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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through September 27, 2019

From the Executive Director's Desk

London Conference: An Extravaganza

Global Gathering Features Justice Breyer and Mock-Trial of Julian Assange

George Freeman with Justice Stephen Breyer

This year's London Conference, held in mid-September, was a great success. We had such great topics, such great speakers, and such great weather that even Boris Johnson's Brexit shenanigans couldn't spoil London as a terrific backdrop for us. So many attendees called it the best London Conference ever that my only problem is that it raises the bar awfully high for the next one two years from now. (First comes our big Media Law Conference to celebrate our 40th anniversary in Virginia at a new site, the Landsdowne Resort and Spa, next September 30 – Oct 2.)

Certainly the highlights of the Conference were the first session starring U.S. Supreme Court Justice Stephen Breyer and the last session featuring a mock jury trial of a publisher for running thousands of classified national security documents leaked to him from a government source. More on those extraordinary programs a bit later. But the other sessions were superb too.

After the interview of Justice Breyer, we had a debate on whether hate speech should be regulated; former President of the ACLU Nadine Strossen eloquently argued that there should be no regulation at all. After lunch on Monday we had three programs: first, we had a session on Press Freedom Under Siege globally with participation from journalists and lawyers physically attacked and prosecuted all over the world; what was especially troubling was how many speakers -and, hence, besieged journalists – there were from all continents around the globe. (This was a good introduction to our Annual Dinner where we plan to give our Brennan

Professor Gavin Phillipson and Nadine Strossen debate hate speech

(Continued from page 3)

Award, the MLRC's highest honor, to Besieged Journalists Abroad, and plan to have Maria Ressa of the Rappler in the Philippines accept the award as a symbol of courageous journalists worldwide.)

Then David Bralow helped put together a panel on defending whistleblowers; James Risen, who has had numerous bouts with the law for protecting his sources, underscored the importance to publishers of supporting their sources. Finally, we had a program featuring Contempt Down Under and focusing on the Cardinal Pell case in Australia; it led to interesting discussion among the audience as to whether and how, in countries far removed from Australia, the prior restraint order was heeded.

Maestro and Deputy Director David Heller prepared an equally enticing second day. It started with a session on combatting fake news, disinformation and hate speech in Europe and featured a well-meaning Member of Parliament who is struggling to combat these problems in the UK; however, many audience comments reflected the difficulties of government regulation on this front. That was followed by a randy, rowdy and raunchy tour of British tabloid litigations, one after the other dealing with increasingly perverse actions taken by so-called footballers and aptly moderated by our own Randy Shapiro and Adam Cannon of The Sun. And after lunch was an interesting session on #MeToo Reporting in the UK; those of us who last year attended our Forum on #MeToo reporting by The New York Times and The New Yorker about Harvey Weinstein and others were intrigued by comparing and contrasting the approaches in the same kind of reporting across the pond.

(Continued on page 5)

(Continued from page 4)

Of course, Justice Breyer was the star of the show. We had invited him early in the year largely because he is known as an internationalist judge; it was many months later that we heard from chambers that he was interested in participating. But we were glad he did: in the almost 45 years I have been in the media bar, never before has a sitting justice addressed a MLRC, ABA or PLI media law event. We then started a search for a journalist to interview him. American journalists couldn't make the trip and we didn't feel the UK reporters knew enough about US law, so that job eventually fell to me.

Adam Cannon and Randy Shapiro moderate panel on raunchy British tabloids and privacy

Justice Breyer and his wife Joanna came to the Conference's reception at the Bloomberg offices and, because he is interested in architecture, they took part in a tour of the modern building, which has Roman ruins underneath. We found him to be very down-to-earth and affable. When I spoke to him about our upcoming program, he wasn't keen on learning in advance what I would be questioning him about, and grudgingly accepted my diplomatic suggestion that he give fairly short answers, as I had many topics I wanted to cover.

At the Conference Monday morning, I started by noting that the audience was divided almost exactly 50-50 between Americans and lawyers from the rest of the world. In that context, I asked him why he believed it important to consider laws from around the world and why his colleagues on the court seem to resist that view. He gave a wide ranging answer that included that consideration of laws from different cultures and regimes seemed worthwhile, and his relationship with Justice Scalia (one of the sharpest adversaries of his internationalist view) and some of his other brethren.

I then turned to speech issues and asked whether the marketplace of ideas theory was still viable in today's internet mismash of fake news and disinformation, and whether the Stolen Valor false speech case would make it harder to snuff out false speech. I also asked whether the European balancing approach, which seems to reflect his judicial philosophy, is more helpful

(Continued on page 6)

The conference was held in the elegant hall of the historic Law Society

(Continued from page 5)

than our more formulaic and stricter tests. In this short column, I can't do justice to all his answers, but members may see them in a few weeks on a tape we made of the proceedings. But I do remember how forcefully he still believes that the marketplace of ideas theory does, and ought, to work.

When I got to the key media law questions, the Justice became more circumspect. Although he appeared to be quite open and talkative, not surprisingly he punted on giving direct answers to questions about the Court's prior decisions or possible future actions. No harm in trying, I thought, but still, I think it's worth considering that though the justices are very careful in what they say, they speak out publicly far more than members of the Court ever did 20, 30 or 40 years ago.

Thus, when I asked why the Court hasn't taken a media law libel case in almost 30 years, Justice Breyer went into an explanation of the conditions needed for them to grant cert. When I followed up with the somewhat snarky question of whether the media bar should be happy about their not taking such cases, he cleverly said, "That's up to you." He was particularly careful in questions about Bartnicki. When I noted that media lawyers in the room disagree on how to interpret his key concurrence there and, hence, give dissimilar advice to clients, he said

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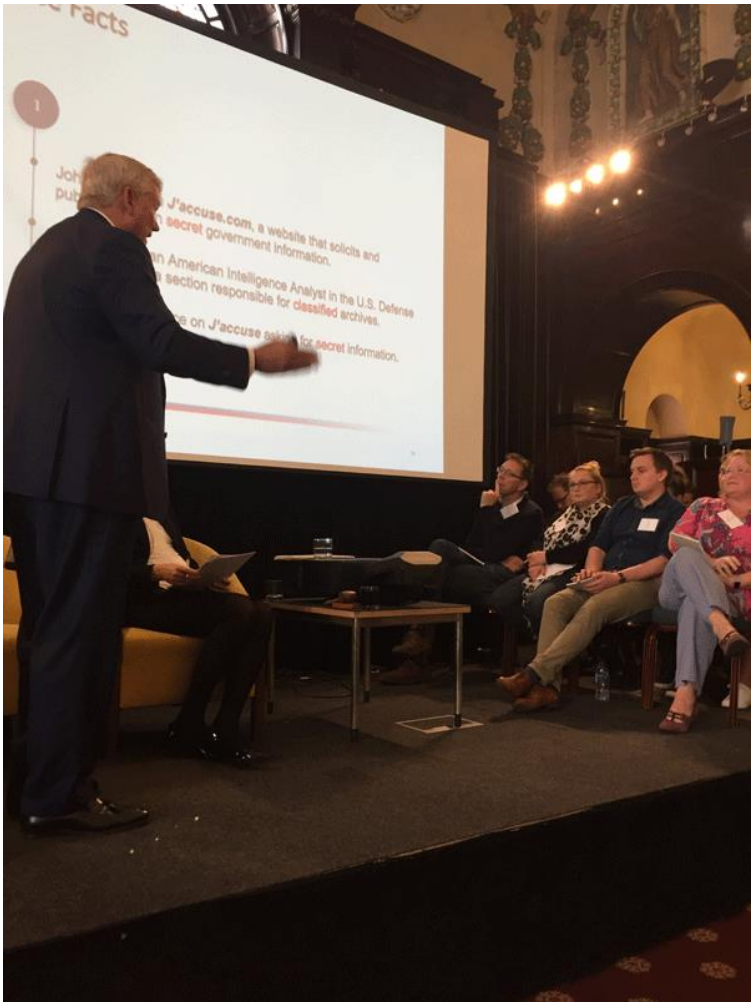

Chip Babcock addresses jurors in the mock trial

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he couldn't answer, and even more obviously, he refused to speculate on what might happen to a Julian Assange prosecution, where the defense would likely rely on that case.

We discussed how the media covers the Court, and he seemed fairly satisfied by the coverage, particularly by reporters who cover the Court full-time and, therefore, understand the law and the Court's procedures better than drop-in reporters. He used that question to go into a discussion arguing that the Court was not as divided as commonly perceived, noting the relatively low percentage of 5-4 decisions each term. I was not convinced by his reluctance to have tv cameras in the Supreme Court, but didn't press the issue. And finally, I brought up Bush v. Gore, and though he passed on commenting on my critique, he noted that he dissented and that it was "a self-inflicted wound."

The audience seemed to have differing views as to his substantive answers, and for the most part understood his finessing some questions, but it was clear to me and, I think the attendees, that he is an extremely approachable and easygoing man, by the way in great shape for 81, who was willing to share with us his judicial philosophy and the way he looks at the world. For all those reasons and more, it was a great way to kick-off the Conference.

The mock jury trial which ended the Conference was, in a word I rarely use, awesome.

First, we convinced two of the finest and most experienced trial lawyers on the planet to be the oral advocates: Chip Babcock agreed to play against role and be the prosecutor; Geoffrey Robertson defended the website publisher who was being prosecuted for publishing classified, national security documents he obtained from his source. Not that working with them was all that easy. While my interest was to present an interesting, informative and entertaining

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A group of conference goers took in a soccer match at the historic Craven Cottage

(Continued from page 7)

program, their interest was quite different. They are litigators, and so their only interest was to win.

The result was a quite contentious few weeks leading to the Conference. One of the lawyers wanted the facts changed from the original hypo I had created. Then there was argument about the format and the amount of time and order of the oral arguments. Finally, on the day before the trial, graphics were introduced, without notice to the other side, causing more of a brouhaha. Tuesday morning, with both lawyers pressing their case, I felt very judgelike when I told them to go out and settle the dispute among themselves and let me know the result. Maybe I should have referred the matter to a Magistrate.

That aside, I thought they both did a terrific job when it came to the trial itself. Chip started with some humor, but then went into a riveting, quite analytic argument which effectively hit all the points a prosecutor had to make. I also loved it that when the jury left the stage to go to its deliberation room, Chip stood up as the jury went by, as though he were in a real courtroom; just as in the real thing, some jurors looked at him and smiled, others looked down at the floor – all the while Chip undoubtedly was reading the tea leaves. Btw, he deserves extra kudos as, less than two days later, Chip was arguing a real case in the Texas Supreme Court.

Geoffrey's argument, delivered in a quaint but very elegant British accent (though he is Australian), was quite different but equally effective. Going back in history to the Zenger and

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William Penn cases, he stressed that the jury ought to be true to its conscience and do the right thing, that the disclosures were in the public interest and might have staved off war, and that, therefore his client ought to be acquitted.

The jury was also perfect. They were a collection of 12 Londoners, none lawyers and all disinterested in the issue. Most were acquaintances of some of our member lawyers in London. I also tried to recruit the bartenders, waitresses and cabdrivers I encountered in the days prior. As it turned out, a fellow who served me champagne at our reception at the National Gallery became one of the twelve.

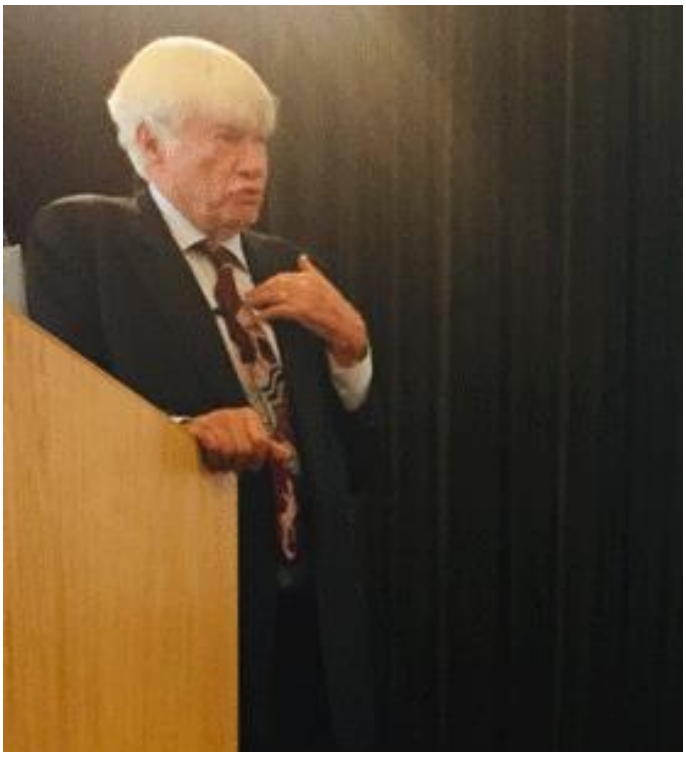
They were videotaped in their deliberation room as they spent about 40 minutes coming to a verdict – and the tape of their deliberations, which we saw in the conference hall, will be available to members for viewing. What's most interesting to me is that they acted exactly as a real jury: they were sometimes confused, and didn't always strictly follow a logical progression, but they grappled seriously with the all the major issues, unraveled the facts in a pretty sensible way, and balancing the law and what was right and wrong, came to a totally reasonable verdict. Interestingly, they progressed in such a normal fashion that Jason Bloom, an experienced jury consultant who came across the pond just to facilitate their deliberations, found it unnecessary to step in. After their deliberations they did come on stage to introduce themselves and answer some probing questions Jason put to them about the trial.

{BIG REVEAL HERE} Solomonically, they came to a split decision. On the first charge, that the defendant had published classified documents about the sensitive Mideast situation which had been submitted to the website's dropbox, the jury acquitted the defendant. They reasoned that the dropbox mechanism did not involve the publisher enough to make him run afoul of the third prong of the Bartnicki test, that he played a part in the illegal conduct of the source. However, as to the second count, where the publisher encouraged the source to get him the classified national security documents dealing with whether or not the US should go to war with Iran, and even told the source where to find them, the jury found the publisher "had gone over the line" and convicted him. They appreciated that his actions probably had a good intent and even a good result, but felt bound to follow the law rather than their feelings.

It was an exciting and almost dramatic end to a marvelous 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.

Top: Randy Shapiro, Justice Breyer, George Freeman and Joanna Hare (Justice Breyer's wife) at the Bloomberg reception. Below: English jurors listening to argument in the mock trial



Top left: Geoffrey Robinson QC addresses the mock jury. Right: James Risen discusses defending whistleblowers. Bottom left: Chip Babcock and George Freeman at the Hiscox reception at the National Gallery; right: Justice Breyer taking in the sights at Bloomberg with David Korzenik, left.

Doctor Who Claims Character in Judge's Novel Defamed Him Loses on Appeal

John C. Greiner

This case offers a twist on the cliché "truth is stranger than fiction." In this case, "truth is more damning than fiction." Dudee v. Philpot, (Ohio App. Sept. 27, 2019).

Background

Timothy Philpot was a long-time family court judge in Lexington, Kentucky. Judge Philpot is religiously and politically conservative, and over time grew weary of granting rubber stamped divorces. He decided to write a novel to explore the issue of marriage in our society.

The novel was entitled *Judge Z: Irretrievably Broken.* The lead character in the book is Judge Atticus Zenas, a family court judge in Lexington, Kentucky. In the book, the Judge institutes a practice, under an actual Kentucky statute, requiring parties to a divorce to participate in an "irretrievably broken" hearing, prior to obtaining the final decree. A couple in the book, forced to go through the process, ultimately reconcile.

The novel is 257 pages long, and in five pages early in the novel, Judge Philpot describes a typical motion day in a Kentucky family court. On that day, the judge hears whatever motions have been filed in a two-week period prior to the hearing day. This can involve disputes over child support payments to custody battles over UK basketball tickets. Two of the five pages concern the saga of a fictional doctor named Gupta Patel. The Patel character had been before Judge Z numerous times and the novel contains the following comments:

A real life Lexington eye doctor named Jitander Dudee filed a defamation claim against Judge Philpot claiming that the Patel character was in fact him.

1. There was no longer any reason to tolerate his arrogance, affairs, and silence.

2. He had already been to jail twice for failing to pay. Then, after screaming under oath, "I have no money, I have no money," he always paid to get out.

3. He still owed money to his past two lawyers, and word gets around.

4. The next time he stayed in jail the full sixty days, growing a mangy beard and claiming various religious convictions no one had heard of to set up a discrimination suit against the jail and maybe even the judge. He found out from Google that the judge was a Methodist and therefore must be biased against Hindus. But his wife had testified that in decades of marriage she had never seen any evidence of a devout Hindu living in her home.

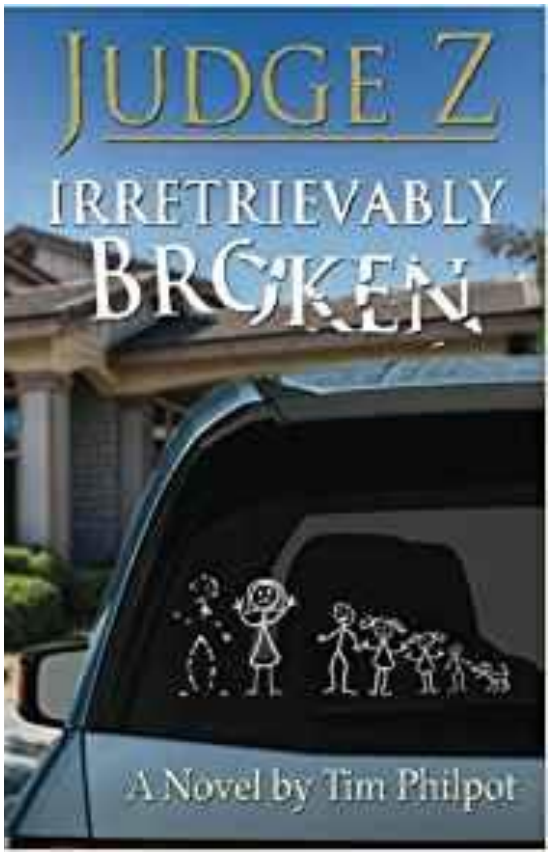
(Continued on page 13)

(Continued from page 12)

5. He could see his kids, but they hated him.

A real life Lexington eye doctor named Jitander Dudee filed a defamation claim against Judge Philpot claiming that the Patel character was in fact him, and the statements were false and defamatory. He also alleged false light and infliction of emotional distress. Because the novel was published by an Ohio based publishing company, Dudee filed the case in Hamilton County, Ohio. The trial court granted summary judgment in favor of Judge Philpot on all counts.

Ohio Court of Appeals Decision



Recently, the First District Court of Appeals affirmed the summary judgment ruling on the defamation and false light claims. (Dudee did not appeal the summary judgment on the emotional distress claim.)

The trial court had determined that there was a question of fact as to whether Dudee was recognizable in the Patel character. There were significant differences between the fictional character and the real life doctor. For example, the fictional character has three teenage children, while Dudee has four young children, the fictional character purchased a house during the divorce and paid cash, Dudee remained in the marital home, and the fictional character completed his residency in 1979, while Dudee was 12 years old in 1979.

Despite those differences, the court found enough similarities between the two – largely based on their contentious relationship with the judge – to deny the of and concerning defense. The court of appeals agreed.

But that was about the only good news for Dudee. On several of the statements, the appellate court agreed with the trial court that substantial truth barred the claim. Interestingly, in several instances, Judge Philpot's rulings in Dudee's case established the substantial truth defense.

For example, with respect to the statement about the fictional character's affairs, the trial court held that in Dudee's case, his wife testified that he'd been unfaithful. This testimony had a direct impact on Dudee's failed effort to reduce his maintenance payments. Thus, Dudee was

(Continued on page 14)

(Continued from page 13)

barred from relitigating the issue of his infidelity in the defamation case. The appellate court affirmed.

With respect to the statement that the fictional character had been jailed twice for failing to make maintenance payments, the trial court noted that Dudee had been jailed three times. Moreover, Judge Philpot had found in a contempt hearing that Dudee had "the ability to pay these amounts, but chooses not to." Again, those findings barred Dudee from relitigating the issue. The appellate court affirmed.

On the statement concerning Dudee's failure to pay his lawyers, the trial court pointed to Dudee's bankruptcy filing, where the schedules indicated he owed unpaid fees to four different firms. Again, the substantial truth defense prevented this claim and the appellate court affirmed.

On the issue of the religious discrimination, the trial court found that Dudee did not allege that statement as one if his claims in his complaint, and refused to consider the merits of that claim. The appellate court affirmed.

On the last statement about the kids hating him, the trial court had found the statement to be unverifiable opinion and hyperbole. The appellate court disagreed, finding that the judge effectively indicated he had "private, first-hand knowledge which substantiates the opinion." But the appellate court went on to find that the statement was at most per quod libel, and Dudee presented no evidence of special damages.

Dudee could ask the Ohio Supreme Court to exercise its discretionary review. Given his litigious nature, it would not be surprising if he did so.

The trial court applied the collateral estoppel/truth/opinion defenses to the false light claims, which eliminated that claim as well. The appellate court agreed, except for the statement about the kids hating him. But the appellate court, in what appears to be a case of first impression in Ohio, applied the per quod analysis to the false light claim as well.

Dudee could ask the Ohio Supreme Court to exercise its discretionary review. The time for that request has not yet run as of the writing of this article. Given his litigious nature, it would not be surprising if he did so.

John C. Greiner is a partner at Graydon Head & Ritchey LLP in Cincinnati. He represented the defendant. Plaintiff was represented by Stephen E. Imm, Finney Law, Cincinnati.

Fifth Circuit Affirms Dismissal of Wide-Ranging Defamation and Conspiracy Claims

By Tom Leatherbury and Marc Fuller

In Walker v. Beaumont Independent School District, No. 17-40752, 2019 WL 4458378 (5th Cir. Sept. 18, 2019) (Smith, Duncan, Engelhardt), the Fifth Circuit affirmed the dismissal of defamation, tortious interference, RICO, conspiracy, and other claims brought against two publishers and their employees, as well as almost thirty other defendants.

The Fifth Circuit based its dismissal of the claims against the media defendants solely on Federal Rule of Civil Procedure 12(b)(6) and declined to address the media defendants' arguments under the Texas Citizens Participation Act in light of the Court's recent holding in *Klocke v. Watson*, No. 17-11320, 2019 WL 3977545 (5th Cir. Aug. 23, 2019), that the TCPA does not apply in federal court.

The Fifth Circuit based its dismissal of the claims against the media defendants solely on Federal Rule of Civil Procedure 12(b)(6) and declined to address the media defendants' arguments under the Texas Citizens Participation Act

Background

Calvin Walker, an African-American master electrician who had performed significant work for the Beaumont ISD, and Jessie Haynes, the African-American former spokeswoman for the Beaumont ISD, sued BISD and individual trustees, international and local union officials, the U.S. Attorney for the Eastern District of Texas, two FBI agents, state prosecutors, a city councilman, local bloggers, The Beaumont Enterprise, and The (Beaumont) Examiner, alleging a decade-long conspiracy "designed to prevent African-American individuals in Beaumont from gaining power and influence in order to perpetuate 'white dominion over Beaumont local politics.'"

The facts are long and convoluted. Despite Walker's refusal to join the local unit of the International Brotherhood of Electrical Workers in 2004, he won a multi-million dollar contract with BISD. The union then filed a complaint against Walker, alleging that Walker had fraudulently obtained his master electrician's license. Walker denied the charge, but ultimately paid a fine to the State, gave up his license, and re-took the required licensing exam.

Walker alleged that the conspiracy to ruin his reputation and his business then spread from union officials and members to BISD and its trustees, who began complaining about the amount of money that BISD paid Walker, the adequacy of his recordkeeping, and the quality of his work. After several years, BISD did not renew Walker's contract.

(Continued on page 16)

(Continued from page 15)

According to Walker, the conspiracy then spread to the U.S. Attorney's Office, which in 2011 secured a 37-count federal fraud indictment against Walker. After a lengthy trial, which Walker claimed was tainted by alleged FBI witness tampering, resulted in a hung jury and a mistrial, Walker pleaded guilty to one count of willful failure to pay income taxes.

As a part of the continuing conspiracy, according to Walker, the local bloggers and the more-established media outlets covered and published numerous allegedly false articles about the BISD contracting controversies and Walker's criminal proceedings. A final piece of the conspiracy involved the State District Attorney's formation of a joint federal-state task force to continue to investigate and prosecute Walker in State court for the alleged fraud he committed on the BISD.

Haynes's allegations against this claimed overarching conspiracy are somewhat less complicated. Haynes claims she was targeted for her support of the former BISD superintendent. She was involved in an altercation at BISD headquarters when she blocked a local blogger from entering a press conference and was charged and convicted in State court of obstructing a public passageway. She claimed to be a victim of "a concerted campaign" of online and in-person harassment and defamation.

As to Walker's defamation claims against The Examiner and its employees, the Court found them barred by the statute of limitations. The Court reasoned that Texas would adopt the single-publication rule for internet publications.

Walker and Haynes filed suit in July 2015. In the trial court, all of the defendants filed motions to dismiss. Most defendants moved to dismiss under Rule 12(b)(6), and the media defendants and several others also moved to dismiss under the Texas Citizens Participation Act. After hearings before Magistrate Judge Keith Giblin and additional proceedings before Judge Marcia Crone, the Court granted the media defendants' motions to dismiss under both the TCPA and Rule 12(b)(6).

While the Court's opinion is forty-two pages long, much of it concerns claims against the non-media defendants, which this article will not summarize. As to the defendants that had filed TCPA motions to dismiss, the Court first noted and followed the prior panel's holding in Klocke that the TCPA does not apply in federal court. Nonetheless, the Court found "dismissal warranted under the Federal Rules of Civil Procedure ... without consideration of the TCPA." The Court then dismissed the RICO claims variously asserted against all of the defendants for multiple pleading failures, holding that plaintiffs had not adequately alleged an enterprise or a pattern of racketeering activity, among other RICO elements.

As to Walker's defamation claims against The Examiner and its employees, the Court found them barred by the statute of limitations. The Court reasoned that the Texas Supreme Court's recent decision in *Glassdoor, Inc. v. Andra Group*, LP, 575 S.W.3d 523 (Tex.

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2019), confirmed the Fifth Circuit's *Erie* guess in *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp*., 512 F.3d 137, 141-46 (5th Cir. 2007), that Texas would adopt the single-publication rule for internet publications. The Court rejected Walker's arguments that he had wrongly been denied the opportunity to discover information that would have avoided the limitations bar. The Court found that Walker did not plead an actionable republication and did not oppose The Examiner defendants' motion for an expedited hearing under the TCPA or motion to stay discovery (which the trial court had entered based on its inherent power rather than on the TCPA). The record demonstrated that Walker had never even sought discovery below. All of Walker's defamation claims against The Examiner defendants were time-barred on their face.

Because the Court's holding on statute of limitations did not bar all of the defamation claims against The Beaumont Enterprise defendants, the Court further analyzed whether the remaining Beaumont Enterprise articles were privileged as fair reports and held that they were. The Court thoroughly compared the articles to multiple government documents, including the factual basis for Walker's federal guilty plea, a U.S. Attorney's Office press release, a letter from the U.S. Attorney's Office to BISD concerning BISD's ability to seek restitution from funds Walker forfeited as part of his guilty plea, and a decision by the Texas Comptroller debarring Walker from contracting with the State for five years.

Based on this comparison, the Court affirmed the district court's findings that "Walker's timely filed defamation claims...asserted against the Beaumont Enterprise . . . fail on the elements of actual malice and falsity, and when considered against the fair reporting defense."

While the Court's discussion of the statute of limitations, substantial truth, and fair report can and will be used by future libel defendants, the most useful portion of the opinion may be the Court's holding that Walker had failed adequately to allege and to brief actual malice.

While the Court's discussion of the statute of limitations, substantial truth, and fair report can and will be used by future libel defendants, the most useful portion of the opinion may be the Court's holding that Walker had failed adequately to allege and to brief actual malice. The Court found Appellants' complaint and brief deficient. They contained only "scant assertions" of "the mere possibility of misconduct." As to Walker's alleged requests for retraction, the Court wrote, "Significantly, Walker has not alleged, for example, relative to any of the Appellees, the existence or contents of specific discussions, correspondence, or supporting documentation provided to any of the media defendants - either prior to or shortly after the publications in question - purporting to correct any errors or misstatements in the publications." The failure to plead actual malice "provide(d) an independent, standalone basis for dismissal of Walker's defamation claims."

(Continued on page 18)

(Continued from page 17)

Finally, plaintiffs' conspiracy claims failed because all of the underlying tort claims failed and because plaintiffs' allegations about the alleged conspirators' agreement were "largely conclusory and speculative and thus legally deficient."

As a coda, after a week-long trial, a Jefferson County jury convicted Walker of fraud on September 26, 2019, and his sentencing is set for October 1, 2019.

Tom Leatherbury and Marc Fuller of Vinson & Elkins, LLP represented The (Beaumont) Examiner defendants, along with Harry Reasoner, Margaret Terwey, John Wander, and Gilbert I. Low and Gary Neal Reger of Orgain, Bell & Tucker, L.L.P. and L. DeWayne Layfield of the Law Offices of DeWayne Layfield, PLLC. Jonathan Donnellan and Eva Saketkoo of Hearst Corporation represented The Beaumont Enterprise defendants.

D.C. Federal Court Rejects RICO Claim Over "Hate Group" Label

By Max Mishkin

A federal judge in Washington, D.C. has tossed out a civil RICO lawsuit brought by the Center for Immigration Studies ("CIS") against a senior official at the Southern Poverty Law Center ("SPLC") and its former President arising out of the SPLC's labelling CIS a "hate group." Granting defendants' motion to dismiss, Judge Amy Berman Jackson chided CIS for trying "to shoehorn a defamation claim into the RICO framework" and found that CIS's "complaint is devoid of any allegation that defendants made a statement that was false." Center for Immigration Studies v. Cohen, 2019 U.S. Dist. LEXIS 156952, 2019 WL 4394838 (D.D.C. Sept. 13, 2019).

Background

Founded in 1971 in Montgomery, Alabama, SPLC is a leading non-profit dedicated to fighting hate and bigotry and seeking justice for the most vulnerable members of society. As part of SPLC's mission, its "Intelligence Project" researches, monitors, and publishes reports on organizations and individuals that SPLC believes may be, or are, hate groups or extremists. Among other activities, the Intelligence Project publishes a quarterly Intelligence Report, a weekly newsletter, and the *Hatewatch* blog, which report on domestic hate groups, extremists, and others who – in SPLC's opinion – espouse or support hatred or bigotry.

In 2016, SPLC designated CIS an anti-immigrant hate group.

Based on its research and investigations, the Intelligence Project expressly designates certain organizations as "hate groups," which SPLC defines in part as organizations that – based on their official statements or principles, the statements of their leaders, or their activities – have beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics.

In 2016, SPLC designated CIS an anti-immigrant hate group. SPLC published a lengthy report explaining the reasons for this designation, noting in part that the organization has a decades-long history of circulating racist writers, while also associating with white nationalists. SPLC's report also details the history of CIS and its close links to individuals and organizations who advocate that immigration be curtailed to preserve a white majority in America or who espouse white nationalist, racist, and anti-Muslim or anti-Semitic views.

The Complaint

On January 16, 2019, CIS filed a one-count complaint in the U.S. District Court for the District of Columbia against Richard Cohen, then-President of SPLC, and Heidi Beirich, the director of

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the Intelligence Project. CIS alleged that Cohen and Beirich engaged in "a scheme to falsely designate CIS a hate group and destroy it" through blog posts that constituted predicate acts of wire fraud, and that this scheme amounted to a conspiracy in violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. CIS sought treble damages and attorney's fees, as well as a permanent injunction "prohibiting Defendants from again calling CIS a hate group and requiring Defendants to state on the SPLC website that CIS is not a hate group."

On February 12, 2019, Cohen and Beirich moved to dismiss for failure to state a claim on the grounds that (1) CIS did not allege a cognizable predicate offense under the RICO statute; (2) CIS did not allege a pattern of racketeering activity; (3) CIS did not allege each defendant's participation in the scheme; (4) CIS did not allege proximate causation between the predicate acts and the alleged harm; and (5) CIS's RICO claim was in reality a thinly-disguised defamation claim barred by the First Amendment, because a "hate group" designation is non-actionable opinion.

On March 19, 2019, after providing CIS with the opportunity to withdraw its lawsuit, Cohen and Beirich additionally moved for sanctions under Rule 11, asserting that CIS's claim was frivolous and filed for the improper purpose of violating SPLC's First Amendment rights.

The court reiterated that "a plaintiff complaining about a defamatory statement cannot end-run the requirements for a defamation claim by pleading it as a RICO violation."

The Court's Decisions

On September 13, 2019, the court granted Cohen and Beirich's motion to dismiss. As the court explained, the ostensible RICO conspiracy was predicated on alleged acts of wire fraud, namely the "false" designation of CIS as a "hate group," but "[t]he upshot of the complaint is that defendants advanced a conclusion that was debatable, and that this expression of a flawed opinion harmed plaintiff's reputation."

Though the court stated that it "need not address [any] First Amendment arguments" because the RICO claim was flawed in its own right, the decision nevertheless observed that CIS "has clearly tried to shoehorn a defamation claim into the RICO framework," and the court reiterated that "a plaintiff complaining about a defamatory statement cannot end-run the requirements for a defamation claim by pleading it as a RICO violation."

This is one of two decisions in recent weeks dismissing claims arising from SPLC designations of an organization as a "hate group." On September 19, the U.S. District Court for the Middle District of Alabama dismissed defamation, trademark, and civil rights claims brought by Coral Ridge Ministries Media, Inc. over its designation by SPLC, which allegedly cost it donations through Amazon's AmazonSmile charitable-giving program. *See* Coral Ridge Ministries

(Continued on page 21)

(Continued from page 20)

Media, Inc. v. Amazon, Inc., 2019 U.S. Dist. LEXIS 159685, 2019 WL 4547064 (M.D. Ala. Sept. 19, 2019).

In a minute order accompanying the CIS dismissal, the court denied Cohen and Beirich's motion for sanctions. The court explained that "although it found plaintiff's reliance on RICO to be misplaced in what was essentially a defamation case," it "did not find the complaint to be completely frivolous."

Max Mishkin is an associate at Ballard Spahr in Washington D.C. Defendants were represented by Chad R. Bowman of Ballard Spahr LLP and by former Ballard attorney Dana Green, now with The New York Times. Plaintiff was represented by Howard W. Foster and Matthew Galin of Foster PC, G. Robert Blakey of the Law Office of G. Robert Blakey, and in-house attorney Julie B. Axelrod.

Kansas Senate Majority Leader Loses Another Round in Defamation Claim over Medicaid-Expansion Column

By J. Eric Weslander

One of Kansas' most prominent politicians now has an 0-2 record in opposing anti-SLAPP motions in the defamation lawsuit he filed over a January 2019 newspaper column that explored his views on Medicaid expansion.

In early July 2019 (as described in Reid Day's article in the July 2019 MediaLawLetter), The Kansas City Star prevailed on its Motion to Strike the defamation claim brought by Sen. Jim Denning, the majority leader of the Kansas State Senate, over a January 2019 opinion column by Steve Rose headlined, "Why hasn't Kansas expanded Medicaid? This GOP leader has a long list of excuses."

In granting the *Star's* Motion pursuant to K.S.A. 60-5320, Judge Paul C. Gurney of the Johnson County (KS) District Court relied on Denning's inability to meet the element of actual malice, given that the issue of which Denning complained—the column's failure to make clear that the discussion between Denning and columnist Rose did not take place as recently as the column implied – was not known to the *Star* at the time of publication.

Central to Judge Gurney's ruling was that Denning never denied the substance of the statements, or denied that he held views substantially similar to those described in the column.

Because the *Star* clearly had a defense based on lack of actual malice, Judge Gurney did not at that time make any ruling as to whether Denning had met other threshold elements, such as demonstrating the legal falsity of specific statements in the article, or that they were capable of a defamatory meaning in the first instance.

On July 30, Judge Gurney took up these issues at the hearing on Steve Rose's anti-SLAPP motion, and following oral argument by Rose and Denning's counsel, ruled from the bench that Denning had failed to meet his burden of demonstrating a likelihood of prevailing on each and every element of a defamation claim. Central to Judge Gurney's ruling was that Denning, in an affidavit submitted in response to the *Star's* original motion and then recycled for purposes of the opposition to Rose's SLAPP motion, had never denied the substance of the statements, or denied that he held views substantially similar to those described in the column—but had only denied making, verbatim, the exact statements published in the column.

Because those statements were clearly paraphrased—indeed, not a single quotation mark appeared in the column – Judge Gurney ruled that Denning's denial that he said the exact words published in the column failed to establish falsity within the meaning of a defamation

(Continued on page 23)

(Continued from page 22)

claim. In addition, given the uncontroverted, detailed history between Rose and Denning which was set forth in the motion and supporting affidavits, including numerous prior columns in which Rose had expressed his admiration and respect for Sen. Denning, and a detailed affidavit from Rose which set out his thought process in writing the column, Judge Gurney ruled that Sen. Denning had failed to meet his burden of showing actual malice, an element which under Kansas law requires a showing of evil-mindedness or specific intent to injure.

One aspect of Rose counsel's successful argument on the SLAPP motion was the fact that, immediately following the July 2 ruling granting the *Star's* motion, Sen. Denning had taken to Twitter to proclaim that he felt he had already proven his case. Given that statement, Rose's counsel argued, the purpose of the lawsuit seemed to be something other than succeeding in court—a hallmark of the type of lawsuit that a SLAPP statute targets. Counsel also emphasized the Plaintiff's race to the courthouse to file the lawsuit just two days after the column was published, at a time when the *Star* and Rose were still attempting to address the complaints about the column raised by Rose's chief of staff —and when Denning's counsel was campaigning for state GOP chairman.

In a statement to news media following the ruling, Rose stated that he felt vindicated by the Court's granting of the SLAPP motion. While acknowledging that the discussion summarized in the column took place later than the column may have implied, Rose maintained all along that Denning had undoubtedly made the statements attributed to him in the column during a discussion between the two men at a restaurant in Fairway, Kansas in approximately 2017. Although the column provided a more recent $14 million budget estimate of the price of expanding Medicaid than had been available at the time of the two men's prior discussion, Denning had in fact publicly and repeatedly expressed his concerns about the $14 million figure and had steadfastly remained opposed to expanding Medicaid up to the time of the column's publication.

"Sen. Denning should have quit while he was behind and dropped his claim against Steve Rose after the court's ruling on July 2 granting the *Star's* motion to strike," Rose's counsel stated to local NPR affiliate KCUR-89.3 FM at the time of the ruling. "That would have saved significant additional legal fees on our end, but the senator didn't learn his lesson the first time. One of the reasons we have free-speech protections like the anti-SLAPP act is to prevent journalists and other speakers from being deterred from the exercise of their rights by the threat of costly legal actions, so the statute worked as intended."

As he did with the *Star's* motion, Judge Gurney ordered that Denning pay Rose's reasonable attorney's fees incurred in bringing the motion, pursuant to the Kansas SLAPP statute's mandatory-fee provision. Ultimately Denning was ordered to pay $24,250 in Rose's fees, which Rose agreed to reduce from a total of approximately $48,000 in exchange for Denning's agreement not to appeal the ruling. A journal entry of judgment against Denning was entered on September 23, 2019.

(Continued on page 24)

(Continued from page 23)

A hearing on the *Star's* pending fee-award application is scheduled for the end of October.

Eric Weslander of Stevens & Brand LLP represented Defendant Steve Rose in this case, with assistance from law clerk Robert Curtis. Sen. Jim Denning was represented by Michael J. Kuckelman and Michael T. Crabb of Kuckelman Torline Kirkland, Overland Park, KS. The Star is represented by Bernard J. Rhodes of LathropGage LLP.

MLRC Fall Events

November 6

2:30-3:45 p.m.
Open Board Meeting
Join the MLRC Board of Directors and staff for reports of 2019's accomplishments and the year ahead, plus elections and open discussion

4:00-5:45 p.m.
Forum: The Possibilities and Perils of Journalism Tech: Automation, AI and Disinformation in the Newsroom
Click to RSVP

6:00 p.m.
Dinner: It's Different for Us: Women Journalists on Their Stories from the Campaign Trail
Top female reporters discussing the advantages and disadvantages of being a woman journalist – or candidate – in Campaign '20

All events above at the Grand Hyatt, New York, NY

November 7

12:00-2:00 p.m.
Defense Counsel Section Lunch Meeting
Carmines, Times Square
Reports on 2019 activities and plans for the new year

5:30 p.m.
Virginia Conference Planning Meeting
Dow Jones, 1211 6th Ave
Join fellow members to plan the two day Media Law Conference in September 2020

California Court of Appeal Sides with Local Newspaper and Reverses Trial Court

Public Figure Plaintiff Failed to Produce Evidence of Actual Malice

By Elizabeth Baldridge and Jean-Paul Jassy

In an opinion issued September 30th, the California Court of Appeal reversed the Los Angeles Superior Court's decision to allow a defamation claim to proceed against small local newspaper the Palisades News. The Court of Appeal based its decision on a finding that the defamation plaintiff was a limited purpose public figure and that she failed to allege or adduce adequate evidence of actual malice. Smith v. Palisades News.

Background

Plaintiff-Respondent Stephanie Smith's suit arose from a January 2018 Palisades News article covering police raids on Smith's commercial property and personal residence. Smith owns warehouses in California where her tenants engage in large-scale marijuana farming, and is self-described as one of the largest marijuana industry landlords in the state. Police raided one of Smith's warehouses and her home, seized plants from her tenants, and arrested cultivators. Following the raids, local, national, and international news picked up on what the Court of Appeal called "journalistic catnip": "the mash-up of motherhood, prior criminal history, and large scale cannabis production[.]" In the midst of the cycle of news coverage on Smith, she made public statements about the controversy, including stating that she is a "well-known and recognized leader in large-scale cannabis real estate development" and embracing the moniker "Queenpin."

The Palisades News published its article several weeks after the initial news coverage, and it largely referenced the prior reports. Smith's defamation claim was based on statements in the article that allegedly implied she engaged in criminal behavior. Smith did not serve a timely retraction demand on the Palisades News.

Trial Court's Decision

In addition to her claim for defamation, Smith included causes of action for false light and intentional infliction of emotional distress. The Palisades News filed an anti-SLAPP motion in response to the complaint, which resulted in the dismissal of the two ancillary claims. The trial court found that Smith's defamation claim survived the anti-SLAPP motion in part because it did not agree with the Palisades News that Smith was a limited public figure at the time of the publication of the Palisades News article. The court therefore treated Smith as a private figure for defamation purposes, found that she had made a prima facie case and rejected numerous other arguments advanced by the Palisades News.

(Continued on page 26)

(Continued from page 25)

The Palisades News appealed the trial court's decision concerning Smith's defamation claim.

Court of Appeal's Reversal

The parties, trial court, and appellate court all agreed that Smith's defamation claim arose from speech on a matter of public interest, satisfying the first prong of the anti-SLAPP analysis under California law. The appellate court based its reversal of the trial court's decision as to Smith's defamation claim on the second prong: whether Smith could show a likelihood of prevailing on her claim.

The crux of the appellate court's decision was its finding that Smith was a limited purpose public figure. Specifically, it held that Smith's public statements before and contemporaneously with the publication of the Palisades News article demonstrated her intent to put herself in the public eye, noting her "multiple public statements seeking to influence public perception of the police raids and San Bernardino's approach to cannabis businesses *before* Palisades News published its article."

The crux of the appellate court's decision was its finding that Smith was a limited purpose public figure. Smith's public statements before and contemporaneously with the publication of the Palisades News article demonstrated her intent to put herself in the public eye.

In making its finding, the court distinguished Smith's limited public figure status from the facts in *Time, Inc. v. Firestone*, 424 U.S. 448 (1975), where the U.S. Supreme Court determined that the plaintiff, a wealthy socialite going through a divorce, was not a limited purpose public figure despite her giving press conferences, because the statements to the press were not designed to inject her into the forefront of a controversy in order to influence its resolution. In contrast, the Court of Appeal ruled that Smith's voluntary comments to the press were an attempt to impact the police investigation and city officials, and to establish herself at the forefront of cannabis controversies in order to influence their resolution.

The Court of Appeal's finding that Smith was a limited public figure for purposes of the public controversy reported on in the Palisades News article meant that Smith had to show a likelihood of prevailing on the issue of actual malice as part of her defamation claim. She could not. The court found that Smith failed to produce evidence of actual malice, which is "fatal in and of itself" to her claim.

In making its actual malice finding, the court noted Smith's lack of argument or evidence that the Palisades News article was fabricated, based on an unverified or anonymous tip, or that the content was inherently improbable. It also observed that on the allegedly defamatory

(Continued on page 27)

(Continued from page 26)

statements, the Palisades News relied on prior reporting from reputable organizations.

Arguments Not Reached by Court of Appeal

Because the Court found no evidence of actual malice, it stopped its analysis at that stage of Smith's claim and did not assess the other required elements of defamation. The Palisades News's lead argument was its contention that Smith was a limited purpose public figure and had not submitted evidence of actual malice, but it advanced other arguments that the Court of Appeal did not reach in its opinion. Some of those additional arguments were that Smith was entitled to only special damages, which she had not pleaded and could not prove because she failed to serve a retraction demand on the Palisades News within twenty days of the article's publication and there was no evidence that the Palisades News caused special damages; that the allegedly defamatory statements were substantially true, and alternatively did not carry a reasonable implication of criminality; that the article was a fair and true report under California Civil Code section 47(d); that the neutral reportage doctrine barred Smith's claim; and that the wire service defense should be applied as an additional bar. The latter two of the additional arguments were supported by a brief from amici counsel, including the Reporter's Committee for Freedom of the Press and twenty-one other media organizations in support of the Palisades News.

Jean-Paul Jassy and Elizabeth Baldridge of Jassy Vick Carolan, LLP served as counsel for Defendants-Appellants Palisades News, Sue Pascoe, and Matt Sanderson. Ben Eilenberg of the Law Offices of Ben Eilenberg served as counsel for Plaintiff-Respondent Stephanie Smith. Katie Townsend, Bruce D. Brown, Caitlin Vogus, and Daniel J. Leon of the Reporters Committee for Freedom of the Press and Kelli Sager, Rochelle Wilcox, and Nicolette Vairo of Davis Wright Tremaine LLP served as amici counsel.

Third Circuit Once Again Sends Broadcast Ownership Rules Back to the FCC

By Emmy Parsons

As Yogi Berra once said, "it's déjà vu all over again." For the fourth time in 15 years, the U.S. Court of Appeals for the Third Circuit has remanded the broadcast ownership rules back to the Federal Communications Commission ("FCC" or "Commission"), finding that the FCC failed in its latest review of the rules to adequately address the impact of rule changes on minority and female ownership of broadcast stations. Prometheus Radio Project v. Federal Communications Commission. So how did we get here and what comes next?

Section § 202(h) of the Telecommunications Act of 1996 requires the FCC to regularly review its broadcast ownership rules. *See* Telecommunications Act, Pub L. No. 104-104, 110 Stat. 56, § 202(h) (1996). During these reviews the Commission is to "determine whether any of such rules are necessary in the public interest as the result of competition" and "repeal or modify any regulation it determines to be no longer in the public interest." Since Congress enacted the law, the FCC has reviewed the ownership rules in a series of rulemaking proceedings known as the "Quadrennial Regulatory Reviews." Each time the FCC has modified its ownership rules during these reviews, however, the same panel of Third Circuit judges has largely rejected the actions and remanded the rules back to the FCC for further consideration.

The Court's new ruling, rendered on September 23, 2019, which will be known as "*Prometheus IV*," throws out changes adopted by the FCC in November 2017 and August 2018. Under the leadership of FCC Chairman Ajit Pai, the *2017 Order on Reconsideration and Notice of Proposed Rulemaking* (2017 Order) eliminated the 1975 ban on newspaper/broadcast and television/radio common ownership in the same market, rescinded the "eight voices" test for television ownership, retained the prohibition on mergers between two of the top four stations in a given market (the "top-four" rule) but adopted a discretionary waiver provision, adopted a presumptive waiver for radio transactions in embedded markets, eliminated the attribution rule for television joint sales agreements, retained the disclosure requirement for shared service agreements involving commercial television stations, and announced plans to adopt an incubator program. In August 2018, the FCC then adopted a Report and Order establishing a radio incubator program.

The Third Circuit has remanded the broadcast ownership rules, finding that the FCC failed in its latest review of the rules to adequately address the impact of rule changes on minority and female ownership of broadcast stations.

Broadly speaking, the FCC, in its now-rejected 2017 Order, said that it was "tak[ing] concrete steps to update its broadcast ownership rules to reflect reality" to give broadcasters and local

(Continued on page 29)

(Continued from page 28)

newspapers "a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." And, in an attempt to address previous concerns from the Third Circuit about diverse ownership, the FCC said that available evidence suggested the rule changes were unlikely to harm minority and female ownership of broadcast stations.

In its decision, the Third Circuit ignored the FCC's detailed analysis of the tremendous competitive changes in the media marketplace, which the FCC had used to justify relaxing the broadcast-specific ownership rules. Instead, the court said that the goal of § 202(h) is not limited to promoting competition, but rather, requires the FCC to review the ownership rules under a broad "public interest" standard "in light of ongoing competitive developments within the industry." And while it acknowledged that "[t]he Commission might be well within its rights to adopt a new deregulatory framework (even if the rule changes would have some adverse effect on ownership diversity," the court said that the FCC must first engage in "a meaningful evaluation of that effect and then explain[] why it believed the trade-off was justified for other policy reasons." On this front, the Third Circuit found the FCC's Order wholly inadequate.

While the court did agree with a few of the FCC's determinations, including its decision to retain the top-four rule and its definition of "comparable markets" for purposes of compliance with the 2018 Incubator Order, the court remanded both orders in their entirety for failure to properly consider ownership diversity. The court scolded the Commission for failing to cite evidence regarding gender diversity, for comparing data regarding minority ownership from two data sets based on different methodology in what it said was "plainly an exercise in comparing apples to oranges," for failing to study whether the percentage of broadcast stations owned by minorities increased or decreased across the years, and for failing to analyze how many minority-owned stations would have existed but for the FCC's deregulatory decisions in the 1990s.

Chairman Pai issued a statement signaling that the FCC "intend[s] to seek further review of [the] decision" and that he is "optimistic" the FCC will succeed on appeal.

The court said that the FCC's decision "rested on faulty and insubstantial data" and failed to "adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities." Where the Commission analyzed ownership diversity, the court said was "so insubstantial that we cannot say it provides a reliable foundation for the Commission's conclusions."

As a result, the court vacated the entire 2017 Order and the 2018 Incubator Order, as well as a definition for "eligible entities" meant to encourage ownership diversity adopted by the FCC in 2016. The court then directed the FCC to "ascertain on record evidence the likely effect of any rule changes it proposes ... whether through new empirical research or an in-depth theoretical analysis." While the Court said it would not "prejudge" the outcome of any future review, it

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(Continued from page 29)

cautioned that the FCC "must provide a substantial basis and justification for its actions whatever it ultimately decides."

So where do we go from here? The Third Circuit, anticipating future litigation on these issues, again retained jurisdiction. Shortly after the decision was released, however, Chairman Pai issued a statement signaling that the FCC "intend[s] to seek further review of [the] decision" and that he is "optimistic" the FCC will succeed on appeal. The FCC has not yet indicated whether it intends to seek an *en banc* review of the panel's decision or whether it will appeal the decision directly to the Supreme Court. In the meantime, it remains to be seen what will happen to transactions pending before the FCC and what will happen to the ownership rules currently under review as part of the 2018 Quadrennial Review.

Emmy Parsons is an associate at Ballard Spahr in Washington D.C. A full list of case counsel is contained in the Third Circuit's opinion.

Ninth Circuit Scrapes Bottom in CFAA Analysis

By Jeff Hermes

On September 9, 2019, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in hiQ Labs, Inc., v. LinkedIn Corp., No. 17-16783, a case involving efforts by professional networking service LinkedIn to shut down scraping of public-facing user data on its website by data analytics company hiQ Labs.

The ruling, which affirmed a preliminary injunction in hiQ's favor against LinkedIn's attempts to block access to user data, is remarkable for its narrow reading of the federal Consumer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA"). However, companies engaging in data scraping from others' sites should be cautious about relying on the decision based on the limited scope of the Ninth Circuit's review and its sometimes questionable logic.

Background

LinkedIn is a popular social networking site for professionals, on which users have profiles to which they can post information about their job history and interest in new career opportunities. The website asserts no property interest in the information posted by its users, and gives users a range of options as to the third parties who can view their data. Users can select different groups to have access to different portions of their profiles: direct connections only; LinkedIn users within three degrees of separation; all LinkedIn users; and the public at large including non-members. LinkedIn also offers a "Do Not Broadcast" option which stops the site from announcing changes made to a user's profile.

Companies engaging in data scraping from others' sites should be cautious about relying on the decision based on the limited scope of the Ninth Circuit's review and its sometimes questionable logic.

Scraping of data from LinkedIn's website is prohibited by the site's User Agreement. LinkedIn has also taken technical measures to prevent such activity including blocking crawlers via its robots.txt file and the use of software to detect suspicious activity and automated scraping.

Plaintiff hiQ was founded in 2012 as a data analytics company. hiQ automatically scrapes profile information made available by LinkedIn users to members of the general public, processes the data through a predictive algorithm, and sells the results to its business clients. hiQ's products, among other things, purport to allow their clients to identify employees at risk of being recruited away and to identify skill gaps in their workforces. Through its participation in conferences organized by hiQ, LinkedIn had potential notice of hiQ's product and business model as early as October 2015.

(Continued on page 32)

(Continued from page 31)

In May 2017, LinkedIn issued a cease & desist letter to hiQ, claiming that hiQ was in violation of the User Agreement. The letter also asserted that any further access to LinkedIn's website would be unauthorized and violate the CFAA, California's state computer hacking statute, the Digital Millennium Copyright Act, and California's law of trespass. HiQ rejected the demand and filed suit in the Northern District of California, seeking (1) a declaration that LinkedIn's asserted rights under the laws mentioned in its C&D letter were invalid and (2) an injunction to stop LinkedIn from blocking its access to the site on the basis that such measures tortiously interfered with hiQ's contracts with its clients and constituted unfair competition.

The district court granted a remarkably strong preliminary injunction in hiQ's favor, requiring LinkedIn to remove any technical barriers to hiQ's access to public-facing user data, prohibiting any new legal or technical barriers to access, and requiring LinkedIn to withdraw the C&D letter. LinkedIn appealed.

Irreparable Harm and the Balance of the Equities

The Ninth Circuit reviewed the district court decision for an abuse of discretion under the traditional four-part test (likelihood of success on the merits, likelihood of irreparable harm, balance of the equities, and public interest), as modified in the Circuit to allow a stronger showing on one prong to offset a weaker showing on another. As relevant to this case, the court noted that "when the balance of the hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only serious questions going to the merits" rather than a likelihood of success on the merits. *hiQ Labs*, slip op. at 11 (internal quotation marks omitted).

The district court granted a remarkably strong preliminary injunction in hiQ's favor, requiring LinkedIn to remove any technical barriers to hiQ's access to public-facing user data,

Thus, the court began its analysis with irreparable harm and the balance of the equities. On the first prong, the Ninth Circuit accepted the district court's determination that hiQ would likely be put out of business absent an injunction. The court found other sources of scraped data such as Facebook to be non-viable, noting that Facebook's user data is not made available to those who have not registered for an account, and took LinkedIn's suggestion that hiQ could gather information by means other than scraping as an implicit admission that hiQ's current business model would fail without LinkedIn access. *Id.* at 13-14.

Similarly, the Ninth Circuit ruled that the district court did not abuse its discretion in deciding that the balance of the equities "tipped sharply" in favor of hiQ. Against the likely failure of hiQ's business, the court weighed LinkedIn's assertions that hiQ's scraping would (1) impair LinkedIn's user goodwill by threatening user privacy and (2) undercut LinkedIn's business by allowing third parties to "free ride" on its services.

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While the court acknowledged that there was "some merit" to the privacy argument, it noted that hiQ was only scraping information available to any non-member of LinkedIn and found no evidence that users who applied the "Do Not Broadcast" option to their public-facing information primarily did so because of privacy concerns (as opposed to, say, wishing not to annoy their contacts). *Id.* at 15-16. It also found that LinkedIn's own data mining efforts undercut its users' expectations of privacy. Id. at 16. With respect to the "free rider" argument, the court pointed to the fact that LinkedIn has no property interest in its users' data. *Id.* at 16-17. Moreover, the court noted that LinkedIn could have eliminated non-user access entirely, but chose not to – thus suggesting that public access was not a detriment to its business but a benefit. *Id.* at 17.

HiQ's Tortious Interference Claim

Based upon its evaluation of the relative harms faced by the parties, the Ninth Circuit next considered whether hiQ had "raised serious questions going to the merits" of the claims supporting its demand for injunctive relief. The court focused its analysis on hiQ's claim for tortious interference with contract; because it found that hiQ met its burden on that claim, the court did not reach the separate claim for unfair trade practices.

The court had little difficulty deciding that hiQ presented sufficient evidence on the elements of its interference claim under California law, finding that: (1) there was no dispute that hiQ had contracts with third parties for its data analytics products; (2) it was likely that LinkedIn knew of these contracts no later than the date of hiQ's response to LinkedIn's C&D letter; (3) LinkedIn's invocation of its legal rights and technical measures to block scraping could be considered intentional acts to disrupt the contracts; (4) those contracts were in fact disrupted; and (5) hiQ was harmed by the interference. *Id.* at 18-20.

The Ninth Circuit accepted the district court's determination that hiQ would likely be put out of business absent an injunction.

Unlike many states, California does not require the plaintiff on a tortious interference claim to establish that the act of interference by the defendant was improper in motive or means. Instead, it recognizes an affirmative defense where the interference was undertaken with a "legitimate business purpose." Such a purpose must be more than a desire for economic advantage, held the court; rather, the purpose must outweigh society's interest in contractual stability. *Id.*at 20-21. As described by the Ninth Circuit, LinkedIn's asserted purposes included protecting member data, protecting LinkedIn's investment in its platform, enforcing its User Agreement on automated scraping, and otherwise asserting its rights under state and federal law. *Id.* at 23-24 & n.10.

Following a California appellate decision that (somewhat awkwardly) blurred the means of interference with the motive behind it, the Court of Appeals began its analysis by noting that

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the means of LinkedIn's alleged interference was dissimilar to "recognized trade practices" not generally considered to raise concerns. *Id.* at 21-22. It contrasted LinkedIn's technical countermeasures with advertising, price competition, and poaching of employees, noting that the latter methods of competition do not directly stifle a competitor's business model. *Id.* at 22.

The Ninth Circuit further found a serious question as to whether LinkedIn's asserted motives were a pretext for the company's true purpose of shutting down a competitor to LinkedIn's own data analytics products. *Id.* at 22. It characterized LinkedIn's interest in protecting member data as relatively weak, referring again to LinkedIn's lack of a property interest in user data and its users' limited expectations of privacy. *Id.* at 23. The court also found that LinkedIn had not shown how it could enforcing the User Agreement against hiQ given that hiQ had been terminated as a user. *Id.*

The Court of Appeals' reasoning in this section is puzzling, if not outright bizarre. On the question of whether LinkedIn's actions were "recognized trade practices," if (as LinkedIn alleges) hiQ's business model depends upon entering LinkedIn's digital preserve without authorization to gather valuable information, taking electronic measures to block that access is no more unusual as a business practice than installing security in one's physical place of business. To be sure, the Ninth Circuit later in this opinion found "serious questions" as to whether hiQ's activity was illegal, but the steps LinkedIn took are ordinary practices to control access and activity on a website.

The Ninth Circuit further found a serious question as to whether LinkedIn's asserted motives were a pretext for the company's true purpose of shutting down a competitor

It is similarly puzzling why the Ninth Circuit disregarded LinkedIn's User Agreement. At least as of May 2018, LinkedIn's User Agreement—like many websites' terms of service—applied both to registered users and to unregistered "visitors" to the site. *See* User Agreement, https://www.linkedin.com/legal/user-agreement (effective May 8, 2018) at ¶¶ 1.1-1.2 (identifying parties to which the User Agreement applies). There might potentially be deeper questions of contract formation at issue, but hiQ was made aware of the terms of the User Agreement, *HiQ Labs,* slip op. at 10, and the User Agreement specifically prohibits the activity engaged in by hiQ, *see* User Agreement at ¶ 8.2 (prohibition of, inter alia, scraping of data and distribution of information without LinkedIn's consent).

Finally, the Ninth Circuit found that hiQ had raised serious questions about LinkedIn's general interest in protecting its legal rights, finding that this interest depended on the outcome of LinkedIn's CFAA and parallel California claims. *HiQ Labs,* slip op. at 24 n.10.

LinkedIn's CFAA Defense

The meat of this opinion, and the issue for which it has garnered the most attention, is the Ninth Circuit's discussion of the CFAA. LinkedIn relied upon the CFAA both as part of its "legitimate business purpose" defense to the interference claim (as discussed above) and as the

(Continued on page 35)

(Continued from page 34)

basis for a separate affirmative defense of federal preemption. That is, LinkedIn argued that there could be no interference claim because hiQ's underlying contracts with its users were premised on activity illegal under the CFAA, and that if California law did not bar such a claim it would be preempted by the federal statute. The basis of the CFAA argument was that once LinkedIn issued its C&D letter to hiQ, any further scraping of data would be access in violation of § 1030(a)(2)(C) of the CFAA, which prohibits "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] ... information from any protected computer."

The meat of this opinion, and the issue for which it has garnered the most attention, is the Ninth Circuit's discussion of the CFAA.

LinkedIn's CFAA argument thus echoed one asserted by Facebook in 2008 against a social media company named Power Ventures ("Power"). In the earlier case, Power aggregated user information from other social media sites such as Facebook, allowing users to see their collected social media activity in a single place. Power gathered this information in part by soliciting Facebook members to join Power and to allow Power access to their Facebook profiles. Although a number of Facebook's users granted that permission, Facebook itself objected, sending Power a cease & desist letter and implementing IP blocks to prevent Power's access. Power evaded those blocks, and Facebook sued Power under the CFAA. Ultimately, the Ninth Circuit upheld Facebook's CFAA claim, stating that "[t]he consent that Power had received from Facebook users was not sufficient to grant continuing authorization to access Facebook's computers after Facebook's express revocation of permission. ... Permission from the users alone was not sufficient to constitute authorization after Facebook issued the cease and desist letter." Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1068 (9th Cir. 2016).

At first blush, the Ninth Circuit's opinion in *Power Ventures* seems squarely on point. LinkedIn's users chose to let third parties view certain of their information, access to which would otherwise have been blocked by LinkedIn's site architecture. However, LinkedIn itself objected to hiQ's access to its computers, and sent a C&D letter revoking authorization and implemented technical measures to prevent hiQ's further access. Like Power, HiQ would therefore violate the CFAA by continuing to scrape LinkedIn profiles, right?

Maybe not, said the Ninth Circuit, holding that hiQ had "raised a serious question" about the issue. The Court of Appeals found that the term "without authorization" presupposed "a baseline in which access is not generally available and so permission is ordinarily required." *HiQ Labs*, slip op. at 26. In contrast, access to LinkedIn's computers was presumptively open; "[w]here the default is free access without authorization, in ordinary parlance one would characterize selective denial of access as a ban, not a lack of 'authorization.'" *Id.*

The court found support for this interpretation in the legislative history of the CFAA, which cited to concepts such as trespass or breaking and entering. *Id.* at 27. Moreover, legislative

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statements regarding the specific purpose of § 1030(a)(2)(C) of the CFAA "ma[de] clear that the prohibition on unauthorized access is properly understood to apply only to private information—information delineated as private through use of a permission requirement of some sort." *Id.* at 28-29. The court also stated that a mention of password fraud in a separate section (§ 1030(a)(6)) "bolster[ed] the idea that authorization is only required for password-protected sites or sites that otherwise prevent the general public from viewing the information." *Id.* at 29. And the court found that this interpretation of the CFAA echoed interpretations of the Stored Communications Act, which was intended to "protect electronic communications that are configured to be private." *Id.* at 31-32 (internal quotation marks omitted). Finally, the court invoked the rule of lenity as favoring a narrow interpretation of the term "without authorization." *Id.* at 33.

Accordingly, the Court of Appeals distinguished its earlier ruling in *Power Ventures* on the basis that the data scraped by Power was not accessible to members of the general public without a password: "While Power Ventures was gathering user data that was protected by Facebook's username and password authentication system, the data hiQ was scraping was available to anyone with a web browser." *Id.* at 30-31.

There are several reasons to be cautious about relying upon the Ninth Circuit's analysis of the CFAA in this case.

There are several reasons, however, to be cautious about relying upon the Ninth Circuit's analysis of the CFAA in this case. First, the court's review was limited by the procedural posture of the case to determining whether hiQ had raised a valid question about the meaning of statute. The opinion's hedging language gives another panel of the Court of Appeals space to reach a different conclusion later. *See id.* at 33-34 ("It is *likely* that when a computer network generally permits public access to its data, a user's accessing that publicly available data will not constitute access without authorization under the CFAA."; emphasis added).

Second, the court's invocation of concepts of trespass and breaking and entering are not as helpful as they might appear. Even overlooking the dubious reliability of physical-world metaphors as applied to digital space, one initially allowed to be present in a privately-owned space can commit a trespass by refusing to leave when directed by the owner. *See* Restatement (Second) of Torts § 158 cmt. l ("A trespass on land may be by a failure of the actor to leave the land of which the other is in possession, or a part of such land. If the possessor of the land has consented to the actor's presence thereon, his failure to leave after the expiration of the license is a trespass."). (Note that while California's criminal trespass law states that refusing an owner's direction to leave is a trespass only if the property is "not open to the general public," Cal. Pen. Code § 602(o), that approach is not universal and should not control the interpretation of a federal statute. *Compare* Restatement (Second) of Torts, § 191 & cmt. d (while privilege exists to occupy a "public utility" to which public has a right of access, "a private enterprise, such as a department store or market, may admit or exclude whom it will, for any reason or for no reason[.]").)

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Thus, even if the CFAA were limited to conduct analogous to trespassing, HiQ's refusal to abide by LinkedIn's direction to cease accessing the site could still be seen as a trespass.

Third, the court's discussion is somewhat confused regarding the role of passwords and privacy controls, particularly in distinguishing *hiQ* from *Power Ventures*. While Facebook does require a would-be user to sign up for an account and use a password to access the site, users generally undergo no authorization process unless Facebook has decided to ban a particular user. It is not Facebook's general password system that provides meaningful protection for privacy on the site; rather, it is Facebook users' choices as to the privacy settings on their accounts that provide meaningful restrictions on access to their content. Likewise, LinkedIn is open to the public unless a particular user is banned, while the relevant privacy barrier derives from choices made by individual users about sharing their profiles. Thus, the privacy systems on the two sites are more similar than the court apparently recognizes.

Fourth, in *Power Ventures*, Power was gaining direct access to Facebook user accounts. That is, rather than scraping data made public by other users, Power gained direct access to user profiles by having those users provide their login information. As a result, Power was potentially able to access a range of information that users might not have otherwise made publicly available through choices on their privacy settings. Had hiQ been accessing LinkedIn's user accounts (which are password-protected) in the same way, the technical distinctions identified by the Ninth Circuit between the two cases would have vanished.

The fact that a CFAA defense did not carry the day for LinkedIn at this stage does not mean that LinkedIn will not be victorious on some other theory of law.

Fifth, and related to point four, it is important to recognize the difference between accessing the computer on which a website is hosted (which requires a trivially-obtained password for Facebook and no password for LinkedIn) and accessing a particular user's account (which on either site requires specific access granted not by the website but by the user). In *Power Ventures* Facebook took steps not only to block Power from accessing particular accounts but from its entire website, and the Ninth Circuit specifically held that user permission is irrelevant if the site owner wants to deny access to its computers. *Power Ventures,* 844 F.3d at 1068. The ease of access to Facebook's computers before Facebook instituted technical countermeasures made no apparent difference in the earlier case, and it is unclear why ease of access to LinkedIn makes a difference here.

Finally, the fact that a CFAA defense did not carry the day for LinkedIn at this stage does not mean that LinkedIn will not be victorious on some other theory of law. According to the Ninth Circuit, LinkedIn chose to limit its arguments on the preliminary injunction to its CFAA claim, but when the case proceeds below it will also be able to assert other legal claims. In particular, the Ninth Circuit stated without deciding that "it may be that web scraping exceeding the scope of the website owner's consent gives to a common law tort claim for trespass to chattels, at

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least when it causes demonstrable harm." *HiQ*, slip op. at 34 n.15. It also suggested that claims such as "copyright infringement, misappropriation, unjust enrichment, conversion, breach of contract, or breach of privacy, may also lie." *Id.* at 34-35. Such claims would likely be asserted to establish that the contractual relationships with which hiQ claims LinkedIn interfered were themselves premised on tortious conduct.

The Final Factor: Public Interest

The last issue considered by the Ninth Circuit was whether the preliminary injunction served the public interest. Both sides asserted a public interest in the free flow of information on the internet: hiQ argued that the injunction would open large data sets held by private companies for public use, while LinkedIn argued that the injunction would prevent it from taking countermeasures to block malicious attacks, requiring it to move publicly-facing information behind a password system.

The Court of Appeals found that while the public interest did favor thwarting denial-of-service attacks and other abuse, the district court's injunction allowed LinkedIn to engage in "technological self-help" against bad actors. *Id.* at 36-37. On the other hand, it agreed that "giving companies like LinkedIn free rein to decide, on any basis, who can collect and use data—data that the companies do not own, that they otherwise make publicly available to viewers, and that the companies themselves collect and use—risks the possible creation of information monopolies that would disserve the public interest." *Id.* at 36. Thus, the court held that the public interest favored the injunction issued by the district court.

There are good reasons to think very carefully about whether the CFAA should apply to the scraping of public-facing information and what "without authorization" means in this context. Unfortunately, this decision does not advance the discussion in a principled way.

But as with other aspects of this opinion, there is something a little off about this conclusion. We frequently allow "information monopolies" that are the product of a concerted effort by individuals or companies to amass data. This happens in academic research, the news media, competitive market analysis, and a host of other situations. We permit the holders of such data to choose when to share this information and with whom, and under what conditions; that control, in addition to being protected by the First Amendment, is the reward for putting in the work to collect the data.

True, once information has been released to the public there is little control (outside of limited legal contexts like the "hot news" doctrine) that the collector of the data can exercise over what others do with it. That, however, does not mean that the collector must allow members of the public to do what they like with the collector's own data storage systems. Contrary to the Ninth Circuit's suggestion, such a result would chill public access by dissuading the holder of a data

(Continued on page 39)

(Continued from page 38)

set from making it available in the first place. It is also irrelevant that the collector does not own the data itself; this is like arguing that the purchaser of a painting has no right to display it privately because she does not hold the copyright.

Conclusion

Overall this is a troubled opinion, and not only because of the odd procedural posture and limited scope of the ruling. (I'm still not sure what exactly a "serious question going to the merits" is, and how it differs from a likelihood of success besides granting the court a greater degree of plausible deniability for its conclusions.) There are also the puzzling conclusory statements (why is hiQ is not bound by the User Agreement?), the arguments not considered (did LinkedIn *really* waive argument on the other reasons hiQ's contracts might be illegal?), the superficial attention given to *Power Ventures* (how do you breeze past the key case in less than a page?), and the odd "information wants to be free" commentary that anchors the whole mess. This is a shame. There are good reasons to think very carefully about whether the CFAA should apply to the scraping of public-facing information and what "without authorization" means in this context. Unfortunately, this decision does not advance the discussion in a principled way.

Jeff Hermes is a Deputy Director at MLRC.

Pennsylvania Federal Court Dismisses Author's First Amendment Claim Against Media Outlets and Libraries

By Leslie Minora

Christopher Egli filed a federal lawsuit in Pennsylvania claiming that various media outlets and local libraries violated his First Amendment rights when they refused his requests to promote his book on their programs and at their facilities. In August, Judge Cynthia Rufe of the Eastern District of Pennsylvania dismissed Egli's case, ruling that the media defendants were not state actors and that none of the defendants had a First Amendment obligation to provide Egli with an outlet to promote his book. Egli v. Chester Cty. Library Sys., No. 18-4012, 2019 U.S. Dist. LEXIS 135174 (E.D. Pa. Aug. 12, 2019).

Background

In early 2018, Egli published a book about anti-Semitism that "'offer [ed] a critique of Judaism.'" *Id.* at *2. In an effort to promote his ideas and book, he sought to appear on media programs and thus asked to appear on programs produced by three media outlets, NPR, WHYY (a Philadelphia-based radio station that is an NPR member), and Pennsylvania Cable Network ("PCN," a private, non-profit cable television network that offers public affairs programming in Pennsylvania). He also contacted two local library systems, seeking to place his book in their libraries and speak to their patrons. Despite Egli's persistent efforts, all of the media and libraries declined his offers. NPR, WHYY, and PCN did not have him on their shows, and the libraries did not shelve his book and would not let him speak there. Egli claimed that the media and libraries refused his offers because they did not agree with his opinions.

The media defendants were not state actors and that none of the defendants had a First Amendment obligation to provide Egli with an outlet to promote his book.

Egli responded to these denials by filing suit on September 11, 2018. In his complaint, Egli asserted a First Amendment claim under 42 U.S.C. § 1983, as well as claims under the Civil Rights Act of 1964, the Cable Communications Policy Act of 1984, and the "Equality Act of 2010." He based all of his claims on the defendants' refusal to grant him access to their programming and facilities, arguing that their decisions constituted content-based viewpoint discrimination. Each of the defendants moved to dismiss his claims.

Court's Decision

On August 12, Judge Rufe granted the defendants' motions and dismissed Egli's claims with prejudice. With respect to the media defendants, the court held that NPR, WHYY,

(Continued on page 41)

(Continued from page 40)

and PCN were not state actors and therefore could not be held liable under § 1983. Judge Rufe rejected Egli's arguments that his allegations that the three private organizations receive government funding and are allegedly highly regulated transformed them into state actors. She noted that the Supreme Court and Third Circuit consistently have held that "private entities do not transform into state actors under § 1983 simply because they may receive extensive government regulation and funding." Indeed, Judge Rufe highlighted the recent Supreme Court decision in *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019), which again held that in the First Amendment context, "extensive government regulation does not transform a private entity into a state actor." *Egli*, 2019 U.S. Dist. LEXIS 135174, at *11.

In addition, the court ruled that even if the media defendants were state actors (which they are not), their conduct would not have violated Egli's First Amendment rights. It noted that "[t]he Supreme Court held over 20 years ago that in the context of government-owned and operated media, 'the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.'" *Id.* at *12 (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998)). The court held that in declining to broadcast Egli's views, the media defendants simply exercised the constitutionally broad editorial discretion afforded to both private and public media.

Judge Rufe rejected Egli's arguments that his allegations that the three private organizations receive government funding and are allegedly highly regulated transformed them into state actors.

Judge Rufe similarly rejected Egli's § 1983 claim against the library systems. She noted that under long-standing precedent, "[l]ibraries have broad discretion in determining the content of their collections," and Egli had not alleged that the libraries "had policies or customs that are inconsistent with this constitutionally permissible discretion or that target certain viewpoints." *Id.* at *8.

After concluding its analysis of the First Amendment claim, the court swiftly disposed of the other claims, holding that (1) Egli could not state a claim under the Civil Rights Act, (2) the Cable Communications Policy Act does provide a private cause of action, and (3) the Equality Act is a British law that has no application to Egli's lawsuit. Egli did not appeal the decision.

Defendants NPR and PCN were represented by Michael Berry and Leslie Minora, Ballard Spahr LLP, Philadelphia, PA; defendant WHYY was represented by Ronald A. Giller, Gordon & Rees LLP, Philadelphia, PA; defendant Montgomery County Library System was represented by John P. Gonzales and Monica L. Simmons, Marshall Dennehey Warner Coleman and Goggin, P.C., Philadelphia, PA; and defendant Chester County Library System was represented by Guy A. Donatelli, Lamb & McErlane, P.C., West Chester, PA. Plaintiff Christopher Egli proceeded pro se.

Ninth Circuit: First Amendment Protects Access to All Sounds of an Execution

But Not the Identities of the Drug Suppliers or Qualifications of Execution Team Members

By Collin P. Wedel

On September 17, 2019, the Ninth Circuit ruled the State of Arizona must allow witnesses to hear all sounds inside the death chamber during an execution, but stopped short of ordering it to disclose the identities of drug suppliers or the qualifications of execution team members. The three-judge panel issued its long-awaited opinion in a lawsuit filed by the First Amendment Coalition of Arizona, Inc., and several death-row prisoners about the public's right of access to executions, finding that the district court erred in dismissing part of the plaintiffs' First Amendment claims and remanding for further proceedings. First Amendment Coalition of Arizona, Inc. v. Ryan.

Background

The lawsuit's origins involve Arizona's botched execution of Joseph Wood, in July 2014. At 117 minutes, it remains the longest execution in United States history. In the lead-up to and aftermath of that execution, the public's search for information about how Arizona conducts its executions (and what, exactly, went wrong during Wood's execution) was stymied by a number of policies that Arizona enforced to keep key aspects of its executions secret.

The lawsuit's origins involve Arizona's botched execution of Joseph Wood, in July 2014. At 117 minutes, it remains the longest execution in United States history.

In particular, Arizona's policies meant that the public could not assess whether the drugs were effective or whether the individuals administering them were qualified to do so. Moreover, because the state turned off the microphones in the chamber during most the process, witnesses heard only brief snippets of audio from inside the execution chamber and could not agree on the severity of Wood's struggle. Some journalists and other witnesses reported that Wood was "snoring" and "coughing;" others said his breathing was akin to "a fish on shore gulping for air." At the time, Senator John McCain declared that the execution absolutely amounted to "torture."

As the plaintiffs allege in their complaint, the lack of transparency before, during, and after Wood's execution reflected a change in Arizona's approach toward access to execution-related information. Historically, the media and the public had greater access to executions themselves, as well as to the State's pre-execution planning, the various methods that the State contemplated using, and the qualifications of the persons involved. The importance of this

(Continued on page 43)

(Continued from page 42)

access was demonstrated in 1992 when a botched execution using lethal gas led to an Arizona voter referendum to end executions by gas.

Lethal injections, until very recently, were subject to the same degree of openness and transparency. When Arizona began executing prisoners by lethal injection, the public knew that the State obtained its drugs from reputable pharmaceutical companies. The public also had learned about Arizona's efforts to get drugs from disreputable sources, such as a pharmacist working inside a London driving school, and a "pharmacy" operating out of an office cubicle in Kolkata, India.

In the years before Wood's execution, however, Arizona began to conceal from public scrutiny critical information about executions. Arizona's growing secrecy came at the same time as several botched executions occurred around the country, several involving poorly sourced drugs and poorly trained team members.

Arizona's refusal to divulge information that was historically publicly available, coupled with concerns about the consequences to prisoners and the public of this information remaining hidden, led a group of prisoners, including Wood, to file the initial complaint in this action against the State, seeking access to the concealed information. As Wood's execution neared, he sought a preliminary injunction, which the district court denied. The Ninth Circuit reversed, granting a "conditional preliminary injunction, staying Wood's execution until the State of Arizona has provided him with (a) the name and provenance of the drugs to be used in the execution and (b) the qualifications of the medical personnel, subject to the restriction that the information provided will not give the means by which the specific individuals can be identified." The U.S. Supreme Court then vacated the stay in a summary opinion without explanation.

Arizona hid key details about Wood's execution from the public and prevented any understanding of what went wrong, what to expect from future executions, and whether Arizona should change its approach to capital punishment.

In seeking to vacate the stay, Arizona had emphasized that "nearly every detail about [Wood's] execution is provided to him and to the general public, including exactly what and how much lethal drugs will be used, how they will be administered, and the qualifications of those placing the IV lines to administer them." But those assurances proved to be untrue. As the Ninth Circuit found in *First Amendment Coalition*, Arizona hid key details about Wood's execution from the public and prevented any understanding of what went wrong, what to expect from future executions, and whether Arizona should change its approach to capital punishment.

After various revisions to Arizona's execution procedures following Wood's execution, the plaintiffs pressed their claim that Arizona violates the First Amendment by concealing from observation portions of executions that historically have been observable and to which public

(Continued on page 44)

(Continued from page 43)

access plays a significant positive role—including the source and quality of execution drugs, the qualifications of the persons administering them, and the sounds made in the execution chamber. The plaintiffs argued the unconstitutionality of that concealment under two separate theories—one, the public's First Amendment right to observe governmental proceedings, and two, the prisoners' First Amendment right to press their claims in court.

The state moved to dismiss the First Amendment portions of the complaint, and the district court granted that relief. After the plaintiffs' Eighth Amendment and Fourteenth Amendment Due Process claims in the case were settled in exchange for ground-breaking changes to Arizona's execution procedures, the plaintiffs appealed their First Amendment claims to the Ninth Circuit.

Ninth Circuit Decision

On appeal, the Ninth Circuit reversed in part and affirmed in part, holding that the public's First Amendment right to view executions encompassed the sounds of an execution, but not information about the drugs used or the qualifications of the people administering them. The court also affirmed the dismissal of the prisoners' access-to-courts claim.

On the issue of execution sounds, the court held that permitting the public to hear an execution "follows directly from the holding and reasoning of" the court's landmark decision in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Noting "historical examples in which the public and the press were able to attend [executions] with no barriers between the prisoners and the witnesses," the court held that history did not support Arizona's "cho[ice] to have witnesses view the events through a soundproof window." And acknowledging "historical examples in which media coverage of executions ha[d] sparked public debate about the appropriate method of execution in Arizona," the court agreed that "allowing witnesses to hear the sounds of the entire execution process will ensure informed and accurate media coverage of the event, which in turn will help the public determine whether executions in Arizona are being carried out in a humane and lawful manner."

The court agreed that "allowing witnesses to hear the sounds of the entire execution process will ensure informed and accurate media coverage of the event.

The court then held that Arizona's restrictions impermissibly burdened that right without a legitimate penological purpose. In reaching that holding, the court roundly rejected Arizona's claim that allowing witnesses to hear the sounds might "increase the risk of litigation," because "Arizona does not have a legitimate penological interest in hampering efforts to ensure the constitutionality of its executions." Instead, the court held, "[e]xecution witnesses need to be able to observe and report on the entire process so that the public can determine whether lethal injections are fairly and humanely administered."

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(Continued from page 44)

The court did not, however, reach the same conclusion with respect to plaintiffs' claims about access to drug and personnel qualification information. Reasoning that plaintiffs' requests to view formerly observable parts of an execution were akin to a demand to inspect "documents" in "minute detail," the court held that, because "information regarding execution drugs and personnel bears no resemblance to a transcript," such information is not encompassed by the First Amendment right of access. The court also affirmed dismissal of plaintiffs' claims that Arizona's concealment violated the prisoners' right to access courts.

Judge Berzon concurred in part and dissented in part. While acknowledging potential "First Amendment issues" with "the State's admission that its concealment of the sources of its lethal-injection drugs is motivated by an interest in suppressing lawful protest," Judge Berzon nonetheless agreed with the majority's treatment of the core First Amendment claims. But she dissented about the access-to-courts claims, observing that "Arizona is now deploying a range of strategies to obstruct any effort to understand the difficulties which plague its executions." That "active[] interfere[nce] with rights protected by the First Amendment," Judge Berzon explained, violated the prisoner's right of access to courts, and also "denies condemned inmates their right under the Fourteenth Amendment to procedural due process of law."

The court roundly rejected Arizona's claim that allowing witnesses to hear the sounds might "increase the risk of litigation."

Collin P. Wedel is an associate in Sidley Austin LLP's Supreme Court and Appellate practice in the firm's Los Angeles office, and is one of the counsel for the plaintiffs in this case. In addition to Mr. Wedel, the First Amendment Coalition of Arizona, Inc., and the prisoner plaintiffs are represented by Joshua Anderson, Alycia Degen, and Kate Roberts of Sidley Austin LLP (Los Angeles), and the prisoner plaintiffs are also represented by Dale Baich, an Assistant Federal Public Defender in Phoenix, Arizona. Defendants are represented by Oramel Skinner, Arizona's Solicitor General.

New Mexico Court Rules Settlement Agreements Held by Private Prison Medical Providers Are Public Records

By Gregory P. Williams

The New Mexico Court of Appeals held that a private prison medical service provider's settlement agreements were subject to the state's public records law, as there was "no distinction" between the provider and the state for purposes of public access to these particular records. New Mexico Foundation v. Corizon Health, (Sept. 16, 2019). In doing so, the Court affirmed a lower court which had ruled in favor of two newspapers and an open government organization in their lawsuit to obtain the settlement agreements.

The decision is the latest in a line of New Mexico cases finding that a private entity which, by contract, provides services traditionally carried out by state government is subject to the state's Inspection of Public Records Act ("IPRA"). The New Mexico Court of Appeals has consistently held over the last several years that public entities cannot, by means of contracting out services to third parties, evade their responsibility to provide public records relating to those services.

The decision is the latest in a line of New Mexico cases finding that a private entity which, by contract, provides services traditionally carried out by state government is subject to the state's Inspection of Public Records Act.

Corizon Health is a private prison medical services provider that provides contracted healthcare services around the country. In a series of contracts with the New Mexico Corrections Department (NMCD), Corizon Health committed to provide healthcare services in certain New Mexico correctional and detention centers. The state paid Corizon Health $37 million per year for these services. As a result of the medical care Corizon Health provided, certain inmates filed civil claims against it alleging instances of improper care and/or sexual assault. Corizon Health negotiated and settled at least 59 such claims.

The New Mexico Foundation for Open Government, the *Albuquerque Journal* and the *Santa Fe New Mexican* submitted requests for documents related to these settlements, pursuant to IPRA, to Corizon Health. Corizon Health provided a table listing settlement amounts from each claim and the correctional facility involved, but declined to produce the agreements themselves, citing confidentiality provisions in the agreements and also asserting that as a private entity, Corizon Health was not subject to IPRA. After the requestors filed suit under IPRA, the state district court ruled in their favor and entered a peremptory writ of mandamus compelling Corizon Health to produce the settlement agreements. Because some of the inmate claimants had sought to block disclosure of the agreements, the district court adopted an order adopting a negotiated exemplar agreement for purposes of redacting certain information contained in the settlement agreements. Corizon Health then appealed to the Court of Appeals.

(Continued on page 47)

(Continued from page 46)

The Court of Appeals affirmed. It first noted the broad scope of public records as defined by IPRA, which includes any records "used, created, received, maintained or held by or on behalf of" a public entity and relate to public business (NMSA 1978, Sec. 14-2-6(G)) and also acknowledged that IPRA declares it "to be the public policy of this state[] that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees" (NMSA 1978, Sec. 14-2-5). The Court had previously relied on this language to hold that in some situations, a private entity is subject to IPRA. The policy underlying these decisions, as noted by the Court in this case, is that allowing private entities who contract with a public entity to circumvent a citizen's right of access to records by contracting with a public entity to provide a public function would thwart the purpose of IPRA and mark a significant departure from New Mexico's presumption of openness at the heart of IPRA. The landmark case on this issue is *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶¶ 13-14, 287 P.3d 364, which enumerated factors by which the public nature of a private entity's provision of services is assessed in determining if the private entity is subject to IPRA.

The Court first held that if this type of record (a settlement agreement arising out of claims by an inmate against a public detention facility) was in the hands of a public entity, it would be a public record under IPRA. It then applied *Toomey* and determined that, notwithstanding that Corizon Health was not a public entity, it was subject to IPRA. The Court noted that 1) the settlement agreements were plainly created and maintained in relation to a public business, the medical care and personal safety of the inmates held by the NMCD; 2) the agreements involved civil compensation based upon flawed medical care or sexual abuse in New Mexico prisons; and 3) Corizon Health was acting on behalf of the NMCD by providing medical services to inmates at New Mexico detention facilities.

The decision included two side matters of interest to open government practitioners in New Mexico. First the Court rejected Corizon Health's argument that the district court's failure to review the settlement agreements in camera before granting the writ was an abuse of discretion. The Court stated that "[w]hile courts may utilize in camera review of documents in determining a question of responsiveness to an IPRA request, it is not required in every circumstance" and that there were sufficient facts in the record to support issuance of the writ. Second, the Court held that a writ of mandamus was an appropriate procedural vehicle. The Court noted that IPRA expressly authorizes issuance of a writ of mandamus for purposes of compelling the production of public records, and that even though mandamus is "an extraordinary remedy," it was appropriate in this case. Finally, the Court held that the district court had not abused its discretion in awarding attorneys fees to Petitioners' counsel at the rate of $400 per hour.

Gregory P. Williams is a media attorney with Peifer, Hanson & Mullins, P.A., in Albuquerque, New Mexico, and an officer and former president of the New Mexico Foundation for Open Government. Daniel Yohalem and Katherine Murray of Santa Fe, New Mexico, represented the plaintiffs.

Illinois Appellate Court Orders Chicago PD to Disclose Records Related to Fatal Shooting of a Minor

By Michael W. Shapiro

On September 5, 2019, an appellate court in Illinois clarified that records relating to police misconduct could not be kept private under the state's public records law on account of the records mentioning a minor with a criminal history. *WMAQ TV v. Chicago Police Dept.*

The Chicago Police Department ("CPD") had interpreted the Juvenile Court Act ("JCA")—which restricts disclosure of law enforcement records "that relate to a minor who has been investigated, arrested or taken into custody before his or her 18th birthday"—to serve as an exemption to the state's Freedom of Information Act ("FOIA"). Thus, potentially meaning the JCA provision would exempt from disclosure records of an investigation of police misconduct under FOIA if it made any mention of a child or teen who was a crime victim or witness. CPD made these arguments in response to a FOIA Request filed by NBCUniversal-owned station WMAQ seeking police reports related to a 2014 fatal shooting of a 16-year-old boy by police officers. The Illinois Appellate Court's Chicago-based First District rejected the CPD's interpretation as overbroad and likely to produce absurd results.

The Illinois Appellate Court's Chicago-based First District rejected the CPD's interpretation as overbroad and likely to produce absurd results.

Background

In January 2016, WMAQ-TV sought from CPD "police reports ... filed in the police shooting" of 16-year-old Warren Robinson, under the Illinois FOIA. Robinson had been shot 16 times after police officers said he pointed a gun at them while lying under a car in Southwest Chicago.

CPD denied the request on grounds that the Juvenile Court Act ("JCA") restricts disclosure of law enforcement records "that relate to a minor who has been investigated, arrested or taken into custody." Under such an interpretation, the law in turn triggered the state FOIA's exemption for "[i]nformation specifically prohibited from disclosure by federal or State law." Thus, even though CPD possessed records about its investigation of officer misconduct in connection to the shooting, those records also "related to" a minor who had been investigated by police so all records were withheld. According to CPD, WMAQ would have to get a juvenile court order to obtain the records.

WMAQ initially sought review of the denial from the Office of Attorney General's Public Access Counselor ("PAC"). The PAC determined, in a non-binding letter, that the police

(Continued on page 49)

(Continued from page 48)

reports sought by WMAQ fell into two categories. One set of reports described a CPD investigation into whether the minor committed a criminal offense. A second set of reports detailed the investigation into police officer misconduct and whether the minor's death was a justifiable homicide. This second set of reports referred to the minor as a "victim," not a criminal "suspect." The PAC determined that the first set of reports were confidential under of the JCA and should be withheld under FOIA. However, it found that the reports investigating police conduct must be disclosed, subject only to the redaction of certain personal information.

The CPD maintained its position, however, and withheld all of the reports. As a result, in July 2017, WMAQ sued CPD, seeking disclosure of all the reports. Thereafter, WMAQ filed a motion for partial summary judgment and CPD filed a cross-motion for summary judgment.

The circuit court held, consistent with the PAC determination letter, that CPD violated FOIA by withholding the reports regarding the investigation of police misconduct. In June 2018, the court entered a final order granting partial summary judgment for WMAQ and staying production of the records pending the outcome of CPD's appeal.

First District Decision

The First District's decision turned on the definition of "relate" in the JCA. The CPD argued for a literal reading of the word such that the JCA prohibited disclosure of all law enforcement records involving juveniles with some history of delinquency or alleged criminal conduct, except in instances where the party seeking such information was able to get an order from the juvenile court. Such an interpretation, CPD argued, would achieve the JCA's goal of protecting the privacy of juveniles by creating a bright-line, do-not-disclose rule for the treatment of juvenile records.

The Court stressed, however, that to the extent the JCA is read literally and broadly, it conflicts with the public policy of FOIA that "all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees." 5 ILCS 140/1.

To guide its interpretation of the JCA, the Court also consulted legislation enacted in December 2018, adding to the JCA a definition of a juvenile law enforcement record to include "records of arrest, station adjustments, fingerprints, probation adjustments, the issuance of a notice to appear, or any other records or documents maintained by any law enforcement agency relating to a minor suspected of committing an offense, and records maintained by a law enforcement agency that identifies a juvenile as a suspect in committing an offense, *but does not include records identifying a juvenile as a victim, witness, or missing juvenile* ..." 704 ILCS 405/1-3 (8.2).

While the court did not give the amendment to the JCA retroactive effect, it nevertheless held that "when viewed within the purpose of the [JCA] and the real-world activity that the

(Continued on page 50)

(Continued from page 49)

confidentiality provisions . . . were intended to regulate, CPD's interpretation—that all law enforcement records that involve in any manner a minor who has been investigated, arrested, or taken into custody may not be disclosed to unauthorized parties absent an order from the juvenile court—would produce absurd results."

Accordingly, the Court rejected the CPD interpretation and affirmed the circuit court decision to require production of the police reports relating to the investigation into police misconduct. The records have subsequently been produced to WMAQ.

Michael W. Shapiro is a Law Clerk in NBCUniversal's News Group. WMAQ was represented by Matthew Topic, Joshua Burday, and Merrick Wayne of Loevy & Loevy. CPD was represented by Edward N. Skiskel, Corporation Counsel of Chicago and Benna Ruth Solomon, Myriam Zreczny Kasper, and Jonathan D. Byrer, assistant Corporation Counsel.

MLRC Fall Events

November 6

2:30-3:45 p.m.
Open Board Meeting
Join the MLRC Board of Directors and staff for reports of 2019's accomplishments and the year ahead, plus elections and open discussion

4:00-5:45 p.m.
Forum: The Possibilities and Perils of Journalism Tech: Automation, AI and Disinformation in the Newsroom
Click to RSVP

6:00 p.m.
Dinner: It's Different for Us: Women Journalists on Their Stories from the Campaign Trail
Top female reporters discussing the advantages and disadvantages of being a woman journalist – or candidate – in Campaign '20

All events above at the Grand Hyatt, New York, NY

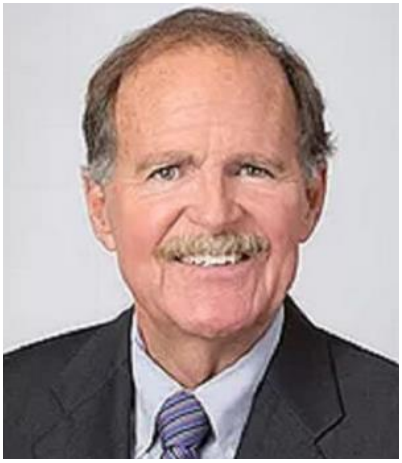
November 7

12:00-2:00 p.m.
Defense Counsel Section Lunch Meeting
Carmines, Times Square
Reports on 2019 activities and plans for the new year

Letter to a Newer Media Lawyer

By Tom Kelley

I am honored by the invitation to contribute to this series but need to begin with a caveat. My target audience for this letter will be lawyers who practice outside the coastal U.S. major media markets. I happen to have lived and worked in Denver, but the challenges I address in what follows are faced by aspiring media lawyers in all sizes of cities and towns in the hinterland. Most of these markets have considerably less need and/or resources for legal work involving media content and newsgathering issues than in the coastal nerve centers.



Some may wonder how a lawyer who decides to start and remain in a place like Denver comes by the kind of aspiration for first amendment media work that is strong enough to make it happen. After growing up in suburban Chicago, attending college in western Massachusetts, then law school in Colorado, I had seen enough to know that the Rockies and its outdoor life were where I wanted to live. I had no background in journalism but left law school with a fascination with civil rights litigation tempered by an appreciation for how difficult it is to make that kind of work pay the bills. I also had 1) a short attention span and thus an appetite for work that was both interesting and passion stirring, and 2) a bit of a problem with authority that drew me to the defense of critics of government and of unpopular speakers.

As luck would have it, my involvement in local politics landed me a clerking job with a boutique firm that represented a good share of the media in the Denver metro area. I quickly became consumed by the challenge of inheriting that work and building the practice throughout the region, with the hope of eventually attracting and gaining the confidence of national media when they encountered legal problems in the mountain states. To an extent, I let my passion for that outcome distract me from pursuing more immediately promising career paths, something most young lawyers are unwilling to do, at least not for long.

What does one do when one does not have such luck at the start? Marketing yourself to, and then within a law firm with an existing media practice is one but not the only way to get started.

It is difficult to draw media clients without first developing meaningful litigation expertise. Once you gain credible courtroom experience, start looking for the client who will give you a chance, perhaps with the aid of a reference from a non-media client who is happy with your work. Win a case for that new client. Submit an article on the victory to the MediaLawLetter. If you are reluctant to toot your own horn, get someone else in your office to help you write and appear as author. But at the article's end, per MLRC protocol, name yourself as lead defense counsel. If the court has issued a written decision you are happy with, submit it to Media Law Reporter.

(Continued on page 52)

(Continued from page 51)

Continue to pick up steam. Focus on your local market with the long-term goal of becoming the go-to guy, the one (or, for starters, one of them) deemed knowledgeable, respected and trusted by the media community, the bar, and local judges in your specialty. As that status matures, you will become more likely to be chosen to serve as local counsel for national media, to represent local or national media consortia on access issues, and, eventually, to take the lead on cases alleging content torts of light to moderate risk and exposure. Being chosen to lead in a bet-the-company case is not out the question once you reach a very high level of skill, experience, and reputation.

Here is some of what has worked for me and others in the same position and may help you whether or not you have joined an existing media practice:

- Establish a relationship with your local and, if possible, state press association and/or broadcasters association. If they already have counsel, do not begin by suggesting replacement but instead let both counsel and the association know of your willingness to assist if needed and your willingness to do pro bono work in the form of amicus briefs, legislative testimony, seminars, and representation of needy reporters and small publishers. Lawyers who are typically reluctant to share client work tend to be more generous when the engagement is no-pay or low-pay.

- In many media markets, TV stations and sometimes print media pool efforts and establish a rotation among lawyers representing media in the pool to file and process requests for camera coverage of court proceedings. Because this is often done for a flat fee that is a "loss leader," some such groups welcome lawyers who do not represent a pool member to join the rotation. Try to get yourself involved.

- Make your availability to do pro bono work for impecunious journalists known to Reporters' Committee for Freedom of the Press.

- Join the ABA Forum on Communications Law and persuade your firm to join MLRC. The latter provides the best opportunities for young lawyers to get involved in its vast array of committee work and to meet folks who are decision makers in selection of counsel.

- Publish. The Forum's publication, The Communications Lawyer, is always looking for thoughtful articles on cutting edge issues, and the MLRC's MediaLawLetter, Bulletins and various other special publications offer the same opportunity.

- Look for speaking opportunities at the conferences of these organizations and others.

- Pay a visit to the claims departments of the insurance carriers who insure media perils in your market. They will be interested in your litigation skills, your knowledge of substantive media law, and your willingness to meet their expectations on hourly rates,

(Continued on page 53)

(Continued from page 52)

litigation control, and billing practices. In today's climate, it would be an understatement to suggest that hourly rates are very important in your effort to persuade the company to give you a try. Before you travel, prepare by talking to other lawyers who have experience with the claims department you are visiting.

- To be ready for what an insurance carrier or other client may want to send you, stay up to date on other but related areas of practice, such as copyright, trademark, trade dress, misappropriation, idea theft, and unfair trade practices litigation. Do not let yourself get behind on the technology aspects of your relevant areas of law, as well as those available to support your work.

- Find a niche by which to set yourself apart from the throng. Although the territory of writing of major treatises on bread and butter topics such as libel and privacy has been pretty well staked out, useful treatises and articles have been produced by a second generation of authors who have written about more focused areas e.g., newsgathering, anti-SLAPP litigation, and applications of the law on the internet. I decided to go with my experience with jury trials of media cases, preparing a biennial report and analysis of recent trials and a panel (which became known as "Trial Tales") for the MLRC's Media Law Conference convened in D.C./suburban Virginia every other year. This led to publication of articles on the same subject in the Communications Lawyer, MLRC bulletins, and other industry read journals.

- Be willing to take risks, particularly in taking hard cases that involve cutting edge issues and facts capable of producing a wellhead explosion at verdict. For me, examples included: *Pring v. Penthouse International Ltd*. (satirical depiction of Miss America contestant whose real talent was the art of fellatio producing levitation); *Cramlet v. Multimedia Program Productions* (suit by mother of child who was the victim of a kidnapping by the non-custodial father against the Donahue on Today show for presenting the father on-air to air his views while program staff had custody of the child*).* *Religious Technology Corp. v. Factnet* (suit brought by the Church of Scientology against former Scientologists who maintained a web presence that was critical of the "Church" for misappropriation of trade secrets and copyright infringement (note: don't take a case brought by this plaintiff unless you have bench strength or you will be overwhelmed by paper and depositions.)); *Rice v. Paladin Enterprises* (defending publisher of book of instructions on contract murder in suit by survivors of victims murdered by a reader of the manual). These cases produced both successes and reversals of fortune in drawn-out litigation, and all became nationally celebrated. Only one (Pring) resulted in ultimate victory, another (Religious Technology Corp.) in a de minimus damage award. The remaining two eventually ended in settlements. But the resulting notoriety opened doors that led to a full-time media law practice.

(Continued on page 54)

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- I should reemphasize a point made earlier. If you take on any media tort or related litigation, you will need to be equipped with the experience and skill necessary to ably handle a jury trial. In the typical litigation venued in Denver and similar markets, clients and/or insurers are not excited about spending big money on jury consultants, mock trials, shadow juries, and the like, so you will need to learn the craft of jury advocacy and gain the instincts of a trial lawyer. Because such trials in media content cases have become increasingly rare, it is virtually impossible to derive the necessary experience from a media practice. Fortunately, for a media specialist in the hinterland, it is unlikely your media practice will book all or even a majority of your card. Fill out as much of the rest as you can with trial practice in other fields. If you feel light on such experience, establish a relationship with another lawyer (in your firm if possible) who has been around the track frequently and recently.

- Never forget that our media clients are litigation savvy and sophisticated consumers of legal services not only within in-house legal departments but also at the management level. Never assume you know more than they do, nor feel that anything short of your very best will satisfy their expectations, nor decide that your work is as close as it can get to perfect. It never is.

- Of course, all of this assumes a willingness to spend countless non-billable hours boning up on the treatises and the case law, working on billable tasks for many more hours than you can bill, networking, and all forms of non-billable work including writing, free seminars and pro bono work. I would not try it if you demand ample leisure time and expect real challenges if you want a reasonable work/life balance.

When I began my quest in the early 1970s, the most a lawyer in the hinterland market could hope for was a part-time (but very exciting and fulfilling) specialty occupying only a small part of one's practice. As I look at the Denver Market now, it seems we have gone back to those days and then some, due the demise of the media industry's business model and the near disappearance of the libel case. But there is still a need for that specialty in every community, for those willing to make the sacrifices that go with the territory. For those who are, I, as a recent retiree from such a practice, can assure you that your work will be accompanied by a strong sense of fulfillment.

Tom Kelley is Special Counsel at Fenno Law. Mr. Kelley was previously with the national media and entertainment law practice of Ballard Spahr; and before that was a partner at Levine Sullivan Koch & Schultz, which merged with Ballard Spahr in 2017.

10 Questions to a Media Lawyer

Tom Burke

Tom Burke is a Partner & Chair of the Pro Bono & Social Impact Committee at Davis Wright Tremaine in San Francisco.

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

As a senior in the final two weeks of college, I was working as a director of evening talk shows at KOY radio in Phoenix when I had the good fortune of meeting a man who was appearing as a guest. The man asked me what I planned to do when I graduated. I told him that I really didn't know but that I was a life-time news junkie and competitive high school and college debater. This man replied: "So you like the news and love to argue. You should have my job! I'm a lawyer who represents journalists." And with that, I've never looked back. I'm forever grateful for meeting Paul Eckstein of Brown & Bain, P.C. in Phoenix, who later hired me as a paralegal. I spent an incredible year at Brown & Bain working on several interesting libel suits with an extraordinary group of lawyers, including David Bodney.

Mine was the best job any high school kid could have – reading the local and national news on live radio and playing my friends' requests for obscure songs off rock albums.

My first job out of law school was as an associate with a 100-person litigation firm in Oakland (Crosby, Heafey, Roach & May, since closed). The firm handled the legal work for Bob Maynard's *Oakland Tribune* along with several other East Bay daily newspapers and the occasional national media client. Under the mentorship of John Carne, I worked on every kind of access motion, subpoena matters and handled dozens of motions for summary judgment in libel cases (in the days before California's anti-SLAPP statute).

Before law, growing up in a small town in rural Nebraska, at my mom's suggestion, I studied for and took the required one-day test to earn an FCC Third Class Radio License to operate a radio transmitter – then a requirement to get a job. I had my FCC license before I had a license to drive! Mine was the best job any high school kid could have – reading the local and national news on live radio and playing my friends' requests for obscure songs off rock albums.

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(Continued from page 55)

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

I am so incredibly grateful to be paid to do work that I absolutely love. I've had this feeling from the day I started and it has continued with (with the same intensity) for the past 30 years. I remain an idealist. I passionately believe in the power of the First Amendment and in the importance of informing the public about what its government is up to. I also feel honored to work every day with dozens of talented colleagues and clients who feel the same way.

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

There are many to choose from! (I've long championed creating a CLE of senior lawyers willing to speak candidly about their mistakes, not only to educate newer lawyers but to remind everyone that mistakes are human nature.) I once left (in the pocket of an airplane seat) records that were marked confidential from a public records act case that I was handling. I immediately reported the situation to my firm. The airline told me that the documents had been tossed into the garbage. The same records later became public when we won the case, so it all worked out, but I've never again traveled carrying confidential records.

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

I've argued several prominent cases (including several anti-SLAPP cases) in the California Supreme Court and Ninth Circuit Court of Appeals and also represented a national media coalition seeking access to livestreaming of the Prop. 8 trial in San Francisco (a matter that went from the District Court and through the U.S. Supreme Court in a single week (*Hollingsworth v. Perry*, 558 U.S. 183 (2010)). But the case I remain the proudest of arose in my hometown in Nebraska. The local historical society asked for help to learn the names of what it believed were a few hundred individuals buried in graves marked only with numbers in a cemetery run by the long-closed state mental hospital. The State was adamant that the names of the individuals should be kept private *forever* because it would be "embarrassing" for families if their relatives were associated with a state mental hospital.

The Nebraska Attorney General issued an opinion against disclosure of the names, citing to HIPAA as well as Nebraska law. After losing at a trial, we filed an appeal in what turned out to be only the second public records act appeal in the state's history. The Nebraska Supreme Court announced it would hear the case. In a unanimous ruling, the Supreme Court held the names should be public. *State Ex Rel. Adams County Historical Society v. Kinyoun*, 277 Neb. 749, 765 N.W.2d 212 (2009). In the end, the historical society discovered that 1,600 individuals were buried anonymously in the cemetery. They were buried there because they were mentally ill (in a period decades before prescription drugs were available), were poor, elderly, or had

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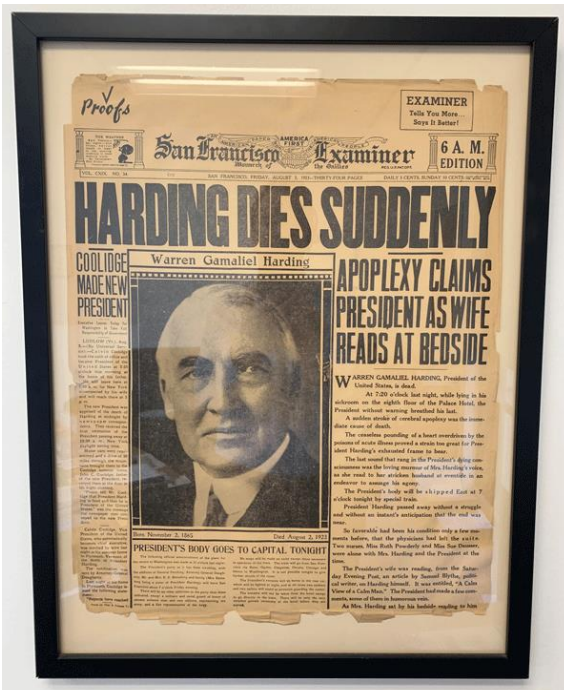

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been abandoned by their families for various reasons (or all of the above). To this day, the historical society still hears from families that have been "reunited" with their lost relatives.

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

Two items – one is the "proof" of the front page of the *San Francisco Examiner* announcing the death (by "apoplexy," so it was reported) of President Warren Harding. He died on August 2, 1923, in the Palace Hotel in San Francisco, just a few blocks from my office. I enjoy history and have long represented the Hearst Corp. so this is a weird piece of San Francisco newspaper history. Aside from various scandals, Harding is often remembered as the first newspaper publisher to become a U.S. President. I also use a device, made of copper, on my desk. It was willed to me by a distant relative years ago. My family loved to speculate how the device was originally used. Since I received it from the estate of a physician, the most creative guess was that it was a small hammer used to dissect a human skull. Then the Internet came along and killed such imagination – turns out it's just an old-fashioned beer bottle opener. It makes a great paperweight.

6. Favorite sources for news – legal or otherwise?

I read broadly, daily. I'm reading the *New York Times, Washington Post, Los Angeles Times, San Francisco Chronicle* throughout the day. I closely follow the work of the Center for Investigative Reporting. I've been a loyal subscriber to *The New Yorker* for decades. I also listen to NPR programming for hours daily. I can't imagine being a media lawyer without being constantly immersed in the news.

(Continued on page 58)

(Continued from page 57)

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

I frequently discourage people from going to law school if I think they are going for the wrong reasons, e.g., because it's "so exciting" or just to make money. But otherwise, I foresee a future that requires creative thinkers and problem solvers.

8. Favorite fictional lawyer?

I really don't have one.

9. What issue keeps you up at night?

I frequently work on my most difficult cases in my head at night. I wish that I didn't. In particular, every time that I have a journalist's subpoena matter in which the client may go to jail on principle, I never sleep well.

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

I genuinely don't have any idea – again, I've found my calling.