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MLRC Media Law Resource Center

MEDIALAWLETTER

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Guest Column

MLRC in Miami and Istanbul - Yes, Istanbul!

By Dave Heller

In March we held our annual conference on Legal Issues Concerning Hispanic & Latin American Media in Miami. This is our smallest conference - but certainly one of our most interesting and inspiring ones. If it's not on your radar, it should be.

What's happening in media in Latin America runs the gamut. There's a healthy market for cross border entertainment - telenovelas going north for broadcast on Telemundo and Univision and American reality shows heading south for adaptation to the Latin American market – like *Bachelor: Em Busca do Grande Amor* in Brazil. Added to this are the new and big footprints of content giants Netflix and Amazon and the disruption they are causing throughout North and South America with over-the-top television.

Jose Diaz-Balart, left, and Dave Heller at the MLRC Miami Conference

Parallel to the media business side are the individual countries' media laws and differing standards for defamation, privacy, and newsgathering, interpreted and applied in line with each countries' political landscape and history – from the repressive Communist regime in Cuba; to democracies in Argentina, Brazil, and Colombia; to the anarchy in Venezuela. Moreover, there is the harsh reality on the ground for some journalists – from the well-documented problem of impunity to the murders of journalists because of their coverage of the narco trade.

It's a rich mix of issues that has made for a fascinating conference each March since we started in 2013.

We learn about these subjects through expert speakers and media lawyer colleagues from across Latin America. Our speakers have included noted media executive and innovator Isaac Lee; Cuban dissident Adolfo Fernández; newspaper editor Myriam Marquez; New York Times reporter Francine Robles; and McClatchy's Nick Nehamas, who shared a Pulitzer Prize for his investigative reporting on the Panama Papers. We also have had as expert discussants media lawyers from Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico and Venezuela who have shared their expertise with American lawyers from HBO Latin America, Univision, Telemundo, OLE, Fox LatinAmerica, Sony and more.

This year's conference was a typical mix of comparative media, and political and business developments. We began with a talk from Jose Diaz-Balart, the Anchor of Telemundo's

Paula Barreto, Nancy San Martin, Natalie Southwick & Roxana Kahale discussing impact of Jair Bolsonaro in Brazil.

national daily newscast *Noticias Telemundo* and *NBC Nightly News Saturday*. He discussed his approach to reporting fairly and accurately in today's toxic "fake news" environment – and how he interacts with his in-house legal team. That led into a session on the impact of new Brazilian President Jair Bolsonaro – the so-called "Trump of the Tropics." A career politician, Bolsonaro campaigned as a populist outsider deriding the "fake news" media and insulting immigrants, women, and the LGBT community. Sounds very familiar. We discussed his potential effect on press freedom in Brazil and how he fits within Latin America's history of authoritarian strongmen and strongwomen – leaders like Juan and Eva Peron in Argentina.

We had a session on Digital and Social Media Issues in Latin America – covering everything from right to be forgotten in Argentina, to the Trump effect on journalism, to the debate over whether *Roma* should have been eligible for the Motion Picture Academy's Best Picture Award. A session on Cross-Border Productions included a primer on producing in Brazil – and a checklist for US lawyers to keep in mind when advising on cross-border productions, including Copyright; Moral Rights; Advertising Restrictions; Brand Protection; Content Protection; E&O Insurance; Immigration/Labor Issues; and Safety Regulations.

To top it off, we had an Ethics session which was a master class on what media lawyers need to know about the Foreign Corrupt Practices Act.

If you haven't considered attending this conference, I hope you will now. If you want to volunteer to help with it, please email me. If you come, you are guaranteed to learn something new and make valuable contacts with colleagues in Latin America.

Special thanks are owed to Adolfo Jimenez, Holland & Knight, and Lynn Carrillo, VP Legal, NBCUniversal News Group, for their work in planning the conference; our sponsors Ballard Spahr; Davis Wright Tremaine; and Holland & Knight; our host the University of Miami School of Communication and Department Chair Sam Terilli; and all our panelists.

The author, far left, at the Istanbul courthouse with fellow trial observers.

Media Freedom in Turkey

A week after our conference in Miami, I was on my way to Istanbul at the invitation of the Clooney Foundation for Justice, the non-profit founded in 2016 by George and Amal Clooney. The CFJ has a new trial monitoring initiative called TrialWatch which focuses on monitoring trials targeting journalists, human rights defenders, LGBTQ persons, women, and religious minorities.

Trial monitoring is a well-recognized technique to foster judicial transparency, protect defendants' rights, and facilitate the administration of justice. The TrialWatch program will train monitors in these objectives and apply a data-driven approach to analyze the results.

I was honored to be asked to participate but approached the assignment with concern. About 18 months ago, a trial observer in Turkey reported back as follows:

> At this moment in time, judicial independence and freedom of expression in Turkey have ceased to exist. It is in this context that journalists … and others are fighting for their basic rights to fair trials and independent thought. For our part as members of an international community committed to the rule of law and a free and independent press, we can and must continue to send the message to Turkey that it cannot use a legal veneer to cover up authoritarianism and brutal repression. These trials are not fair, these courts are not independent, and no one is fooled by the attempt to pretend otherwise.

My assignment was to observe and report on the trial of Veysel Ok, a lawyer in Istanbul who has defended many of the most prominent journalists in Turkey. The charge against Ok is serious – violating notorious Penal Law 301 which broadly criminalizes denigrating the Turkish nation, the government, or the judiciary. The basis for the charge is an interview Ok gave in 2015 questioning the independence of the Turkish judiciary. For that Ok, and the journalist who conducted the interview, Cihan Acar, face six months to two years in prison. The case was initiated at the request of Turkey's President Erdoğan who was named in the case as the victim.

The trial itself lasted under an hour. Veysel Ok stood by the interview he gave, but argued that under European Court of Human Rights precedent his words constituted legitimate and protected criticism. There was no cross examination. There was also argument over whether President Erdoğan was a proper party to the case. The defense argued that since the President was not named in the interview he should be dismissed from the case; but if not dismissed from the case the President should be required to appear and testify. After a short recess, the Judge delivered a partial decision. President Erdoğan was dismissed from the case – but a ruling on the merits was put off until June 20. Without a decision, a chill will undoubtedly linger over the defendants.

In addition to observing the trial proceedings, I asked and was allowed to speak to the Judge and to President Erdoğan's personal lawyer. I have submitted a report to CFJ – for now, like the Mueller Report, the details are confidential. CFJ will decide how best to use the report.

Trial observations are an important tool in monitoring the fairness of criminal proceedings. It was an honor to assist CFJ in its efforts and I hope MLRC will continue to do so.

Dave Heller is a deputy director of the Media Law Resource Center.

Hot Topics Roundtable: *Sandmann v. The Washington Post*

The second installment in our "Hot Topics" series examines defamation suits filed in March against the Washington Post and, later, CNN. The plaintiff, Nick Sandmann, is the MAGA hat-wearing high school school student whose confrontation with Nathan Phillips, a Native American activist, on the Washington Mall was widely covered in the national press and on social media.

Our panelists: ***Professor RonNell Andersen Jones****, University of Utah College of Law;* ***Charles "Chip" Babcock****, partner at Jackson Walker;* ***Professor Clay Calvert****, University of Florida;* ***Tom Kelley****, recently retired partner at Ballard Spahr;* ***Professor Jonathan Peters****, University of Georgia School of Law; and* ***Deanna Shullman****, partner at Shullman Fugate.*

Will high school student Sandmann be found to be a private person or a limited-purpose public figure? Which should he be? Is this a rare case to apply the involuntary public figure doctrine?

Andersen Jones: I think Sandmann will be found to be a private figure. But this case is a great one for thinking about the complexities that arise in public figure doctrine in an era of ubiquitous cell phone cameras and rapid virality. It of course cannot be the case that every person who shows up for a rally—or happens to be on a field trip in the vicinity when a rally is taking place and becomes a subject of media interest—is a public figure for purposes of the rally topic. Before the incident, this teenager had no notoriety or public profile, and he hadn't taken any actions to thrust himself into any pre-existing controversy to try to influence the outcome of it. The best argument for the Post here may be that after the video went viral and

before the Post wrote a story about the viral video, the virality rendered Sandmann an involuntary public figure for purposes of a story about the behavior depicted in a viral video. Under this analysis, it would be important to know whether the video was viral when the Post wrote about it or whether the Post article itself made the video go viral. The courts aren't keen to throw open the doors to a broad category of involuntary public figure, so it might still be a tough row to hoe.

Calvert: He's most likely a private person. Nobody knew who he was before the reporting and social media posts about him started after this incident. One question might be whether his interview on the Today Show with Savannah Guthrie on January 23 was sufficient to transform him into a voluntary limited-purpose public figure. This reminds one of Richard Jewell becoming a limited-purpose public figure in his libel case against the Atlanta Journal Constitution by giving interviews to the news media about what he saw and knew regarding the bombing of Centennial Olympic Park. But Jewell gave multiple interviews and I don't believe Sandmann did. Additionally, it would likely be a question of timing. Did Sandmann give the interview after the Post's allegedly defamatory statements had already been published? If he gave it afterwards, then there's even less of a chance he'd be a voluntary limited-purpose public figure.

Kelley: On the surface, public figure status seems like a 3-point shot at best.

Shullman: The more efficient route here may be the involuntary purpose public figure doctrine because Sandmann found himself in the middle of a racially-tense confrontation between a group calling themselves the Hebrew Israelites, participants in the March for Life demonstration (that Sandmann was a part of) and participants in the Indigenous People's March (where Phillips was a participant) and ended up playing a central role in that controversy.

The problem is that "[d]efining public figures," as one federal judge put it, "is much like trying to nail a jellyfish to the wall."

Babcock: Some of the most important issues of our times are the national debates over abortion, racism, the treatment of indigenous people and President Trump. All of these public controversies intersected on a Friday, January 18, 2019 , in Washington D.C. on the mall in front of the Lincoln Memorial. All three groups Deanna mentions were voluntary, active and antagonistic participants at the rally. They had injected themselves into these controversies with the students traveling over 500 miles to participate in the March For Life and the incidents that (unexpectedly) were to follow.

On Sunday Sandmann further injected himself into the controversy by publishing a "Statement ... Regarding Incident at the Lincoln Memorial" which was widely disseminated by the press. He followed this with an interview on NBC's Today Show. He was offered , but turned down, many interview opportunities. He obviously had access to the media.

Even so, the public figure question is, I think, a close one. Sandmann is, after all, only 16. While he participated in the Right to Life March it was over and he was waiting for a bus to take him home. There is no evidence that he taunted anybody or did anything but stand passively in front of Phillips, the Native American. His lawyer will undoubtably rely on the cases which say that the press cannot create the public controversy they rely upon for public figure status. On his limited post incident interactions with the media Plaintiff will argue, as his complaint says, they were "reasonable, proportionate, and in direct response to the false accusations against him." Perhaps.

As for involuntary public figure, the Plaintiff will argue that this category is extremely narrow and stems from nothing more than dicta in the Gertz case and that if a plaintiff can be labeled public through no action of his own then the discredited Rosenbloom public interest test will have been resurrected after being rejected by the U.S. Supreme Court in Gertz.

Peters: The problem is that "[d]efining public figures," as one federal judge put it, "is much like trying to nail a jellyfish to the wall." Sandmann is not an all-purpose public figure (that much is clear), but whether he is an involuntary or limited-purpose public figure is complicated.

In *Gertz*, the Supreme Court observed: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." The Court went on to note that usually public figures would "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

The Court has not provided clear guidance on those categories, and the lower courts can't even agree if they are distinct categories or if involuntary public figures are types of limited-purpose public figures. This area is a doctrinal mess. With that said, I'm intrigued by the argument that Sandmann is an involuntary public figure.

The question as to Sandmann becomes whether describing him as having "a relentless smirk," standing in the way of Phillips and not allowing him to retreat is defamatory given that the headline tells the reader that this is 'The Native American drummer's" version of the event. I say not defamatory.

By participating in a public rally, Sandmann engaged in conduct from which it was reasonably foreseeable that public interest would arise, and when it did he was a central figure in the public debate about it. Then he released a public statement and sought out press attention to discuss his experience and views.

The catch: The rally in which Sandmann participated was "March for Life" and unrelated itself to the content of the statements made about him. More generally the courts, channeling Gertz, rarely deem people involuntary public figures.

Is a headline: "'It was getting ugly': Native American drummer speaks on the MAGA-hat wearing teens who surrounded him" defamatory?

Shullman: No. Of course, headlines cannot be excised from their articles for making this determination, but even in isolation (or even in the context of any article determined to be defamatory), the headline can never be proven true or false. "Ugly" is not capable of proof here because it clearly conveys Phillips' subjective perception of the scene around him.

Calvert: Standing alone, that headline isn't defamatory. It suggests things were getting heated or tense, but I don't believe that falsely accusing someone of provoking such a situation by itself is defamatory. Additionally, whether it was getting "ugly" is really a matter of opinion. Furthermore, headlines typically must be read in context with the articles connected to them.

Babcock: Standing alone certainly not. But you have to read the article (and the headline) as a whole. So the question as to Sandmann becomes whether describing him as having "a relentless smirk," standing in the way of Phillips and not allowing him to retreat is defamatory given that the headline tells the reader that this is 'The Native American drummer's" version of the event. I say not defamatory.

Andersen Jones: Whether or not a situation "got ugly" sounds like a matter of opinion, rather than fact. It is a subjective descriptor of someone's view of the pleasantness or unpleasantness of a situation, rather than an objectively provable statement. The question will be whether, under the circumstances, the average person would infer that the statement has a factual context. It's possible that the phrase "it was getting ugly" implies some provably false factual assertion that the Native American drummer feared for his safety or suggests other undisclosed defamatory facts as the basis for the opinion. In context, with the broader setting of the article and the accompanying headline calling him "surrounded," this might well be capable of that defamatory meaning.

There's no way the "relentless smirk" allegation is actionable. What's a smirk after all? And Phillips might have legitimately felt threatened, so I think that's off the board.

Is it defamatory for the Post to republish statements from the Native American Mr. Phillips to the effect that he "felt threatened by the teens" who "swarmed around him" and that Sandmann wore "a relentless smirk" and "blocked my way."?

Peters: These statements generally seem to be opinions, which can't form the basis of a successful libel claim. These are the beliefs of a person involved in a convoluted incident and his own subjective characterizations of what happened. Such statements can't be proven true or false, and they don't imply unstated underlying facts. Moreover, the totality of the paper's relevant coverage included a video of the incident and would have allowed the reader to come to his or her own conclusions.

The statement that flies closest to the fact-opinion line, based on the video The Post used in its early coverage, is that Sandmann "blocked" the "way" of Phillips. But even if Sandmann could

show that statement to be an untrue expression of fact, he would still have to show that it harmed his reputation. Being falsely accused of blocking a person's way is not inherently defamatory.

Kelley: Not in the per se sense, but context is everything and I never know when a judge will rule defamatory meaning is a jury question (most of my predictions during my now concluded 47-year career proved wrong).

Calvert: There's no way the "relentless smirk" allegation is actionable. What's a smirk after all? And Phillips might have legitimately felt threatened, so I think that's off the board. The factual allegations that probably needed some investigation, however, were whether the boys (including Sandmann) actually swarmed Phillips and whether Sandmann, in fact, blocked Phillips' way. The defamatory implication is that Sandmann swarmed and blocked Phillips because Phillips was Native American.

Shullman: As to the "swarm" and feelings of being threatened, I'm going to actually argue here that these statements are not "of and concerning" Sandmann. In the preceding paragraph, the article mentions Sandmann standing in front of Phillips with a relentless smirk on this face. The article then refers to Phillips feeling threatened by teens who swarmed around him. Sandmann standing in front of him is different than swarming around him. I would argue the article is meant to refer to other teens in the group. As to the "relentless smirk," I think whether the smirk was relentless is a matter of opinion. Whether Sandmann blocked his way is either opinion or true.

There are cases that clearly hold that non-specific accusations of intolerance or bigotry cannot be the basis for a defamation suit and that a mere allegation of racism, without more, is not actionable. It's just name-calling.

Is a statement that Sandmann engaged in racist conduct one of fact or protected opinion?

Babcock: The answer generally is, of course, that it depends. As I understand it, the claim against the Post is that the "gist" of the seven Post articles is that Sandmann behaved as a racist. "Smirking" even when it's relentless doesn't exactly equate with racism nor do the other facts published as to Sandmann. He didn't do the tomahawk chop chant but even if he did that isn't per se racist although some people may have the opinion that it is.

Calvert: Accusations of racism are bandied about so frequently and loosely today that they usually are deemed protected statements of opinion or deemed to be protected name calling. But if Sandmann can connect the allegation to a specific act that appears racist, such as an accusation he blocked Nathan Phillips because Phillips is a Native American or that he hurled racist insults, then there's a chance the court might call it a factual assertion. As a federal district court noted in *Payne v. WS Services*, "when accusations of bigotry relate to specific or concrete acts, courts ... acknowledge that such statements may be actionable."

Kelley: Whether Sandman's smiling and standing his ground was racially motivated would seem an opinion, but the issue will be whether there were material omissions from or misstatements of the facts offered for readers' use in evaluating the opinion.

Andersen Jones: There are cases that clearly hold that non-specific accusations of intolerance or bigotry cannot be the basis for a defamation suit and that a mere allegation of racism, without more, is not actionable. It's just name-calling, which is an expression of opinion—like calling someone a "loser." The thinking is that calling someone "racist" is different than, say, calling someone a "liar," because the latter has a core verifiable meaning (a liar is someone who has stated things that are objectively false) while the former is a vague insult that doesn't have specific criteria that can be proven true or false. Even though an audience would understand that the person who is labeled a racist isn't held in high esteem by the speaker, it is quite hard to objectively state that someone is a racist. But there are also cases suggesting that statements labeling plaintiffs racist can rise to the level of being factual assertions. I'm remembering, for example, the "David Duke of Chester County" case, where the court concluded that phrase could be interpreted as moving beyond a label of racism to a suggestion that the plaintiff had taken some actions worthy of moral opprobrium. So while I'd lean toward it being opinion, I think we have to acknowledge that suggestions of racist conduct—that someone made specific determinations or took specific actions against another person because of that person's race—could inch it out of opinion territory and into fact territory. The "David Duke" case might suggest that at least some judges, particularly in today's climate, would see it as a jury question.

Had the Post linked the long version video and invited readers to decide, we might not be having this conversation.

Shullman: It would be a protected opinion. Calling someone "racist" simply is not capable of being proven true or false. How would we ever verify Sandmann's motives for standing before Phillips the way he did? What defamatory facts are suggested by the characterization? This falls into the category of caustic, insulting epithets that make up the law of rhetorical hyperbole and should be protected.

Was the Post negligent in running a story about an incident that was getting national attention when it had only spoken to some, but not all, sides in the incident and had only access to and seen a part but not all of the videos of the incident?

Peters: I'd be surprised if Sandmann could satisfy the negligence standard. He would have to show that The Post did not act with reasonable care in publishing the statements at issue, and that would turn on whether the newspaper did everything reasonably necessary under the circumstances to engage in research, editing, and fact checking. Understandings of what happened at the January incident evolved over days, and relevant videos and photos came out along the way. The same is true of the statements made by those involved. Even the Diocese of Covington and Covington Catholic High School criticized the students at first, before reversing course and apologizing to them as understandings changed.

Accordingly, the paper's stories evolved, too. The early coverage was more limited because the stock of available information was more limited. That doesn't make the early coverage negligent. It simply expanded and grew fuller as more information surfaced. Several days after the incident, The Post published an editor's note saying as much that also linked to a report, commissioned by the diocese and high school, exonerating the students. The editor's note was neither a correction nor a retraction. It was a recognition of journalistic realities, that the paper had produced accurate and fair reports based on what the paper knew and when it knew it, following ordinary reporting practices. That's a good argument against negligence.

Kelley: Had they linked the long version video and invited readers to decide, we might not be having this conversation. Without benefit of that hindsight, I don't know enough to comment, except to note that even if the republication of Phillip' claim indicates an apparent willingness to believe it, that is a not only a rational but "reasonable" interpretation of a very ambiguous situation (regardless of which video you study) that should defeat negligence.

Calvert: There's no legal duty for the story to be fair or to show all sides. The duty issue will be whether the Post should have investigated the credibility of the source of the allegations, Nathan Phillips, before it ran them. The complaint rips into Phillips and attempts to thoroughly discredit him, with the implication being that any media outlet today could have quickly scoured the Internet to learn more about him before running his allegations.

Andersen Jones: While nothing in the record suggests knowing falsity or reckless disregard for the truth, there are some decent arguments for negligence here. As far as I can see, the story had no intense time pressure, except that it was being discussed widely on social media. It was related to a matter of national interest, but the potential damage to the plaintiff if the communication proved to be false arguably was heightened because we were dealing with a minor here. I suspect that the fact that a child is at stake may be important some judges or juries. Also, the nature and reliability of the source can be relevant to the reasonableness determination, and if the @2020fight Twitter account that was spreading the partial video had problems on this front or contained obviously highly polarized political messaging, that could also be a component of the inquiry.

Negligence should not be found in failing to report a piece of the story during a breaking news situation when the paper has no idea that piece exists.

Shullman: As long as it turns out the paper was not aware of the rest of the video and ignored it, I don't think so. Negligence should not be found in failing to report a piece of the story during a breaking news situation when the paper has no idea that piece exists. Where the full story does not emerge until later, the press cannot be expected to have ESP and know how that story will turn out. In the same way we don't call the press negligent for failing to report an arrestee will ultimately be acquitted, we should not fault the press for failing to report that the confrontation later turned out to be different than at first perceived.

Would the recognition of a neutral reportage privilege help to resolve this case appropriately? Why or why not?

Shullman: Of course, and I find the privilege is more needed now than ever in these days of information overload where everyone is a publisher in real-time as events occur. Both sides of this story cannot be reported without disinterestedly describing the perspective of both sides. In fact, if the Post had only reported Sandmann's point of view (which it did as his side of the story emerged), would it not have cast Phillips in a defamatory light?

Andersen Jones: It is a theoretical fit but perhaps not a technical one. The situation here surely speaks to the primary goals of that privilege—to soften the sometimes harsh impact of the republication rule and to acknowledge that the reporting of defamatory allegations relating to an existing public controversy can have public informational value regardless of the truth of the allegations. I've always thought that the central premise of neutral reportage—that the very making of a defamatory allegation sheds valuable light on the character of controversies fit for press coverage—is an important one, and I think there's an argument to be made that this is increasingly true in these times of hyperpartisan, attack-style public commentary. I'd agree that at least part of what is newsworthy about these particular allegations is that they were made. But my sense is that most versions of the neutral reportage doctrine require that the allegations come from some "responsible, prominent organization" (Edwards v. National Audubon Society) and be about a public figure. There are other versions of the privilege, but under this primary version, I'm not sure it makes the cut.

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Babcock: I have never liked this privilege and it has not achieved much acceptance by the courts despite Floyd's persuasion in the Audubon case. I prefer to frame the issue as one of truth. It is true that Phillips said what he said and the Post faithfully reported it. So it is true in that sense thus destroying an element of the Plaintiff's case. The Post should not have to prove the underlying truth of an accusation (or one of perception like Phillips'); to rule otherwise would subject the press to limitless liability and force it to avoid accurately publishing many accusations on matters of public concern. It would have helped if the Post had obtained comment from Sandmann or viewed all of the available video.

Calvert: I doubt it, especially if that privilege is narrowly interpreted to require that the allegations are made by a responsible, prominent person about a public figure. Phillips likely was not such a source and Sandmann is likely not such a public figure.

Kelley: I would try it on for size but worry that Sandman may not be a public figure; and even with the more liberal deviation from the republication rule that allows reporting of allegations of public concern there appear to be issues of completeness of reporting.

Sandmann interviewed by Savannah Guthrie a few days after the confrontation.

Peters: It's hard to say because of the variables. The privilege, which has not been widely adopted, generally applies where the defendant can show that the accusation at issue was made by a responsible and prominent person or organization, that the accused/plaintiff is a public figure, that the accusation was accurately and neutrally reported, and that the accusation was made in relation to a public controversy existing before publication. The Post might be able to make that showing, depending especially on whether the court deems Sandmann a public figure.

But few jurisdictions have consistently applied the neutral reportage elements or carefully spelled out what they mean. For example, some courts have questioned or deemphasized the responsible qualification, and at least one has recognized the privilege even though the plaintiff was a private person. Courts disagree, too, about the nature of the controversy. One court said it must be "raging," while others said it must be public and of legitimate interest. All of which is to say: Recognition alone of the privilege would not be enough here; it would have to be the right variation of the privilege, and Sandmann likely would need to be some kind of public figure.

Why is it generally not recognized?

Peters: Most jurisdictions do not recognize the neutral reportage privilege, because they have rejected it or not issued an opinion on it, or they have confused it with the fair report privilege. Among the courts that have rejected the privilege, there seem to be a few reasons. One is the long tradition of generally holding people responsible for what they republish. Another is the Gertz principle, said to be inconsistent with neutral reportage, that press freedom and reputational harm must be balanced. And yet another is the concern that neutral reportage sidesteps the Sullivan standard.

However, some jurisdictions have established common law, statutory, or constitutional doctrines that otherwise protect journalists who report on serious and newsworthy accusations about public figures. For example, the neutral reportage privilege is unavailable in Ohio, but in analyzing such accusations, the courts consider whether they were published in a balanced report about a public controversy that includes opposing views. And in New York, where state courts have rejected the privilege, The New York Times argued in 2011 that accusations it published about the owners of a coffee company were protected opinion. Agreeing, the court essentially substituted the opinion defense for neutral reportage.

Shullman: Neutral reportage is generally not recognized because it is in derogation of the common law principle that one who repeats a defamatory statement of another is equally responsible for it. Not recognizing the privilege prevents the wide-spread dissemination of defamatory statements that might otherwise have a very minimal audience (and corresponding minimal damage). It needs to be revisited as a concept because the proliferation of social media has given everyone access to a large audience traditionally reserved for print and broadcast media. The media should be given leeway to report the now widely public discourse in a neutral fashion.

Andersen Jones: An important piece of the answer is the pattern of hesitance from the Supreme Court on this. It has never held that the First Amendment mandates the privilege, and in Harte-Hanks it declined to decide the issue. At least some courts seem disinclined to be any more expansive in their protection of the press than the Supreme Court has expressly required them to be.

Tennessee Supreme Court: Malice Does Not Defeat Fair Report Privilege

Shield Law Exception Limited in Scope

By Paul R. McAdoo

The Tennessee Supreme Court issued its ruling in Funk v. Scripps Media involving the fair report privilege and Tennessee's statutory shield law, Tennessee Code § 24-1-208. The first issue addressed by the court was whether showing either express or actual malice defeats the fair report privilege defense. The second issue involved whether an exception to Tennessee's shield law applied when the fair report privilege was asserted as a defense, and if it did, what was the scope of the exception. The court's ruling on these critical issues were generally favorable to Scripps Media and other journalism organizations in Tennessee.

Background

Since the 19th Century, the Tennessee Supreme Court has held that express malice was a means for defeating the fair report privilege. But the last time the court addressed the fair report privilege was in 1956. Since 1956, lower state courts and federal courts in Tennessee have confused the issue with some stating that the fair report privilege could be defeated by express malice, others stating that actual malice defeated the privilege, and some omitting the discussion of malice completely from its application of the privilege. Even though this case arose as a discovery dispute, the Court tackled the issue head-on.

The Court began by noting that the case demonstrated "the tension that exists between two competing social commodities: reputation and information."

Fair Report Analysis

The Court began by noting that the case demonstrated "the tension that exists between two competing social commodities: reputation and information" and discussed the fact that unrestrained defamation suits "may obstruct access to … information." The Court traced the privilege back to an English decision from 1769, and noted that traditionally an assertion of the privilege could be defeated by express malice: if the allegedly false and defamatory statements were made "solely for the purpose of causing harm to the person defamed." The Court also explained that that the "original justification" for the fair report privilege: "that newspapers should be allowed to report on publicly accessible information" has been joined by a second justification: "the worthwhile goal of public supervision of official actions or proceedings."

Before deciding if either express malice or actual malice defeat the privilege, the Court surveyed how courts outside of Tennessee have decided the issue. First, the Court found that "the vast majority of states have concluded that [actual malice] does not defeat the privilege" and that this view is consistent with the Restatement (Second) of Torts. On express malice, the

Court explained that the modern approach "looks only at whether a report of an official action or proceeding is fair and accurate, eliminating express malice from consideration" and that this modern approach is grounded in U.S. Supreme Court precedent that "emphasized the importance of public access to information about governmental proceedings."

The Court first rejected application of the actual malice standard to the fair report privilege. Noting the differing interests served by the actual malice standard and the privilege, the Court explained that "[i]f we were to now hold that a reporter's knowledge of a statement's falsity could defeat the fair report privilege, it would undermine the purposes of the privilege. It would lessen the public's opportunities to be 'apprised of what takes place in the proceedings without having been present."

In revisiting the express malice component of the privilege, the Court examined two of plaintiff's arguments. First, plaintiff claimed that elimination of the express malice component would permit "reporters with vendettas" to "solicit or goad others into making defamatory statements in official proceedings and then repeat the defamatory statements to the public without punishment." While agreeing that such a scenario would be "cause of concern," the Court looked to Restatement (Second) of Torts Section 611 comment c, which rejected application of the privilege in such situations. The plaintiff also raised the specter of "fake news" and politically motivated reporting as a concern that express malice would supposedly deter. The Court likewise rejected this argument noting that treating two reporters who both fairly and accurately report on an official proceeding differently based upon their motivations in publishing their report "would neither advance the purposes of the fair report privilege nor protect the individuals about whom defamatory statements were made."

The Court explained that "[i]f we were to now hold that a reporter's knowledge of a statement's falsity could defeat the fair report privilege, it would undermine the purposes of the privilege.

The interpretation of the exception to Tennessee's statutory shield law, which provides that the shield law does "not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information," was also in dispute. Plaintiff claimed that the fair report privilege is a defense based on the source of the allegedly defamatory information and, therefore, the exception applied.

Relying upon Black's Law Dictionary, the Court held that "'source' encompasses documents and events as well as people," and that a broad application of "source" in the shield law includes official actions or proceedings. Thus, "[b]y asserting the fair report privilege, the defendants are claiming that the allegedly defamatory information they published is privileged because the source of that information is an official action or proceeding" and therefore the exception applied because "the fair report privilege is a defense based upon the source of the allegedly defamatory information."

The Court, however, restricted the scope of the exception. The plaintiff argued that because the exception applied he was permitted to "discover the source of *any* information, regardless of whether the information was procured for publication or broadcast, and that this discovery includes 'documents or data' in the defendants' possession.? The Court disagreed, explaining that the exception is limited in four ways:

> "(1) the exception applies only to defamation cases; (2) the exception applies only if the defendant asserts a defense based on the source of information; (3) the exception only allows the compelled disclosure of sources and not information; and (4) the exception specifies that the source that must be disclosed is only the source of the allegedly defamatory information – it does not apply to all of the sources of all of the information that a media defendant may have researched when preparing a news report."

The Funk case is a great result for media companies operating in Tennessee. In addition to updating Tennessee's common law fair report privilege, the Court provided detailed guidance on how the exception to the shield law should be interpreted.

For example, the Court explained that its interpretation "does not mean that, if the source of information is a document, a defendant must provide the plaintiff with the document in addition to identifying the document." Drawing a distinction between the source and the information, the Court held that the exception "allows a court to compel disclosure of the source of a media defendant's information – how media defendants know something; it does not authorize a court to compel media defendants to disclose the information the source provided." The only way to compel access to the information itself would be to satisfy the statute's three-part test.

The *Funk* case is a great result for media companies operating in Tennessee. In addition to updating Tennessee's common law fair report privilege to exclude both express malice and actual malice from the analysis, the Court provided detailed guidance on how the exception to the shield law should be interpreted in a limited fashion.

Paul R. McAdoo from Aaron & Sanders PLLC in Nashville, TN represented a coalition of media organizations as amici in the Funk case. Funk is represented by James D. Kay, John B. Enkema, and Michael Johnson from Kay, Griffin, Enkema & Colbert, PLLC in Nashville, TN. Scripps Media and its reporter Phil Williams are represented by Ronald G. Harris, Jon D. Ross, and William J. Harbison, II from Neal & Harwell, PLC in Nashville, TN.

No Jackpot For Illinois Governor Candidate's Claim Over Ballot Lottery Story

By Steven Mandell, Natalie Harris and George Desh

In 2014, Tio Hardiman was a candidate for Illinois governor and a longtime activist and violence interrupter with the organization CeaseFire, known for hiring volunteer former gang members to assist with de-escalating potential violence on city streets. Hardiman and CeaseFire were featured in the 2011 award-winning documentary film entitled *The Interrupters*.

In January 2014, Hardiman was facing a formidable Democratic primary challenger, incumbent Illinois governor Pat Quinn. Shortly after Quinn dropped a challenge against the signatures Hardiman had gathered to make the ballot, Hardiman literally won the ballot lottery. Not only would Hardiman appear on the primary ballot—his name would top the list based on a random selection of candidate names.

Immediately following Hardiman's ballot lottery victory, WFLD Fox 32 Chicago broadcast a report on Hardiman's candidacy featuring a campaign stop interview with WFLD's political editor Mike Flannery. During the interview, Flannery pressed Hardiman about his domestic violence arrest record. Specifically, Flannery asked Hardiman if voters should be concerned about a record that includes a guilty plea to domestic violence.

In response, Hardiman stated that his entire record had been expunged. Flannery asked Hardiman to address what happened in 1999 when he was first arrested for domestic violence and Hardiman said, "I refuse to go back there." WFLD ran a teaser during the broadcast, but before the report aired. The teaser referred to Hardiman as a "former gang member" and mentioned Hardiman's "domestic violence conviction."

The court reasoned that the "gist or sting" of defendants' statements that plaintiff "was once accused of beating his wife" and had a "conviction for misdemeanor domestic violence" were substantially true.

A companion web article published on WFLD's website after the report aired referenced "Hardiman's 1999 guilty plea and conviction for misdemeanor domestic violence." During the broadcast, Hardiman called in to complain about the gang member reference and WFLD issued an on-air clarification, stating, that Hardiman said "he has worked closely with gang members, but says he himself has never been in a gang."

Hardiman sued WFLD for defamation based on the teaser and the web article—but not the actual report—claiming that the "gang member" reference and "conviction" statement destroyed his "good reputation as a reputable and law-abiding citizen and candidate with the voters of the State of Illinois." WFLD producer Beth Kane was responsible for creating the teaser, and testified at her deposition that based on prior WFLD interviews where Hardiman claimed to have inside knowledge of gang activity and be an expert on street life, she believed that Hardiman was a former gang member when the teaser aired. At his deposition, Hardiman

admitted to pleading guilty to "simple battery" and acknowledged that the person he pled guilty to battering was his ex-wife. WFLD prevailed on summary judgment and Hardiman appealed.

On appeal, Hardiman argued that he was never convicted of domestic violence, but pleaded guilty to simple battery, and that his guilty plea was expunged. On February 25, 2019, the appellate the court affirmed. Hardiman v. Aslam.

The court reasoned that the "gist or sting" of defendants' statements that plaintiff "was once accused of beating his wife" and had a "conviction for misdemeanor domestic violence" were substantially true based on Hardiman's deposition admission. The court also noted that "[t]here is no serious question that simple battery against one's spouse is an act of domestic violence." It reasoned that "[e]ven accepting as true that the 1999 battery conviction was expunged, and that defendants used an incorrect legal term to describe the current status of the 1999 disposition of those criminal charges, any discrepancies did not meaningfully alter the uncontroverted fact that plaintiff pleaded guilty to and acknowledged his criminal culpability for an act of battery against his wife."

Hardiman argued that he "lost thousands of votes" but the court determined that lost votes do not constitute ? pecuniary loss, and that any pecuniary loss arising from a failed election bid was simply too speculative to support a claim for defamation *per quod*.

The court found that the "gang member" statement did not fall into any one of the five defamation *per se* categories and ruled that Hardiman failed to establish the requisite special damages to prevail on a defamation *per quod* claim. Hardiman argued that he "lost thousands of votes" but the court determined that lost votes do not constitute pecuniary loss, and that any pecuniary loss arising from a failed election bid was simply too speculative to support a claim for defamation *per quod*. Hardiman also claimed that he "lost over $200,000 in pledged campaign contributions," but the court found no evidence in the record to support this claim and noted that even if such evidence existed, campaign contributions may not be used as personal funds, and thus would not qualify as damages Hardiman personally suffered.

In addition, the court found that even if Hardiman had submitted sufficient evidence of special damages to defeat summary judgment, as a candidate and public official, Hardiman failed to submit any evidence that defendants acted with actual malice in publishing the "gang statement." Beth Kane testified regarding the basis for her belief that the "gang statement" was true at the time it aired, and Hardiman offered no contrary evidence. On March 18, 2019, Hardiman petitioned the appellate court for rehearing. That motion remains pending.

Steven Mandell, Natalie Harris and George Desh are lawyers with Mandell Menkes in Chicago and represented the defendants in this case. Alfred Phelps represented the plaintiff.

A Plain-Meaning Interpretation of the Texas Citizen Participation Act Limits Statute's Right of Association

By Megan Coker and Misty Howell

Texas's anti-SLAPP statute has become known for its broad application, particularly through its statutorily-defined right of association. In recent years, the right of association in the Texas Citizens Participation Act ("TCPA") routinely has been held to apply to trade secret misappropriation, conspiracy, tortious interference, breach of contract, and other such claims.

If alleged tortfeasors so much as allegedly communicated with each other for the purpose of, for example, stealing confidential information, violating nondisclosure agreements, or tortiously interfering with a competitor, courts have found the TCPA applies through the right of association – simply because these alleged tortfeasors joined together to pursue the common interests of committing a tort. *See, e.g.*, *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 294-96 (Tex. App.—Austin 2018, pet. filed).

Yet, these broad interpretations mean that litigants who may think they have averred garden-variety torts increasingly find themselves facing expedited review, a heightened pleading standard, frozen discovery, interlocutory appeals, and mandatory fee awards if they are not able to defeat a TCPA motion to dismiss. The courts of appeals have reluctantly followed the Texas Supreme Court into this wide open landscape, minding its exhortations to rely on the plain language of the TCPA and construe the statute liberally per the Texas Legislature's instructions. *See, e.g.*, *Craig*, 550 S.W.3d at 294-95.

Texas's anti-SLAPP statute has become known for its broad application, particularly through its statutorily-defined right of association.

TCPA and Right of Association

The Fort Worth Court of Appeals recently turned plain-meaning interpretation of the TCPA on its head. Kawcak v. Antero Resources Corporation, No. 02-18-00301-CV, 2019 WL 761480, at *10-12 (Tex. App.—Fort Worth Feb. 21, 2019, no pet. h.). The court applied the statute's plain language to *limit*—rather than to expand—the TCPA's reach. The novel approach focuses on how to define what constitutes a "common" interest in the TCPA's statutorily-defined right of association. The court held that "the plain meaning of the word 'common' in TCPA section 27.001(2)'s definition of 'the right of association' requires more than two tortfeasors conspiring to act tortiously for their own selfish benefit." *Id.* at *17. Instead, the court concluded that, under either the "primary definition of 'common'" or the definition most in harmony with the TCPA's purpose, "the common interests required in the TCPA's definition of the right of association must be shared by the public or at least a group." *Id.* at *8.

With this opinion, the Fort Worth Court of Appeals split with Texas appellate courts that have applied the TCPA's right of association more broadly, though apparently no court has

previously considered how the word "common" should affect the analysis. Perhaps the Texas Supreme Court will address this split, whether in *Kawcak* (if the parties ultimately petition for review) or in a future case. In the meantime, *Kawcak* left open the issue of how narrowly a court might interpret a "common interest" – would three or more tortfeasors in a given conspiracy suffice, or is a broader, community-oriented purpose required? Regardless, the court's novel approach may lead Texas litigants and courts to scrutinize the statute's undefined terms for the common meanings of other words that might limit the TCPA's expansive reach.

Background and the Court's Analysis

Antero Resources Corporation sued John Kawcak, a former employee, for tortious interference based on Kawcak's alleged participation in a kickback scheme with a vendor. Kawcak filed a motion to dismiss pursuant to the TCPA, arguing that the lawsuit was based on his right of association. The trial court denied Kawcak's motion, concluding that the TCPA applied but that Antero had pled a prima facie case, and Kawcak appealed. The Fort Worth Court of Appeals affirmed the trial court's denial of Kawcak's TCPA motion, but on the grounds that the TCPA's right of association does not encompass tortious interference claims merely because more than one individual conspired with a single other individual to commit a tort.

The Fort Worth Court of Appeals recently turned plain-meaning interpretation of the TCPA on its head. The court applied the statute's plain language to *limit*—rather than to expand—the TCPA's reach.

Specifically, the Fort Worth Court of Appeals noted that the TCPA's definitions bring a legal action within the reach of the TCPA's right of association if that legal action "'is based on, relates to, or is in response to' 'the making or submitting of a statement or document in any form or medium' 'between individuals who join together to collectively express, promote, pursue, or defend common interests.'" *Id.* at *6 (quoting Tex. Civ. Prac. & Rem. Code §§ 27.001 (1)-2), 27.003(a)).

Focusing on what qualifies as "common" interest, the court examined several different dictionaries' definitions of the word "common." The court found that *Webster*'s dictionary and several others defined "common" first as something like "of or relating to a community at large," *id.* at *7 (quoting *Webster's Third New Int'l Dictionary* 458 (2002)), before mentioning any definition of common that might result from the actions of merely two parties, *see id.* At least one dictionary, however, suggested that "common" only requires the participation of two or more persons. *See id.* at *8 (quoting the *American Heritage College Dictionary* 281 (3d ed. 1993)). The court concluded that a more communal definition of "common" should prevail based on its prevalence and primacy. *Id.* at *7-8.

Even if dictionaries did not settle the matter, the court chose to select the definition it deemed most consistent with the TCPA's statutory scheme. *Id.* at *9. A more communal definition more closely hews to the TCPA's purposes because "a definition of 'common' that is limited to the interests of two tortfeasors does not encourage and safeguard any constitutional

right and undermines the right of persons to file meritorious lawsuits for demonstrable injury. *Id.* at *10. Moreover, the court noted that the rights of petition and speech both incorporate some sort of "public" component, whether through communications relating to government or public proceedings in the right to petition or through the explicit requirement that the right to free speech involve a communication on a matter of public concern. *See id.* (quoting Tex. Civ. Prac. & Rem. Code §§ 27.001(3), (4)).

The Fort Worth Court of Appeals is hardly the first to address the scope of the TCPA's protection for the right of association. As the court noted, the Dallas Court of Appeals similarly attempted to limit TCPA's protection for the right of association in circumstances where applying the TCPA would frustrate the TCPA's purposes – safeguarding constitutional rights and protecting the right to file a meritorious lawsuit. *Id.* at *13 (citing *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841 (Tex. App.—Dallas 2015) (reading a public participation requirement into the TCPA to avoid "absurd results" of TCPA protecting private communications underlying tortious interference claim), *rev'd on other grounds*, 512 S.W.3d 895 (Tex. 2017)). And the El Paso Court of Appeals noted in *dicta* that applying the right of association to the common purpose of participating in a criminal conspiracy would create an anomalous, higher standard for litigants challenging joint tortfeasors than for those challenging a single defendant. *See, e.g.*, *MVS Int'l Corp. v. Int'l Advert. Solutions, LLC*, 545 S.W.3d 180, 194 (Tex. App.—El Paso 2017, no pet.).

Kawcak may also prove notable in the midst of the 2019 Texas legislative session, given the Legislature's ongoing interest in revising the TCPA.

Yet, acknowledging the Texas Supreme Court's commands to focus on the plain meaning of the TCPA rather than its purpose, the Fort Worth Court of Appeals declined to rely on the same logic. *Id.* at *10. Using what it found to be the primary definition of "common" that also harmonized with its reading of the TCPA's purposes, the court held that Kawcak's conduct was not an exercise of his right of association because his communications with his co-conspirator related only to two alleged tortfeasors' interests – and not to interests shared by any particular community or the broader public. *Id.* at *1.

Practitioners' Note

Kawcak arguably conflicts with several prior decisions in the Austin, Houston, and Tyler Courts of Appeals. All of these decisions have held that the TCPA's right of association applies to communications made for an improper purpose, including in suits involving claims for tortious interference and misappropriation of trade secrets. *See, e.g.*, *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079-CV, 2018 WL 6695810, at *12 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet. h.) (TCPA protected communications made in furtherance of conspiracy to commit tortious interference and misappropriate trade secrets); *Morgan v. Clements Fluids S. Tex., Ltd.*, No. 12-18-00055-CV, 2018 WL 5796994, at *3 (Tex. App.—Tyler Nov. 5, 2018, no pet.) (TCPA protected communications relating to misappropriation of trade secrets); *Abatecola*

v. 2 Savages Concrete Pumping, LLC, No. 14-17-00678-CV, 2018 WL 3118601, at *8 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.) (TCPA protected communications that were basis of tortious interference claim); *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287 (Tex. App.—Austin 2018, pet. filed) (claims regarding alleged misuse of trade secrets and confidential information implicated and related to the right of association).

Kawcak may also prove notable in the midst of the 2019 Texas legislative session, given the Legislature's ongoing interest in revising the TCPA. Whether or not the Texas Legislature intervenes, *Kawcak* provides practitioners and courts with a new interpretive tool to narrow the TCPA's application. It remains to be seen whether the Texas Supreme Court will agree that *Kawcak* sufficiently relies on the TCPA's plain meaning.

Megan Coker is a Senior Associate at Vinson & Elkins, and Misty Howell is an associate at Vinson & Elkins. Plaintiff Antero Resources Corporation was represented by Daniel H. Charest, Burns Charest LLP, Dallas. Defendant was represented by Brent Shellhorse, Whitaker Chalk, Fort Worth.

Zillow "Zestimates" Are Non-Actionable Statements of Opinion

By Sari Mazzurco

A panel of the Seventh Circuit affirmed dismissal of claims brought by homeowners against real estate listings database, Zillow, over its home value "Zestimates." Patel v. Zillow, Inc., 18-2130 (Feb. 8, 2019). The Court held Zillow "Zestimates" are statements of opinion as to a house's value, and thus are not actionable under the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 to 510/7.

Background

In May 2017, a group of homeowners brought a putative class action lawsuit against Zillow in Illinois, alleging their homes, profiled on Zillow.com, were undervalued by their respective Zillow "Zestimates." In their amended complaint, the homeowners argued the "Zestimate" tool violated the Trade Practices Act because: (1) Zillow promotes the "Zestimate" as fair and accurate; (2) Zillow does not indicate when a "Zestimate" diverges from an appraisal or comparative market analysis; (3) Zillow does not change a "Zestimate" upon a homeowner's request; (4) users are confused by the "I Disagree" link next to the "Zestimate," which allows users to contact a local real estate agent; and (5) listings marked as "For Sale by Owner" include links to disclosures about "suspicious listings." Upon Zillow's motion to dismiss the homeowners' amended complaint for failing to state a claim, the District Court dismissed the homeowners' claims because "Zestimates" were "nonactionable opinions of value" and thus "are not false or misleading representations of fact likely to confuse customers."

Affirmance of Dismissal

In a concise opinion authored by Judge Easterbrook, the Seventh Circuit considered whether allegedly inaccurate Zillow "Zestimates" of real estate and land may run afoul of the Trade Practices Act. The Court affirmed the District Court's dismissal of the claims brought by the homeowners, holding **"**Zestimates," which are derived from Zillow's proprietary algorithm, are not actionable under the Trade Practices Act because they are statements of opinion.

"Zestimates," the Court explained, are explicitly labeled as "estimates," which are inherently statements of opinion, rather than fact, and an erroneous opinion does not constitute "deception" in violation of the Trade Practices Act. Moreover, Zillow's refusal to alter or remove "Zestimates" upon a seller's request does not alter the conclusion that they are opinions, and mistakes the function of algorithms.

The Court explained an algorithm's accuracy does not improve by changing or removing particular data points, because interference with the algorithm would skew the distribution. If erroneously low values were removed, potential buyers would be worse off because mistakes favoring sellers would remain. And, if the seller asserted incorrectly, either mistakenly or intentionally, that the "Zestimate" was erroneously low, potential buyers would be deprived of valuable knowledge that may aid their purchase decision. The Court did not opine on the homeowners' other allegations in support of their argument that "Zestimates" are deceptive.

Sari Mazzurco is an associate with Covington & Burling LLP in New York in the Data Privacy & Cybersecurity and Copyright and Trademark Counseling & Prosecution practice groups.

Supreme Court Requires Complete Registration Before Infringement Action Can Be Commenced

By Ken Norwick

People who create copyrightable content, and people who publish or otherwise use such content - and the lawyers who represent them - should be aware of an important recent decision from the Supreme Court - Fourth Estate Public Benefit Corporation v. Wallstreet.Com.

An essential aspect of our copyright system is the phenomenon of "registration." Thus, while copyright protection automatically attaches to all works on their creation, Section 411(a) of the Copyright Act provides (with some exceptions) that no action for infringement "shall be instituted until ... registration of the copyright claim has been made in accordance with this title.? "Registration" simply means submitting the work to the U.S. Copyright Office with a request - called a "claim" - that it formally acknowledge the work's copyright status.

But what does "has been made" mean? Some federal circuits, including the Ninth, concluded that that requirement is met when the application for registration is sent. But other circuits, including (most courts within) the Second Circuit, have held that only a completed registration complies. The main reason this issue is important, and sometimes crucial, is that - except as explained in the next sentence - it can take the better part of a year for a certificate of registration to be issued following application. The exception: expedited registration can be obtained in the event of imminent litigation for a "handling fee" of $800 in addition to the regular filing fee. which is often prohibitive to many creators. The time between application and certificate will often leave the aggrieved copyright owner with no legal means to pursue a potentially massive and damaging infringement.

To the disappointment (mostly) of copyright owners, the Supreme Court on March 4th unanimously held that completed registration is required and that mere application is insufficient.

To the disappointment (mostly) of copyright owners, the Supreme Court on March 4th unanimously held that completed registration is required and that mere application is insufficient. The Court concluded:

> True, the statutory scheme has not worked as Congress likely envisioned. Registration processing times have increased from one or two weeks in 1956 to many months today.... Delays in Copyright Office processing of applications, it appears, are attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure.... Unfortunate as the current administrative lag may be, that factor does not allow us to revise §411(a)'s congressionally composed text.

The same day, *Variety* published a story headlined "Content Groups Fear Supreme Court Decision Will Make It More Difficult to Curb Piracy" that included this statement from the

Recording Industry Association of America: "This ruling allows administrative backlog to prejudice the timely enforcement of constitutionally based rights and prevents necessary and immediate action against infringement that happens at internet speed.? And the Copyright Alliance added: "In a world of viral, online infringement, a lot of damage can be done to a copyrighted work while an owner is powerless to stop it."

Notwithstanding advice often given by their lawyers, most creators - including especially photographers - do not usually seek to register their work when it is created - or even ever. This presents two separate (but related) problems if infringement is discovered: First, those creators will now have to await the issuance of the registration certificate before they can sue for infringement, and second, when registration is made after infringement begins they cannot recover the very valuable remedies of statutory damages and attorneys' fees, which (by statute) are only available if registration precedes the infringement.

Notwithstanding advice often given by their lawyers, most creators - including especially photographers - do not usually seek to register their work when it is created - or even ever.

The decision in *Fourth Estate* may well provide a new incentive to creators to seek registration as soon as possible after their work is created, even if there is no sign of infringement. (The fee for basic registration is a relatively affordable maximum of $55. Also, the Copyright Office allows for certain "group" registrations, so that many - often a great many - works can be covered in a single application for registration. Otherwise, the decision can only be seen as a further burden on (often) already beleaguered copyright owners.

Ken Norwick is a partner at Norwick & Schad in New York. Fourth Estate was represented by Aaron M. Panner, Kellogg, Hansen, Todd, Figel & Frederick, Washington, D.C. Wallstreet.com was represented by Peter K. Stris, Maher & Stris, Los Angeles. Jonathan Y. Ellis, Assistant to the Solicitor General, argued for the United States, as amicus curiae.

Supreme Court Preview: FUCT

By Roberta L. Horton & Jesse M. Feitel

On April 15, 2019, the Supreme Court will hear oral argument in In re Brunetti. The case presents a question at the crossroads between trademark registration and free speech. Section 2 (a) of the Lanham Act bans the registration of a trademark that consists of or compromises "immoral" or "scandalous" matter—does this ban violate the First Amendment. A three-judge panel of the Federal Circuit provided an emphatic "yes" to that question in December 2017, when it concluded that the ban on registering immoral/scandalous trademarks impermissibly discriminates based on content in violation of the First Amendment. *See In re Brunetti*, 877 F.3d 1330 (Fed. Cir. 2017).

For those who may have déjà vu on the brain, don't be alarmed. Just short of two years ago, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Supreme Court found that a *sister* provision of Section 2(a)—which bans the registration of trademarks that might disparage any persons, living or dead—was facially unconstitutional under the First Amendment, in a case involving the mark "Slants" for a musical rock band, which the U.S. Patent and Trademark Office (the "PTO") had refused to register on the basis that it disparaged Asian-Americans. The disparagement and scandalous/immoral bans are two grounds listed in the Lanham Act that the PTO previously could rely on to refuse the registration of a mark. Whether the PTO can continue to rely on the latter is now an open question to be decided by the Justices.

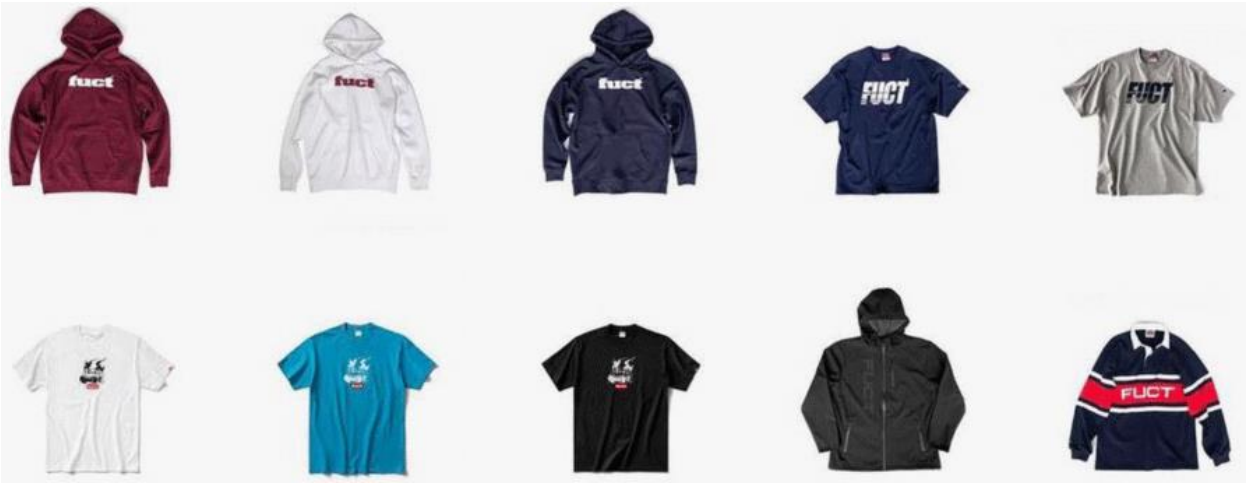
On April 15, the Supreme Court will hear oral argument in *In re Brunetti*. The case presents a question at the crossroads between trademark registration and free speech.

The Supreme Court's decision to hear *Brunetti* raises some important questions. Namely, why has the Court agreed to take another close look at Section 2(a) after reviewing a similar provision twenty-two months earlier? One hint may be to look to the current make-up of the Court. *Tam* featured a splintered plurality opinion, where the eight participating Justices only subscribed to the basic principle that the disparagement ban violated the First Amendment. The many concurring opinions demonstrate that the Justices could not find much more in the way of common ground, including, for example, whether the ban constituted a restriction on speech subject to strict scrutiny or a lower level of constitutional scrutiny.

Might the justices have taken up *Brunetti* to issue a more definitive pronouncement on this issue? And, of course, what about the addition of Justices Gorsuch and Kavanaugh, who did not hear *Tam*? Below, we provide an overview of the Federal Circuit's decision in *Brunetti*, along with thoughts on what steps the Court might take next.

Federal Circuit: Section 2(a)'s Scandalous/Immoral Ban Unconstitutional

The trademark at issue in *Brunetti* is FUCT, which Respondent Erik Brunetti, a graffiti artist, seeks to register for a clothing brand. The PTO attorney reviewing Mr. Brunetti's application (examining attorney) refused to register the mark, relying on Section 2(a)'s scandalous/immoral ban to conclude that the proposed mark was the past tense of the "F-word" (feel free to Google



Erik Brunetti, a graffiti artist, seeks to register FUCT for his clothing brand.

this if there is any confusion!). The appellate tribunal of the PTO, the Trademark Trial and Appeal Board (the "TTAB" or the "Board") agreed that the mark was vulgar and was barred from registration by Section 2(a).

For example, the Board observed that the Urban Dictionary defined the word "fuct" as a "slang and literal equivalent" of the past tense of the "F-word". Brunetti argued that "fuct" is ambiguous and that, if anything, the term refers to the term "Friends yoU Can't Trust." The Board disagreed. It certainly did not help Brunetti's cause when the examining attorney and the Board emphasized that Brunetti had previously used the mark on clothing "in the context of "strong, and often explicit, sexual imagery that objectifies women and offers degrading examples of extreme misogyny. *Brunetti*, 877 F.3d at 1337 (quotation marks omitted).

Judge Kimberley Moore, writing for the Federal Circuit, embraced the Board's finding below that the mark was vulgar and thus technically would have violated the scandalous/immoral ban. But, she found that the scandalous/immoral band could no longer stand as a basis to deny the issuance of a registration under the Lanham Act. Accordingly, the court reversed the Board's decision denying the registration under Section 2(a).

The Federal Circuit's opinion centered on its conclusion that the scandalous/immoral ban constituted impermissible content-based discrimination, namely, the "government restricts speech based on content when 'a law applies to particular speech because of the topic discussed or the idea or message expressed.' *Brunetti*, 877 F.3d at 1341-42 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

The Supreme Court's decision to hear *Brunetti* raises some important questions. Namely, why has the Court agreed to take another close look at Section 2(a) after reviewing a similar provision twenty-two months earlier?

The government made matters relatively straightforward for the Federal Circuit. It agreed that Section 2(a)'s scandalous/immoral ban is a content-based restriction on speech, and also conceded that the ban would not survive strict scrutiny. Instead, the government asserted that the ban was subject to a *lower* level of constitutional inquiry—intermediate scrutiny—as purely commercial speech under the framework established by *Cent. Hudson Gas & Elec. Corp. v.*

Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980). Purely commercial speech consists of "expression related solely to the economic interests of the speaker and its audience," *Cent. Hudson*, 447 U.S. at 561, and a regulation that restricts commercial speech is subject to a four-part analysis, which focuses on whether the asserted government interest in regulating the speech "directly advances" that interest and is "not more extensive than necessary to serve that interest." *Brunetti*, 877 F.3d at 1350.

The Federal Circuit found that the scandalous/immoral ban would not even survive this lower level of scrutiny. Namely, the ban had been unevenly applied because it forced the PTO to engage in a "vague and subjective" inquiry about each mark. This resulted in the registration of marks like "FCUK", while other marks such as "F**K PROJECT" and "MUTHA EFFIN BINGO", were *refused* registration as vulgar. *Brunetti*, 877 F.3d at 1354. The court also found that the government could not articulate a substantial interest here; merely promoting certain trademarks over others, including shielding the public from "off-putting" marks, is not enough. *Id.* at 1351.

Finally, the government argued that the scandalous/immoral ban did not even implicate the First Amendment because it should be considered a government subsidy. The Supreme Court's government subsidy doctrine recognizes that Congress may attach conditions when it funds programs through its Spending Clause powers, even if those conditions infringe on the First Amendment. The Federal Circuit rejected the government's argument out of hand, concluding that the trademark application regime does not implicate Congress' power to spend funds because the relevant flow of funds comes from the applicant to the PTO. Because the applicant never receives federal funds from the PTO, even if a registration is accepted, the Spending Clause is not implicated.

What to Expect:

Application of Intermediate (Not Strict?) Scrutiny to Challenges to the Lanham Act

The Supreme Court in *Tam* found that the disparagement ban could not stand as a restriction of purely commercial speech. But, the Supreme Court explicitly declined to consider whether that framework should be applied to the *other* provisions of Section 2(a) which include, of course, the scandalous/immoral ban at issue in *Brunetti*. *See Tam*, 137 S. Ct. at 1764 n.17 ("we leave open the question whether [the Supreme Court's doctrine addressing restrictions on purely commercial speech in] *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act."). By contrast, in *Brunetti*, the Federal Circuit did address whether the scandalous/immoral ban could survive as a restriction of purely commercial speech and held that it could not.

Brunetti presents the Court with an opportunity to expand its ruling in *Tam*. Will the Court conclude that any First Amendment challenge to the Lanham Act would be subject to intermediate scrutiny, rather than strict scrutiny?

Addition of Justices Gorsuch and Kavanaugh

The makeup of the Court has changed dramatically since the *Tam* decision was issued in

June 2017. Justices Gorsuch and Kavanaugh are expected to participate in the case; recall that *Tam* was issued by eight justices, because Justice Gorsuch did not participate in the decision (he had been confirmed after oral argument was already held) -- and, of course, Justice Kavanaugh was not yet on the Supreme Court.

Might the new Justices' views on the First Amendment affect how the Court interprets the immoral/disparaging provision? Prior to each Justice's confirmation, observers generally concluded that Justices Gorsuch and Kavanaugh had been solidly pro-First Amendment votes on the Tenth and D.C. Circuits, respectively. See Tejinder Singh, "Judge Gorsuch's First Amendment jurisprudence," SCOTUSBlog (Mar. 7, 2017) ("With few exceptions, Gorsuch has been willing to find in favor of First Amendment plaintiffs and against defendants attempting to assert immunity against a First Amendment claim."); Ken White, "You'll Hate This Post On Brett Kavanaugh And Free Speech," Popehat Blog (July 10, 2018) ("Kavanaugh has been an appellate judge for 12 years and has written many opinions on free speech issues. They trend very protective of free speech, both in substance and in rhetoric.").

And, when sitting on the D.C. Circuit, Judge Kavanaugh specifically addressed government restrictions on commercial speech in *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), which held that a federal regulation requiring manufactures to include the country of origin on meat packaging did not violate the First Amendment.

Brunetti presents the Court with an opportunity to expand its ruling in Tam. Will the Court conclude that any First Amendment challenge to the Lanham Act would be subject to intermediate scrutiny, rather than strict scrutiny.

Then-Judge Kavanaugh concurred, articulating his own views on the commercial speech doctrine. Justice Kavanaugh was highly critical of the government's stated interest in enacting the regulation, and rejected the government's argument that the label requirement satisfied a governmental interest in "providing consumers with information." *Id.* at 31. That interest was too "broad" for Justice Kavanaugh to accept. *Id.* Instead, he found that the relevant government interest was more nuanced and specific than what the government had originally asserted. *See id.* (upholding the regulation because of the United States' "historically rooted interest in supporting American manufacturers, farmers, and ranchers as they compete with foreign manufacturers, farmers, and ranchers").

While Justice Kavanaugh ultimately found that the government's regulation could withstand a First Amendment challenge, the decision presents an insight into his views on this issue. If the Supreme Court does apply the commercial speech doctrine to this case, we imagine that Justice Kavanaugh might similarly press the government on its interest in regulating speech through the scandalous/immoral ban.

In short, Justice Kavanaugh may be willing to apply his view of commercial speech in the context of the Lanham Act—an issue that the Court plainly declined to do two years ago. It is not clear whether Kavanaugh's views, along with those of Justice Gorsuch, will transform an eight-Justice plurality decision in *Tam* into a more definitive opinion concerning the Lanham Act.

Roberta L. Horton is a partner and Jesse M. Feitel an associate at Arnold & Porter.

SCOTUS to Hear Argument on FOIA's Confidential Information Exemption

South Dakota Newspaper Is Seeking Food Retailers' SNAP Data

By Alexa Millinger

In April, the Supreme Court will, for the first time, hear argument on a case that requires it to grapple with Exemption Four of the Freedom of Information Act ("FOIA"), exempting trade secrets and confidential information. Food Marketing Institute v. Argus Leader Media. The issue reaches the Court by way of a dispute between a South Dakota newspaper and a grocery trade group over data related to food stamps.

Background

In 2011, the Argus Leader, a newspaper out of Sioux Falls, South Dakota, after being denied a FOIA request, sued the U.S. Department of Agriculture ("USDA") seeking data related to the Supplemental Nutritional Assistance Program ("SNAP"). The USDA issues SNAP participants a card, similar to a debit card, to use to buy food from participating retailers. When a participant buys food using their SNAP card, the USDA receives a record of that transaction, which is called a SNAP redemption. The Argus Leader asked the USDA for annual SNAP redemption totals for stores that participate in the SNAP program. Approximate 321,000 retailers were implicated in the requested data

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The USDA withheld the data, taking the position that the SNAP data is protected by FOIA's Exemption Four, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privilege or confidential." 5 U.S.C. §552 (b)(4). The parties stipulated the data was commercial or financial and not privileged, so the outstanding issue was whether the data was "confidential."

After a two-day bench trial, a federal district court judge in South Dakota agreed with the newspaper that it was entitled to this data under FOIA. *Argus Leader Media v. United States Dep't of Agric.,* 224 F. Supp. 3d 827 (D.S.D. 2016). The district court adopted the widely applied *National Parks* test, from a 1974 case out of the D.C. Circuit. *See Nat'l Parks & Conservation Ass'n v. Motyon,* 498 F.2d 765, 770 (D.C. Cir. 1974).

The *National Parks* test deems information confidential when it is "likely to cause ***substantial harm*** to the competitive position of the person from whom the information was obtained." The USDA argued to the District Court that this harm would take two main forms: harm arising from grocery competitors using SNAP data to lure away customers from their business; and (2) harms arising from the potential stigma associated with being a high-volume SNAP retailer. Competitive retailers could use this data for purposes like determining profitable

locations for new grocery stores. But that did not convince the District Court, who found that the USDA had not met its burden.

The USDA decided not to appeal, but the Food Marketing Institute ("FMI"), a trade organization that represents grocery retailers, intervened and appealed on its behalf. The Eighth Circuit upheld the lower court's decision in May 2018. *Argus Leader Media v. United States Dep't of Agric.,* 889 F.3d 914 (8th Cir. 2018).

The appeal to the high court turns on the proper requirement to prove information is "confidential" under Exemption Four. The Argus Leader argues in its briefs that court should maintain the *National Parks* test requirement of showing competitive harm? FMI, on the other hand, argues that this definition deviates from the ordinary meaning of the term, and courts should interpret "confidential" to mean information that is kept private and not publicly disclosed. FMI maintains that the SNAP data is kept private pursuant to 7 U.S.C. §2018, a section of the SNAP statute that provides safeguards for limiting disclosure of information retailers provide to the government by law.

So far, at least sixteen media, non-profits, corporate, and other interests have filed amicus briefs espousing a range of arguments. The U.S. Chamber of Commerce argues in favor of overruling the *National Parks* test because it deviates from the text of Exemption Four, has created uncertainty, and imposes a substantial burden on parties seeking to meet the test and prevent disclosure. The Retail Litigation Center, Inc. argues that the Court should reject the rule favoring narrow construction of FOIA exemptions, which the Eighth Circuit below had used to, as the brief argues, deviate from the dictionary definition of "confidential" as used in Exemption Four.

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In addition to commercial interests, several not-for-profit organizations that claim they regularly provide information to federal agencies that is subject to disclosure obligations, including the Alliance of Marine Mammal Parks & Aquariums, Animal Agricultural Alliance, and the Fur Information Council of America, filed a brief arguing for strict construction of the term "confidential" and disposing of the *National Parks* test.

Representing media interests, the Reporters Committee for Freedom of the Press ("RCFP") along with 36 media organizations filed an amicus brief on March 25, 2019. The RCFP brief argues that the 2016 amendments to FOIA that impose a "foreseeable harm" requirement to discretionary withholdings that must be satisfied before agency records may be withheld. Therefore, because those amendments do not apply to the Argus Leader's FOIA request, made before 2016, the RCFP urges the Court to dismiss the writ of certiorari as improvidently granted. In the alternative, the RCFP advocates for affirming and adopting the *National Parks* test.

The case is scheduled for argument on April 22, 2019.

Alexa Millinger is an associate at Hinckley Allen in Hartford, CT.

Court Rejects FBI's *Glomar* Response to Request for Records on Documentary Filmmaker Impersonation

By Jennifer Nelson

In a ruling that will prove useful in future *Glomar* challenges, Judge Rudolph Contreras held that the Federal Bureau of Investigation improperly refused to confirm or deny the existence of documents responsive to portions of a Freedom of Information Act request from the Reporters Committee for Freedom of the Press regarding the FBI's impersonation of documentary filmmakers. RCFP v. FBI, (D.D.C. March 1, 2019).

Background and Lawsuit

In March 2017, an FBI agent using the pseudonym Charles Johnson testified in open court that the FBI had invented a phony documentary film company called Longbow Productions to lure Nevada rancher Cliven Bundy and his supporters into giving incriminating videotaped interviews. To ensure their targets would not doubt their authenticity, the agents crafted fake credentials, business cards, and a website for the fabricated production company.

The following month, in April 2017, the Reporters Committee submitted a FOIA request to the FBI seeking records regarding the FBI's impersonation of documentary filmmakers in the Bundy investigation, as well as records concerning all other incidents of FBI impersonation of documentary filmmakers since 2010.

Longbow Productions is not the first documented example of the FBI's impersonation of members of the news media. The practice dates back decades.

Notably, Longbow Productions is not the first documented example of the FBI's impersonation of members of the news media. The practice dates back decades**,** with several such incidents taking place in the 1960s and 70s. Most recently, in June 2007, the FBI created a fake news article attributed to The Associated Press and impersonated an AP editor during its investigation of a 15-year-old student suspected of sending bomb threats to administrators at his high school outside Seattle, Washington. The agent, posing as a journalist, convinced the suspect to click an emailed link containing surveillance malware that revealed the suspect's location to authorities. The Reporters Committee and AP filed a lawsuit against the FBI and Department of Justice in 2015 after the agencies failed to comply with FOIA requests regarding this incident of media impersonation. The case remains ongoing.

In response to the Reporters Committee's April 2017 FOIA request, the FBI issued a *Glomar* response under FOIA Exemption 7(E) to the portions of the request seeking records concerning other incidents of documentary filmmaker impersonation, refusing to confirm the existence *vel non* of responsive records.

Exemption 7(E) provides for the withholding of records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for

law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.? 5 U.S.C. § 552(b)(7)(E). To satisfy this exemption, courts in the D.C. Circuit have generally required the government to meet a two-part inquiry by showing that (1) the records being withheld contain law enforcement techniques and procedures that are generally unknown to the public; and that (2) disclosure could reasonably be expected to risk circumvention of the law.

The Reporters Committee and the FBI agreed to bifurcate briefing and filed cross motions for partial summary judgment on the propriety of the FBI's *Glomar* response.

The Reporters Committee relied on three primary arguments in its brief? (1) that the FBI had failed to show that confirming or denying the existence of responsive records would result in a cognizable harm under FOIA Exemption 7(E); (2) that the FBI waived its ability to assert a *Glomar* response because it has officially acknowledged the existence of responsive records; and (3) that upholding the FBI's use of the *Glomar* doctrine in this case would raise serious First Amendment concerns because it would chill journalists' speech.

The Reporters Committee submitted with its motion for partial summary judgment affidavits from two documentary filmmakers, Abby Ellis and David Byars, detailing the negative effect that the FBI's impersonation of documentary filmmakers has had on their ability to gain the trust of potential sources. According to Byars, "if an individual cannot be certain if they are speaking with a legitimate documentary filmmaker — as opposed to an undercover FBI agent — they are less likely to speak candidly, and more likely to refuse to speak at all."

The Court's Decision

The district court ultimately needed to reach only the first of the Reporters Committee's three arguments, holding that the government had failed to justify the FBI's assertion of a *Glomar* response under Exemption 7(E).

The district court expressed skepticism at the government's argument that documentary filmmakers are distinct from members of the news media, citing the examples the Reporters Committee had provided of situations in which documentary filmmakers have benefited from the journalist privilege. Ultimately, however, the court decided that it "need not grapple with the semantics of what constitutes 'news media'" because it found that the impersonation of documentary filmmakers is itself a known law enforcement technique due to the FBI's testimony in open court that it had impersonated Longbow Productions in the Bundy investigation. The court held that "it is implausible for [the government] to assert the technique is secret simply because it has only been acknowledged to have been used in one instance," and that while "other situations the technique may have been used in is still a secret, [] the fact that it is a technique law enforcement uses is not[.]? Here, even one well-publicized example of documentary filmmaker impersonation was enough to nullify an agency's attempted 7(E) *Glomar* response, which could prove helpful in future *Glomar* cases seeking information about a newly-revealed law enforcement practice.

The district court also held that simply acknowledging the existence or nonexistence of records related to other instances of documentary filmmaker impersonation would not reduce or

nullify the effectiveness of the technique or otherwise risk circumvention of the law. "Simply revealing that the FBI has any such records," the district court held, "would not allow criminals to discern whether or not the FBI has used the technique to investigate their own, specific criminal activity, because all a criminal would know is the existence of an unquantified number of records.? As such, the district court held that where the requested records concern a law enforcement technique known to the public, as is the case here, any purported withholdings for 7(E) harm "must be made utilizing the standard FOIA tools applied on a document-by-document basis."

The government is not appealing the district court's decision and has begun a search for the records responsive to the Reporters Committee's request for information related to other instances in which the FBI has impersonated documentary filmmakers.

Jennifer Nelson is the Stanton Foundation Media Litigation Fellow at the Reporters Committee for Freedom of the Press.

South Carolina Judge Limits FOIA to In-State Petitioners

By Eric P. Robinson

A five-year long corruption probe has led to the guilty pleas and probation sentences for three South Carolina state legislators, including the former House majority leader, and the conviction and 18-month sentence—staying pending appeal—of another legislator. A trial against another former legislator is pending. The probe also exposed the influence and authority of powerful lobbyists.

Yet a recent ruling by Common Pleas Judge Robert E. Hood would limit the effectiveness of the state's Freedom of Information Act to disclose some of the records from the public corruption probe. Judge Hood held that while South Carolina's Freedom of Information Law allows anyone to request access to state and local government records, only "citizens" of the state can sue to enforce the statute when access to records is denied. And "citizens," he ruled, means only people who live in South Carolina, not corporations that do business in the state.

Judge Hood held that while South Carolina's Freedom of Information Law allows anyone to request access to state and local government records, only "citizens" of the state can sue to enforce the statute when access to records is denied?

The ruling came in a case brought by the press to obtain records the House Republican Caucus turned over to investigators. The press argued that the legislature's House Republican Caucus is subject to South Carolina's Freedom of Information Act. Although the caucus uses government resources without charge, and much of the state legislature's policies are formulated in the caucus meetings in a Republican-dominated House and state government overall, Judge Hood held that the caucus was not covered by the Act.

While that is a troubling result, the ruling regarding the plaintiffs' standing to bring suit could have more long-term implications. The plaintiffs in the case all conduct business in the state: the corporate entities of *The State* and *Post and Courier* newspapers; Gannett (owner of *The Greenville News*); the South Carolina Press Association; the South Carolina Broadcasters' Association; and The Associated Press. Counsel conceded at trial that Gannett and the AP are incorporated outside of South Carolina, and thus are not citizens. Judge Hood then held that the remaining newspapers and organizations were not individuals and thus were not "citizens" of South Carolina under the statute.

Hood wrote that this decision was rooted in the language of the FOIA itself. At first, the "Findings and Purpose" section (§ 30-4-15) states that

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that *citizens* shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. (§ 30-4-15, emphasis added).

But in the very next sentence, the statue implies that "persons"—not just citizens of the state—have the legal right to request access to public records and meetings. It also implies that "representatives" of citizens should have access, without requiring the representatives themselves to be citizens.

> Toward this end, provisions of this chapter must be construed so as to make it possible for *citizens*, *or their representatives*, to learn and report fully the activities of their public officials at a minimum cost or delay to the *persons* seeking access to public documents or meetings. (§ 30-4-15, emphasis added).

Later on, the statute provides that "[a] *person* has a right to inspect, copy, or receive an electronic transmission of any public record of a public body," subject to certain records exemptions (§ 30-4-30 (A)(1), emphasis added), and that "[e]ach public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request, notify the *person* making the request of its determination and the reasons for it" (§ 30-4-30 (C), emphasis added).

But the FOIA section that allows lawsuits to enforce disclosure requirements describes only "citizens" being able to file such lawsuits: "A *citizen* of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases …" (§ 30-4-100 (A), emphasis added). But, again, the next section—allowing for the award of attorney fees in such actions—provides that "[i]f a *person or entity* seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the *person or entity* prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees" (§ 30-4-100 (B), emphasis added).

Judge Hood's ruling contradicted a 2016 ruling by a Court of Common Pleas judge which rejected a similar argument that a corporation was not a "citizen" and thus could not sue under the Freedom of Information Act. "The Court finds the General Assembly intended that corporations, such as the Plaintiff, be entitled to enforce FOIA," Circuit Judge D. Craig Brown ruled in that case. An appeal after trial in that case is pending. See Sisters of Charity Providence Hospitals v. Palmetto Health, No. 2016-CP-4001651, 2016 WL 9560204 (S.C. Ct. C.P., Richland County, Sept. 29, 2016), appeal pending, No. 2017-001726 (S.C. Ct. App.

The media plaintiffs in the caucus case have moved to alter or amend the court order to restrict it to the standing question alone, allowing for an appeal the ruling on that basis.

If Judge Hood's decision is upheld, South Carolina would become one of several states that have limited access under their freedom of information laws to state residents. These include Alabama, Arkansas, Delaware (see below), Georgia, Missouri, New Hampshire, New Jersey (see below), Tennessee and Virginia (see below). And a bill pending in Kentucky, H.B. House Bill 387, would impose a similar restriction.

In 2013 the United States Supreme Court held in *McBurney v. Young, 569 U.S. 221 (2013)*, that Virginia's limitation of access under the its freedom of information to citizens did not violate the Privileges and Immunities Clause of the U.S. Constitution, which provides that "the

citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." In his majority opinion, Justice Samuel Alito wrote, "This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."

The Supreme Court's decision effectively overruled Lee v. Minner, 458 F. 3d 194 (3d Cir. 2006), which held that a similar limitation in Delaware's freedom of information law did violate the Privileges and Immunities Clause.

Despite the Supreme Court's decision, a memo from the Virginia Freedom of Information Advisory Council issued after the court's ruling recommends that state and local agencies release information regardless of the requestor's residency. And in 2017 Virginia amended its Freedom of Information Act to allow access not only by Virginia citizens, but also by "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth."

In Tennessee, the Open Records Counsel's FAQs note the statutory limitation to citizens, but add that "governmental entities may make records accessible to individuals who are not citizens of Tennessee." The Delaware Attorney General took a similar position in a 2016 opinion.

In 2018, a New Jersey appellate court went further, ruling in *Scheeler v. Atl. Cty. Mun. Joint Ins. Fund*, 454 N.J. Super. 621, 186 A.3d 930 (App. Div. 2018) that while its freedom of information state referred to "citizens" of the state, the statute's general goal of access to government information meant that non-residents of the state could also seek information under the law.

> [T]he reference to "citizens"—found in [New Jersey's Open Public Records Act] and nowhere else in OPRA—expresses the Legislature's general intent to make New Jersey government records open to the public, rather than expressing an intent to limit access to only New Jersey residents or domiciliaries. Because the more specific provisions of OPRA refer to "any person," and because OPRA is to be construed broadly to achieve the Legislature's over-arching goal of making public records freely available, we conclude that the right to request records under OPRA is not limited to "citizens" of New Jersey.

Hopefully Judge Hood or an appeals court will take the same approach regarding South Carolina's law. Looking at the totality of the Freedom of Information Act, the law should serve as a means for news organizations and other groups to seek information from state government on behalf of the residents of this state, regardless of the technicalities of where the organizations are incorporated. After all, the entire purpose of the Freedom of Information Act is to promote disclosure of government information, not to limiting access to that information.

Eric P. Robinson is an assistant professor at the USC School of Journalism and Mass Communication, and is Of Counsel to Fenno Law in Charleston / Mount Pleasant, S.C. He writes a monthly media law column for the South Carolina Press Association. The Press Association and the other plaintiffs were represented by Jay Bender of Baker Ravenel and Bender.

Second Circuit Takes Step to Unseal High-Profile Sex-Trafficking Case Docs

By Sanford Bohrer, Madelaine Harrington & Caitlin Vogus

On Monday, March 11th the Second Circuit took a step toward unsealing documents long sought by members of the press that could inform the investigation into a sex-trafficking operation allegedly run by Jeffrey Epstein, the South Florida financier, and his associates.

Specifically, the Court issued an order to show cause directing the parties in two related appeals (*Giuffre v. Maxwell*, Index Nos. 16-3945 and 18-2868) to show why the summary judgment motion in the underlying defamation case, including the district court decision on the motion and any materials filed in connection with the same, should not be unsealed.

Underlying Defamation Case

The underlying case is a defamation matter. The plaintiff, Virginia Giuffre, alleged that she was a victim of Epstein. In 2008, Epstein pled guilty to two state prostitution charges pursuant to a plea agreement with the federal government. As part of a later lawsuit challenging the plea agreement under the Crime Victims' Rights Act, Giuffre alleged that Alan Dershowitz, who had represented Epstein in his criminal case, had had sex with Giuffre while she was a minor, a claim that Dershowitz denies. Giuffre's claims against Dershowitz were later withdrawn.

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In 2015, Giuffre filed a libel lawsuit against an associate of Epstein's, Ghislaine Maxwell, claiming that Maxwell had defamed her by calling her a liar. Pursuant to defendant-Maxwell's motion, the district court issued a protective order that allowed the parties to unilaterally designate material as "Confidential" and required that any party seeking to file confidential information submit a motion to seal. In the months that followed, the parties filed numerous motions to file documents under seal, and the district court granted each one.

In August 2016, the district court entered a sealing order that allowed the parties to file any document under seal *without* first filing a motion to seal in order "[t]o reduce unnecessary filings and delay." In the end, more than one hundred and fifty separate filings were submitted under seal or redacted. The sealed documents include motions and memoranda of law, court orders, and hearing transcripts, among other documents.

Initial Motions to Unseal

During the pendency of the case, two separate parties moved to unseal specific documents? First, in August, 2016, Dershowitz moved to intervene to unseal certain documents, or in the

alternative, to modify the protective order, claiming that the sealed documents corroborate his denial of Giuffre's claims against him. The district court denied Dershowitz's motion in a sealed order entered on November 3, 2016.

Second, Michael Cernovich – who has been variously described as a social media personality, right wing provocateur, and pro-Trump blogger – moved to intervene and unseal summary judgment documents. These included defendant-Maxwell's motion for summary judgment, Giuffre's response, Maxwell's reply, almost all of the attached exhibits, and nearly fifty pages of the district court's order, which were filed under seal or redacted. Dershowitz joined Cernovich's motion.

The district court denied Cernovich's motion, reasoning, in part that, "release of contested confidential discovery materials could conceivably taint the jury pool. Although the district court recognized that there is a general presumption of public access to judicial documents, it held that the public interest in access to summary judgment motion is "not as pressing" when, as here, the motion for summary judgment is denied. It ultimately concluded that interest in maintaining the confidentiality of "the sensitive nature of the materials designated as confidential, involving allegations of sexual abuse and trafficking of minors," and the upcoming jury trial outweighed any public interest in their disclosure.

On behalf of itself and a coalition of 18 news media organizations, the Reporters Committee filed an amici brief arguing that the district court erred in treating their motion to unseal as a motion to modify a protective order and in refusing to unseal.

Initial Appeals and RCFP Amicus Brief

Both Dershowitz and Cernovich appealed the denials of their motions to intervene and unseal to the Second Circuit.

It was at this point that the Reporters Committee for Freedom of the Press became involved in the case as *amicus curiae*. On behalf of itself and a coalition of 18 news media organizations, the Reporters Committee filed an amici brief arguing that the district court erred in treating their motion to unseal as a motion to modify a protective order and in refusing to unseal the records Dershowitz and Cernovich sought. The *amici* brief highlighted the high-profile, newsworthy nature of the case and the strong public interest in access to the sealed records. The Reporters Committee argued that the district court abdicated its responsibility under the First Amendment and common law by granting the parties carte blanche to litigate their dispute in secret, excusing them from justifying requests to file judicial records under seal and individualized review by the district court of such requests. Additionally, Reporters Committee urged the Second Circuit to instruct the district court, upon remand, to examine *all* of the judicial records filed under seal, as opposed to the more specific unsealing requested by Dershowitz and Cernovich.

Miami Herald's Intervention

The Miami Herald has covered Jeffrey Epstein, his alleged victims, and the prosecution of

his crimes for over four years. The investigation remains ongoing and seeks to determine whether Epstein's victims were heard by prosecutors and whether Epstein escaped more serious consequences because of his wealth and political connections. In connection with this investigation, Miami Herald and investigative reporter Julie Brown intervened in the district court and moved to unseal the entire docket on April 6, 2018. As with the previous motions to unseal, this too was denied. The order issued by the district court emphasized, in broad strokes, the privacy interests of the litigants, notwithstanding recognition that the alleged victim – Ms. Giuffre – consented to unsealing.

The Miami Herald appealed the order, arguing that public and press had a right to the documents under the common law and the First Amendment, and, at minimum, the documents should be remanded to the district court for a document-by-document analysis.

The Reporters Committee also filed an *amici* brief in support of the Miami Herald, on behalf of itself and a coalition of 32 news media organizations. That *amici* brief again emphasized the significant public interest in access to the sealed summary judgment records and argued that the district court erroneously dismissed that interest. In addition, the *amici* brief argued that generalized privacy interests, such as those relied upon by the district court, cannot support the sealing of the summary judgment records.

The Second Circuit's order to show cause suggests that the Court is considering unsealing the summary judgment materials itself, rather than remanding the case.

Oral Argument

Oral argument on both the Cernovich and Dershowitz appeals (Index No. 16-3945) and the Miami Herald appeal (Index No. 18-2868) was held on March 6, 2018 in front of judges José A. Cabranes, Rosemary S. Pooler, and Christopher F. Droney. Counsel for Miami Herald, Cernovich, Dershowitz, Defendant-Appellee Maxwell and Plaintiff-Appellee Giuffre appeared.

The panel focused on the parties' proposed solutions. Miami Herald argued that the district court erred in issuing a blanket sealing order without applying the analysis required by the common law and the First Amendment to each document. The panel, in turn, asked each party whether they agreed that the case should be remanded for a document-by-document analysis. All parties but Defendant-Appellee Maxwell agreed to this solution – preferences diverged as to which documents should be prioritized first.

On Monday, March 11, 2019, just five days after Oral Argument, the Second Circuit issued the order to show cause. The order applied only to the summary judgment documents at issue – the decision as to the rest of the docket remains pending.

Post Order Filings

A flurry of filings followed. These included a motion to reconsider filed by Defendant-Appellee Maxwell (denied on March 18, 2019), and responses to the order to show cause from all parties in their respective appeals. Additionally, two separate and anonymous parties

appeared in the Miami Herald appeal (Index No. 18-6828). Third-Party J. Doe moved (1) to request leave to file unreacted motions ex parte, under seal, for in camera review, (2) to intervene to demonstrate that portions of the summary judgment documents should be redacted or remain sealed, and (3) to request leave to proceed under pseudonym J. Doe. A separate anonymous party, John Doe, filed a motion for leave to file an amicus brief in support of Defendant-Appellee Maxwell's objections to the order to show cause. The identities of the J. Doe and John Doe remains uncertain.

On March 28, Defendant-Appellee Maxwell moved in the Miami Herald appeal (Index No. 18-2868) for leave to file a response to Cernovich's response, filed in appeal Index No. 16-3945. The Second Circuit's decision on the various responses and applications remains pending.

The Second Circuit's order to show cause suggests that the Court is considering unsealing the summary judgment materials itself, rather than remanding the case to the district court for a decision about the unsealing of those documents, as Defendant-Appellee Maxwell has urged the Court to do. Depending on the Court's decision, this case may set an important precedent on numerous issues, including the common law and First Amendment rights of access to discovery -related motions (sought by Dershowitz) and how claims of privacy concerns should be weighed in determining the sealing or unsealing of judicial documents under the First Amendment or common law.

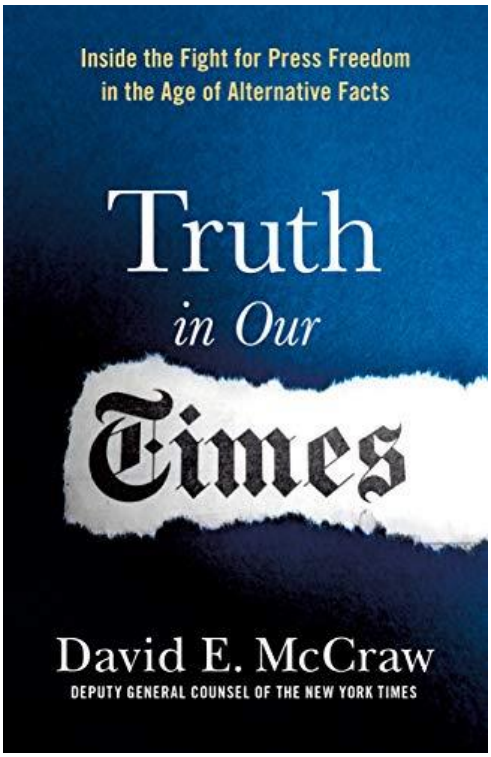
Sanford Bohrer is Consulting Counsel, and Madelaine Harrington an associate, at Holland & Knight LLP. Caitlin Vogus is a staff attorney with The Reporters Committee for Freedom of the Press.

Book Review

Truth in Our Times By David McCraw

By Ashley Messenger

David McCraw, Deputy General Counsel of the *New York Times*, became a legend in 2016 when his letter to Donald Trump's lawyer, who had demanded a retraction and apology for an article about Trump allegedly groping two women, went viral. In three succinct paragraphs, McCraw decimated the argument that any action was warranted, not-so-gently reminding his audience that Trump's reputation regarding his treatment of women was already rather poor, and noted that the law was strongly on the *Times'* side. "If Mr. Trump disagrees, if he believes that American citizens had no right to hear what these women had to say and that the law of this country forces us and those who would dare to criticize him to stand silent or be punished, we welcome the opportunity to have a court set him straight."



Some wise literary agent decided that McCraw probably had enough good stories to fill a book, and she was right. The product of a three-month book leave, *Truth in Our Times* chronicles McCraw's encounters with guiding *New York Times* reporters through Trump's first couple of years in office, along with anecdotes about his past as a reporter in small town Iowa and lawyering in pre-candidate Trump New York.

One question raised in the book is whether Trump has ushered in an era of rich men actively undermining the press. McCraw recalls that Emily Bazelon had written a story, "Billionaires vs. the Press in the Era of Trump," and he told her that he "fundamentally disagree[d] with the premise of the piece," because he didn't see a "trend" or a "threat, not compared, say, to what was going on in 1964." But he now acknowledges that perhaps he was mistaken and that there have been several incidents that would disturb advocates of a free and independent press.

The stories he tells will be both familiar and fascinating to media lawyers. He covers a wide range of topics, including journalist safety, publishing the Trump tax returns, creating a social media policy that journalists could actually take seriously, dealing with Wikileaks, the Boies scandal, and how hard it is to protect foreign journalists on the ground.

In a chapter that discusses how readers have reacted to the Times' coverage of events, he makes an eloquent distinction between serving your audience and pandering to it. He compares the fervor of true believers at the Reporters Committee gala to those at Midwestern evangelical revivals – a comparison that will ring true to anyone who has ever attended. He takes the threat of libel lawsuits less seriously than other media lawyers might, but on the other hand, he

provides good tips for dealing with conflicts between reporters and their editors, and his discussion of how to publish sex tapes and defend their newsworthiness is a gem.

The best parts of the book are those in which he captures the tense and sometimes ridiculous nature of being a newsroom lawyer: dealing with plaintiffs' lawyers who send letters stuffed with empty threats or who want to senselessly debate everything from how sentences are constructed to how penile injections work (it came up, no pun intended, in the Weinstein coverage) – anything they think will stop a negative story or get a correction in favor of their client. He expresses concern with how lawyers are portrayed in films, ever-conscious of the risk of appearing as the gloomy, neurotic naysayer (casting suggestion when a film about the *Times* is inevitably made: a jocular Ryan Gosling).

If the worst fears some have about the crumbling of American institutions were to come to be, this book would stand as a chronicle of what happened and how.

McCraw's casual writing style and witty quips make the book easy to read, and he skillfully weaves his experiences with explanations of the law. The reader gets a solid if cursory explanation of *New York Times v. Sullivan*, *Landmark Communications v. Virginia*, *Bartincki v. Vopper*, laws concerning the confidentiality of tax records, the Espionage Act, cases on access to press conferences (as opposed to "gaggles"), *U.S. v. Alvarez*, the SPEECH act, and FOIA.

The book's final chapter is essentially an editorial in support of the First Amendment, wisely noting that "the First Amendment story is, in the end, not about law but about hearts and minds. It doesn't really matter how much freedom journalists have if no one believes them … It is a very short half-step from not believing the press to not believing in press freedom."

And there it is. The main point of the book is that, while the First Amendment has given the press quite a bit of legal protection, there are nevertheless abundant threats, not all of which come in the form of a viable Complaint. If the worst fears some have about the crumbling of American institutions were to come to be, this book would stand as a chronicle of what happened and how.

Ashley Messenger is Senior Associate General Counsel at NPR.

Letter to a Newer Media Lawyer

Be Patient, Brave and Don't Forget to Eat

Dear Newer Media Lawyer,

I know the media law world can look like a law geek's equivalent of a hot New York night club: The lucky few on the inside have all the fun, while everybody else looks on from the wrong side of the velvet rope.

Jonathan Anschell

So it seemed to me during my first few years of practice. I saw role models like Lee Levine, Barbara Wall, Henry Hoberman, Kelli Sager, George Freeman and others handling cutting-edge issues where the First Amendment itself seemed to hang in the balance. When they spoke at conferences, I listened from my seat in the back of the room. I read their articles in clubby journals like this one. I wondered if I might ever get the chance to breathe their rarified air.

If I could give my younger self a piece of advice from where I sit today, it would be something like this: First, relax. Second, you're doing the right thing. Continue devoting yourself to whatever work crosses your desk, any opportunity you get to pursue your interests and the people you meet along the way. The rest will take care of itself.

Your First Job Might Not Be Your Dream Job, And That's OK

My first post out of law school was not a dream gig. Although the firm where I started – a mid-sized, full-service shop in Los Angeles – had its share of media and entertainment matters, I was assigned to two partners who handled corporate governance and securities cases. Transplants from a big New York firm notorious for its intensity, they had little tolerance for my novice mistakes, of which there were many. But after their profanity-laced screeds that I wouldn't have lasted a day at the Big Law behemoth from which they spawned, they patiently trained me in the nuts and bolts of lawyering, taking the time to sit with me and review my early briefs and deposition transcripts line by line, explaining where I'd gone wrong and how I could do better. I still benefit from those lessons today.

It wasn't media law. Nonetheless, that training gave me the tools I needed later to jump onto media cases. Very few of us start our careers battling for the freedom of the press. As long as you're honing your skills and exploring opportunities to learn more about the interplay between law and creative content, your day as a media lawyer will come.

There's Big Value In Small Cases

If you're lucky enough to work on media matters early in your career, the thrill can be addictive. More than likely, you'll be part of a team led by a seasoned and inspiring expert in

the field. After all, when a news report or movie premiere is on the line, clients like to see a little gray hair on their lead counsel. I whole-heartedly encourage you to jump at the chance to play a junior role on significant and interesting media cases. But I also urge you to work on smaller matters where you can play a bigger role. This holds true even if – really, especially if -- those cases have nothing to do with the media.

During my first several years of practice, the small, non-media cases that came my way included a title insurance dispute about an overbuilt McMansion and a contractual fight over the workings of a robotic cheese packaging system. Hardly the stuff of a budding media lawyer's aspirations. These first cases and appeals, however, got me into court in a first-chair role, and gave me the chance to make my beginner's mistakes, learn how to fix them, and get those first trial jitters out of my system.

Fortunately, nobody's First Amendment rights hung in the balance while I cut my teeth as a trial lawyer. And when it came time for me to represent media clients in front of judges, juries or appellate panels, I had the confidence that comes from having been there before. You will, too, if you don't turn your nose up at small cases.

Eat and Drink As Friends

In Shakespeare's "Taming of the Shrew," the character Trunio asks his peers to "do as adversaries do in law, strive mightily, but eat and drink as friends." I love this quote, not just because it endorses eating and drinking as important to our profession, but because I think it gives good career advice. Trite as it may sound, there is no substitute for the breaking of bread or the raising of a glass to build and cement the relationships that can open doors, offer a leg up or impart a word or two advice as you build career in media law.

Along the way, you'll get to meet and spend time with wonderful people – peers and mentors alike – in the close-knit and collegial media law bar. For me, this has brought memorable experiences like becoming a devoted fan of the bar band The Edge with people like Ashley Kissinger, Jill Meyer and Steve Mandell; bonding with David Bodney, a role model in the media bar, while comparing boats in a Florida marina to the Kennedy family's legendary yacht Honey Fitz; and enjoying a good meal and even better conversation with a small group of people (whose names I omit for their own protection) who gather each year for a dinner-after-the-dinner following the MLRC's annual banquet.

How do you meet these people? Get involved. Attend a conference, plan or speak on a panel, write an article. The more you do, the more you'll learn and the more friends you'll make.

When Opportunity Knocks, Don't Be Afraid to Answer

I was very lucky to spend several years of my career at a boutique-sized law firm that focused on media and entertainment litigation, working on interesting cases with great people. I wasn't looking for a career change.

So when Susan Holliday, my predecessor as the general counsel of CBS Television, told me she was retiring and suggested that I consider applying to take her place, I was more than a little hesitant. I thought I'd be woefully unprepared in the unlikely event I got the job. Although I had litigated cases arising from news and entertainment content and provided related advice, I had never before made real-time judgment calls for a journalist or producer calling from the field or soundstage with cameras rolling. While I had handled my share of contractual disputes as a litigator, I had never "done a deal" as the lead negotiator in a complicated transaction.

Setting my trepidation aside and taking Susan Holliday's advice was one of the best decisions I've ever made. The opportunity to work at CBS with enormously talented and deeply dedicated colleagues on relentlessly interesting issues has been a lawyer's equivalent of Disneyland (with my apologies to our friends in Disney's trademark practice). My colleagues at the company have shown me the ropes and steered me around trouble more times than I can count. I've also been able to learn a thing or two along the way, just as Susan assured me I would.

As you move forward in your career, you will encounter opportunities that feel like a stretch or a gamble. Don't be afraid to take those chances. As the saying goes, a ship is always safest in port, but that's not what ships are built for.

Good luck and Godspeed as you build your media law career. Welcome. And the next time you're at a conference or a lecture, please come find me and say hello – I remember what it's like to be on your side of the velvet rope.

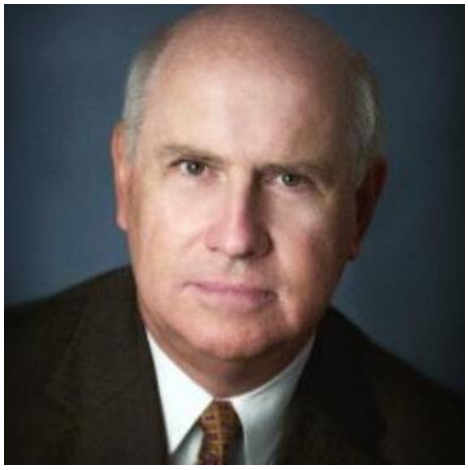
Jonathan Anschell is Executive Vice President, Deputy General Counsel and Corporate Secretary at CBS Corporation.

10 Questions to a Media Lawyer: Robert Nelon

Robert "Bob" D. Nelon is a shareholder at Hall Estill in Oklahoma City.

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

When I was in law school at the University of Oklahoma, I wanted to practice securities law. My last semester in school and for several months after until I passed the bar in 1971, I clerked with Andrews Davis, the preeminent securities law firm in Oklahoma City. However, I had a three-year commitment to the Marine Corps to serve as a JAG officer (think Kevin Bacon in "A Few Good Men" or the new CBS series "The Code").



When I finished military service, I returned to Andrews Davis at the beginning of 1975 expecting to practice securities law. However, as the newest associate – and now, given my JAG experience, being viewed by the firm as a litigator – I was assigned to work with a couple of litigation partners instead. (As it turned out, I never drafted a registration statement or 10-K.) One of the partners was defending a defamation case for a television station client (the firm had previously done its business and tax work) and I assisted in the defense. Then a second partner was retained to represent a different television station, and I assisted in defending that case. I found media law to be fascinating, especially because in the second half of the 1970's (keep in mind I'm old, and this was just a decade after *New York Times* and a couple of years after *Gertz*), the constitutional aspects of defamation law were just developing. Andrews Davis quickly got known for defending media, and the firm picked up several media clients as Oklahoma became something of a hotbed for defamation and privacy litigation. In 1980, the firm joined LDRC (MLRC's predecessor) and that year I wrote a two-part, 100–page article for the Oklahoma Law Review about "new perspectives" in defamation law. My interest in media law was cemented, and I've never escaped.

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

I love the analytical aspects of media law, briefing motions and arguing finer points of legal theory, and even trying cases. However, what I like most are the people who practice in this area, both in my firm (such as Jon Epstein, my partner at Hall Estill where I've practiced for the last 23+ years) and throughout the country. I count as some of my best friends the media law practitioners that I've come to know through the years. They're good people.

I'm not sure I can really point to anything I like "least" about my job, unless it's having to deal with opposing counsel who know little about defamation law and don't seem to want to learn.

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

Nelon in June 1976. Says the author: "Notice the absence of a computer, and the yellow note pad and pencil. Ahh, the good ol' days. Notice, too, the hair, worn in the long style of the '70's. I'm not sure if I'd gotten a haircut since I left the Marines at the end of 1974."

I think my biggest blunder came early in my media law career, not long after I had become a partner in the Andrews Davis firm. The details are fuzzy now – it was a long time ago, and repressed memory (who wants to really remember blunders) or a little senility are setting in – but it had to do with failing to remember that a witness had been deposed. As I recall, I was defending a defamation case against a television network and one of its reporters (who shall remain nameless). A witness that the client and I thought was relatively inconsequential was scheduled for a deposition during the time I had planned a summer vacation.

I had an associate cover the deposition while I was gone and the client's house counsel decided we didn't need to get a transcript of the deposition. Months later, when another and more consequential deposition was being taken, I was caught by surprise when the testimony of the supposedly inconsequential witness became significant, I didn't even remember that the witness had been deposed, and it was embarrassing to be so clueless about the previous testimony. I've never failed to get a deposition transcript since, and generally prefer to take or defend depositions myself.

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

I've argued several times before the Court of Appeals for the Tenth Circuit (Oklahoma appellate courts generally do not hear oral argument), most recently in March of this year in a false light case against Time Inc./Sports Illustrated.

The most "high profile" case I argued was *Peterson v. Grisham* (10th Cir. 2010), in which the court affirmed the dismissal on Rule 12(b)(6) of defamation, false light, IIED, and conspiracy claims against John Grisham, Random House, and several other defendants. The suit arose out of Grisham's only non–fiction book, "The Innocent Man."

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

Shovels. Lots of shovels. I'm honored to serve as a member of the MAPS3 Citizens Advisory Board, a mayoral appointment to a volunteer city board that oversees $800 million of public works projects in downtown Oklahoma City (such as a new convention center, a 70–acre downtown park, new modern streetcar system, senior wellness centers throughout the city, a

whitewater rafting venue, and so on). As a member of the CAB I've attended numerous groundbreaking ceremonies for the various projects and I have gold–plated shovels from each of the ceremonies resting against an office wall.

6. Favorite sources for news – legal or otherwise?

I confess to being a bit of a news junkie. As a progressive Democrat, I watch a lot of MSNBC (Rachel Maddow and Nicole Wallace are favorites), but I try to catch local and national news on all of the networks from time to time. (The NBC, ABC, and FOX affiliates in Oklahoma City are clients, so I have to watch them all at one time or another.) I also am a digital subscriber to New York Times, Washington Post, and LA Times. In addition, though trying to maintain a healthy dose of skepticism, I check Twitter and Facebook just about every day (OK, several times a day) just to see what's going on.

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

I think you should go, at least if you really think being a lawyer is what's right for you. Be aware that law school these days is expensive, and the job market is filled with law school grads who aren't working glamour jobs in high-paying law firms. But if you're even thinking about law school, your ego is probably big enough to think you can make a successful go of it, so give it a shot.

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

Short of working for one of the power firms that do media work (which might entail moving to New York, DC, LA, or one of the firm's satellite offices), getting into media law may be a little tough, especially if you live and work in a smaller media market. I was fortunate that my first firm had done the business and tax work for a television station client when that client was sued for the first time ever in a defamation case. I happened to be in the right place at the right time to get into media law work (*see* question No. 1), but it was admittedly fortuitous. If you're in a firm that doesn't currently do media work, join the ABA Forum on Communications law, attend a conference or two and get to know people, and hope for a referral. If you're in a firm that has any existing relationship with a publisher, broadcaster, ISP, or struggling blogger or author (even if not in a true media–law context), get the firm to join MLRC and pitch your

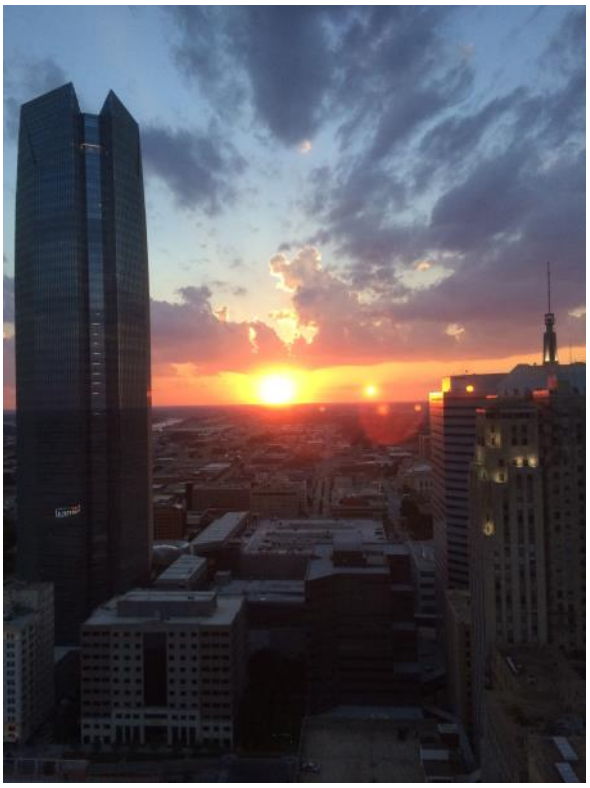
membership as a reason for that business or person to use your services, even if both of you are in the learn–by–doing stage of media law.

9. What issue keeps you up at night?

Really nothing. I sleep soundly, knowing that whatever issue is out there can be met head on the next day.

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

Probably an aerospace engineer. That was what I wanted to be from the time I was in junior high (when I was a student member of the American Rocket Society, later the American Institute of Aeronautics and Astronautics) until I got to college in 1964. (If you're not old enough to remember, that was during the dawn of the space age and the era of Mercury and Apollo space flights.) I actually was enrolled to begin with in the engineering school in college (Northwestern), but after a year or so concluded that being an engineer for the rest of my life was not what I really wanted. So, instead of studying about ion plasma physics for deep space probes, I became a political science major and went to law school. The rest, as they say, is history.



View from the office