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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through November 25, 2016

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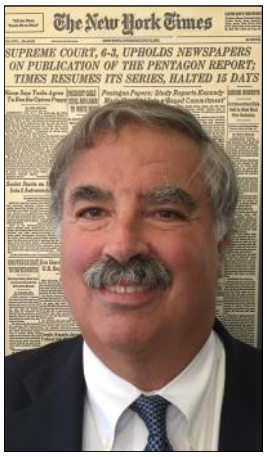
MLRC in the Era of Trump

Annual Dinner and Forum Gleam on Maudlin Day After; Media Lawyers Meet to Gird for Access Issues Ahead

The MLRC's Forum and Annual Dinner last month were quite fascinating– but were overshadowed by the events of the prior 24 hours: the Presidential Election. Although they both contained useful nuggets and interesting discussions from a media law point-of-view, they probably will be better remembered for the cathartic relief they gave many of us from the upset victory of PE Trump which was declared only about 14 hours before the Forum began.


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

George Freeman

Being together as a group – over 600 strong – was a welcome change from watching the returns alone in the privacy of our TV rooms, and even being in our offices, many of us bemoaning the developments of the historic day. At a time like that, what better than to be with lots of like-minded friends and colleagues and talk about our reactions, fears, hopes and prognostications about the new Administration, domestically and foreign policy-wise - - not to mention mull Supreme Court appointments and media relations and journalistic access. Plus, having a few stiff drinks at our reception didn't hurt – other than if you were half asleep already from having stayed up to the wee hours as Wisconsin, Pennsylvania and Michigan were still being counted.

MLRC's Forum and Annual Dinner probably will be better remembered for the cathartic relief they gave many of us from the upset victory of PE Trump which was declared only about 14 hours before the Forum began.

That said, the Forum was terrifically timely. It was billed as a discussion on how the media covered the campaign, but inevitably morphed into how the media called it so wrong, what mistakes they had made – and most aptly, what will be the challenges and difficulties in the media's covering a new President who had spent the better part of the last year bashing them and calling them "scum". Indeed, as reported below, the MLRC has just convened a meeting of inside counsel to start strategizing on that very question. And the Annual Dinner's commemoration of the 45th anniversary of the Pentagon Papers case was perhaps a welcome homage to a press victory in what today feels like a bygone era – who knows if the balance between government and the press will be at all tilted in the media's favor in the next four years.

Frankly, getting a panel of journalists for the Forum was very difficult, as we were turned down by numerous reporters and editors who did not want to

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commit to being out of their newsrooms the day after the Election. But my colleague Michael Norwick persevered, and ultimately gathered a terrific panel. Not only were they all smart, knowledgeable and excellent analyzers, they were also great as an ensemble, having civil disagreements and solid discussions among them, and all being generous with floor time. They made my job as moderator very easy.

Olivia Nuzzi, a reporter for The Daily Beast who had been covering Trump on the campaign trail, was the breakout star of the day. Just a few years out of school, she gave amusing, but meaningful, anecdotes about incidents at Trump rallies, and generally was very sophisticated and nuanced in her comments. She explained Trump's popularity as the bad boy who is cool. Bill Carter, an old colleague at The Times who covered media, with a specialty in late night tv, and now is a commentator for CNN and hosts a radio show about the media on Sirius Radio, spoke poignantly about Trump's psyche, how while he is bashing the media for political gain, he loves to connect with media, be on the air and watches and reads media avidly. Jay Rosen, a NYU journalism professor, supplemented the practical discussion with his own more theoretical and academic postulates which provoked sharp comments; he argued that Trump's attacks on the press resulted its trust being eroded when it criticized him. And, finally, Ken Auletta, a long-time contributor to The New Yorker, author and media analyst, gave wise and thoughtful counsel about how to deal with the new White House, and applauded the media for calling the PE on his falsehoods, while cautioning of the resultant dangers of being perceived as opinionated.

Bill Carter spoke poignantly about Trump's psyche, how while he is bashing the media for political gain, he loves to connect with media, be on the air and watches and reads media avidly.

The Annual Dinner began with the MLRC's awarding its William J. Brennan, Jr. Defense of Freedom Award to Daniel Ellsberg for his leaking of the Pentagon Papers to the press. In his humorous but poignant remarks accepting the honor, Mr. Ellsberg noted that he was the first source to have received our award, and stressed the importance of sources in the journalistic process.

After dinner, the program began with some timely words from moderator Floyd Abrams. He said that Trump's election was the greatest threat to the First Amendment since the Sedition Act of 1798. He exhorted the audience to be ready to (wo)man the front lines and be prepared to protect the media's right and ability to cover the new administration fully and fairly despite the inevitable challenges and roadblocks the new President will put in our way.

The program, entitled "The Tension Between National Security and an Independent Media: Apple v. FBI, the Snowden Disclosures and the 45th Anniversary of the Pentagon Papers Case" had an all-star cast. It highlighted the two most renowned leakers of the last half century, Mr. Ellsberg and Edward Snowden, and also included Max Frankel, former Executive Editor of The

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New York Times and Washington Bureau Chief at the time of the case, and Noreen Krall, Chief Litigation Counsel of Apple who quarterbacked its opposition to the FBI's attempt to force Apple to give it software sufficient to unlock the iPhone of a San Bernardino terrorist.

To use a technical legal term, it was pretty cool to see Mr. Snowden on a big screen direct and live from his exile in Moscow. He spoke seriously and methodically about why and how he disclosed the NSA's top secret surveillance program to the press. In answer to Mr. Abrams sharp questions, he said he did not give out information regarding some covert US programs to spy on other world leaders, and that he entrusted the journalists to whom he gave all his materials to filter them and redact any which would endanger Americans abroad or our national security.

Mr. Ellsberg spoke quite movingly about why he risked his freedom to disclose the Pentagon Papers. He said it would have been morally irresponsible to do anything else, and as someone with access to these classified materials, he felt he had to do whatever he could to end the killing of both Vietnamese and Americans in what he was sure was an unwinnable war.

Mr. Frankel spoke about the challenges in deciding whether to publish such sensitive materials, but underscored that the Government had to articulate really good reasons for the press to keep such information from the people. And, in discussing the latest iteration of the tension between the Government and the media, Ms. Krall outlined the steps Apple took to keep its customers' information private and keep the FBI from being able to overcome the phone's encryption.

At 10:05, exactly 24 hours after Hillary's firewall had turned to rubble, the Dinner was over. It had been quite a day.

Floyd Abrams said that Trump's election was the greatest threat to the First Amendment since the Sedition Act of 1798. He exhorted the audience to be ready to (wo)man the front lines and be prepared to protect the media's right and ability to cover the new administration fully and fairly.

* * *

In part as an outgrowth of Floyd Abrams' words at the Dinner, the discussion at the Forum and some of the developments impacting the press during the campaign and in the recent weeks after the election – from PE Trump's barring the press from some trips and events to distributing his message on You Tube alone – the MLRC convened a meeting of inside counsel last week to begin discussing some of the challenges the media might face in covering the White House in the coming months. About 35 people attended, including counsel from the three national newspapers, the four major television networks, and the key wire services, news

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websites and magazines, as well as general counsel of the ASNE and the White House Correspondents' Association.

At the outset, potential issues with access to the White House were discussed. Thus, we discussed what to do if certain reporters or publications were retaliated against and barred from events open to the rest of the press, what to do if access to Presidential events traditionally attended by the press were ended, and what steps to take if the White House relied on its own photographer's pictures, p.r. handouts and You Tube videos to communicate with the public, thereby circumventing the Fourth Estate and endarounding potential questions from reporters.

Many present argued that it was vitally important for the media to pick its fights (and litigations) wisely, and not to engage in every battle. There was a sense that the media should select fights which it could win both in the courts and in the market of public opinion. There were reminders that some of these issues were not new: for example the current Administration has used handout photos on many occasions to document Presidential activity and Democrat Nancy Pelosi had distributed doctored photos of Congresswoman just a few years ago.

It was interesting to see how often discussion on these legal and journalistic issues veered into deliberations about public relations. There were many doubts voiced as to the degree of sympathy the media would receive on these issues and reminders of how successfully the President Elect had simultaneously used and trashed the media and its reporters during the campaign. There was a sense that we had to bring our message of why an independent media was critical to the whole country, not just advertise it to like-minded readers of The New York Times and Washington Post. There was concern about the new Administration's taking extreme steps to produce and distribute its own news messages to the exclusion of the independent press – though if such actions went so far so that they could be called "propaganda," there was a sense that could be used effectively in the public relations wars; indeed, there may well be judicial receptivity to our arguments on that score.

There was a sense that we had to bring our message of why an independent media was critical to the whole country. There was concern about the new Administration's taking extreme steps to produce and distribute its own news messages to the exclusion of the independent press.

There was discussion of the legal landscape as well. There is not a huge body of law on these matters, particularly on access to the White House, but one case from federal court in Georgia, albeit in 1981, before the internet age, CNN v. ABC, indicates that First Amendment rights do attach to proceedings which have "an enduring and vital tradition of public entrée", the Court concluding that "the total exclusion of television representatives from White House pool coverage denies the press and public their limited right of access, guaranteed by the First

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Amendment." In addition, there is pretty good caselaw in favor of reporters who were retaliated against for purported "unfavorable" coverage.

Fear about FOIA implementation was also voiced, though many in the group pointed out that it would be difficult for FOIA compliance to move even slower than it has in the present and past administrations. Despite Presidential proclamations endorsing openness in government, prior administrations have already applied FOIA exemptions as broadly as seems possible. Nonetheless, the group felt we should be vigilant in ensuring no further erosion in FOIA.

Finally, other potential troublespots were discussed: leak investigations, subpoenas on journalists and a possible weakening of the DOJ Guidelines; the possibility all government employees would have to sign non-disclosure agreements and the fear of prosecution of journalists; new appointments to the federal bench, not only the Supreme Court; a lack of support of legislative initiatives, such as the anti-SLAPP bill and the federal shield law (although it was, of course, noted that VPE Pence was a strong supporter of the latter); and the threatened opening up of the libel laws and the worry that in this new environment there might be more libel cases filed, some, but not all, by Administration figures. There was recognition that some of these issues were already being dealt with by existing groups and that others, such as the President Elect's wish to change the libel laws, were more illusory than real.

The meeting also allows us to start from a common place with somewhat agreed upon premises as we await any changes and initiatives after January 20.

At its end, the general feeling was that the meeting was worthwhile – that though no specific decisions were reached and no specific accomplishments made, the discussion was a good and thoughtful one, with many points and ideas which lawyers could bring back to their newsrooms. Moreover, the organization of the group – consisting of all smart and eloquent lawyers of all the major media players – should be useful going forward as it could now quickly be convened as circumstances warrant; it also will be easy to inform the entire group of developments and exchange ideas as we move forward. The meeting also allows us to start from a common place with somewhat agreed upon premises as we await any changes and initiatives after January 20. My former boss Sol Watson believed in the six P's: Prior Preparation Prevents Piss Poor Performance. We have followed that tenet. But, best of all would be if there's no need for us to meet again.

Minnesota Television Station and Newspaper Win Libel Trial

Plaintiff Sued After Being Named a Murder Suspect

By Tom Curley

Following ten hours of deliberation, a jury returned a defense verdict for the *St. Cloud Times* and KARE 11 television in a libel case arising out of the murder of a Minnesota police officer. *Larson v. KARE-TV and the St. Cloud Times,* (Minn. Dist. Nov. 21, 2016).

The verdict, which took place in November after an eight-day trial, represents a rare victory for media defendants in recent months. The plaintiff had sought a multi-million dollar verdict.

Background

In November 2012, a police officer was shot twice in an ambush killing in the town of Cold Spring. Shortly after the shooting, authorities publicly announced the arrest of Ryan Larson in connection with the murder.

The verdict, which took place in November after an eight-day trial, represents a rare victory for media defendants in recent months.

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

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

However, Larson was released four days after his arrest because of lack of sufficient evidence, though, according to police, he remained a suspect at that time. Months later, law enforcement officials announced that another individual, who had committed suicide in the interim, was likely responsible for the killing of the officer and that there was no evidence to connect Larson to the murder.

Coverage of Larson's Release

Larson's release and other developments in the investigation were covered extensively by KARE 11 and the *St. Cloud Times*, both of which were owned by Gannett at the time. KARE 11 is now owned by Tegna.

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For example, the *St. Cloud Times* secured a phone interview with Larson while he was still in jail in which he proclaimed his innocence and the newspaper interviewed him after his release, giving prominent coverage to his complaint that police had rushed to judgment.

KARE 11 similarly reported on Larson's protestations of innocence and his subsequent vindication as the focus of the investigation shifted elsewhere.

Larson sued or threatened to sue several news media organizations who had reported on his arrest. With respect to the *St. Cloud Times* and KARE 11, the thrust of Larson's libel claim was that their initial reporting falsely implied that he had been charged with murder when, on the contrary, he had been arrested for that crime but not charged.

In addition, Larson generally claimed that the media defendants went beyond the language of the police statements to falsely suggest his guilt had already been established.

In part because many individuals arrested for crimes are not ultimately charged or convicted, most states including Minnesota afford the media what is called the "fair report" privilege. Through this privilege the media are immunized from defamation claims arising out of police accusations so long as they are fairly summarized and attributed.

Typically the privilege is applied by the trial court to dismiss the action and therefore claims against the media arising solely from police statements should not often reach a jury. (The fair report privilege also applies to a wide variety of other proceedings, statements and records.)

The thrust of Larson's libel claim was that their initial reporting falsely implied that he had been charged with murder when, on the contrary, he had been arrested for that crime but not charged.

Summary Judgment Denied

The media defendants moved to have Larson's case dismissed based on the privilege. Relying in part upon a 1907 case, the court decided against the defendants, holding that news conferences and media releases announcing the arrest of a murder suspect could not shelter under the privilege "beyond the fact of Larson's arrest[,] or of the charge of crime made by the officer in making or returning his arrest."

Although not entirely clear from the court's summary judgment decision in May 2016, the court appeared to hold that "the mere fact of arrest and charge of arrest" might not include statements in the challenged publications which included other details such as: "Investigators say 34 year-old Ryan Larson ambushed the officer, shooting him twice."

The court also held that, regardless of the degree to which the privilege applied, "there would still be issues of fact for the jury concerning whether or not Defendants fairly and accurately reported the contents of those sources," *i.e.*, whether the gist of the publications was the same as the communications from law enforcement.

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The trial began on November 7, the day before Election Day, in state court in Hennepin County, the county in which Minneapolis sits.

The Trial Starts

At trial, the media defendants had intended to argue the application of the privilege to the jury, specifically that the gist of their reporting was consistent with the fact that police had arrested Larson for murder and publicly named him as the sole suspect, notwithstanding later events.

However, on the first day of trial, the court – on its own initiative and despite its prior summary judgment decision – held that there were no issues of fact for the jury to determine because, "as a matter of law." the gist of the defendants' reporting was different from what the police had communicated publicly through the news conference, media release and jail log.

For example, the court held this statement – "Rosella holds no ill-will against the man accused of killing her son" – to be inaccurate "as a matter of law" for purposes of applying the privilege because "[i]n this context, 'accused' generally means charged with a crime."

The court noted that Larson was arrested and jailed for suspicion of murder, but never charged. Thus, according to the court, use of the word "accused" was inaccurate.

At the start of trial, the court also permitted plaintiff to amend his complaint to seek punitive damages. In addition, the court later permitted submission to the jury of a special verdict form with nineteen separate lines for damages for each one of the eight allegedly defamatory statements, despite the fact that many of the statements were in the same publications and that plaintiff had not tied any specific harm to an individual statement. The verdict form ran nearly twenty-five pages.

The Plaintiff's Case

The case proceeded to trial, with plaintiff alleging both negligence and actual malice and actual, presumed and punitive damages. The plaintiff's case emphasized that Larson had been falsely accused of a terrible crime and, according to Larson, media coverage had hounded him out of town and left him unable to find a job.

Larson stressed that police had, in some of their comments at the time of his arrest, indicated that the investigation was "preliminary" and "active and ongoing." Larson also emphasized that the media reports had not used the exact words of law enforcement.

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Larson downplayed the impact on his life from the actions and statements of police, instead blaming the media for allegedly exaggerating them. Shortly after the trial ended, however, Larson held a news conference to announce his intention to sue law enforcement too.

The defendants, whose trial witnesses were a parade of veteran Minnesota journalists, emphasized they did no more than accurately report upon what law enforcement authorities were publicly saying and that any accusations were explicitly attributed to police.

Emphasis on Context

In addition, defense counsel encouraged the jury to ignore the plaintiff's linguistic hair splitting and focus instead on whether there was any other way to reasonably interpret the context of what police were saying about the crime and who they were alleging was responsible at the time.

At the request of plaintiff, who may have had a different view of its overall effect, the jurors were repeatedly shown the televised news conference in which police identified Larson as the murder suspect and answered "no" when asked if they were searching for other suspects.

Throughout their case, the media defendants also gave great emphasis to the breadth and prominence of their coverage concerning Larson's release from jail, the eventual focus of police on a different individual and Larson's ultimate exoneration.

It appears that the jurors were convinced by the argument that the media defendants did no more than accurately report what police were saying about Larson's arrest.

There were eight jurors and seven of them sided with the defense, finding that none of the allegedly defamatory statements were false. Given the verdict**,** it appears that the jurors were convinced by the argument that the media defendants did no more than accurately report what police were saying about Larson's arrest, without falsely inflating its significance.

Steven J. Wells, Angela Porter and Emily Mawer of Dorsey & Whitney LLP in Minneapolis represented Tegna and Gannett at trial. In addition, Mark R. Anfinson of Minneapolis represented the media defendants in pretrial motions. Tegna was also represented by Associate General Counsel Christopher Moeser and Gannett by Associate General Counsel Thomas Curley. Plaintiff Ryan Larson was represented by Stephen C. Fiebiger of Burnsville, Minnesota.

Who's Your Daddy?: Third Circuit Affirms Dismissal of "Son of a Nazi" Libel Claim

By Robert Balin and John Browning

The Third Circuit's recent opinion dismissing a libel suit targeting the book *The Nazis Next Door: How America Became a Safe Haven for Hitler's Men* should come as welcome news for historians, authors and publishers of historical non-fiction. *Soobzokov v. Lichtblau*, 2016 WL 6543362 (3d Cir. Nov. 4, 2016).

In a reassuringly sensible opinion, the court re-affirmed two important principles: First, the court held that the son of a deceased man accused of committing Nazi war crimes does not have a "defamation by association" claim in his own right merely because he is identified as the son of an infamous relative. Second, the court ruled that, under New Jersey's speech protective fault standard, plaintiffs in libel suits who challenge statements concerning a "political subject" – like the lives of accused Nazi war criminals living in America – must plead (and ultimately prove) actual malice. At bottom, the *Soobzokov* decision recognizes that courts are not the final arbiters of history and that generous constitutional protection must be accorded historical research and writing.

The son of a deceased man accused of committing Nazi war crimes does not have a "defamation by association" claim in his own right merely because he is identified as the son of an infamous relative.

Background

The Nazis Next Door – written by Pulitzer Prize-winning *New York Times* reporter Eric Lichtblau and published by Houghton Mifflin Harcourt – argues that the United States government knowingly allowed Nazi war criminals to emigrate to America after WW II as part of its strategic efforts to outflank the Soviet Union. One of the central figures in the book, Tscherim Soobzokov, worked for the CIA and lived freely in America, despite charges that he committed brutal war crimes while acting as a Waffen SS officer in his native Caucasus region of Russia.

As the book reports, efforts were ultimately made to deport Tscherim after details of his collaboration with the Nazis became public. However, the deportation case ultimately fell apart (on the ground that Tsherim had not lied about his Nazi past in his immigration application), with Tscherim proclaiming his innocence until his death. In 1985, Tsherim was assassinated in front of his New Jersey home in a bombing that remains unsolved to this day.

Aslan Soobzokov, who is Tscherim's son and the plaintiff in the *Soobzokov* case, appears only sporadically in *The Nazis Next Door*. In the book, Aslan, like other children of accused

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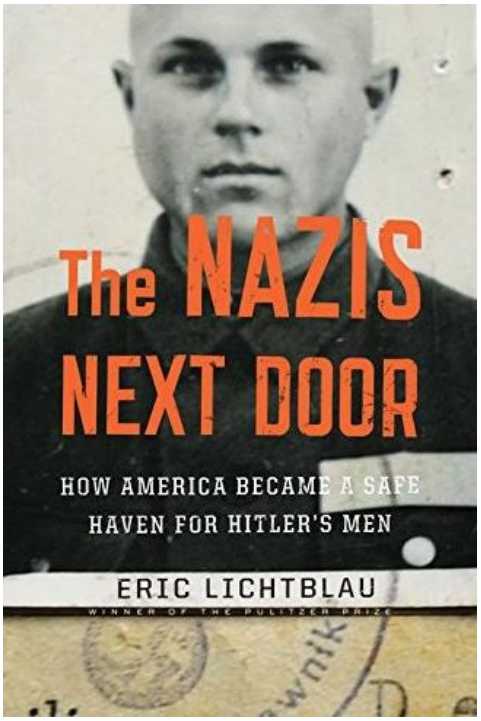
Nazis, is sympathetically portrayed as a stalwart defender of his father's innocence. Specifically, based on interviews with Aslan, Lichtblau notes that Aslan confronted anti-Tsherim protesters outside the family home and, at a book signing ceremony, angrily denounced the author of a book who accused Tscherim of Nazi atrocities. The book also reports that, in the wake of Tscherim's murder, Aslan sued the federal government for not doing enough to apprehend his father's killers.

After publication of the book, Aslan went to court in an effort to rewrite the historical record. In his complaint, he averred libel, false light invasion of privacy and emotional distress claims against Lichtblau and Houghton Mifflin Harcourt. Specifically, Aslan alleged that it was false for the book to report that his father was a Nazi war criminal, and that he (Aslan) was therefore defamed by being identified as the "son of a Nazi."

Aslan also alleged that he was defamed by the handful of statements in the book that specifically mentioned him – including by even a note in the book's acknowledgments section where Lichtblau thanked Aslan for his cooperation. The federal district court in New Jersey granted defendants' pre-answer dismissal motion, finding that the complaint failed to state a viable claim. Aslan then appealed to The Third Circuit Court of Appeals.



Aslan alleged that it was false for the book to report that his father was a Nazi war criminal, and that he (Aslan) was therefore defamed by being identified as the "son of a Nazi."

Third Circuit Opinion

Writing for a unanimous panel, Judge Thomas Hardiman held that the references in the book to Aslan were not defamatory as a matter of law. Judge Hardiman found that, far from portraying Aslan as mentally unstable (as the complaint alleged), the book's account of Aslan's confrontation of his father's critics demonstrated "an understandable pattern of behaviour seen in first-generation children of accused Nazis who believe in their fathers and their innocence."

Similarly, the book's discussion of Aslan's efforts to revive the investigation into his father's unsolved murder was not defamatory, but rather "evidences a son's devotion to his father and desire to obtain answers about his murder." Finally – and perhaps most predictably – the Third Circuit found that the book's "brief and benign acknowledgement" of Aslan's cooperation was not defamatory and was, in any event true in light of the extensive pre-publication assistance Aslan provided Lichtblau.

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Noting the well-worn rule that Aslan could not bring a libel claim on behalf of his dead father, the Third Circuit further held that likewise Aslan could not state a "defamation by association claim" merely by alleging the book "falsely label[ed him] the son of a Nazi." Drawing on the New Jersey Supreme Court's precedent in *Romaine v. Kallinger*, 537 A.2d 384 (N.J. 1988), the *Soobzokov* court explained that "New Jersey requires that the offending statement do more than merely associate the plaintiff with a disreputable *individual*; it must indicate that the plaintiff participated in disreputable *behaviour*." In other words, the "mere imputation of a family relationship without more cannot be defamatory."

Since the book made it clear that Aslan's "devotion to his father stemmed from sympathy and compassion and not from predilections toward or involvement in Nazi causes," the Third Circuit held that Aslan had no ground to claim that his own reputation had been damaged by the book's portrayal of his father's involvement in Nazi war crimes.

Finally, the Third Circuit ruled that the complaint must also be dismissed for the independent reason that Aslan failed to plead actual malice. Under New Jersey state law (which governed Aslan's claims), where the statement in suit involves a "matter of public concern" liability cannot be imposed for defamation (or for false light or emotional distress) unless the plaintiff pleads and proves actual malice. *See Durando v. Nutley Sun*, 37 A.3d 449, 457 (N.J. 2012); *G.D. v. Kenny*, 15 A.3d 300, 318-19 (N.J. 2011); *Decker v. Prineton Packet, Inc.*, 561 A.2d 1122, 1129 (N.J. 1989).

The *Soobzokov* decision serves as a timely reminder that discourse on political subjects and historical critiques of the government lie at the very core of our First Amendment.

In the *Soobzokov* case, the Third Circuit found that *The Nazis Next Door* unquestionably implicates matters of public concern since it "uncovers controversial matters of international relations and geopolitics following a world war." In so holding, the court rejected Aslan's argument that the few mentions of him in the book involved only private family matters concerning his devotion to his father, noting that "[a]lmost any historical account will include details of individuals. If each person could object to the inclusion of his own story, then important speech could be stifled."

The *Soobzokov* decision serves as a timely reminder that discourse on political subjects and historical critiques of the government lie at the very core of our First Amendment.

Rob Balin and John Browning, who are attorneys in the New York office of Davis Wright Tremaine LLP, represented defendants Eric Lichtblau and Houghton Mifflin Harcourt Publishing Company in the Soobzokov libel suit. Aslan Soobzokov, also an attorney, represented himself pro se.

Seventh Circuit Reinstates Libel Claim vs. Gawker Over User Comment

Plaintiff Alleged Gawker Created Defamatory Comments

Alleging that Gawker created defamatory user comments was sufficient to overcome a Section 230 defense, at least on a motion to dismiss. *Huon v. Denton*, No. No. 15-3049 (7th Cir. Nov. 14, 2016) (Williams, Easterbrook, Yandle, JJ.). According to the decision, there was "nothing farfetched about [plaintiff's] factual allegations." They were supported by detailed pleadings on the use of defamatory comments to increase traffic and therefore discovery was the proper way to flesh out the validity of plaintiff's claim.

Background

The case grew out of media coverage of a criminal trial. The plaintiff, Illinois attorney Meanith Huon, was tried and acquitted of rape in 2010. Following the acquittal, Huon sued legal news site Above the Law for its coverage of the trial. (The bulk of the claims against Above the Law were dismissed and the remaining claim settled.) He also sued Gawker.com which wrote about the trial and the defamation lawsuit against Above the Law.

Alleging that Gawker created a defamatory user comment was sufficient to overcome a Section 230 defense, at least on a motion to dismiss.

The article, published on the Jezebel website, was titled "Acquitted Rapist Sues Blogger for Calling Him Serial Rapist." Huon alleged, among other things, that the use of his booking photograph in the article falsely implied he was guilty of rape. He also alleged that a number of user comments were defamatory. All the claims against Gawker.com were dismissed by the federal district court in Chicago.

Seventh Circuit Decision

The Court first affirmed dismissal of plaintiff's claims about the Jezebel article itself. The Illinois innocent construction rule protected the article headline and graphic. And the state fair report privilege protected the discussion of the criminal trial and defamation suit.

But the Court ruled that the district court erred in dismissing the claims over user comments, finding that plaintiff alleged sufficient facts to defeat the application of Section 230 on a motion to dismiss.

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Plaintiff alleged that Gawker itself was an information content provider because it: "(1) 'encouraged and invited' users to defame Huon, through selecting and urging the most defamation-prone commenters to 'post more comments and continue to escalate the dialogue'; (2) 'edited,' 'shaped,' and 'choreographed' the content of the comments that it received; (3) 'selected' for publication every comment that appeared beneath the Jezebel article; and (4) employed individuals who authored at least some of the comments themselves."

Moreover, the Court noted that plaintiff supported these claims with over four pages of allegations arguing that "increasing the defamatory nature of comments can increase traffic to Gawker's websites"; and citation to a news article about Gawker's efforts to monetize comments. This was sufficient to satisfy the Iqbal / Twombly plausibility standard.

Turning to the alleged defamatory user comments, the Court found that most were hyperbole, opinion, or not "of and concerning" plaintiff.

Among the non-actionable comments:

- Just because a man is acquitted of rape does not mean he did not commit rape. That a jury would decide 'not guilty' does not magically erase what he did—if he did, in fact, rape someone. The vast majority of rapists are never convicted of rape. Does that make them not rapists?
- 'Not guilty' is absolutely not the same thing as 'innocent' from a legal standpoint. Those words do not mean the same thing in the world of law. 'Innocent until proven guilty' is merely a concept for laymen to try to keep their non-lawyer brains from jumping to (nonlegal) conclusions.
- Nevermind [sic] 'serial rapist,' he sounds like a foreal [sic] crazy person.

Only one comment, qualified as defamation *per se* under Illinois law:

- Fuck this 'he's been acquitted' noise. He's a rapist alright, so we may as well call him one.

According to the Court, this comment unequivocally accused plaintiff of rape and was not mere name-calling or exaggeration.

The Court also reinstated plaintiff's false-light and emotional distress claims based on this statement, since they were dismissed solely because of the dismissal of the defamation claims.

Plaintiff is representing himself in this case. Gawker is represented by Levine, Sullivan, Koch & Schulz.

Reporter's Claim That Veteran Lied About Purple Heart Not Actual Malice

By Sara Sáenz and Sarah Fehm Stewart

The State Court of DeKalb County, Georgia, recently held that the plaintiff in a defamation case, a Veteran accused of lying about receiving a Purple Heart, failed to prove a FOX 5 investigative reporter acted with actual malice. The Court found that the plaintiff was an involuntary limited purpose public figure, and that the reporter had conducted an extensive investigation that demonstrated he had not acted with actual malice. *Ladner v. New World Communications of Atlanta, Inc.*, 2015 WL 6560868 (Ga. State Ct. 2016).

Background

The plaintiff, Shane Ladner ("Plaintiff"), was a police officer in Holy Springs, Georgia. He submitted an application to Hunt for Heroes, and was selected to participate in their annual hunting trip and parade event to honor wounded veterans. Plaintiff's application included a bio, which stated that he joined the Army in 1989, and was wounded in Panama during Operation Just Cause. The latter point was not true.

Hunt for Heroes garnered local media and Twitter attention, and Plaintiff's bio was among those featured in a local newspaper. During the parade, a train struck the float carrying Plaintiff and his wife. The accident became national news. Many reports focused on Plaintiff's military history and gave inconsistent accounts of his background, including several false reports that Plaintiff had earned two Purple Hearts.

Plaintiff himself released several statements to the media, gave interviews, and attended a public ceremony to receive a veteran's license plate. The Court found that these facts made Plaintiff "at least an involuntary limited purpose public figure." *Id.* at *3.

The Reporter's Investigation

Plaintiff's in-laws questioned the reports about his military record. They made a Freedom of Information Act (FOIA) request, hired a private investigator, and eventually reached out to a FOX 5 reporter. The reporter then launched his own independent investigation into Plaintiff's claim that he had been awarded a Purple Heart. He contacted Plaintiff's employers, sent a FOIA request, and reached out to several Army offices. The reporter found there was no individual or any record verifying that Plaintiff had been awarded a Purple Heart or that he had even been injured in combat.

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Plaintiff eventually produced a Form DD-214 that listed a Purple Heart as one of his awards. The reporter contacted the woman who had signed the DD-214, but she was unable to authenticate the information listed about Plaintiff's alleged awards. When confronted about discrepancies between his military record and his accounts of his service, Plaintiff ultimately admitted he was never in Operation Just Cause, but had been instructed to lie because he was sent on a secret military drug interdiction mission. The reporter was unable to verify these new claims and Plaintiff was unable to identify a single person who could substantiate his participation in the drug interdiction mission.

The reporter then published a series of investigative news reports accusing Plaintiff of lying about his military record and his alleged award of a Purple Heart. He showed a copy of Plaintiff's DD-214, which listed a Purple Heart, but stressed that he was unable to find any supporting documentation or any Army official who could verify that Plaintiff had been awarded a Purple Heart. After the broadcasts, local authorities charged Plaintiff with felony criminal offenses for making fraudulent statements during a police interview and for lying to obtain a financial benefit of a Purple Heart recipient, a tax-free license plate.

The Court Finds No Actual Malice

The reporter conducted an investigation that the Court referred to three times as "extensive."

Plaintiff sued FOX 5 for defamation based on the investigative news reports. FOX 5 moved for summary judgment and argued, among other things, that Plaintiff could not prove that the reporter acted with actual malice. The Court recognized that, as a limited purpose public figure, Plaintiff had to prove actual malice by showing that FOX 5 (through its reporter) knew the reports were false or acted with reckless disregard as to their falsity.

However, in granting FOX 5's motion for summary judgment, the Court did not focus solely on the reporter's subjective belief as to whether the reports were false, but also analyzed the sufficiency of the reporter's investigation. In setting forth the applicable standard, the Court found that actual malice may be inferred where "the investigation for a story was grossly inadequate in the circumstances and there was a purposeful avoidance of the truth." *Id*. at *4 (emphasis added).

Fortunately for FOX 5, the reporter conducted an investigation that the Court referred to three times as "extensive." *See id.* The Court held that the investigation simply did not show that the reporter acted with actual malice. The Court found that the reporter made one mistake during his investigation: Plaintiff claimed that his original DD-214 listing a Purple Heart was

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housed at the Veterans Affairs center in St. Louis and the reporter failed to contact that VA center.

However, even with this oversight, the reporter took a position based on an "extensive investigation" that revealed ample evidence that Plaintiff lied about his military record. *Id.* Thus, the Court could not find that the reporter acted with actual malice. In conclusion, the Court wrote, "Without such a finding, the Court is constrained to grant Defendant's motion for summary judgment." *Id.* at *5.

Despite the Court's objective focus on the reporter's investigation, the Court also acknowledged that a failure to investigate, or an investigation that is not as complete as a plaintiff would like, does not establish reckless disregard. And to that end, "[a] plaintiff cannot show actual malice merely by making assertions contrary to those of the identified sources from which [the reporter] obtained [his] information." *Id.* at *4. In other words, a court will still examine whether the reporter obtained his story by "purposefully avoiding the truth or ignored facts with reckless disregard." *Id.* at *5.

The reporter "may have used flamboyant and accusatory language and reported in the finest tabloid fashion, but that does not equate to actual malice."

The Court held that the reporter "may have used flamboyant and accusatory language and reported in the finest tabloid fashion, but that does not equate to actual malice as a matter of law." *Id.* at *4. Despite the procedural posture of the case, the depth of the reporter's investigation fatally undermined any accusation that he was reckless with the truth. Thus, while the failure to investigate may not doom a defamation defendant, an extensive investigation may well doom the plaintiff.

Sara Sáenz is an associate with Duane Morris LLP, in the firm's Miami, Florida office. Sarah Fehm Stewart is an associate with Duane Morris LLP, in the firm's Newark, New Jersey office.

Texas Appeals Court Addresses "Clear and Specific Evidence" Requirement in State Anti-SLAPP Law

By Cassidy Daniels

An intermediate appeals court in Texas recently addressed the claimant's evidentiary standard under Texas's anti-SLAPP statute, the Texas Citizens Participation Act (TCPA). The Amarillo Court of Appeals decided the question of how detailed "evidence" in a pleading must be in order to meet the burden of establishing a prima facie case by clear and specific evidence under the TCPA.

The court held that the TCPA evidentiary standard is not met if the claimant's pleading consists only of general allegations that merely recite the elements of the claim or requires the court to make a series of inferences. *Vander-Plas v. May*, No. 07-15-00454-CV, 2016 Tex. App. LEXIS 10822, at *16–17 (Tex. App.—Amarillo Oct. 4, 2016, no pet. h.)

Background

Kristen Vander-Plas, a Texas Tech University law student, reported to school officials that Donald May, a public figure, had sexually harassed her on multiple occasions before she entered law school, which prompted the officials to ban May from campus. Vander-Plas issued a press release stating that May also gave her "unwanted attention" on campus. May denied these allegations and sued Vander-Plas for libel and defamation. Vander-Plas filed an anti-SLAPP motion under the TCPA.

The TCPA evidentiary standard is not met if the claimant's pleading consists only of general allegations.

Because the parties did not dispute that the TCPA applied to May's claims, the burden shifted to May to demonstrate "by clear and specific evidence a prima facie case for each essential element of the claim." See TEX. CIV. PRAC. & REM. CODE § 27.005(c). May was required to establish that Vander-Plas acted with actual malice, meaning knowledge of or reckless disregard for the falsity of the statements. To determine whether the non-movant has met this prima facie burden to avoid dismissal, the court "shall consider the pleadings and supporting and opposing affidavits." Id. § 27.006(a).

The trial court dismissed May's slander claim, but allowed the libel claim to proceed. Vander-Plas appealed, arguing that the libel claim should also be dismissed because May failed to meet the TCPA evidentiary burden.

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"Clear and Specific Evidence" Under TCPA

In response to Vander-Plas's motion to dismiss, May rested on his pleadings. His only potential source of "clear and specific evidence," therefore, was his unverified original petition.

The Texas Supreme Court permits a respondent to rely on pleadings to meet the burden of establishing a prima facie case. See *In re Lipsky*, 460 S.W.3d 579, 590–91 (Tex. 2015). However, the TCPA requires more than fair notice – general allegations that merely recite the elements of a cause of action are insufficient. Under *Lipsky*, May was required to provide enough details to show the factual basis of his claim. A claimant establishes a prima facie case by providing the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Vander-Plas*, 2016 Tex. App. LEXIS 10822, at *12 (quoting *Lipsky*, 460 S.W.2d at 590).

Rather than providing factual details, his petition generally alleged that the statements were "false and defamatory" and "made with knowledge of or reckless disregard for [their] falsity."

Applying *Lipsky*, the court of appeals found that May's pleadings fell short. Rather than providing factual details, his petition generally alleged that the statements were "false and defamatory" and "made with knowledge of or reckless disregard for [their] falsity."

May also alleged a discrepancy existed between two of Vander-Plas's statements, and that this discrepancy impeached Vander-Plas's credibility and established a prima facie case. The court dismissed this argument because it required "the drawing of any number of inferences." First, to find a prima facie case based on this discrepancy, the two statements must be seen as incompatible. Second, the court would have to infer that this incompatibility demonstrated both the falsity of one of the statements and the actual malice behind it. Because neither one of these was a necessary inference, the court held that May's pleading failed to meet the TCPA's evidentiary requirement.

Accordingly, the court of appeals reversed the trial court's order, rendered judgment dismissing libel claim, and remanded the case to the trial court for consideration of an award of attorney's fees and sanctions.

Cassidy Daniels is an associated at Haynes & Boone, San Antonio, TX. The plaintiff was represented by Fernando M. Bustos, Aaron M. Pier, and Dustin N. Slade. Defendant was represented by Kevin Glasheen, G. Alan Waldrop, Ryan D.V. Greene, and Jonathon Clark.

From the Next Gen Committee

Please, Don't Leave a Message After the Beep

By Nikki Moore

Once when I was in high school, I sat on my 2001 Ericsson pushbutton cellphone and recounted the night before, when I had taken my first shot of booze. Unbeknownst to me, my mother rode along, an invisible passenger, phoned-in to all the details.

The butt-dial was a completely original, if not patently millennial way to get myself grounded. I hadn't thought much about the incident until a few months ago, when an attorney accidentally called me, resulting in a 90-second voicemail capturing a client conversation. Coincidentally, the next day, I again butt-dialed my mom, who again listened in, for 12 minutes. Livid with my mother for spying, again, I accused her of violating the California Penal Code which prohibits intentional eavesdropping. But research quickly eliminated the likelihood that I had any actionable claim.

A search of the term "butt-dial," or more tamely, "pocket-dial," nets only 15 case results on Westlaw. The most noteworthy, *Huff v. Spaw*, 794 F.3d 543 (6th Cir. 2014), held that a cellphone owner had no reasonable expectation of privacy in a 91-minute conversation overheard by pocket-dial. Applying the plain-view doctrine, the court found that a person possessing a cellphone lacks a reasonable expectation of privacy in an involuntarily broadcast call because it is the cellphone holder's burden to prevent pocket-dials.

When a lawyer's client is unaware that a call occurs, it cannot unknowingly waive the privilege.

Equating the open phone line to a home's open drapes, the court, applying the law of the listener's situs, said that there was no violation of the state's eavesdropping law without a reasonable privacy interest to protect. Under the *Huff* analysis, my mother's earwigging, though personally offensive, was not actionable by me. Conversely, the *Huff* court did recognize that a third party unwittingly in contact with a pocket-dialer may still have a reasonable expectation of privacy—so my companion, had she been the one confessing in our conversation, *could* have a claim.

But lawyers alone face a different law. And, perversely, it may not be the caller who risks claims of impropriety as much as the recipient who fails to recognize the call's triggering duties.

Both the California and ABA rules of professional responsibility require an attorney who receives inadvertently disclosed information to notify the sending lawyer of the mistake. It seems that the same standard applies to a butt-dial-turned-voicemail as to any other record.

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The *Huff* court's reasoning supports this conclusion: When a lawyer's client is unaware that a call occurs, it cannot unknowingly waive the privilege. Since the lawyer cannot unilaterally waive the privilege, it persists. And even though the record was unrelated to any controversy, it was still an inadvertent disclosure. Thus, I was compelled to notify my colleague of the call. Accordingly, and unlike a prying mother, a lawyer who answers a butt-dial is duty bound to hang up upon realization that privileged information is being transmitted.

Take a different type of inadvertent disclosure. When the attorney of Cleveland Browns quarterback Johnny Manziel accidentally texted an Associated Press reporter, "Heaven help us if one of the conditions is to pee in a bottle," the text sparked a national story.

What if that text had gone to an AP lawyer instead? A media lawyer faces a unique dilemma here, a conflict recently highlighted in *Ardon v. City of Los Angeles*, 62 Ca1.4th 1178, 1180 (2016), where the California Supreme Court required an attorney to return inadvertently disclosed privileged records produced in response to a public records request. The court also barred disclosure of the record's contents.

How the court might address these issues is, for now, unanswered. Ring, ring, ring….

Critics of the decision argue that *Ardon* ignores prior restraint and First Amendment implications, failing to consider a media lawyer's quandary: the duty to communicate newsworthy information to the client, with *Bartnicki v. Vopper*'s protection to publish lawfully obtained information, versus the professional duty not to disclose the communication's contents.

How the court might address these issues is, for now, unanswered. Ring, ring, ring….

Nikki Moore is legal counsel at the California Newspaper Publishers Association.

Maryland High Court Holds Vanity License Plates Are Nonpublic Forums

Subject To Reasonable and Viewpoint Neutral Restrictions

By Adrianna C. Rodriguez

In a decision that cited Cosmo Kramer's "ASSMAN" license plate, George Carlin, and the King James Bible, The Maryland Court of Appeals held that the Maryland Motor Vehicle Administration's ("MVA") decision to revoke a vanity license plate bearing the Spanish word for "shit" did not violate the First Amendment. *Mitchell v. Maryland Motor Vehicle Admin.*, No. 10, Sept. Term, 2016, 2016 WL 6311749 (Md. Oct. 28, 2016).

The Court held that "the characters or message on a vanity license plate represent private speech in a nonpublic forum, which requires government speech restrictions thereof to be reasonable and viewpoint neutral."

Background

In 2009, the MVA granted Mitchell's application for a vanity license plate bearing the Spanish word "MIERDA" on an agricultural commemorative plate. Two years later, the MVA received a complaint about the plates. After determining that the word "mierda" meant "shit" in Spanish, the MVA revoked Mitchell's plates relying on a state regulation authorizing the agency to deny or recall vanity plates containing "profanities, epithets, or obscenities."

Mitchell challenged the agency's decision first in administrative proceedings before the Maryland Office of Administrative Hearings, then in the Circuit Court for Prince George's County, and the Court of Special Appeals. All upheld the MVA's determination to revoke the license plate.

Upon review, the Court of Appeals agreed holding that the language on vanity license plates was private speech in a nonpublic forum. Regulations on such speech need only be reasonable and viewpoint neutral, and the MVA's regulations met that standard. "The state has a legitimate interest in not communicating the message that it approves of the public display of offensive scatological terms on state license plates, and it is reasonable, therefore, for Maryland to prohibit 'profanities, epithets, or obscenities,' content with which it does not wish to associate."

The Court further held that "[t]he MVA rescinded Mitchell's plates not because of Mitchell's real or presumed intent, but based on the content with which Maryland is not willing to be associated, and the content the State is not willing to inflict upon the discerning public."

Adrianna C. Rodriguez is an associate in the Washington, D.C., office of Holland & Knight LLP.

Colorado Trial Court Applies First Amendment Protections in Criminal Case Involving Juvenile

By Ashley I. Kissinger

A Colorado state trial court recently vacated an unconstitutional prior restraint order in a decision that strongly endorses the notion that prior restraints are, and should be, very difficult to uphold. In the same case, the judge issued another opinion applying the First Amendment right of access to criminal case documents. Anytime a prior restraint is vacated, and anytime a court applies the First Amendment right of access in a context not yet addressed by the United States Supreme Court, there is cause for celebration. But open government advocates have extra cause to celebrate here: These rulings happened in a criminal case *involving a juvenile* – an area where courts are typically reluctant to recognize the benefits that public scrutiny can bring to such proceedings.

In *People v. Collins*, No. 16-CR-1882 (Colo. Dist. Ct.), a 16-year-old boy was charged in Boulder, Colorado with the attempted murder of a 71-year-old woman. Although he was initially brought before the juvenile court, the district attorney re-arrested him as an adult shortly thereafter, pursuant to a state statute that permits prosecutors to charge juveniles as adults in district court when they are alleged to have committed certain classes of violent crimes. The defendant's appointed attorney filed a motion to seal the entire case file that same morning. Thirty minutes later, an employee in the district attorney's office who was unaware of the motion to seal gave a copy of the arrest warrant, including the affidavit of a police officer that formed its basis, to the *Daily Camera*, Boulder's daily newspaper.

Later that afternoon, Judge Marcia Berkenkotter, the Chief Judge of the District Court in Boulder, presided over a hearing in the case during which she entered a blanket order temporarily sealing the entire case file and entered a briefing schedule on the defendant's motion to seal. The district attorney then advised the judge that it had already given the *Daily Camera* the arrest warrant earlier that day, and the judge immediately entered a prior restraint order prohibiting the newspaper from disseminating the contents of the arrest warrant and accompanying affidavit and set the matter for an emergency hearing the next morning.

The *Camera* filed a motion to vacate the prior restraint order as unconstitutional, which the court took under advisement after hearing from the parties the next day. The day after the hearing, the court granted the motion, although it stayed its order for a week to provide the defendant an opportunity to appeal the order, which the defendant ultimately declined to do. The court began by discussing the unusual case of *People v. [Kobe] Bryant*, 94 P.3d 624 (Colo. 2004), a case in which the Colorado Supreme Court took the extraordinary step of upholding a prior restraint prohibiting the press from publishing evidence provided in a rape shield hearing,

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which had been emailed to the press accidentally. The court then implicitly distinguished the state "interest of the highest order" sought to be protected by the prior restraint in that case – which it described as "providing a confidential evidentiary proceeding under the rape shield statute, because such hearings protect victims' privacy, encourage victims to report sexual assault, and further prosecution and deterrence of sexual assault" – from the state interest sought to be protected by the court's prior restraint in this case – *i.e.*, the privacy and potential rehabilitation of a juvenile. The court held that "[w]hile Colorado's statutory scheme for the disclosure of information in juvenile cases reflects the special sensitivity with which those cases are handled, a special sensitivity is not an interest of the highest order." In support of its conclusion, the court cited *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), in which the United States Supreme Court held that an order restraining the press from publishing a juvenile delinquent's name and photograph violated the First Amendment where, as here, the press obtained the information lawfully.

A month later, the court denied the defendant's motion to seal the entire case file in a written opinion that contains two helpful rulings. First, the judge applied the First Amendment standard for requests to close criminal proceedings to the defendant's request to seal his case file. That ruling is significant because the United States Supreme Court has not yet reached the question of whether this stringent standard, articulated by the Supreme Court in *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1 (1986), applies to documents in the case file as well as criminal proceedings themselves. Here, the court held that it does, ruling that only certain highly sensitive documents relating to the defendant's mental health, family, and other confidential matters could be maintained under seal because there is not an "overriding and compelling" reason pursuant to which sealing the remainder of the documents would "comport with the First Amendment."

Second, the judge applied the *Press-Enterprise* standard in a case that can be described as "quasi-juvenile." Although the defendant has been charged as an adult, he has filed a motion to transfer his case back to juvenile court – a motion that will not be decided until February 2017. As courts across the country have held that the First Amendment right of access simply does not apply to juvenile proceedings, the court's ruling applying it in this case, which might ultimately be prosecuted in juvenile court, is significant.

Judge Berkenkotter did cast one unfortunate shadow over these otherwise sunny access proceedings. In between the prior restraint ruling and the motion to seal ruling, she entered *another* order forbidding publication, and she declined to acknowledge that this order, too, was unconstitutional. On the day the judge entered her order vacating the (first) prior restraint, she read that seven-page order aloud from the bench, and the *Camera* immediately described the ruling in a story posted to its website. Later that day, when it obtained a copy of the physical order itself, the *Camera* posted the order alongside the story for its viewers to read in full. The defendant quickly moved to hold the *Camera* in contempt of court, arguing that the posting of

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the order itself violated the court's temporary blanket sealing order, and the court very shortly thereafter entered an "interim order" requiring the *Camera* to take the order down. The *Camera* was not ultimately held in contempt of court, because the judge properly concluded that it did not intend to violate the sealing order. But the court unfortunately failed to recognize that this "interim order," too, violated the First Amendment because the order the *Camera* had posted had already been read verbatim from the bench in an open court proceeding.

All in all, these proceedings established some precedents that, while not binding, will hopefully prove useful to those seeking access to juvenile proceedings and criminal case files.

Ashley Kissinger, a partner in the Denver office of Levine Sullivan Koch & Schulz, LLP, represented the Daily Camera in these proceedings.

NJ Court Orders Town to Release Memo on Social Media Policy

Public Use of Governmental Facebook Page May Implicate First Amendment

By Raymond Baldino

In a freedom of information law decision that touches upon a novel First Amendment question, a New Jersey court has ordered the disclosure of a one-paragraph memorandum drafted by the City Clerk of the City of Trenton, to the Trenton Police Department instructing the Department that it must comply with records retention laws when using its Facebook page and preserve records of user's Facebook posts. *Lord v. City of Trenton* (N.J. Super. Oct. 26, 2016).

Also, the same memo advised the Police Department "A public entity cannot have a public Facebook page and then decide what they can censor in and what they can censor out." The memo showed a City holding a nascent consciousness that governmental Facebook pages may qualify as a limited public forum.

Background

The memo was drafted on June 9, 2016, at a time when the Trenton Police Department was facing criticism from some for its arrest of local pro-marijuana legalization activist Ed "Weed Man" Forchion. Some of that criticism was voiced in the form of posts on the Department's Facebook page, where the Department had posted news bulletins about Forchion's arrest.

Colorful legalization advocate Ed Forchion a/k/a "Weed Man" has become a minor New Jersey celebrity (or anti-celebrity) frequently appearing in state-wide news for his activities, including an attempt to legally change his name to Weed Man, an unsuccessful run for governor, public protestor, and founder of a private "cannabis church" known as the Liberty Bell Temple.

Forchion was arrested on April 27, 2016, an incident that prompted a spate of critical Facebook comments on the Trenton Police Department's web page.

The Trenton Police Department did what Police Departments around the country likely do with their Facebook pages: deleted the negative posts (at least some of which were merely critical, but restrained and respectful) and blocked or banned the users who had posted the critical commentary. The practice was thought so unremarkable by the Department that when Richard Lord, the individual who would later sue the department due to being censored contacted Trenton's internal affairs department, Lord was told by the Department that they had done nothing objectionable.

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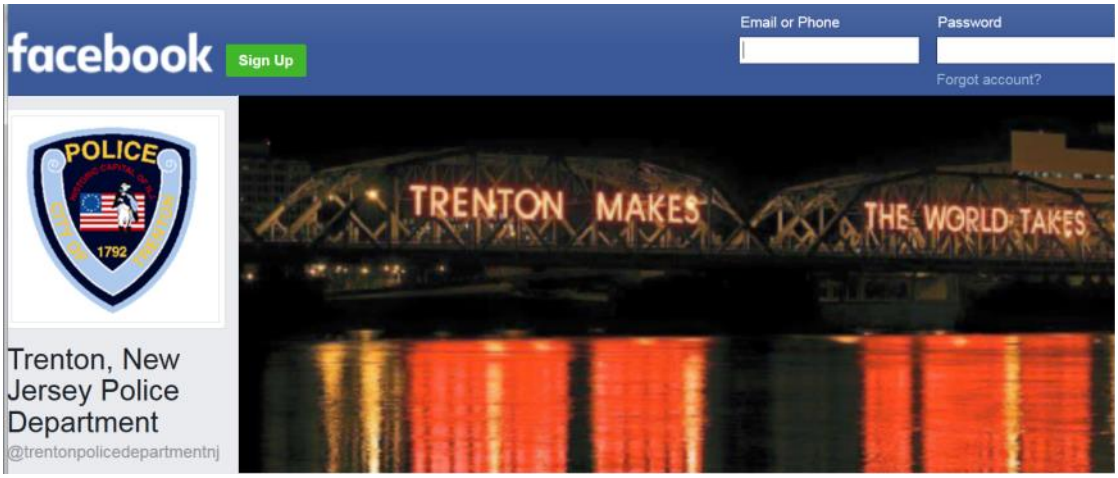

The police department deleted, blocked or banned users who had posted critical commentary.

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Richard Lord, an electrician from Central New Jersey who is also a Boy Scout Leader and part-time civil rights advocate, had one trait that distinguished him from the countless other individuals who are censored on government Facebook pages: he had heard of words like "limited public forum," and "content-based regulation" and he believed his rights had been violated.

Lord posted comments on the Trenton Police Department's Facebook page critical of the Weed Man arrest, and found that his comments were promptly deleted and he was instantly blocked from accessing the page. He contacted the Trenton Police, as he had other Police Departments who engaged in similar conduct towards him, and was turned away.

Undeterred, Lord pursued an attorney. He contacted the local open government organization *New Jersey Foundation for Open Government* ("NJFOG") (a National Freedom of Information Coalition affiliate). He came into contact with the undersigned attorney, who is a board member of that organization.

From there an investigation commenced. In the initial investigation, Lord learned through placing open records requests to the City of Trenton that literally scores of individuals had been placed on a "blocked" list for the Trenton Police Department page.

There was only one problem: even though Lord knew he could not access the Facebook page, and even though the Trenton Police Department had essentially admitted that he had been "blocked" when Lord contacted internal affairs about the incident, Lord did not appear on the list of blocked users that was disclosed in response to his initial records requests.

In the meantime, on June 10, 2016 the disappearance of the Trenton Police Department's Facebook page was announced in an article in the local newspaper, *The Trentonian*, whose lede said it all: "The Trenton Police's Facebook status is nonexistent." As the article discussed, the Trenton City Clerk had written a memo to the Trenton Police Department, apparently prompted

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by open records requests sent to the City regarding the Trenton Police Department Facebook page.

Whatever the Clerk had discussed in the memo had prompted the Police to shut down its Facebook page. But the subject of the discussion was unclear and the City Clerk objected to whoever had discussed the memo with the press, deeming it "confidential."

Lord placed a new request, this time for the memo that was discussed in the *Trentonian* article, and, upon learning that Facebook pages also possess the capability of "banning" users in addition to blocking them, Lord requested the City's list of "banned" users. He was denied access to the memo, and in a series of confusing and muddled responses, the City repeatedly failed to appreciate the difference between a "banned" user list and a "blocked" user list.

Access Lawsuit

When Lord ultimately sued for access in August 2016, a list of "banned" users was disclosed shortly after the request. This list, like the "blocked" list, also contained scores of people who were barred from accessing the page, and an important distinction from the "blocked" list – voila! Richard Lord was on the "banned" list, which demonstrated that he had been barred from accessing the Trenton Police Department Facebook page. It was not disclosed in litigation why the City maintained two separate lists of people who were barred from accessing the Facebook page.

It was also discovered in litigation that, during the summer while the Trenton Police Department Facebook page was deactivated or shut down, the City had hired a special vendor to engage in the art of recovering data from social media pages. The City now possessed the ability, through its contract with its special vendor, to recover deleted and lost comments, and Richard Lord now began to request his deleted comments.

However, regarding the withheld memo, the City continued to deny access and forced Lord to litigate the matter in Court. The City claimed that the memo fell under the "advisory consultative and deliberative" privilege due to its containing policy formulations, whereas Plaintiff argued that the memo was ministerial in nature, containing a directive to shut down its Facebook page and formulate a social media policy, rather than formulations in policy. Ultimately, appearing before Judge Mary Jacobson in Trenton who conducted an *in camera* review, Jacobson agreed that the one-paragraph memo, the text of which described itself as a "directive" was not deliberative. The Judge ordered disclosure of the memo.

In addition to the Memo's warning not to engage in social media censorship, the memo also contained interesting advice regarding the maintenance of governmental Facebook pages: "you must store and record all pages that change each day and since the Trenton Police Department is not storing and preserving the pages of its FACEBOOK PAGES, until such time as the City

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Clerk as Record Custodian is presented with a suitable record storage and archive plan it is here by the directive of the Record Custodian to turn off shut down the FACEBOOK page until such time as a plan of storage is in place."

As a result of Lord's open records litigation, the users who were blocked and banned from the Police Department's web page were unbanned, but not before the list was circulated among a large number of people who had received similar treatment but never retained a lawyer. The Trenton Police Department has crafted guidelines for comment on its Facebook page that are similar to those that might govern a limited public forum such as a town council meeting. And, at least tacitly in New Jersey, there has been some recognition that citizens using governmental Facebook pages may have First Amendment rights.

Ray Baldino is an associate at the Law Offices of Walter M. Luers, LLC in Clinton, New Jersey, a Board Member of the New Jersey Foundation for Open Government, and a member of the Next Generation Committee.

Journalism Experts Debate Media Challenges Covering Trump Campaign

MLRC's November 9th Forum Now Available as a Podcast

Left to right: Ken Auletta, Jay Rosen, Olivia Nuzzi, Bill Carter and moderator George Freeman

By Michael Norwick

This year's MLRC Forum, held just hours after the surprise result of the 2016 presidential election, addressed the many contentious issues surrounding media coverage of the Trump campaign.

The event, titled "The Day After: Media Fallout from Trump vs. Clinton," a wink to the 1983 nuclear-war disaster movie, turned out to be a prescient descriptor of how many MLRC members felt about the election of Donald Trump, and what might follow for the media and journalism in the coming Administration.

Joining our November 9th post-election discussion was Ken Auletta, author and long-time writer for *The New Yorker*; Olivia Nuzzi, political reporter from the *Daily Beast*; Bill Carter, CNN Analyst & Sirius Radio host; and Jay Rosen, journalism professor at New York University. MLRC Executive Director, George Freeman moderated the post-mortem on all of the various challenges of covering candidate Trump, with an eye towards covering a President Trump.

From the outset of the primary campaign, much criticism had been lodged against the media for helping to boost Trump's candidacy. Ken Auletta criticized the networks, particularly CNN, for airing extended coverage of Trump rallies, to the exclusion of news about other candidates. He further noted that many television news outlets, that generally required candidates to sit down in their studios for an interview, were allowing Trump to call in, "because it was good for ratings." Bill Carter noted, however, that it wasn't a mistake for the press to cover Trump

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early, because he was ahead in the polls, and Nuzzi added that it wasn't for the press to determine that he was an illegitimate candidate.

The panel offered a number of explanations for why Donald Trump made attacks on the media a centerpiece of his campaign rallies, often calling out specific reporters and television networks as "dishonest," "disgusting," "slime" and "scum." According to Nuzzi, who had been out on the campaign trail with Trump, people like having a "good guy and bad guys . . . and the media is an easy target." Rosen took this point a step farther, saying that Trump's "style in which he gets people to project their hatred at the press ... erodes trust in people who are going to be critical" of Trump. That distrust of the media was borne out by Nuzzi's interviews with Trump supporters: whenever she asked them about the sexual assault allegations, Trump University, tax returns or Putin, their response was, "Oh, well that's just the media trying to sabotage him." When asked how the media goes about fixing this mistrust, Rosen made a sobering comment:

> I think there's a hard core of Trump supporters who are beyond the reach of American journalism. We have to accept that. It's not like cozying up to them is going to change the situation. They are beyond the reach of the press.

Bill Carter followed-up citing a staged focus group that aired on Conan O'Brien as a comedy bit. In the segment, real Trump supporters were willing to defend Trump on just about anything — even allegations (albeit fake ones) that Trump found cows sexually attractive, and that he wanted to do genetic testing to find out if Ivanka was really his daughter to see if he could date her: "the Trump supporters found an excuse every time."

Nuzzi indicated that Trump's supporters admire that he can get away with all of his numerous scandals, "they're in awe of him – it's like he's leaning on the back of a Chevy outside a high school ready to cut class. They just think he's really cool."

Auletta applauded newspapers like the *New York Times* and the *Washington Post* for "calling a lie, a lie," but also expressed concern that acceptance of this new reporting style opened a Pandora's Box to reporters injecting their own views into straight stories. But while journalists took steps like this to call out Trump's serial lying, the panel agreed that it was the public, not the press, which let him get away with those lies. Rosen stated that Trump asserted his power over the press by showing that he could lie, and get away with it.

Rosen aired his worries that leak investigations in a Trump administration could be used "to get back at anyone who slights him" backed by "the full power of the federal government including the NSA."

The panel gave some deep thought as to whether we're going to return to normal presidential campaigns after this year, playing off a question from the audience about whether

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future candidates will have to release tax returns. Carter noted that clearly Trump had set a precedent. Rosen further observed that much in our election system, such as the disclosure of tax returns, are not required by law or regulation, but are "norms of behavior"--- and "an actor can come along, like Trump, who violates those norms, and all of the sudden practice changes, and there are so many things about running for president that are in that category that he just completely trashed."

Olivia Nuzzi interjected, "I don't think we will ever get back to normal. . . I think we are passed the point of no return in so many respects . . . I think he has completely broken the system." Auletta disagreed, at least with respect to tax returns: "the power of shame is a very potent force . . . and most candidates are very conventional and . . . they're going to be shamed into releasing their tax returns. Donald Trump had a real incentive not to release his tax returns and most people don't have that same incentive."

Michael Norwick is an MLRC Staff Attorney.

MLRC Dinner Addresses Tension Between National Security and Independent Press

The mood was at once funereal and electric as some 650 MLRC members and friends gathered November 9th, the day after the election, for the 2016 MLRC Annual Dinner in New York City. The program was in two parts – the presentation of the William J. Brennan Defense of Freedom Award to activist Daniel Ellsburg, followed by a panel discussion on the tension between national security and an independent media with Ellsburg joined by Edward Snowden (via video from Moscow), former New York Times editor Max Frankel, and Vice President and Chief Litigation Counsel at Apple Inc., Noreen Krall.

MLRC Board Chair Lynn Oberlander opened the evening by reminding the assembled of the heightened importance of their work in light of the previous day's events.

"Having three branches of government controlled by the same party reminds us again of the importance of our branch, the fourth estate, as a bulwark of liberty" she said.

As guests tucked into their roast chicken, MLRC executive director George Freeman introduced Brennan Award winner Daniel Ellsburg. Running down the list of previous winners, Freeman said that Ellsburg is in some ways the most worthy in that he is the only one who knowingly risked personal freedom to do his work.

Floyd Abrams, left, and Daniel Ellsburg

"Dan leaked highly classified documents first to anti-war politicians, and then, when they wouldn't speak publicly or distribute them, to New York Times reporter Neil Sheehan. And then, when the Times was temporarily stopped from publishing, to 18 other newspapers in turn – pretty much knowing that these actions would lead to his arrest and jailing."

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In his acceptance speech, Ellsburg pointed out that he is the only Brennan recipient who is neither a journalist nor lawyer, but a source – an undervalued and sometimes suspect player in the journalistic ecosystem.

"Sources are a part of journalism – something that I think is not regarded as self-evident by any means to a lot of journalists and editors" he said. "In fact, I've often been led to feel, 45 years later, that a lot of journalists think of their sources, on whom they depend, the way police regard their informants. As people who are, after all, disobeying the law."

He said that he hoped that his award would establish a precedent and that future honors be given to fellow whistleblowers such as Chelsea Manning and Edward Snowden.

After a break for dinner, moderator Floyd Abrams took the stage. In his opening remarks, Abrams suggested that the Trump era could be as threatening to speech as any in the nation's history and that attorneys will have to think creatively, "striking back – perhaps even affirmatively, perhaps even commencing libel suits when things are said by people in power which are defamatory and false." With that, Abrams called the panel to the stage.

Edward Snowden via video from Moscow

Among the highlights:

Ellsburg opened, explaining that his motivation for leaking was not to set the record straight, but rather a matter of life and death – to counter a "process of murder that I should not [?]simply try to shorten."

He said that he took for granted that his actions might mean spending the rest of his life in prison.

Abrams asked Ellsburg how a single person could justify making a unilateral decision about information deemed top-secret by elected officials. Ellsburg replied that he was sure no one else would do it and that furthermore he felt certain that the documents, like many erroneously marked classified, posed no active threat.

"The Pentagon Papers were all three to twenty-five years old," he said. "I felt confident that they would not find in those 4,000 pages one sentence that could harm the United States."

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Abrams called next on Edward Snowden, who appeared projected on two large screens at the front of the hall. Abrams asked Snowden to explain why he leaked and how he envisioned the consequences.

Snowden replied that unlike Ellsburg, he had the benefit of seeing the consequences for prior whistleblowers. In all cases, he said, regardless of the consequences of their leaks, espionage charges had been brought, meaning jail time as well as severe limits on communication with lawyers and the press.

In terms of motivation, Snowden said that by leaking he was upholding the oath he took to support and defend the Constitution, which he felt was being radically and illegally redefined behind closed doors.

Abrams questioned Snowden about leaking documents with information on what some might consider legitimate intelligence gathering – for instance, monitoring the cell phones of foreign leaders such as Vladimir Putin and Angela Merkel.

Max Frankel and Noreen Krall

Snowden replied that he felt his own judgment of particular documents' value was irrelevant, that decisions as to newsworthiness and consequences were delegated to experienced journalists and with the condition – consistently adhered to – that the government always be given right of reply in advance of publication.

"Ultimately that filter between the source's judgment and the public interest, the public's right to know this information, has to be filled by journalists. If you have a problem with a particular story, this is not a question best addressed to me, but to [for instance] the Washington Post."

Moving from source to journalist, Abrams asked Max Frankel, a young editor at the New York Times when Ellsburg approached with the Pentagon Papers, how journalists go about deciding what to print and what to withhold.

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"We ad-hoc'd our way through any secret that came along," Frankel replied. Frankel recalled that Times lawyers were initially critical of the decision to publish, but that ultimately journalism would cease to function without leaks.

"There would be no sophisticated reportage on diplomacy and on military foreign relations without a regular traffic in top secrets."

While admitting that editors "arrogate to themselves" the final judgment as to what material to publish, Frankel said that when the injunction came in the Pentagon Papers case, there was no question but that the paper would comply.

He concluded that the climate surrounding privacy in our culture has changed.

"In era where competing interests of privacy and free communication have left us all floating in mid-air, without any real sense of order or ethics, we have to do a lot of hard talking about what's private and what's not."

Abrams turned last to Noreen Krall, who oversaw Apple's defense against the government's demand to write software to decrypt an iPhone in the wake San Bernadino terrorist attack. Abrams asked how decisions are made as to whether comply or resist a government request.

"There would be no sophisticated reportage on diplomacy and on military foreign relations without a regular traffic in top secrets," says former New York Times editor Max Frankel.

Krall said that Apple is generally supportive of law enforcement. For instance, in the San Bernandino case, Apple proactively provided information about what data might be available pursuant to valid subpoenas.

The fight went "sideways and public" when the government filed an ex parte request to compel Apple to rewrite its operating system to back out security features. Krall said that Apple felt strongly that the debate was too important to be done on the basis of an ex parte order.

Abrams asked if Apple's policy to protect its operating system is absolute. Krall said that like the journalists, Apple works on an ad hoc basis and that ideally[?] the government finds its own way in, such as it did in a similar case in New York.

Krall ended on an ominous note, recalling that at a recent ABA conference FBI director James Comey suggested it was time to have an "adult conversation" about the encryption debate. "We all know what happens when he reopens investigations," Krall said with a laugh.

With that, Abrams thanked panelists and guests and the program concluded.