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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through October 31, 2019

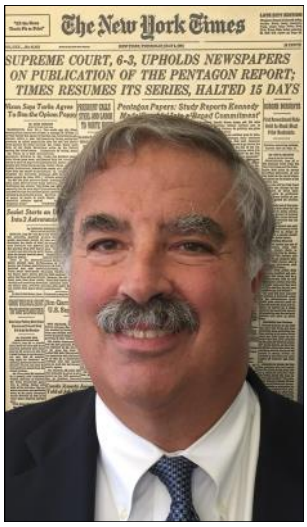
From the Executive Director's Desk

The Judiciary and the Media Bar

Once Antagonists, Now Allies

The Rule of Law in the U.S. is being threatened as never before.

The President appears thirsting to create a constitutional crisis. He is either ignorant of the cornerstone of our constitutional democracy, the Separation of Powers, or chooses to willfully ignore it; he attempts to delegitimize the other branches, in particular, the judiciary and the press, by crudely and crassly demeaning those institutions and the people who responsibly work for them (he doesn't similarly have to attack the Republican Senate because they have become spineless and hypocritical toadies, though he does bully and slur the House Democrats who have the temerity to look into his corrupt and immoral behavior); and he is running the Government as though it is his private business dedicated to expanding his visibility, brand and pocketbook, all the while ruling by executive fiat, without listening to aides or reading briefing books, but running roughshod over the checks and balances of the other participants in government who stand in his path.



George Freeman

The President appears thirsting to create a constitutional crisis. He is either ignorant of the cornerstone of our constitutional democracy, the Separation of Powers, or chooses to willfully ignore it.

Many of us lived through the constitutional crisis spawned by Watergate. But this is far worse. Nixon respected and was concerned about the country, and, even amidst his impeachment, was willing to abide by our traditions and processes. (His counsel, Len Garment, once lamented in a panel I moderated that "he should have burned those f___ tapes", but he didn't, abiding by the judicial process instead.) He also cared about his historical legacy.

Trump is interested in none of this. He is only looking out for himself. He believes that if he emasculates the press, he can write his own legacy.Therefore, it is reasonable to fear that he is posed to take the country down with him.

Putting aside any substantive differences on policies, this threat to the rule of law ought to be of paramount concern to all lawyers. His attacks on our most fundamental tenets and on our constitutional democracy ought to be rebuffed by all. His lies (the Washington Post counts over 13,000 false or misleading claims in his 1,000 days in office), his corrupt behavior, and his end-running constitutional balances - this whole unnecessary drama he has plunged us into - should be of the gravest concern to all citizens. But it should be of particular concern to attorneys, as custodians of the legal process.

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And so, as lawyers, we should do what we can to push back on these attacks on our system. While we can't do everything, or perhaps even a lot individually, what we can do is take steps to defend the legal system from being destroyed and devalued. In particular, we can help defend our judiciary.

The relationship between the media – and its lawyers – and the judges used to be much more antagonistic. When I started in this bar, just as Richmond Newspapers was being decided, there was fairly open warfare between judges, steeped in the tradition of closing courtrooms and sealing documents for the benefit of the parties before them (and sometimes themselves), on the one hand, and media lawyers on the other. During the 1980's those issues resolved themselves and the Supreme Court's precedents on open courts became generally accepted by judges below. While in the 80's I found myself going to Court once a week to argue for open proceedings, by the 90's, when casual clothing became the rule, I didn't fret not wearing a jacket and tie, as unexpected court appearances to rectify court closings became exceedingly rare.

Today the media and the judiciary find themselves in the same boat. Far from being antagonists, Trump has turned us into allies. We are the two greatest subjects of his attacks. Not surprising, since with Congress ineffective and a profile in cowardice, we are the two institutions which can stand in the President's path. Therefore, since he is used to getting his way, he has embarked on an intentional strategy of bad-mouthing and bullying both of us so as to downplay our respect and credibility among the public, and, hence to render us as toothless, unable to effectively block his often dangerous initiatives.

His lies, his corrupt behavior, and his end-running constitutional balances - this whole unnecessary drama he has plunged us into - should be of the gravest concern to all citizens. But it should be of particular concern to attorneys, as custodians of the legal process.

It is true that, of late, Trump's direct criticism of the judiciary has been less acute; more often the White House's recent messages about the courts have related to the number of judicial appointments Trump has made. (The fact that the ABA has determined that a number of those judges were unfit for lifetime appointments is a separate problem.) And it would be a mistake to believe that unfair criticism of the courts arises solely from the right. Out of desperation at the incompetence and malignity that flows from the White House and goes unchecked by the Senate, many on the left have looked to the judiciary for salvation as if it possessed veto authority over Trump's vicious policy decisions. That misconception of the role of the judiciary has led to good judges of both parties being accused of political partisanship or cowardice when they do not block unwise but lawful actions by the president. These attacks, which are an indirect result of Trump's actions, are almost as corrosive as direct attacks by the executive branch on the judicial branch.

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As it happens, last month I was named to the ABA's Section of Litigation's Committee on the American Judicial System. And while that seems like a committee with a pretty broad jurisdiction, it became clear that its primary mission is to protect the independence and reputation of the judiciary so as to allow it to fulfill its role contemplated by Article III of the Constitution and its state equivalents. Prime among our projects is to establish procedures for "Rapid Response to Fake News, Misleading Statements and Unjust Criticism of the Judiciary." That is something we, as media lawyers, with our professional experience and access to the media, should be able to handle.

An ABA booklet supporting that effort prompts that "inaccurate, unjustified, and simply false criticisms of judges should be answered promptly and fully." While it assumes that bar associations would take a leading role in responding to such unfair criticisms, often the individual lawyer – particularly one, such as many of us, with connections to the media – can respond more quickly and at least just as well.

To be more specific, the mission is to respond 1) where criticisms or misleading statements unjustly impugn the integrity of a judge or the judiciary, and 2) where a response will address a misunderstanding of the judge's role or of how the judicial system works. The booklet stresses the importance of a quick response, particularly in the age of social media where "fake news" (I hate that meaningless rhetorical device) can spread almost instantaneously. The overall purpose is to better educate the public with information to help them understand particular legal issues, including the role of judges, the application of the law and the restrictions and responsibilities placed on judges by the canons and rules.

The relationship between the media – and its lawyers – and the judges used to be much more antagonistic. Today the media and the judiciary find themselves in the same boat. Far from being antagonists, Trump has turned us into allies.

Of course, we, as media lawyers, may have a quite different view as to what commentary is unjustified and what impugns the integrity of a judge than a bar association. Thus, an article which lists a city's 10 worst judges, with sufficient support, may be looked at as demeaning and inappropriate by the bar establishment, but as fair opinion by the media bar. On the other hand, a piece which lambasts a judge for issuing a too light sentence when the judge was just following the sentencing guidelines or reports, hypothetically, or a politician saying a judge is presumptively unfair because she is of a certain ethnicity I think ought to be considered unfair and unjustified by anyone.

The booklet cautions that one should consult the judge being attacked before making a public response, since sometimes the judge might prefer no response. It emphasizes quickness – that the response should optimally be in the same news cycle as the unfair attack. It stresses – as most of us know, but many of us lawyers have a hard time with – that we should develop a coherent message using good sound bites and lay terms. It suggests that it's best for the

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response to come in the same media outlet as the original attack, and that social media, letters to the editor, op-eds or editorials are all worthy vehicles to use. Of course, since many of us have some degree of access to the latter vehicles, we can be particularly effective here.

There are more guidelines, steps and criteria in the booklet itself which has been placed on our website here. And obviously, none of this is meant to suggest that you should be calling for favors from your clients or local media leaders. Moreover, it may seem that the above seeks a cozier relationship between the judiciary and the media than is appropriate. But these are unique times, and, at least in my view, the press and the judiciary are suffering from the same outlandish and made-up attacks, all designed to diminish our vital role and mar our constitutional democracy in favor of an egomaniacal chief executive bent on running our government virtually alone. We should not countenance this, and whatever each of us can do to right the balance is as , if not more, important than any other work we may do.

While it assumes that bar associations would take a leading role in responding to "inaccurate , unjustified, and simply false criticisms of judges," often the individual lawyer can respond more quickly and at least just as well.

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

Is Assange Entitled to Full First Amendment Protection?

By James C. Goodale

At a recent panel discussion at Columbia University on Press Freedom, National Security and Whistleblowers, at which the case of Julian Assange was discussed, no one on the panel mentioned the application of the First Amendment to the defense of Julian Assange. Rather, members of the panel effectively suggested his actions could be judged by a public interest or public concern standard.

While few would disagree that whistleblowers like Assange are entitled to what is popularly known as a public interest defense, the First Amendment provides much more protection - and more to the point, it is what the law demands. A public interest defense involves a balancing of the publication by WikiLeaks against the damages of such publication. This balancing process is inherently vague and unpredictable. This approach therefore to the defense of Assange is misplaced and does not provide him the full protection of the First Amendment.

There should be no question whether Julian Assange is entitled to full First Amendment protection for publication of the Afghanistan war logs, Iraq war logs, and State Department cables for which he was indicted on 11 April 2019 and on 23 May 2019. Further, there is no doubt that the test of such protection should be some iteration of the "clear and present danger test" as used in the Pentagon Papers case.

While few would disagree that whistleblowers like Assange are entitled to what is popularly known as a public interest defense, the First Amendment provides much more protection - and more to the point, it is what the law demands.

Don't take my word for it, just read Geoffrey R. Stone's essay "WikiLeaks and the First Amendment" written at the time of the publication by WikiLeaks, the New York Times, the Guardian, El Pais, Der Spiegel and Le Monde, of the leaks of classified information by Chelsea Manning. Stone is a renowned First Amendment expert and is the former Dean of the University of Chicago Law School and Provost of the University. Since the publication of Stone's article, as we all know, Assange has been indicted under the Espionage Act. Stone states unequivocally that prosecution under that Act "violates the First Amendment unless, at the very least, it is expressly limited to situations in which the individual knows that the dissemination of the classified material poses *a clear and present danger of grave harm to the Nation.*"

Those steeped in the law and lore of the First Amendment reject balancing of a sort suggested by the Columbia panel because it amounts to what First Amendment advocates refer to as "ad hoc balancing." Since such balancing does not provide sufficient contours for the First Amendment analysis, First Amendment experts believe that it should be avoided at all costs.

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Instead "categorical analysis" is preferred in which each category of speech has its own particular test, i.e., one for commercial speech, one for broadcast speech etc., and particularly one for national security cases, i.e., clear and present danger. While Justice Thomas has cast some doubt on this form of analysis in his opinion in Reed v. Town of Gilbert his comments would seem to be not relevant to national security cases such as Assange's. The test to be applied to national security cases is, as Stone points out, the Pentagon Papers version of the clear and present danger test (per Stewart "direct, immediate and irreparable damage to our Nation or its people").

For those who would balance Assange's rights under the First Amendment, they could follow the reasoning of Justice Breyer's concurring opinion in Bartnicki v. Vopper. His test for the First Amendment is "whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." In short, Justice Breyer's approach to the First Amendment is a form of "ad hoc balancing" and as noted, highly disfavored in the First Amendment world.

In Bartnicki, a Philadelphia radio station broadcast an illegally acquired tape of a phone call of a union leader threatening the safety of managerial negotiators, i.e., "we're gonna have to go to their homes ... To blow off their front porches." The issue for the Bartnicki Court was whether the broadcast of this phone call was protected by the First Amendment. Writing for himself and Justices Kennedy, Souter, and Ginsberg, Justice Stevens said the station was protected by the First Amendment but did not precisely articulate which First Amendment test he was adopting. Instead he cited a series of cases that used the so-called Daily Mail standard for privacy cases which holds that truthful speech about a matter of public concern cannot be subject to criminal or civil sanctions absent an over riding interest of the "highest order."

For those who would balance Assange's rights under the First Amendment, they could follow the reasoning of Justice Breyer's concurring opinion in *Bartnicki.*

Justice Breyer, concurring in this opinion along with Justice O'Connor, concluded the test Stevens adopted amounted to "strict scrutiny." This test requires the government cite a compelling interest narrowly tailored, i.e., using the least restrictive alternative to carry out that interest. Breyer criticized the use of the test as follows: "What this Court has called strict scrutiny -with its strong presumption against constitutionality - is out of place where, as here, important competing constitutional interests are implicated." What was "in place" was Breyer's ad hoc balancing test.

This isn't the first time Breyer has tried to reshape First Amendment jurisprudence. He's been doing it for decades but has never succeeded. His approach has driven some members of the Court nuts. Justice Kennedy once remarked that Justice Breyer would do well to read the book "The Elements of Law" so that he could understand basic First Amendment jurisprudence. I have written several essays in which I have pointed out that were the Court to follow Justice

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Breyer's analysis it would fall into "Breyer's Patch." (James Goodale, The Strange Case of Justice Breyer, NEW YORK LAW JOURNAL–(Aug. 6, 2004); James Goodale, Caught In Breyer's Patch, NEW YORK LAW JOURNAL (July 23,1996); James Goodale, Playboy Escapes From Breyer's Patch, NEW YORK LAW JOURNAL (June 2, 2000).)

Not unsurprisingly Stone disses ad hoc balancing with respect to Assange's case noting, "the mere fact that dissemination might harm the national interest does not mean that harm outweighs the benefits of publication. Second, a case-by-case balancing of harm against benefit would ultimately prove unwieldly, unpredictable and impractical."

He goes on to say, "we have learned from our own history, there are great pressures that lead both government officials and the public itself to underestimate the benefits of publication and overstate the potential harm of publication in times of national security. A strict clear and present danger standard serves as a barrier to protect us against this danger."

Accordingly, for the government to convict Julian Assange for the publication of the Afghanistan war logs and other material leaked to him by Chelsea Manning, it must show that such publication caused a clear, present and imminent danger to national security. Additionally, such proof must be beyond a reasonable doubt since it is a criminal case.

For the government to convict Julian Assange for the publication of the Afghanistan war logs and other material leaked to him by Chelsea Manning, it must show that such publication caused a clear, present and imminent danger to national security.

It would seem that such proof would create a high bar for the government to jump - particularly, when the government has never stated once whether there has been damage to anybody as a consequence of Assange's publication. It has, of course, said such publication caused general damage to national security but has not particularized any harm to anyone such as for example, its' Afghanistan sources. Since Assange's publication took place ten years ago, the government has had ten years to come up with evidence that shows damage to national security but has not.

Not only should the First Amendment apply to the publication by Assange of Manning leaks – after all such publication was not dissimilar from that of the New York Times, the Guardian, et. al. – but it should also apply to the efforts of Assange to obtain those leaks. While the members of Columbia's panel did not have the time to go into the details of actions by Assange, there have been others that have raised concern that the First Amendment only protects Assange's publication and not his newsgathering efforts. The reason for making a distinction between publication and newsgathering can be traced to *Bartnicki*. In that case, Stevens made it clear that he was not deciding a case where a publisher or a radio broadcaster participated in the illegal activity that led to the broadcast of the phone call in that case. Many commentators have assumed therefore that the only First Amendment protection in a leak case is where a

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newspaper or other leakee is totally passive. In other words, if a reporter does a little above waiting around and having a leak magically dropped on his or her desk, then he/she would be "participating" in the leak.

Frequently the Times' publication of the Pentagon Papers is cited as an example of passive publication. This is because commentators seem to believe that New York Times reporter, Neil Sheehan, who obtained the Pentagon Papers from Daniel Ellsberg received them passively as part of a data dump by Ellsberg.

Nothing could be further from the truth and I speak with some authority since I led the legal team in the Pentagon Papers case. As set out in my book, "Fighting for the Press," Sheehan received a small cache of Pentagon Papers from a source other than Ellsberg and then pursued Ellsberg day and night to get the rest. Ellsberg was hesitant to give them to Sheehan or to give permission to Sheehan (and the Times) to use them. Only after Sheehan secretly xeroxed Ellsberg's set of the Pentagon Papers, without Ellsberg's permission, did Ellsberg finally give in to Sheehan's blandishments.

If the First Amendment only protects the passive receipt of classified information, Sheehan could have been convicted as a co-conspirator for violating the Espionage Act along with Ellsberg. Indeed, a grand jury was convened in Boston to indict Sheehan for that purpose. The government ultimately gave up on trying to indict Sheehan and others and disbanded the grand jury.

Had Sheehan been indicted, his defense would have been that actively pursuing Ellsberg to let him see and publish the full Pentagon Papers was fully protected by the First Amendment because it did not present a clear and present danger to the national security of the United States any more than did the publication of the Papers themselves. The same protection that applied to Sheehan should apply to Assange. And such protection should be based on the rule of the Pentagon Papers case and not by balancing the benefits of publication against the harm such publication causes.

The same protection that applied to Sheehan should apply to Assange. And such protection should be based on the rule of the Pentagon Papers case and not by balancing the benefits of publication against the harm such publication causes.

It would be a grave mistake it is suggested for the defenders of Assange and the defenders of First Amendment press rights to propose a balancing standard of harm to national security against the public benefit of publication as the test to be applied to defend Assange. It should be for the reasons stated above and as Geoffrey Stone suggests some iteration of the clear and present test, since the First Amendment requires no less.

James C. Goodale, former vice chairman and general counsel of The New York Times, is the author of "Fighting for the Press."

Illinois Supreme Court Upholds "Revenge Porn" Law Against First Amendment Challenge

Court Applies Intermediate Scrutiny

By Erik Bierbauer and Michael Cort

Last month, an Illinois Supreme Court majority applied intermediate scrutiny to uphold the constitutionality of the state's "revenge porn" statute against a facial First Amendment challenge. People v. Austin, 2019 IL 123910, 2019 WL 5287962 (Oct. 18, 2019). By a vote of 5 -2, the Court reversed the decision of the Illinois circuit court, which had applied strict scrutiny in striking down the statute.

The Illinois Supreme Court ruling adds to a growing body of sometimes contradictory First Amendment decisions by state courts addressing laws targeting non-consensual pornography, which have been enacted in 46 states and the District of Columbia. See https://www.cybercivilrights.org/revenge-porn-laws/ (last visited Nov. 10, 2019). For example, last year an intermediate appellate court in Texas applied strict scrutiny in striking down that state's "revenge porn" law. Ex Parte Jones, No. 12-17-346-CR, 2018 WL 2228888 (Texas App., May 16, 2018) (withdrawing and superseding opinion on overruling of reh'g), reported in the April 2018 MediaLawLetter. That decision is being reviewed by Texas' highest criminal court. And in Vermont, the state Supreme Court applied strict scrutiny, but found that Vermont's non-consensual pornography law served a compelling government interest and was narrowly tailored so as to survive that demanding First Amendment standard. State v. VanBuren, 214 A.3d 791 (Vt. 2018).

The Illinois Supreme Court ruling adds to a growing body of sometimes contradictory First Amendment decisions by state courts addressing laws targeting non-consensual pornography.

Laws that target reprehensible speech often raise the thorniest First Amendment issues, and non -consensual pornography laws fit that mold. As the decisions in Vermont, Texas, and now Illinois show, First Amendment challenges to these laws pose a doctrinal quandary: Are the laws content-based, and therefore subject to strict scrutiny, because they are aimed only at intimate images? Or are the laws content-neutral, justifying a lower level of scrutiny, because they turn on the victim's lack of *consent* to having her (or his, but victims are disproportionately female) intimate images disclosed? After all, the laws don't target any particular idea or message that an intimate image conveys, and they don't punish publication of the very same content if done with the subject's consent.

In *Austin*, the state Supreme Court concluded that the Illinois law is content-neutral. The case arose from a break-up. Austin's engagement fell apart after she discovered nude photographs

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sent to her fiancé by the couple's neighbor, saved on the couple's shared iCloud account. Austin's ex-fiancé began telling family and friends that they broke up because Austin was crazy and no longer cooked or did household chores. In response, Austin circulated a letter telling her version of the story and attaching four of the naked pictures of the neighbor and accompanying text messages. The ex-fiancé contacted the police, and Austin was indicted for nonconsensual dissemination of private sexual images under 720 ILCS 5/11-23.5(b).

Austin moved to dismiss the charge, arguing that the statute is facially unconstitutional as a content-based speech restriction that fails strict scrutiny because it is not narrowly tailored to serve a compelling government interest. The circuit court agreed with Austin and struck down the statute. The State appealed to the Illinois Supreme Court.

Illinois Supreme Court Decision

The court first addressed the State's argument that a "categorical exception" to First Amendment protection exists for the nonconsensual dissemination of private sexual images, since it is "a category of speech that has not been protected as a historical matter." *Austin* at ¶ 33. The court declined to create a new category of unprotected speech, although it said that non-consensual pornography may be a "strong candidate" for such classification, if the United States Supreme Court chooses to take up the question. *Id*. at ¶ 36.

Laws that target reprehensible speech often raise the thorniest First Amendment issues, and non-consensual pornography laws fit that mold.

Next, the court addressed the big question: the proper degree of First Amendment scrutiny. The court held that intermediate scrutiny was proper for two independent reasons: first, the Illinois statute is a "content-neutral time, place, and manner restriction," and second, it regulates a "purely private matter."

With respect to time, place, and manner, the court reasoned that the statute was content neutral because it "distinguishes the dissemination of a sexual image not based on the content of the image itself but, rather, based on whether the disseminator obtained the image under circumstances in which a reasonable person would know that the image was to remain private [.]" *Id*. at ¶ 49. The court explained that the law addressed the *manner* of dissemination – that is, dissemination without consent. The *content* of the images was not the operative factor. The court added that invalidating the law would cast doubt on the constitutionality of other, similar regulations that prohibit the unauthorized disclosure of private information such medical records, biometric data and social security numbers. *Id*. at ¶ 50.

Regarding its privacy justification, the court reasoned that "first amendment protections are less rigorous where matters of purely private significance are at issue." *Id*. at ¶ 54 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985). The court concluded that Austin's nonconsensual dissemination of the victim's private sexual images was not an

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issue of public concern, as "the public has no legitimate interest in the private sexual activities of the victim or in the embarrassing facts revealed about her life." *Id.* at ¶ 56.

The intermediate scrutiny standard requires that a law serve "an important or substantial governmental interest unrelated to the suppression of free speech and must not burden substantially more speech than necessary to further that interest[.]" *Id*. at ¶ 59 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In *Austin*, the court reasoned that is well-established that the government has an interest in protecting privacy rights. It stated "that the United States Supreme Court has never declared unconstitutional a restriction on speech on purely private matters that protected an individual who is not a public figure for an invasion of privacy." *Id*. at ¶ 64. The Illinois court then held that, in particular, the government has a substantial interest, unrelated to the suppression of speech, in preventing non-consensual pornography. The court emphasized the "unique and significant harm to victims" that non-consensual pornography causes, including intimidation through the threat of disclosure, psychological harm, and loss of employment opportunities. The court also reasoned that the fact that many states have enacted laws to combat non-consensual pornography in recent years demonstrates a recognition of the need to protect victims. *Id*. at ¶ 69.

The court then held that the Illinois law is narrowly tailored under the intermediate scrutiny standard, insofar as the government's substantial interest would be achieved less effectively absent the legislation. The court stated that available civil remedies, such as privacy and copyright causes of action, are ineffective on their own because perpetrators are often judgment -proof and lawsuits subject the victim to further exposure. The court concluded that "criminalization is a vital deterrent." *Id*. at ¶ 76. The court further found that the elements of the Illinois law, which require intentional dissemination, reasonable awareness that the victim intended the image to be private, and knowledge that she did not consent to its dissemination, mean that the law does not burden more speech than necessary. *Id*. at ¶¶ 79-85.

The question of whether strict or intermediate scrutiny applies to a non-consensual pornography law will often be central to whether the law survives a First Amendment challenge. Indeed, the two dissenters in *Austin* argued that the Illinois law is content-based, and therefore subject to strict scrutiny, because the nonconsensual dissemination of an image of a *clothed* individual would not, pursuant to the majority's reasoning, constitute criminal behavior. *Id*. at ¶ 127 (Garman, J., dissenting). The dissenters would have struck down the law.

Given the divides among state courts and judges over the proper level of First Amendment scrutiny of non-consensual pornography laws, and the importance of the issue, the question might well end up in front of the U.S. Supreme Court.

Erik Bierbauer is Vice President, Litigation, and Michael Cort is the litigation law clerk, at NBCUniversal in New York. They were not involved in People v. Austin.

Jury Rejects Tortious Interference Claim Against Quad City Times

A Scott County, Iowa jury unanimously sided with the *Quad City Times*, and two of its journalists, in a lawsuit brought by the former city administrator of Davenport, Iowa, who had claimed articles written by the paper had wrongly interfered with his contract with the city. *Malin v Quad City Times et al.* (October 4, 2019).

Background

In 2017, plaintiff Craig Malin sued the paper, columnist Barb Ickes, reporter Brian Wellner, as well as the paper's parent company, Lee Enterprises, for defamation and false light, in addition to the tortious interference claim.

The 41-page complaint alleged that a series of articles published in the paper in 2014 and 2015 had falsely accused him of mismanagement in his official actions handling various public-private works projects for the city. The heart of the case involved the plaintiff's claim that the paper falsely accused him of making decisions favoring a developer of a casino without informing the mayor and city aldermen.

Specifically, the paper reported that the mayor and aldermen had been led to believe that the city was only paying for a road leading to the privately-owned casino but that Malin had negotiated the deal such that the city would also pay for grading and paving the lot.

Furthermore, plaintiff claimed that the reporting on him was a deliberate effort to get him fired after he had started a city-run news outlet, davenporttoday.com, which had hired two Quad City Times reporters. Quad City Times' editorials had called the website taxpayer-funded propaganda. Plaintiff alleged that defamatory statements in the paper led to his removal as city administrator after a 14-year tenure. The mayor asked him to resign, which he did in connection with a severance package that precluded him from suing the city.

In a 2018 motion for summary judgment, the defendants moved to dismiss the complaint, arguing that allegations made in the paper were substantially true and non-actionable opinion, and that plaintiff was a public figure who lacked proof of actual malice, and further lacked proof of reputational damage. In a mixed ruling, Judge Nancy S. Tabor, dismissed the defamation and false light claims based upon the plaintiff's failure to demonstrate reputational damage caused by the articles.

Although the court found that the plaintiff was a public figure, and that that actual malice standard applied with respect to the plaintiff's defamation and false light claims, it permitted the tortious interference claim to proceed to trial without consideration of the constitutional defenses. The defendant moved for reconsideration and sought interlocutory appeal on multiple

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grounds, including that the interference claim was subject to the actual malice standard and that articles in question constituted constitutionally protected opinion, but those applications were denied.

Trial

A different judge, the Hon. Henry W. Latham II, was assigned to the trial, and he was apparently more receptive to the defense's First Amendment arguments. Notwithstanding the unfavorable rulings on summary judgment, the defense was successful in obtaining several favorable jury instructions, including one that largely put the actual malice question back in the hands of the jurors. That instruction read, in part, that "so long as the Defendants reasonably believed the published information was true, did not act with reckless disregard for the truth, and the publications involved an issue of public concern, then they are entitled to protection of the First Amendment." Other jury instructions provided the newspaper defendants with a public interest defense, if they were, among other factors, "acting in good faith for the protection of the public interest," and another instruction protected the defendants if their conduct was intended to petition the government about specific grievances.

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At trial, the plaintiff called about a dozen witnesses in his case, including most of the defense witnesses, reporter Brian Wellner, columnist Barb Ickes and editorial page editor, Mark Ridolfi, in effort to try to prove his case that it was their intent to get him fired by painting a false portrait of plaintiff, but apparently the jury was more persuaded by the picture brought out in their cross-examination, that they were simply doing their job as hard -nosed journalists (a defense journalism expert witness backed up this aspect of the defense). But perhaps the most damning witness was the plaintiff himself, who on cross-examination repeatedly said that he didn't dispute any of the specific allegations written in the paper, which were often direct quotes of criticism lodged by the mayor and city aldermen.

At the close of plaintiff's case, the defendants moved for a directed verdict, which the court granted with respect to the newspaper's parent company, Lee Enterprises, for a lack of evidence that it had any involvement in the dispute.

After about a week and a half of testimony, and a day of closing arguments and jury charges, a jury of 4 men and 4 women deliberated for three hours before returning a verdict in favor of the remaining defendants. The plaintiff has filed an appeal.

Defendants were represented Ian Russell and Abbey Furlong, Lane & Waterman LLP, Davenport, Iowa. Plaintiff was represented by Larry Thorson, Ackley Kopecky & Kingery, L.L.P., Cedar Rapids, Iowa and Richard A. Pundt, Pundt Law Office, Cedar Rapids, Iowa.

Jury Awards $450,000 to Sandy Hook Father in Defamation Case Against Conspiracy Theorist

By Daniela Abratt

On October 16, 2019, a jury in Dane County, Wisconsin decided that a Sandy Hook conspiracy theorist must pay a grieving father almost half a million dollars for his denial that the Sandy Hook massacre occurred. *Pozner v. Fetzer, et al.*

James Fetzer was ordered to pay $450,000 after a jury found him liable for defamation for falsely claiming that Leonard Pozner, whose six-year-old son Noah died at Sandy Hook Elementary School, fabricated Noah's death certificate.

Noah was the youngest of the victims who were killed in the December 14, 2012 mass shooting in Newtown, Connecticut. Since that day, numerous conspiracy theorists circulated rumors alleging that the shooting was a hoax perpetrated by the Obama administration, the children were hired actors, and that no one actually died.

Pozner claimed victory in a statement after the verdict was announced: "Mr. Fetzer has the right to believe that Sandy Hook never happened," he said. "He has the right to express his ignorance. This award, however, further illustrates the difference between the right of people like Mr. Fetzer to be wrong and the right of victims like myself and my child to be free from defamation, free from harassment and free from the intentional infliction of terror."

This case is just one example of a slew of defamation litigation arising from Sandy Hook conspiracy theories.

This case is just one example of a slew of defamation litigation arising from Sandy Hook conspiracy theories. Pozner is also one of a number of parents suing Infowars host and prolific right-wing conspiracy peddler, Alex Jones, in Texas for repeatedly insisting that the shooting was a hoax to promote gun control and that the children were crisis actors. Another suit is currently pending against Jones in Connecticut by relatives of five children and three adults killed in the shooting, along with one F.B.I. agent who responded to the scene. Both cases are currently in the discovery stages. Alex Jones has recently lost some key motions that now require him to divulge certain business records and to produce specific company representatives for deposition.

Suit Against Fetzer

Pozner filed the Wisconsin suit in November 2018, which centered on claims made in the book "Nobody Died at Sandy Hook: It was a FEMA Drill to Promote Gun Control." He named three

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defendants: (1) Fetzer, who served as an editor for two editions of the book as well as a co-author of the chapter "Are Sandy Hook Skeptics Delusional with 'Twisted Minds'"; (2) Mike Palecek, an additional editor of the same book; and (3) Wrongs Without Remedies, LLC, which published the book under the name Moon Rock Books Publishing.

Pozner alleged that in the first edition of the book, Fetzer claimed that Noah did not actually die at Sandy Hook, that Noah was not a real person, and that Noah was not Pozner's son. The complaint also quotes various lines from a second, expanded version of the book that claimed Noah's death certificate was a fake and that Pozner had circulated a version that had clearly been manipulated. This accusation was then repeated in a number of Fetzer's blog posts.

To support his claims, Pozner produced an official death certificate for Noah issued by the Connecticut Department of Health as well as DNA evidence proving that he was Noah's father.

In April, both Pozner and Fetzer filed motions for summary judgment. Representing himself pro se, Fetzer argued truth as a defense. He asserted that the version of the death certificate he had received and ultimately published in his book was different from the one Pozner presented to the court; the one Fetzer received was not certified and contained inconsistent fonts and hand-drawn boxes and borders. Such differences, Fetzer claimed, led him to believe the death certificate had been forged.

Pozner alleged that in the first edition of the book, Fetzer claimed that Noah did not actually die at Sandy Hook, that Noah was not a real person, and that Noah was not Pozner's son.

But the court disagreed. In June, the court found that plausible explanations existed for the variations in the death certificates and that the substance in each remained the same. The court ultimately granted Pozner's motion for partial summary judgment on liability and ruled that as a matter of law, Fetzer and Palecek defamed Pozner by alleging that he faked the death certificate to promote the conspiracy, and permitted the case to go to a jury for a damages determination.

Prior to the hearing on summary judgment, Pozner reached a settlement with the publishing company. Dave Gahary, the principal officer from Moon Rock Books Publishing, told NPR that as part of the settlement, he agreed to stop selling the book. In an interview with the New York Times, he also apologized for his personal role in the conspiracy: "I came away from that believing that [Pozner] was telling the truth," he said. "And I felt personally bad for anything that I had done to contribute to his misery."

Pozner similarly settled out of court in September with Palecek.

At trial, Pozner claimed that he suffered from post-traumatic stress disorder from the shooting, which was exacerbated by the lies in the book and the subsequent, repeated harassment by people who similarly believed that Sandy Hook was a staged event. For example, Pozner

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received death threats online and in voicemails from one such believer in Florida, who was later convicted and sentenced to five months in federal prison for the threats. At defendant's sentencing, Senior Judge James Cohn of the Southern District of Florida stated: "Your words were cruel and insensitive. This is reality and there is no fiction. There are no alternative facts."

Fetzer newly retained counsel argued that Pozner could not prove that the threats were a direct cause of the statements in the books and that he had offered no proof that those statements had been read by those who threatened him. But the jury listened to an interview in which Fetzer said that the ebook had been downloaded more than 10 million times, with 3,000 hard copies sold.

After nearly four-hour of deliberation, the jury determined that $450,000 was the price to pay for Fetzer's conspiracy theory.

After nearly four-hour of deliberation, the jury determined that $450,000 was the price to pay for Fetzer's conspiracy theory. At the time of the verdict, lawyers for Fetzer called the damages amount "absurd" and said they planned to appeal.

Daniela Abratt is an associate at Thomas & LoCicero in Fort Lauderdale.

NY Federal Court 'SLAAPs' Sheldon Adelson for Suing Political Group

By Jessica Meek and Margaret Christensen

The Southern District of New York recently granted summary judgment on a claim for damages and attorney's fees brought by the parties who successfully defended a defamation claim under the applicable anti-SLAPP statute. Specifically, in *Adelson v. Harris*, 973 F. Supp. 2d 467, 504 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413, 415 (2d Cir. 2017) ("Defamation Lawsuit"), the court dismissed the plaintiff's claims under Nevada's strategic lawsuit against public participation statute ("anti-SLAPP"). Thereafter, the prevailing defendants sued for compensatory damages, punitive damages, and attorney's fees ("Damages Lawsuit").

The Southern District of New York, in National Jewish Democratic Party v. Adelson, No. 18-CV-8787, *appeal pending* No. 19-3195, granted summary judgment in favor of the prevailing defendants for compensatory damages and attorney's fees, but not on punitive damages. In the same Order, the Court denied the former defamation plaintiff's Motion to Dismiss the Damages Lawsuit. In doing so, the Court rejected a slew of arguments, and, most notably, that the Damages Lawsuit was itself a SLAPP and that fee recovery was allowed only if the Defamation Lawsuit was "objectively baseless."

Underlying Defamation Lawsuit

Sheldon Adelson is the Chairman and CEO of Las Vegas Sand Corporation, which owns and operates casinos. He provided financial support to Republican candidates during the 2012 presidential election cycle. The National Jewish Democratic Council and its chair, Marc Stanley (collectively, the "Council") published a statement on its website that encouraged Mitt Romney to stop accepting money from Adelson. Importantly, the statement included the allegation that Adelson "personally approved" of prostitution in his Macau casinos.

Adelson then sued the Council for defamation based on the Council's statement. The Court, however, granted the Council's anti-SLAPP motion, awarding attorney's fees and costs to the Council. *See*, 973 F. Supp. 2d at 504, *aff'd* 876 F.3d at 415 The Council then filed the Damages Lawsuit to recover compensatory and punitive damages from the Defamation Lawsuit, as well as attorney's fees from the Damages Lawsuit.

Summary Judgment in the Damages Lawsuit

The court granted the Council's motion for partial summary judgment on liability for compensatory damages and attorney's fees—before Adelson even filed a responsive pleading. While noting that motions for summary judgment are ordinarily "unreasonable" at this procedural stage, the court held that this was a case where a pre-answer motion for summary judgment was appropriate. The court explained that the *sole precondition* for compensatory

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damages and attorney's fees under Nevada's anti-SLAPP statute is that the district court grant a motion to dismiss under that statute. The Council filed a statement of undisputed facts, including the key fact that the district court indeed granted the Council's anti-SLAPP motion. Because the court granted the Council's anti-SLAPP motion, and Adelson did not dispute this fact, "that end[ed] the matter" on compensatory damages and attorney's fees.

Although the Council was entitled to compensatory damages and attorney's fees as a matter of law, the court declined to enter summary judgment on liability for punitive damages. Liability on punitive damages was "premature" given another Nevada statute requiring proof of "oppression, fraud or malice" for recovery of punitive damages. The punitive damages claim had to wait minimally until after Adelson responded to the Complaint.

Motion to Dismiss in the Damages Lawsuit

Adelson moved to dismiss the Damages Lawsuit on several bases, including that applying Nevada's anti-SLAPP statute would violate the Supremacy Clause and New York's choice of law rules (the court rejected both arguments). This article, however, addresses only two of Adelson's arguments in support of dismissal.

Characterizing Adelson's allegation as "puckish," the Court rejected this argument. In short, Adelson had not demonstrated that his initial lawsuit was in good faith.

First, Adelson argued that the Defamation Lawsuit—even though dismissed as a SLAPP—was itself protected under the anti-SLAPP statute, and the Damages Lawsuit qualified as a SLAPP. In other words, Adelson contended that the Damages Lawsuit could be a SLAPP if the Defamation Lawsuit was a "good faith communication." Characterizing Adelson's allegation as "puckish," the Court rejected this argument. In short, Adelson had not demonstrated that his initial lawsuit was in good faith; there was no evidence that the allegations in the Defamation Lawsuit were truthful or made without knowledge of their falsehood. The court also noted that adopting Adelson's view would create an "oddity," stating, "[i]t would be peculiar, to say the least, if Nevada wrote its anti-SLAPP statute to shield litigants who file SLAPPs from liability in a subsequent anti-SLAPP damages action."

Second, Adelson argued that Nevada's anti-SLAPP statute does not permit recovery unless the Council demonstrated that the Defamation Lawsuit was "objectively baseless," and the Council did not plead objective baselessness. The court rejected this argument based on the anti-SLAPP statute's plain language. Adelson's proposed "objectively baseless" standard is not in the anti-SLAPP statute, despite Adelson's arguments, essentially, that the standard *should* be read-in (e.g., that California's anti-SLAPP statute contains the "objectively baseless" standard; that this standard would protect the right to petition the courts; and that the doctrine of constitutional avoidance necessitates reading this standard into the statute). The key point was that the anti-

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SLAPP statute imposed "no legal precondition on the availability of damages." As the court aptly noted, "[c]ontext only reinforces text."

Takeaways

A theme of the court's order is the presence or absence of statutory preconditions for anti-SLAPP damages. In the motion to dismiss portion of the order, the court emphasized that imposing a heightened pleading standard ("objectively baseless") *not* found in the anti-SLAPP statute would run awry of the plain text. However, in the summary judgment portion of the order, the court looked to state law limitations *outside* of the anti-SLAPP statute governing recovery of punitive damages (i.e., "oppression, fraud or malice" as a prerequisite for recovery). Both lines of reasoning are logical, as both are rooted in plain statutory text. However, this case is a reminder for media lawyers that certain state law provisions, even if they are not within the anti-SLAPP statute, may affect the burden of proof and bounds of recovery.

Margaret Christensen and Jessica Meek are attorneys at Bingham Greenebaum Doll in Indianapolis. Bingham Greenebaum Doll will be combining with Dentons in January 2020.

National Jewish Democratic Council was represented by Richard D. Emery, Emery Celli Brinckerhoff & Abady, LLP, NY. Adelson was represented by Lee A. Armstrong, Jones Day, New York.

High School Varsity Coach Not a Public Official in Minnesota

By Christopher Proczko

On September 4, 2019, the Minnesota Supreme Court handed down a decision in McGuire v. Bowlin, 932 N.W.2d 819 (Minn. 2019) reversing the lower courts' decision that a public high school coach was a public official and thereby allowing his defamation suit against one student athlete's parent to survive summary judgment. The court reached this decision despite other cases holding that elementary school teachers are public officials and despite what seems an undeniable public interest—especially given recent scandals facing entities such as USA Gymnastics—the qualifications and performance of government employees with substantial and influential contact with student athletes.

Background

Nathan C. McGuire was the head coach of the girls' basketball program at Woodbury High School in Minnesota. While he was coaching, several parents alleged that McGuire behaved inappropriately towards players—for example, swearing at practice, giving a player a back rub during an away game, moving players by their shoulders and hips during practices, and flirting with players. The parents raised their complaints about McGuire to school administrators, and two months later, the school district decided not to renew McGuire's coaching contract. Several parents of student athletes, including Julie Bowlin, continued to make statements about McGuire's conduct even after he was no longer coaching.

McGuire served and filed a complaint against several parents of high school basketball players, alleging claims of defamation and civil conspiracy. The district court granted multiple summary judgment motions in the defendants' favor on various grounds, including: (1) that McGuire was a public official; (2) that McGuire was a public figure; and (3) that some of the defendants' statements were protected by a qualified privilege and McGuire had failed to establish malice. Bowlin, a *pro se* defendant, did not assert that her statements were protected by a qualified privilege, and the court granted summary judgment in her favor solely on the basis of McGuire's public status.

The Court of Appeals affirmed the district court, and McGuire petitioned the Minnesota Supreme Court for further review. The court took the case to decide whether Maguire, "a public high school basketball head coach," was either a public official or a public figure for purposes of a defamation claim. Notably, McGuire did not appeal the district court's ruling that the other defendants' statements were protected by a qualified privilege. He petitioned for further review solely on the issue of his public status, the only ground on which the lower courts granted summary judgment against McGuire's claims against *pro se* Bowlin.

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The Court's Decision

The Minnesota Supreme Court reversed the lower courts and held that McGuire was not a public official or a public figure under Minnesota law. With respect to McGuire's "public official" status, the court determined that McGuire was not performing a governmental duty that related to "the core functions of government, such as safety and public order." McGuire's duties were specifically identified as relating entirely to the team's on-court activities: supervision of strategic team decisions such as team selection, offensive and defensive strategies, scheduling games, and general oversight over the program," as well as "decid[ing] who got court time," "set[ting] the tempo of practices," "refrain[ing] from playing girls who skipped practice," and "encourage[ing] them to try harder, or play better, or to utilize certain tactics or ideas that he had imparted beforehand or on the fly." All of these duties, the court determined, are "ancillary to core functions of government" and therefore, McGuire's position did not make him a public official. *Pro se* defendant Bowlin did not raise—and the court did not address—the role that varsity coaches play in preparing children for adulthood, for example, by instructing them on work ethic, sportsmanship, balancing extra-curricular activities with academic obligations, dealing with adversity, and, in some circumstances, by helping them obtain athletic scholarships. Nor did it address the outsized amount of time that many varsity coaches spend with their team throughout the course of the year and the pressure coaches are able to exert on the student athletes.

The court determined that McGuire was not performing a governmental duty that related to "the core functions of government, such as safety and public order."

The court went on to determine that McGuire did not hold "a position to influence significantly the resolution or public issues," nor did he have or appear to have "substantial responsibility for or control over the conduct of government affairs." The court noted that "high school basketball is an important piece of the social fabric in many communities," but ultimately concluded that the highs and lows of high school sports "are not the sort of issues that the public has a strong interest in debating," nor are they within the scope of government affairs that would make the coach a public official. McGuire was similarly not public figure of any kind under Minnesota law because no public controversy existed other than the controversy generated by the defendants' statements.

This decision is somewhat surprising given the accepted view that even low-level government employees are public officials, including elementary school teachers. Noting without explanation "he distinct roles teachers and coaches occupy," the court explicitly distinguished *Elstrom v. Independent School District No. 270*, 533 N.W.2d 51 (Minn. Ct. App. 1995), *review denied* (Minn. July 27, 1995), where the Minnesota Court of Appeals determined public high

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school teachers are public officials. *See also Ducklow v. KSTP-TV*, 2014 Minn. App. Unpub. LEXIS 169, *6 (Minn. Ct. App. Mar. 3, 2014) (citing *Elstrom*, 533 N.W.2d at 56) (requiring second-grade public school teachers to prove actual malice to pursue defamation claims). At the same time, the court completely disregarded its decision in *Weinberger v. Maplewood Review*, where it assumed without fanfare that a public high school head football coach was a public official. 668 N.W.2d 667, 673 (Minn. 2003). The court briefly considered other cases holding that certain individuals were government officials—a grand juror and a juvenile probation officer—and noted that these individuals' execution of their duties "had the potential to impact a substantial portion of the public at large." According to the court, the same reasoning did not make a high school girls' varsity basketball coach a public official because, "put simply, basketball is not fundamental to democracy"—an argument that seems to ignore the fact a coach's interaction with children over the course of several seasons has the potential to seriously impact their lives in both positive and negative ways.

Christopher Proczko is an associate at Ballard Spahr in Minneapolis. Plaintiff was represented by Sharon L. Van Dyck, Van Dyck Law Firm, Minneapolis, and Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota.

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Maine Court Rules that Undercover Game Warden is a "Public Figure"

Must Allege Specific Facts to Plead "Actual Malice"

By Benjamin S. Piper, Sigmund D. Schutz and Jonathan S. Piper

A Maine Superior Court held that an undercover game warden qualified as a public figure, and dismissed his claims because he had not pled facts sufficient to make a claim of actual malice. *Livezey v. MTM Acquisition, Inc.*, BCD-CV-18-22 (Business & Consumer Docket). The orders are available here. Maine is a notice pleading state that has not adopted the *Iqbal/Twombly* pleading standard, but the decision stands out for the court's close scrutiny of the facts alleged in plaintiff's complaint. In Maine, pleadings that merely recite the elements of actual malice and attribute that conduct to the defendant in a conclusory manner will not suffice.

Background

The case arose from a series of more than two dozen investigative reports published by the *Portland Press Herald/Maine Sunday Telegram* headlined "North Woods Lawless." The extensively sourced articles detailed aggressive undercover law enforcement tactics by the Maine Warden Service in a sting operation to prosecute residents of Allagash, Maine (population: +/-250) for violating fish, game, and other laws.

In Maine, pleadings that merely recite the elements of actual malice and attribute that conduct to the defendant in a conclusory manner will not suffice.

The undercover Game Warden, William Livezey, posed as a hunter from Pennsylvania and was reported to have "done his best to tempt locals into violating. . . laws" by, among other things, providing a target with a rifle and ammunition during illegal night hunting expeditions. The *Press Herald's* reporting led to a community outcry, hearings before the Maine Legislature, and ultimately the suspension of Warden Service undercover operations. The reporting also raised questions about whether the Warden Service may have hyped its activities to make better television for Animal Planet's popular but discontinued "North Woods Law" TV show.

Former Undercover Game Warden Files Defamation Action

Livezey filed a defamation action alleging that the *Press Herald* published false and defamatory statements concerning his involvement in the Allagash undercover operation and previous allegations of entrapment made against him. The *Press Herald* moved to dismiss the complaint on the grounds that (a) Livezey was a public-figure but failed to allege facts that constitute actual malice; and (b) the alleged statements did not convey defamatory meaning as a matter of law.

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Although the Livezey had pleaded that the *Press Herald* published the allegedly defamatory statements with knowledge of their falsity or with reckless disregard for the truth, the newspaper argued that he pleaded no facts to support that conclusion. In response, Livezey argued that under Maine's notice pleading standard, his recitation of the elements of actual malice was sufficient.

Maine Superior Court Justice M. Michaela Murphy agreed with the *Press Herald*, ruling that if "there are no factual allegations to support the conclusion that [defendant] acted with actual malice, then the Complaint should be dismissed, regardless of [plaintiff]'s characterization of [defendant's] employees' states of mind" when they published the allegedly defamatory statements.

For each allegedly defamatory statement, the court analyzed whether the complaint pleaded facts that, if true, supported the conclusion that the *Press Herald* published the statement knowing it to be false or with reckless disregard for its truth or falsity. The court concluded that the plaintiff pleaded no facts evincing actual malice for any of the alleged statements.

Even in notice pleading states, courts may be willing to give Iqbal/ Twombly-like scrutiny of actual malice allegations by public figures.

Of note, several of the allegedly statements were *Press Herald* journalists' interpretations of an excerpt from an earlier Maine Supreme Court opinion concerning a conviction resulting from an earlier sting operation in which Livezey was involved. The *Press Herald* reported that the Court had ruled that Livezey's behavior "might have been repugnant" but was "not so outrageous" that criminal charges against the target should have been dismissed. The Plaintiff alleged that the *Press Herald* had mischaracterized that court's statement about plaintiff in a defamatory manner. But Justice Murphy, relying on *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971), held that the *Press Herald's* characterizations were rational interpretations of a legal opinion that could be ambiguous to a layperson. Journalists "cannot be held to the same standard as a lawyer, judge, or legal scholar" in interpreting court opinions. Accordingly, the *Press Herald's* characterization of the court opinion—even if an incorrect interpretation—did not constitute actual malice.

The Court also suggested that characterizing Livezey's behavior as "repugnant" was probably non-actionable since "repugnant" is comparable to "trashy," "reprehensible," and "repulsive"—epithets that have been held to be non-actionable by other courts.

Reconsideration Denied After Public Records are Introduced

Livezey promptly moved for reconsideration and for leave to amend his complaint. He attached a proposed amended complaint incorporating new allegations that the *Press Herald* had mischaracterized his own field reports documenting his undercover work. The *Press Herald* had used the field reports as a primary source in its reporting. To support its argument that the

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amended complaint still did not plead actual malice, the *Press Herald* provided the court with Livezey's own field reports and cited them to show that the published article was true.

In an order entered earlier this year, the court agreed with the *Press Herald*. Justice Murphy concluded, "Mr. Livezey's investigative reports are replete with examples of behavior that could be rationally interpreted as efforts to entice his targets to commit wildlife crimes .... The Court thus concludes as a matter of law that no reasonable juror could determine that the allegedly defamatory statements ... are anything less than rational interpretations of what is included in those reports." Plaintiff did not appeal.

Conclusion

The Maine Superior Court's orders show that even in notice pleading states, courts may be willing to give *Iqbal*/*Twombly*-like scrutiny of actual malice allegations by public figures bringing defamation claims. The orders also show that when news organizations use public records as sources and those records support the accuracy of reporting, those sources may be used to fight allegations of actual malice and introducing them may have case-dispositive results.

Benjamin S. Piper, Sigmund D. Schutz and Jonathan S. Piper are media defense attorneys at Preti Flaherty, LLP in Portland, Maine and represented the Portland Press Herald/Maine Sunday Telegram.

Georgia Women Arrested for Criminal Defamation Wins Settlement Award

By Cynthia Counts and Brian Biglin

Criminal defamation statutes have long been unconstitutional. Yet in some states, unconstitutional laws remain on the books with a mere footnote to indicate that the law cannot be applied. What happens, then, when law enforcement invokes such laws are to punish speech, such as a non-threatening post on Facebook?

We recently obtained a $100,000 settlement for a Georgia woman whose ex-husband orchestrated her arrest – solely due to a Facebook post he disliked. In *King v. King, et al*., 5:17-cv-24 (MTT) (M.D. Ga.), the District Court issued an insightful order denying summary judgment to the two police officers involved in a "criminal defamation" arrest. 342 F. Supp. 3d 1364 (2018). One of the officers appealed to the Eleventh Circuit, but before the court took any action, the parties settled on terms favorable to plaintiff.

Plaintiff Anne King is a single mom who, one January day, was sick and taking care of her sick children and father. She asked the children's father, her ex-husband Corey King, if he could bring some medicine from the drugstore. He refused. She vented on Facebook:

Corey King was a sheriff deputy, and warden of the county jail. He knew the county magistrate. As he testified, he felt "disrespected" by Anne so he spoke with the magistrate about Anne's post, and then with his colleague at the sheriff's office, Trey Burgamy. Officer King filed a complaint, and Officer Burgamy wrote up an incident report. The Magistrate summoned Ms. King to a probable cause hearing, at which Officer King testified about how the post was false. Though Burgamy had initially classified Ms. King's offense as harassment, the Magistrate opined that he believed it could be "Criminal Defamation." He invited the officers to swear out a warrant.

Burgamy then prepared and submitted an arrest application with a sworn affidavit claiming that Ms. King committed criminal defamation by "communicat[ing] false matter" and "derogatory and degrading comments directed at and about Corey King" in violation of the former O.C.G.A.

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§ 16-11-40. That statute was abrogated by *Williamson v. State*, 249 Ga. 851 (1982), and formally repealed by Ga. L. 2015, p. 385, § 3-1/HB 252, effective July 1, 2015.

Burgamy's law enforcement handbook noted that the statute was held unconstitutional in 1982. The magistrate signed the warrant, and Anne was arrested and put in a squad car in broad daylight in front of the courthouse. She spent the day in jail, away from her kids. Her ex-husband, the jailer, stopped by to observe her behind bars. When Anne appeared in state court, the judge convinced the county solicitor to drop the charges.

Ms. King sued the officers. She brought First and Fourth Amendment claims under Section 1983 for false and retaliatory arrest. She also brought state tort claims for malicious prosecution. The district court denied summary judgment to Officer King on the state law claims, and denied summary judgment on both the federal and state law claims as to Burgamy, as he was the officer that submitted the unconstitutional warrant application.

The case has generated considerable headlines because Ms. King was an ordinary person against whom the criminal justice system was weaponized solely because of something she said on social media.

In an important opinion, the District Court opined that Burgamy could be liable for the unconstitutional arrest under Section 1983. It rejected Burgamy's theory that he merely "followed orders" from the magistrate and thereby enjoyed "quasi-judicial" immunity, or a finding that the magistrate caused the constitutional violation, not him. In the court's view, Burgamy bore responsibility for the contents of *his* false warrant application, and the constitutional consequences. Burgamy was not entitled to qualified immunity, either, given "his critical role in the patently absurd, and unconstitutional, decision to arrest Ms. King." 342 F. Supp. 3d at 1377-78. Further, Ms. King established that Burgamy violated clearly established law as he subscribed a warrant affidavit containing knowingly false assertions, and sought arrest on the basis of a statute long held unconstitutional.

The court denied summary judgment to both officers on Ms. King's claims of malicious prosecution. It found that the jury could concluded that the defendants "jointly prosecuted Ms. King without probable cause. It further found that the state law defense of official immunity did not apply because Officer King was not acting in the performance of his official duties when he initiated the action against Ms. King, and Officer Burgamy, although acting in his official capacity, could be found to have acted "with actual malice or with actual intent to cause injury."

Burgamy filed an interlocutory appeal in the Eleventh Circuit. He again claimed that he was merely following orders from the magistrate and acting in a ministerial capacity in subscribing

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the arrest warrant. Before the Eleventh Circuit took any action, the parties settled. Ms. King received $100,000 and a public apology.

The case has generated considerable headlines because Ms. King was an ordinary person against whom the criminal justice system was weaponized solely because of something she said on social media. The facts indeed show a notable abuse of power, and blatant content-based punishment against speech. Close review of the district court docket and the parties papers confirm that rectifying even an egregious arrest like this is easier said than done; that officers and local governments will litigate even gross claims of abuse; and that plaintiffs must carefully plead and prosecute their claims to overcome the slew of immunities afforded officers. Indeed, officers will prevail on a claim of qualified immunity if they had probable cause to believe that any crime may have occurred. Thankfully, in a case such as Anne King's, the lack of probable cause was beyond dispute.

Cynthia Counts and Brian Biglin, of Duane Morris LLP, represented Anne King.

GateHouse Media and *Fayetteville Observer* Win 2-Year Battle to Unseal Files in Abuse Case

By Jon Buchan

On September 13, 2019, the two-year battle by GateHouse Media and *The Fayetteville Observer* to unseal a North Carolina state court civil file ended with the court-ordered unsealing of every document in the file, redacting only the identities of the three juvenile plaintiffs who had brought claims of sexual abuse against a politically prominent North Carolina car dealership owner.

The unsealed "Confidential Settlement Agreement" revealed that the defendant Michael Lallier and/or his related businesses had paid $1.9 million to settle the case. It also revealed that the plaintiffs, through their guardians *ad litem* and families, had agreed that the settlement could be revealed to the prosecutor in the South Carolina criminal case in which Lallier has been charged with felony sexual misconduct with one of the three minor plaintiffs in the civil case. That minor plaintiff and his family agreed in an affidavit made part of the settlement agreement that they would "not challenge or object to the Solicitor's decision to resolve" that criminal case "in whatever way the Solicitor deems appropriate." The criminal case, brought in September, 2016, is still pending in the South Carolina trial court. The unsealed civil complaint and amended complaint disclosed the minors' detailed allegations against Lallier.

The two-year battle by GateHouse Media and The Fayetteville Observer to unseal a North Carolina state court civil file ended with the court-ordered unsealing of every document in the file.

Case History

The North Carolina Court of Appeals in December 2018 vacated the two original orders entered in 2016 that sealed the civil case in its entirety, and reversed the August 2017 trial court order denying the newspaper's motion to unseal the file. (*See* MLRC MediaLawLetter, December, 2018; *Doe v. Doe*, 823 S.E. 2d 583 (N.C. App. 2018)). The two sealing orders hid from public view every document in the file, including the summons and complaints, the names of the defendants, the two orders sealing the file, the names of counsel for plaintiffs and defendants and the name of the trial judge. The Court of Appeals remanded the case to the trial court to unseal most of the file in a redacted form to protect the identities of the juveniles, but instructed the trial court to consider two core issues.

First, the Court of Appeals directed the trial court to consider on remand any argument that might be made by Lallier that disclosure of the complaints could harm his right to a fair trial in the S.C. criminal case. That issue had never been raised by defendants when the newspaper moved in 2017 in the trial court to unseal the file, was not mentioned in the trial court's 2017 order denying the newspaper's motion to unseal, and was never raised in the briefing and argument to the Court of Appeals. The Court of Appeals, nonetheless, directed that Lallier could raise the issue on remand. On remand, counsel for Lallier submitted only a conclusory affidavit from Lallier's S.C. criminal attorney asserting that disclosure of the allegations in the complaints prior to resolution of the criminal case would harm his fair trial rights.

Second, the Court of Appeals directed the trial court to determine whether the confidential settlement agreement should remain sealed forever, "considering the subject matter of the Agreement and the 'facts of

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this specific case,'" noting that the trial court should consider "the public policy factors of encouraging settlement of litigation and freedom of contract."

The Plot Thickens on Remand

Lallier's counsel seized on that strong language, and argued that if this had not been a case involving the settlement of minors' claims requiring judicial approval, the settlement agreement would not have been filed with the court and would have remained undisclosed. Lallier's counsel also argued to the trial court that confidentiality was naturally part of the consideration bargained for by defendants in making the settlement payments, and that North Carolina public policies of encouragement of the settlement of litigation and the right of "freedom of contract" supported permanent sealing of the settlement agreement.

Counsel for the newspaper countered that there was no North Carolina case law suggesting that the state has a public policy of encouraging settlement that is strong enough to constitute a compelling public interest in sealing court-approved and filed settlement agreements. Counsel also pointed to courts – such as the United States District Court of South Carolina – that have made the sealing of court-filed settlement agreements permissible only in extraordinary circumstances.

Counsel for the newspaper countered that there was no North Carolina case law suggesting that the state has a public policy of encouraging settlement that is strong enough to constitute a compelling public interest in sealing court-approved and filed settlement agreements.

Counsel for the newspaper, who had been permitted by the trial court to review the sealed material under an Attorneys' Eyes Only limitation, drew the court's attention to the specific portions of the settlement agreement that allowed the defendant Lallier to present the settlement documents to the S.C. prosecutor. This provision allows Lallier to argue that the minor plaintiff in the S.C. criminal case and his family had agreed that they had no objection to whatever resolution of the case the prosecutor decided upon, possibly opening the door to a dismissal or significant reduction of the charges based on this then-non-public agreement. Counsel for the newspaper asked the court to review those specific provisions and argued that not only was there <u>not</u> a compelling public interest in keeping the agreement sealed, such continued sealing was actually <u>contrary</u> to the public interest.

After extensive briefing and oral argument of these issues, the trial court – the same judge who had sealed the file in 2016 and rejected the newspaper's motion to unseal in 2017 – on August 15, 2019 ordered that the entire file, including the complaints and settlement agreement, be unsealed, redacting only the names of the minors and their families and any other specific identifying information. (*John Doe 15 v. Lallier et al*, 2019 N.C.Super. LEXIS 117) The trial court specifically ruled that Lallier had not met the First Amendment standard for maintaining the complaints under seal, finding that there were adequate alternatives to sealing, such as *voir dire*, that would protect his right to a fair trial.

But the fight was not over. Defendant Lallier filed notice of appeal and asked the trial court to stay the order as to the complaints and settlement agreement pending appeal of the August 15 order, arguing that unsealing the complaints and settlement agreement would moot their appeal. The newspaper opposed that motion, and

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the trial court denied it. Lallier then filed a petition for writ of supersedeas with the Court of Appeals seeking to have it stay the August 15 order pending appeal.

The newspaper vigorously opposed that petition, arguing: (1) that Lallier should not be rewarded for passing on the opportunity to present the fair trial issue to the Court of Appeals in the first appeal and for offering no competent evidence on that issue on remand, and, (2) that the trial court had on remand ruled on the unsealing of the settlement agreement considering "the facts of this specific case," as directed by the Court of Appeals. Therefore, the newspaper argued, the Court of Appeals had no new issue of law before it.

On September 13, 2019 the Court of Appeals denied Lallier's petition for writ of supersedeas, and later that day the Cumberland County Clerk of Court released redacted copies of the complaints and the settlement agreement.

Jonathan E. Buchan, Natalie D. Potter, and Caitlin Walton of Essex Richards, P.A. in Charlotte N.C. represented The Fayetteville Observer, a GateHouse Media, Inc. newspaper, throughout this dispute. The defendant Michael G. Lallier was represented in the trial court on remand by H. Gerald Beaver of Fayetteville, N.C. and by Joshua Davey of McGuire Woods, LLP. In Charlotte, N.C. Plaintiffs were represented by Michael Porter, of The Michael Porter Law Firm, in Fayetteville, N.C.

Second Circuit Cuts Back on "Express Adoption" Doctrine in FOIA Case Over Torture Memos

By Alexandra Perloff-Giles

In a decision from September, the Second Circuit substantially limited the "express adoption" doctrine, which had been an important vehicle for FOIA requesters seeking disclosure of legal memoranda from the government.

The decision came in The New York Times Co. & Charlie Savage v. United States Department of Justice, which addressed whether a series of memoranda prepared by an Assistant United States Attorney appointed to investigate the legality of CIA interrogation techniques were exempt from disclosure under the deliberative privileges incorporated into Exemption 5 of FOIA.

The Second Circuit rejected The Times's main argument – that the secret memos must be released because DOJ had relied upon them in public statements after the conclusion of the investigation.

The Second Circuit substantially limited the "express adoption" doctrine, which had been an important vehicle for FOIA requesters seeking disclosure of legal memoranda from the government.

The case had its origins in the Bush administration, when AUSA John Durham was appointed to lead an investigation into whether CIA interrogators had violated federal law in interrogating detainees overseas and whether criminal charges should be brought. In a series of reports, Mr. Durham concluded that full criminal investigations *were* warranted in connection with the death of two detainees in the custody of the United States, but that the investigation could be closed as to the remaining 99 incidents of alleged mistreatment of detainees.

Attorney General Eric Holder issued a press release in June 2011, accepting Durham's recommendations. Two full criminal investigations followed, for which grand jury subpoenas were issued, but no indictments were ultimately issued. Eventually, in 2012, following subsequent reports by Durham, the criminal investigations into the deaths of the two detainees were closed.

Again, Holder adopted Durham's recommendations and announced in an August 2012 press release that the Department of Justice would not initiate criminal charges in either of the two matters.

In April 2014, New York Times reporter Charlie Savage submitted a FOIA request to DOJ, seeking the reports from Durham's investigations. In May 2014, after DOJ refused to produce the documents, The New York Times filed suit in the Southern District of New York. The

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parties cross-moved for summary judgment, with DOJ asserting that the documents were properly withheld under FOIA Exemptions 1 (national security), 3 (other federal law), 5 (privileged communications), 6 (personal privacy), and 7(c) (law enforcement information that could constitute an unwarranted invasion of personal privacy).

Judge Paul Oetken granted in part and denied in part both motions for summary judgment. In relevant part, Judge Oetken held that Exemption 5 did not apply because Holder had "expressly adopted" the contents of Durham's memoranda through public statements. Under the "express adoption" doctrine, if an agency "expressly adopts" the reasoning of an internal memorandum or "incorporates by reference" the document into a final decision, Exemption 5 no longer applies.

Judge Oetken did, however, permit redactions of the portions of the memoranda that were no adopted by Holder or that were justified by other FOIA exemptions.

Following DOJ's appeal, the Second Circuit affirmed in part and reversed in part. The court concluded that DOJ had waived the attorney work-product privilege as to information in the memoranda relating to the conclusion that some of the detainees were not in CIA custody. The court ordered those sections of the memos released.

But the more significant part of the decision was the court's narrowing of the scope of the "express adoption" doctrine, through which The Times sought the release of extensive portions of the memos. The ruling was the latest in a series of decisions in which the Second Circuit has attempted to delineate two waiver doctrines: working law and express adoption.

The courts have long held that agencies must release secret legal memos if they are the "working law" of the agency, setting out the law and rules that the agency must follow.

Then, in *Brennan Center v. United States Department of Justice*, 697 F.3d 184 (2d Cir. 2012), the court laid out "express adoption" as a separate doctrine from working law. The court characterized express adoption as a "distinct path[] through which Exemption 5's protections could be lost," separate and apart from the "working law" doctrine.

While working law referred to the secret law governing an agency, express adoption applied when an agency made public statements relying on a document's analysis even if that analysis was not publicized. *See, e.g.*, *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 358-59 (2d Cir. 2005). The *La Raza* approach, which was embraced by *Brennan*, found that it was offensive to FOIA for an agency to give public assurances of a decision's legality and then refuse to share the legal analysis that supported that conclusion.

However, in *ACLU v. NSA*, 925 F.3d 576 (2d Cir. 2019), the Second Circuit began to walk away from that distinction, suggesting that the "express adoption" doctrine applies to documents that have "become an agency's 'effective law and policy" and that its contours were

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therefore coterminous with "working law." In the Durham torture memo case, the Second Circuit, citing the *ACLU v. NSA*, went a step further. It held that "an 'express adoption' inquiry is only relevant insofar as the previously-privileged intra-agency document has become binding 'working law,'" setting out an agency's policy in its dealings with the public.

Because Durham's recommendations to Holder "are not *binding* on the public")—even if expressly adopted by Holder in his final decision—and because prosecutorial decisions in any given case "are not precedential" in any future case, Durham's recommendations were not working law, the court concluded.

The *New York Times* decision thus goes one step further than the *ACLU* decision: While *ACLU* stated that "a document embodies an agency's 'working law' when the document binds agency officials *or* members of the public," 925 F.3d at 594 (emphasis added), *New York Times* implies that working law must bind *both* the agency and the public.

Alexandra Perloff-Giles is the New York Times's 2019-2020 First Amendment Fellow. The New York Times Company and Charlie Savage were represented by David McCraw, the company's senior vice president and deputy general counsel. The government was represented by DOJ Attorney H. Thomas Byron III and by AUSAs Benjamin H. Torrance and Jeannette Anne Vargas.

D.C. Circuit Hands Blow to President Trump

Requires Accounting Firm to Comply with House Subpoena

By Karolyn Perry

In October, a divided federal appeals court panel decided that Mazars USA, LLP, an accounting firm used by President Trump, has to comply with a subpoena issued by a House of Representatives committee. Trump v. Mazars (D.C. Cir. Oct. 11, 2019).

The House Committee on Oversight and Reform issued a subpoena to Mazars after President Trump's former attorney Michael Cohen testified before the Committee earlier this year in February. Mr. Cohen testified that he believes President Trump improperly manipulates his financial documents. To support his claim, Mr. Cohen provided the Committee with several of President Trump's accounting documents, including 2011 and 2012 "Statements of Financial Condition" prepared by Mazars.

After Mr. Cohen's testimony, then-Chairman Elijah Cummings wrote a letter to Mazars, informing the accounting firm that its 2011 and 2012 work presented during Mr. Cohen's testimony was troubling to the Committee. The Chairman requested certain categories President Trump's financial documents spanning back to 2009, and Mazars rejected the Committee's request, stating that it would not produce the documents voluntarily.

President Trump appealed the decision to the D.C. Circuit Court of Appeals, alleging, among other things, that the Committee's stated legislative purpose was not "genuine."

Chairman Cummings responded by writing a memorandum to the Oversight Committee, in which he formally announced his intention to subpoena Mazars pursuant to the investigative power granted by House Rule X. In his memorandum, Chairman Cummings laid out four areas he believes the Committee should investigate: whether President Trump engaged in illegal conduct before and during his time in office, whether President Trump is complying with the Constitution's Emoluments Clauses, whether President Trump has unidentified conflicts of interest that impact his ability to make objective policy decisions, and whether President Trump has properly reported his finances to certain entities, including the Office of Government Ethics. According to Chairman Cummings, the Committee's purpose for investigating these matters was purely legislative—to "inform its review of multiple laws and legislative proposals under its jurisdiction."

In April, the Committee formally issued Mazars a subpoena seeking documents and communications from 2011 to 2018 that relate to the accounting firm's preparation of financial

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and accounting documents for President Trump and his businesses. President Trump's attorneys filed a lawsuit in the D.C. District Court to stall enforcement of the subpoena against Mazars, but the judge granted summary judgment in favor of the Oversight Committee. The court held that the subpoena is enforceable and that the legislative rationales laid out in Chairman Cummings's memorandum were subjects "on which legislation could be had."

President Trump appealed the decision to the D.C. Circuit Court of Appeals, alleging, among other things, that the Committee's stated legislative purpose was not "genuine," that the Committee's desire to "investigate whether the President may have engaged in illegal conduct before and during his tenure in office" constituted an "unlawful law enforcement purpose," and that the subpoena falls outside of the Committee's power.

Writing for the 2-1 majority, Judge Tatel rejected each of the Plaintiff-Appellants' arguments and affirmed the lower court's grant of summary judgment in favor of the Committee. The majority held that the Committee has power under both the House Rules and the Constitution to issue the subpoena to Mazars, that the Committee's legislative inquiry is legitimate, and that information sought by the subpoena is "'reasonably relevant' to the Committee's legitimate legislative inquiry."

According to the majority, "even if such an investigation would not by itself serve a legitimate legislative purpose, [the court could] easily reject the suggestion that this rationale spoils the Committee's otherwise valid legislative inquiry."

In support of the majority's decision to uphold the Committee's subpoena, Judge Tatel repeatedly references the investigation's permissible "remedial legislative purpose." The court cites to Chairman Cummings' House memorandum and a letter that he wrote to White House counsel two months prior to the memorandum. According to the court, Chairman Cummings repeated the same legislative purpose in both documents, and this consistency further supports the legitimacy of the Committee's stated legislative purpose for investigating and issuing a subpoena to Mazars.

The majority also highlighted legislation currently pending in the House as support for the Committee's stated legislative purpose. "Although the House is under no obligation to enact legislation after every investigation," the court found the relevant pending legislation and the Chairman's correspondence to be "more than sufficient to demonstrate the Committee's interest in investigating possible remedial legislation."

Interestingly, the court sidestepped the Plaintiff-Appellants' argument against the Committee's rationale "to investigate whether [the President] may have engaged in illegal conduct" both before and after entering office. According to the majority, "even if such an investigation would not by itself serve a legitimate legislative purpose, [the court could] easily reject the suggestion that this rationale spoils the Committee's otherwise valid legislative inquiry."

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Not surprisingly, the majority's approach to President Trump's "illegal conduct" argument was a major source of contention for the dissent. Judge Rao rejected the majority's rationale and found that the Committee could only pursue this inquiry by issuing a subpoena through its impeachment power. Judge Rao was unpersuaded by the Committee's argument that its investigation centered around future legislation. Even though the President's conduct was not the focus of the Committee's investigation, Judge Rao held that "[a]llegations [about] an impeachable official act[ing] unlawfully must be pursued through impeachment." Because the Committee wanted to investigate the President's potential illegal conduct, Judge Rao found that the investigation "naturally raises the specter of impeachment." As such, according to Judge Rao, the Mazars subpoena should have been issued pursuant to the House's impeachment power. Not its legislative power.

The Plaintiff-Appellants also alleged that the Committee does not have authority to subpoena the President's private financial records because the House did not "unequivocal[ly] grant" it this authority. The majority rejected this argument, and, to support its rejection, the court pointed to a House Resolution that was adopted in July. This resolution confirmed the House Oversight Committee's authority under House Rules X and XI to issue subpoenas like the one at issue.

This is not the first lawsuit involving President Trump and a House Committee subpoena. In April of this year, the House Committee on Financial Services and the House Permanent Select Committee on Intelligence issued subpoenas to Deutsche Bank and Capital One, two entities that provide financial services for President Trump. President Trump unsuccessfully sought to enjoin enforcement of the subpoena, and he appealed the denial to the Second Circuit Court of Appeals.

Several news organizations moved to intervene in the appeal and to unseal an unredacted version of a letter Deutsche Bank filed with the court. The sealed version of the letter includes names of certain taxpayers whose information was requested by the House subpoena, but these names are redacted in the unsealed public version. The Second Circuit granted the news organizations' motion to intervene, but it denied their motion to unseal the unredacted version of Deutsche Bank's letter. According to the court, the taxpayers' names were not "'judicial documents' relevant to any issue in the underlying appeal."

Karolyn Perry is an associate Waller Lansden Dortch & Davis LLP in Nashville.

California Federal Court Refuses to Recognize French Copyright Judgment

By Neil A.F. Popović

On September 12, 2019, a United States District Court in San Jose granted summary judgment denying recognition of a €2 million ($2.2 million) French judgment against art editor Alan Wofsy and Wofsy's company Alan Wofsy & Associates. De Fontbrune v. Wofsy.

The dispute concerns photographs of the works of Pablo Picasso. In the early 1900s, Christian Zervos, working directly with Picasso, solicited photographs of Picasso's art, which Zervos then used in a multi-volume *catalogue raisonée* of Picasso's works. The first volume of the Zervos Catalogue was published in 1932. Yves Sicre de Fontbrune, a French citizen, later acquired the rights to the Zervos Catalogue.

In 1995, American art editor Alan Wofsy, having obtained permission from the Picasso estate to reproduce the master's works, began publishing a new collection entitled *The Picasso Project,* which included some photographs that had appeared in the Zervos Catalogue. In response, de Fontbrune brought a copyright infringement suit against Wofsy in France. A series of disputes between the parties led to a 2001 judgment in France, in which a French court of appeals (reversing the factual findings of a lower court) found *The Picasso Project* infringed the copyrights to several photographs in the Zervos Catalogue. The judgment prohibited Wofsy from using the photographs at issue and imposed an "*astreinte*" of 10,000 francs (approximately $1,680) for each future use of the prohibited works.

When copies of *The Picasso Project* were found in a French bookstore almost a decade later, de Fontbrune brought a new lawsuit to enforce the previously issued *astreinte*. With no appearance by Wofsy, who had not been served, de Fontbrune convinced the French enforcement judge to liquidate the *astreinte,* resulting in a 2012 enforcement judgment against Wofsy for €2 million ($2.2 million), payable to de Fontbrune.

In an effort to enforce the 2012 French judgment, de Fontbrune sued Wofsy in California state court under California's Uniform Foreign-Country Money Judgments Recognition Act, which Wofsy removed to federal court based on diversity of citizenship. California's Recognition Act, like the analogous statutes in many U.S. states, provides a list of potential defenses to recognition, most of which focus on procedural irregularities in the foreign proceedings. In addition, a court in California is not required to recognize a foreign judgment that is repugnant to the public policy of the state or the United States. Noting that "[t]he court is mindful of concerns over comity between French and U.S. courts," District Judge Edward Davila (N.D. Cal.) nevertheless concluded that Wofsy "carried [his] burden of showing there [was] no genuine issue of material fact that the 2012 Judgment is repugnant to U.S. public policy."

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Despite the "high bar" that California courts have set for repugnancy, defendants successfully argued that the French judgment contravenes fundamental U.S. public policy that favors free speech and promotion of the arts. Judge Davila agreed that these fundamental ideals, grounded in the First Amendment, are embodied in the well-established "fair use" defense to copyright infringement. Because the fair use defense would preclude liability in a U.S. court, and because French law does not recognize fair use doctrine, the French judgment—regardless of whether it was defensible under French law—did not warrant recognition in California.

In determining whether an infringement constitutes fair use, U.S. courts weigh four factors. First, courts consider the purpose and character of the use. Judge Davila found this factor weighed heavily in favor of fair use because *The Picasso Project* is intended for "libraries, academic institutions, art collectors, and auction houses," falling within the list of exemplary uses laid out in preamble to § 107 of the Copyright Act. Next, courts evaluate the nature of the copyrighted work. Judge Davila found the second factor weighed slightly against fair use because the French appellate court found (reversing the lower court) the photographs are themselves creative works that seek to find Picasso's "quintessence" through deliberate artistic choices of lighting, lens, filter, framing, and angle. However, the factor's weight against fair use is slight because the Zervos Catalogue is "documentary in nature" and aims to "faithfully reproduce" Picasso's "work, not to showcase the original artistic expression of the photographer."

Because the fair use defense would preclude liability in a U.S. court, and because French law does not recognize fair use doctrine, the French judgment—regardless of whether it was defensible under French law—did not warrant recognition in California.

The third factor considers the amount and substantiality of the taking. Judge Davila concluded that this factor favors fair use because the photographs contained in *The Picasso Project* represent less than ten percent of those in the Zervos Catalogue. Finally, the fourth factor assesses the effect of the use on the market of the original.

Judge Davila found that the fourth factor, which legal precedent deems the most important, weighed strongly in favor of fair use because the Zervos Catalogue and *The Picasso Project* "do not compete." While the Zervos Catalogue sells as an expensive collector's item to a niche, high-end market, *The Picasso Project* sells for a much lower price point as an educational resource for libraries and academic institutions. Finding that the first, third, and fourth factors all favor fair use, Judge Davila found *The Picasso Project* would qualify as fair use under U.S. law.

While fair use is fundamental to upholding the First Amendment and free expression principles, French law includes no parallel or comparable protection. Because Wofsy's use qualifies as a fair use under U.S. law, Judge Davila found that recognizing the French judgment would

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discourage the ideals the fair use doctrine promotes, making the French judgment repugnant to U.S. public policy.

Analysis

The court made a bold and correct decision, recognizing that French law is very different from U.S. law in the area of fair use, and that the special place of the First Amendment in terms of protecting freedom of speech and artistic expression is important in our legal system. The result in this case is particularly gratifying because the Court recognized the value of defendants' publication as a reference work intended for libraries, academic institutions, art collectors and auction houses, and that under the circumstances, the French judgment—regardless of its merits under French law—is at odds with the First Amendment and therefore repugnant to U.S. public policy.

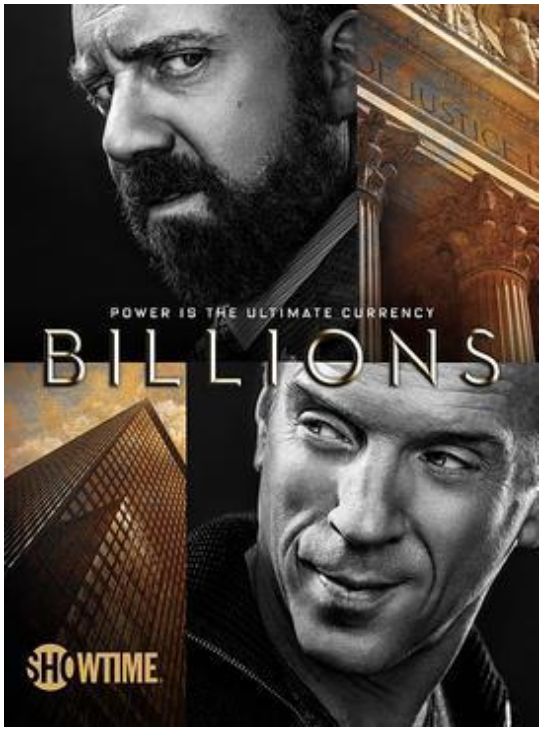
Neil A.F. Popović is the leader of the International Litigation and Arbitration Team at Sheppard Mullin Richter & Hampton LLP in San Francisco and represented Alan Wofsy and Alan Wofsy & Associates. Plaintiff was represented by Richard James Mooney, RJM Litigation Group.

Court Dismisses Author's Claim That TV Series *Billions* Copied Her Work

No Substantial Similarity Under Any Applicable Test

By Jamie Raghu

On New Year's Eve, December 31, 2018, professional performance coach and author of the book *Market Mind Games*, Denise Shull, filed an action against the creators of the hit premium television series *Billions* and the exhibitor of the series, SHOWTIME, alleging "that Defendants improperly appropriated ... Plaintiffs' copyrighted work, *Market Mind Games*, as well as Shull's style and persona without permission, compensation, or remuneration, in violation of the Copyright Act" and other state and federal claims. Shull v TBTF Productions Inc., 18 CIV. 12400 (GBD), 2019 WL 5287923, at *1 (S.D.N.Y. Oct. 4, 2019). Judge Daniels of the Southern District of New York disagreed and dismissed the action with prejudice, noting that "[t]he problem here, as Defendants aptly point out, is that these works do not seem to resemble each other in the least." *Id.* at *9.



The Works

At the center of the lawsuit are the two works: Shull's book, *Market Mind Games*, and the television series, *Billions*.

Market Mind Games explains the basics of neuroscience and describes for the reader a trading system that Shull claims is designed to take full advantage of your emotional assets. Shull's theories are based on the academic disciplines of neuroeconomics, modern psychoanalysis, and neuropsychoanalysis. To explain these theories in a more digestible fashion, Shull presents them in her book through a series of lectures, workshops, and seminars given by a fictional version of Shull based on the "typical lectures, workshops and consulting programs" she gives in real life. Shull incorporates other fictional characters as a way to transition the book through her typical academic-style lectures.

The main subject of the book, besides Shull, is the character Michael Kelly, a well-to-do man making his way through his career starting as a PhD candidate then working at a Wall Street firm before finally starting his own hedge fund, all while participating in group lectures from

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Shull. Eventually, after Michael starts his own fund, Shull joins as its in-house performance coach, where Shull and Michael engage in a single one-on-one counseling session about Michael's bad trade.

Billions, by contrast, is a highly acclaimed hour-long "complex drama about power politics in the world of New York high finance. Shrewd, savvy U.S. Attorney Chuck Rhoades ... and the brilliant, ambitious hedge fund king Bobby 'Axe' Axelrod ... are on an explosive collision course, with each using all of his considerable smarts, power and influence to outmaneuver the other." Axe went from a working-class background to billionaire founder of the hedge fund, Axe Capital, using both legal and illegal means to successfully beat the market. Chuck, who grew up in a privileged New York family, is the United States Attorney of the Southern District of New York known for his perfect record prosecuting financial crimes – but he also has a flexible moral compass. The early seasons of *Billions* chronicle the showdown between Axe and Chuck that arises when Chuck begins prosecuting Axe for his alleged illegal activities.

"[t]he problem here, as Defendants aptly point out, is that these works do not seem to resemble each other in the least."

Complicating the battle between Axe and Chuck is Wendy. Wendy is married to Chuck but has worked with Axe for the past fifteen years as an in-house psychiatrist and performance coach. Wendy and Chuck have two children and live in a multimillion-dollar townhouse in Brooklyn. Wendy's career supports their lifestyle as she earns eight times as much as Chuck. The power dynamics between Chuck and Wendy are defined by Wendy's first introduction to viewers – through their sadomasochistic sex lives with Wendy as the dominatrix and Chuck as the submissive.

Further complicating Chuck and Wendy's relationship is Wendy's close relationship with Axe. Wendy has worked with Axe longer than she has been married to Chuck and is his biggest defender. In Wendy's role as in-house performance coach, she works with Axe Capital employees in one-on-one sessions, most often with Axe himself. Wendy again is the dominant one, going toe-to-toe with Axe on multiple occasions. Despite Wendy's dedication to both men, Chuck and Axe consistently question Wendy's loyalty to them as they try to outmaneuver each other.

The Lawsuit

Shull claims that *Billions* is an "unauthorized" use and "derivative work" of her book, *Market Mind Games*, since they both depict a female financial performance coach who explains how a trader's emotions can affect trading decisions. According to Shull, back in 2012, Defendant Sorkin invited Shull on his show *Squawk Box*, where they discussed her book. Shull alleges that

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three years later Sorkin emailed Shull and "introduced" her via email to the actress already cast as Wendy in order to discuss the character. Shull then alleges she had an "initial" meeting with the actress playing Wendy and two of the creators of *Billions* that Shull claims "was the beginning of the[ir] relationship," and that she expected the "terms [of Shull's alleged involvement in *Billions*] would be negotiated subsequently." No terms were ever discussed or agreed upon.

Shull brought claims for direct, contributory, and vicarious copyright infringement and state law claims for unjust enrichment, implied in fact contract, misappropriation, accounting, violation of Section 51 of New York Civil Rights Law, injury to business reputation, dilution, and unfair competition in violation of GBL Section 360-L, and deceptive trade practices in violation of GBL Section 349 and under common law.

Defendants moved to dismiss the complaint, arguing that the copyright infringement claims must fail as a matter of law because the works were not substantially similar and that the state law claims were either preempted by the Copyright Act, or in the alternative, failed to state a claim. The court granted Defendants' motion in full, finding that *Market Mind Games* and *Billions* were not substantially similar under any applicable test. The Court also dismissed Shull's state law claims for implied in fact contract, unjust enrichment, and Section 51 for failure to state a claim and held that the other state law claims were preempted by the Copyright Act because they were based on the same alleged misappropriation as Shull's copyright claims.

The court applied three tests – the discerning ordinary observer test, the qualitative/ quantitative test, and the fragmented literal similarity.

The Decision: Copyright Claims

The court applied three tests – the discerning ordinary observer test, the qualitative/quantitative test, and the fragmented literal similarity test – to determine whether *Market Mind Games* and *Billions* were substantially similar and, therefore, could withstand Defendants' motion to dismiss. After reviewing the works, the Court explained that under any test "these works do not seem to resemble each other in the least" and dismissed the copyright claims with prejudice. *Shull*, 2019 WL 5287923 at *9, *14.

Under the discerning ordinary observer test, the court asked whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (quoting *Laurezysses v. Idea Group, Inc.*, 964 F.2d 131, 141 (2d Cir. 1992)).

Comparing the protectible elements of the works, the court found that the "total concept and feel, theme, characters, plot, sequence, pace, and setting" of the two works "differ greatly." As

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Judge Daniels put it, "[a]nd the issue does not lie in the fact that one is a book and one is a television show, but the fact that Plaintiffs' work is an academic work which interweaves fiction to better help the reader understand Shull's ideas, while Defendants' work is a television show, based in the Southern District of New York, to demonstrate the drama that lies in the age old trifecta of money, power, and sex." *Shull*, 2019 WL 5287923, at *9.

Finding no substantial similarity under the discerning ordinary observer test, the court applied the quantitative/qualitative approach, which addresses "the amount of copying not only of direct quotations and close paraphrasing, but also all other protectible expression in the original work", *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 534-35 (S.D.N.Y. 2008), as well as the fragmented literal similarity test, where substantial similarity may be shown by demonstrating "the copying of even a relatively small quantitative portion of the pre-existing work ... if it is of great qualitative importance to the [pre-existing] work as a whole." *TurfAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 597-98 (S.D.N.Y. 2013).

In analyzing whether there was substantial similarity under either test, the court focused on Shull's claim that the character of Wendy in *Billions* copied the character of Shull in *Market Mind Games.* The court explained that Shull's character was "not given much of a persona" in *Market Mind Games* because the purpose of that character was to explain Shull's theories. *Shull*, 2019 WL 5287923 at *11. The court characterized Shull's claim that Wendy and Shull were substantially similar as "essentially argu[ing] that because Wendy is *also* a female in-house hedge fund performance coach, Defendants copied her fictionalized character of herself." *Id.* (emphasis original).

Shull's claims for unfair competition, deceptive business practices, and lack of accounting all arose from Defendants' alleged unauthorized use of Market Mind Games and thus were preempted by the Copyright Act.

The court quickly rejected this argument finding a female in-house performance coach is "not a copyrightable idea," because if it were, Shull would "essentially [be] grant[ed] ... a monopoly on the entire subject matter of the female performance coach." *Id.* Moreover, the court held that "[a] finding of copyright infringement in this case would serve to be even more troubling, as the character of Denise and Wendy do not resemble one another in the slightest." *Id.* Overall, because the court could not "identify any copying, not even copying that is said to be 'fragment,'" the court dismissed Shull's copyright infringement claims with prejudice. *Id.* at *10, *14.

The Decision: State Law Claims

The court then found that Shull's claims for unfair competition, deceptive business practices, and lack of accounting all arose from Defendants' alleged unauthorized use of *Market Mind Games* and thus were preempted by the Copyright Act. *Id.* at *14. The court found that the

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remaining state law causes of action for implied in fact contract, right of publicity under Section 51, and unjust enrichment were not preempted by the Copyright Act, as these claims did not derive entirely from the alleged misappropriation of her work, but dismissed these claims because they failed to state claims. *Id.*

Of great importance, in finding Shull failed to state a claim for implied in fact contract, the court distinguished the Second Circuit's holding in *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424 (2nd Cir. 2012). In *Forest Park*, the court found that plaintiff's claim for breach of implied in fact contract was neither preempted nor subject to dismissal where plaintiff had submitted a written idea for a television series and alleged an implied promise to pay reasonable compensation if the idea was used. *Id.* at 432.

Here, the court agreed that Shull's implied in fact contract claim was not preempted but distinguished *Forest Park* because here, Shull merely consulted on *Billions*, she had not submitted a written idea, and she had failed to allege a required element of her claim – that "*both* parties had understood that there was an agreement." *Shull*, 2019 WL 5287923 at *15. Moreover, the court found Shull's counsel's "uncertain" response of "yes and no" to the court's question of whether there was "some agreement that Shull would be compensated for her services" was evidence "denot[ing] that there was no manifestations" or "inferences" of mutual assent, a required element of any contract, implied or express. *Id.* at *15. For the same reasons, the court dismissed Shull's unjust enrichment claim. *Id.* at *16.

Finally, the court also dismissed Shull's right of publicity claim under Section 51, which asserted that Defendants benefited from editorial articles about Shull which "piqued interest in *Billions*" and made the story more believable, because any article allegedly written by Defendants that used Shull's name, picture, or persona did not advertise or promote *Billions*. *Id.*

Shull has until November 8, 2019 to file a notice of appeal.

Elizabeth McNamara, Jamie Raghu, and Rachel Strom of David Wright Tremaine in New York represented defendants. Plaintiff was represented by CKR Law LLP and Felicello Law P.C., NY.

New Digital Advertising Regulations Require Operational Changes

By Gamelah Palagonia

Digital advertising depends on sharing and using consumer behavioral data, which may include selling that data to downstream third parties. Section 1798.115(d) of the California Consumer Privacy Act (CCPA), prohibits businesses from selling consumers' personal information that they do not receive directly from the consumer, unless the consumer has received "explicit notice" and is able to opt out of that sale. This creates uncertainty for downstream third parties that can't provide the explicit notice and/or opt-out opportunity to the consumer that websites and mobile application publishers can. Thus, the need for an industry compliance framework has arisen.

In September, numerous stakeholders in the digital advertising industry assembled at the Interactive Advertising Bureau's (IAB) headquarters in New York for a preview of its CCPA Industry Compliance Framework. To address the challenges of the CCPA's do-not-sell obligation, the IAB and IAB Tech Lab proposed a technical solution that includes the sending of a variety of signals by the publisher to downstream third parties in the advertising ecosystem. Furthermore, they sought to address the lack of a contractual relationship between the publisher and downstream third parties by developing a limited-service-provider contract, scheduled to be released by mid-November.

In addition to operationalizing CCPA's do-not-sell requests with downstream third parties, publishers and advertisers will need to develop a technical solution to integrate opting out of cookies on their websites and applications for cookie providers.

Operational changes required

CCPA and laws like it proposed in other states create new obligations and impose operational changes that many businesses have yet to fully comprehend. The first step toward CCPA compliance is recognizing that it requires a fundamental change in how businesses handle personal data.

Examples of operational changes are rooted in the CCPA's notice obligations:

- **"Notice at Collection of Personal Information"** – CCPA requires businesses to provide notice communicating to consumers the type of personal data they are collecting and the purpose of such collection.

- **"Notice of the Right to Opt Out of the Sale of Personal Information"** – CCPA requires businesses that sell consumers' personal data to communicate to consumers that they can opt out of the sale of their data to third parties.

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- **"Notice of Financial Incentive"** – CCPA requires businesses to notify consumers being offered financial incentives or price differentials in exchange for using their personal data.

Privacy policy – CCPA requires businesses to clearly disclose in a privacy policy their online and offline business practices regarding the collection, use, disclosure and sale of personal data.

One of the major obstacles that businesses face when implementing these operational changes is not properly budgeting for the costs of compliance.

Cost of compliance is high…

Legal, operational and technical costs associated with adapting business models to bring technology and infrastructure systems into compliance, must be taken into account when budget forecasting. These costs will vary considerably based on the maturity and size of the business, industry sector, type of data collected or used, the geographic footprint and current data privacy practices and systems.

A recent CCPA Economic Impact Assessment Report prepared for the California attorney general's office by an independent research firm concluded that the CCPA could cost businesses $55 billion in initial compliance costs. In addition, total compliance costs for all companies subject to the law could be as high as $16 billion over the next decade, according to the report.

…But cost of non-compliance is higher

The California attorney general has enforcement powers and may bring actions for violations of the CCPA. In addition, consumers will have a private right of action only for the unauthorized acquisition of non-encrypted or un-redacted personal information and be entitled to the greater of actual damages or statutory damages of $100 to $750 per violation.

Enforcement actions by the AG and consumer private actions will both require notice to the non-compliant business and a 30-day period to remedy. If the violation is not remedied, the attorney general may seek an injunction and a civil penalty of no more than $2500 for each violation, or $7500 for each intentional violation.

Depending on the size of the class, the potential costs to defend AG actions and consumer private actions could often outweigh the costs of compliance.

Compliance with GDPR does not mean compliance with CCPA

Assuming compliance with the General Data Protection Regulation (GDPR) automatically equates with CCPA compliance could be a costly mistake for companies. While there are many

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similarities, there are also important differences. Unlike the GDPR, the CCPA applies to any data that can be directly or indirectly associated with a consumer or household. This is an especially important distinction when it comes to digital advertising.

Compliance with the CCPA will be costly and it necessitates operational changes. Consumer protection laws like the CCPA have been proposed in other states such as New York. Businesses that view the CCPA as a baseline and become compliant now will be better positioned to succeed and comply with future consumer protection laws. Another benefit to the responsible handling of personal data and compliance with consumer protection laws is a higher level of consumer trust, which is always a good thing.

Gamelah Palagonia is Senior Vice President for Network Security, Data Privacy and Technology Errors & Omissions at Willis Towers Watson. Her article was originally published on her company's Insights blog.

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10 Questions to a Media Lawyer
Jeff Portnoy

Jeff Portnoy is a partner at Cades Schutte in Honolulu.

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

I had a journalism minor. I took a course at Duke Law School in the First Amendment and that led to the opportunity to become involved in media law.

My first job is where I am right now. I'm in my 48th year at the law firm of Cades Schutte in Honolulu where I specialize in civil litigation defense – primarily medical and legal malpractice, product liability, bad faith and other related litigation matters on the defense side. But my involvement in media law is really my passion. It's changed a lot over the years – local media became part of national media and the money available to attorneys to challenge media related problems has dried up. (Only about five percent of my work these days is media related.)

But out of law school, it was a different world and I was fortunate to join a law firm that represented the Honolulu Advertiser, the major newspaper at the time. I was asked to help the senior partner on a defamation case very early. Eventually I became their primary counsel. I've also represented virtually every television and radio station, magazine, and neighbor island newspaper in Hawaii.

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

Media law is my favorite part of my practice. It's also the most significant, it affects the most people. Most other cases I do affect the parties to that litigation. Yes, occasionally you make law one way or another that will impact other people, but none of the matters come close to having the statewide impact that the media cases do. Not necessarily defamation, which oftentimes only concerns the parties, but all of the access cases I've had over the years – access to courts, to state government meetings and records – those impact everyone. And several of those relate not only to statutory issues, but occasionally to constitutional issues as well.

What do I like least? Very little as it relates to media other than the drying up of opportunities. Virtually none of the media in Hawaii is now locally owned, and mainland operations just don't give the same support that we had. Things that would've been challenged years ago now go unchallenged. That doesn't mean that the media here, particularly the Star Advertiser, is not doing anything. But the television stations have virtually dropped off the map when it comes to First Amendment challenges on access and related issues. The magazines will occasionally write investigative pieces where they'll ask for pre-publication review. But overall the work has significantly dropped off.

Virtually none of the media in Hawaii is now locally owned, and mainland operations just don't give the same support that we had. Things that would've been challenged years ago now go unchallenged.

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

It's not a media blunder, but the one that caused me the most angst was missing a statute of limitations. It was a personal injury case in my second year lawyering. I missed the deadline by about a week. I was devastated, thought it was the end of my career. But fortunately, Hawaii is a small town. I had a relationship with the lawyer on the other side, and after extensive discussions, they agreed to permit the matter to proceed. I was very lucky.

However, my calendar is now done in pen in a real book. It's backed up by the firm on its computer. But as I tell my staff, if it's not in my notebook calendar, it doesn't exist. And that came from that mistake 46 years ago.

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

In the Ninth Circuit, I argued the Kamakana police misconduct case which deals with access to federal courts – when courts can be closed, when records can be sealed. It generated a profound decision on what federal judges need to do before they can either close a courtroom or deny access to records. It took over three years, but it was a total, convincing victory for the newspaper.

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I've had cases at the Hawaii Supreme Court on fair comment, public figures, and defamation. There have also been several access cases in which the Hawaii Supreme Court has warned Circuit and District Court judges about failures to properly follow procedures.

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

It's not just an office, but an office and the conference room next door, now called my "annex." I've had several magazines write articles about it. It's filled with literally hundreds of pieces of memorabilia, mostly sports. As a sideline for the past 26 years, I've been color commentator for the University of Hawaii basketball on radio. I have autographed basketballs from almost every big-name basketball coach - from Mike Krzyzewski, Roy Williams, Dean Smith, Jim Boeheim and many others. I also have basketball net on a basket and a bunch of autographed photographs. I'm also a huge Dodgers fan so I've got a ton of Dodgers memorabilia as well.

6. Favorite sources for news – legal or otherwise?

I'm not a big computer person so I'm not on Facebook or Twitter. I mostly watch MSNBC and CNN at night and subscribe to the Washington Post and the Sunday New York Times.

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

I'm mixed. I'm asked the question a lot – not only by parents whose kids are considering law school, but also by law students trying to decide what to do with their degree. (I teach an

(Continued on page 54)

As a sideline for the past 26 years, Portnoy has been color commentator for the University of Hawaii basketball on radio.

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advanced constitutional law course at the William S. Richardson School of Law in Honolulu.) I think the profession is changing dramatically, however I'm out in the in the middle of the Pacific so it's hard to comment.

It really depends on the person. There are so many paths: you could be a lawyer at a thousand-person law firm, or go somewhere much smaller, or do legal aid. When I was in law school I was convinced I was going into legal aid. I worked legal aid in Durham and had multiple legal aid jobs lined up when this job in Hawaii opened up. It was a fluke. But I took it and I'm still here. Maybe I'm a bit of a hypocrite.

I guess you just go where your passion is. And if you think your passion is the law – and there's a lot of reasons for it to be – then go. But I wouldn't go just to make a lot of money, although that's not a bad idea either.

8. Favorite fictional lawyer?

Joe Pesci in *My Cousin Vinny*. He showed you don't have to go to law school to convince a jury. In a more serious vein, Atticus Finch of *To Kill a Mockingbird*. He's a tremendous fictional ideal of what a lawyer can do. I see him relating to my legal aid background and the media work I do.

9. What issue keeps you up at night?

The position of the President and his Attorney General regarding executive privilege has turned the rule of law on its head. That's what keeps me up. We're in a terrible situation regarding

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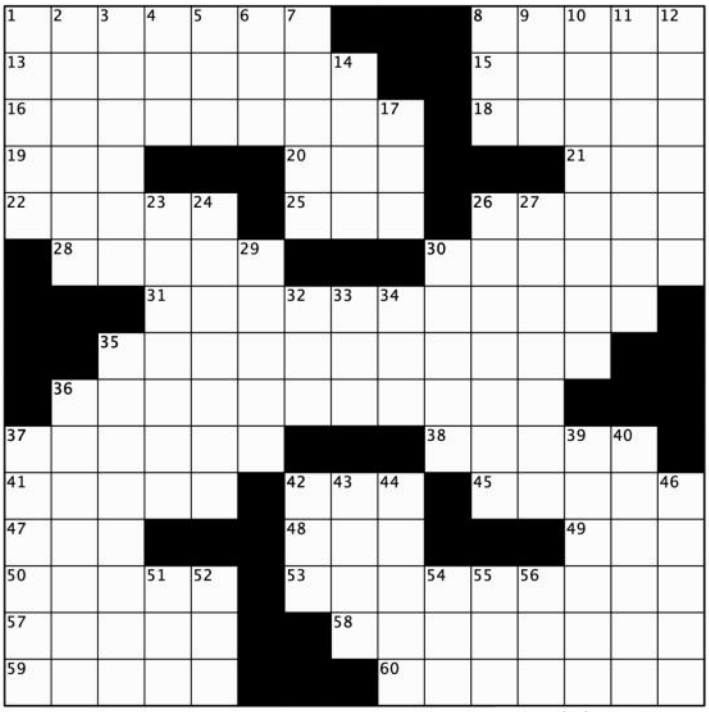
leadership, separation of powers, and the rule of law. I think the bastion of this is the federal courts. Unfortunately, just as we most need an independent judiciary, it's becoming less and less so.

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

I was almost a professional drummer. I was in a band in high school that made a record and I got to back up Tom Jones in concert.

I also thought about being a journalist. I was a journalism minor. But it's funny how it turns out. I applied to the Woodrow Wilson School of Government at Princeton and didn't get in. I applied to Northwestern's School of Speech to be an actor and I didn't get in. I got into lots of other schools. I got a political science degree and then was fortunate enough to get into Duke Law School. So that's how things worked out.

The MLRC Crossword



Puzzle by J. Hermes

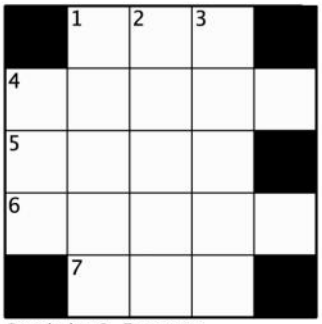
ACROSS

1. First female co-anchor of a network evening news broadcast
8. It can be found after gym or golf
13. "Leave it to me"
15. The only major city in the United States founded by a woman
16. Theme of this puzzle
18. Resident of Troy
19. Prefix for opposites
20. Journalist Nellie, who beat Phileas Fogg's record by about eight days
21. Draw
22. Swedish town that is the setting for Henning Mankell's Inspector Wallander novels
25. Org. for Chargers, Colts and Broncos, but not Cowboys
26. Teatro alla _____
28. Computer peripheral that connects you to the internet
30. Crumb
31. Former ABC anchor who is one of only six people to request and receive a public denial from Bob Woodward about being Deep Throat
35. Former CBS anchor who was the only guest host on "The Tonight Show with Jay Leno" ... and the only person to interview Hugh Grant for the MLRC
36. Far-ranging war correspondent for The Sunday Times who was killed in Syria
37. Journalism, for the subjects of this puzzle
38. Kett and Candy of comics
41. Guiding beliefs of a community
42. Gwen Ifill's network
45. Lord of the Rings character played by Karl Urban
47. Org. for Canadiens and Canucks
48. ___-right
49. ___-Ray
50. Billy Blanks' fitness system using martial arts movements
53. Journalist who chronicled lynchings in the U.S. South in the 1890s
57. With 52-Down, face-to-face meeting
58. Regret
59. Intuit
60. Cokie or Robin

DOWN

1. Full of hot air
2. Problem for older job seekers
3. "But one of the attributes of love, like art, is to bring ... highs and _____ a landscape that was previously flat." -- Molly Haskell, film critic (2 wds.)
4. Sys. that transforms written words to spoken language
5. Friday text message sign-off
6. Greek P
7. Title character in "The Lion King"
8. More than you wanted to know
9. "The History of the Standard ___ Company," by Ida Tarbell (1904)
10. "Hold on..."
11. Sender of digital messages
12. Of direct descent from an ancestor
14. Conde Nast women's health publication
17. Municipality with the largest num. of foreign-born residents in the world
23. Pulitzer-winning photojournalist Lynsey
24. Hera, Demeter, Hestia and others
26. "I'm here to tell you, no one wants to read that, cos you don't know anything. _____ about something you don't know. And don't be scared, ever." -- Toni Morrison (2 wds.)
27. _____ one's beer (2 wds.)
29. Prolific street photographer Vivian, whose photos were discovered and published only after her death
30. Cousin of hyacinth, violet and lilac
32. Multinational electronics company
33. Green prefix
34. It falls between fa and la
35. Emmy-winning newscaster Sullivan or Pulitzer-winning columnist Parker
36. Primary component of natural gas
37. Brand of mint candy that can be dropped into Diet Coke to dramatic effect
39. Stroller
40. Let go for
42. Chair of the Federal Communications Commission
43. Edifice (abbr.)
44. Comic strip "Brenda _____, Reporter"
46. Oxidizes
51. Sox on a scoreboard
52. See 57-Across
54. Life, in short
55. Charlotte's ____
56. ___ Pollard, Lady Lloyd, OBE, former editor of the Sunday Mirror, the Sunday Express, and ELLE magazine

The MLRC Mini Crossword



Puzzle by G. Freeman

ACROSS

1. Caesar or Vicious
4. "Cocktails ____, dinner at seven" (2 wds.)
5. Gilda's character on SNL
6. Co-anchor of CBS Evening News, 1993-1995
7. Mobile communications network

DOWN

1. Long-time "60 Minutes" correspondent Lesley
2. "Life ____ a dream" (2 wds.)
3. TV journalist Sawyer
4. ___ World News, formerly anchored by 3-Down