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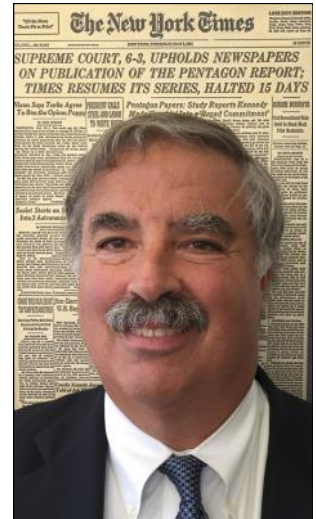
## *From the Executive Director's Desk*

# Letter to a Newer Media Lawyer

As astute readers of the *LawLetter* hopefully have recognized, we have added a number of new features to our monthly offerings. Just as weekly magazines no longer can just give news summaries of last week's events, we thought we needed some new angles over and apart from our compendium of litigation developments, many of which you probably have already learned about.

Thus, in our last two issues we have had a roundtable of experienced media lawyers and academics discussing recent issues – drones and the *Sandmann v. Washington Post* case; a book review; a feature article by Lee Levine and Steve Wermiel, co-authors of a book about *Times v. Sullivan's* progeny, about Justice Thomas' provocative concurrence seeking reconsideration of the Sullivan doctrine; and a new feature on career advice to newer media lawyers. Chuck Tobin and Jonathan Anschell both wrote very useful, interesting and personal advice columns which I hope did not go unnoticed by our readers, especially our younger ones. So as to highlight this feature and because I had some of my own thoughts on the matter, I thought I'd use the space for my regular column to address the question.

My advice centers on two aspects: First, KNOW YOURSELF; don't be moved by the PREVAILING WISDOM. Second, in an interview or on a big case, TALK ABOUT WHAT YOU'RE AN EXPERT AT, not what the interviewer's specialty is; and if you're working on a case with a big team, figure out a part of the case nobody is expert at, and own it. Let me explain, based on personal experiences.



**George Freeman**



**Freeman, left, with his mentor Floyd Abrams and New York Times media columnist Jim Rutenberg on a panel at an ABA conference.**

The decision I made which led to my career in media law was a risky one – but not so risky because I knew what I wanted and what was good for me – even though it was counter to the prevailing wisdom and, indeed, significantly decreased any chance I had at partnership. But I knew myself well enough to know that, for me, at least, being partner wasn't the end-all; working on interesting stuff was more of a priority.

I was a junior associate at Cahill Gordon, a big NY firm, still one of the top litigation firms in the country, which prided itself on its lack of structure – no departments, no associate rotations; just planned chaos where partners called upon any associates who generally were to agree to work on a case unless they were really full-up busy. One day I heard one member of my associate class after another paged to go to the office of the senior labor associate. I was about the 15<sup>th</sup> called. When I went to his office, he explained that the labor/employment work at the firm was being handled by him and an aging partner; that when they called for associates to help them, they invariably were turned down because neither had any power in the firm and so associates thought working for them was hardly a career enhancing move; and so the firm had allowed them to recruit an associate whose primary responsibility would be to work for them. Would I like to be that person?

I thought quickly: clearly everyone else in my class had turned them down – hence, they were still going down the list. Their obvious lack of power, even respect, at the firm would hardly help my chances of becoming partner (still 5-6 years down the line). But, first, the group's clients were The New York Times, NBC, Columbia University and the New York Racing Association – many times more interesting than the accounting firms and financial institutions which were the main clients of the firm. Second, it was a very small group, so inevitably I would soon get more responsibility and experience than were I to be the bottom person on the 5 or 6 lawyer teams which (wo)manned the big cases – I thought I'd soon be taking and defending depositions and writing briefs, rather than simply writing memos and answering interrogatories. Third, most of the cases were Title VII cases, many class actions, which were interesting to me, not NLRB/labor cases; after all, on my 12<sup>th</sup> or 13<sup>th</sup> birthday, even though I don't think I was, or am, a nerd, I asked for and received 1960 Census Surveys as a present, so deep was I into demographics which were a large part of those cases. Fourth, it was a life raft; I figured that when I received a call at 5pm on a Friday night asking me to work on a tender offer case through the weekend, I could now say, with some credibility, no I can't, I'm the labor person and I'm busy with my employment work.

As I sat there, actually thinking about pulling the trigger on the deal, I quickly realized that I had all the leverage in this negotiation – and I should use it now. The Times, NBC and Columbia all were the clients of Floyd Abrams, though, I correctly suspected, he wasn't really involved in their labor work. So I bargained, if I had any free time, could I use it to work with

**By knowing myself, what I really wanted out of my life at the firm, rather than going with the prevailing wisdom that becoming partner was the be-all and end-all, I made a decision which paved the way for the rest of my career.**



**How a 1L became an Assistant Dean at Vermont Law School, above, is a story for another time, but telling it was a great help to the author in distinguishing himself at law firm interviews.**

Mr. Abrams on media law matters? They assured me that was fine, and so the deal was done, and my new career path set.

To be sure, within hours word had gotten out. A friend walked into my office and said: “You idiot. You’ll never make partner. That’s the Siberia of the firm.” Others followed with similar analyses. But, it turned out, things went pretty much as I had hoped: I was soon doing deps alone; I was writing briefs, not memos; I found the work interesting; the biggest cases were two class actions against the Times, which took me into the Times building on an almost daily basis – and indeed, allowed me to carefully study things like Executive Editor Abe Rosenthal’s files and the salaries of all Times reporters and editors; I composed expert reports for a former Census Department executive; I escaped from unexpected last-minute weekend work; and in the spare time I had, I worked on cases such as *Herbert v. Lando* and *Arrington v. New York Times* with Mr. Abrams. And, needless to say, all that linkage with the Times led me to a job in its Legal Department, where I had the privilege of working for 31 years.

So by knowing myself, what I really wanted out of my life at the firm, rather than going with the prevailing wisdom that becoming partner was the be-all and end-all, I made a decision which paved the way for the rest of my career. (I also calculated objectively the tiny chances of becoming partner even had I gone the more favored route.) And that was despite the fact that I’m generally pretty conservative in life moves – 31 years at one job, only 3 places to live in over 40 years, etc. So it really wasn’t a risk; it was throwing ego and what others were saying out of the picture, and just relying on what I saw as the right move for myself.

Second, when you are dealing with others, whether it be an interviewer or colleagues on your team, figure out an area you know more than them about and talk about it: you’ll look smart, interesting, valuable, neigh needed – all qualities which should enhance your career prospects. The easiest example is the job interview. Typically, the interviewer will spend most of the time talking about his firm and his cases. He generally will have worked at the firm for



**At ease at the New York Times, circa 1998**

decades and worked on the cases he is enthusiastically describing for years. How are you, who knows next to nothing about his cases, going to impress him? Certainly not by commenting or asking a question about a case he has spent days and nights thinking about.

So the strategy to make the interview successful for you has to be to move the discussion to something you know more than her about. Find a segue to connect the conversation to a case you are working on or an experience you had. When I was applying for summer associate jobs, I put on my resume that I was Assistant Dean of Vermont Law School. It happened to be true – how a 1L

became an Assistant Dean is a story for

another time, but involved a bizarre owner/Dean of Vermont's only and brand new law school who said, while whipping up a gourmet meal at his hotel's kitchen a stone's throw from the law school, that I needed a title (I was assisting a two-person faculty in teaching a required summer course for incoming students) – and it certainly engendered many questions at interviews. So precious interview time was spent not on my interlocutor's exposition of his latest antitrust case – to which I would have nothing intelligent to add – but to my story about my interesting job, which at least made me look somewhat clever, humorous and different from all the other associates who had come marching by.

A pithier example came in an interview at a big NYC firm, still around today. The partner was regaling me with stories about all the benefits of working at the firm – 4 weeks vacation, Friday night parties, an hour of tennis a week in a bubble (he didn't realize he had the perfect foil for that one), box seats at the Jets game since they were a firm client. Passing on asking why that was relevant since doubtless those seats weren't going to first year associates, I immediately interjected with, "I can't believe they punted on third down in yesterday's game." He said he was at the game, agreed with my cogent analysis, and 90 seconds later said, "I think you're exactly the kind of young man we're looking for," and gave me an offer. Move the conversation to what you are expert at!

The same principle works in the context of working with colleagues at a firm or law office. Find a slice of a case or matter which is or will become important and which no one else seems to be an expert in ... and own it. Whether it's the law or the facts, if you can become indispensable on one aspect of a case because of your detailed knowledge which no one else on

your team has, you will become more valuable and your star will rise. If you just mirror your more experienced colleagues and know a little about everything in the case, I doubt you will have the opportunity to stand out.

A version of this strategy fell into my lap back in my Cahill days. As I described above, I was working on Title VII class actions against The Times. Floyd Abrams was the partner in charge, but was at the height of his First Amendment practice and really hadn't focused on these big discrimination cases. But a time came, perhaps after our summary judgement motion was denied, when settlement talks commenced or as we approached trial, when he had to get involved. So it fell upon a lowly associate, me, to get him up to speed on the law, the facts, both strong and weak, our strategy, prognostications as to what might happen, and so on. I was always pretty good at talking non-legalese – a trait that held me in particularly good stead when I went in-house – so I did pretty well in explaining an otherwise complicated and largely statistical case to Floyd.

However well I made Floyd familiar with a summary of the case, I certainly played a more important and useful role than as an associate on a libel case where there was virtually nothing I could have taught to the country's leading practitioner. (And I say this despite that fact that of all partners and clients I ever worked for, Floyd listened more carefully and responsively to what associates said than anyone.) So I always felt that the time I spent with Floyd on these employment cases went a long way in his forming a positive impression of me, and just perhaps may have led to some good words to the Times when they were thinking about hiring me (though I've never asked him if that's the case). I certainly wouldn't have had the same opportunity to be needed or to shine by talking with him about the footnotes I was drafting on our *Herbert v. Lando* brief or a libel case.

As you can see from my examples, some opportunities happen serendipitously. But sometimes you can influence events to make it more likely that you will have opportunities such as the ones I discussed here. So make career decisions based on what you really want for your future and your life, not on what your ego, your colleagues or the prevailing ethos is telling you. And try to get a role in a case or a part of an interview where you are the expert and can impress others in areas where you know more than them.

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

**However well I made Floyd familiar with a summary of the case, I certainly played a more important and useful role than as an associate on a libel case where there was virtually nothing I could have taught to the country's leading practitioner.**

# Fighting Copyright Pirates Through Preregistration

By David Halberstadter

On March 4, 2019, the United States Supreme Court issued its decision in [\*Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC\*](#). The high court concluded that it is not sufficient for a copyright claimant merely to have applied for registration in order to satisfy the “registration” requirement of 17 U.S.C. § 411(a); rather, the statute requires that the Copyright Office must either issue a certificate of registration or reject the claimant’s application before a claimant may sue for copyright infringement. One of the primary arguments in favor of the “application” approach over the “registration” approach had been that the latter could be especially prejudicial when injunctive relief might be necessary to prevent rampant, rapid piracy.

In the wake of this ruling, there has been heightened interest in the provisions of the Copyright Act that provide for “preregistration” as a possible means for protecting certain copyrighted works prior to the Copyright Office’s action on a formal application for registration, and as a possible alternative to requesting expedited processing of an application. But there is some confusion over the preregistration process, the types of works that may be eligible for preregistration, and the scope of potential protection that preregistration may provide. This article will explain what preregistration is and what it can do.

## What is “Preregistration” and How Does It Work?

In 2005, Congress passed the Family Entertainment and Copyright Act, which President George W. Bush signed into law on April 27, 2005. This Act comprised two separate parts, one of which was the Artist's Rights and Theft Prevention Act of 2005. This Act principally targeted two activities: filming of movies in a movie theater; and the unauthorized release of movies and software before they become publicly available. This Act provided for preregistration of certain types of unpublished works that have experienced a history of infringement/piracy prior to their commercial distribution.

The preregistration of works being prepared for commercial distribution is governed by 17 U.S.C. § 408(f). The statute directs the Register of Copyrights to take two steps: (1) determine which classes of works have had a history of infringement prior to authorized commercial distribution; and (2) issue regulations to establish procedures for preregistration of such works. The statute makes clear that preregistration is only a temporary measure, and that the copyright owner eventually must submit a formal application for registration or risk the dismissal of any copyright infringement lawsuit that originally was permitted to proceed based upon preregistration of the work. (More on this below.) In effect, preregistration serves as a “place-

**There is some confusion over the preregistration process, the types of works that may be eligible, and the scope of potential protection. This article will explain what preregistration is and what it can do.**

holder” for a copyright owner who needs to sue for infringement while a work is still being prepared for commercial release.

### What Types of Works Are Eligible for Preregistration?

The Register of Copyrights has identified various classes of works that have had a history of infringement prior to authorized commercial distribution. 37 C.F.R. § 202.16(b)(1). The list includes: (1) “motion pictures” (which term includes feature films, animations, television shows, documentaries and other audiovisual works); (2) sound recordings; (3) musical compositions; (4) literary works being prepared for publication in book form; (5) computer programs (including videogames); and (6) advertising or marketing photographs. Such works are considered to be in the process of being prepared for commercial distribution if (i) the claimant certifies that it has a reasonable expectation that the work will be commercially distributed to the public and (ii) preparation of the work has commenced and at least some portion of the work has been fixed in a tangible medium of expression.

Obviously, every type of work that does not fit into one of the categories described above is ineligible for preregistration. Motion picture screenplays, animation storyboards, costume designs, and television series bibles, for example, are not eligible.

Neither are literary works that may be intended for publication but not as books, or software that may be integral to other products but are not themselves intended to be offered for commercial sale. Photographs that, when taken, are not intended to be used in advertising or marketing are likewise ineligible.

**For motion pictures and other eligible audiovisual works, the creation and fixation of the work in a motion picture format must have already commenced.**

### When Does A Work Become Eligible for Preregistration?

For motion pictures and other eligible audiovisual works, the creation and fixation of the work in a motion picture format must have already commenced. In other words, filming of the motion picture or videotaping of the audiovisual work must have begun. Sound recordings, whether based on musical compositions or other types of underlying works (for example, comedy albums and audio books), become eligible for preregistration once at least some of the sounds have been fixed in a sound recording medium. 37 C.F.R. § 202.16(b)(2)(ii)(A) & (B).

For musical compositions that are eligible for preregistration, some portion of the composition must have already been fixed in some tangible medium, such as handwritten musical notation or an audio recording. For a literary work being prepared as a book, the actual writing of the text (even a few handwritten pages) must have commenced. Similarly, a computer program becomes eligible once some of the computer code (source code or object code) has been fixed. Finally, for a collection of advertising or marketing photographs to become eligible for preregistration, at least one of the photographs intended for simultaneous publication must have been taken. 37 C.F.R. § 202.16(b)(2)(ii)(C)-(F).

Because of this “fixation” requirement, there may be a gap in time – perhaps even a substantial gap – between when an author commences development of a creative work and the time when it becomes eligible for preregistration. This is especially true of motion pictures and television programs, which can be in development for years prior to the commencement of shooting (much less commercial release). If an author has a need to protect his or her work from pre-release infringement before it becomes eligible for preregistration, the only way to do so is by a formal registration of then-existing development materials.

### How Does Preregistration Work?

A person who wishes to preregister a copyright must use the online application process since no hard copy (paper) form of application exists for preregistration. The current fee for preregistration is \$140. No deposit of the work being preregistered is required, but an application for preregistration must include a detailed description of the work at issue.

An application for preregistration of a motion picture, for example, must include (to the extent known at the time of the filing) a description of the work’s subject matter, a summary or outline, the director, the primary actors, and the principal location of filming. In the case of a sound recording, the description must include the subject matter of the work, its genre (e.g., classical, pop, musical comedy, soft rock, heavy metal), the title and composer of any musical compositions embodied in the sound recording, the names of the performers featured, and the principal location of the recording. Basically, the Copyright Office wants as much information as possible to facilitate identifying the work, so that there is no ambiguity when the copyright owner initiates copyright enforcement proceedings. 37 C.F.R. § 202.16(c)(6)(i)-(ii).

For an eligible literary work, the description should include the genre of the book (e.g., biography, novel, history) and a brief summary, including a description of the subject matter, plot, primary characters, events, or other key elements. The description of a computer program should include its nature, purpose, and function, the programming language used, the form in which the program is expected to be published, and the identities of the persons involved in its creation. And if the computer program is a videogame, the description also should include the subject matter of the game, its overall object, goal, or purpose, the names of the principal characters (if any), and the general setting and surrounding depicted in the game. 37 C.F.R. § 202.16(c)(6)(iv)-(v).

Finally, an application for preregistration of advertising or marketing photographs should include a description of the subject matter depicted in the photographs (including the particular product, event, public figure, or other item or occurrence which the photograph is intended to advertise or market) and, if possible, the party for whom the photographs were taken, the approximate time period when the photographs were taken; the approximate number of

**When the work has been completed, it may be registered as an unpublished work; or when it has been published, it may be registered as a published work.**

photographs that may be included in the group, any events associated with the photograph (e.g., the Superbowl) and the location depicted in the photographs. 37 C.F.R. § 202.16(c)(6)(vi).

The Copyright Office will conduct a limited review of an application for preregistration in order to determine whether the described work qualifies. If so, the work will then be preregistered, as long as the applicant has provided all of the required information and certified its accuracy. Upon completion of the preregistration process, the Copyright Office will send an official notification email, a certified copy of which an applicant may use to support a complaint for copyright infringement.

Unlike a formal registration, preregistration of a work does not constitute *prima facie* evidence of the validity of the copyright or of the facts stated in the application. The fact that a work has been preregistered also does not create any presumption that the Copyright Office will register the work upon submission of an application for registration.

### What Happens Next?

When the work has been completed, it may be registered as an unpublished work; or when it has been published, it may be registered as a published work. Pursuant to 17 U.S.C. § 408(f), however, in order to preserve the legal benefits of preregistration, a copyright owner is required to submit an application for registration by the earlier of (i) one month after the copyright owner becomes aware of infringement and (ii) three months after first publication. If the copyright owner fails to do this in a timely manner, a court is compelled to dismiss an action for copyright infringement that was based on the preregistration and in which the alleged infringement occurred prior to or within two months after, the first publication of the work.

**For creators of commercial works that have a history of pre-release infringement, preregistration can be a relatively inexpensive and useful tool.**

### Conclusion

For creators of commercial works that have a history of pre-release infringement, preregistration can be a relatively inexpensive and useful tool for responding quickly when unauthorized copies of their works appear in the marketplace. But the requirements must be followed carefully, both during the preregistration process and following the initial publication of the work, for preregistration to be an effective enforcement mechanism.

*David Halberstadter is a partner in the Entertainment & Media Litigation practice group at Katten Muchin Rosenman LLP and a Deputy General Counsel of the firm.*

# The Second Circuit Reaffirms Section 230's Broad Immunity

## *Products Liability, Negligence, and Emotional Distress Claims Barred by Statute*

By Daniel P. Waxman and Courtney J. Peterson

On March 27, 2019, the Second Circuit issued its decision in the highly publicized and monitored case, [\*Herrick v. Grindr LLC\*](#), 2019 WL 1384092. The Court affirmed the district court's dismissal of Herrick's products liability, negligence, intentional infliction of emotional distress and negligent infliction of emotion distress claims as barred by Section 230 of the Communications Decency Act ("CDA"), and, in doing so, reaffirmed the intention of Congress to broadly interpret Section 230 immunity.

### Background

The Grindr App ("App") is a digital social networking application designed to provide a "safe space" for gay, bisexual, trans and queer people to connect. Plaintiff Matthew Herrick ("Herrick") was a user of the App between 2011 and 2015, until he deleted it following his commencement of a relationship with an individual who he met through the App. Herrick sued Grindr LLC, KL Grindr Holdings Inc. and Grindr Holding Company, claiming that after Herrick and his boyfriend ended their relationship, Herrick's boyfriend used the App to begin a campaign of harassment, creating impersonating Grindr profiles of Herrick, and using those profiles to invite other Grindr users to Herrick's home and workplace to engage in sexual activities.

Herrick alleged claims for products liability, failure to warn, negligence, promissory estoppel, fraud, violation of N.Y. Gen. Bus. Law § 349 (deceptive practices) and §§ 350 and 350-a (false advertising), intentional infliction of emotional distress, negligent infliction of emotional distress and negligent misrepresentation. Herrick's claims were rooted in three themes: (1) the App is a defectively designed and manufactured product because it lacks built-in safety features to block or remove his ex-boyfriend's impersonating profiles, messages, or photographs; (2) Grindr misled him into believing it could ban impersonating profiles or other harassing content; and (3) Grindr has wrongfully refused to search for and remove



**Herrick's boyfriend used the App to begin a campaign of harassment, creating impersonating Grindr profiles of Herrick, and using those profiles to invite other Grindr users to Herrick's home and workplace.**

impersonating profiles. Defendants moved to dismiss on the grounds that all of Herrick's claims were barred by Section 230, or were otherwise improperly pled.

The District Court [granted defendants' motion to dismiss](#), finding that Herrick's products liability, negligence, intentional infliction of emotional distress and negligent infliction of emotional distress claims were barred by Section 230, and that Herrick's representation-based claims failed, *inter alia*, due to a lack of any misrepresentations and lack of causation.

### Second Circuit Opinion

The Second Circuit [affirmed the District Court's decision](#), holding that "Herrick's product liability claims and claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress are barred by CDA § 230, and dismissal on that ground was appropriate because 'the statute's barrier to suit is evident from the face of the complaint.'"

The Court rejected Herrick's argument that the App is not an interactive computer service ("ICS"). Citing the district court, the Court noted that "courts have repeatedly concluded that the definition of an ICS includes 'social networking sites like Facebook.com, and online matching services like Roommates.com and Matchmaker.com,' which, like Grindr, provide subscribers with access to a common server."

The Court likewise rejected Herrick's argument that his claims are not based on third-party content, but rather on Grindr's "management of its users." The Court found his ex-boyfriend's "online speech is precisely the basis of his [products liability] claims that Grindr is defective and dangerous. Those claims are based on information provided by another information content provider and therefore satisfy the second element of § 230 immunity."

**The Court rejected Herrick's argument that the App is not an interactive computer service.**

The Court found that Herrick's contention that Grindr created its own content by way of the App's publication of geolocation information of users "is undermined by his admission that the geolocation function is 'based on real-time streaming of [a user's] mobile phone's longitude and latitude.'" Thus, any location information was provided by Herrick's ex-boyfriend as it was undisputed that Herrick was no longer a user of the App at the time of the harassment.

The Court also rejected Herrick's argument that his claims were based on Grindr's design and operation of the App rather than on Grindr's role as a publisher of third-party content. As the District Court observed, "Grindr's alleged lack of safety features 'is only relevant to Herrick's injury to the extent that such features would make it more difficult for his former boyfriend to post impersonating profiles or make it easier for Grindr to remove them.' It follows that the manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and are barred by § 230." This is a powerful endorsement of decisions such as the First Circuit's in [Doe v. Backpage](#) which reject plaintiffs' attempts to circumvent § 230 by focusing on the design of the app or website.

The Court disagreed with Herrick's argument that his failure-to-warn claims were not covered by § 230 based on [Doe v. Internet Brands](#). The Court distinguished *Internet Brands* on the ground that it did not involve an allegation of the defendant's website transmitting the harmful content. The Court included a powerful response to failure-to-warn workarounds to § 230 in stating: "Herrick's failure to warn claim is inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content provided by his ex-boyfriend; accordingly, it is barred by § 230." The Court added that any failure-to-warn claim failed for lack of causation because Herrick deactivated the Grindr account over a year before any impersonation or harassment.

The Court found that Herrick's claims premised on Grindr's allegedly inadequate response to his complaints were barred "because they seek to hold Grindr liable for its exercise of a publisher's traditional editorial functions."

The Court held that to the extent Herrick's claims were premised on Grindr's geolocation feature, they were similarly barred, because under § 230 an ICS "will not be held responsible unless it assisted in the development of what made the content unlawful" and cannot be held liable for providing 'neutral assistance' in the form of tools and functionality available equally to bad actors and the app's intended users."

The Court also affirmed dismissal of Herrick's claims based on statements in Grindr's Terms of Service. The Court found that the statements "do not represent that Grindr will remove illicit content or take action against users who provide such content, and the Terms of Service specifically disclaim any obligation or responsibility to monitor user content." The Court additionally held that the claims failed for lack of causation: "Herrick therefore could have suffered the exact same harassment if he had never seen the Terms of Service or created a Grindr account; so his injury is not a 'direct and proximate result of his reliance on [the alleged] misrepresentations.'"

**The Court also rejected Herrick's argument that his claims were based on Grindr's design and operation of the App rather than on Grindr's role as a publisher of third-party content.**

*Herrick v. Grindr LLC* is an impactful decision as it is only the Second Circuit's third foray into addressing § 230. In issuing its opinion, the Second Circuit reaffirmed § 230's broad immunity for the content of bad actors, against the backdrop of cases such as [Daniel v. Armlist, LLC](#), 2018 WL 1889123 (Wis. App. Ct. Apr. 19, 2018), which have attempted to chip away at the statute's potency. It provides one more circuit decision rejecting the efforts to work around § 230 by arguing that an app or website is defectively designed.

*Daniel P. Waxman and Courtney J. Peterson, Bryan Cave Leighton Paisner LLP in New York represented Grindr LLC and KL Grindr Holdings, Inc., and Moez M. Kaba, Hueston Hennigan LLP in Los Angeles represented Grindr Holding Company. Plaintiff was represented by Tor B. Ekeland, Tor Ekeland Law, PLLC, Brooklyn, NY and Carrie A. Goldberg of C. A. Goldberg, PLLC, Brooklyn, NY.*

## *Hot Topics Roundtable*

# Internet Regulation and Free Speech

*May's hot topic is the past and future of speech regulation online: the current state of play, the role of government and content providers, and how the First Amendment offers guidance (or lack thereof) in addressing these issues.*

*Our panelists: Eric Goldman, well-known blogger and professor at Santa Clara University School of Law; Joshua Koltun, a solo practitioner in San Francisco who has counseled numerous digital publishers; and Jeff Hermes, deputy director of the MLRC and former director of the Digital Media Law Project at Harvard University's Berkman Center for Internet & Society.*

**1. A few years ago social media platforms such as Facebook seemed to be saying there should be no censorship on their platforms, almost all speech was ok, and that no regulation, or self-regulation, was appropriate. They take a different position today. Are they just talking the talk for political reasons or has the environment changed?**

**Goldman:** I'm not sure I agree with the predicate assumption. Even a few years ago, most social media platforms were removing lots of legally permissible content. However, since then, the major social media platforms – especially Facebook, YouTube, and Twitter – have been inundated with massive volumes of junk content that was no longer possible to ignore. In particular, the Russian disinformation campaign in the 2016 election exposed that the major social media platforms could be weaponized for anti-social purposes – which is antithetical to the goals of the social media platforms. Plus, the pressure from government, both domestically and internationally, has gotten so strong that it could not be easily dismissed.

**Hermes:** I would dispute the suggestion that any platform, Facebook included, has taken a “no censorship” stance with respect to user speech; to the contrary, the major platforms have long reserved to their own discretion the ability to remove material for any of a number of reasons or for no reason at all, and have routinely exercised that right. That is entirely within the platforms’ own First Amendment rights, of course, which largely renders the question of externally-imposed regulation moot except with respect to speech that could be punished under the First Amendment. Despite public outrage, it is meaningless to talk about whether platforms are for or against regulation of racist or violent content, or other categories that do not fall within exceptions to the First Amendment.

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This question really seems to be about whether platforms still believe that they need the protection of statutes such as Section 230 of the CDA and Section 512 of the DMCA to insulate them from liability for user-generated content that is actually unlawful. By and large, I do not see platforms retreating from their belief that these protections are essential, although we have seen some softening of that position at certain companies with respect to specific instances of egregious activity such as sex trafficking.

What has changed in recent years is the degree of public scrutiny given to platforms' attempts to stem particular patterns of undesirable behavior. The problem is that different groups disagree as to which patterns are offensive, which is why regulation in this area is fraught with danger – virtually any attempt by government to meddle with moderation decisions would constitute a content-based, if not actually viewpoint-based, regulation of speech.

**Koltun:** I am not sure it is fair to say that all social media platforms were taking the position that there should be no self-regulation of content. I think the common position was that each platform should be allowed to set its own standards for regulating what speech they will permit and let the consuming public pick the platform they find the most congenial. To be sure, the prevailing assumption was, and I think still is, that the consuming public in general will want the platforms to act as pretty open forums. There certainly seems to be some political momentum around the idea that "we can't just sit here, we have to do something!" And the platforms are responding to this by trying to reassure us that they are doing "something" to weed out "harmful content."

The problem is that there really isn't any consensus at all as to what constitutes "harmful content." From a First Amendment perspective, the right of a platform to exercise editorial control over "harmful" speech is a very different situation from that of the government seeking to regulate "harmful" speech. But that doesn't make the task of drafting rules concerning "harmful" content any easier. The difficulty for social media platforms is that they wish to be PLATFORMS, not editorial voices of their own. They want to be seen as imposing some appropriate, but limited, "house rules" without appearing to be making biased or, even worse, ad hoc decisions.

Mark Zuckerberg seems to be calling for governmental or quasi-governmental regulation as opposed to self-regulation. I think the purpose is to take the onus off Facebook to decide what is "harmful," and also to set severe limits on the extent to which any content will be regulated, because a governmental or quasi-governmental entity would have far less leeway than a private entity.

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## 2. Does the First Amendment outlaw any government regulation? If so, what should be done if some limits on speech on social media platforms are appropriate?

**Goldman:** Of course not. The First Amendment permits a wide variety of speech restrictions. Some categories of speech, such as obscenity, child pornography, and true threats, are categorically outside of the First Amendment's protection. Other categories of speech, such as commercial speech, receive less than full First Amendment protection. These are all grounds for speech regulation today despite the First Amendment. To me, the real question is whether we want to require private enterprises to decide when speech is legal and when it isn't. Private enterprises aren't likely to do as good a job at such evaluations as courts, and there is often substantial collateral damage from imposing liability on private enterprises for third-party speech.

**Hermes:** Yes, the First Amendment generally prevents the government from substituting a legislative judgment as to moderation of content for a platforms' own judgment. No, the First Amendment does not necessarily prevent holding a platform liable for the republication of unlawful content posted by a user (so long as the plaintiff can prove the elements of an underlying claim with respect to the platform, including any necessary fault or scienter elements) – which is why we have Section 512 of the DMCA for copyright and Section 230 for most everything else. If “limits on speech” are appropriate, that leaves you with two problematic options.

First, you could eliminate Section 230 protection for certain categories of “problem speech,” restoring republication liability. This (1) presumes that the “problem speech” is actually unlawful, and (2) poses a problem because platforms often have no practical way to distinguish lawful from unlawful content. Given that we could expect at least the degree of abuse and misuse of takedown notices that we see in the narrower context of copyright under Sec. 512, the result would be the mass removal of lawful content. Even if you were to adopt a removal and restoration procedure as per Sec. 512, it would still allow the censorship of protected speech for at least some period of time.

Second, you could try to figure out what it is about social media that is producing undesirable behavior and alter the structure of the platform in response. That too has perils where the functions that generate “problem speech” are the same ones that make social media valuable. For example, the networking effects of social media allow minority voices to find one another and have an effect that they've never had before. That's great if you're talking about unfairly oppressed segments of society but not so great if you're talking about the lunatic fringe – and the latter always argues it's the former. Moreover, even if structural solutions are possible,

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attempts to enact those solutions through law would almost certainly fail for lack of content neutrality.

**Koltun:** The First Amendment severely restricts the government's ability to regulate content, but it doesn't outlaw any regulation. The precise contours of "content-neutrality" may be in flux, but that doesn't mean any and all any and all regulation would be necessarily be struck down as unconstitutional.

Certainly, the First Amendment does not generate Section 230. I suspect the courts will be more lenient in scrutinizing carveouts to Section 230 than they would be to direct regulations. That is not to say that any and all carve-outs would survive constitutional scrutiny.

Legislators seeking to rein in social media and other internet platforms may find it more fruitful to focus on the regulating the data-gathering ecosystem that is the lifeblood of social media. That is an area in which I think the Courts would give regulators an even more leeway. The countervailing privacy interests may well be seen as constitutional interests, and in any event as compelling interests.

### **3. How can social media companies monitor and police the millions of posts on their sites? Who should do it and what standards should be used?**

**Goldman:** Social media platforms use a variety of tools to police their networks, including ex ante technology filters, ex post technology filters, human pre-publication and post-publication review, user flagging, third party blocklists, and more. These techniques all create Type I and Type II errors, so our goal should be to make sure regulation doesn't exacerbate the category errors.

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**Hermes:** You have to take the last part of this question first, because the feasibility of content moderation depends on what you're looking for. If you have a limited purpose forum for discussion of Star Trek, it's much easier to identify content that doesn't belong on the forum than if you are trying to moderate an all-purpose forum.

As for what the rules "should" be, the answer is whatever the platform wants them to be. There is no legal reason that a platform has to set its limits to be co-extensive with the First Amendment. A smart platform will not be shy about its exercise of editorial discretion if it wants to preserve its own First Amendment rights; it needs to position itself closer to the newspaper in *Tornillo* (which could not be compelled by law to host third-party content) than to the shopping center in *PruneYard* (which could). Some platforms would prefer their role to be as invisible as possible, but owning one's First Amendment rights can help platforms avoid grief from users who object to having their content blocked: "You were in the section of our site designated as family-friendly, you posted adult-oriented content, end of story."

But this question really seems to be about the difficulty of moderating at scale. You can try to do that with technology, you can try to do that with lots of people, you can try a combined approach where algorithms flag content and people review it. It's expensive any way you go about it, and will never be perfect. Moreover, any time moderation depends on extrinsic facts, the best you can do is guess unless you're prepared to investigate (which is impossible at scale). Neither humans nor algorithms can determine whether a statement is false just by reading it.

**Koltun:** I am deeply skeptical as to whether it is possible. I try to imagine a manifestly wise/fair/ thoughtful person (myself) in the position of one of these poor employees seeking to deal with the firehose blast of claims that this or that content is "harmful," and having to make hundreds of multiple decisions on the fly, and I can't imagine that I would do a good job. I think it is very difficult even if one assumes that the rules defining "harmful" are appropriate and that everyone involved is given a fair opportunity to weigh in on the dispute. And I don't know that either of those assumptions actually is true in real-world situations.

Of course, the volume of problems being blasting through that firehose depends on how broadly the platform defines "harmful." But no matter how narrowly one defines it, one is always going to be accused of being biased and unfair in administering the rules.

I also think it is easy to over-estimate the effectiveness of any system of self-censorship. Imaginative people can find ways to evade any system of censorship, for example by using coded language. To try to plug those holes by making determinations as to who is using codewords and "dog whistles" becomes ever more problematic.

Indeed, in some ways such censorship may backfire. I don't doubt that social media can be a vehicle for hateful speech that is used as a justification for violence. By barring such speech, a platform will, in one sense stop "hate" from being circulated. But it may also have the unintended effect of serving to confirm a powerful and dangerous narrative, at least in some circles and subcultures. According to that narrative, there are certain truths that cannot be spoken (i.e., about the hated group). These truths cannot be spoken, not because they are false, but because shadowy cabals are preventing them from being spoken. Stamping out conspiracy theories is no easy task.

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**4. In some countries, without the burden/benefit of a First Amendment, Government is weighing in on what should be taken down. Is this a bad idea? What should social media companies do if their servers distribute their content in those countries? What will be the ramifications of a final decision in *Google v. CNIL*, perhaps allowing for extraterritorial reach of takedown orders?**

**Goldman:** All governments gravitate towards censorship. This is inherent in the structure of government. The First Amendment curbs some of that tendency in the US, but in other countries, government censorship is an omnipresent reality. So giving more power to governments to decide what content they like and don't like only feeds the censorious impulses of governments.

**Hermes:** Even with the First Amendment, the U.S. government weighs in on what should be taken down – e.g., copyright infringement and material related to sex trafficking. The U.S. government also routinely puts soft pressure on platforms with respect to particular content, such as the Obama administration leaning on Google/YouTube to remove the “Innocence of Muslims” video. It’s a good idea when the reason for removal accords with the free speech principles and standards of the nation where the takedown occurs, it’s a bad idea when it doesn’t.

It’s the cross-border issues that are tricky, because free speech principles differ and the availability of online content doesn’t map to jurisdictional borders. This has been an issue for as long as there’s been a global internet, and the general answer has been to comply with local law where feasible on the theory that it’s better to provide the information you can to people in a particular country than to be blocked entirely. Technically, companies have relied on geoblocking particular content based on the location of the requesting user, so that compliance with local law does not result in global censorship.

It’s not a perfect solution, though, because tools such as virtual private networks can be used to circumvent geoblocking. The issue in the *Google v. CNIL* case stems in part from the French data protection authority’s unwillingness to accept the porous geoblocking of content as a response to a “right-to-be-forgotten” takedown demand, ordering that Google delist content globally. A ruling in favor of France would raise the specter of a least-common-denominator approach to online content; in its starkest form, this presents countries with the choice of acceding to worldwide takedown demands, on the one hand, or taking an axe to international fiber cables and dividing up the internet into regional networks, on the other.

It is more likely that certain tech companies will simply choose not to do business in Europe while those that choose to enter Europe will accept the worldwide limitations that are entailed. That’s bad enough, however, and hopefully the European court will see sense and reject France’s position.

**Koltun:** I feel the same way about government action in countries without a First Amendment as I do about such efforts in my own country. Ultimately the questions of extraterritorial reach is a practical question as to where a company has assets and personnel. Perhaps at some point

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these difficulties will create openings for smaller US-based companies to provide better platforms for free speech, behind the shield of the First Amendment and the SPEECH Act.

**5. What are the two areas where self-regulation is most needed? Will it happen in a significant way in the next two to five years?**

**Goldman:** I don't think there's an industry-wide answer to these questions. Each service creates its own unique community, each of which poses their own unique challenges. So each service has its own highest priorities for self-regulation.

**Hermes:** Ongoing responsibility in the implementation of machine learning and AI-based solutions will be critical. The potential impact of AI-driven decisions on the rights and opportunities of individuals in an ever-widening range of activities makes it essential to establish norms for issues such as the types of information that are used to train these systems for particular applications, transparency about the training process, and the degree to which human judgment is permitted to override particular results. These conversations are already happening and I expect they will continue.

I would have said data privacy for my second, but we already have the GDPR and the CCPA and there are numerous privacy-related federal bills floating around in Congress. As such, it seems like any opportunity to stave off government regulation through self-imposed restrictions has passed. We have seen this in terms of tech companies shifting from arguing about whether legislation is needed to what form it should take.

**Koltun:** It would not surprise me if large segments of the industry adopt some sort of standardized templates that would give the users more effective control over the extent to which their data -- browsing habits, location, and so forth -- are shared. In other words, something more than the notional "consent" that is involved in the typical "click here to continue [and thereby agree to whatever it is that we want you to agree to in our lengthy privacy policy]." That would involve a sea-change in the way data is handled, but the various players may well decide to adopt some such templates out of a fear that any legislative solution would be even more devastating to their business models.

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**6. Is Section 230 under active threat, and if so, what form might that take? Will we see new legislative carve-outs for terrorism-related content, revenge porn, deepfakes or other specific problematic categories? Is a complete repeal of sec. 230 feasible?**

**Goldman:** Section 230 is in extreme peril. Both Democrats and Republicans are criticizing it, and that suggests the potential for rare bipartisan agreement. At this point, pretty much any Section 230 reform proposal poses extreme risks that it will pass, so a lot depends on who makes the first proposal.

**Hermes:** There certainly seems to be greater political will to question Section 230 than we have seen previously, and on a bipartisan basis. It is more likely that we will see proposed carve-outs along the lines of FOSTA, because it is less feasible as a political and public relations matter for tech companies to mount a lobbying defense against carve-outs for specific and obvious evils. Moreover, a recent series of failed lawsuits against digital platforms for their alleged role in terror attacks could inspire legislation in much the same way that a series of failed lawsuits against Backpage.com over sex trafficking provided a political foundation for FOSTA.

I would previously have said that a total repeal or reworking of Section 230 was very unlikely due to the catastrophic economic effects that would result.

Unfortunately, the dialogue around the statute has become so twisted (Sen. Cruz getting the idea from somewhere that the statute mandates content neutrality, Speaker Pelosi describing it as a gift to platforms rather than protection for users' speech, a weird recurring belief that Section 230 is the defense of internet giants when it is if anything even more critical for smaller companies) that I would not be surprised to see someone float a proposal to get rid of it entirely.

**Apparently benign carveouts from Section 230 may well have massive impacts on the ecosystem, particularly for smaller players.**

**Koltun:** I think a wholesale revision or repeal of section 230 is unlikely. I think some of the views commonly expressed in recent discourse actually reflect contradictory impulses. For example, Senator Cruz in his questioning of Mark Zuckerberg at the joint hearing over Cambridge Analytica pushed the notion that the beneficiaries of Section 230 need to be "neutral platforms." Of course, that is actually the exact opposite of the original legislative purpose of Section 230, which was precisely aimed at overturning the Prodigy decision and giving platforms a free hand to censor content. But we can understand him to be advocating a vision as to how section 230 might be modified in the future. There is another strain of thought suggested by Senator Wyden, one of the original authors of Section 230, which is that the purpose of Section 230 was to encourage platforms to censor harmful content, and if they aren't taking their editorial/censorship role seriously enough, maybe the legislature needs to step in and force the beneficiaries of Section 230 to do more to censor speech. These two impulses tend to cancel each other out. Needless to say the internet ecosystem has evolved considerably since the days of Prodigy, and there are a lot of powerful vested interests, not to mention vested expectations on behalf of the consuming public, that will be hard to uproot.

But if wholesale revision is unlikely, I think purportedly "modest" carveouts are likely. Such apparently benign carveouts may well have massive impacts on the ecosystem, particularly for smaller players. But even those powerful vested interests that would be impacted may well make strategic decisions to channel the call to "do something!" rather than attempt to resist it completely. The inadvisability of such carveouts is no guarantee against their passage. See SESTA.

# Fair Report Privilege Bars Libel Suit Against Jeanine Pirro

By Dori Ann Hanswirth, Theresa House, and Jesse Feitel

Judge Jeanine Pirro's report and commentary about controversial legal proceedings was absolutely protected under New York law, according to a recent New York state court decision. [Mckesson v. Pirro](#) (N.Y. Sup. March 25, 2019).

Justice Robert D. Kalish dismissed the defamation complaint of prominent social activist DeRay Mckesson against Fox News and its popular host Judge Jeanine Pirro. In his 22-page decision, Justice Kalish makes an important clarification about the scope of New York's fair and true report privilege, and provides a full-throated defense of the legal protections available to commentators who express opinions about court proceedings—even when those opinions are controversial.

## Factual Background

Mckesson sued over Judge Pirro's comments on two federal court proceedings in Louisiana. Both of those cases related to Mckesson's activities at a 2017 political demonstration in Baton Rouge associated with the Black Lives Matter movement.

In the first of those actions, Mckesson was the lead plaintiff for a class action of 69 protestors who were arrested at the demonstration, alleging that they were victims of excessive force and arrest without probable cause. The case was settled with plaintiffs receiving a "total economic benefit[]" of \$136,000.

In the second Louisiana action, a different federal judge dismissed a personal injury complaint against Mckesson filed by an anonymous police officer who was seriously injured during the same demonstration. In his John Doe complaint, the police officer claimed that Mckesson was responsible for his injuries based on allegations that Mckesson "staged and organized" the demonstration, that he "was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests," and that, as the protest grew into a full-blown riot, he "incited the violence." A proposed amended complaint submitted by the officer also asserted claims against the social movement "Black Lives Matter" and further alleged that Mckesson "direct[ed] the activity of the protestors to incite lawless actions, including blocking of a public highway and allowing protestors to throw objects at the police."

On September 28, 2017, the district court in the Doe police officer action granted a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The court first held that the complaint fell below federal pleading standards, because the officer did not allege specific facts as to *how* Mckesson allegedly incited violence or *what* orders that he gave to others to commit violent acts. The court found that the First Amendment barred the officer from holding Mckesson liable "solely because of his association with" other protestors who

**Judge Jeanine Pirro's report and commentary about controversial legal proceedings was absolutely protected under New York law.**

may have acted violently at the rally. The court also refused to allow the officer to proceed against the proposed defendant Black Lives Matter, because the group was not a “juridical person that is capable of being sued.”

### **The Challenged Statements**

The next day, Judge Pirro appeared as a guest on Fox News’ morning news and commentary program “Fox and Friends” to discuss and analyze the outcome of the Louisiana lawsuits. In her segment, Judge Pirro summarized the allegations against Mckesson in the police officer’s complaint and expressed her opinion about the substance and outcome of the two lawsuits—which was, essentially, that it was unfair for the law to allow one group of protestors to sue in federal court as part of a class action, while at the same time denying an injured police officer the right to sue the another group of protestors, particularly when both groups were part of the same protest and the same organized social movement.

Mckesson’s suit challenged the following statements by Judge Pirro: (1) that Mckesson “directed the violence”; (2) that the John Doe police officer “was injured at the direction of Deray Mckesson”; and (3) that “Deray Mckesson walks away with \$100,000 for an organization that is amorphous.”

### **Fair and True Report of Judicial Proceeding / Protected Opinion**

Judge Pirro and Fox moved to dismiss Mckesson’s complaint on grounds that the challenged statements were absolutely privileged under N.Y. Civil Rights Law § 74 (“Section 74”) as fair and true reports of the two Louisiana proceedings, and that the challenged statements were not actionable as a matter of law because they were protected opinion. The motion to dismiss also asserted that the statement that Mckesson received a civil rights settlement was not capable of a defamatory meaning, and that none of the statements were published with actual malice. The motion was fully submitted on May 15, 2018, and oral argument took place on October 23, 2018.

In the March 25, 2019 decision, Justice Kalish rejected Mckesson’s arguments and dismissed the complaint in its entirety. The court concluded that Judge Pirro’s comments were privileged under Section 74, and also protected as opinion under the First Amendment and the New York State Constitution.

First, the court rejected Mckesson’s contention that because Section 74, by its literal terms, applies to “libel” claims only, it could not bar a claim based on a television report, which Mckesson argued should be considered a claim based in slander. Citing multiple previous decisions applying Section 74 to defamation claims based on televised statements, Justice Kalish held unequivocally that Section 74 applies both to slander and libel claims, as well as to statements on television.

Next, the court confirmed that a report summarizing allegations in a judicial complaint is protected by Section 74, *even if* those same allegations are later found not to satisfy federal

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pleading standards. Mckesson argued that Judge Pirro's statements could not be a "fair and true" report of the proceedings because the police officer's allegations against him that Pirro reported on were too conclusory to survive a Rule 12(b)(6) motion (even though the segment also reported that the claims had been dismissed). Justice Kalish disagreed, holding that a report discussing allegations in that complaint will be absolutely privileged under Section 74 so long as it was a substantially accurate report of its content—even if a complaint is subsequently dismissed by a federal judge on Rule 12(b)(6) grounds. (Notably, on April 24, 2019, [the United States Court of Appeals for the Fifth Circuit reversed the court below](#) and reinstated the negligence claim against Mckesson.)

Mckesson also attempted to evade Section 74 by arguing that certain of Judge Pirro's statements would be interpreted as stating actual facts about him, rather than mere allegations in a lawsuit, because for at least one of the statements she had failed to say "the plaintiff alleged" before repeating the plaintiff's allegations. The court disagreed, holding that Section 74 will apply so long as the publication as a whole will be understood to be a report of an official proceeding, *even if* each individual sentence of the report does not expressly refer back to that proceeding.

Separate and apart from the court's Section 74 holding, Justice Kalish also agreed that Judge Pirro's statements were protected as her opinion of the Louisiana proceedings, based squarely on the facts alleged in those proceedings.

In reaching this conclusion, the court emphasized the context of the statements, including that the statements at issue in were made on "Fox & Friends," which is known to be a news and commentary talk show, and that Judge Pirro had a reputation and earned popular acclaim for her opinionated commentary.

The court also relied on the context of the statements to reject Mckesson's argument that Judge Pirro's statements implied the existence of undisclosed facts. The court concluded that there was "no suggestion at any point" that Judge Pirro and the other Fox anchors who appeared during the segment had "any kind of direct knowledge" about the Baton Rouge demonstration. According to the opinion, there was absolutely no insinuation that Judge Pirro or the other anchors "witnessed the protest or [] spoke to sources who witnessed the protest."

Viewing the entire segment in context, according to Justice Kalish, distinguished this case from *Greenberg v Spitzer*, 155 A.D.3d 27 (2d Dep't 2017). In *Greenberg*, the Second Department concluded that the defendant, the former New York State Attorney General, may have caused viewers to believe he implied undisclosed facts about the plaintiff because he "spearheaded the investigation" into the plaintiff's accounting practices. The court also rejected Mckesson's reliance on the New York Court of Appeals' decision in *Davis v. Boeheim*, 24 N.Y.3d 262 (2014) and focused on the broader context of the segment to conclude that Judge Pirro was expressing a pure opinion that the Doe police officer should have been allowed to continue his federal lawsuit against Mckesson, on the basis of Mckesson's actions during the Baton Rouge demonstration.

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The court further concluded that the controversial subject matter, which was part of an ongoing debate involving such heated topics as police brutality and race, gave further support to a finding that Judge Pirro's comments were protected opinion. Against this backdrop, according to Justice Kalish, viewers would understand that Judge Pirro was expressing her opinion rather than statements of fact.

While Justice Kalish did not reach the question of whether the Mckesson had sufficient alleged that the defendants acted with actual malice, he nevertheless concluded his opinion with a lengthy citation to the New York Court of Appeals' decision in *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369 (1977), which provides a strong defense to the *N.Y. Times Co. v. Sullivan* doctrine. Specifically, Justice Kalish quoted the Court of Appeals' holding that even though the *Sullivan* doctrine "may sometimes yield harsh results" and may leave "[i]ndividuals who are defamed ... without compensation," principles of free speech command this result because "excessive self-censorship by publishing houses would be a more dangerous evil."

*Dori Ann Hanswirth, Theresa M. House, and Jesse M. Feitel of Arnold & Porter represented Fox News and Judge Jeanine Pirro. Plaintiff was represented by Matthew D. Melewski, Altamont, NY.*

# Legal Frontiers

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# Digital Media

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Enforcement and  
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**A Fourth Amendment  
for the Digital Age**

**Free Speech for  
Product Counsel**

# California Appeals Court Departs from Predominate Standard of Review for Libel by Implication Claims

By Nina D. Boyajian, Kelly L. McNamee and Jena A. MacCabe

Last month, on somewhat unusual grounds, a California state appeals court granted an otherwise paradigmatic anti-SLAPP motion to strike a complaint asserting libel by implication. [Sonoma Media Investments, LLC v. Superior Court](#), Nos. A151968, A152008, A152320 (Cal. App. 2019).

Rather than apply fully what is now considered to be the controlling legal standard for such claims, the court's directive granting defendants' anti-SLAPP motion and striking the complaint turned on plaintiffs' failure to prove the falsity of the alleged defamatory implication. The court's reasoning, however, may prove problematic insofar as it ignores the need for a plaintiff to demonstrate the author's intention or endorsement of the purported defamatory inference and, instead, suggests that falsity alone provides the dispositive element in libel by implication cases.

The case arose from a series of investigative articles published by *The Press Democrat*, a daily newspaper with the largest circulation in the California North Bay. In the span of less than a month in late 2016, *The Press Democrat* published five articles detailing substantial amounts of independent election expenditures made by Scott Flater on behalf of three City Council candidates. Flater, along with his father-in-law William Gallaher, a prominent real estate developer, sued the newspaper asserting causes of action for defamation, libel per se, and false light invasion of privacy. The gravamen of plaintiffs' complaint was that the articles falsely implied that Flater was Gallaher's "front man" such that the latter could circumvent direct campaign contribution limits, and that Gallaher was the true source of Flater's independent political expenditures—*i.e.*, those made not to a specific campaign but tending to support one candidate. Such a libel by implication claim presents a constitutionally problematic theory of recovery because it is premised not on actual published statements but on purportedly false suggestions, impressions, and implications arising from otherwise true statements.<sup>[1]</sup>

Defendants moved to strike the complaint pursuant to the California anti-SLAPP statute, which authorizes early dismissal of meritless or retaliatory causes of action brought to stifle the valid exercise of First Amendment rights. After confirming that plaintiffs' claims arose out of news reportage falling within the purview of the anti-SLAPP provision, the court turned to the merits by scrutinizing whether plaintiffs could establish a probability of prevailing on their libel by implication claim. While some jurisdictions have yet to adopt or clarify a standard of review for such claims, the majority approach is to subject implication claims to rigorous scrutiny to

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avoid a chilling effect on admittedly true speech caused by burdensome litigation and intrusive inquiry into the editorial process. Accordingly, the prevailing legal standard follows:

To survive a [dispositive motion] for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to [1] impart a defamatory inference and to [2] affirmatively suggest that the author intended or endorsed that inference.

*Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 44 (1st Dep’t 2014)<sup>[2]</sup>; *see also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (“The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.”); *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990) (“[I]f the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.”); *Chaiken v. VV Publ’g Corp.*, 907 F. Supp. 689, 698 (S.D.N.Y. 1995) (“[P]ublisher is not liable for a defamatory innuendo unless it intended or endorsed that inference.”), *aff’d*, 119 F.3d 1018 (2d Cir. 1997).

Here, the court’s decision is silent as to the newspaper’s intent or endorsement, the second prong of the analysis, as it relied solely on plaintiffs’ failure to make a *prima facie* showing of the falsity of the alleged implication. Specifically, the court’s inquiry into the merits focused on two declarations submitted by Flater—one that proffered evidence of falsity and another that failed to do so with the same exactitude—and a companion declaration submitted by Gallaher. The court questioned the evidentiary value of the first affidavit submitted by Flater, reasoning that the inconsistencies in Flater’s affidavits indicated an inability to prove falsity. The court concluded that, at the very least, the affidavits injected ambiguity into the analysis, making it impossible for plaintiffs to carry their constitutional burden of proving the falsity of the implications.<sup>[3]</sup> Notably, throughout this discussion, the court appeared to take comfort in the presumptive ease with which plaintiffs could have proffered evidence of falsity, suggesting that their failure to make such a straightforward showing highlighted the apparent truth of the implication at issue.

The court’s comfort may have been misplaced, however, as most libel by implication claims are not readily amenable of direct proof of falsity.<sup>[4]</sup> By its very nature, proving the falsity (or truth) of a putative defamatory implication – that may or may not exist in the mind of a reader – is a notoriously slippery enterprise.<sup>[5]</sup> For this very reason, and to prevent the multiplication of defamation lawsuits based on subjective and amorphous inferences arising from truthful published accounts, courts across the country have required something more to establish a claim

**Proving the falsity (or truth) of a putative defamatory implication – that may or may not exist in the mind of a reader – is a notoriously slippery enterprise.**

for libel by implication—notably, that an alleged defamatory inference was intended or endorsed by the publisher based on an examination of the language of the entire communication. *Dodds v. Am. Broadcasting Co.*, 145 F.3d 1053, 1064 (9th Cir. 1998) (citing federal appellate court decisions holding that “the particular manner or language in which the true facts are conveyed” must affirmatively demonstrate that the defendant intended to create the defamatory inference), *cert. denied*, 525 U.S. 1102 (1999).

Accordingly, dismissals of disfavored libel by implication claims typically derive from a plaintiff’s inability to establish the requisite intent or endorsement, an effective means of disposing of such claims through threshold dispositive motion practice. Without expressly analyzing—or even acknowledging the importance of—the author’s intent or endorsement, but instead relying solely on plaintiffs’ failure to establish falsity, the court’s decision may muddy application of the speech-protective two-prong standard in future defamation by implication cases.

*Nina D. Boyajian is a Shareholder and Jena A. MacCabe is an Associate in Greenberg Traurig’s Los Angeles office. Kelly L. McNamee is an Associate resident in the firm’s Albany office. They are members of the firm’s Media and Entertainment Litigation Group. Plaintiffs were represented by Perry, Johnson, Anderson, Miller & Moskowitz, Santa Rosa, CA. Defendants were represented by Thomas R. Burke, Rochelle L. Wilcox and Diana Palacios, Davis Wright Tremaine.*

### Notes

<sup>[1]</sup> Libel by implication claims are carefully constrained and confront significant constitutional obstacles because they create a chilling effect beyond that associated with explicit misstatements of fact by charging the press “with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendos that could be drawn from the article.” *Woods v. Evansville Press Co.*, 791 F.2d 480, 487-88 (7th Cir. 1986).

<sup>[2]</sup> Recognizing that implication claims must be subjected to careful judicial scrutiny because freedom of speech is jeopardized in direct proportion to a libel plaintiff’s ability to extrapolate from a news article to have it say something not contained on its face, the *Stepanov* court emphasized that application of the second prong of this inquiry presents a threshold question of law for the court. 120 A.D.3d at 44.

<sup>[3]</sup> According to the Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*, “where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.” 475 U.S. 767, 776 (1986). The First Amendment mandates this resolution “to ensure that true speech on matters of public concern is not deterred . . . [and] to encourage debate on public issues.” *Id.* at 776-77. “To do otherwise could only result in a

deterrence of speech which the Constitution makes free.” *Id.* at 777, quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

[4] A non-literal approach to the truth defense would expose a reporter to tort damages for the falsity of statements she did not make (or consciously chose not to make) even though what she did report was true. As stated by the federal district court in *Conroy v. Kilzer*, 789 F.Supp. 1457, 1462 (D. Minn. 1992) (emphasis supplied) in rejecting such an anomalous result:

[I]f plaintiff were allowed to base recovery on his own interpretations of defendants’ statements, rather than on the statements they actually made, defendants could be held liable for statements that they did not make. ***Holding media defendants liable for statements they did not make raises serious first amendment concerns.***

[5] *Locricchio v. Evening News Assoc.*, 438 Mich. 84, 122 (Mich. 1991) (“[I]t seems clear that claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.”).

# Legal Frontiers

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# Digital Media

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**In-line linking after *Goldman***

**Protecting Anonymous  
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**Compliance with the  
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Consumer Privacy Act**

**Cross-Border Takedown  
Enforcement and  
EU Copyright Directive**

**A Fourth Amendment  
for the Digital Age**

**Free Speech for  
Product Counsel**

# Powerful Lobby Groups Take Aim at the Texas Anti-SLAPP Statute

By Laura Prather

As Tennessee passes SB 1097 (its anti-SLAPP statute), the other state that begins with T (Texas) seeks to overhaul its anti-SLAPP law.

Even before the session started, the writing was on the wall – it was going to be a fight to preserve the Texas Citizens Participation Act (“TCPA”). Virtually every article in legal journals and newsletters was about the “abusive uses” of the TCPA; for example, lawyers filing anti-SLAPP motions in response to anti-SLAPP motions or motions for sanctions. Or, the focus was on the TCPA’s broad reach, raising questions about its use in trade secret and covenant not to compete cases or in attorney disciplinary proceedings. Seldom was the discussion about whether a litigant brought forth any evidence to support its claim (prong 2). Instead, all eyes were on the types of cases the law reached and the mechanisms to which it could be applied. Those unfamiliar with broad anti-SLAPP statutes viewed the law as something that should only apply in defamation cases, ignoring the fact that creative lawyers can plead around defamation and that retaliatory actions come in all forms. In addition to the critical coverage the TCPA received, grumblings surfaced from lawyers, judges and prior supporters of the law, including the very powerful Texans for Lawsuit Reform (“TLR”).

By the time session began on January 8, 2019, TLR had united forces with the Texas Trial Lawyers Association, the Texas Civil Justice League, the Family Law Bar, the Texas Association of Defense Council, and the Texas Medical Association – organizations with a veritable Who’s Who of lobbyists at the Capitol. By the beginning of February, TLR had published on its foundation website its analysis of the TCPA entitled: “Texas’s Anti-SLAPP Statute: An effective statute but is it too broad?” They also distributed a hard copy to *every* lawmaker’s office in the Capitol. Although the analysis indicated it would suggest reform measures, the only solution offered was to refer back to a bill from the prior session that would have effectively gutted the law. Curiously, though, when the analysis was referenced in a newspaper editorial, TLR indicated the organization was only on the “sidelines” of the issue.

While this was transpiring, the Capitol was adjusting to a new Speaker of the House and anticipating who would be in the leadership that he named. When the committee chairs were announced, the TLR candidate for Chair of Judiciary & Civil Jurisprudence (Jeff Leach, R-Plano) was named. This is the committee that would hear any bill impacting the TCPA. The original House sponsor of the TCPA (Todd Hunter, R-Corpus Christi) was not given a chairmanship this session, and the original Senate sponsor had left the Senate. By the time the bill filing deadline arrived (March 8<sup>th</sup>) there were 3 bills in the House and 2 bills in the Senate hoping to “reform” the TCPA.

HB 2730 was filed by Judiciary Chairman Jeff Leach; HB 4575 was filed by Ways and Means Chairman Dustin Burrows (R-Lubbock); and HB 3547 was filed by Speaker Pro Tem

**Even before the session started, the writing was on the wall – it was going to be a fight to preserve the Texas Citizens Participation Act.**

Joe Moody (D-El Paso). The Moody bill was a proactive approach at reform that was supported by the media industry. Not surprisingly, though, the bill that was going to move was the Chairman of Judiciary's bill, HB 2730. HB 2730 was also the only bill to have a Senate companion (SB 2162) and was carried by Sen. Angela Paxton (the wife of Texas Attorney General Ken Paxton).

The key provisions of concern in HB 2730/SB 2162 were:

- It would eliminate the TCPA's existing definitions for the exercise of the right of free speech and the exercise of the right of petition, which would erase an entire body of law interpreting the statute, and would spark confusion and litigation over what the new definitions (or lack thereof) mean.
- It expressly stated that the law was procedural and would have prevented application in federal court.
- It exempted breach of non-disparagement contracts from the law's coverage.
- It would allow a plaintiff to nonsuit the case 3 days before a hearing with no repercussions and no payment of attorney's fees.

By all measures, the bill would have taken the teeth out of the TCPA.

### **Protect Free Speech Coalition Formed**

In hope of having a voice in the process, we built the Protect Free Speech Coalition – a coalition consisting of more than 620 organizations that believed in the purpose behind the TCPA and wanted to preserve the integrity of the law. In addition to national and local broadcasters and newspapers throughout the state (and beyond), the Coalition included: the ACLU, the BBB, Common Cause, Earth Rights International, Electronic Frontier Foundation, the Freedom of Information Foundation of Texas, Grassroots America, Greenpeace International, Institute for Justice, League of Women Voters, National Coalition Against Censorship, National Press Photographers Association, PEN America, Protect the Protest, Public Citizen, Public Participation Project, R Street Institute, Texas Campaign for the Environment, Yelp Inc., and more.

The Coalition launched a website featuring its membership list, the potential impact of the legislation, and examples from throughout the State of how the law had worked exactly as intended. [www.protectfreespeechcoalition.com](http://www.protectfreespeechcoalition.com). Some of the categories of demonstrated need listed on the website show how the TCPA helps: Digital Communities, Public Officials, Non-Profit Organizations, Domestic Violence and Sexual Harassment Victims, Consumers, Businesses, Law Enforcement, and Those Who Speak Out. In addition to the Coalition, the media became engaged in writing newspaper editorials and featuring broadcasts about how the law had helped average citizens. All of this lead to having a seat at the table for the negotiations on the bill.

The week after his bill was filed, Chairman Leach held a “stakeholders” meeting including the powerful lobby groups listed above (TLR, TTLA, TMA, *etc.*), AT&T, Institute for Justice

and the Protect Free Speech Coalition. Although we were severely outnumbered, we brought a citizen to tell her story about how the TCPA had helped her. In a nutshell, she was taking care of her special needs brother and placed him in an assisted living community. Unfortunately, the facility did not properly care for him, and when she brought her concerns to the facility's attention, the problems were not resolved. Among other things, her brother went months without necessary medication. Ultimately, she filed a complaint with a regulatory agency and posted an online review of the facility. In response, the facility summarily evicted her brother (without proper notice) and sued her for filing the complaint and posting the review. After she hired a lawyer and spent several thousands of dollars filing the motion to dismiss, the facility offered to drop the lawsuit if she would remove the online review. She declined the offer, and, because of the TCPA, her attorney (J.T. Morris) was able to get the case dismissed and fees awarded to her. After she told this compelling story to the room full of stakeholders (many of whom had only heard from judges and lawyers complaining about the law), the bill sponsor was so moved, he announced the 3-day non-suit provision would be removed from the bill. He then appointed a smaller "working group" to try to come to an agreement on a committee substitute.

After that, several hours of working group meetings and discussions began. The entire time, broadcasters, newspapers, citizens, consumers, and liberty groups were outnumbered, but we benefited from the intellect and willingness of MLRC members to help in the process. What became readily apparent in the discussions was how different people's views of the TCPA were. Those working group meetings, as well as meetings with Judiciary committee members, enlightened us to the fact that many had *only* heard about the law's abuses and not about the good it has done. Still, by the time the committee hearing took place (April 1), the proposed committee substitute was a drastic improvement from the original bill. There were, however, still some important concerns: most significantly, the new definition for "matter of public concern" was so narrow, it would only protect a fraction of instances where those who speak out are on the receiving end of a meritless lawsuit.

At the April 1<sup>st</sup> hearing, the committee heard from all of the lobbyists who were supporting the bill and from judges and practitioners who had concerns about the existing law, but they also heard from more than 3 dozen citizens ... citizens who had benefited from the TCPA, as intended. The hearing lasted for 4 ½ hours, and witnesses ranging from domestic violence victims to online commenters, from liberty organizations to right to life organizations, as well as review sites such as Yelp and Rip Off Report, all spoke about the need to preserve the integrity of the law and to continue to provide a broad definition of matter of public concern so the TCPA's applicability would continue to be broad. Ultimately what came out of the committee incorporates the *Snyder v. Phelps* definition and includes a provision expressly for speech about public officials and public figures. The committee substitute also still includes components that give the law teeth (*i.e.* discovery stay, interlocutory appeal and mandatory fees). There are, however, a number of ways the bill will limit the TCPA, both from an applicability standpoint and from the standpoint of what pleadings give rise to a motion being filed.

The bill is currently set to be heard on the House Floor on Monday, April 29<sup>th</sup>. So, stay tuned...

*Laura Prather is Co-Chair of Media & Entertainment Practice Group at Haynes and Boone, LLP.*

# Through the Looking Glass: Texas's Anti-SLAPP Law Held Applicable to Attorney Disciplinary Proceeding

By Devin L. Kerns

“When I use a word . . . it means just what I choose it to mean—neither more nor less.” [Comm’n for Lawyer Discipline v. Rosales](#), No. 03-18-00147-CV, 2019 Tex. App. LEXIS 2632, at \*29 (Tex. App.—Austin Apr. 3, 2019, no pet. h.) (Kelly, J., concurring) (quoting LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 205 (Macmillan and Co. ed. 1934) (1871)).

Texas’s anti-SLAPP law, the Texas Citizens Participation Act (“TCPA”), is notoriously broad in scope. In a particularly unusual application of the statute, a divided panel of the Austin Court of Appeals recently held in *Commission for Lawyer Discipline v. Rosales* that the TCPA may be used to dismiss attorney disciplinary proceedings. The court employed a technical, plain-language reading of the statutory enforcement action exemption and held that the exemption did not encompass such proceedings.

## Background and Court’s Analysis

In 2016, attorney Omar Rosales sent demand letters to medical providers in Texas, alleging that the recipients’ websites violated the Web Content Accessibility Guidelines (“WCAG”) of the Americans with Disabilities Act (“ADA”) and threatening the recipients with federal lawsuits. Certain providers filed grievances against Rosales with the Office of the Chief Disciplinary Counsel of the State Bar of Texas, which then instituted a disciplinary proceeding against Rosales on behalf of the Commission for Lawyer Discipline. The Commission alleged that Rosales violated the Texas Disciplinary Rules of Professional Conduct that prohibit fraudulent conduct and frivolous claims, among other Rules. Rosales moved to dismiss the proceeding under the TCPA. Rosales’s tactic worked at the trial court, which granted his motion and dismissed the suit. The Commission appealed, arguing in part that the TCPA did not apply and that if it did, the Commission met its burden of proof under the TCPA procedural framework to show clear and specific evidence of a *prima facie* case.

In determining whether the TCPA applied, the statute’s plain language ruled the day. The court held that the Commission could not take advantage of the enforcement action exemption under the TCPA because that exemption applies only to suits brought by the four entities listed—the attorney general, a district attorney, a criminal district attorney, or a county attorney. The court explained that accepting the Commission’s argument that the Texas Legislature could not have intended to exclude state disciplinary proceedings “would require us to either ignore or add words to the text that the Legislature enacted[.]”

**A divided panel of the Austin Court of Appeals recently held that the TCPA may be used to dismiss attorney disciplinary proceedings.**

The court was not persuaded by the Commission’s policy arguments to the contrary. While the Commission made “credible policy arguments . . . regarding the folly or wisdom of subjecting the Commission to the TCPA[,]” the court could not agree that applying the TCPA here would lead to “absurd results.” Further, the TCPA’s purpose of “safeguarding constitutional rights” was not inconsistent with the possible application of that statute to the State.

Additionally, the court’s previous decision in *Sullivan v. Texas Ethics Commission*, 551 S.W.3d 848 (Tex. App.—Austin 2018, pet. filed), did not control because that decision held that the underlying suit was not a “legal action” to which the TCPA applied. Specifically, the court emphasized that *Sullivan* presented “unique circumstances”—the plaintiff in that case sued the Ethics Commission to appeal an order determining that he failed to register as a lobbyist and that assessed a civil penalty against him. The court realigned the parties and, when the initial plaintiff became the defendant, he filed a TCPA motion to dismiss the Ethics Commission’s pleadings. The court denied his motion on the grounds that the instant proceeding was not a “legal action” as required under the statute. The *Rosales* court distinguished *Sullivan* and held that the Commission for Lawyer Discipline’s unresolved suit seeking affirmative legal relief against the attorney fell under the broad definition of “legal action.”

However, the *Rosales* court ultimately held that the suit should not be dismissed because the Commission introduced “clear and specific evidence” of its claim for professional misconduct by showing that (1) Rosales was a licensed attorney and (2) that he violated the Texas Disciplinary Rules of Professional Conduct by, among other things, misrepresenting the binding nature of the ADA and WCAG to providers’ websites and using a misleading trade name.

**In determining whether the TCPA applied, the statute’s plain language ruled the day.**

### Justice Kelly’s Concurrence

Alluding to Lewis Carroll, Justice Kelly concurred in the court’s result but opined that “[w]e are indeed through the looking glass” because the TCPA should not apply to exercises of free speech rights that go beyond what the law permits. The TCPA protects free speech rights not to an unfettered degree, but rather only to the “maximum extent *permitted by law*.” Justice Kelly attacked the majority’s application of *Sullivan*, explaining that *Sullivan* held that the TCPA did not apply to enforcement actions commenced by the Texas Ethics Commission because such an application would “frustrate the legislature’s . . . enforcement of the lobbyist-registration statute [.]” which was no different than the lawyer disciplinary context. She emphasized that the differences between the proceedings of the Ethics Commission and the Disciplinary Commission were “not substantive when viewed in context.” While the Ethics Commission comes to the trial court with an underlying regulatory decision in hand and the Disciplinary Commission does not, Justice Kelly detailed the “significant regulatory action” that occurs prior to the Disciplinary Commission filing suit.

Further, Justice Kelly explained that the Texas Supreme Court has broad power to promulgate rules on the procedures for asserting grievances against lawyers, but the majority's ruling essentially allowed the TCPA to trump those procedural rules. Lastly, she pointed out that lawyers do not have a free speech right to violate the Disciplinary Rules and that the majority's opinion "will only encourage attorneys facing discipline to file TCPA motions to dismiss as a way of delaying their proceedings." Note: The Texas Legislature is currently considering bills that would amend the TCPA. House Bill 2730 was amended in committee to exempt attorney disciplinary proceedings from the TCPA. On April 8, 2019, the bill was unanimously voted out of committee.

*Devin L. Kerns is an Associate at Vinson & Elkins LLP (Dallas). Plaintiff Commission for Lawyer Discipline was represented by Matthew J. Greer of the Office of the Chief Disciplinary Counsel, Austin, TX. Defendant Omar Rosales was represented by John W. Rudinger Jr. and Gaines West of West, Webb, Allbritton & Gentry, PC, College Station, TX.*

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# Fifth Circuit Denies Tampa Bay Buccaneers' Motion to Seal Courtroom in BP Oil Spill Case

By Pete Thomas and Tom Leatherbury

On March 29, 2019, the Fifth Circuit refused to prohibit public access to oral arguments in the Tampa Bay Buccaneers' ("the Bucs") bid to recover "millions of dollars" in damages relating to the *Deepwater Horizon* oil spill. [BP Exploration & Production, Inc. v. Claimant ID 100246928](#), No. 18-30375, 2019 WL 1434936 (5th Cir. Mar. 29, 2019). Although the team was previously able to seal the briefs and appellate record in its case, the court determined that the Bucs had not satisfied the higher standard for sealing a courtroom. In doing so, the Fifth Circuit underscored the strong presumption in favor of the public's right to access court proceedings.

## Background

In April 2010, over 4 million barrels of oil spilled into the Gulf of Mexico following an accident on *Deepwater Horizon*, an offshore drilling rig operated by British Petroleum ("BP"). In the years since, thousands of claimants have sought compensation for damages caused by the spill. In 2012, BP entered a multi-billion dollar settlement agreement to resolve claims brought by a broad class of individuals and businesses. The settlement included a confidential process through which class members could recover their share of the uncapped settlement amount. BP initially estimated that it would cost \$7.8 billion to resolve all the settlement claims. However, once numerous businesses began filing claims for lost profits, it became clear that the total cost would greatly exceed that estimate. BP has since appealed many of the businesses' claims, thus slowing down the disbursement process.

Initially, the Fifth Circuit ordered all appeals in the *Deepwater Horizon* litigation to be filed under seal, although it eventually opened most oral argument sessions. In February of this year, the Fifth Circuit issued an en banc order vacating its prior order sealing all *Deepwater Horizon* appeals by default. That order returned *Deepwater Horizon* appeals to the standard presumption that court proceedings are open to the public.

**Although the team was previously able to seal the briefs and appellate record in its case, the court determined that the Bucs had not satisfied the higher standard for sealing a courtroom.**

## The Bucs' Case

The Tampa Bay Buccaneers' *Deepwater Horizon* claim was not publicly known until the Fifth Circuit denied the team's motion. Judge Costa authored the court's five-page order. Because the appellate record is still under seal, it is not clear what the team's claim against BP

entails. On appeal from sealed proceedings before the district court, the Bucs moved to seal the courtroom during oral argument.

The Fifth Circuit denied the motion, recognizing that the right of public access to the courtroom is vital to the public's confidence in the judicial system. *See id.* at \*1. Simply put, “[h]ow can the public know that courts are deciding cases fairly and impartially if it doesn’t know what is being decided?” *Id.* Cognizant that it had already sealed the briefs and record in the case, the court distinguished sealing a record from closing a courtroom. Because public attendance at court proceedings allows the public to see that the judiciary functions fairly, “shutting the courthouse door poses an even greater threat to public confidence in the justice system” than sealing documents. *Id.*

The Bucs advanced three arguments for sealing the courtroom. The court rejected each. First, the team worried that confidential financial data would be disclosed at oral argument. The court found that fear to be unwarranted, given that numerous other businesses basing their *Deepwater Horizon* claims on profit and loss statements were able to argue their cases in open court without disclosing confidential information. The court also noted that it was able to look at the data from the bench without an attorney having to disclose that sensitive information during argument.

Second, the Bucs argued that opening the courtroom to the public would “gratify BP’s private spite, promote public scandal, and harm the team’s competitive standing” by surprising the public with the fact that a NFL team has a claim relating to the oil spill. *Id.* at \*2 (quotations omitted). The common law recognizes that some of these interests may limit the general presumption of openness. *Id.* (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)). In response, the court noted that the news of a NFL team seeking compensation for the *Deepwater Horizon* oil spill “is not in the same universe” of scandals that would warrant sealing a courtroom. *Id.* The court cited examples of sensitive cases, such as workplace harassment, sex crimes, and child abuse, that are heard in open court daily.

Finally, the team argued that opening oral argument would violate its “expectation of secrecy” that it had throughout the litigation, given that the settlement program proceedings were confidential under the class-wide agreement. However, the court responded that private confidentiality agreements, even if approved by a lower court, are not binding on judges. Above all, the court recognized that private parties cannot contract away the *public’s* right of access to court proceedings. Rather, it is for the courts to determine whether the parties have presented a sufficient justification for sealing the courtroom.

In *Claimant ID100246928*, the Fifth Circuit reaffirmed the foundational principle that court proceedings are presumptively open to the public. The case serves as a reminder that, absent a “good reason” to close the courtroom, courts will not allow litigants to exclude the public from judicial proceedings.

**“How can the public know that courts are deciding cases fairly and impartially if it doesn’t know what is being decided?”**

# Minnesota Court Rules Graphic Videos Shown to Jury Cannot Be Shielded from Public View

By Christopher Proczko

Despite the judge's natural inclination to protect victim and juror privacy, a Minnesota court hearing a high profile murder case concluded that any evidence shown to the jury must also be shown to the members of the press and public attending the trial. [\*State v. Noor\*](#).

In the same order, the court concluded that it could not prohibit the courtroom sketch artist from sketching members of the jury without running afoul of the First Amendment. In announcing her decision from the bench on April 9, District Judge Kathryn L. Quaintance explained that "The court, like the jury, must follow the law even if I disagree with it." A written order followed on April 10.

## Background and Lawsuit

Late in the evening of July 15, 2017, Minneapolis Police Officer Mohamed Noor shot and killed Justine Ruszczyk Damond, an unarmed woman, while he and his partner were responding to a 911 call. Mr. Noor is a member of Minneapolis's vibrant Somali community and was one of the first Somali-Americans in the Minneapolis Police Department. The case received national and international press attention, and several weeks after the incident, Noor was charged with second-degree murder, third-degree murder, and second-degree manslaughter.

After several months of pre-trial proceedings, jury selection began on April 1, 2019. Public interest in the trial remained constant, and multiple media outlets regularly reported on the proceedings. While jury selection was still underway, Judge Quaintance announced her intention to conduct trial with two specific controls in place. First, suggested video screens in the courtroom would be turned away from the public so that only the jury and other trial participants could see body-cam or dash-cam footage recorded by Mr. Noor, his partner, and other officers on the scene of the shooting, as well as photographs from the medical examiner's office. Second, the judge suggested she might limit the courtroom sketch artist from portraying the jurors in the courtroom during the trial.

Shortly thereafter, a media coalition comprising Star Tribune Media Company, LLC, CBS Broadcasting Inc., Minnesota Public Radio, TEGNA Inc., Fox/UTV Holdings, LLC, The Associated Press, Hubbard Broadcasting, and the Minnesota Coalition on Government Information ("the Coalition") filed a motion seeking to ensure that the public and the press would have access to the same information and evidence that was presented to the jury in open court and that no prior restraint would be imposed on the sketch artist.

**The court found there had been no showing that allowing the press and public to view the video footage would create a substantial probability of harm to a compelling interest.**

## Court Decision

The court issued its written order on April 10, 2019. The court held first that restricting the press and public's ability to view evidence presented to the jurors and lawyers participating in the case would be an unconstitutional limitation on the right of public access to criminal trials.

The court stated that the plan to keep the video footage from all but the jury, the defendant, and the lawyers was an effort to balance the press and the public's right of access to public criminal trials, the defendant's Sixth Amendment rights to a fair, public trial and an impartial jury, and the victim's and the victim's family's privacy. The court was troubled by the graphic nature of the body and dash-cam footage, which depicted the victim taking her last breaths and receiving CPR, which required removing some of her clothing and exposing her breast. Ultimately, however, the court was persuaded that the proposed limitation ran afoul of the Constitution.

Specifically, the court found there had been no showing that allowing the press and public to view the video footage would create a substantial probability of harm to a compelling interest, especially in light of the fact that, under Minnesota law, an individual's privacy interests do not survive their death. The court also noted that less restrictive alternatives existed, such as announcing to the gallery that the evidence about to be shown contained disturbing material and giving observers a chance to leave the courtroom. Conducting the trial while showing some of the evidence only to the jurors, the defendant, and the lawyers "would negatively impact the press' ability to observe and report on the video evidence being presented, how the jury reacts to it, and how the evidence might impact the jury's verdict"—all of which, as the court recognized, are journalistic decisions.

The court also held that prohibiting the sketch artist from sketching certain people in the public courtroom would be an unconstitutional prior restraint. The court reviewed the three prongs under *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), that a court must consider in deciding whether to enter an order restraining speech: (1) the gravity of the harm posed by media coverage; (2) whether other measures short of a prior restraint would adequately protect the defendant's right to a fair trial and would likely mitigate other undesired effects of unrestrained publicity; and (3) how effectively a restraining order would operate to prevent the threatened danger.

The court held that "[t]he proposed order prohibiting the media sketch artist from sketching jurors in the courtroom during trial does not pass muster under these criteria." The court observed that "even were [it] to proceed with its previously announced plan to prohibit the media sketch artist from sketching the members of the jury during trial, any attending members of the public would be free to record their own images, or describe any of the jurors to a sketch artist outside the courtroom, and this Court could not then prevent the media from publishing or broadcasting such images."

*Christopher Proczko is an associate at Ballard Spahr in Minneapolis. Leita Walker, a partner in Ballard Spahr's Minneapolis office, represented a coalition of media outlets in this case.*

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

# Colorado Opens Police Internal Affairs Files to the Public – Can Two States Spawn a National Trend?

*A Periodic Report from  
MLRC's State Legislative Committee*

By Steven Zansberg

On April 19, Colorado's Governor Jared Polis signed into law [House Bill 19-1119](#), making Colorado the second state in as many years to open to the public completed internal affairs investigation (IA) files of police and sheriff's offices. The new law, which took effect upon the Governor's signature, declares that a subset of completed IA files are now "records of official action" which, under Colorado's Criminal Justice Records Act, are *mandatory* disclosure records (no longer subject to discretionary withholding).

Not all completed IA files are subject to the new law; it applies only to IA records that concern officers' on-duty conduct "related to a specific, identifiable incident of alleged misconduct involving a member of the public." (So, alleged police misconduct towards fellow officers, corruption, false testimony, for example, are not included). Certain information in those completed IA files – Social Security numbers, driver's license and passport numbers; the identity of confidential informants, witnesses or victims; and a law enforcement officer's home address, personal phone number and email address – must be redacted prior to disclosure. Also, the new law is not retroactive; it applies only to IA files that are initiated after the law's passage.

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*Photo courtesy of Jim Anderson, AP*

## Two Years in the Making

The bill's passage culminated a two-year effort by government transparency advocates – lead by the Colorado Freedom of Information Coalition and its constituent organizations the ACLU of Colorado, Common Cause, Colorado Broadcasters Association, Colorado Press Association, and The Independence Institute – to reform Colorado's criminal justice records law. These groups worked with Professor Margaret Kwoka at Denver University's Sturm College of Law, and two of her students (Bridget DuPey and Christopher McMichael), to survey 43 police and sheriff's departments across the state to assess how accessible, or rather inaccessible, completed IA files were under the law's existing "contrary to the public interest" discretionary withholding standard.

The DU study, "[Access Denied](#)," revealed that in the vast majority of Colorado's cities and counties, records custodians had adopted a blanket policy of denying access to all IA files, despite a Colorado Supreme Court [decision](#) that required a balancing of competing interests on a case-by-case, document-by-document basis, and which directed police chiefs and sheriffs to "redact sparingly" to "maximize the amount of information disclosed to the public."

[That study served as the factual predicate for an earlier bill](#), similar to HB-19-1119, that Representative Coleman introduced during the 2017-18 legislative session. That bill passed out of the House, but was defeated in Senate committee after the leading criminal law enforcement associations (the Sheriffs' Association, Colorado Chiefs of Police, and the District Attorneys' Council) all testified against it. They argued that opening up these records would hamper their ability to conduct internal reviews and would invade officers' privacy rights.

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In response to those concerns, prior to the start of the 2018-19 session, CFOIC and its constituent organizations worked with Representative Coleman to revise his bill, limiting its reach only to a subset of completed case files concerning officers' on-duty interactions with members of the public, and setting forth itemized categories of information for mandatory and discretionary redaction. In addition, records custodians are authorized to first provide a records requester with only a summary of the file. (This is the approach taken by Denver's Department of Public Safety). Although this disclosure frequently satisfies many records requesters, they are still entitled, under the new law, to access the actual file materials, including redacted witness interviews, video and audio recordings, transcripts, documentary evidence, investigative notes and the agency's final decision regarding disciplinary sanctions, if any.

## Second Time's a Charm

As a result of these revisions to last year's bill, and extensive discussions with members of the law enforcement community prior to the introduction of HB-19-1119, the Sheriffs, Police, DAs and the Colorado Municipal League all agreed to take a "neutral" position on the bill.

Only the statewide union representing police officers, The Fraternal Order of Police, actively opposed it.

Also, in the November 2018 election, Democrats gained 8 seats in Colorado’s legislature, taking majority control of both houses. And, like many other states, Colorado has had its fair share of high-profile incidents of police abuse, with officers exonerated by their departments of wrongdoing while cities paid out substantial civil settlements. One example: In 2017, the city of Aurora, Colorado paid Darsean Kelley \$110,000 to settle his claims against a police officer who tased Kelley in the back, even though he had fully complied with the officer’s orders. Upon being tased for no reason, Kelley fell straight backward and hit his head on concrete. The [bodycam video of the incident](#) went [viral](#). An Aurora police investigation found that the officer’s actions were “reasonable, appropriate and within policy.” But Aurora refused to release the tasing officer’s IA file.

One additional piece of documentary evidence proved helpful in promoting the passage of HB-19-1119 through the state legislature: last summer, CFOIC worked with an intern, Brittany Garza, a law student at the Sturm College of Law, to produce a second report, [“Dismantling the ‘Blue Wall’ of Secrecy: Experience with Other States’ Access to Completed Internal Affairs Investigation Files,”](#) which documented how major metropolitan police departments in Seattle, Atlanta, Hartford, Milwaukee, and Minneapolis (among others) routinely disclose completed IA files [as a matter of course](#); yet those departments encounter no difficulty conducting effective internal reviews while fostering greater community trust and support. Ms. Garza [testified before the House Judiciary Committee](#) about her findings, and several members of the committee said they found that testimony persuasive.

The Fraternal Order of Police sought to limit the bill only to the completed IA files where the allegations of officer misconduct were sustained; unsustained or “unsubstantiated” complaints, they argued, would subject innocent officers to undeserved stigma and reproach. Transparency advocates countered by pointing to cases like the tasing of Darsean Kelley (and others where officers were exonerated by an IA investigation, but the city paid substantial sums to settle citizen complaints) as evidence that “unsubstantiated” cases are often the most controversial. Also, allowing the continued withholding of “unsubstantiated” case files would incentivize police and sheriffs’ departments to “whitewash” (or “bluewash”) serious allegations of officer abuse in order to keep the file under wraps. Thus, FOP’s effort to limit the bill only to “substantiated” citizen complaints was defeated.

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### **The Start of a National Trend?**

In late August 2018, California enacted legislation ([SB-1241](#)) opening some police internal affairs files, that is broader in some respects, and narrower in others, than Colorado’s new law. Narrower, because California’s law applies only to IA files that (a) involve use of weapons

against civilians, (b) sexual assault, or (c) an officer's lying in police reports; and it only applies to the subset of those files where wrongdoing was found. Unsubstantiated complaints remain sealed from public view. California's law is broader than Colorado's new law in that it applies retroactively to IA files completed before the law's passage. And, it requires that IA files finding wrongdoing be released to the public 18 months after the incident.

California's law reversed decades of secrecy afforded to police IA files. Prior to passing SB-1421, California was one of only three states in the nation whose statutes specifically prohibited the disclosure of internal police records. Introduced by Senator Nancy Skinner (D-Berkeley), the bill's success was (to a large extent), attributable to the tireless efforts of Nikki Moore, the former Vice-Chair of MLRC's State Legislative Developments Committee, during her tenure at the California Newspaper Publishers Association. Six rounds of amendments to the original bill convinced California's Chiefs of Police to affirmatively support it.

Political pressure in favor of passage increased when public records [disclosed](#) that the police union (the Peace Officers Research Association of California) had donated more than \$70,000 to seven members of the Senate Appropriations Committee (to whom the bill had been referred) and more than \$33,000 to the Senate Pro Tem, who was responsible for determining whether the bill would be advanced to the Senate floor. And, the Los Angeles Times [revealed](#) that literally the day before the vote on the bill (and another one addressing access to body worn camera footage), "the Los Angeles Police Protective League, which represents rank-and-file [LAPD] officers, gave \$4,000 a piece to a dozen Assembly Democrats seen as friendly to law enforcement interests." SB-1421 was approved by the Assembly and the Senate on August 31, 2018, the final day of California's legislative session.

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### **A New Landscape Favors Transparency**

As recently as five years ago, (before Ferguson, MO, and the "Black Lives Matter" movement it spawned), neither California's nor Colorado's laws opening to the public completed IA files would have been viable. But owing to a host of changed circumstances in both states, government transparency advocates succeeded in getting these laws on the books. To quote a recent Nobel Prize winner for literature, "the times they are a-changin'." Hopefully, these two recent legislative victories will encourage other states to follow suit. "Imagine" the day when NYPD internal affairs files are open for inspection, upon request. To quote another great Twentieth Century sage, "You may say I'm a dreamer, but I'm not the only one."

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## *10 Questions to a Media Lawyer*

# Cameron Stracher

*Cameron Stracher is a solo practitioner in New York City. Previously, he was General Counsel of American Media, publisher of Us Weekly, In Touch, Life & Style, Star, OK!, and the National Enquirer.*

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

My very first job was at Covington & Burling in Washington, D.C., where I lasted just about a year doing white collar criminal defense work (with Chuck Ruff) and ERISA litigation (don't ask). I quit to get an MFA in fiction writing from the Iowa Writers' Workshop (where I met my wife), but when I graduated, I realized I was unemployed. I moved back to New York, wrote my first book at five in the morning, and did securities litigation for 18 months. Finally, I got a break when CBS took pity on a young attorney with no media law background to handle its general litigation, and from there I wormed my way upwards.



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

As someone who appreciates a good editor, I like helping clients figure out how to publish what they want to publish while minimizing the legal risk. I've also done more transactional work in the last ten years, and that's very rewarding because you get to put something together rather than tearing it apart for clients who are doing creative work.

I really dislike the burdens that electronic discovery has placed on all of us.

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

Ha! I'm not going to tell you that.

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

For better or for worse, I was recently involved in defending American Media against civil claims brought by Karen McDougal and in related proceedings before the Federal Election Commission and in the Southern District of New York. I also assisted in managing the PR fallout from those matters. Let's just say it was an exhausting couple of years, although I'm truly glad I had the experience.

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

It may not be that surprising, but I always have a gym bag lying around with a pair of running shoes and clean running clothes ready to go in case I can sneak in a quick run during the

workday. I have a framed copy of an article from the Staten Island Advance with a photo of me racing against Bill Rodgers for inspiration when I need it.

#### **6. Favorite sources for news – legal or otherwise?**

I admire all the work of all my clients! But I really admire the way the New York Times, the Wall Street Journal, CNN, the Washington Post, and the New Yorker have been taking on the Trump administration.

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

I have two children who are both considering law school, and I wouldn't discourage either of them. Although I was very unhappy in my early years as a lawyer, and have written critically about the misery of young lawyers (and law students), I really enjoy my job now, and consider myself very fortunate. I've told my son and daughter that if there's an area of law they're truly interested in, and aren't applying to law school simply because they feel pressured to do it, they should go. I have a feeling they both will.

#### **8. Favorite fictional lawyer?**

I'm biased because Adam Wright, the protagonist in my novel, *The Curve*, is a law professor. Because I birthed him, he's my favorite.

#### **9. What issue keeps you up at night?**

Now that I have my own practice, I worry about making payroll! But when I'm not checking my bank balance, I worry that non-fiction television programming (f/k/a "reality TV") will kill the First Amendment protections afforded to journalists. I think we've been pretty successful in convincing the courts they shouldn't draw distinctions between "news" and "entertainment," but I also think the more we push that envelope, the more reluctance we're going to get from the judiciary, until we end up with some bad case law we will regret.

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

I would have written more books!

