520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through September 28, 2018

MLRC Media Law Resource Center

ANNUAL DINNER

WEDNESDAY, NOVEMBER 7, 2018

1968: Echoes of a Tumultuous Year

Max Frankel

'68 N.Y. Times Washington Bureau Chief; N.Y. Times Executive Editor, 1986-94

Jeff Greenfield

Former Senior Political Correspondent for CBS,
Senior Analyst for CNN, and Political and Media Analyst for ABC News

Marvin Kalb

'68 CBS News Chief Diplomatic Correspondent; Moderator, Meet the Press

Lydia Polgreen

Editor-In-Chief, Huffington Post

Cocktail Reception at 6:00 P.M.
Sponsored by AXIS PRO

Dinner at 7:30 P.M.

Grand Hyatt New York
Empire Ballroom, 109 East 42nd Street at Grand Central Station

RSVP by Friday, October 19, 2018

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 7, 2018

RSVP for Dinner by Friday, October 19, 2018

Reservations are not refundable for cancellations received after Monday, October 29, 2018

Firm/Organization: _____

Contact Person: _____

Address: _____

_____

Phone: _____ Fax: _____

E-mail: _____

Please reserve: ____ Single seat(s) at $495 each

____ Table(s) for 10 at $4,950 each

____ Table(s) for 11 at $5,445 each

____ Table(s) for 12 at $5,940 each

Amount Enclosed for Dinner Reservations: $ _____

Please make checks payable to **Media Law Resource Center, Inc.** *(Must be spelled out!)*
And mailed to 266 W 37th Street, 20th Floor, New York, NY 10018

If you prefer to pay by credit card please go to our website, www.medialaw.org, and click on MRLC Annual Dinner. Please note that online payments will be 3% higher to cover credit card fees.

Dietary restrictions/requests: _____

For further information please contact Liz Zimmermann at lzimmermann@medialaw.org or 212-337-0200 ext. 204

DEFENSE COUNSEL SECTION

2018 Annual Meeting

Thursday, November 8, 2018

Family style lunch will be served

12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

CARMINE'S
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MLRC
DEFENSE COUNSEL SECTION

2018 Annual Meeting

$75.00 per person includes lunch.

To reserve your seat and pay by credit card
go to www.medialaw.org and click on DCS Annual Meeting

— OR—

Complete the form below and send payment by check payable to:

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266 W 37th Street — 20th Floor, New York, NY 10018

Payment enclosed @ $75.00 per person: _____

Please reserve _____ seats at the DCS Annual Lunch Meeting for:

Firm Name: _____

Address: _____

Phone: _____ Fax: _____

Please list names of individuals attending below (print clearly)

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Name: _____ E-mail: _____

Reservations are not refundable for cancellations received after Friday, November 3, 2017.

For further information contact Liz Zimmermann at lzimmermann@medialaw.org.

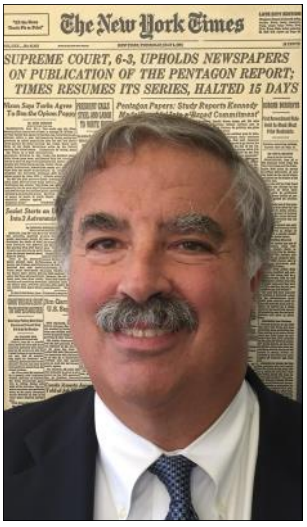
Telephone: 212-337-0200 Fax: 212-337-9893 www.medialaw.org

From the Executive Director's Desk

Record Turn-Out for MLRC's 2018 Media Law Conference

Sessions on the Trump Effect, Political Cartooning, Masterpiece Cakeshop, plus an Avenatti Cameo

Although I might not be the most objective observer, all comments and evaluations we have so far received indicate that the MLRC Media Law Conference in Reston, VA was a massive success. The plenary sessions were timely and interesting with first-rate speakers; the smaller sessions engendered lots of participation from all; I even got some comments praising the food and our menu choices, rather unexpected praise I dare say; and attendance was a record-setting 356. There also was some drama throughout in that the Conference played out against the Kavanaugh hearing and controversy just 30 miles away on Capitol Hill.



George Freeman

Herewith a brief summary of the events of the Conference from the host's point of view, including some of the decisions which had to be made, some changes we are planning for the next Virginia Conference, and other asides. As well, at the outset, let me thank my MLRC colleagues, especially Dave Heller, who worked tirelessly to ensure a top-flight program, our event organizing team from OSI in Michigan who did a tremendous job tending to the details and making sure everything worked smoothly, and all the speakers, facilitators, planning committee members and sponsoring firms, all of whom were in large part responsible for the Conference's success.

I must admit the first session was pure theft on my part. In April I was invited to moderate a panel at a 1 ½ day symposium run by Jane Kirtley at the U. of Minnesota on the 30th anniversary of the Supreme Court's strong First Amendment opinion in *Hustler v. Falwell*. Many political cartoonists – a irreverent and rowdy lot – attended and spoke, and the Court's decision and its effects were dissected from all angles. I found it both interesting and entertaining, and so my mission was to capture the best of that full program in a one-hour session. Although we only had one cartoonist, Pulitzer Prize-winning Signe Wilkinson, the panel also included Ros Mazer who submitted a brief chock full of political cartoons from throughout our nation's history – who knew that in Chief Justice Rehnquist's high school yearbook, cartooning was noted as his special interest?; Len Niehoff, who poked holes in the Court's analysis; and Prof. Sophia McClennen, an expert on satire, who put the case into current Late Night/Colbert context and forcefully argued that such satire was helpful to our democracy.

The opening session also included a shorter discussion about the unusual Judge Rakoff evidentiary hearing on a motion to dismiss in the *Sarah Palin v. New York Times* libel case – timely since the argument in the Second Circuit on the appropriateness of both the dismissal

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Hustler v. Falwell – 30 Years Later **panel, left to right: Len Niehoff, who poked holes in the Court's analysis; Jane Kirtley, moderator; Ros Mazer who submitted a brief chock full of political cartoons from throughout our nation's history; Prof. Sophia McClennen, an expert on satire; Pulitzer Prize-winning cartoonist Signe Wilkinson at podium.**

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and the procedure had taken place just a few days earlier. At a bar association meeting some months ago I had been struck by how many lawyers thought that this procedure was a bad idea. I feel it increases the odds of dismissing a libel case early, since judges are otherwise reluctant to throw out cases without plaintiffs' having any chance to garner some evidence of what went on in the newsroom. But the popular opposing view was that this grants plaintiffs discovery too early in the case and probably gives them two bites at discovery. Bottom line, I thought let's have a debate on the issue, and that's what we did, with both sides being eloquently represented.

The dinner program featured a Fred Friendly-style hypothetical case study aptly entitled "Stormy Weather." Although it was surely a hypo, it raised issues remarkably similar to the libel by implication claim brought by John McCain's alleged lobbyist/girlfriend against the New York Times, the "liar" libel cases brought by some of Bill Cosby's victims, the BuzzFeed dossier case, the showing of a sex tape of a public person, and whether sex harassment victims (and journalists interviewing them) are bound by NDA's. The panel included journalists Judy Woodruff of the PBS NewsHour and Peter Baker, chief White House correspondent of the New York Times, plaintiffs' libel lawyer Libby Locke, and media lawyer and one of the founders of the MLRC, Victor Kovner.

The real drama at this session was provided by the ubiquitous Michael Avenatti, who months ago had accepted my invitation to join us on this program. Over the last few months I figured it was a toss-up as to whether he would really appear. The day before the event I contacted his office and they seemed on board. Even so, when I heard that his client, a Kavanaugh sex witness, was going to release an affidavit the very day of our program, I thought 50/50 was far too optimistic. Sure enough at about 4pm, a few hours before the program, I received an apologetic email from one of his colleagues that he missed his plane from Alabama because of the Kavanaugh matter and wouldn't be here. He suggested, however, that maybe Avenatti could appear by Skype. I couldn't imagine that with all the networks breathing down his back for

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The opening session included a discussion of the unusual Judge Rakoff evidentiary hearing on a motion to dismiss in the *Sarah Palin v. New York Times* libel case. Left to right: Lynn Oberlander, Nathan Siegel and Lee Levine.

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interviews, he would be willing to sit quietly on camera 1,000 miles away while our four other panelists were discussing hypothetical situations, but I said great to the proposal: having him appear at all would be a kick.

After some technical and logistical struggles, everyone was on board with the Skype proposal. They said he could appear at 8:15, but I felt we should start the program as planned at 8:00. Sure enough, at about 8:20 his familiar face appeared on our screens. After interrupting the discussion to introduce him (my intro included that Trump had just called him a "lowlife" and the country's "least respected lawyer"), Laura Handman and I asked him a few questions pertinent to the hypo, including issues not irrelevant to his current cases. But about 10 minutes later his visage disappeared; evidently he had too many interviews to do.

The Senate confirmation hearing presented another quandary since both Ms. Blasey Ford and Judge Kavanaugh's testimony were scheduled at the same times as our programs. Since I felt we couldn't be oblivious to these events- after all, dealing with the Supreme Court- and since I didn't want attendees watching tv in their hotel rooms, we bought a television and set it up in a main hallway where everyone could stop by while walking from one session to another. We decided against putting it in a private room with chairs both because we didn't have a free room and because I preferred that attendees go to our sessions rather than get too comfortable watching the proceedings. This seemed to be a good solution as most sessions were still pretty fully subscribed, but folks could still get a pretty good taste of what was going on in Washington. In the end, rather than conflict with our programs, the consensus was that the

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brouhaha in Washington gave the Conference an extra fillip of energy. When in the future, attendees are asked where they were during the Kavanaugh hearing, they can say "in the Digital/Social Media breakout session of the MLRC Conference."

Thursday's breakfast program was a big hit: Floyd Abrams moderated a discussion among three lawyers, each of whom had submitted briefs to the Supreme Court in the Masterpiece Bakeshop case. Bob Corn-Revere was the only one who was on the First Amendment side, supporting the cakemakers who had refused to design a cake for the gay couple; David Cole, ACLU Legal Director, was one of the lawyers who supported the gay couple. The discussion, pitting First Amendment values of freedom of expression versus anti-discrimination laws was both very civil and on a high level.

Tom Kelley was honored both for his work as a leading First Amendment lawyer – he has handled just about every important media case in Colorado for close to two score – and for his contributions to the media bar.

Thursday at lunch the MLRC bestowed its First Amendment Leadership Award to Tom Kelley. Tom received this honor both for his work as a leading First Amendment lawyer – he has handled just about every important media case in Colorado for close to two score – and for his contributions to the media bar: among other things, Tom headed our DCS Executive Committee and has been the founder and orchestrator of our very popular Trial Tales program at our media law conferences for 30 years. Lee Levine's speech giving Tom the award and Tom's address accepting it are elsewhere in this edition.

After lunch we played Journalism Jeopardy. Having authored the questions (or answers?) and emceed the game for some 15 years at the ABA Forum meetings, I had bequeathed it to the ABA. But since they hadn't played it for the past two years, I deemed them to have waived it. Hence, a rousing game, won by Jack Greiner's table. (The final Jeopardy answer was: It was argued in the Supreme Court six days before *Bush v. Gore*.)

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Taking in a plenary in the grand ballroom. MLRC had record turnout for our 2018 event.

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Thursday night we typically have had a group outdoor buffet. However, over the last few conferences, we have noted dwindling attendance as many prefer to use that night to take out clients or go out for dinner in small groups. The result: a lot of wasted food. So this year we decided to cancel a big dinner, but have a pre-dinner reception with ample food and wine and a post-dinner dessert hour in the hotel lobby. For those who didn't have plans, we organized sign-ups for three dinner groups of about 15 each who went to local restaurants. Each group was headed by a MLRC Board member, so that if one wanted, s/he could talk about MLRC matters. To my knowledge, everyone was quite happy with this new format.

Friday morning at breakfast we had a session which was suggested by a MLRC member at an open planning meeting held last November the day after our Annual Dinner in New York. The suggestion was to have a program where jury consultants could talk about the Trump effect on juries: how to pick juries which don't believe the media is the enemy of the people, whether jury verdicts are rising because of the President's unceasing attacks on the press, and so on. Although there haven't been many libel trials in the last year or two, the jury consultants reviewed the recent data which was available and unveiled poll numbers showing a growing distrust of the media starting all the way back from after the Watergate era.

The Next Big Thing is our usual Friday lunch program. This year we tweaked that somewhat: the panel assumed that the internet was the NBT**,** but discussed if, how and why the internet honeymoon was over, and what, if anything should or could be done about it. Franklin Foer of The Atlantic began with a broadside attack on the big internet companies and how they have ruined American culture and democracy, and the lively discussion went on from there.

While I have focused on the plenary sessions, many attendees marveled at how the small group sessions were the highlight of the Conference. They allowed for a lot of interactive

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discussion among all attendees, and the opportunity for younger and less experienced attorneys to engage in discussion with some of our revered experts. There were six time slots for such small sessions, three boutiques on narrow subjects one could select and three breakouts on broader, required subject headings. I attended "Scandals," how to deal with press coverage, investigations and your H.R. Department when a sexual harassment issue hits your media company; PrePublication/PreBroadcast; and Campaign Finance 101. In all three cases, my plan was to leave after 30 minutes to visit a couple other simultaneous sessions, but in all three cases, I was so pulled in and engaged by the discussion I was a part of that I never left. I felt the use of hypos, as in the Scandals and PrePub boutiques, was especially engaging. I also found it interesting that the four new boutiques we initiated, on Campaign Finance, Scandals, Drones and Hate Speech & the First Amendment on Campus, did not draw as many attendees as the old standbys – PrePub, Newsgathering, Entertainment Law, Anti-SLAPP, Trial Tales, and the like. Apparently sessions which really will help practitioners on matters which will hit their desk in the next week are preferable to more theoretical First Amendment topics.

Whether at our receptions, breaks or at the hotel bar into the wee hours both Wednesday and Thursday nights, there was an energy, enthusiasm and bonding in the get-togethers that was palpable.

After a lot of consideration and discussion with others, I think at our next Virginia Conference in 2020, our 40th anniversary, we will dispose of the compulsory breakout topics and sessions and set time aside to go to five boutiques. This gives registrants the chance to go to programs on the precise subjects they are most interested in, eliminating our forcefeeding of what have become more amorphous and vague breakout topics. We also then will have time to repeat the most popular boutiques which should minimize the complaint I've often heard, that folks weren't able to go to all the boutiques they would have chosen because they were being offered at the same time.

Finally, a highlight of the Conference I haven't yet mentioned: the fun and conviviality that was had throughout the two-plus days. Whether at our receptions, breaks or at the hotel bar into the wee hours both Wednesday and Thursday nights, there was an energy, enthusiasm and bonding in the get-togethers that was palpable. As one well-known jurist recently said, "I like beer." Our group might have liked wine more, but whatever was imbibed help fuel a wave of bonhomie that was another highlight of a very successful Conference.

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.

MLRC's First Amendment Leadership Award Presented to Tom Kelley

Introduction by Lee Levine

The first time I ever laid eyes on Tom Kelley was November 1981. It was at the PLI Conference in NY at what was then called the Statler Hilton hotel across from Penn Station.

The ballroom was packed and the panel was discussing the litigation disaster du jour—the $26 million judgment that a Wyoming court had entered against Penthouse Magazine in a suit by Kimerli Jayne Pring, a former Ms. Wyoming.

For those of you too young to remember, $26 million was real money in those days, somewhere between Hulk Hogan money and pink slime money in today's dollars.

The case was on appeal to the Tenth Circuit, where it had been argued a day or two earlier by a young lawyer (at least compared to the members of the PLI panel) named Tom Kelley. He had replaced, reportedly at the insistence of Penthouse's insurance carrier, a colorful NY lawyer who had not, shall we say, played particularly well in Wyoming.

During the conference, Tom rose from the audience and, at the request of PLI Chair Jim Goodale, gave a succinct and thoughtful summary of the appellate argument. I was a fairly new lawyer at the time, attending only my second PLI conference, but I distinctly remember thinking to myself, why haven't I heard of this guy? He's terrific.

His anonymity, of course, did not last long. Tom won the Pring appeal and secured a terrific opinion on the First Amendment's protection for satire that is still the key precedent on the subject.

And, of course, he went on to represent media clients in a very long list of high profile and otherwise important cases, including countless access battles in the Jon Benet Ramsey, Oklahoma City bombing and Kobe Bryant sexual assault matters. He actually convinced the Colorado Supreme Court to apply the actual malice standard in all defamation cases about matters of public concern (one of the very few states to do so). And, he took on the decidedly unpopular representation of Paladin Press in the infamous "how to be a hit man" case.

It was my great honor to be co-counsel with Tom in the hit man case and in several others while we were at different firms, including an especially difficult, but ultimately successful prior restraint battle against the Church of Scientology.

It was my even greater honor when, a dozen or so years ago, Tom became my law partner. As anyone who has spent more than five minutes with him will tell you, Tom is all of the things we should each aspire to be, as lawyers and as people: decent, honorable, thoughtful, and wise.

He has demonstrated all of those traits, again and again, in his law practice and in his service to this bar, from leading the MLRC's Defense Counsel Section, to chairing the ABA Forum, to literally inventing the "Trial Tales" program that has become a staple of these biennial gatherings.

In all of these endeavors, he has served as a role model, which is, I think, his greatest and most lasting contribution to us all.

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Remarks by Tom Kelley

I am not only honored, but overwhelmed by this award, from an organization that shaped my career.

While I am a true believer in the First Amendment, this isn't going to be a motivational talk. Instead, I choose to confess that what drew me to this practice was not totally altruistic. I apologize to friends who have heard me say this before, but as a young lawyer with a short attention span and a problem with authority, First Amendment work was one of the few areas where my limited talents could be put to use. I needed more than the usual amount of stimulation and inspiration, and I couldn't have been luckier in finding it.

Back in the '70s, before the MLRC and our Defense Counsel Section existed, mentoring was hard to come by outside of New York, unless you were lucky enough to be supervised by lawyers like Harold Medina or Dick Winfield, acting for their national media clients when sued in an outlying state.

I had been practicing only eight years when the MLRC was being organized in 1980, as the LDRC, or Libel Defense Resource Center. It since changed its name at the close of the century to shed some of the special interest connotation and to proclaim its expanded horizons. You see, for its first couple of decades, this conference, which started even before there was a Defense Counsel Section, focused on the libel trial, and perfected the craft of trying those cases successfully, to stem the tide of high plaintiff's verdicts. Having surveyed all of our jury trials over nearly thirty years, I can say these efforts were decidedly a success.

But as my friend Mike Sullivan is fond of saying, we've perfected the art of surgery on dinosaurs. Over the years, the libel trial has been disappearing, in some part due to our success. Coincidentally, there has been dynamic growth and proliferation of the other kinds of resources offered by the MLRC through the DCS, as evidenced by the vast committee structure we hear about at our annual luncheon and the broad array of topics at this conference. During the early years of this gathering, we spoke much slower than now, like we were practicing talking to juries or something. We speak much faster now because we have to, there is so much more to cover than libel trials, largely due to advances in technology. The good news is I don't intend now to add significantly to this conference's word count.

For the success of the DCS we owe much to original executive director Henry Kaufman, who built this conference. And then came my great friend Sandy Baron, whose Tom Sawyer-like enticement and cajoling gave rise to our incredible level of committee participation. Sandy also led the MLRC onto the international stage, where it became the world's principal organization of media lawyers. And now we are fortunate to have George Freeman, who came to the MLRC with vast experience in most of the job description, and keeps the organization going and growing, both nationally and globally.

I will digress for a minute and note that when one's life's work is communications, be it to courts, juries, or the public, one has more frequent contact with irony than in other callings.

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One of my favorite bits of irony as a media lawyer has been exemplified by my friend, college-mate, and fellow person with a problem with authority, George Freeman. George was put off by the unrelenting rigor of this conference, so he became one of the major architects of the more climate-friendly and recreational Forum conference. It was an act of rebellion, pure and simple. So what is George's day job now? By the way, I trust you all recognize George's influence here? It's not just journalism jeopardy.

In my time in this practice, I wrote some decent briefs, but in a Rocky Mountain style that drove my eastern colleagues crazy. My real passion was the study of this inscrutable thing called a libel jury trial, sometimes referred to as a morality play. Libel trials have not only become few and far between, but have also become too dangerous an undertaking for anyone who has to answer to shareholders. The danger is a jury trial in a plaintiff-friendly venue with a judge lacking either the will or fortitude to enter summary judgment, that all too easily might result in a ruinous verdict – a verdict that is unappealable because it is unbondable.

These risks have always been with us, but the new piece is that verdicts have jumped in size, now to the hundreds of millions. Why so is multi-factored problem beyond my scope just now, but I hope it will be addressed at tomorrow's breakfast panel.

For those who want to test their defenses to an appeals court before paying up, you need a statute or rule authorizing interlocutory appeals. The case for such a rule in today's reality is powerfully made in the recent article by my partner Steve Zansberg in the Fall '17 *Communications Lawyer*.

The disappearance of the libel trial, as much as anything, it what informed my decision to retire now. Part of me wants to stick around and try to contribute to the fix of the current pickle we're in, but this time I'm finally ready to pass the torch to younger and brighter minds. We all want to retire before losing control of bladder and the send button, but I've always planned to move on a good decade before that happens. I have a few other things I want to do, among them hiking and biking with Linda in exotic places.

I need to extend thanks to that exquisitely conceived and wonderful band of brothers and sisters once known as Levine Sullivan Koch & Schulz. That firm died peacefully on September 30, 2017. We're all with a big but great firm now, Ballard Spahr, and we're happy there. Personally, I've never seen a firm with such a meaningful commitment to gender and cultural diversity, not only in hiring, but also in the practice, and in client relationships. I've never enjoyed the practice of law so much as with my friends from LSKS.

But the big picture, as I suggested up front, is that for forty-seven years I've had to pinch myself because I have been living the dream, to be doing civil rights work and getting paid for it. Most of the people I owe for that are in this room. You've been great friends. I won't try to name you, or we'd be here far longer than I've promised, and even then I would risk an omission.

I will keep my law license. What I do with it next is a work in progress, but it will be for people who are unable to pay, which these days includes most journalists. I'll send you my new e-mail address. Bye and thanks.

Court Rules Fair Report Privilege Does Not Apply to Statements Made to Police

Official Action Required Before Privilege Applies

In the absence of any official government action, does the fair report privilege extend to a newspaper's report of witness statements made to police? No, says the Appeals Court of Massachusetts. Butcher v. University of Massachusetts, No. 17-P-161 (Sept. 17, 2018). The court reinstated libel and related claims against a University of Massachusetts student newspaper over its publication of a police blotter item, holding the fair report privilege had been improperly applied to witness statements where no official action, such as an arrest, search, or charge, occurred.

A media amicus challenging the ruling is expected.

Background

The plaintiff was an IT engineer at the University of Massachusetts Boston campus. A student and shuttle bus driver reported him to campus police for allegedly photographing women on campus.

This led to an article stating:

> "A suspicious white male in a black jacket took photographs and video of nearby women, as well as some buildings on campus. A witness stated that the party did not appear to be a student and was not wearing a backpack. The witness snapped a photograph of the suspect and shared that photograph with Campus Safety. Officers tried to locate the suspect at JFK/ UMass Station, but could not find him."

In the absence of any official government action, does the fair report privilege extend to a newspaper's report of witness statements made to police? No, says the Appeals Court of Massachusetts.

A follow up article containing the photograph of plaintiff was headlined "Have You Seen This Man?" and repeated that he "allegedly walked around the UMass Boston campus snapping pictures of female members of the university community without their permission."

The plaintiff was later questioned, his camera phone reviewed, and no charges were brought. He sued several members of the student newspaper and university officials for defamation, emotional distress and related claims, alleging the newspaper falsely branded him a "sexual predator." The Superior Court granted summary judgment to defendants.

Fair Report Analysis

On appeal, the Court reasoned that under Massachusetts law "the fair report privilege does not apply to witness statements to police, whether appearing in an official police report or not,

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where no official police action is taken. Such unconfirmed allegations have neither the authority nor the importance to the public that other documents or statements shielded by the fair reporting privilege possess. Extending the privilege to a witness's allegations merely because they appear in a police blotter does not further the doctrine's purpose of allowing the public to learn of official actions affecting the public interest."

While reinstating the claims, the court noted in a footnote that plaintiff would still face the hurdle of proving fault.

IIED

The court also reinstated plaintiff's emotional distress claim, concluding that a jury could find the publication of plaintiff's photograph alongside allegations that he was secretly photographing women on campus was sufficiently outrageous and extreme to state a claim.

Plaintiff acted pro se. Defendants were represented by Jean M. Kelley, Boston, MA.

First Circuit Affirms Dismissal of Priest / Hedge Funder Manager's Libel Suit

Plaintiff Failed to Plausibly Allege Actual Malice Under Iqbal/Twombly

In a decision reaffirming the fundamentals of the actual malice standard, a First Circuit panel affirmed dismissal of libel and related claims against Bloomberg over a financial news article. Lemelson v. Bloomberg, No. 17-1620 (Aug. 30, 2018) (Torruella, Lynch, and Kayatta, JJ.).

The plaintiff, Emmanuel Lemelson, describes himself as "a world-renowned priest and religious leader" in the Greek Orthodox Church, as well as the manager of a hedge fund, Lemelson Capital, LLC. He also blogs about finance and religious issues.

At issue was a March 2016 Bloomberg News article headlined "Hedge Fund Priest's Trades Probed by Wall Street Cop." The article reported that the SEC was examining whether Lemelson had knowingly published false information about companies he had shorted. The article also noted that Lemelson "hasn't been accused of wrongdoing" and that the investigation was but a "preliminary step."

Lemelson sued Bloomberg for defamation, commercial disparagement, negligence, and intentional interference with prospective economic advantage. The case was filed in state court, but removed to federal court based on diversity jurisdiction. The Massachusetts federal district court dismissed, holding that plaintiff was public figure and failed to allege actual malice; and failed to plead facts to support the interference claim.

Plaintiff appealed dismissal of his defamation, disparagement and interference claims.

First Circuit's Actual Malice Analysis

The Court began by noting that under the *Iqbal/Twombly* standard, the court must look at non-speculative, non-conclusory facts and their reasonable inferences and "ask whether it is plausible, as opposed to merely possible, that plaintiff's complaint narrates a claim for relief."

Here there was no support for plaintiff's claim that Bloomberg fabricated the story. Among other things, plaintiff alleged no plausible motive for such a fabrication; an SEC investigation was not so implausible to cast doubt on the story; and the Bloomberg reporter repeatedly sought comment from plaintiff. Moreover, plaintiff's allegation that Bloomberg failed to confirm the report with the SEC was not sufficient to establish reckless disregard. "Not even an 'extreme departure from professional standards' can do the trick. A fortiori, an investigation that included an attempt to obtain SEC comment and repeated inquiries of Lemelson trying to confirm or rebut facially plausible reports from other sources raised no inference of reckless disregard."

Bloomberg was represented by Robert A. Bertsche, Prince Lobel Tye, Boston, MA; and Jeffrey B. Korn and Jonathan D. Waisnor, Willkie, Farr & Gallagher, New York. Plaintiffs were represented by Thomas R. Mason, Law Offices of Thomas Mason.

Newspaper Petitions for SCOTUS Review of Colorado's Categorical Rejection of Right to Access Judicial Records

Amici Support Invited

By Steve Zansberg

On September 28, 2018, *The Colorado Independent*, an online newspaper, filed a petition for certiorari review to the United States Supreme Court in which the Question Presented is:

> Does the public's qualified First Amendment right of access defined by this Court in a series of cases culminating in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), apply to the substantive motion papers, hearing transcripts and court order filed in a capital murder prosecution?

As reported in the June 2018 MediaLawLetter, the Colorado Supreme Court issued a unanimous ruling, in June, holding that there is no presumptive right of public access to judicial records protected by the First Amendment. The ruling came in the case of *In re People v. Sir Mario Owens*, a capital murder case where the convicted defendant is one of three men on Colorado's death row.

Case Background: Convicted Capital Defendant Moves to Disqualify His Prosecutor, and All Case Filings Are Sealed

In post-conviction proceedings before the trial court, Owens moved to disqualify the prosecutor's office on two alternative grounds: (1) prosecutorial misconduct, and specifically, withholding potentially exculpatory information from the defense team, and (2) conflicts of interest. The trial court ordered Owens to file his motion to disqualify under seal, as well as the prosecutor's response brief. The judge then conducted a closed-door hearing on the sealed motion, which generated a sealed transcript. Thereafter, the judge issued an order, denying the defendant's motion, that itself was (and is) sealed from public view.

The Colorado Supreme Court issued a unanimous ruling, in June, holding that there is no presumptive right of public access to judicial records protected by the First Amendment.

Subsequently, the trial court issued a 1,343-page order denying Owen's post-conviction motion to vacate the jury's verdict and/or the death sentence. In that ruling, the trial court found that the district attorney had engaged in multiple acts of prosecutorial misconduct, including deliberately withholding or suppressing exculpatory evidence from the defense. The trial court found nonetheless that the withheld or suppressed exculpatory evidence would not have had an impact on the outcome of the trial. Thus, the jury's verdict and death sentence were upheld.

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Online Newspaper Seeks Access to Sealed Judicial Records and is Rebuffed

Following the issuance of that ruling, *The Colorado Independent*, an online newspaper, asked the trial court to unseal Owens' Motion to Disqualify the prosecutor's office, the People's Response, the sealed hearing transcript, and the court's order denying Owens' motion. The newspaper asserted a qualified First Amendment right of public access to the sealed records and urged that the records could not remain sealed without satisfying the constitutional test laid down in *Press Enterprise II, supra,* requiring that the court make record findings that a compelling interest ("of the highest order") required continued sealing and there was no alternative to restricting access that would adequately protect that interest.

In responding to the *Colorado Independent*'s motion to unseal the judicial records, the district attorney argued that no First Amendment access right applies to the sealed records and urged the court to deny the unsealing motion simply by balancing "the interests of the public and the protection of individuals who are parties."

In a cursory 2-page order, the trial court unsealed only those allegations of prosecutorial misconduct in Owens' motion that had already been disclosed in the court's lengthy post-conviction order. The trial court refused to unseal any aspect of Owens' legal arguments, his allegations of a disqualifying conflict of interest, the district attorney's response, the transcript of the closed hearing, or the court's order deciding the motion.

In maintaining this secrecy, the court recognized *The Colorado Independent*'s "legitimate interest in investigating the underlying facts and claims of alleged government misconduct," but then apparently found this interest outweighed by some entirely unspecified "countervailing considerations." The trial court's order did not articulate any legal standard applied in concluding that the public can be kept from knowing Owens' arguments about why prosecutorial misconduct and alleged conflicts of interest warranted the district attorney's removal, the prosecution's rejoinder, and the reasons for rejecting Owens' positions.

Colorado's Supreme Court Issues Extraordinary Writ to Review Trial Court's Order and Then Rejects the Newspaper's Claim that Constitutional Issues are at Stake

The Colorado Independent filed an emergency petition for an extraordinary writ to the Colorado Supreme Court, arguing that the First Amendment presumption of access to judicial records required the trial court to enter record findings that continued sealing of the records was necessary to protect a state interest of the highest order and that no less restrictive alternative means were available to protect that interest. The Colorado Supreme Court granted the petition and directed the trial court to "show cause" why the relief sought should not be granted.

After full briefing, on June 11, 2018, Colorado's Supreme Court issued a perfunctory five-page opinion, affirming the trial court's sealing order in full. The Court categorically rejected *The Colorado Independent*'s assertion that "presumptive access to judicial records is a constitutional right." The Court offered no explanation why it chose not to apply such a

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presumptive right, asserting only that "[w]e find no support in the United States Supreme Court jurisprudence for Petitioner's contention that the First Amendment provides the public with a constitutional right of access to any and all court records in cases involving matters of public concern."

The Colorado Independent filed a Petition for Rehearing to the Colorado Supreme Court, in which it noted that the U.S. Supreme Court has twice held that a transcript of a closed criminal proceeding that is subject to the First Amendment access right cannot be sealed indefinitely without satisfying the same constitutional standard that governs closure of the underlying proceeding. (In *Press-Enterprise I*, the Court found a constitutional violation in the sealing of the transcript of closed *voir dire* without the factual findings required to overcome the First Amendment access right. 464 U.S. at 513. In *Press-Enterprise II*, the Court held the trial court violated the First Amendment by refusing to unseal the transcript of a closed preliminary hearing. 478 U.S. at 13-14). The rehearing petition also noted that all eleven Circuit Courts of Appeals that have addressed the issue have recognized a First Amendment-based presumptive right to access judicial records in a variety of contexts.

The Colorado Supreme Court summarily denied the petition for rehearing on July 2, 2018.

This case presents an important foundational question about the public's right to information concerning the operation of our state and federal criminal justice systems.

Certiorari Review Sought

The *Colorado Independent*'s petition begins by informing the Supreme Court:

> This case presents an important foundational question about the public's right to information concerning the operation of our state and federal criminal justice systems. The Colorado Independent asserted a qualified right under the First Amendment to access the sealed motion papers, hearing transcript and order relating to a capital murder defendant's effort to disqualify his prosecutor for misconduct and conflicts of interest. Contrary to every federal appellate court and state court of last resort to decide the issue, the Colorado Supreme Court categorically rejected the existence of a constitutional right of access to the sealed records.
>
> The Colorado Court rejected a First Amendment right to any of the records without employing the two-part "experience and logic" test this Court formulated nearly 40 years ago to identify where the access right exists, and without addressing this Court's holding in *Press Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) . . . that the right applies to hearing transcripts in a criminal prosecution. It affirmed the trial court's denial of access to motion papers, a transcript and a court order without

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any factual finding of a compelling need for secrecy and with no explanation why a more narrow sealing order would not suffice.

The cert. petition argues that three of the criteria for the Court's exercise of discretionary review enumerated in Supreme Court Rule 10 are easily satisfied here: the Colorado Supreme Court's decision interpreting a provision of the U.S. Constitution (1) conflicts with the relevant decisions of the Supreme Court, (2) conflicts with the relevant decisions of all eleven federal courts of appeal and with those of every other state court of last resort, and (3) addressed an important question of federal constitutional law that deserves to be settle by the Supreme Court.

As to third point above, the cert. petition emphasizes that "[t]he Colorado Supreme Court's rejection of any First Amendment right to access judicial records impedes the functioning of the justice system, restricts the public's ability to monitor the courts, and undermines public confidence in the judiciary." Therefore, the petition asserts, "[p]ermitting the Colorado Supreme Court's holding to stand can only corrode the functioning of the judicial system and undermine public acceptance that justice is being done. . . it will undermine both the ability of the Colorado courts to reach just results and 'the appearance of fairness so essential to public confidence in the system.'"

It is anticipated that several briefs of amici curiae will be filed at the end of this month in support of Colorado Independent's petition.

The filing of the petition has elicited some support from editorial writers in Colorado.

Amici Participation Invited

It is anticipated that several briefs of *amici curiae* will be filed at the end of this month in support of *Colorado Independent*'s petition, including briefs from a group of First Amendment scholars and legal academics. The Reporters Committee for Freedom of the Press is preparing an *amicus* brief on behalf of itself and national news organizations and book publishing companies. If your organization is interested in reviewing that brief, and possibly signing on to it, please contact Katie Townsend or Caitlin Vogus at the Reporter's Committee.

The Colorado Independent is represented by David A. Schulz, Steve Zansberg and Greg Szewcyzk of Ballard Spahr, LLP. The District Court for the 18th Judicial District of Colorado is represented by Cynthia Coffman and Matthew Grove of the Office of the Colorado Attorney General.

Use Of Affiliate Links Does Not Necessarily Transform Editorial Content Into Advertising Says NAD

By Terri J. Seligman

In a significant new Decision, the National Advertising Division (NAD) has declined jurisdiction over content in Buzzfeed's "Shopping Guide" because of its determination that it does not constitute "national advertising." This Decision provides important guidance to advertisers and publishers, particularly with respect to the increasingly important issue of distinguishing editorial content and advertising for purposes of regulatory and self-regulatory compliance.

Background

As part of its routine monitoring, NAD requested substantiation for statements about a skincare product contained in a BuzzFeed shopping guide. BuzzFeed's shopping guides are lists of product recommendations from its editorial staff. The content includes purchasing links and some, though not all, of those links are monetized: if a reader clicks on the link and makes a purchase of the product, BuzzFeed is compensated. BuzzFeed discloses this affiliate relationship with the following statement on each shopping guide page: "We hope you love the products we recommend! Just so you know, BuzzFeed may collect a share of sales or other compensation from the links on this page. Oh, and FYI—prices are accurate and items in stock as of time of publication."

This Decision provides important guidance to advertisers and publishers, particularly with respect to the increasingly important issue of distinguishing editorial content and advertising for purposes of regulatory and self-regulatory compliance.

The article at issue in NAD's inquiry was titled "35 Skincare Products That Actually Do What They Say They Will." NAD focused on statements in the article about one of the products and its ability to reduce the appearance of fine lines and wrinkles. BuzzFeed argued that NAD did not have jurisdiction over these statements because NAD's jurisdiction is limited to "national advertising" and the statements in the article are not national advertising: BuzzFeed argued that it was not paid to recommend the product, but rather recommended the product based on its own writing staff's editorial choice, and that the product manufacturer and retailer had no input in or control over what was said about the product.

BuzzFeed further defended the content as purely editorial, outside NAD's jurisdiction, notwithstanding the presence of the monetized purchasing links. It argued that the decision as to which products to include in the content was made without influence by the potential for affiliate link revenue and that the editorial staff "is not beholden to the business teams that add affiliate links to content." It pointed out that if affiliate links are available for a recommended

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product, they are added by a separate team at BuzzFeed after the article is done. Thus, BuzzFeed argued, "[t]he creation of the content is done editorially and independently without the impetus of a monetary transaction, and the affiliate link is subsequently added without influencing the content of the shopping guide."

BuzzFeed also argued that, even if NAD were to determine that the product statements constituted "advertising" because of the affiliate links, BuzzFeed would not be responsible for treating that content any differently than it treats other editorial content. BuzzFeed argued that, while the FTC imposes an obligation on advertisers and publishers to be transparent about affiliate relationships, it does not impose a claim substantiation obligation on the editorial content published by a publisher using affiliate links and such links "[do] not transform the editorial content into advertising."

NAD agreed...at least as to BuzzFeed's shopping guide itself, if not as to the use of affiliate links generally.

Significantly, NAD determined that "[i]f the primary economic motivation driving the content is the same as other digital editorial content—to attract page views and develop a readership—the content would not be advertising and would fall outside of NAD's jurisdiction. However, if a publisher creates content with the purpose of directly influencing readers to purchase products through its affiliate links, the economic motivation would match that of an advertiser's commercial speech. In such a case, the content may be 'advertising' within NAD's jurisdiction."

If a publisher creates content with the purpose of directly influencing readers to purchase products through its affiliate links, the economic motivation would match that of an advertiser's commercial speech. In such a case, the content may be 'advertising' within NAD's jurisdiction."

Here, because (i) the product content in BuzzFeed's guide was selected by the editors without the input of the business team regarding the potential for affiliate link revenue; (ii) the retailer and brand did not have any say in the content – before or after its publication – and; (iii) the affiliate links were added to the "shopping guide" after the editorial content was completed, NAD concluded that the content was not tied to the "economic or commercial motivation" that "could, under different circumstances, be introduced by the presence of affiliate links." Thus, NAD found that BuzzFeed's shopping guide content regarding the skincare product was not a "paid commercial message" and, therefore, not national advertising as defined by NAD's procedures.

And in a companion Decision, NAD closed another matter involving BuzzFeed content, this one about Unilever products. (It is not clear from the Decision whether or not the article contained shopping links for Unilever products, monetized or otherwise.) Unilever advised NAD that it had not paid for, approved, or sponsored the article and that it had not reposted or promoted it. Accordingly, NAD determined that the article did not constitute Unilever's "advertising" and administratively closed the matter, holding that when "statements about a product or service are made by a third party with no material connection to the company purveying that product or service, those statements are, by definition, not that company's

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advertising."

Key learnings: If you're a publisher and want to ensure that your editorial content is always considered as such, even if monetized with affiliate links, or if you're a brand and want to ensure that the editorial content you're sponsoring or advertising against is not treated as your advertising, especially if you're providing affiliate revenue to a publisher, make sure to implement policies and practices that demonstrate and support the traditional separation of "church and state." And make sure that your affiliate relationships are clearly and conspicuously disclosed.

> ...the issue at hand is whether the presence and influence of the affiliate link transforms the publisher's own content into advertising for the product it promotes. Thus, the question at the center of this matter is whether embedding affiliate links into content, particularly content that reviews products for sale, renders it "national advertising" that requires substantiation.

Terri J. Seligman is the co-Chair of the Advertising, Marketing & Public Relations Group at Frankfurt Kurnit. This article first appeared in Law360.

Key Media Law Developments in India

By Raghav Mendiratta

In 2017, India was ranked 136th on the World Press Freedom Index released by Reporters Sans Frontiers (worse than Afghanistan, Columbia, Mozambique etc.).[1]

Themes

1. **Fake News / Misinformation**
   - Misinformation on WhatsApp leading to Lynching / Mob Violence
     - Led to death of 30 persons since 2017 (unofficial number since the National Crime Records Bureau does not record this yet). Some Media outlets report this number to be much higher. [2]
     - Rumors relate to child abduction, organ harvesting, cow slaughter etc. Often based out of doctored videos etc.
     - India is WhatsApp's biggest market globally with more than 200 million active users.
     - In July 2018, after a warning from the Government, WhatsApp took steps to stop the flow of misinformation:
       - Limit on the number of forwards to 5 for one message.
       - Forwarded messages will indicate that they are 'Forwarded' messages.
       - Cap on Group Membership.[3]
     - An Oxford University backed study recently commented that the Fake News Epidemic is likely to grow in light of the upcoming National Elections in 2019. [4]

   - Amendment to Guidelines for Accreditation
     - In April 2018, Govt. proposed to amend the Guidelines for Accreditation for Journalists to provide for suspension of Press Accreditation for 6 months (1st Violation), 1 year (2nd Violation) and permanently (3rd Violation) if Press Council or News Broadcasters Association found the Complaint to be true.[5]
     - Problem: Fails to distinguish between deliberately spread fake news and inaccurate reporting.
     - Moreover, the idea of Accreditation is now defunct and thus this only affects Big Media Houses and not actual independent disseminators of Fake News.[6]
     - Prime Minister's Office, after hue and cry in media, directed Ministry[7] of Information and Broadcasting to withdraw the Rules within 24 hours.

   - Earlier in 2015, in a widely celebrated pro-speech decision, the Supreme Court struck down Section 66A of Information Technology Act, 2008 that imposed a punishment of imprisonment of up to 3 years on any person who disseminated any information

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which he knew to be false for the purpose of causing annoyance, inconvenience, danger etc.[8]

2. Defamation

- Section 499 of the Indian Penal Code, 1860 makes defamation criminally liable with imprisonment up to 3 years.
- Earlier in 2016, the Supreme Court upheld the Constitutionality of Section 499.[9] Coincidentally, the author of the judgment (currently the Chief Justice of India) later said that criminal defamation cannot be used as a political tool.[10]
- No bar on simultaneous civil and criminal proceedings.
- Often been used by Politicians and Big Businesses by suits against Politicians and Publishers. Three recent examples:
  - i. Politician v. Media House: Jay Shah Defamation Case on the Wire
    - Jay Shah's (son of Ruling Party's President) company's turnover grew exponentially after the BJP-led government came to power at the Centre in 2014.
    - Jay Shah sued the Wire for Rs. 100 Crores (USD $ 15 million)
    - Gujarat HC gave a Gag Order for not covering any proceedings.
    - Gujarat HC refused to quash Complaint, the Wire filed a petition in the SC.
    - Hearings pending.[11]

  - ii. Politician v. Politician: Arun Jaitley defamation case
    - Arun Jaitley's (current Union Finance Minister) had filed a Defamation Suit on Arvind Kejriwal (current Chief Minister of Delhi) for Rs. 10 crores (USD $ 1.3 million)
    - Simultaneously also instituted a Criminal Defamation case. Proceedings were ultimately dropt after 2.5 years after Mr. Kejriwal apologized. [12]

  - iii. Big Businessman v. Media House
    - Anil Ambani filed a Rs. 5000 Crores (USD $ 693 million) Defamation Suit against National Herald for allegations of corruption in the notorious Rafale fighter jets business deal.[13]

3. Media Ownership, Media Pluralism and Independence of Media

- Operation 136, Cobrapost
  - Undercover journalist approached approximately 20 major news outlets and offered them cash deals to promote the right-wing Hindutva agenda.
  - The expose was titled Operation '136' due to India's ranking in the World Press Freedom Index.
  - Instead of taking action against exposed News Outlets, extortion proceedings have been initiated against the CEO of Cobrapost himself has been charged of Extortion. [14]

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- Heavy concentration in media ownership trends
  - More visible in Television than Print.
  - Three major conglomerates own 50-70% of Television media.[15]
  - TRAI recommended curbs on cross-media and corporate ownership of television channels and newspapers and came down on ads-for-equity treaties and paid news. Further, it recommended a blanket ban on political parties owning media houses.
  - No action has been taken on the recommendations yet.[16]

- Arm twisting NDTV by imposing additional taxes amounting to Rs. 650 Crores (USD $ 90 Million)
  - Additional liability of Rs. 650 Crores imposed by ITAT in June 2017.[17]
  - Houses of owners were raided on multiple occasions. Heavily criticized by Owners and even Foreign Media. [18]

4. Censorship

- Supreme Court is a glimmer of hope: has expressly said that the culture of censorship and banning books must strongly be condemned. [19]
- It has also liberalized the standard of Obscenity and has adopted the Contemporary Community Standards from Miller v. California.[20]
- Bombay High Court made a strong statement against banning movies reminding the Central Board of Film Certification that it could not censor movies in the garb of giving them Certification.[21]

5. Violence against journalists

- 6 journalists have been reported killed directly in association with their work since 2017. [22] Taking cognizance of the situation, concern was expressed by the UN SecGen recently. [23]
- Gauri Lankesh Murder[24]
  - Shot by unknown assailants last year. One of the three arrested persons has admitted to killing her since she was extremely vocal against his religion.
  - Committee to Protect Journalists had put Lankesh on most vulnerable list for many years prior to the incident.

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Notes

[1] In 2018, the Rank has further fallen down to 138th out of 180 countries (Reporters Sans Frontiers) Accessible at: https://rsf.org/en/india

[2] Police arrest 25 people in India after latest WhatsApp lynching (The Guardian) Accessible at: https://www.theguardian.com/world/2018/jul/15/india-police-arrest-25-people-after-latest-whatsapp-mob-lynching-child-kidnapping-rumours;

Mob Lynchings Fueled By WhatsApp Sweep India: Foreign Media (NDTV 24*7) Accessible at: https://www.ndtv.com/india-news/mob-lynching-after-whatsapp-rumours-mob-lynchings-fueled-by-whatsapp-sweep-india-foreign-media-1876929; Accessible at: WhatsApp Messages and the Mad Mob Lynching: A Timeline (News18) https://www.news18.com/news/india/whatsapp-messages-and-the-mad-mob-lynching-a-timeline-1798135.html

[3] India lynchings: WhatsApp sets new rules after mob killings (BBC News) Accessible at: https://www.bbc.com/news/world-asia-india-44897714

[4] Oxford researchers warn India of a fake-news epidemic as elections approach (Quartz India) Accessible at: https://qz.com/india/1335161/indias-fake-news-crisis-to-worsen-ahead-of-election-oxford-study/

[5] Journalist accreditation could be permanently cancelled for fake news: Government (Times of India) Accessible at: http://timesofindia.indiatimes.com/articleshow/63586274.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[6] India's new rules do little to fight fake news – but give government more power over journalists, Scroll.in Accessible at: https://scroll.in/article/874220/indias-new-rules-do-little-to-fight-fake-news-but-give-government-more-power-over-journalists.

[7] India backs down over plan to ban journalists for 'fake news' (The Guardian) Accessible at: https://www.theguardian.com/world/2018/apr/03/india-backs-down-over-plan-to-ban-journalists-for-fake-news

[8] SC strikes down 'draconian' Section 66A (The Hindu) Accessible at: https://www.thehindu.com/news/national/supreme-court-strikes-down-section-66-a-of-the-it-act-finds-it-unconstitutional/article10740659.ece;

(Continued on page 29)

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All you need to know about Section 66A of the IT Act (The Hindu) Accessible at: https://www.thehindu.com/news/national/all-you-need-to-know-about-section-66a-of-the-it-act/article10773220.ece

[9] Breaking; Law on Criminal Defamation is not Unconstitutional (LiveLaw) Accessible at: https://www.livelaw.in/breaking-law-criminal-defamation-not-unconstitutional-sc/

[10] Defamation law can't be used as political weapon: SC to Jayalalithaa govt, Hindustan Times Accessible at: https://www.hindustantimes.com/india-news/defamation-law-can-t-be-used-as-a-political-weapon-sc-to-jayalalithaa-govt/story-5P2sgPrkQ565JcRq04MrMI.html.

[11] Top Court Extends Stay On Proceedings In Jay Shah Defamation Case (NDTV). Accessible at: https://www.ndtv.com/india-news/top-court-extends-stay-on-proceedings-in-jay-shah-defamation-case-1888410.

[12] Bitter legal battle ends as court acquits Kejriwal in Jaitley defamation case (Times of India) Accessible at: http://timesofindia.indiatimes.com/articleshow/63597454.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[13] Rafale deal row: Anil Ambani files Rs 5,000 crore defamation case against National Herald (The Indian Express) Accessible at: https://indianexpress.com/article/india/rafale-deal-row-anil-ambani-files-reliance-defence-rs-5000-cr-defamation-suit-against-national-herald-5324809/

[14] Cobrapost Founder: We Are A Banana Republic, And The Aftermath Of Operation 136 Made The Mainstream Media Look Even Worse (HuffPost) Accessible at: https://www.huffingtonpost.in/2018/05/30/cobrapost-founder-we-are-a-banana-republic-and-the-aftermath-of-operation-136-made-the-mainstream-media-look-even-worse_a_23446514/; Cobrapost exposé shows Indian media is sinking. Now we can fight back or be drowned for good, Scroll.in Accessible at: https://scroll.in/article/880384/cobrapost-expose-shows-indian-media-is-sinking-now-we-can-fight-back-or-be-drowned-for-good.

[15] The Big Five: The Media Companies That the Modi Government Must Scrutinize To Fulfill Its Promise Of Ending Crony Capitalism, The Caravan Accessible at: http://www.caravanmagazine.in/vantage/the-big-five-the-media-companies-that-the-modi-government-must-scrutinise-to-fulfill-its-promise-of-ending-crony-capitalism.

[16] Trai sets out rules for media owners, Business Standard. Accessible at: https://www.business-standard.com/article/economy-policy/trai-sets-out-rules-for-media-owners-114081201227_1.html; Telecom Regulatory Authority of India. Accessible at: https://trai.gov.in/sites/default/files/Recommendations_on_Media_Ownership.pdf.

(Continued on page 30)

(Continued from page 29)

[17] Income Tax Appellate Tribunal upholds tax demand raised on NDTV, Business Standard Accessible at: https://www.business-standard.com/article/companies/income-tax-appellate-tribunal-upholds-tax-demand-raised-on-ndtv-117071801484_1.html.

[18] 4 World Media Reports On Raids On NDTV And Concerns Of Freedom Of Press, NDTV Accessible at: https://www.ndtv.com/india-news/how-world-media-is-reporting-raids-on-ndtv-1708775.

[19] Ban culture 'must go' (The Telegraph) Accessible at: https://www.telegraphindia.com/india/ban-culture-must-go/cid/1353081; N. Radhakrishnan v. Union of India (Columbia Global Freedom of Expression) Accessible at: https://globalfreedomofexpression.columbia.edu/cases/n-radhakrishnan-v-union-india/

[20] Obscenity: The Supreme Court discards the Hicklin Test (Indian Constitutional Law Blog) Accessible at: https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/

[21] Certify films, don't censor them, court tells CBFC (The Hindu) Accessible at: https://www.thehindu.com/features/cinema/Certify-films-dont-censor-them-court-tells-CBFC/article14414703.ece

[22] Journalists who were silenced, Times of India Accessible at: https://timesofindia.indiatimes.com/india/journalists-who-were-silenced/articleshow/64632633.cms.

[23] UN chief expresses concern over deaths of Indian, journalists Accessible at: https://www.thehindu.com/news/national/un-chief-expresses-concern-over-deaths-of-indian-journalists/article23370405.ece.

[24] The killing of Gauri Lankesh (Columbia Journalism Review) Accessible at: https://www.cjr.org/special_report/gauri-lankesh-killing.php/;

Whoever killed Gauri Lankesh, it is clear that India continues to be deadly for journalists (Scroll.in) Accessible at: https://scroll.in/article/849691/whoever-killed-gauri-lankesh-it-is-clear-that-india-continues-to-be-deadly-for-journalists

10 Questions to a Media Lawyer: Mickey Osterreicher

Osterreicher testifies before the House Subcommittee on Courts, Intellectual Property and the Internet on allowing cameras in federal courts. *Photo by John Shinkle, Politico*

Mickey Osterreicher is general counsel for the National Press Photographers Association (NPPA) and of counsel to Barclay Damon, LLP in its Media and First Amendment Law practice area.

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

Having been a photojournalist in both print and broadcast for over 40 years, it seemed like a natural progression of things to be drawn to media law once I decided to go to law school, which happened toward the end of my career in television. One of the reporters who I worked closely with got in the car one day on our way to an assignment and said he was thinking about going to law school. I replied that I had always thought about going to law school and so we embarked on that journey – first taking study courses, then the LSAT's and then applying to only one school. Since we were both still working at the station the sole viable option was the University of Buffalo School of Law. We were both accepted and went to classes from 8am to 2pm and then raced to work 2:30 – 11:30pm.

Aside from working and going to school I also freelanced for ESPN. Sitting outside the Buffalo Bills locker room reading my contracts book while waiting for weekly practice to end so I could do interviews, the Bills' head coach, Marv Levy, stopped to ask me what I was doing? "Studying," I said. He replied he could see that but wanted to know what I was studying for? I told him I had returned to law school. He just shook his head and walked away. It turns out he had gone to Harvard Law for 2 weeks and hated it, graduating instead with a master's degree in

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English history. It became a running joke – when he saw me outside the locker room Marv would ask if I was still studying (my nose was in the book) and I would look up to say, "yep coach, still studying." When I found out (by pager) that I passed the bar I was at Bills' quarterback Jim Kelly's house doing an interview with ESPN's Chris Berman. They were the first two people I told and got high-fives from both of them.

My first job in journalism was as the photo editor of the Spectrum which is the school paper at SUNY Buffalo. My first job as a lawyer was as a sole practitioner taking whatever came in the door, which was family law.

Osterreicher on the campus of SUNY Buffalo circa 1970. *Photo by Marilyn Brenner*

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

I am so grateful that I can give back to journalism, a profession I loved when I worked as a photojournalist. It is also very helpful that I truly understand what it is my client does (having done it for so long) which is so important as an attorney. It has been very frustrating trying to make sure that photographers, in particular visual journalists, are paid for their work in an age when far too many people believe the Internet is the public domain and there is an almost mob mentality of entitlement to taking anything found there without permission, credit or compensation.

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

My biggest blunder was not going into First Amendment law immediately – but because Buffalo is not yet the media capital of the world, I took what came through the door. Much of what I learned practicing family law has actually been very helpful in dealing with clients and issues, so really when you ask I don't have any regrets. As for actual big blunders – I can't recall any – that is not to say I have not made plenty of mistakes but none of them have been uncorrectable.

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

NPPA has been involved in a number of very important First Amendment case regarding the right to photograph and record police officers performing their official duties in a public place. We have helped draft or been signatories to amicus briefs supporting that proposition and I am

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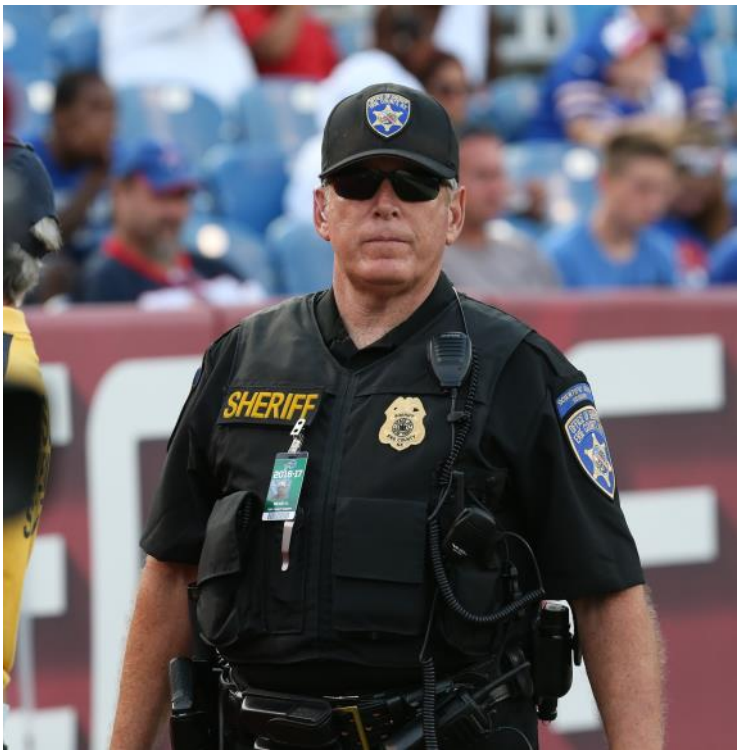
proud to say that since the U.S. Supreme Court has declined to rule on this issue, such a right is now clearly established in the First, Third, Fifth, Seventh, Ninth and Eleventh U.S Circuit Courts of Appeals.



Osterreicher, a uniformed Reserve Sheriff's Deputy with the Erie County Sheriff's Office since 1976, at Ralph Wilson Stadium during a Buffalo Bills game.
Photo by James P. McCoy

Most recently I was involved in an amicus brief concerning such a matter in the Second Circuit. One of our members, Douglas Higginbotham, had been arrested and charged with disorderly conduct while filing an Occupy Wall Street demonstration in 2011. I was able to have those charges dismissed almost immediately. Higginbotham then brought a federal civil rights lawsuit in the United States District Court for the Southern District of New York against the arresting officers and the City of New York. Among other things, his complaint alleged that "the defendants retaliated against him for filming a violent arrest in violation of his First Amendment rights." In refusing to grant the defendants' motion to dismiss the case, the judge held that "the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was 'clearly established' at the time of the events alleged in the complaint."

Unfortunately, a motion for summary judgment on probable cause was granted and subsequently appealed. Attorneys Robert Balin, Abigail Everdell and Jack Browning, of Davis Wright Tremaine LLP drafted and filed an *amicus* brief with my help and joined by more than 60 leading news outlets and free speech organizations. Despite our best efforts, the Second Circuit upheld the lower court on probable cause and refused to address the right to record question as other Circuits had done.

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

A framed photo of President John F. Kennedy looking over Niagara Falls taken by a photographer at the newspaper where I used to work. Also an engraved shell casing from a USAF A-10 Thunderbolt II "Warthog" commemorating the event where my son was awarded the Distinguished Flying Cross by the Secretary of the Air Force for flying that aircraft and helping to save 60 soldiers in Afghanistan who were under attack.

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6. What's the first website you check in the morning?

In the morning, the Media and Entertainment feed from Law 360 and the MLRC MediaLawDaily mid-day.

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

Alicia Calzada, a past president of NPPA who brought me onboard to represent the organization, asked me a few years later if she should go to law school. I encouraged her to do so (as I encourage anyone to go to law school if they have the desire). I am so very pleased to now be working with her in advocating for the rights of visual journalists.

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

Osterreicher's photograph for the *Buffalo Courier-Express* of Harvey Weinstein, left, and O.J. Simpson in 1977.

Photo by Mickey Osterreicher

I would strongly advise that anyone looking to get into media law join the MLRC and the ABA Communications Law Forum. It is extremely collegial and there are many programs to help and encourage law students. It is also a wonderful place to find a mentor while learning about this very crucial area of law.

9. What issue keeps you up at night?

The fact that far too many newspapers are folding or laying off staff. The loss of entire photo departments is frightening, and things are only slightly better on the broadcast side. Contracts for freelancers are becoming more onerous – with more rights being demanded for less compensation – and copyright infringement of images is running rampant. Being labeled as the "enemy of the people" creates an atmosphere in which core First Amendment protections may be further eroded.

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

I would have remained a photojournalist, a profession where I felt I never really worked a day in my life because I so loved going places, meeting people and telling stories. But at this point in my life I am so grateful for the opportunity to represent such an important organization as NPPA and be part of such a supportive firm as Barclay Damon.