuzzFeed, Inc. in the libel suit brought by CEN and Michael Leidig. CEN and Mr. Leidig are represented by Harry H. Wise, III of the Law Office of Harry H. Wise, III.

New MLRC Committee: Data Privacy

The Data Privacy Committee's purpose is to monitor developments in the law governing the collection, maintenance and use of data concerning individuals and entities as relevant to MLRC’s media members, and to educate members regarding those developments, their impact on both the business of and the content produced by members, and areas of legal risk and best practices for reducing that risk. Join the committee by sending an email to lzimmermann@medialaw.org.

Goldman v. Breitbart (‘Embed’) Case – Continued and (Not Quite) Ended

By Ken Norwick

A piece I wrote in the [February 2018 Media LawLetter](#) recounted the first year or so of *Goldman v. Breitbart* – the (in some circles) infamous “embedded links” copyright case. That piece ended with a discussion of the [decision rendered by SDNY Judge Katherine B. Forrest](#) on February 15, 2018 that the high-tech process of “embedding” did not provide a defense to copyright infringement to for-profit websites that affirmatively coveted, reached-out for, and then prominently displayed a copyrighted photo. This piece continues and (in part) concludes the story.

Immediate Aftermath

Judge Forrest’s decision was immediately greeted by howls of outrage and dismay from, mostly, the tech community, including the website industry that had wholeheartedly embraced “embedding” as a convenient and cost-effective (i.e., free) way to display copyrighted content – especially photos – without having to obtain (i.e., pay for) licenses and without (they thought) risking exposure for infringement.

For one example, the online publication Techdirt headlined an article about the decision [“Terrible Copyright Ruling Over An Embedded Tweet Undermines Key Concept Of How The Internet Works.”](#) And [New York Magazine](#) declared that the decision “had the potential to shake the very foundation on which the modern internet is built, changing the way websites from huge publications to one-person blogs do business online.”

Sharing and giving legal voice to that alarm, the defendants in the case that embedded (not all did) immediately sought to appeal Judge Forrest’s ruling. However, in the federal court system appeals of most rulings in a case almost always must await the final termination of the case. But the applicable rules allow for discretionary “interlocutory” appeals if the trial court (here Judge Forrest) and the appeals court (here the Second Circuit) agree that the challenged ruling meets the stringent requirements for such appeals.

Responding to entreaties from the defendants, Judge Forrest “certified” – supported – an immediate appeal of her decision. She wrote in part: “In this high-profile, high-impact copyright case, defendants have moved for certification of the Court’s partial summary judgment decision for interlocutory appeal ... The Court finds that certification ... is appropriate here for several reasons. The Court credits the parties’ representations that its

It was widely expected that the Circuit would allow the immediate appeal. But on July 17, 2018, it declined, declaring without further explanation that the requested appeal was “unwarranted.”

(Continued on page 59)

(Continued from page 58)

February 15, 2018 Opinion, finding defendants liable for violating the display right under §106 (5) of the Copyright Act, has created tremendous uncertainty for online publishers. In this case, the embedded image was hosted on Twitter; given the frequency with which embedded images are ‘retweeted,’ the resolution of this legal question has an impact beyond this case.”

Heartened, the defendants then urgently sought the (required) approval of the Second Circuit. Their Petition asserted, in part: “This ‘Server Test’ [the Ninth Circuit’s rationale for holding that embedding was not infringing] has been fundamental to the internet’s development over the past decade, providing a bright-line rule for determining liability for direct copyright infringement with respect to embedding links. The district court, however, upended that certainty, concluding that when the Publishers embedded links to Tweets in articles on their websites, ‘their actions violated [Goldman’s] exclusive display right’ and that ‘the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result.’”

Plaintiff Goldman opposed the requested interlocutory appeal, declaring in part: “As defendants effectively concede, although not so directly, their industry used their interpretation of *Perfect 10* [the underlying Ninth Circuit opinion] to bestow upon themselves the legal immunity they now ask this Court to actually grant to them. As defendants put it, ‘[Judge Forrest’s] Order upended settled expectations regarding liability for the ubiquitous practice of linking to content on the internet.’ Exactly. But, crucially, the real questions are: Were those ‘settled expectations’ fairly based on law – the search-engine *Perfect 10* case – or instead on a cynical self-serving and self-created concoction of a legal ‘justification’ for, as here, no longer seeking licenses for their for-profit uses of copyrighted content? And, second, whether this Court will now actually give to that industry the blanket legal immunity it has already granted to itself?”

Especially in light of Judge Forrest’s certification, it was widely – if not universally – expected that the Circuit would allow the immediate appeal. But on July 17, 2018, it declined, declaring without further explanation that the requested appeal was “unwarranted.” This sent the case back to the district court for discovery, further summary judgment motions, and (if still alive) trial, followed by (then automatically available) appeals.

Back in the District Court

In the fall of 2018, Judge Forrest referred the case to Magistrate Judge Sarah Netburn to supervise pre-trial discovery, and shortly thereafter, for reasons unrelated to the case, Judge Forrest resigned from the Court and the case was re-assigned to District Judge Alison J. Nathan.

From September 2018 through April 2019, the parties engaged in the usual panoply of discovery maneuvers – along with the usual panoply of discovery disputes and court hearings about them. Eventually, Judge Netburn set May 1, 2019 as the “cut-off” date for all “fact discovery,” including depositions.

(Continued on page 60)

(Continued from page 59)

Also during that period, one after another of the original defendants reached settlements with the plaintiff and were dismissed from the case. (The nine original defendants were Breitbart News Network, LLC; Heavy, Inc.; Time, Inc.; Yahoo, Inc.; Vox Media, Inc.; Gannett Company, Inc.; Herald Media, Inc.; Boston Globe Media Partners, LLC; and New England Sports Network, Inc.) By late April 2019 only two defendants remained in the case – Yahoo, Inc. (now called Oath) and Heavy, Inc. Plaintiff’s full-day deposition of Yahoo was set for April 30, the day before the end of the discovery period.

That combination of developments – only two remaining defendants and an imminent, expensive deposition, to be followed by lots more litigation – led to serious introspection on the part of Mr. Goldman and his lawyer, me. In short: did it really make sense to continue to litigate the case against only those two defendants, through (unavoidable) party depositions, expert reports and depositions, summary judgment motions, a possible jury trial, and then inevitable appeals? After all, we’d already won the crucial legal battle and completed seven separate settlements. Our answer was “No.”

Termination

Conveniently, Federal Rule 41(a)(2) specifically permits a plaintiff to request the Court to dismiss a pending case – on “terms” the Court considers “proper.” (The plaintiff is not required to accept the Court’s terms, and can continue to litigate the case instead.) We moved for such a dismissal and submitted a letter/brief setting forth our approach to the motion. Excerpts from that letter/brief follow:

“To date, plaintiff has prevailed on every substantive motion/petition made in this case, including Judge Forrest’s historic rejection of the defendants’ ‘embed’ defense and the Second Circuit’s significant (but probably not historic) summary rejection of the defendants’ urgent plea for an immediate appeal. And plaintiff is confident that he will similarly prevail on whatever arguments might yet be made by the remaining defendants.

“But in light of all of the above, and especially the fact that seven (financially appropriate) settlements (and related dismissals) have now been accomplished, the plaintiff (in consultation with me as his counsel) has weighed the ‘pros’ and ‘cons’ of continuing the litigation against (at most) the two remaining defendants. The ‘cons’ include (at least) a) the unavoidable costs of depositions of both defendants and then their proffered experts; b) the costs of retaining his own experts if he so chooses; c) potentially another two or more years of litigation; d) the costs (at least) of printing briefs on appeal; and e) an uncertain

That combination of developments – only two remaining defendants and an imminent, expensive deposition, to be followed by lots more litigation – led to serious introspection on the part of Mr. Goldman and his lawyer, me.

(Continued on page 61)

(Continued from page 60)

ultimate financial recovery (against at most two defendants) after a full-blown jury trial and (presumed) affirmance by the Circuit (and possibly beyond). Defendant Oath has consistently asserted that it has no interest in any settlement and that it is prepared to take this case as far as it possibly can, at (I believe) a total cost to it in seven figures. (In 2017, Verizon purchased Oath/Yahoo for a reported \$4.5 billion.) The ‘pros’ are -- well, there really aren’t any. And so, in the words of the Second Circuit . . . , the plaintiff has concluded that the case ‘is no longer worth litigating.’ Hence plaintiff’s current Rule 41(a)(2) motion.

“Oath (previously ‘Yahoo!’) is an enormous billion-dollar media and digital enterprise. It by far has been the driving force for the defendants in this case and it has made clear that it is willing to litigate this case as far as it can. Heavy, in contrast, is pretty much the opposite – apparently a small independent website owned by a single individual. It has not been a driving force for the defendants in this case and it has repeatedly expressed its interest in a settlement leading to its dismissal from the case. It has made specific offers of settlement but they did not lead to agreement/dismissal. It is my understanding that it does not have seven figures to invest in the further litigation of this case and that even if it did it would not choose to. So, as we address the ‘proper’ terms that the Court might propose pursuant to Rule 41(a)(2), we must take into account the very different natures and circumstances of the two remaining defendants.”

In what was no doubt a radical departure from what most plaintiffs propose when seeking 41(a)(2) dismissal, our letter/brief suggested that Judge Nathan include in her “proper” terms modest payments from the two remaining defendants to the plaintiff. But that motion was never decided, because the plaintiff and Yahoo and Heavy privately agreed that the case should be dismissed as against those defendants, which also meant that the entire case would be terminated. And that’s what happened on May 28, 2019. Both literally and figuratively, for better or worse, the *Goldman v. Breitbart* “embed” case is now history.

Both literally and figuratively, for better or worse, the *Goldman v. Breitbart* “embed” case is now history. But the debate it spawned is far from over.

Looking Forward

But the debate it spawned is far from over. In our letter/brief, we anticipated and briefly addressed two arguments we expected the remaining defendants to assert if the motion was not mooted by the privately-agreed termination. One of those arguments – never before asserted in any case – contended that a little-known and little-litigated “safe harbor” provision of the DMCA – §512(d) of the Copyright Act, entitled “Information Location Tools,” and generally understood to apply to search engines – actually provides “safe harbor” for the technical process utilized in embedding. Attempting to head-off that contention even before it could be made, our letter/brief asserted:

(Continued on page 62)

(Continued from page 61)

“[A]s we understand it, that argument will seek from this Court the following holding:

Every website subject to the U.S. Copyright Act (including by way of example hate-speech, porn, and the schlockiest of used-camera sites, etc.), is now and must continue to be absolutely free – with no legal consequences – to help itself to and prominently display (with no action or desire on the part of its viewers) any and all copyrighted content it covets on every other website it finds – including all copyrighted content created and owned by Yahoo and Heavy – unless and until the owners of that displayed content affirmatively take steps to have those displays taken down, in which event there will be no consequences whatever for the usurping websites.

We assumed – perhaps wrongly – that that (accurate) summary of the 512(d) argument would repel even the most ardent advocate of embedding.

The second argument we anticipated was that a 41(a)(2) dismissal of the case would preclude an appeal from Judge Forrest’s “embed” ruling. We wrote:

“First, no such appeal will be possible if these defendants prevail, e.g., on their ‘fair use’ defense, resulting in the dismissal of plaintiff’s claims and leaving them nothing to appeal. Presumably, they will make that motion, and/or others, expecting to win them.) Thus, there is absolutely no guarantee that these defendants will ever have – after all the proposed further expensive and burdensome litigation, through trial – the ability to appeal Judge Forrest’s ‘embed’ ruling.

“Moreover, as these defendants well know, there are numerous other cases now pending in this district that present the exact same ‘embed’ legal issue, so that these defendants could well – at a much lower cost to them – support (at least as *amici*) appeals in one or more of those cases, assuming of course those cases reach the same result as did Judge Forrest. So, indisputably, dismissal of this case now in no way precludes a future appeal of the holding of Judge Forrest’s decision.”

If nothing else, it is now clear that Judge Forrest’s ruling in *Goldman v. Breitbart* remains highly controversial – although it is now also clear that it did not lead to the imminent demise (or even disruption) of the Internet, as was predicted by some. Sooner or later its holding will be presented to one or more federal appeals courts, including perhaps the ultimate one. But that will not be through *Goldman v. Breitbart*, which will now take its rightful (or wrongful) place – whatever that may be – in the ever-developing law of the Internet.

Ken Norwick, a partner at Norwick & Schad in New York City, represented the plaintiff in Goldman v. Breitbart throughout the case.

California Supreme Court Limits Anti-SLAPP Protection

Adds “Contribution To The Public Conversation” Requirement Not Found In The Statute

By Lincoln Bandlow

On May 6, 2019, the California Supreme Court issued its ruling in [Filmon.com, Inc. v. DoubleVerify, Inc.](#), 2019 WL 1984290 (2019), reversing both trial court and Court of Appeal decisions which held that statements by defendant DoubleVerify in a report to its clients that related to the well-known alleged serial copyright infringer, Plaintiff FilmOn, and the mature audience content of FilmOn’s websites were protected by California’s Anti-SLAPP statute. In so doing, the California Supreme Court added a requirement to the Anti-SLAPP first prong analysis which requires courts to examine whether statements contribute to or further a public conversation on an issue of public interest. This nebulous test, not found in the statute, and apparently examining the state of mind of the speaker when the statements were made, could muddy the waters of what was otherwise clear anti-SLAPP law in California and weaken its protection for speakers.

Background

DoubleVerify is a company that is engaged by its customers to research, review and issue reports about the content of millions of websites. Advertising agencies, marketers, publishers, ad networks and other companies hire DoubleVerify to detect and prevent waste or misuse of advertising budgets and to help take proactive measures to maintain brand reputation. Thus, DoubleVerify monitors the websites on which its clients advertise, or on which they may wish to advertise, and then determines: (a) if each website has content that a client may consider inappropriate; (b) the regional location of the website’s viewers; (c) whether competitor advertising appears on the website; (d) where the website actually places advertisements, and (e) how long the advertisement appears on the website.

This nebulous test, not found in the statute, and apparently examining the state of mind of the speaker when the statements were made, could muddy the waters of what was otherwise clear anti-SLAPP law in California and weaken its protection for speakers.

Typically, a client comes to DoubleVerify and gives DoubleVerify information about the client’s media plan (*i.e.*, what websites that company has chosen to associate with and on which it has run advertising). In accordance with that plan, DoubleVerify evaluates billions of advertising campaign impressions, conducts substantial further research, and then prepares a report regarding the websites where those advertisements ran which are then made available to DoubleVerify’s clients. This media verification service allows

(Continued on page 64)

(Continued from page 63)

DoubleVerify's clients to make informed choices about where to place their advertising, avoiding such online advertising pitfalls as affiliating with inappropriate content and other issues. For instance, DoubleVerify's reports provide information about what websites have content that the specific client may deem inappropriate, about whether the website targets the audience the company seeks to attract, whether competing products are advertised on the website, and also whether the advertisement is actually noticeable. FilmOn was one of the millions of websites that was subject to a DoubleVerify report.

FilmOn is an Internet-based television and other content provider owned by FilmOn.TV Networks Inc., which was founded in 2006 by controversial figure Alki David. FilmOn claims that advertising and product placement are its primary sources of revenue. As part of its service, FilmOn provides television content from a variety of sources, including the major television networks, CBS, ABC, NBC, and Fox Television. According to lawsuits filed around the country, however, FilmOn provided stolen television content. Indeed, FilmOn is notorious for, as one national article put it, a "long history of violating copyright owner's exclusive rights." Thus, it was the subject of multiple lawsuits around the country by those television networks for copyright infringement due to providing copyrighted material without permission or appropriate licensing. (*See CBS Broad. Inc. v. Filmon.com, Inc.* (S.D.N.Y. 2010) No. 10-7532; *Fox Television Stations, Inc. v. FilmOn X, LLC* (D.C.C. Sept. 5, 2013) No. 13-758 RMC, 2013 WL 4763414 *appeal docketed*, No. 13-7145 (D.C. Cir. September 17, 2013), *Fox Television Station Inc. v. BarryDriller Content Sys., PLC* (C.D. Cal. 2013) 915 F.Supp.2d 1138 *appeal docketed sub nom, Fox Television Stations, Inc. v. FilmOn X, LLC*, No. 13-55156 (9th Cir. argued August 27, 2013) and No. 13-55157, *NBC Universal Media, LLC v. FilmOn X, LLC* (C.D. Cal. 2012) No. 12-6950-GW *appeal docketed*, No. 13-55228 (9th Cir. February 8, 2013).)

FilmOn is notorious for, as one national article put it, a "long history of violating copyright owner's exclusive rights."

Indeed, even after courts found that FilmOn engaged in copyright infringement, this did not stop FilmOn from continuing to stream infringing content, resulting in FilmOn being held in contempt of court. Those lawsuits were covered in great depth by the press. Moreover, FilmOn's CEO and billionaire owner, Mr. David, regularly injects himself in the public spotlight to discuss himself, his companies and the legality of FilmOn's services. Mr. David has drawn massive attention to himself and his company and was dubbed "one of Hollywood's biggest trouble makers."

When DoubleVerify evaluated FilmOn and its websites, DoubleVerify concluded that FilmOn should be classified with the designations "Copyright Infringement: Streaming or File Sharing" and "Adult Content," and these classifications were made available to DoubleVerify's clients in DoubleVerify's reports. Before a website is given a designation that it may be associated with copyright infringing activity, DoubleVerify performs an investigation of the website's content and structure, the website's compliance with the requirements for online service

(Continued on page 65)

(Continued from page 64)

providers mandated by the Digital Millennium Copyright Act (DMCA), and third-party information that is available about the website. Such was the case with DoubleVerify's investigation of FilmOn.com.

DoubleVerify defines "Copyright Infringement: Steaming or File Sharing" as "[s]ites presently or historically, associated with access to or distribution of copyrighted material without appropriate controls, licensing, or permission..." In its investigation, DoubleVerify found several indicators that FilmOn's websites met these criteria. For example, FilmOn had an incomplete DMCA notice, it had no obvious notice of copyright holder permission to display content, and there were several indicators that FilmOn sites did not comply with guidelines and best practices policies set forth by the Interactive Advertising Bureau and Mobile Marketing Association Counsel.

As mentioned above, FilmOn has been sued for copyright infringement multiple times, thus it has clearly been associated, either presently or historically, with copyright infringement. As of the time of the preparation of the report that was the subject of the lawsuit, the Southern District of New York, the District of Columbia, and the Central District of California all agreed that FilmOn was a copyright infringer. In 2014, the United States Supreme Court held that Aereo, a company which provided identical services to those provided by FilmOn, was engaged in copyright infringement. *American Broad. Cos. v. Aereo, Inc.* (2014) 573 U.S. 431. After this decision, FilmOn argued that its online streaming of content was comparable to being a cable service provider and thus FilmOn was entitled to the same compulsory licenses that such cable providers get to legally rebroadcast copyrighted works. The Second and Ninth Circuits rejected this argument and found that FilmOn continued to engage in copyright infringement. (*CBS Broad. Inc. v. FilmOn.com, Inc.*, (2d Cir. 2016) 814 F.3d 91, 98-99; *Fox Television Stations, Inc. v. Aereokiller, LLC* (9th Cir. 2017) 851 F.3d 1002, 1015. Similar findings were made by district courts in Washington D.C. and Illinois. *Fox Television Stations, Inc. v. FilmOn X LLC* (D.D.C. Dec. 2, 2015); No. CV 13-758 (RMC), 2015 WL 7761052, at *16; *Filmon X, LLC v. Window to the World Commc'ns, Inc.* (N.D. Ill. Mar. 23, 2016). No. 13 C 8451, 2016 WL 1161276, at *13) All of these lawsuits were ultimately settled.

DoubleVerify classifies "Adult Content" as including "[m]ature topics which are inappropriate viewing for children including explicit language, content, sounds and themes." By its own terms, this does not expressly or implicitly mean pornography, as FilmOn alleged. The FilmOn website unquestionably fits the "adult content" classification. It offers a variety of streaming and video on demand channels that include adult content. FilmOn's "Most Watched videos" category yields a category called "Bikini Babes," which includes the channels "After Dark TV"; "Hooters' Calendar Girls"; and "Bikini Girls Show" (offering "[s]exy babes in bikini's [sic], all day everyday"). Indeed, FilmOn has admitted in the litigation that it has "programming [that] may be properly characterized as R-rated."

(Continued on page 66)

(Continued from page 65)

After the classifications for the FilmOn website (among thousands of other websites) were made available to DoubleVerify's clients in a report, counsel for FilmOn sent DoubleVerify a cease and desist letter claiming the classifications were defamatory. Upon receipt of this letter, DoubleVerify conducted a full investigation into the classification of FilmOn and confirmed its findings. Ultimately, FilmOn brought an action against DoubleVerify in Los Angeles Superior Court, claiming that the classifications constituted libel.

In response, DoubleVerify filed a motion to strike all of FilmOn's causes of action pursuant to the Anti-SLAPP Statute on the grounds that DoubleVerify's review and categorizations were protected under Section 425.16(e)(4)), the so-called "catch-all provision," which states that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes ... (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." DoubleVerify asserted that the "public issue" or "issue of public interest" was the public's interest in being aware about the content of websites, including such matters as what content is suitable for children or whether websites are believed to contain infringing material. The motion was supported by over 700 pages of exhibits, including articles about the public's interest in FilmOn, issues pertaining to copyright infringement and FilmOn's alleged involvement in such infringement, and federal reports about the public interest in keeping inappropriate content away from children.

In opposing the motion, FilmOn concentrated its arguments almost entirely on the fact that DoubleVerify's categorizations in its reports are made available only to paid subscribers. FilmOn also argued that the "commercial speech" exemption of Section 425.17(c) applied to the case. That provision was enacted to address the perceived over-extension of Anti-SLAPP protection to disputes involving alleged commercial speech. The provision states in relevant part that Anti-SLAPP protections do not extend "to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services ... arising from any statement or conduct by that person if both of the following conditions exist: (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services [and] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer ... notwithstanding that the conduct or statement concerns an important public issue."

The trial court agreed that DoubleVerify's speech was in connection with important public issues, especially information about material not suitable for children and infringing content. The trial court found that DoubleVerify's review and classification of websites was "not any

(Continued on page 67)

(Continued from page 66)

different, really, than the Motion Picture Association putting ratings on movies.” It held that by commenting on FilmOn’s adult-themed content and being associated with copyright infringement, DoubleVerify was serving “a legitimate and important public function.” Indeed, after noting that DoubleVerify’s speech serves “a very valuable public function, and I think we are better for it,” the trial court held that:

there is no way that this kind of speech about these kind of interests -- and when you look at the massive amount of attention being paid to FilmOn and its founder for what it is doing and what its site entails, it’s hard to imagine a good faith argument that this isn’t in the public’s interest as it stands.

The trial court also summarily rejected FilmOn’s argument that the commercial speech exemption of Section 425.17 applied, noting that it could not possibly apply because DoubleVerify and FilmOn are not business competitors. Finally, the trial court held that FilmOn could not meet its burden on the second prong, holding that FilmOn had essentially conceded that it had been held to be a copyright infringer by numerous courts and that its website featured content not appropriate for children.

FilmOn appealed the trial court’s decision, but only as to the first prong (*i.e.*, whether DoubleVerify’s report constituted protected activity under Section 425.16(e)(4)). It did not dispute the trial court’s findings that it did not have a probability of prevailing on its claims. Moreover, FilmOn did not challenge the trial court’s ruling that the commercial speech exemption found in Section 425.17 did not apply to the action.

The Court of Appeal affirmed the trial court’s decision. First, the Court of Appeal found that DoubleVerify’s reports arose from an act in furtherance of protected speech under Section 425.16(e)(4) because:

FilmOn’s business tort and trade libel claims are based *entirely* upon the message communicated by DoubleVerify’s “tags.” Indeed, it is only because advertisers understand the message within DoubleVerify’s tags that FilmOn can claim the tags caused “advertising partners to pull advertising from FilmOn’s websites.” And, it is only because advertisers understand that the public is interested in whether adult content or copyright infringing material appears on a website that these companies would modify their advertising strategies based on DoubleVerify’s tags.

“...there is no way that this kind of speech about these kind of interests -- and when you look at the massive amount of attention being paid to FilmOn and its founder for what it is doing and what its site entails, it’s hard to imagine a good faith argument that this isn’t in the public’s interest as it stands.”

(Continued on page 68)

(Continued from page 67)

Moreover, the Court of Appeal rejected FilmOn’s argument that (1) Section 425.16(e)(4) does not extend to purportedly private communications (from DoubleVerify to its hundreds of clients); and (2) a matter of “widespread public interest” under Section 425.16(e)(4) requires the conduct or speech to contribute to the public debate. *Id.* at 720-22. The Court of Appeal found these requirements to be legally unsound and contrary to the Legislature’s intent that Section 425.16 be construed broadly. *Id.*

The California Supreme Court granted a petition for review. In doing so, it stated that it was interested in addressing the following issue: “In determining whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of Civil Code section 425.16, should a court take into consideration the commercial nature of that speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech?”

The Supreme Court answered this question in the affirmative. The Court held that the anti-SLAPP statute applies “only if the claims arise from acts in furtherance of a person’s “right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” It further noted that the catchall provision of Section 425(e)(4) specifies that such acts include “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest” but “nowhere does the statute further define these terms.”

In setting out to define those terms, the Supreme Court had to first “decide whether the commercial nature of a defendant’s speech is relevant in determining whether that speech merits protection under the catchall provision.” In resolving that question, the Supreme Court also sought to “clarify how the context of a statement more broadly—including the identity of the speaker, the audience, and the purpose of the speech—informs the same analysis.” It went on to state that the context of a defendant’s statement “is relevant, though not dispositive, in analyzing whether the statement was made ‘in furtherance of’ free speech ‘in connection with’ a public issue.”

The Court held that the anti-SLAPP statute applies “only if the claims arise from acts in furtherance of a person’s “right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.”

The Supreme Court from the outset, although not stating it in so many words, seemed to want to create an “intent of the speaker” element to anti-SLAPP analysis. Thus, it noted that we live in “an age of easy public access to previously private information through social media and other means,” and thus “context allows us to assess the functional relationship between a statement and the issue of public interest on which it touches—deciding, in the process, whether it merits protection under a statute designed to ‘encourage continued participation in

(Continued on page 69)

(Continued from page 68)

matters of public significance.” In other words, does the context demonstrate that the speaker meant to engage in a private communication and did not intend, at the time the speaker spoke, to participate in matters of public significance. The use of the term “functional relationship” implies that the statute somehow requires that it be shown that the function of the speaker was to participate in discussions of matters of public significance. If the context shows that was not what the speaker intended, anti-SLAPP law somehow does not apply according to the Court. The Supreme Court went on to state that DoubleVerify’s reports were simply “generated for profit, exchanged confidentially, without being part of any attempt to participate in a larger public discussion” and thus they did “not qualify for anti-SLAPP protection under the catchall provision, even where the topic discussed is, broadly speaking, one of public interest. This is not because confidential statements made to serve business interests are categorically excluded from anti-SLAPP protection. It is instead because DoubleVerify’s reports are too tenuously tethered to the issues of public interest they implicate, and too remotely connected to the public conversation about those issues, to merit protection under the catchall provision.” What will be conduct that is not “tenuously tethered” to an issue of public interest? What will be a statement that is not “too remotely connected to the public conversation about those issues”? Your guess is as good as mine because the Court did not give any examples of how this analysis will work going forward.

As set forth above, the Court of Appeal had rejected FilmOn’s contention that DoubleVerify’s reports were not protected by anti-SLAPP because they are delivered to individual clients and were required to be kept confidential. Rather, the Court of Appeal held that “it is irrelevant that DoubleVerify made its reports confidentially to its subscribers,” since “[n]either the identity of the speaker nor the identity of the audience affects the content of the communication, or whether that content concerns an issue of public interest.” Thus, according to the Court of Appeal, “[w]hether a statement concerns an issue of public interest depends on the content of the statement,” and only that content, “not the statement’s speaker or audience.”

What will be conduct that is not “tenuously tethered” to an issue of public interest? What will be a statement that is not “too remotely connected to the public conversation about those issues”? Your guess is as good as mine.

The Supreme Court was clearly troubled by that absolute approach. The Supreme Court noted that the text of the anti-SLAPP statute “defines conduct in furtherance of the rights of petition and free speech on a public issue not only by its content, but also by its location, its audience, and its timing.” For example, the location where speech took place is part of Section 425.16(e) (1) (“before a legislative, executive, or judicial proceeding”); Section 425.16(e)(2) (“in connection with an issue under consideration or review by” a government entity); and Section 425.16(e)(3) (“in a place open to the public or a public forum in connection with an issue of public interest”). The Supreme Court cited its decision in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 in which it held that the Legislature “‘equated a public issue with the authorized official proceeding to which it connects,’” which “effectively defining the protected status of the statement by the context in which it was made.”

(Continued on page 70)

(Continued from page 69)

The Supreme Court acknowledged, however, that the catchall provision that was at issue in the case “contains no similar contextual references to help courts discern the type of conduct and speech to protect.” This language thus had to be analyzed “within its context, and in light of its structure, analogous provisions, and any other appropriate indicia of its purpose.” By referring to “*other* conduct in furtherance”, the Supreme Court held that this “supports the inference that this provision encompasses conduct and speech similar to what is referenced in subdivision (e) (1) through (e)(3).” The use in the catchall of the term “*any* other conduct” therefore “proves both broader in scope than the other subdivisions, and less firmly anchored to any particular context.” As a consequence, the Supreme Court noted that “courts should engage in a relatively careful analysis of whether a particular statement falls within the ambit of ‘other conduct’ encompassed by subdivision (e)(4).”

In conducting this analysis, the Supreme Court found that it would be “all but impossible” for a court to “justify ignoring the ordinary contextual cues affecting how people generally evaluate speech.” Moreover, in trying to determine if speech relates to a matter of public interest, courts often “look to certain specific considerations, such as whether the subject of the speech or activity ‘was a person or entity in the public eye’ or ‘could affect large numbers of people beyond the direct participants.’” In addition, courts look at whether the speech-related activity occurred “in the context of an ongoing controversy, dispute or discussion” or affected a “community in a manner similar to that of a governmental entity.”

The Supreme Court concluded that the Court of Appeal’s position that content, and not context or the identity of the speaker, was all that mattered was “not supported by the cases on which it relied.” According to the Supreme Court, the cases the Court of Appeal relied upon, *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 33 Cal.Rptr.3d 145 (*Terry*) and *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 137 Cal.Rptr.3d 455 (*Hecimovich*), stood only for the proposition that section 425.16 could apply to private communications concerning issues of public interest. The Supreme Court acknowledged that long ago it held that section 425.16 could, indeed, “protect private events and conversations.” In reaching that conclusion, however, the Supreme Court “never suggested quite a different proposition: that it will never matter whether the conversations were private or widely broadcasted and received, and for what purpose.”

Rather, these “contextual factors mattered” in both *Terry* and *Hecimovich*. In *Terry*, the speakers were church leaders attempting to protect children in the church’s youth groups, as evidenced by the fact that the matter had been referred to the police for investigation. In *Hecimovich*, “the court highlighted the relationship between the speech, the speaker, and the audience” when it focused on how the communications at issue concerned “the well-being of

The Supreme Court concluded that the Court of Appeal’s position that content, and not context or the identity of the speaker, was all that mattered was “not supported by the cases on which it relied.”

(Continued on page 71)

(Continued from page 70)

young children in an afterschool sports program, as discussed between and among members of the PTO, parents of the young team members, and league officials.”

DoubleVerify had asserted in its briefs that one “context” that should not be imported into Section 425 analysis was “commercial context” since that inquiry is the focus of Section 425.17, subdivision (c). The Supreme Court disagreed. The Supreme Court agreed that Section 425.17 exempted certain expressive actions from the scope of section 425.16 and whether that exemption applied depended “not only on the content of that speech but also the identity of the speaker, the intended audience, and the purpose of the statement.” But this exemption only applies to “a subset of commercial speech”—specifically, comparative advertising.” Thus, certain “commercially oriented” statements fall outside the scope of section 425.17. If such a statement falls outside the exemption, then it is “eligible for anti-SLAPP protection under section 425.16.” The Supreme Court rejected DoubleVerify’s argument that considering commercial context under the catchall provision would render Section 425.17 redundant: “the Legislature’s decision to explicitly require consideration of certain contextual factors—like speaker, audience, and purpose—in defining the comparative advertising exception should not lead us to decide these contextual factors are categorically excluded from consideration under section 425.16.”

The Supreme Court cited the legislative history of section 425.17, which “included language observing how the exception allowed certain lobbying activities and marketing to ‘be viewed in the context of its offering, *just as a speech by a person against the building of a waste facility in the neighborhood*’” and that “while the latter ‘can clearly be seen to have been made in the context of exercising the person’s constitutional right of speech,’ the ‘content and context of the former activities are clearly more in furtherance of business considerations.’” In conducting this analysis, a court should not “sort statements categorically into commercial or noncommercial baskets in analyzing whether they are covered by the catchall provision.” Rather, “the very contextual cues revealing a statement to be ‘commercial’ in nature—whether it was private or public, to whom it was said, and for what purpose—can bear on whether it was made in furtherance of free speech in connection with a public issue.” Thus, “context matters under the catchall provision, and commercial context is no exception.”

Where courts have struggled, however, is articulating “the requisite nexus between the challenged statements and the asserted issue of public interest—to give meaning, in other words, to the ‘in connection with’ requirement.”

Accordingly, within the framework of section 425.16, subdivision (e)(4), “a court must consider the context as well the content of a statement in determining whether that statement furthers the exercise of constitutional speech rights in connection with a matter of public interest.” Turning to the facts of the case, the Supreme Court first looked at the “matter of public interest” aspect of this analysis and noted that it has “ably distilled the characteristics” of it in the past. Where courts have struggled, however, is articulating “the requisite nexus

(Continued on page 72)

(Continued from page 71)

between the challenged statements and the asserted issue of public interest—to give meaning, in other words, to the ‘in connection with’ requirement.”

The Supreme Court held that in applying the “catchall” provision of the anti-SLAPP statute, a court has to undertake “a two-part analysis rooted in the statute’s purpose and internal logic.” The first part of that analysis is to ask “what ‘public issue or issue of public interest’ the speech in question implicates—a question we answer by looking to the content of the speech.” After that analysis is completed, a court must “ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful.”

That first part of the analysis, the Supreme Court held, is often satisfied because “virtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest.” It noted that DoubleVerify had “argued before the appellate court that its reports ‘concerned’ or ‘addressed’ topics of widespread public interest: the presence of adult content on the internet, generally, and the presence of copyright-infringing content on FilmOn’s websites, specifically.” But relating to these matters was not enough for the Supreme Court because “the catchall provision demands ‘some degree of closeness’ between the challenged statements and the asserted public interest. So even if adult content on the Internet and FilmOn’s particular streaming model are in fact issues of public interest,” it is not enough that a statement refer to a subject of widespread public interest, rather, “the statement must in some manner itself contribute to the public debate.” Such a requirement is, of course, nowhere to be found in the text of the anti-SLAPP statute.

Having created this new condition of “contribute to the public debate” to the anti-SLAPP statute, the Supreme Court set out to define it, but offered vague analysis.

Having created this new condition of “contribute to the public debate” to the anti-SLAPP statute, the Supreme Court set out to define it, but offered vague analysis. It held that whether a statement contributes to the public debate “will perhaps differ based on the state of public discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest.”

The Supreme Court disagreed that this added an additional requirement beyond those already in the catchall provision. Rather, it held that this “contribute to the public debate” requirement was “instead a reasonable interpretation of the provision’s existing requirement that statements be made ‘in connection with’ an issue of public interest—an interpretation informed by the statutory purpose explicitly articulated in the preamble to the anti-SLAPP statute” which states

(Continued on page 73)

(Continued from page 72)

that “it is in the public interest to encourage continued participation in matters of public significance.” The Supreme Court conceded that it has previously held that “statutory preambles do not impose substantive requirements” but it held that such preambles “can be illuminating.” In other words, preambles don’t impose additional statutory requirements ... or maybe they do.

The Supreme Court held that by referencing “continued participation” in matters of public significance, the preamble suggests that a statement is made “in connection with” a public issue “when it contributes to—that is, ‘participat[es]’ in or furthers—some public conversation on the issue.” How does a statement so contribute? That, according to the Supreme Court, is a matter of a court “incorporating considerations of context—including audience, speaker, and purpose” to answer the question.

The Supreme Court held that although it was “true enough that the various actions of a prominent CEO, or the issue of children’s exposure to sexually explicit media content—in the abstract—seem to qualify as issues of public interest under subdivision (e)(4)” a court has to look to “the specific nature of the speech” and whether the specific dispute involves something more than a “slight reference to [a] broader public issue.” Although the Supreme Court agreed that the case involved reports that categorized FilmOn as being associated with copyright infringement and having content appropriate for adults, these reports did not explain “how that identification relates to the issues of copyright and adult content.” Rather, the Supreme Court held it had to look at whether DoubleVerify’s “conduct qualifies for statutory protection by furthering the public conversation on an issue of public interest.” The Supreme Court held it did not because “DoubleVerify issues its reports not to the wider public—who may well be interested in whether FilmOn hosts content unsuitable for children or whether its streaming platform infringes copyright—but privately, to a coterie of paying clients. Those clients, in turn, use the information DoubleVerify provides for their business purposes alone. The information never entered the public sphere, and the parties never intended it to.”

The Supreme Court did note that “no single element is dispositive—not DoubleVerify’s for-profit status, or the confidentiality of the reports, or the use to which its clients put its reports. Nor does the combination of these contextual factors create a ‘commercial speech’ category onto which we automatically map the presence or absence of anti-SLAPP protections. Some commercially oriented speech will, in fact, merit anti-SLAPP protection.” In so holding, it referenced as an example Industrial Waste & Debris Box Service, Inc. v. Murphy, (2016) 4 Cal.App.5th 1135, 1148 which held that a for-profit consultant’s report was within the catchall provision. Even though that report could be characterized as “commercial,” it had analyzed public reports, landfill records and state agency data to conclude that a company was misreporting the rate at which it was diverting waste for reuse and recycling. There, applying a similar two-part test as the Supreme Court was establishing, the Court of Appeal decided first that “limited landfill capacity and the environmental effects of waste disposal” were issues of “significant interest” to the public and governments. Applying the second part of the test, the

(Continued on page 74)

(Continued from page 73)

Court of Appeal found the report “shed light on these subjects” and thus “contributed to the issue of public interest” and commenting on “whether and to what degree waste hauling companies in Sonoma County were meeting government standards.” In addition, these findings prompted changes to the sanitation board’s contracts and policies.

The Supreme Court then held that DoubleVerify’s reports differed from the report in Industrial Waste because the report came in the context of “two well-funded for-profit entities engaged in a private dispute over one’s characterization—in a confidential report—of the other’s business practices.” Thus, although courts should “liberally extend the protection of the anti-SLAPP statute where doing so would ‘encourage continued participation in matters of public significance,’” in the case of DoubleVerify’s statements about FilmOn, DoubleVerify was not issuing its report in furtherance of free speech in connection with an issue of public interest.

It is really quite difficult to discern what test comes out of this decision. When the matter was argued before the Supreme Court, one of the first questions was essentially “if this were not DoubleVerify but the New York Times, this case would be over, right?” There were other questions that inquired about, essentially, DoubleVerify’s “intent” when it issued its reports. It struck me as well as counsel for the amicus parties after the argument that the Supreme Court wanted to find a way to limit the number of anti-SLAPP motions that are filed and have to ultimately be heard by courts of appeal. And the way it did it here was, without saying it in so much words, was to say that for anti-SLAPP to apply, a speaker has to do more than talk about issues of public concern, but have a state of mind of wanting to influence the direction of the debate on those issues. Add to that a pinch of “are you really a speaker we care to protect?” and you get a decision that limits anti-SLAPP protection in ways not contemplated by the language of a statute that the Legislature and the courts have stated is to be construed broadly. The decision will not likely have any effect on anti-SLAPP motions brought by traditional media defendants, but those engaging in speech about matters of public concern who are arguably not trying to particularly drive the public debate about that issue will face obstacles previously not presented in California anti-SLAPP jurisprudence.

The decision will not likely have any effect on anti-SLAPP motions brought by traditional media defendants, but those engaging in speech about matters of public concern who are arguably not trying to particularly drive the public debate about that issue will face obstacles previously not presented in California anti-SLAPP jurisprudence.

Lincoln Bandlow is the Founder of [Law Offices of Lincoln Bandlow, PC](#) in Los Angeles and is counsel for DoubleVerify. Plaintiff was represented by Baker Marquart, Los Angeles.

Federal Court Allows *Glomar* Response to FOIA Requests Regarding the President's Allegations of Campaign Surveillance

By Jacquelyn Schell

On April 3, 2019, Judge Cote of the Southern District of New York ruled in favor of the Department of Justice, upholding its refusal to confirm or deny whether the Government had additional records relating to electronic surveillance of the Trump campaign for president in 2016. [Gizmodo Media Group, LLC v. Department of Justice](#), SDNY Case No. 1:17-cv-03566 (DLC).

Background

On March 4, 2017, President Trump issued a series of tweets, including the following, claiming that the prior administration had surveilled his campaign in 2016:

[Terrible! Just found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found. This is McCarthyism!](#)

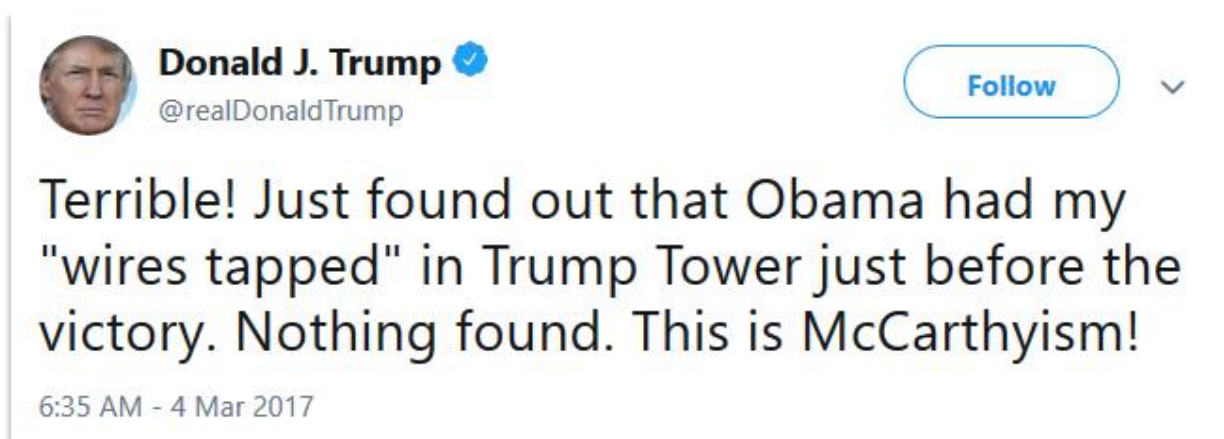
[Is it legal for a sitting President to be 'wire tapping' a race for president prior to an election? Turned down by court earlier. A NEW LOW!](#)

The President made similar statements in interviews with the [Daily Caller](#) and [Fox News](#).

Three weeks later, former FBI Director James Comey testified to the House Permanent Select Committee on Intelligence that the FBI had “no information that supports” President Trump’s “tweets about alleged wiretapping *directed at him* by the prior administration.”

On April 6, 2017 Gizmodo filed a FOIA request with the National Security Division (“NSD”) at DOJ, seeking information about the surveillance referenced in these Presidential statements.

(Continued on page 76)



(Continued from page 75)

Specifically, the request sought “all information provided to or received from the FISA Court pertaining to requests made in 2016 for one or more warrants to conduct electronic surveillance on Mr. Trump, any of his associates, any of his properties, and/or any foreign entities . . . with whom he or his associates were alleged to be in communication.”

NSD replied with a blanket *Glomar* response, refusing to confirm or deny the existence of any responsive documents and claiming that doing so would “reveal properly classified information regarding whether particular surveillance techniques have or have not been used by the U.S. Intelligence Community.”

Gizmodo filed suit, challenging this response and seeking responsive documents, and the parties moved for summary judgment.

While the case was pending, President Trump declassified the Nunes Memorandum, which revealed that DOJ had sought, and the Foreign Intelligence Surveillance Court (“FISC”) had authorized, electronic surveillance of Carter Page. DOJ subsequently disclosed heavily-redacted copies of the FISA applications and FISC order relating to Page.

Gizmodo and DOJ then filed new cross-motions for summary judgment, addressing the permissibility of DOJ’s *Glomar* response in light of the official acknowledgements made by the President and the DOJ’s release of the Page documents. Throughout this time, the President continued to claim that the Obama administration had ordered surveillance on his presidential campaign. *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Aug. 29, 2018, 7:12 am) ([“The Obama people did something that’s never been done...They spied on a rival presidential campaign....”](#)).

The *Glomar* Arguments

In limited circumstances, agencies may issue a *Glomar* response to a FOIA request, refusing to confirm or deny the existence of requested records on grounds of national security. *See, e.g., Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009). *Glomar* responses are justified “only in ‘unusual circumstances, and only by a particularly persuasive [agency] affidavit.’” *Florez v. CIA*, 829 F.3d 178, 186 (2d Cir. 2016) (citation omitted).

Glomar responses are not permitted where the national security information that would be revealed has already been officially acknowledged. *See Florez*, 829 F.3d at 186; *see also Wilner*, 592 F.3d at 70 (“If the government has admitted that a specific record exists, a government agency may not later refuse to disclose whether that same record exists or not.”).

The Court granted summary judgment for DOJ, adopting its interpretation of the President’s tweets and ruling that “President Trump’s tweets were too vague to foreclose a *Glomar* response to this remaining category of requests.”

(Continued on page 77)

(Continued from page 76)

DOJ did not deny that the President's tweets and other statements constituted "official acknowledgements." Instead, DOJ argued that the President's statements only referenced the existence of "records of alleged wiretapping of then-candidate Trump in Trump Tower by President Obama prior to the election," which Director Comey had stated did not exist.

Gizmodo argued that the President's tweets and comments were not so restrained, but rather, disclosed a broad scope of surveillance conducted on him, his campaign, and his political operatives. Gizmodo contended that DOJ's interpretation discarded the President's words in favor of more circumspect statements by Director Comey, and asked the Court to reject the *Glomar* response and require DOJ to state whether records of campaign-wide surveillance exist.

The Court's Ruling

The Court granted summary judgment for DOJ, adopting its interpretation of the President's tweets and ruling that "President Trump's tweets were too vague to foreclose a *Glomar* response to this remaining category of requests." The Court ruled that the President "did not refer to any targets of this surveillance apart from himself, or to any number of targets," that he did "not disclose the existence of records of surveillance of any specific individual associated with his Campaign," and therefore, "statements may be fairly interpreted to refer only to the surveillance of himself or Page."

The decision here came shortly after a ruling in a similar FOIA litigation in the Northern District of California. There, too, the court adopted the Government's limited interpretation of the President's statements and allowed the Government to assert a *Glomar* response to requests for other surveillance documents. *See Poulsen v. U.S. Department of Defense*, No. 17-cv-3531-WHO (N.D. Cal.). Several other similar cases settled after the disclosure of the Page documents. One case is still pending. *James Madison Project v. Department of Justice*, No. 17-597-APM (D.D.C.). There, the parties have filed cross-motions for summary judgment, and the DOJ's supplemental reply is due June 28, 2019.

David Schulz and Jacquelyn Schell of Ballard Spahr LLP represented Gizmodo Media Group, LLC. Andrew Krause of the U.S. Attorney's Office, SDNY, represented the Department of Justice.

Texas Lets The Sunshine In

By Wesley Lewis and Laura Prather

During the 86th Session of the Texas Legislature lawmakers resolved to let more sunshine in through the passage of significant open government initiatives. It was a productive one for government transparency advocates across the state. While the legislature's marquee property tax and education reform measures occupied much of the media spotlight this session, the legislature also passed several significant pieces of legislation intended to improve government transparency and accountability. These bills will provide Texans with greater access to information regarding the functioning of their government, including increased transparency regarding how the state spends taxpayer money, and they will result in stronger, more robust open government laws in Texas.

SB 943: Contracting Transparency

Senator Kirk Watson (D–Austin) and Representative Giovanni Capriglione (R–Southlake) worked with stakeholder groups across the political spectrum to pass legislation aimed at improving transparency regarding government contracting. To advocate for the passage of these laws, the authors of this piece created the Texas Sunshine Coalition, a non-partisan, grassroots organization dedicated to protecting Texas taxpayers by promoting greater access to public information and increasing government accountability and transparency at all levels of Texas government. www.txsunshine.org

SB 943 principally addressed issues created by the 2015 Texas Supreme Court case, *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), which significantly limited public access to information about government contracting under the Texas Public Information Act (TPIA). SB 943 addressed the decision by ensuring greater access to information regarding how government entities spend taxpayer money, while acknowledging private entities' legitimate needs to protect their trade secrets and proprietary information.

The Texas Supreme Court's decision in *Boeing* greatly expanded a previously minor exception to the TPIA that prevented the release of commercially-sensitive information regarding private companies' business dealings with government entities. First, it held that private, third-party entities—not just the government entity receiving a request—may claim this “competitive bidding” exception, overturning decades of well-settled AG precedent. Second, the Supreme Court concluded in *Boeing* that this exception can foreclose public access to contracting information upon a showing that the release of requested information would result in a competitive disadvantage to the company asserting the exception—even in cases

These bills will provide Texans with greater access to information regarding the functioning of their government, including increased transparency regarding how the state spends taxpayer money, and they will result in stronger, more robust open government laws in Texas.

(Continued on page 79)

(Continued from page 78)

where a governmental body has completed a competitive bidding process and awarded a final contract. As a result, the *Boeing* decision dramatically reduced citizens' access to important information regarding how taxpayer money is spent.

Since it was handed down in 2015, this decision had been cited more than 2,700 times in Attorney General Opinion's foreclosing access to information under the TPIA. Many of those instances involved TPIA requests for information regarding final contracts, effectively foreclosing access to even the most basic information about government contracting and expenditures.

Senate Bill 943 reverses some of the harmful impacts that the *Boeing* decision had on the public's right to access contracting information, and it ensures that government entities are obligated to reveal the core elements of their contracts with private companies—including the final dollar amount of the contract, key contract provisions, and line-item pricing. A similar bill, HB 81 by Representative Terry Canales (D–Edinburg), also passed this session, ensures that taxpayer money spent on parades, concerts, and other entertainment can be publicly accessible. Canales brought this bill after the City of McAllen, relying on the *Boeing* decision, withheld the final payment amount that the City paid for a concert event featuring the recording artist Enrique Iglesias.

SB 943 seeks to balance private companies' interests in protecting proprietary information with the public's right to know how the government is spending taxpayer money.

SB 944: Closing the “Custodian Loophole”

In 2013, the legislature passed SB 1368 in response to several incidents in which government officials sought to circumvent public information laws by conducting official business through private emails. That law codified decades of AG Opinions establishing that the content of a particular communication governed whether it was subject to public information requests, regardless of the device or server on which the communication was made. However, in the years since that law was passed, some government agencies have been unable to comply with TPIA requests in situations where government officials conducted government business on private devices or through personal e-mail addresses not owned by the government. Because the agency did not maintain custody and control over the information and had no means of obtaining it, it could not compel its production pursuant to a TPIA request.

The 2014 Third Court of Appeals' opinion, *City of El Paso v. Abbott*, 444 S.W.3d 315, 324-325 (Tex. App. – Austin 2014, pet. denied), highlighted this deficiency in the law: “Our review of the PIA reveals no methods by which the City could compel the disclosure of public-information emails located on private email accounts, other than what the City did here—*i.e.*, request the documents from the targeted individuals and change the City's policy regarding public business on private emails. In fact, other than requiring that the governmental body ‘promptly’ produce public information for inspection, duplication, or both... the PIA provides

(Continued on page 80)

(Continued from page 79)

no guidance regarding the efforts a governmental body must take to locate, secure, or make available the public information requested.”

An omnibus TPIA reform bill, SB 944 by Watson (D–Austin) and Rep. Capriglione (R–Southlake), closes this loophole by making clear that officers or employees of governmental bodies do not have personal property or privacy rights to public information created or received as part of their performance of official duties. (This bill was also introduced by Representative Todd Hunter (R–Corpus Christi) as a standalone measure in HB 1700.)

Further, it requires that such employees and officers surrender privately held public information, and it gives a governmental body the ability and the responsibility to compel the surrender of any such information pursuant to a TPIA request. This bill closes the long-running custodian loophole by giving government bodies the ability to obtain public information that had once been shielded from disclosure because it was stored on a private device.

SB 1640: “Walking Quorums” under the Texas Open Meetings Act

On February 27, 2019, the Court of Criminal Appeals issued an opinion partially striking down the portion of the Texas Open Meetings Act (TOMA) that prohibited “walking quorums.” *State of Texas v. Doyal*, 2019 WL 944022, No. PD-0254-18 (Tex. Ct. Crim. App. Feb. 27, 2019).

A walking quorum refers to a particular practice by which government officials attempt to circumvent TOMA’s open-meeting requirements. TOMA requires that when a quorum of a government body is present to discuss official business that government body must adhere to TOMA’s open-meeting requirements, such as providing adequate public notice in advance of the meeting. To circumvent these requirements, some public officials have engaged in “walking quorums,” conducting business by meeting in a series of successive meetings in which a quorum is never achieved, thereby avoiding triggering TOMA notice requirements. TOMA contained a provision banning these walking quorums, but the Supreme Court ultimately held in *Doyal* that the provision did not pass constitutional muster. The Court of Criminal Appeals decision specifically concluded that the criminal penalties associated with violating TOMA’s walking quorum provision was “hopelessly indeterminate by being too abstract” and struck down that portion of the statute.

Regardless of the constitutional infirmities, the legislative intent animating the now-unconstitutional provision was clear: to prevent circumvention of open-meeting requirements by meeting in a series of smaller, non-public gatherings to discuss public business. Acting swiftly to resuscitate this provision, Representative Dade Phelan (R–Beaumont) and Senator Kirk Watson (D–Austin) successfully obtained passage of SB 1640, which provides more detailed language on TOMA’s walking quorum ban. The intent of the bill is to remedy the constitutional concerns while providing government officials with additional clarity regarding the limits of the law regarding the prohibition on walking quorums.

(Continued on page 81)

*(Continued from page 80)***HB 2840: Clarifying Open Meetings Laws**

Many government entities have been the subject of criticism for the lack of meaningful opportunities for public input and comment during official government business. HB 2840 (by Rep. Canales (D–Edinburg)) seeks to address this issue by amending current law to establish greater rights for members of the public to address a governing body of a political subdivision during open meetings. The bill aims to provide a greater opportunity for members of the public to weigh in on decisions being made in several ways. First, it ensures that governmental bodies adopt reasonable rules governing public input at meetings. Second, it requires that governmental bodies allow each member of the public who desires to provide testimony regarding an item on an agenda for an open meeting of the body before or during the body’s consideration of that item. Finally, the bill prohibits a governmental body from prohibiting public criticism of the governmental body, unless otherwise prohibited by law. Ultimately, this bill will improve public participation in open meetings by facilitating and promoting public input on government decision-making.

SB 494: Open Meetings during a Disaster

Two Houston lawmakers, Senator Joan Huffman and Representative Armando Walle introduced SB 494 to address how the Texas Open Meetings Act would function in situations of natural or manmade disasters, or in the event of a terrorist attack. The bill was brought in response to government entities’ inability to fully comply with TOMA and the TPIA during the exigent circumstances of Hurricane Harvey. Specifically, SB 494 provides for the temporary suspension of several open-meeting requirements in the wake of an emergency situation or “imminent threat” of such a situation, such as the advance-notice requirement for open meetings. Furthermore, the bill provides for a temporary suspension of TPIA obligations during a catastrophe if the government body involved passes a resolution establishing a temporary suspension and serves notice of a temporary suspension on the Office of the Attorney General.

Wesley Lewis is an associate in the Intellectual Property and Media Practice Group at Haynes and Boone, L.L.P. Laura Prather is a co-Chair of the Media Practice Group at Haynes and Boone, L.L.P. and a member of the Intellectual Property and Appellate sections.

Concern About Internet Regulation Brings Huge Crowd to Legal Frontiers in Digital Media Conference



The challenges of responding to new internet regulations and the calls for increased scrutiny of digital platforms were among the major topics at this year's Legal Frontiers in Digital Media conference, held May 20-21, 2019 at the Mission Bay Conference Center in San Francisco.

MLRC co-produced this two-half-day program with the Berkeley Center for Law & Technology. The conference was sponsored by Axis, Ballard Spahr, CNA, Davis Wright Tremaine, Fenwick & West, Kilpatrick Townsend, Munger Tolles & Olson, Perkins Coie, WilmerHale and ZwillGen; moreover, Google sponsored the conference's Monday evening reception, and Microsoft sponsored Tuesday morning's breakfast. With 173 attendees, this year's conference was the largest in recent years.

In a Washington, D.C. that is rarely bi-partisan, there are increasing calls from both sides in Congress to regulate digital companies, which have been widely criticized for, among other things, election interference and the spread of other misinformation; allowing online speech that facilitates sex trafficking, hate speech, and terrorism; and deceptively selling user data.

Future of Section 230

Perhaps the most alarming of the policy prescriptions floated by lawmakers are the calls to curtail or eliminate Section 230 of the Communications Decency Act, the 23-year-old law that immunizes platforms from defamation and related liability for content posted by third parties. In reaction to these threats, including Nancy Pelosi's recent statement that Section 230 was "a

(Continued on page 83)

(Continued from page 82)

gift” to tech companies that could be removed if they don’t take greater responsibility, conference organizers invited Section 230 experts, Eric Goldman (Santa Clara Law) and Daphne Keller (Stanford), to co-moderate a session titled, “Saving Section 230.” The first half of the session addressed why these threats need to be taken seriously, while the second half was devoted to audience comments and questions, including how the tech industry can educate lawmakers on the substantial benefits of Section 230.



Eric Goldman, left, and Daphne Keller

Following the enactment of FOSTA, which removed immunity for content promoting sex trafficking or prostitution, the first major Section 230 carveout passed by Congress, Mr. Goldman was asked by his co-moderator whether Section 230 was more likely to suffer “death by a thousand cuts” or be repealed outright. He didn’t predict either, but rather opined that if any of the “power players” in Congress propose a reform of Section 230, it will garner bipartisan consensus. Although he could not predict the details, Goldman stated, “whatever the bill says is going to pass.”

Ms. Keller went on to dispel the notion that the First Amendment would protect platforms in the absence of Section 230, citing the situation in Europe where a notice and takedown framework applies (much like under copyright law in the U.S.), causing the over-removal of content alleged to violate people’s rights (such as under defamation law).

European Regulations

European regulations took center stage in two sessions at the conference. The first, dubbed “EU Updates,” featured presentations from two European-based MLRC members, Bryony Hurst, Bird & Bird (London) and Remy Chavannes, Brinkhof (Amsterdam). Ms. Hurst focused on cross-border takedowns at issue in two key cases pending before the European Court of Justice, *Google v. CNIL* and *Glawischnig-Piesczek v Facebook*. In the Google case, various delinking orders had been issued by the French data protection authority to perform delisting on all Google domain names (including .com), but Google only delisted on local domains and geo-blocked European searchers from accessing the material from google.com. In the Facebook case, an injunction was granted by an Austrian court – to remove (worldwide) a photo of and negative comments directed at the former leader of the Austrian Green Party – under Austrian copyright and hate speech law. The issue on appeal to the ECJ in both cases is whether

(Continued on page 84)

(Continued from page 83)

removal/delisting must be performed worldwide, or whether local removal and geoblocking is sufficient.

Mr. Chavannes spoke about two controversial provisions of the recently enacted EU Copyright Directive that are particularly worrisome to American digital companies, one (Article 15) calling for a so-called “link tax” on news content shared by digital platforms and the other (Article 17) requiring platforms to use upload filters to screen for infringing content. The provisions must be implemented into the national law of EU member states in the next two years, but according to Mr. Chavannes, the Directives are extremely vague making it unclear what companies are subject to the law and what they must do to comply, characterizing Article 17 as a set of “impossible demands.”

Privacy regulation – which is keeping many tech lawyers very busy these days – was the subject of another panel, “Issues in Compliance: GDPR & California Consumer Privacy Act,” focusing on the year-old European General Data Protection Regulation, and the soon-to-be-in-effect California Consumer Privacy Act (CCPA). That panel was moderated by Tyler Newby, Fenwick & West, and included Emily Jones, Osbourne Clarke, Kandi Parsons, ZwillGen and Nithan Sannappa, Twitter.

Embedded Links

While the regulatory sessions focused on recent legislative activity, other sessions deep-dived into a handful of significant case law developments in established areas of digital law.

One session focused on the ground-shifting copyright decision from the Southern District of New York in *Goldman v. Breitbart*, which called into question years of reliance by digital content providers on embedding (or inline linking) images into their platforms, but stored on other sites, as a means of avoiding infringement claims. The case was litigated by Ken Norwick on behalf of an individual who took a picture of NFL star Tom Brady and shared it only with a limited number of his Snapchat followers. The photo went viral on Twitter without the photographer’s consent, and subsequently was used in news stories on a significant number of online media sites.



Ashley Kissinger

While most of the defendants claimed, as a defense, that they were simply embedding the image from Twitter, the district court judge, the Hon. Katherine Forrest, ultimately held on a motion for partial summary judgment that this embedding did not serve as a defense to plaintiff’s claim for infringement of his display right under the Copyright Act. The decision rejected the notion

(Continued on page 85)

(Continued from page 84)

that a “server test” applied, a test that other courts have followed based on the Ninth Circuit’s 2007 decision in *Perfect 10, Inc. v. Amazon.com, Inc.* *Perfect 10*, in rejecting a claim for infringement of the display right, found that, *inter alia*, Google had not stored allegedly infringing images on its own servers. The conference brought together the lead attorney on *Perfect 10*, Andrew Bridges, Fenwick, with Mr. Norwick to debate the merits of in-line linking as a defense to copyright infringement. Moderating the panel was Erik Stallman, Assistant Clinical Professor of Law, Berkeley Law and the panel was rounded out by Angela Kim, Audience Development Manager, Verizon Media, who provided important context as to how and why media companies use embedded photos on their online sites.



Left to right: Joshua Koltun, Raymond Aghaian, and Tom O'Brien

Anonymous Online Speech

Another panel, titled “Protecting Anonymous Online Speech,” covered an area on law that has increased in importance over the past several years with the rise of online review sites that are frequently the targets of litigation strategies intended to uncover the identities of online speakers, frequently those submitting unflattering information about a business or individual. The panel was moderated by Ashley Kissinger, Ballard Spahr, and included Joshua Koltun, Raymond Aghaian, Kilpatrick Townsend & Stockton, and Tom O'Brien, Glassdoor, Inc.

In the context of a civil case where subpoenas are served on an internet service provider, Ms. Kissinger explained that a party seeking to unmask the identity of an anonymous speaker must generally show (with variations from jurisdiction to jurisdiction), that (1) notice has been given to the speaker, (2) to some extent, it has been shown that plaintiff has a valid claim, and often (3) some balance of the equities favors disclosing the anonymous speaker’s identity. For Glassdoor, an online site that has the mission of allowing employees to speak candidly about their employers, preserving online anonymity is essential, and the company makes special efforts to make sure the interests of its users in remaining anonymous are represented in court where a subpoena has been issued. As Mr. O’Brien explained, Glassdoor has even gone as far as funding lawyers to prepare anti-SLAPP motions on behalf of its users.

(Continued on page 86)

(Continued from page 85)

Unfortunately, as Mr. Koltun noted, Glassdoor is the exception to the rule, and most online platforms – upon receiving a subpoena – simply provide notice to the user and leave it to them to try to find a lawyer to defend their interests. Mr. Koltun, who specializes in representing anonymous online speakers, has in recent years paved the way – winning several court victories – that allow anonymous speakers to defend lawsuits, and even go to trial, while remaining anonymous.



Left to right: Marc Zwillinger, Judge Stephen Smith, and Jim Dempsey

US v. Carpenter

Another session looked at the Supreme Court’s landmark ruling in *U.S. v. Carpenter* and its implications for the Fourth Amendment as applied to the online world. In *Carpenter*, Justice Roberts in a 5-4 decision held that law enforcement must obtain a warrant before gathering historic cell site location data about a suspect from cellular service providers. The ruling calls into question the validity of the “third-party doctrine,” which in the past has generally permitted the government in criminal cases to obtain data from third parties without a warrant. The Berkeley Center for Law & Technology’s Jim Dempsey led a conversation with two other experts on the subject, former federal magistrate judge, Stephen Wm. Smith and noted practitioner, Marc Zwillinger.

Before his recent retirement, Judge Smith was one a handful of judges who refused to issue subpoenas for real-time, and later historical, cellphone location data without a probable cause showing sufficient to issue a warrant. Courts will now be looking to *Carpenter* when deciding if subpoenas for location data should be enforced when issued to companies with apps like Fitbit, bikeshare and rideshare companies like Uber, and even companies like Starbucks and the Weather Channel that provide apps which process and store user location data.

According to Zwillinger, whether the data collected by these companies is protected under *Carpenter* depends on the factors considered by Justice Roberts, whether (1) the type of data at issue reveals the privacies of life; (2) whether the information was involuntarily collected; (3) whether the service is essential to participating in modern life; and finally (4) the duration of the tracking. Using this criteria, Mr. Zwillinger predicted that perhaps a court would, in the future, find that website browser history is subject to Fourth Amendment protection, even though it is stored by a third party.

Free Speech for Product Counsel

(Continued on page 87)



Left to right: Ben Glatstein, Ambika Doran, Jacob Rogers, Alexis Hancock, and Jeff Hermes

(Continued from page 86)

Finally, a unique – perhaps first-of-its-kind – panel sought to address the free speech implications that are created by the very design of a digital platform or product. This session, called “Free speech for product counsel,” was moderated by MLRC Deputy Director, Jeff Hermes, who was joined by Ben Glatstein, Microsoft, Ambika Doran, Davis Wright Tremaine, Jacob Rogers, Wikimedia Foundation and Alexis Hancock, Staff Technologist with the Electronic Frontier Foundation. As Mr. Hermes explained, the panel explored the “ways in which the design of platforms and tech products create, shape, and sometimes suppress speech.” One of the more interesting ideas explored during the session was the observation of so-called dark patterns, a pejorative term used to describe a design feature by a platform that is alleged to manipulate users into making certain choices – perhaps to share more of their data – because other alternatives or opt outs are not as prominent or visible. But as was observed by some of the panelists, what may be deemed a dark pattern to a critic may be deemed free speech to the platform, to underscore and advocate for the user to select features it thinks will benefit overall user experience.

The next digital conference will be back at the Mission Bay Conference Center in San Francisco May 14-15, 2020.

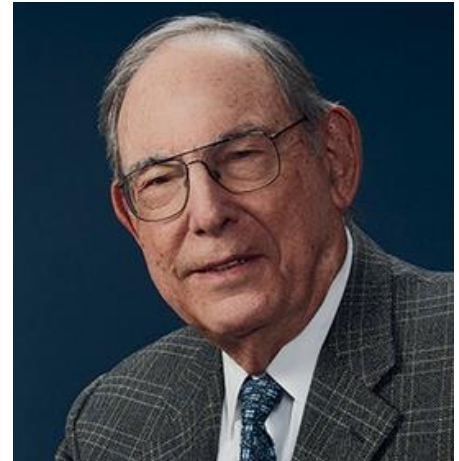
If you have ideas for topics for the next conference or would like to get involved in planning, please send an email to MLRC Staff Attorney, Michael Norwick, mnorwick@medialaw.org

Letter to a (Newer) Media Lawyer

Be Patient - And Nine Other Tips from Victor Kovner

George Freeman asked me if I would write a “Letter to a Newer Media Lawyer” from an “Older Media Lawyer.” First, I should begin with a little background for context and then add some non-legal advice that may seem obvious, but often is not.

A very long time ago, after I was released from service in the United States Army in 1964, I joined a law firm named Hays, Sklar & Herzberg, a fine, pre-Civil War, middle-sized firm in New York, which unfortunately expired in the late 1990s. After three years as an associate, I left to join the firm of Koch Lankenau & Schwartz. Yes, that is the former Mayor Edward I. Koch and the former Corporation Counsel and United States District Judge Allen G. Schwartz. I joined as an associate and within a short time I had risen to be a name partner in Koch, Lankenau, Schwartz & Kovner (all partners, no associates).



Victor Kovner

Having been elected to Congress in 1968, Ed Koch left the firm. One of Ed’s clients, which I inherited, was The Village Voice. It was a spectacular client and, in its prime, a spectacular newspaper as well. I knew the owners Ed Fancher and Dan Wolf very well. Indeed, a couple of years earlier, before I met my wife, she had worked at the Voice, as their first paid employee, as she would say.

The Voice was feisty and became the progenitor of alternative papers around the nation. As it grew during the 1960s, with its irreverent and aggressive coverage of government at all levels, it began to draw libel litigation and I started to provide both prepublication review and libel defense as well. It was an exciting period. We had some great cases, including a number by sitting Justices of the New York State Supreme Court, our court of general jurisdiction. Several libel claims against the Voice went to the appellate courts, some to the highest court of our State, and a couple were even followed by unsuccessful cert petitions from plaintiffs’ counsel. Happily, we were able to defeat every single claim against The Voice.

For this article, the lesson is that getting to know and work with young reporters, fact checkers and editors at a small publication may be a route to enhance one’s future business. Those young journalists I knew at the The Voice generally went on to a variety of publications in print, radio and television (no online journalists at the time) and several would recommend me as libel counsel, and on some occasions those recommendations were accepted (Esquire Magazine, New York Magazine and not long thereafter, Rolling Stone).

(Continued from page 88)

Before long, our firm had a substantial volume of First Amendment litigation, and I was invited to join the faculty of the PLI Communications Law seminar, teaching the section on the various privacy torts. Keeping up with the law in these areas annually was fascinating, challenging and, needless to say, it was satisfying to have the opportunity to present to that audience for more than twenty years.

To include libel highlights here would go beyond advice to “newer” lawyers. But to represent such clients as George Crile (the CBS Reports correspondent at the heart of the Westmoreland litigation), the author Shana Alexander and Doubleday, and Ted Hughes, then the poet laureate of England and widower of Sylvia Plath in the Bell Jar libel litigation among others, were all I could have hoped for. And since a lawyer’s life should not be without humor, representing Bob Guccione, Sr., publisher of Penthouse Magazine for more than a decade, left me and my colleagues with stories inappropriate for a family publication like the MLRC LawLetter.

With that as background, let me summarize advice I share with younger colleagues, all too infrequently.

First, if you are going to advise publications, particularly news publications, read the news. Be current on what is happening in the world especially in the areas covered by the media represented by your firm and, of course, be current and knowledgeable regarding areas covered by clients that you might aspire to represent at some point. There is nothing worse than reviewing materials for publication and having to ask the author, editor, publisher or whomever for factual context as to matters that should be known to people from whom they seek advice.

Second, get to know people in your field. Join relevant bar committees. Attend relevant programs. When you have assembled some reasonable expertise by reason of your involvement in one matter or another, look for the opportunity to present about it in some form, however modest, or to write an article for a publication, such as the MLRC LawLetter. Your colleagues read the MLRC LawLetter. Your knowledge of a particular area or matter can only be helpful.

Third, within your firm, look for the opportunity to work on matters that may be of interest to your colleagues in the media bar and to the media. That, of course, is easier said than done, but always be mindful of the opportunity and remember, not every relevant development in the law derives from a media case. They derive from other litigation. Indeed, non-media litigation provides much relevant law to our work.

Fourth, be willing to help others within your firm and outside the firm whenever the opportunity may be appropriate – even if it is not billable and even if your role may not be public beyond those for whom you provided assistance. Your willingness to help will usually be on a pro bono basis, but often will prove to be beneficial to your practice. People remember those who have provided such assistance.

(Continued on page 90)

(Continued from page 89)

Fifth, in addition to the media bar, make contacts among journalists in a tasteful manner. Again, that is easier said than done, but when those in the media, such as editors and/or publishers learn that you are a media lawyer, they will often pick your brain. You should welcome that opportunity to share your experience with appropriate disclaimers that you are not advising as their counsel, but merely as a friend. As noted above, today's young reporter or editor may be a future client.

Sixth, attend media conferences, if you can persuade your firm or company to send you. Though the substance is not always profound or intense, it usually is very helpful, and it is the networking that may be more valuable. But remember, others in your firm will seek such opportunities and they should of course be shared reasonably.

Seventh, do not sit on such suggestions and opportunities you believe to be relevant. Draw them to the attention of your colleagues. Whether or not implemented, doing so will be appreciated.

Eighth, there are a lot of opportunities, in addition to MLRC LawLetter, for publications in the field. They sometimes require hard work which is not billable, and one cannot become overcommitted with such assignments. Look for those that provide a moderate amount of work over a reasonable time period. If done on a regular basis, it will lead others to look to you for such opportunities which you can undertake and/or share with your colleagues.

Ninth, getting to take or defend a particular deposition, or actually argue a motion, or participate and take witnesses at a trial is challenging, to say the least. Nonetheless, look for the opportunities. One does not want to be unduly forward, but senior lawyers should know directly or sense indirectly that, where feasible, you would love to take or defend a witness. But one must also recognize that major arguments and major depositions will inevitably be handled at the partner level, because, among other things, that is among the reasons your partner has been engaged to handle the matter.

Lastly, even when the crunch and pressure may be intense, enjoy and take pride in your work. The media, and the applicable law are constantly evolving, but if you stick with it, you will have the opportunity to help shape the law for the future.

Victor Kovner is a partner at Davis Wright Tremaine in New York.

10 Questions to a Media Lawyer

Kelli Slade



Kelli Slade is Senior Counsel at CNN in Atlanta.

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

My first job out of law school was with a non-profit organization that provided residential services/group homes for male youth in Washington, DC. I think I wanted to save the world, or at least a little piece of it by helping those in need.

My first corporate legal position was with Univision. I speak Spanish so I came in house, and did whatever legal work was needed, e.g., sponsorship agreements and production and license agreements. I also reviewed news scripts for Univision's local stations across the country. That was my introduction to media law.

I was fortunate enough to work very closely with our outside lawyer, who just happened to be Gary

Bostwick. Gary is bilingual and he was my go-to for all things First Amendment for many years. He was my mentor and friend. I learned so much from him and he encouraged me to apply for the position I now hold at CNN.

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

I love the pace of the work, that nothing lasts forever. Every day is different and I'm always learning something new. I vet lots of long-form programming which I enjoy tremendously.

I also appreciate the work that I do with CNN en Espanol. Although the legal issues are essentially the same, the Spanish language news world has a different focus from the US and I am constantly learning the laws in various countries and the nuances of those laws, so the work is very interesting and engaging.

I also like the interaction with my clients. I am a people person. Connection is important to me. I focus a lot on building real relationships with clients, which makes it easier to advise them about challenging issues. When you know people as people, not exclusively in their role as, say, show producer, or writer or talent, it eases the work relationship.



Detail from one of Slade's vision boards. "The boards mostly contain images that represent things I would like to do or experience, but I love aesthetics so some simply contain bright, powerful imagery. For me, they represent the aspirational."

(Continued from page 91)

Although I hate to say it, what I like least is navigating time pressured situations. Even after all these years, I find it unnerving when clients are stressed – when they are on very tight deadlines or other times when decisions must be made instantly. I know that there are many media lawyers who thrive in that space, and I have conditioned myself to do the work well under those circumstances, but it doesn't come naturally to me.

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

When I first started my job, Univision's Jerry Perenchio ran the company as chairman and CEO. Once a year, he would rent out a small, opulent hotel and host a weekend senior leaders retreat. The year I began, the event was held at a hotel in Phoenix, Arizona. I'd only been working at Univision for about a month or so and was incredibly nervous about attending. During the day, there would be all these meetings and lunches and recreational activities with executives that I didn't know, and in the evening there were dinners and social gatherings that you were expected to attend. Needless to say, I found it painful.

One evening, I was randomly seated at the dinner table of Ray Rodriguez who ran Univision Network in Miami at the time. He was incredibly engaging and friendly. Lucky me, I felt relieved that I'd met someone, not only noteworthy, but also kind. Later that evening I ran into him on the lobby patio. We greeted each other and he introduced me to Andy Hobson, the man standing beside him. I smiled, said hello, but didn't recognize the

(Continued on page 93)

(Continued from page 92)

man's name. I then innocently inquired, "What do you do for the company?" He replied almost impishly, "I take out the trash." Turns out that Andy was the acting Senior Executive Vice President and Chief Financial Office at Univision Communications. He, of course, reported directly to Perenchio. I was absolutely horrified and even more horrified that the story became the joke of the evening among a number of the senior leaders who found it absolutely hilarious.

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

I've never litigated.

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

A Vision Board or two. The boards mostly contain images that represent things I would like to do or experience but I love aesthetics so some simply contain bright, powerful imagery. For me, they represent the aspirational. I'll include a modern home with amazing ceilings and beautiful decks, bathed in color and natural light, or an image of Basquiat's art, or pictures of wildflowers and forests that express my love of nature or a Moroccan themed room that speaks to my love of travel, or words that capture who I want to be: joyful, peaceful, courageous.

6. Favorite sources for news – legal or otherwise?

The Washington Post and the New York Times. I read El Pais out of Spain and a handful of publications coming out of Latin America. Also: Elephant Journal and Hay House Radio for all my self-exploration, health, wellness and spiritual stuff. (For more on that, see answer to question ten below.)

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

I think you have to do what moves you and what speaks to you from the inside out. Everything else will take care of itself. If you are truly aligned with the choices you are



When she's not lawyering, Slade facilitates personal and spiritual development retreats for women.

(Continued on page 94)

(Continued from page 93)

making, there is never a problem. If someone feels called to go or wants to go to law school, then they should do it and do it fearlessly, no matter what others say. Your career will work out one way or another.

It's rarely the profession or career that we choose that's the problem – it's not knowing ourselves and focusing on the external noise and opinions of others that frequently creates upset and unfavorable outcomes. If we are learning about ourselves, there can be no bad choices.



8. Favorite fictional lawyer?

I don't really have one but when I was in Law School at UNC Chapel Hill I was voted most likely to appear on LA Law. When I moved back to Los Angeles after law school, while I never did appear on the show, I did legal work for a producer that did low budget music videos and episodic cable programs. Through that experience I rubbed elbows with a handful of celebrities associated with the projects. It was fun and the closest I ever got to the spotlight.

9. What issue keeps you up at night?

Mostly making a mistake with far reaching negative implications for my clients or the company. But more than that, while I love what I do, I want to make sure I never allow myself to be defined by it. That definitely keeps me up thinking. I never want to limit expansion in other areas of my life because I'm only paying attention to one aspect of myself.

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

I would probably be doing exactly what I do now in my free time: facilitating personal and spiritual development retreats for women. I'd be leading them not only in the US but all over the world in exotic locations. I'd also probably be doing some sort of transformational life coaching as well. I love having a positive impact on the lives of others and introducing people to tools that they can use (like meditation and journaling) to lead more balanced lives.

If you'd like to reach Kelli, email kelli.slade@turner.com.