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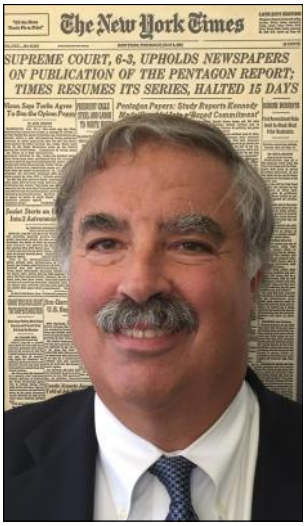
From the Executive Director's Desk

Remembering Rick Ovelmen and John Borger, Stalwarts of the Media Bar

And Los Angeles Entertainment Law Conference Kicks Off MLRC's 40th Anniversary

Sadly, two well-respected stars of the media bar died in the last few months –John Borger and Rick Ovelmen. Both were very smart and effective media lawyers, beloved by their journalist clients, zealous defenders of the First Amendment and the right of the public to know what their governments are up to, and both left us in their late 60's – far too young. But in reflecting on their lives, I couldn't help but consider that although we knew them as First Amendment lawyers and media bar colleagues, that was but one slice of their lives. Like all of us, they had families, friends, other interests and passions – and thinking about all that only makes their passing even sadder.


The New York Times

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

I knew Rick Ovelmen, who died quite suddenly on January 14, best in the 1980's, when the Times Company owned many small Florida newspapers from Gainesville to Marco Island. Rick was an associate at the firm we used, Paul & Thomson, working under the legendary Dan Paul. Dan and Rick were both characters, though in different ways, both very intelligent, creative lawyers, with outsized personalities to match. Indeed, Rick was barely over 30 when in 1983 he was tabbed to be General Counsel of the Miami Herald, then a powerhouse newspaper known for its investigative reporting and its coverage of Latin America. In 1988, on Rick's watch, the Herald was the subject of worldwide attention for breaking the Gary Hart/Donna Rice/Monkey Business story which led to frontrunner Hart's departure from the Presidential race. Oh, how times have changed!

Rick acted as though he knew a lot about everything and was always right, but the fact was he generally *did* and *was*. It was obvious that he was very smart and very knowledgeable, but colleagues closer to him than I marveled at his voracious work ethic as well as his brilliant mind. But beyond that, Rick also had a dry and quirky sense of humor. In the 80's he was a regular speaker at PLI's Communications Law Conferences, never a hotbed of humor. He had been asked to give a talk on vending machine law – at the time a major issue since newspapers, particularly USA Today, were embedding PRINT newspapers filled with ADS all over city sidewalks to grow circulation. (Cities found them to be eyesores: I remember a meeting I had with the fathers of Greenwich, CT who wanted the Times to remove all 80 of its machines there. The "negotiation" was about to break up antagonistically when I asked them whether they would accept our machines if we painted them pink and green with an alligator on them.) In any event, Rick gave his talk, with a riff on David Letterman's Top Ten list, by enumerating

Rick Ovelmen

John Borger

the top ten issues in vending machine litigation to roars of laughter from the PLI audience, laughter I never heard again in the succeeding 30 years at PLI.

After leaving the Herald because he wanted to broaden his practice and do more litigation at law firms, including Baker & McKenzie and Carlton Fields (where he was co-chair of the firm's national appellate practice group when he died), Rick branched out from press law. His practice in the last 20-30 years included First Amendment cases, but also featured sophisticated business disputes, controversial Miami land use cases, class actions and the like.

But Rick had passions beyond the law. He was a husband, father of two sons, grandfather of a young girl and an avid fisherman. In his later years, I would see Rick at PLI, and noticed that not many people knew him since his days as a First Amendment specialist and media bar maven had been decades earlier. Nonetheless, he was a star in our practice and should not be forgotten.

John Borger was probably better known to most of you, since he received the ABA Forum's "Champion of the First Amendment" honor at its meeting in Napa a couple of years ago. That award cited John's devotion to freedom of speech and press, "passionately and zealously fighting to hold public officials and institutions accountable through transparency." John, the longtime attorney for the Minneapolis Star Tribune and lots of other Minnesota media, died just a month before Rick. He, too, was praised and adored by his journalist clients as well as colleagues at Faegre & Benson (now Faegre Baker Daniels) where he worked for four decades. While always revered in Minnesota, John received national attention in the last decade through his representation of Chris Kyle, author of "American Sniper" in a defamation suit brought by former wrestler and Minnesota Governor Jesse Ventura over a passage in the book about a fight Kyle claimed the two had in a bar. (Ventura won at trial; it was overturned by the 8th Circuit, then settled.)

But more than a First Amendment lawyer, John was a pillar of the media bar. For years he brought a dozen lawyers together to see a Broadway show on the Friday night of PLI/MLRC Annual Dinner week. When Len Niehoff and I were in the Twin Cities a couple of years ago to speak on the 30th anniversary of *Hustler v. Falwell*, we had dinner with a weakened John, and

then accepted his invitation to visit his place in downtown Minneapolis. Aside from numerous photos of his lovely wife Judith, a former reporter, and his three children (he left six grandchildren), what was most noteworthy at his apartment was a room devoted totally to comic books. Apparently John was a devotee of superheroes of the DC Comics and Marvel variety. In addition to his own holdings, he had donated 40,000 comic books to the Univ. of Minnesota.

Indeed, on his final weekend, dressed in a Superman sweatshirt, John went with his family to an indoor skydiving set-up, where he went through a wind tunnel that simulates the sensation of jumping out of an airplane. As his wife wrote, "With his thumbs up, and a smile on his face, John felt the joy of free flight."

Two obits I read referred to John's ability to retain trivia and how other lawyers sought to be on his team at our annual Journalism Jeopardy games at ABA and MLRC Conferences. It's hard to end such an article better than Jack Greiner did in his blog:

> *"So in John's honor, a quick Jeopardy round:*
>
> *A: John Borger*
>
> *Q: What Minnesota lawyer will be greatly missed by all who knew him."*

* * *

The MLRC began its 40th birthday year with its 17th Annual Entertainment Law Conference in Los Angeles in mid-January. Deputy Director Jeff Hermes orchestrated a timely and interesting program, gathered engaging and articulate speakers and brought together a record 168 registrants. The Conference was held in a different site, the Southwestern Law School. Southwestern has long been a partner in producing this Conference, so having them host it, after a number of years at the LA Times and two years at the Japanese American National Museum, both in downtown LA, was a welcome and interesting change.

Life Rights, from left: Natalie Rodriguez, Pat Duncan, Lisa Kohn, Aaron Moss, Mark Roesler

Our beautiful new space at Southwestern Law School

I always thought that if one lived in, or moved to LA, one was making a pact with the Devil to live under a regime that to go anywhere was at least a 45 minute drive. But through the years, in seeming contravention with this reality, Angelinos who worked in the high-rises of Century City or in the studios in the Valley grumbled about having to drive downtown for the Conference. Happily, not only is Southwestern an effective and enthusiastic partner, it is located about halfway between downtown and Century City and somewhat equidistant from the Valley. So everyone would be convenienced, or inconvenienced, equally by driving there, and more to the point in terms of LA priorities, they had ample parking right adjacent to their building. And a poll we took a year ago favored it as a locale over the downtown alternatives.

To be less catty, they also have a beautiful building, an art deco structure in what was once a very upscale department store on Wilshire Blvd. And the room for the Conference was ornate, with lovely chandeliers and other elegant appointments, and ample room for the record crowd. But obviously, in the end, a Conference is judged by its content, and this one had four very interesting and engaging panels.

At the first session, moderated by Prof. RonNell Andersen Jones, we heard from attorneys who represented parties or amici in recent U.S. Supreme Court cases. Although the details were sometimes esoteric, the cases discussed all involved issues potentially affecting the media. For example, the outcome in *Allen v. Cooper*, which turned on whether Congress had effectively abrogated state sovereign immunity to copyright claims, could determine whether Hollywood studios have an effective remedy if state governments decide to augment their revenue by showing films without permission or payment. Similarly, we heard about: *Iancu v. Brunetti* and

Social Media in Crisis, from left: Jeff Hermes, Gloria Franke Shaw, Lincoln Bandlow, Brian Willen, and Rick Lane

how the USPTO's refusal to register the trademark "FUCT" connected with broader questions about the First Amendment and "indecent" speech; *Comcast v. NAAAOM* and how the standard for analyzing the role of racial discrimination in contracting decisions tied into Comcast's channel selections; and *Georgia v. Public.Resource.org* and how questions about the copyrightability of annotations of state law related to broader questions about government-created works.

We then moved on to a discussion, moderated by JP Jassy, about the law around life rights and best practices in the production of biopics and docudramas. The session explored recent cases involving rights of publicity, such as the *de Havilland* case; biopics based upon copyrighted memoirs, such as *Vallejo v. Narcos Productions*; and the effect of non-disclosure agreements entered into by individuals involved in a production, as in the *Jenni Rivera Enterprises* and *Ronnie Van Zant* cases. The panel also discussed key terms in the negotiation of life rights agreements and when it is necessary to bring in foreign attorneys when dealing with subjects based in other countries.

Shifting Media Landscape, from left: Bill Bromiley, Ken Basin, Peter Martin Nelson, Lisa Schwartz, and Jonathan Handel

Hollywood and the Supreme Court, from left: Prof. RonNell Andersen Jones, John Sommer, J. Mira Hashmall, Max Rosen, and Jessica Stebbins Bina

Our third session, which Jeff moderated, dealt with the recent crisis around social media platforms and its implications for content creators. It kicked off with a discussion of a recent pattern of copyright actions against entertainment companies and celebrities over the posting of photos to social media. The discussion then segued into a discussion of brand safety issues for those engaged in online advertising, and recent defamation and related lawsuits filed against services that have attempted to sort the wheat from the digital chaff. From there the panel launched into a broader debate around online content moderation, the role of Section 230 and whether it should be amended, the positions taken by entertainment companies in the debate, and recent attempts to treat social media providers as state actors for First Amendment purposes.

The conference ended with a wide-ranging discussion, led by David Aronoff, about the tumultuous entertainment landscape, examining in particular how streaming services and recent mergers have upended traditional relationships among players in the market. The speakers discussed how the streaming environment has changed the nature and the amount of content being produced, and the economics of content production at companies such as Amazon and Apple whose core business lies elsewhere. They also talked about the impact of recent changes on groups including producers, talent, writers, and more, including the recent legal disputes between writers and agents over “packaging” deals.

After the formal program, a lovely reception was held with ample food and drink; a large portion of our audience stayed to network and party; and the conversation was spirited. It was a festive way to top off the first MLRC Conference in our 40th anniversary year.

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

Court Holds One-on-One Conversations With Government Officials Are Not Immune Under Fair Report Privilege

By Kristel Tupja

The Supreme Court of Tennessee has held that the state's fair report privilege only applies to official actions of the government or public proceedings, explicitly excluding one-on-one interviews or conversations with government officials. Burke v. Sparta Newspapers, Inc., No. M2016-01065-SC-R11-CV, 2019 Tenn. LEXIS 519 (Dec. 5, 2019).

The White County trial court granted Sparta Newspapers, Inc.'s Motion for Summary Judgment, reasoning that the Defendant's one-on-one interview with a White County Sheriff's Department detective, which was the basis for a news article detailing the Plaintiff's indictment and arrest, was covered by the fair report privilege, specifically because the "official" prong of the privilege was met.

Vacating the lower court's ruling, the Court of Appeals held that the fair report privilege was inappropriately applied, as the privilege was not so broad as to encompass "statements made by any governmental employee in any circumstance." *Burke v. Sparta Newspapers, Inc.*, No. M2016-01065-COA-R3-CV, 2018 Tenn. App. LEXIS 420, at *10-11 (Ct. App. July 23, 2018). On December 5, 2019, the Supreme Court of Tennessee further parsed out what constitutes an official action or proceeding and a meeting open to the public, establishing that a one-on-one conversation between a reporter and a detective was not a meeting open to the public that dealt with a matter of public concern. In reaching its conclusion, the Tennessee Supreme Court focused on the necessity of including the public, holding that "the fair report privilege encompasses only *public* proceedings or official actions of government that have been made *public*."

The Court of Appeals held that the fair report privilege was inappropriately applied, as the privilege was not so broad as to encompass "statements made by any governmental employee in any circumstance."

The Article in Question

Plaintiff Jeffrey Todd Burke served as a middle man between a local youth football league and a cookie dough fundraising company. In 2013, Burke was accused of stealing money from a White County football team's cookie dough fundraiser, and subsequently plead guilty to theft. During this time, Defendant Sparta Newspapers, Inc. published a news article detailing an interview between a reporter and Detective Chris Isom of the White County Sheriff's Department about Burke's indictment and arrest. Detective Isom was one of the three individuals tasked with investigating Burke, and also served as the Public Information Officer for the White County Sheriff's Department, a job function that required speaking to the press on behalf of the Department.

The article discussed Burke's alleged misappropriation of more than $16,000 raised by the football league, which he failed to deliver to the cookie dough company, consequently leaving the football league with no cookie dough. Burke's attorney reached out to Sparta Newspapers and indicated that the football league did, in fact, receive everything they ordered—albeit, in an untimely fashion. Sparta Newspapers edited the amount in controversy to $11,000, but otherwise stood by their story, informing Burke's attorney that the information in the article came directly from Detective Isom, who verified his statements were accurate, aside from the amount in controversy. Burke subsequently filed a defamation suit, alleging that because the article erroneously stated the amount of money in controversy and that neither the funds nor cookie dough were ever delivered, Burke lost his job, sustained damage to his personal and vocational reputation, and suffered serious emotional strain and duress. In its Motion for Summary Judgment, Sparta Newspapers cited Tennessee's fair report privilege and argued it was immune from liability because the article was a fair and accurate report of the statements Detective Isom made to the reporter in his capacity both as a lead detective and as the Public Information Officer.

Tennessee's Fair Report Privilege Standard

The Supreme Court of Tennessee recently adopted the approach found in Section 611 the Second Restatement of Torts for determining when the fair report privilege applies, which states that an alleged defamatory statement is privileged if the statement is an accurate and complete or a fair abridgement of an official action or proceeding, or of a meeting open to the public that deals with a matter of public concern. *See* Restatement 2d of Torts, § 611.

Joined by a number of *amici*, Sparta Newspapers argued that the Court of Appeals' decision was inconsistent with Tennessee law because it introduced "several pernicious principles" that improperly narrowed and restricted application of the fair report privilege. Citing to the Court of Appeals holding in *Lewis v. NewsChannel 5 Network, L.P.*, Sparta Newspapers conceded that while the fair report privilege might not extend to news reports from anonymous sources, the privilege nonetheless applies to news reports of statements made to a reporter during an on-the-record interview with a government official. *Lewis*, 238 S.W.3d 270 at 287. Given this holding, Sparta Newspapers argued the fact that the detective chose to make his statement orally and directly to one reporter as opposed to a press release disseminated to multiple people should not have given rise to a fair report privilege distinction.

Sparta Newspapers further argued that numerous courts applying Tennessee law previously concluded statements from law enforcement officials in non-public interviews are protected under the fair report privilege so long as the statements are made on the record and in an official capacity. Therefore, the additional qualifier that the official action or statement be public and/or made available to the public should not have impeded the Courts of Appeals from finding that reporting on a private but on-the-record interview with a government officials was protected.

Tennessee Supreme Court Decision

The Supreme Court of Tennessee was not swayed. Citing the precedent it recently established in *Funk v. Scripps Media, Inc.,* the Supreme Court agreed with the Court of Appeals, noting that the fair report privilege is warranted only when the context in which the contested statement was made involves the public in some way. 570 S.W.3d 205 (Tenn. 2019). Although the holding in *Funk* addressed whether actual malice defeated the fair report privilege, the Supreme Court also took the opportunity to define the fair report privilege in its holding, and adopted the elements laid out in the Second Restatement of Torts, discussed supra. In the present case, the Supreme Court declined to expand the fair report privilege to situations where there is a nonpublic, one-on-one conversation because it would amount to "a departure on which the privilege is based," and would result in complicating a court's task of determining when a statement should be protected by the privilege.

The Supreme Court of Tennessee pointed out, however, that its holding did not impose liability on Sparta Newspapers or foreclose Sparta Newspapers from raising other available defenses on remand.

Future Implications

Justifying its holding in this case, the Tennessee Supreme Court highlighted that such a holding would not hinder newspapers and other outlets from being the "eyes and ears of the members of the public who would have been able to witness the proceeding or obtain the information had they been present to see or hear for themselves."

However, an alternate reality could very well result.

The *Burke* decision may have a chilling effect on journalists relying on quotes from government officials, undoubtedly leaving the public with less opportunities to receive meaningful information about current events in their local communities. At the heart of any journalistic piece is the opportunity to disseminate information to the public that it may have not otherwise been aware of.

A journalist's job description entails uncovering pertinent information and circulating it to the public, and journalists, by virtue of their profession and their credentials, are able to access more information than an ordinary citizen. Thus, limiting the fair report privilege to information the public would "have been able to witness … had they been present" strips from journalists a certain level of protection in their ability to freely investigate and report.

Kristel Tupja is an Intellectual Property and Media Associate at Ballard Spahr LLP in Philadelphia, PA. Plaintiff Jeffrey Todd Burke was represented by Edmund S. Sauer, Brian R. Epling, and Caroline D. Spore of Bradley Arant Boult Cummings LLP, and W.I. Howell Acuff of Acuff & Acuff, P.C.. Sparta Newspapers, Inc. was represented by Lucian T. Pera, Phillip Michael Kirkpatrick, and J. Bennett Fox, Jr. of Adams and Reese LLP.

Defamation Claim Over *Above the Law* Article Dismissed

Fair Report and First Amendment Bar Claim

On January 6, 2020, the Massachusetts federal district court dismissed a defamation action over an article on the legal website *Above the Law* operated by Breaking Media, Inc. and authored by then editor-in-chief Elie Mystal. Jonathan Mullane v. Breaking Media, Inc. et al, 2020 LEXIS 1339 (D. Mass Jan. 6, 2020).

Background

Jonathan Mullane was a student at the University of Miami Law School. During the spring of 2018, he served as a legal intern with the United States Attorney's Office ("USAO") in the Southern District of Florida. While employed with the USAO, Mullane was a party to a *pro se* civil lawsuit involving a credit card dispute pending before Judge Federico Moreno in the United States District Court for the Southern District of Florida.

In an attempt to speed up the process, Mullane sought to file a petition of mandamus but had questions about how to do so. He decided to speak with Judge Moreno's clerk about the petition but was initially turned away. To gain access to the Judge's chambers, Mullane stated that he worked for the USAO, even though he was in intern and sought access for reasons unrelated to his internship. Thereafter, Judge Moreno summoned Mullane to a hearing on April 10, 2018, where Mullane acknowledged that he had sought to file a writ of mandamus in his pending credit card dispute. Judge Mullane reprimanded Mullane for his actions, Mullane was terminated from his internship at the USAO, and the Securities and Exchange Commission rescinded Mullane's invitation to serve as a "Student Honors Volunteer."

On April 30, 2018, *Above the Law*— a legal news publication owned by Breaking Media, Inc. — published an article written by its editor-in-chief Elie Mystal covering the hearing. The Article states: "[Mullane] was trying to file a petition of mandamus... That's pretty rude. He didn't know where to file the petition, and ended up asking the judge's career clerk, in the judge's chambers, ex-parte, what to do about it. That's pretty dumb. Initially, the clerk wasn't even going to let him in, but Mullane said he worked for the U.S. Attorney's office (he's an intern), which gained him access to the chambers to discuss his own personal case. That's pretty unethical." "It also appears that Mullane is a little entitled ponce," "Turns out the kid's father is also an attorney. . . wonder if that helped him get his sweet internship," and "If Mullane is a dauphin …."

The Lawsuit

In November 2018, Mullane brought this action in Suffolk Superior Court against Breaking Media and Mystal alleging that the Article was defamatory. The action was immediately removed to federal court. Mullane asserted claims for libel per se among others.

Defendants' filed a motion to dismiss and after a full hearing on the merits, the Court granted the Defendants' motion and held that the Article is protected by Massachusetts' fair report privilege and the First Amendment.

The Opinion

Massachusetts recognizes a privilege for fair and accurate reports of official actions and statements, which also applies to a public hearing before a judge. "Accuracy" for fair report purposes refers only to the factual correctness of the events reported and not to the truth of the events that actually transpired.

In his opposition to the Media Defendants' motion to dismiss, Mullane asserted that the fair report privilege did not apply because the article was inaccurate and the Defendants' acted with "actual malice." However, the Court concluded in its decision that many of the statements challenged by Mullane are protected under the fair report privilege because they were accurate since they were either a direct quote of the court reporter's transcript of the April 10, 2018 hearing or a summary of the topics discussed in that hearing.

Relying on the recent Massachusetts Supreme Court decision, *Butcher v. Univ. of Massachusetts*, 483 Mass. 742 (2019), which upheld protections for journalists reporting on official statements and actions by holding that the fair report privilege applies to statements in articles that are "substantively identical" to statements made by official actors, the Court concluded that the statements in the Article provide a "rough-and-ready summary" of the hearing that was substantially correct. Thus, because the article accurately reports what was said in the hearing, the statements are protected regardless of whether they are accurate.

The Court concluded that the statements in the Article provide a "rough-and-ready summary" of the hearing that was substantially correct. Thus, because the article accurately reports what was said in the hearing, the statements are protected regardless of whether they are accurate.

The Court granted the Defendants' motion and held that the article is protected by Massachusetts' fair report privilege and the First Amendment. In its opinion, the Court held that the "actual malice" exception to the fair report privilege does not apply because the article reported on a court proceeding, which is a matter of public, not private, concern.

First Amendment

Under the First Amendment, a defendant cannot be liable under state defamation law unless statements on matters of public concern are provable as false.

Mullane challenged the statements in the article that referred to him as "rude," "dumb," "unethical," a "little entitled ponce," and a "dauphin" – and that questioned if he got his internship at the USAO because of his father. The Court concluded that the statements are protected by the First Amendment. First, the Court held that many of the challenged

statements—such as those referring to Mullane as rude, dumb, unethical, a little entitled ponce and a dauphin — are mere epithets that are insufficiently fact-based to ground a defamation claim.

Second, the Court held that the word "ponce" is protected because the First Amendment shields such figurative language. Lastly, the Court held that the statement, "Turns out Mullane's father is an attorney – wonder if that helped him get his sweet internship" is protected. Although the statement might be provable as false, when examined in the totality of circumstances in which the statement was made, including the format, tone, and content of the article, Mystal was expressing a point of view, rather than stating actual facts, about how Mullane obtained his internship. Because a statement of pure opinion is not susceptible of being proved false, it is constitutionally protected.

On the same day that the Court rendered its opinion, Mullane filed a notice of appeal to the First Circuit Court of Appeals. Counsel for the media defendants, J. Mark Dickison, is confident that they will prevail on appeal given that there is a century of Massachusetts precedent supporting the application of the fair report privilege to reports of courtroom proceedings.

This case, involving reporting on Judge Moreno's conduct and treatment of Mr. Mullane, is precisely what Justice Holmes had in mind when enunciating the fair report privilege.

Defendants cite to an opinion authored by Justice Oliver Wendell Holmes, Jr. in the 1884 Massachusetts Supreme Judicial Court case *Cowley v. Pulsifer* in which Justice Holmes stated, "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed…"

This case, involving reporting on Judge Moreno's conduct and treatment of Mr. Mullane, is precisely what Justice Holmes had in mind when enunciating the fair report privilege.

The media defendants were represented by J. Mark Dickison of Lawson & Weitzen, LLP, Boston, MA. Plaintiff acted pro se.

Crain's Wins Summary Judgment on Libel and False Light Claims

By Steven Mandell and Brian Saucier

The Circuit Court of Cook County, Illinois entered summary judgment in favor of the publisher of *Crain's Chicago Business*, its reporter and a former editor on plaintiff's claims for defamation and false light invasion of privacy, finding that the plaintiff was a limited purpose public figure who had no evidence that the defendants published either of the two statements at issue with actual malice. The court also found that both of the statements were substantially true and that one of them was not actionable under the Illinois innocent construction rule. Fox v. Crain Communications, (Dec. 24, 2019).

Background

Plaintiff, Joseph Fox, was the co-founder and CEO of Ditto Holdings, Inc. and its wholly owned subsidiary/broker-dealer, Ditto Trade, Inc. The Ditto entities offered a proprietary technology that allowed unsophisticated investors to mimic and join the trades of lead traders to whom they were connected via Ditto's social network platform. Over the years, Fox cultivated a reputation as an investment technology pioneer, testifying before Congress, becoming the first person to conduct an electronic trade on the floor of Congress and appearing on numerous cable financial news programs to tout the use of his technology in the trading world. Fox's media activities continued with his efforts to market Ditto as a tool that permitted inexperienced investors to participate in the financial markets where, in Fox's words, they otherwise "should stay out." Notwithstanding Fox's relentless promotion of Ditto's technology across a wide range of business media, Ditto's fortunes were not as bright as Fox and Ditto's investors had hoped, and Ditto was out of business by the end of 2015.

In June, 2016, the defendants wrote and published an article about Fox and Ditto that carried the headline "Frustrated investors led on Fox hunt in L.A." The article recounted the rise and abrupt fall of Ditto and investors' ensuing frustrations with Fox, mostly arising out of their inability to get information from him regarding the causes of Ditto's failure and the details of an SEC investigation into his conduct as Ditto's CEO. Ironically, the SEC found that Fox had willfully violated securities laws in failing to make proper disclosures to Ditto investors, resulting in an order for disgorgement of profits, an imposition of fines, and Fox's eventual five -year ban from the securities industry. The article also reported on a federal lawsuit between Fox, Ditto and one of its former executives, Paul Simons, in which Simons claimed that his employment was terminated in retaliation for blowing the whistle on Ditto and Fox to securities regulators.

Fox took offense to the article, in particular its "Fox hunt" headline and a statement that the federal judge presiding over Simons' lawsuit had "agreed" with Simons' claims. Fox claimed that the headline falsely implicated that he had done something illegal which led him to flee from Chicago to LA when Fox actually lived in Los Angeles. Fox also claimed that the article's

statement that the judge agreed with Simons' was false because it failed to note that a $2.7 million-dollar judgment entered in favor of Simons and against Ditto was a default judgment.

Court Ruling

The court held that Fox was a limited purpose public figure under the Illinois courts' adoption of the three-part test established by the D.C. Circuit in in *Waldbaum v. Fairchild Publications, Inc.* The court found that Fox had continued to broadly leverage his renown in the media to promote Ditto, consistent with his efforts to position himself as a leading voice on the sometimes controversial role of technology in the finance industry, especially with regard what the court deemed to be Ditto's "foreseeable and significant ramifications" to the investing marketplace generally.

The court concluded that, despite full discovery, Fox was unable to produce a shred of evidence that any of the defendants published the statements at issue with actual malice.

Moreover, the SEC finding that "both investors and the marketplace were harmed [by Fox] by being deprived of information" was further evidence of controversy surrounding both the technology and the company, "especially given Fox's efforts to promote it and the federal government's interest in his activities."

Having determined that Fox was a limited purpose public figure, the court found that he bore the burden of showing, by clear and convincing evidence, that the defendants published false statements with actual malice. After reviewing the extensive record**,** the court concluded that, despite full discovery, Fox was unable to produce a shred of evidence that any of the defendants published the statements at issue with actual malice and defendants were entitled to summary judgment.

The court went further, however, and also found that both the statement that the federal judge agreed with Simons in his suit against Ditto and Fox and the statement in the headline that investors were led on a "Fox hunt" in Los Angeles were substantially true. Despite Fox's insistence that the article was false because it failed to note that the $2.7 million judgment was based on a default, the federal judge had stated on the record that the judgment was nonetheless "on the merits" and, thus, no reasonable jury could find that the statement was not substantially true. Likewise, the headline was substantiated by uncontroverted affidavits of Ditto investors who expressed their displeasure at Fox's lack of availability to address their concerns when Fox "literally packed up the Ditto assets, left for California, didn't return to Chicago, and was unreachable by Ditto investors." As the final nail in the coffin of Fox's claims, the court also held that the headline was capable of an innocent and non-actionable construction that the article critiqued Fox's performance rather than his ability in his profession, which was not defamatory *per se.*

Steven P. Mandell, Brian Saucier and George Desh of Mandell Menkes LLC represented Crain Communications, Inc., former Crain's editor Michael Arndt and Crain's Senior reporter Lynne Marek. Joseph Fox, was represented by E. Leonard Rubin of LRubinLaw and Christina Formeller and Matthew Formeller of Formeller & Formeller LLP.

New York Appellate Court Affirms Summary Judgment for WPIX

Station Not Grossly Irresponsible

By Bruce S. Rosen and James Harry Oliverio

The New York Appellate Division, First Department has rejected a libel plaintiff's novel argument that a New York television station's seven-month delay in taking down an erroneous news story created a separate cause of action or was grounds for declaring the station to be grossly irresponsible. Starlight Rainbow v. WPIX, Inc., (N.Y. App. Jan 23, 2020).

In doing so, the Court reaffirmed the state's single publication rule and that media entities have no legal duty to correct previously-acquired inaccurate information.

The court upheld the summary judgment awarded to WPIX, then a Tribune Broadcasting Co. station, declaring the station and its reporter were not grossly irresponsible when they inaccurately reported the first name of a Brooklyn teacher who allegedly bullied a student in 2014.

The court upheld the summary judgment awarded to WPIX, declaring the station and its reporter were not grossly irresponsible when they inaccurately reported the first name of a Brooklyn teacher who allegedly bullied a student in 2014.

Background

The March 2014 piece was broadcast and then posted on WPIX's website with the headline, "Flatbush 12-year-old claims her fifth-grade teacher is bullying her." Magee Hickey had been assigned to cover a press conference by a local community activist highlighting the alleged bullying of an African-American girl by a white teacher with the last name Rainbow. At the press conference, Ms. Hickey asked the mother of the alleged victim the first name of the teacher and was told the name "Starlight." She then asked again because the name was so unusual, and the mother repeated her answer. The activist managing the press conference confirmed the exchange.

Hickey, a highly experienced reporter, testified that she called the city's Department of Education asking for confirmation of the teacher's name and other details; however, the DOE simply responded that it was investigating the matter and had no other comment at that time. Ms. Hickey also testified she tried to ask other parents, students and teachers if they knew about a teacher named Rainbow but school safety agents ordered her off the school sidewalk and told her not to interfere with school business. She knew from experience that school personnel are trained not to comment so she did not try to call the school directly.

It was learned days later from other media that the teacher's name was actually Cynthia Rainbow. But in a highly improbable coincidence, a teacher actually named Starlight Rainbow taught in a different Brooklyn public school several miles away. Starlight is a former Peace

Corps volunteer from Portland, OR whom at the time had just begun her teaching career. She did not hear about the Broadcast or web story until another teacher told her about it five months later, in August 2014. Starlight testified that she emailed and called the station's generic mailboxes soon after she learned about the piece, but did not obtain counsel until January 2015, at which time counsel sent a letter to the station again seeking a correction. WPIX did not have any record of receiving the communications.

Starlight sued the station on March 13, 2015, and WPIX removed the story from its website five days later. In October 2018, Supreme Court Justice Robert D. Kalish found that the reporter, Magee Hickey, had no reason to suspect the unusual name she received from the mother of the alleged victim was incorrect and objectively had reason to believe the provided name was correct under the gross irresponsibility standard.

Appellate Court Decision

In affirming the trial court, the Appellate Court said there was no dispute that with a private plaintiff and a matter of public concern, the gross irresponsibility standard applied, which it noted is more lenient than the actual malice standard. The Court said the trial court appropriately determined that Hickey was right to assume the child's mother knew the correct first name of the offending teacher and that the community activist's implied endorsement of the mother's information further gave Ms. Hickey no cause for concern. "Hickey provided credible reasons to explain why she did not reach out to the teacher" because it would not have been normal procedure under the school system's media access rules. Thus, the Court said, Ms. Hickey "cannot be faulted for the [press office's] refusal to respond to her questions."

The Court reiterated the trial court's finding that WPIX could not be held liable for failure to retract the article during the period when the station purportedly received notice from plaintiff and counsel. "Plaintiff provides 'no authority to support [her] argument that the Chapadeau [gross irresponsibility] standard imposes a duty to correct previously-acquired information – and the law does not recognize such an obligation," adopting a similar holding in a federal district court case, *Thomas v. City of New York*, 2018 US Dist LEXIS 189305, at *29 (E.D.N.Y. 2018). The Reporters Committee filed an amicus brief supporting defendants and which focused on the single publication rule and the breadth of the gross irresponsibility standard.

Bruce S. Rosen and James Harry Oliverio of McCusker, Anselmi, Rosen & Carvelli, P.C. (MARC) of Florham Park, N.J. and Manhattan, represented defendants. Christine Walz of Holland & Knight LLP submitted an amicus brief on behalf of the Reporters Committee for Freedom of the Press and 20 other media entities. Plaintiff was represented by Daniel Clifton of Lewis, Clifton and Nikolaidis, PC, New York.

New York Appellate Court Affirms Dismissal of Claims Against Dow Jones

By Tom Leatherbury

On December 19, a unanimous four-justice panel of the New York Appellate Division, First Department affirmed the dismissal of defamation and tortious interference claims brought by Dallas-based financial firm Highland Capital Management, L.P. against Dow Jones & Company, Inc., reporter Matthieu Wirz, and editor Aaron Kuriloff. Highland Capital Management v. Dow Jones.

Dow Jones published *The Wall Street Journal* article at issue on November 26, 2017. The article and three related weets reported on Texas state court proceedings between Highland and its former executive Joshua Terry, as well as on other litigation in which Highland was involved.

After Highland fired Terry, Highland claimed the firing was "for cause" and withheld payments and investments to which Terry claimed he was entitled. The arbitration panel found that Highland's justification for firing Terry was "pre-textural" and awarded Terry $8M from ACIS, a Highland affiliate. Terry then filed the arbitration award, which was repeatedly highly critical of Highland and its founder, James Dondero, and sought to enforce the award in Texas state court.

"The articles and tweets were substantially accurate reports of the arbitration decision."

Highland's defamation claim centered on its contention that the article falsely reported that the arbitration award was rendered against Highland rather than against ACIS. The court rejected Highland's contention, holding that "the articles and tweets were substantially accurate reports of the arbitration decision."

The court wrote, "Although (defendants) erroneously stated that the award was rendered against (Highland) when it was rendered against ACIS ..., the (arbitration panel) attributed to (Highland) the wrongful conduct that was the basis of the award and noted that ACIS ... operated exclusively through (Highland's) employees and officers. It is unlikely that a reader knowing the actual truth would have had a more favorable impression of (Highland) than that created by the article."

Highland also complained of the article's statements about Terry's successful opposition to certain terms of a proposed acquisition that Highland planned to make and the article's failure to include certain additional "favorable" facts about other litigation in which Highland was involved. But the court rejected these arguments as well, reinforcing its holding that the article was a privileged fair report under New York Civil Rights Law §74.

Highland's tortious interference claim fared no better. Highland alleged that the defendants'

newsgathering conduct (contacting current and former Highland employees who allegedly were subject to confidentiality or non-disclosure agreements and asking them questions) constituted tortious interference with those confidentiality or non-disclosure agreements. The court affirmed the dismissal of the tortious interference claim on two grounds. First, defendants' conduct "was incidental to the lawful and constitutionally protected process of news gathering and reporting...." Second, Highland failed to plead "any specific confidentiality agreements that defendants knowingly induced their sources to violate."

Defendants Dow Jones & Company, Inc., Matthieu Wirz, and Aaron Kuriloff were represented on appeal by Thomas S. Leatherbury, Marc A. Fuller, and Megan N. Coker of Vinson & Elkins LLP and Jacob P. Goldstein, Jason Conti, Craig A. Linder, and Joseph Weissman of Dow Jones & Company, Inc. Plaintiff Highland Capital Management, L.P. was represented by Charles Harder and Anthony Harwood of Harder LLP.

Ninth Circuit Knocks Out Boxing Fan Class Action Over Mayweather-Pacquiao Fight

By Bethany Rabe, Mark Tratos, and Ruth Bahe-Jachna

The Ninth Circuit has issued an opinion on a matter of first impression in that circuit: whether a spectator disappointed by a sporting event has legal recourse against the athletes, promoters, and others associated with the event. In accordance with two other circuits and several other cases addressing similar issues, the Ninth Circuit held that such consumers suffered no legally cognizable injury, affirming the district court's dismissal of the putative class action complaints with prejudice. In re: Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation, No. 17-56366 (Nov. 21, 2019).

The matter arose out of the 2015 boxing match between Manny Pacquiao and Floyd Mayweather. The match was hyped by the media and promoted by HBO as "the biggest event in boxing history," and "the Fight of the Century." However, Mr. Pacquiao suffered a torn rotator cuff injury during training several weeks before the fight; this fact was not disclosed to the public. Instead, his promoter, trainer, and manager continued to make statements that Mr. Pacquiao was in great shape and prepared for the fight.

Each athlete was medically cleared to fight by the regulating body, the Nevada State Athletic Commission, prior to the event. The fight went twelve rounds, with the judges awarding Mr. Mayweather the victory by unanimous decision. However, some media outlets described the fight as boring, and after the fight, Mr. Pacquiao revealed publicly that he had not been 100% due to the injury.

The plaintiffs brought putative class actions in numerous jurisdictions, primarily focused on consumer fraud allegations, against a variety of defendants. The plaintiffs named a number of people and entities associated with Mr. Pacquiao, including the promoter and his manager. The plaintiffs also named HBO, which had produced a documentary about the fight, as a defendant. Finally, the plaintiffs named Mr. Pacquiao's opponent, Mr. Mayweather, as well as Mr. Mayweather's promotions company, Mayweather Promotions, on the grounds that they allegedly had a "mole" in the camp and therefore knew of the injury. The plaintiffs alleged that all defendants knew of the injury yet failed to disclose it, depriving the plaintiffs of the opportunity to make an informed purchasing decision. The plaintiffs contended that they were led to believe that "they were purchasing the right to see a contest between healthy athletes in peak physical condition and not suffering from any disability or serious injury."

More than 40 putative class actions were consolidated as a Multi-District Litigation ("MDL"), with the Central District of California serving as the transferee court. After motion practice under Rule 12(b)(6), the district court dismissed all complaints with prejudice on the grounds

that the plaintiffs suffered no cognizable injury to a legally protected interest. The plaintiffs appealed.

Several previous cases had held that disappointed fans had no recourse in the courts. *See, e.g.*, *Mayer v. Belichick*, 605 F.3d 223, 225 (3d Cir. 2010) (affirming dismissal of putative class action brought by ticketholder against the New England Patriots as a result of the "Spygate" controversy); *Bowers v. Federation Internationale de l'Automobile*, 489 F.3d 316, 319 (7th Cir. 2007) (affirming dismissal of putative class action of racing fans after fourteen cars withdrew from a race that was expected to have twenty cars); *Le Mon v. National Football League*, 277 So. 3d 1166 (La. 2019) (season ticketholders had no right of action to challenge a referee's missed call during NFC Championship game); *Castillo v. Tyson*, 701 N.Y.S.2d 423 (N.Y. App. Div. 2000) (affirming dismissal of putative class action arising out of boxing match in which boxer Mike Tyson was disqualified after biting off part of his opponent's ear).

From a policy perspective, the plaintiffs' theory of liability was "potentially boundless" and unworkable, and would "fundamentally alter the nature of competitive sports."

Here plaintiffs attempted to characterize themselves as "defrauded consumers" instead of "disappointed fans." The plaintiffs relied on a series of cases involving season ticketholders. The Ninth Circuit rejected this argument, noting that none of those cases involved evaluation of the actual athletic performance, but instead involved the location of the team or similar issues.

Viewing the case as analogous to the disappointed fan cases, the court noted that the "license approach" – which generally holds that a ticket provides a fan only a license to view whatever event transpires – had been referenced in those cases to deny relief to disappointed spectators. Although the Ninth Circuit did not specifically adopt the license approach, it held, consistent with that approach, that "Plaintiffs essentially got what they paid for – a full-length regulation fight between…two boxing legends." The court explained that "[w]hatever subjective

expectations Plaintiffs had before the match did not negate the very real possibility that the match would not, for one reason or another, live up to those expectations."

The court distinguished the case from a more typical consumer fraud situation where, for example, a car is advertised to have a sunroof, but does not. Specifically, the court noted that the "human drama of athletic competition" plays a role, as well as fans' varied expectations. The court went on to note that from a policy perspective, the plaintiffs' theory of liability was "potentially boundless" and unworkable, and would "fundamentally alter the nature of competitive sports." Accordingly, the Ninth Circuit affirmed the dismissal.

Mark G. Tratos is the founding shareholder of the Las Vegas office of Greenberg Traurig. Bethany Rabe is an attorney in that office. Both are members of the firm's Media and Entertainment Group. Ruth Bahe-Jachna is a shareholder in the Chicago office of Greenberg Traurig and a member of the Class Action Litigation Group. They were members of the Mayweather defendants' defense team in this litigation.

Second Circuit Likely Ends 15-Year-Old "Torture" Allegations Against Chinese Journalist

By Bruce S. Rosen and Zachary Wellbrock

The Second Circuit has summarily rejected a 15-year-old lawsuit which claimed that a well-known Chinese science journalist's criticism of the spiritual practice Falun Gong actually incited prison guards and police throughout the country to torture adherents in China. Chen Gang v. Zhao Zhizhen, 18-3187 (Jan. 14, 2020).

The Court upheld a 2016 Connecticut federal district court ruling which said the Falun Gong plaintiffs had been unable to sufficiently allege that Zhao Zhizhen knowingly and substantially assisted in such torture and also agreed with the district court's repeated rejection of the group's requests to file successive amended complaints. The appeals court also agreed that because of extensive delays in the case – in which discovery never commenced – Zhao would be prejudiced if the case proceeded. Because the decision was issued as a summary order, the chances of any further appeal are slim.

The suit was brought by the Falun Gong's litigation arm on behalf of several followers who left China and now live abroad, alleging that they had been tortured for their religious beliefs under two seldom-used laws that allow citizens from one country to sue citizens of another in the U.S. courts. The plaintiffs sued under the Alien Tort Statute (ATS), an 18th-century law that allows suits in the U.S. by foreigners who allege human rights violations around the world, and the Torture Victim Protection Act (TVPA). Proceedings were delayed partially because of legal developments with the ATS and ultimately the lower court ruled that the ATS did not apply.

In 2016, U.S. District Judge Robert N. Chatigny denied the plaintiffs' motion to amend the complaint for the third time finding the plaintiffs insufficiently stated a claim, specifically that they did not show that Zhao substantially assisted in torture. The appeals court said, "the plaintiffs failed to allege that Zhao directly participated in the torture, ordered any Chinese police or prison guards to carry out the torture, or assisted in the torture in any way, other than creating a propaganda polemic expressing anti-Falun Gong sentiments that some officials used in carrying out Chinese torture practices targeting Falun Gong members."

The appeals court also agreed with Chatigny that the Falun Gong failed to allege the existence of an agreement to commit torture between Zhao and the individuals who allegedly conducted the torture – therefore failing to sufficiently allege a civil conspiracy claim. The appeals court held that a shared association with the Chinese Communist Party was "insufficient to support an inference of a conspiracy to torture."

Zhao's papers argued that it was against public policy for the ATS or TVPA to be applied in a way that would not be permitted under the First Amendment. He said that his reporting on the

Falun Gong was similar to that aired about religious sects on "60 Minutes" and other U.S. programs. He also said in an early certification that he was not aware of the allegations involving torture.

Zhao was the director of Wuhan Television in Wuhan, China in the late 1990s when he sent correspondents to the hometown of Falun Gong founder Li Hongzhi because he believed the increasingly popular Li may have been a charlatan and some of the group's practices were questionable. The footage was not enough for a news piece, however, and it sat on Wuhan Television's servers until more than 10,000 Falun Gong followers held a huge demonstration outside of Chinese government offices in 1999, leading to the practice being banned.

Soon after, China Central Television created a documentary titled "Li Hongzhi, A Man and His Deeds" using some of the footage. A version of the documentary can be easily found on Google with English subtitles. It is relatively innocuous as a documentary and delves into Li's past to assert Li was a fake and his teachings dangerous and disruptive to Chinese society. The lawsuit claimed that torture victims were forced to repeatedly watch the documentary and that Zhao's work on this and on behalf of the China Anti-Cult Association helped dehumanize Falun Gong members and made it easier for authorities to arrest, detain and torture them.

Zhao was served with the law suit in July 2004 after attending his daughter's graduation from a Yale graduate school in New Haven, CT.

The speech at issue was little more than criticism of Falun Gong movement and its leader Li Hongzhi that would not have survived a motion to dismiss a libel suit. The case was a libel suit disguised as a torture case.

Neither the district court nor the circuit ever reached issues related to the First Amendment argued by Zhao since the original motion to dismiss was filed in 2004.

This case was one of the last of numerous unsuccessful cases brought by the Falun Gong against Chinese officials in the U.S. to try to bring attention to the torture of its members and to embarrass the officials and find them civilly guilty of torture. Zhao is the only Chinese official to actively oppose one of the lawsuits.

The speech at issue was little more than criticism of Falun Gong movement and its leader Li Hongzhi that would not have survived a motion to dismiss a libel suit. The case was a libel suit disguised as a torture case.

Defendant Zhao was represented by Bruce S. Rosen of McCusker Anselmi Rosen & Carvelli, P.C. of Florham Park, N.J. and New York City, assisted at various points by colleagues Katie Hirce, Alicyn Craig and Zachary Wellbrock. Plaintiffs were represented by Terri E. Marsh of the Human Rights Law Foundation, Washington D.C.

Third Circuit Confuses Statutes and Court Orders in Prior Restraint Analysis

By Jeff Hermes

In January, the U.S. Court of Appeals for the Third Circuit issued its opinion in In re Application of Subpoena 2018R00776, No. 19-3124 (Jan. 10, 2020). The ruling involved a First Amendment challenge to non-disclosure orders ("NDOs") that accompanied a grand jury subpoena and subsequent search warrant directed to an electronic service provider for subscriber information. The Third Circuit held that although the NDOs did constitute prior restraints on speech, they were nevertheless constitutional.

Background

Given that the underlying proceedings involved a grand jury proceeding, the facts of the case are somewhat nebulous; even the identity of the electronic service provider was hidden in the Third Circuit's opinion, being referred to under the pseudonym "ABC Corp." What we do know is that ABC provided some kind of digital services to a corporate subscriber, and that at some point an employee of the subscriber became the subject of a criminal investigation.

The Third Circuit held that although the NDOs did constitute prior restraints on speech, they were nevertheless constitutional.

In January of last year, ABC received a grand jury subpoena under the Stored Communications Act, and in March a search warrant, for information relating to the employee. Each demand was accompanied by an NDO prohibiting ABC from disclosing the existence of the demand to anyone except its own attorneys for a period of one year.

The corporate subscriber (i.e., the employer of the target of the investigation) later filed for bankruptcy, and a trustee was appointed. ABC turned over the requested information, but also filed a motion in the district court to modify the NDOs to allow it to provide the trustee with at least some information about the subpoena and warrant so that the trustee could assert the subscriber's rights; ABC argued that the modifications presented a less restrictive alternative to the prior restraint on speech imposed by the NDOs.

Invoking the secrecy of grand jury proceedings as a compelling government interest, the district court ruled that the one-year time limitation on the NDOs represented narrow tailoring, that ABC had not explained why the trustee needed the information, and that the disclosure to the trustee would risk breaching the secrecy of the investigation. ABC appealed.

Analysis

The Third Circuit began its substantive analysis by affirming that the NDOs in question are both properly considered to be prior restraints on speech. The government had argued that the NDOs should be subjected to a lesser degree of scrutiny, comparing them to the gag order on

parties to civil litigation that the Supreme Court considered in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), but the Third Circuit held that ABC was in a different position from the parties in *Rhinehart* as a grand jury witness with no stake in the case. Slip op. at 11. The net result was that the Third Circuit held that the NDOs had to be subjected to full strict scrutiny -- but it then went on to confuse how strict scrutiny actually applies to a prior restraint.

The main problem is that the court looked to cases involving statutory prohibitions on speech rather than orders targeting a specific party. For example, when it decided that the NDOs serve a compelling government interest, the court made generic statements about the benefits of grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Slip op. at 14-15. Which would be fine if the court were considering a generic statutory scheme supporting grand jury secrecy; the scheme could pass constitutional muster, and then be subject to as-applied challenges in the case of particular witnesses. But a judicial order targeted at a particular entity must be justified by reference to the specific individual involved. Looking at the list in the quotation above, it is difficult to see how the specific orders issued to ABC serve interests (2) through (4): ABC has no idea who the grand jurors are, and ABC is unlikely to be tampered with as a witness or "trammeled" in its disclosures given that (a) it is a corporation whose disclosures were essentially documentary in nature and (b) it had already turned over the requested information.

The problem appears to arise from the fact that the Third Circuit based its analysis on Supreme Court decisions that discuss courtroom secrecy but deal with statutory schemes rather than prior restraints – for example, the Third Circuit cites to *Butterworth v. Smith*, 494 U.S. 624 (1990) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) for the standard by which to evaluate the asserted government interest. But *Butterworth* dealt with Florida's general statutory scheme for grand jury secrecy, not a specific order; similarly, *Smith* was a challenge to a West Virginia statute granting juvenile judges the authority to prohibit publication of a juvenile's name. In fact, the Supreme Court in *Smith* specifically held that it was not necessary to determine whether the statute should be treated as a prior restraint (and thus warrant the "most exacting scrutiny"), because it failed to pass muster under the more general standard for statutes creating penalties for speech. *Smith*, 443 U.S. at 101-102.

As a result, it is not entirely surprising that the Third Circuit considered an overbroad set of government interests. And for that set of interests that might actually have been implicated

(e.g., preventing the escape of the target or protecting of the target from the assumption of guilt), this error explains why the Third Circuit did not grapple with either of the following questions:

- whether that more narrow set of interests could be said to be compelling on its own, see *Butterworth*, 494 U.S. at 634 (in considering grand jury secrecy, "reputational interests alone cannot justify the proscription of truthful speech"); or

- whether the disclosure at issue presented an actual threat to those interests, see *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.").

Rather, the Third Circuit simply moved on to consider whether the NDOs were narrowly tailored. The court started off by acknowledging that the one-year limitation on the NDOs did not, by itself, constitute narrow tailoring. Slip op. at 16. But it then rejected the idea that the NDOs were a "total ban" on speech, because they (1) only prohibited the disclosure of information learned through the proceedings (as opposed to information previously known by ABC) and (2) permitted abstract disclosure of the receipt of the subpoena without any information regarding the specific case (as in the statistical information provided in digital companies' transparency reports). *Id.* at 16-17.

The court's "total ban" argument is a bit disingenuous, however, because the NDOs did present a complete barrier for a specified period of time to ABC saying what it wanted to say to the person to whom it wanted to say it. The fact that ABC was allowed to present a less informative subset of that information in a different context does not make the orders less burdensome to ABC. And because the Third Circuit took a broad view of the government interests at stake, there was no analysis of whether the NDOs were narrowly tailored to the specific interests potentially implicated – e.g., whether some disclosure could have been permitted that did not affect the likelihood that the target of the criminal investigation would flee.

That last question collapsed into the final phase of the Third Circuit's analysis, in which it was supposed to consider whether proposals by ABC that would have allowed it to communicate with the bankruptcy trustee were a less restrictive alternative to the NDOs. Notably, one of these proposals would have led to the trustee being brought within the ambit of a protective order.

The court placed the initial burden on ABC to advance a "plausible, less restrictive alternative," at which point, it stated, the burden would shift to the government to establish why the alternative would be "ineffective to achieve its goals." Slip op. at 17-18. However, the court then refused even to consider any solution that involved communicating to a third party selected by ABC, stating:

> We cannot and will not assess the trustworthiness of a would-be confidante chosen by a service provider. Simply put, we decline to wade into this swamp of unworkable line drawing. Neither courts nor the government can be expected to

> vet individuals selected by service providers and determine their risk of subverting an ongoing investigation.

Slip op. at 18 (internal citation and quotation marks omitted). By refusing to countenance such a solution as being even within the realm of the plausible, the court prevented the burden from shifting to the government.

But the Third Circuit's focus on "trust" is a dodge. As mentioned above, ABC specifically suggested a process that would bring the trustee within the scope of a protective order. The government doesn't "trust" witnesses when it subpoenas them, it threatens them with penalties for disclosure – and if that works for ABC, why not the trustee? It is true that every person brought in on a secret increases the chances of its eventual disclosure, but ABC was not proposing to tell the world or extend the chain indefinitely. Rather, it was only proposing to tell a court-appointed representative of the subscriber.

In the end, the Third Circuit concluded that the NDOs survived strict scrutiny. Given that the NDOs are set to expire no later than the end of March, it seems unlikely that there will be a further appeal.

Conclusion

The Third Circuit's decision is framed as an analysis of grand jury secrecy generally, and thus framed it is unsurprising that the final result is to respect the long tradition of confidentiality and uphold the issuance of gag orders to participants in that process. Indeed, the court's analysis essentially disregards any distinctions based on the positions of the particular witness or of the parties to whom they wish to speak.

If the actual orders that are issued are considered to be prior restraints – as logic and the Third Circuit's opinion dictate that they must be – it is incumbent on the court to consider the specific orders and parties at issue.

But if the actual orders that are issued are considered to be prior restraints – as logic and the Third Circuit's opinion dictate that they must be – it is incumbent on the court to consider the specific orders and parties at issue. This is not to say that gag orders on grand jury witnesses will always be problematic; an in-person witness who sees the grand jurors and hears the direction of the prosecutor's questioning might be subject to a comprehensive gag order without raising significant First Amendment issues. But ABC is in a different position, and should have been treated as such.

This is particularly important because the demands to ABC implicate the question of what privacy rights subscribers have in data held by third party electronic service providers. It is unclear what rights ABC's subscriber might have had to object to the government's acquisition or use of the information in ABC's possession; ABC did apparently point out that the trustee has authority to assert the subscriber's attorney-client privilege (however that might be implicated). But whatever those rights might have been, the NDOs ensured that ABC was the only party who could assert them – if it even had standing (or the desire) to do so.

Jeff Hermes is a Deputy Director of MLRC.

New York Court Orders Disclosure of Letter from Conflicts of Interest Board to Mayor De Blasio

Awards New York Times Its Attorneys' Fees

By Al-Amyn Sumar

In a decision issued last month, a New York state court rebuked the New York City Mayor's Office for unlawfully withholding a document sought by The New York Times Company ("The Times") under the Freedom of Information Law ("FOIL"). New York Times v. City of New York. The document at issue is a letter sent to Mayor Bill de Blasio by the city's Conflicts of Interest Board ("COIB" or "the Board") about ethically and legally dubious conduct by the Mayor. The court found it "abundantly clear" that the asserted exemptions did not apply to the letter, ordered the Mayor's Office to release it, and awarded The Times its attorneys' fees.

The COIB letter sought by The Times grew out of an investigation into the Mayor's fundraising activities for the Campaign for One New York ("CONY"), a nonprofit the Mayor founded to help advance his political agenda. The Mayor contended that the letter was exempt pursuant to both § 2603(k) of the New York City Charter, which makes "records . . . of the board" confidential, and § 87(2)(g) of the Public Officers Law, which applies to "inter-agency or intra-agency" advice.

The court's ruling rejecting those arguments was as swift as it was strong. Only five weeks after The Times filed its reply brief, the court issued a decision wholly adopting The Times's position and awarding it its attorneys' fees.

The court first held that § 2603(k) of the Charter applies only to records in the Board's possession or control; it does not reach records in the hands of another agency, even if originally created by the Board. The court relied on the plain language of the statute, the broader statutory scheme, and the Court of Appeals' 2002 decision in *Newsday, Inc. v. Empire State Development Corp. Newsday* rejected a state agency's argument that subpoenas served upon it were exempt from disclosure because the judiciary – on whose behalf the subpoenas were issued – is categorically exempt from FOIL.

The court also brushed aside as irrelevant COIB's position (set out in an affirmation filed by the Mayor's Office) that warning letters are "non-public and confidential," and it noted that the Mayor's Office had itself publicly disclosed letters it received from COIB in the past. Given those disclosures, the court said, the agency "cannot now claim that it is compelled to confidentiality."

On the exemption in § 87(2)(g), the court agreed with The Times that a private warning letter is a "final agency determination" rather than agency advice. It relied on COIB's own description of a private warning letter as one possible "disposition of the case."

The court also rejected the agency's suggestion that disclosure of warning letters could deter public servants from contacting the Board, and that warning letters should not be disclosed because the public would misunderstand them. The first was merely a "policy argument," and the second was a perversion of FOIL's basic premises. As the court wrote, "[t]he public has the right to view the contents of the letter and come to its own conclusions regarding the Mayor's fundraising efforts with CONY."

The court granted The Times its attorneys' fees. The Mayor's Office had no "reasonable basis" for withholding the letter, the court found, while The Times's interest in obtaining the letter and sharing it with the public was "clear and compelling." The court underscored the function of attorneys' fees as a deterrent: "entities such as Respondent should be deterred from making future efforts to impede the right of the public to know information related to agency discipline of public officials." The quantum of fees is to be determined by a special referee.

The investigation of the Mayor originated at the City's Department of Investigation, which opened an inquiry into the Mayor's fundraising in 2016. When it formally closed the investigation in October 2018, it set out its findings in a closing memorandum that has since been partially released to the public.

As the memo reflects, the Department concluded that the Mayor's fundraising for CONY in 2014 and 2015 was inconsistent with COIB guidance. Two advisory opinions issued by the Board address when an elected official may solicit contributions for a nonprofit that supports the official's mission. The Department found, among other things, that the Mayor ran afoul of the guidance by soliciting donations from real estate executives who likely had business or potential business pending before the city. The Department thus substantiated the allegations against the Mayor and "referred its findings" to COIB for potential sanction.

COIB has said little about its investigation into the Mayor. But its lawyers have told *The New York Times* that the Board could neither penalize the Mayor nor issue a public warning about his conduct, because he did not violate a specific Board rule. In such a case, the only option available to the Board is to send a public servant a "private warning letter."

The Board describes a private warning letter as "a formal reminder of the importance of strict compliance with the conflict of interest law," which contains no findings of fact or violation. The issuance of private warning letters is entirely a matter of Board policy; such letters are mentioned neither in the provisions of the New York City Charter that govern the Board nor in the Board's own rules.

Initially, the Mayor declined even to say whether he indeed received a private warning letter from COIB, but in response to The Times's FOIL request, his office acknowledged that it possessed such a letter.

Al-Amyn Sumar is an associate at Ballard Spahr LLP seconded to the New York Times. He and David McCraw, Senior Vice President & Deputy General Counsel at the New York Times Company, represented The Times.

Letter to a Young Media Lawyer: Barbara Wall

When Jake Wunsch called to ask me to write an advice column for aspiring media lawyers, I was flattered—and a bit worried. I'd read the pieces written by George Freeman, Chuck Tobin, Victor Kovner, Tom Kelley and Jim Stewart, and I thought, what more can I add? Their columns were smart, funny, and filled with humanity and great advice.

But when I reread their columns, I realized there was one big difference between their early years of practice and mine: for them, while the path to becoming a media lawyer may not have been obvious, at least the path to becoming a lawyer was. By contrast, when I arrived in New York City in 1979, there were precious few senior women lawyers in practice anywhere, much less senior women *media* lawyers. And while the uber talented Robin Luce Herrmann has written winningly about how she became a media lawyer, despite her "farm girl" (her phase) background, she began practicing 15 years after I did, and during those intervening years women lawyers had made many important strides.

Suffice it to say that when I began my practice at age 23, five feet three inches in my highest heels, a Louisiana native who'd never lived north of the Mason-Dixon Line, great things weren't being predicted for my legal career by the New York bar. So this column is for every young lawyer who is looking around for a role model and sees none!

Lest I paint too bleak a picture, I had one advantage: I'd managed to land a job at Satterlee & Stephens, a firm whose client roster included companies like Doubleday, Random House, CBS, and Moody's. The firm also represented an insurer whose policies protected media companies against libel and copyright claims. Since the insurer referred the defense of those claims to Satterlee, there was a steady stream of libel and copyright cases coming into the firm. Back in the 70s, before lawyers had computers, email, or cell phones, every day at Satterlee a clipboard made its way around the firm with a yellow sheet for each new matter opened the previous day. The sheets listed the client, the partner in charge of the matter and the associates assigned to the case. By studying the clipboard, I realized that while the firm was opening a number of media client matters, only a few associates were being assigned to those cases. My goal was to become one of them–but how?

Here, dear reader, is what I did:

At the time I started at Satterlee there were practice groups—corporate, tax, trusts and estates, litigation, etc.—but associates were not assigned to any department. The firm's stated reason for this policy was that to become a good lawyer you needed exposure to different areas of

practice. While I happen to believe that's true, it put the onus on each associate to develop a reputation that led partners to seek them out. But this system created a couple of pitfalls: be too accommodating to partners whose practice areas were of no interest to you, and you risked being buried under a mountain of boring projects. Be too picky, and expect the kiss of death—what partner would want to work with an arrogant associate who would turn down paying work from large clients?

Given the challenges I faced—youth, inexperience, a Southern background, not looking the part—I decided it was better to take on work that others shunned than look like I wasn't a team player. If a partner needed a memo on the new proxy disclosure rules, I would dive into the CCH Securities Law Reporter and distill the revisions into the most lucid prose I could muster. If a client needed someone to draft and negotiate a license agreement, I was there with a smile. If an M&A partner needed someone to head to rural Georgia to review documents for due diligence, I'd pack my suitcase and get going. When the T&E Department landed a case involving an obscure point of New York guardianship law, I'd blow the dust off the decennial digests and research a hundred years of precedent.

Gradually my hard work began to be recognized. And, at about that time, luck turned my way. Several senior associates who'd worked on media cases left the firm within a couple of months of each other. All of a sudden, the partners who controlled the media work needed to look elsewhere to staff their cases. While they were in the process of recruiting mid-level associates from other firms, there was a period of time when they had to make do with the junior associates they had. Given the reputation I'd developed for being a hard worker, I was hoping I might be one they'd turn to.

Again, luck turned my way. Several large media matters came into the firm at about the same time, including a high-profile case in which ABC was seeking to enjoin WCBS from hiring a popular sportscaster, Warner Wolf. The complaint was filed on May 6, 1980, the new matter was opened, the yellow sheet circulated, and I was listed as the associate on the case. It would be an understatement to say that I was thrown into the deep end and expected to swim. But swim I did, as fast and as hard as I could and the outcome for CBS was a resounding success American Broadcasting Company, Inc. v. Wolf 52 N.Y.2d 394 (1981).

After the Warner Wolf case, my reputation at the firm grew. We hired a few talented mid-level associates, including one of the smartest lawyers I've ever known, Chris Goff, who went on to become general counsel of HarperCollins. But I became one of the associates who could count on media client assignments. I continued to work hard, bill lots of hours and managed to win summary judgment victories in a number of our cases. And I continued to work for partners in other departments, finding myself in the now somewhat familiar deep end: researching the difference between hardware and software to prepare the first draft of a registration statement for a software company; being sent as a third year to Illinois to close the sale of one of the firm's oldest clients when the partner was abroad on another transaction; and first-chairing a copyright infringement case in the Southern District of New York when the partner was on trial elsewhere and the court wouldn't grant an extension.

By my sixth year at Satterlee, I was well respected by the partners, but I still had a big problem: outside of the firm I was invisible. Every year I'd sit at the Satterlee table at the MLRC dinner (then known as the Libel Defense Resource Center) in awe of the high profile media lawyers in attendance, but none of them—and I mean not one of them—knew or cared who I was. How, I wondered, would I ever generate the business on my own that I would need to make myself a viable candidate for partnership?

I signed up for Columbia's Volunteer Lawyers for the Arts program, providing pro bono advice on intellectual property issues, and I attended City Bar programs and other CLEs. But using those activities to attract clients to the firm seemed like a long shot.

And as I pondered my situation, once again luck turned my way. My husband, Chris Wall, a sixth year associate at Winthrop, Stimson, Putnam & Roberts had been asked to move to Washington D.C to help three partners open up a new office. Chris was thrilled—he'd be working on trade matters for several of his firm's largest international clients and living in the same city with his two brothers. I decided to explore opportunities in D.C. and discovered that Gannett was moving its headquarters from Rochester to Northern Virginia and was looking to bring someone new on board.

As it turned out, experience like mine was just what Gannett was after. While they didn't need an expert in New York guardianship law, they did need someone to oversee the company's securities filings, negotiate talent contracts for TV stations like the one at issue in the Warner Wolf case, manage M&A transactions, negotiate license agreements and advise on copyright issues. And while Gannett already had a newsroom lawyer, there were so many libel suits pending (over 100) when I joined the company that I took over half the case load.

Bottom line: if I'd had nothing but media law experience, Gannett would not have been interested in me. My strategy of taking on any work that came my way at Satterlee paid off once again.

At this point I should mention what every media lawyer reading this column probably already knows: The difference between being an associate at a law firm with a media practice and being an in-house lawyer at a media company is night and day. My problem with feeling invisible was instantly solved. As an in-house lawyer responsible for hiring outside counsel in dozens of cases, the media law luminaries who wouldn't give me the time of day when I was at Satterlee all of a sudden were beating a path to my door, asking me to participate on panels, and seeking my views on industry issues.

Had I all of a sudden gotten smarter, taller, or more cosmopolitan? Fortunately I realized that the answer was no. Seeing the situation for what it was, I resolved not to let the attention go to my head. Instead, I decided to use my newfound influence to help younger lawyers, particularly young women lawyers, find their footing.

How? Whenever I was selecting a firm to defend a case for Gannett, I asked about the associate who'd be assigned to the case. Since associates do most of the drafting, ensuring that good

associates were staffing our cases was in Gannett's best interest. But it also gave me an opportunity to spot young talent. And whenever I sensed that associates weren't being given enough responsibility, I'd do what I could to change that.

Two examples. First: Local counsel for Gannett's Austin TV station was a small firm with two partners who handled media cases. A troublesome new case had been filed against the station—an invasion of privacy claim arising out of a report that revealed a woman had AIDS—and both partners were tied up on other matters. The general manager was concerned, but I'd met their associate, Laura Prather. I convinced the GM that she was up to the task which, of course, she was, and her successful defense of the station led to a precedent-setting decision benefitting all Texas media. And Gannett had found an advocate for all its Texas properties, a list that grew longer and longer as we acquired more stations and newspapers there.

Second example: A reporter at Gannett's newspaper in Marin County had been subpoenaed to testify in a criminal case. A young associate at the firm we used as local counsel, Nicole Wong, had written a persuasive brief in support of the motion to quash. But as the date of argument approached, the partner at the firm found himself on trial in another case and told me he planned to bring another partner up to speed on the matter. I insisted that Nicole argue the motion. She did, and of course she won. As to the rest of Nicole's career, the history books have that covered.

The list of bright young lawyers I worked with in defending Gannett cases is far too long to include here, but some of the talent available to me: Chuck Tobin, whose firm represented WTLV in Jacksonville; Lucy Dalglish who was an associate at the firm that represented our Minneapolis TV station; Mike Grygiel, Laurin Mills and Les Machado who practiced at Nixon

Peabody in Rochester and D.C.; Len Niehoff and Robin Luce Hermmann at Gannett's Detroit firm; Kathy Kirby at Wiley Rein; Diane Morse and Sue Underwald at Dow Lohnes; and Derek Bauer who represented WXIA in Atlanta. And later when I was in a position to hire members of the Gannett Law Department, again I found the best: Mark Faris, Tom Curley, Andrea Shandell, Liz Allen, Marc Sher, Chris Moeser, Will Herman, Courtney French, Kate Barry and Chuck Tobin.

When George Freeman, Lee Levine and I launched the Forum on Communications Law Annual Meeting, we made it a point to create opportunities for young lawyers to shine (like the Young Lawyer's Division Moot Court), and for women lawyers to feel welcome (Kelli Sager and I founded the Women in Communications Law committee). Our WICL gatherings lead to lifelong friendships as we shared the rewards and challenges of our practices and lives.

Being Gannett's First Amendment lawyer was deeply satisfying. I worked with some extraordinarily talented journalists on investigative stories that won Pulitzers and Emmys and changed lives. And in that practice I found my tribe: reporters, editors and news directors at Gannett's newspapers and broadcast stations; other in-house media lawyers like George Freeman, Karlene Goller, Ashley Messenger, Ralph Huber, Jerry Birenz, David McCraw, Julie Xanders, Susan Weiner, Ken Richieri, Dierdre Sullivan, Jay Conti, Dave Giles, David Bralow, Karen Kaiser, Jim McLaughlin, Carol Melamed and Jonathan Donnellan; and lawyers at firms who approach practicing media law as if it were a religion.

So what lessons should an aspiring media lawyer draw from this rather long-winded account of how I found my path?

Work hard, very hard

Don't turn down projects because they don't fit what you think you want to do

Smile

Help other people as often as you can

Don't be afraid to upset the apple cart

Surround yourself with people who make you look good

Make friends

Be yourself

Oh, and one last thing: if you're truly lucky, you'll find a great life partner to share your journey, like I did.