Hot Issues in Libel and Privacy

Friday, February 1, 2019 | 11:00 am to 12:00 pm &
Saturday, February 2, 2019 | 8:30 am to 9:30 am

Program Description

Panelists will lead you through an examination of recent high-profile trials, settlements, and appeals. We will review the current state of the law regarding opinion, libel-by-implication, and the reporting of third-party allegations; libel and the right of publicity in fiction and docudrama; how the internet and social media are affecting courts’ analysis of public figure status, defamatory meaning, and other elements of libel law; and the increase in politically-charged defamation cases.

Lead Facilitator

Marc Fuller, Vinson & Elkins | Dallas, TX

Facilitators

- Stephanie Abrutyn, Home Box Office, Inc. | New York, NY
- Chadwick James, Sheppard Mullin | Palo Alto, CA
- Herschel Fink, Jaffe Raitt Heuer & Weiss | Detroit, MI
- John C. Greiner, Graydon | Cincinnati, OH
- Robert P. Latham, Jackson Walker | Dallas, TX
- Stephen Schaefer, Mutual Insurance | Columbia, MD
- Tami Sims, Katten Muchin Rosenman | Los Angeles, CA
- Leita Walker, Faegre Baker Daniels | Minneapolis, MN

Program Materials

Libel and Privacy Cases Decided in 2018 and Closely Watched Pending Cases
HOT ISSUES IN LIBEL AND PRIVACY

FACILITATORS:

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The following is a summary of some of the most important libel and privacy cases decided in 2018 and some of the most closely-watched pending cases.


   In 2012, Ava Bird approached the Hassell Law Group, owed by Dawn Hassell, for representation in a personal injury case. Bird entered into a representation agreement, but after communication difficulties, the Hassell Law Group withdrew from representation. Shortly thereafter, two one-star reviews (out of five stars) of the Hassell Law Group appeared on Yelp. The review contained comments such as “Steer clear of this law firm!” Hassell filed suit against Bird for the reviews, asserting claims for *inter alia* libel and false light. Hassell obtained a default judgment and an order for Bird to remove each of the defamatory reviews from Yelp.

   Yelp was not named as a defendant in the underlying lawsuit. It became involved only after Hassell served it with the judgment and removal order. The court of appeal rejected Yelp’s argument that the order was invalid under the Communications Decency Act of 1996, 47 U.S.C. § 230 (“section 230”). The Supreme Court reversed in a plurality opinion.

   Section 230(c)(1) provides that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Additionally, section 230(e)(3) provides in relevant part, “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

   The Supreme Court explained that section 230 has been consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source. The Court noted that Yelp could have sought section 230 immunity had plaintiffs originally named it as a defendant in the lawsuit. In the Court’s view, the removal order ultimately treats Yelp as the publisher or speaker of information under section
230(c)(1) because Yelp is being held to account for its decision to publish the challenged reviews. Accordingly, the Court held that Yelp is entitled to immunity under section 230 despite the fact that it was not a defendant in the case. Thus, the Court reversed the judgment of the Court of Appeal, instructed that Yelp’s motion to set aside the order and vacate the judgment should have been granted, and remanded for further appropriate proceedings.

On October 1, 2018, Hassell filed a petition for writ of certiorari with the U.S. Supreme Court. The case is currently styled Hassell v. Yelp, No. 18-506.


In June 2017, 101-year-old actress Olivia de Havilland filed a lawsuit in California state court arising from her portrayal by Catherine Zeta-Jones in the FX television series Feud: Bette and Joan, a docudrama about the rivalry between Bette Davis and Joan Crawford. De Havilland’s complaint asserted right of publicity, false light, and unjust enrichment claims based on an imagined interview of her used to narrate the series. De Havilland alleged that the series created the impression that she was an ill-mannered “hypocrite, selling gossip in order to promote herself.”

The trial court denied FX’s motion to strike under California’s anti-SLAPP law in September 2017, holding that de Havilland had established a probability of prevailing on the merits of her false light and right of publicity claims. In March 2018, the court of appeal reversed the trial court’s ruling, finding that de Havilland failed to establish the requisite minimal merit for any of her claims (de Havilland conceded on appeal that the first prong of the anti-SLAPP analysis was met).

On the right of publicity claim, the court of appeal held that, even assuming that a docudrama is a use of a person’s name and likeness under Civil Code Section 3344, under Guglielmi v. Spelling-Goldberg Productions, 603 P.2d 454 (Cal. 1979), the First Amendment
protects taking the stories of real individuals and transforming them into art. The court also held that producers of films and television programs may enter into consent agreements with individuals who will be portrayed in their works for a variety of reasons, such as gaining access to a person’s recollections, but the First Amendment does not require such agreements.

The court of appeal also found that FX’s use was transformative under Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001). In so holding, the court noted that the transformative test under Comedy III makes sense when applied to products and merchandise, but that courts have struggled to apply it to film, plays, and television programs. For such creative uses, there is a tension between wanting to make a character such as de Havilland as real as possible, while at the same time, using the celebrity’s likeness as raw material for an original work. Applying Comedy III, the court of appeal held that Feud was a nearly 8-hour docudrama that told the story of competition between Hollywood’s leading ladies, which constituted significant expression. De Havilland’s character was a small part of that expression, and the marketability and economic value came from the creativity, skill, and reputation of Feud’s creators and actors, not de Havilland.

On the false light claim, the court held that, assuming that the docudrama could be considered factual, the alleged vulgar remarks were either not highly offensive or were substantially true given their similarity to remarks de Havilland had made in prior interviews. The court emphasized that a jury cannot be permitted to dissect the creative process to determine what was necessary to achieve the expressive work’s final product.

De Havilland filed a petition for review with the California Supreme Court, which was denied on July 11, 2018. She filed a petition for writ of certiorari with the U.S. Supreme Court on October 5, 2018.

The Texas Supreme Court issued a decision that will likely guide lower courts’ consideration of libel-by-implication claims. On June 20, 2010, *The Dallas Morning News* published a column entitled, “Shrouding Suicide Leaves its Danger Unaddressed.” The column quoted from the paid obituary for a high school student who had died by a self-inflicted gunshot wound. The column, which did not refer to the student or his family by name, stated that the obituary had left out the fact that the student’s death “turned out to have been a suicide.” The column then stated generally that secrecy surrounding suicides “only puts more lives at risk.”

According to the student’s parents, however, their son’s death had not been a suicide. The self-inflicted gunshot came just hours after their son had been involved in a serious car accident, and he had been reported by a friend to have been acting erratically just before he shot himself. The parents sued the newspaper for libel and related claims, alleging that the column falsely implied that they had hidden that their son was suffering from mental illness. The paper moved for summary judgment, which the trial court granted, but the Dallas Court of Appeals reversed, holding that a reasonable reader could understand the column’s gist as accusing the parents of deceptively reporting the circumstances of their son’s death in an effort to shield themselves from criticism that their son was mentally ill and they failed to intervene.

The Texas Supreme Court began its analysis by attempting a taxonomy of defamation claims, borrowing from established doctrines and adding new terminology. The Court stated that defamation law can be divided into two broad categories: “textual defamation” and “extrinsic defamation.” The former “refers to the common-law concept of defamation per se, that is, defamation that arises from the statement’s text without reference to any extrinsic evidence.” The latter “refers to the common-law concept of defamation per quod, which is to say,
defamation that *does* require reference to extrinsic circumstances.” (Nevertheless, these terms do not fully supplant the doctrines of defamation per se and defamation per quod, which remain relevant in the context of presumed damages.)

The Court subdivided the category of textual defamation into “extrinsic defamation” and “defamation by implication.” It explained that extrinsic defamation cases involve meanings that are based on and aligned with the literal language of the publication, whereas implication claims involve meanings that are implicit in the text. Those implied meanings can arise from the publication as a whole or from distinct parts of the publication. In determining meaning in the context of an implication claim, the Court addressed a lingering dispute in its prior cases regarding whether the correct “ordinary reader” standard was whether the claimed gist was a meaning that the hypothetical reasonable reader “*could*” or “*would*” understand. The Court stated that neither “could” nor “would” was entirely correct, as the former improperly credited all potential meanings while the latter credited only a single meaning. Rather than focus on the “could” vs. “would” dispute, courts should look to whether the claimed meaning was “among the implications that the objectively reasonable reader would draw.” This is a question of law unless the meaning is ambiguous.

The Court then considered whether the First Amendment provided additional protections to publishers in libel-by-implication cases. Concluding that it did, the Court held that the plaintiff must make an affirmative showing, based on publication itself, “that the defendant *intends* or *endorses* the defamatory inference[.]” Unlike the actual malice inquiry into intent, this inquiry “is objective, not subjective.” And the Court stated that certain questions will aid this inquiry, such as: (i) Does the publication clearly disclose the factual bases for the alleged meaning?; (ii) Does the alleged implication align or conflict with the publication’s explicit
statements?: (iii) Does the publication accuse the plaintiff in a defamatory manner as opposed to simply reciting that other have accused the plaintiff of the same conduct?; and (iv) Does the publication specifically include facts that negate the alleged implication?

Applying this framework to the *Dallas Morning News* column at issue, the Court held that the only meaning supported by the column’s literal text was that the parents’ obituary was deceptive. The court held that this meaning was an opinion, but nevertheless proceeded to analyze whether it was true. The court held that the meaning was true, noting that the obituary “leads readers to believe something that is not true. It states that [their son] died from injuries arising out of a car accident when in fact [he] committed suicide.”

In a concurrence joined by two other justices, Justice Boyd lamented the majority’s analysis as needlessly complicated and predicted that it would inject more confusion into an area of law already noted for its complexity. In place of that analysis, Justice Boyd would have asked simply whether the column was reasonably susceptible of defamatory meaning. Concluding that the only defamatory implication was an opinion—that the parents published a deceptive obituary—Justice Boyd would have rendered summary judgment in favor of the newspaper without considering whether the column was substantially true.

4. **Trump Dossier Cases**

- **Gubarev v. Buzzfeed Inc., No. 17-cv-60426 (S.D. Fla.)**

On January 10, 2017, Buzzfeed published a 35-page dossier by a former British intelligence agent that contained unverified allegations that the Russian government had been supporting then-President-elect Trump and had obtained compromising information about him (the “Dossier”). Buzzfeed’s publication came after CNN reported that President Obama and Trump had been presented with a two-page synopsis of the Dossier in classified briefings. The Dossier, which was prepared at the behest of political opponents of Trump, had been
disseminated among journalists for months but not published prior to that point. In the online article accompanying the dossier, Buzzfeed said that it was publishing the full document “so that Americans can make up their own minds about allegations about the president-elect that have circulated at the highest levels of the US government.” Buzzfeed noted that the report was “not just unconfirmed: It includes some clear errors.”

One paragraph of the Dossier included allegations that Russian-born tech entrepreneur Aleksej Gubarev and his companies XBT Holding and Webzilla had been involved in hacking the Democratic Party. Following Buzzfeed’s publication of the Dossier, Gubarev and the companies filed a defamation suit against Buzzfeed and its editor-in-chief, Ben Smith, in Florida state court. Buzzfeed and Smith removed the case to the U.S. District Court for the Southern District of Florida.

On June 4, 2018, the district court denied Plaintiffs’ motion for partial judgment on the pleadings with respect to Defendants’ affirmative defenses of the fair report privilege and the neutral report privilege. (Dkt No. 169.) The district court began with a choice-of-law analysis and determined that New York law should apply over Florida law. The fair report privilege is codified in New York Civil Rights Law section 74, which provides that a civil action cannot be maintained for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceedings, or for any heading of the report which is a fair and true headnote of the statement published. The district court found that the Buzzfeed article accurately reproduced the Dossier, albeit with some redactions. The issues were thus whether an official proceeding concerning the Dossier was underway when the article was published and whether an ordinary reader would have understood that the Dossier was the subject of official action.
The district court determined that the term “official proceeding” is broadly interpreted to apply to any official action and covers a confidential briefing to the President and the President-elect by senior intelligence directors, as well as an FBI investigation into the truth of the Dossier’s allegations. Next, the district court determined that the article itself would not permit an ordinary reader to understand that the Dossier was the subject of classified briefings or an FBI investigation. However, the district court found that an ordinary reader would conclude that the Dossier was subject to official action because the article conspicuously cited to and hyperlinked to a CNN article that mentioned the official actions.

The district court thus denied Plaintiff’s motion for judgment on the pleadings on the fair report privilege. The district court noted, however, that the application of the privilege turns on whether facts essential to its application are undisputed. For example, that the official actions in the CNN article actually occurred. These facts are to be borne out during discovery.

The district court granted Plaintiff’s motion with respect to the neutral report privilege. This privilege was articulated in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977) and applies when the press publishes an accurate and disinterested report, of serious charge against a public figure, by a responsible, prominent organization, and does not espouse or endorse the organization’s statement. The district court found that New York does not recognize the neutral report privilege, as New York courts have roundly rejected *Edwards* as contrary to the policy underpinning the fair report privilege and Supreme Court precedent. The district court likewise held that there is no neutral report privilege under the United States’ Constitution and declined to adopt *Edwards* as a matter of first impression.
Russian businessmen Mikhail Fridman, Peter Aven, and German Khan were named in the Dossier and filed a defamation lawsuit against Buzzfeed, Inc., alleging that the Dossier falsely stated that they were engaged in criminal acts at the behest of the Russian government. On May 7, 2018, the court denied in part and granted in part Plaintiffs’ motion to dismiss Defendants’ affirmative defenses of the fair report privilege, neutral report privilege, and public figure defense.

The court denied Plaintiffs’ motion to dismiss Defendants’ defense of the fair report privilege. Defendants alleged in their answer that the Dossier was part of an official proceeding and was part of briefings to the President and the President-Elect, and that the Dossier was given to the FBI director. The court found that these allegations were sufficient to defeat Plaintiffs’ motion to dismiss because they demonstrated that the article was on an issue of national importance and that the Dossier itself was part of the government’s investigation.

The court granted Plaintiff’s motion to dismiss Defendants’ defense of the neutral report privilege because New York law does not recognize such a privilege. And the court denied Plaintiffs’ motion as to Defendants’ defense of public figures. The court found that the Defendants properly pled the public figures standard as an affirmative defense because Plaintiffs do not believe they are public figures, they may have been subject to unfair surprise if Defendants had not included this as an affirmative defense. The court declined to find that Plaintiffs are not public figures at the pleading stage. Discovery may reveal whether or not Plaintiffs are public figures for purposes of the defamation claim.
German Khan, Mikhail Fridman, and Petr Aven also sued Orbis Business Intelligence Limited and Christopher Steele for defamation. Steele compiled the Dossier between June 2016 and October 2016. Plaintiffs sued over the portion of the Dossier that discussed Plaintiffs’ relationships with the Russian government. The court granted Defendants’ special motion to strike under the D.C. Anti-SLAPP Act. The court denied as moot Defendants’ motion to dismiss under Rule 12(b)(6) for failure to state a claim.

As an initial matter, the court rejected Plaintiffs’ argument that the D.C. Anti-SLAPP statute did not apply because Steele is not a U.S. citizen and Orbis is not a U.S. company. The court also rejected Plaintiffs’ argument that the First Amendment does not apply to Defendants’ speech. The court found that the Defendants and their speech have ample connection with the United States that are clearly substantial enough to merit First Amendment protection.

Under the D.C. Anti-SLAPP Act, the moving party must make a prima facie showing that the claim arises from an act in furtherance of the right of advocacy on issues of public interest. The burden then shifts to the non-moving party to demonstrate that the claim is likely to succeed on the merits. The court held that Defendants satisfied the first prong of the statute because Defendants’ provision of the Dossier to the media was an act in furtherance of the right of advocacy. The court found that the Dossier as a whole concerns issues of public interest, and the portions involving Plaintiffs were matters of public interest because they discussed Plaintiffs’ alleged cooperation with Russian interference in the election, Russian foreign policy toward the United States, and President Putin’s advisors on Russia-U.S. policy.

Next, the court determined that Plaintiffs are limited public figures due to their prominent roles in the civic life of Russia and the fact that they have been the subject of widespread news
coverage. The court then held that Plaintiffs have not carried their burden to prove that a reasonable jury could find by clear and convincing evidence that Defendants made the statements with actual malice. The court determined that Plaintiffs failed to offer any evidence that Defendants knew or recklessly disregarded substantial information that no conceivable possibility existed that Plaintiffs were involved in any Russian interference. Last, the court denied Plaintiffs the opportunity to conduct targeted discovery because it found that Plaintiffs did not show that any discovery is likely to uncover evidence that Steele fabricated any information provided in the Dossier or had solid intelligence that his sources fabricated information.

5. Additional Fair Report Privilege Cases

- The Marshall County Coal Company et al. v. John Oliver et al., No. 17-C-124, Circuit Court of Marshall County, West Virginia

Plaintiffs filed claims for libel, false light invasion of privacy, and intentional infliction of emotional distress based on an episode of Last Week Tonight with John Oliver. In the episode at issue, Oliver introduced Plaintiff Robert Murray as one of the loudest critics of President Obama’s policies concerning the coal industry and proceeded to poke fun of Murray for *inter alia* stating that a mine collapse was due to an earthquake and for an NLRB dispute Murray had with his miners concerning bonus payments.

Defendants John Oliver, Charles Wilson, Partially Important Productions, LLC, Home Box Office, Inc., and Time Warner Inc. filed motions to dismiss for failure to state a claim for defamation. The court held that the show’s accounts of the mine investigation and the NLRB dispute are protected by the fair report privilege, which shields publishers from liability for coverage of an official government report or proceeding so long as the publication is accurate and complete or a fair abridgement of the occurrence reported.
The court found that the show’s account of a mine collapse, in which Oliver stated that Murray has no evidence to support his assertion that an earthquake caused the collapse was protected by the fair report privilege. Oliver quoted directly from a government investigation that found that there was no evidence that the earthquake caused the collapse, and a verbatim quotation is clearly a fair and accurate account of the government’s report. Even though Oliver quoted two lines from the summary of the report, the report as a whole repeatedly stated that the collapse was due to a flawed mine design, not an earthquake. Further, Plaintiffs’ reliance on three studies were of no moment because two of them were reviewed in the government’s report and the third study was published years after the report, and still did not support Murray’s earthquake theory.

The court likewise held that the show’s statements that Murray’s company paid bonuses to miners based on the quantity of coal they extracted and the miners’ rejection of the program over safety concerns came directly from a NLRB decision on the dispute and was therefore covered by the fair report privilege. In so holding, the court found that Plaintiffs’ assertion that the show should have published other details about the bonus program that would have cast Plaintiffs in a more favorable light was a complaint about the NLRB opinion itself, and not with the show’s accurate account of it.

The court also rejected Plaintiff’s contention that the fair report privilege may be defeated by a showing of actual malice. And even assuming that it could be so defeated, Plaintiffs did not allege any facts supporting actual malice.

Last, the court found that the defamation claim failed for the independent reason that the statements about the mine incident and the bonus dispute were substantially true, and that any
remaining statements were nonactionable opinion, satire, or hyperbole. Plaintiffs’ false light and intentional infliction claims failed for the same reasons as Plaintiffs’ defamation claim.

- *Larson v. Gannett Company, Inc. et al., A17-1068, State of Minnesota Court of Appeals*

Ryan Larson sued Multimedia Holdings Corporation and the St. Cloud Times for defamation based on a new report they issued about his arrest following the 2012 murder of a police officer. The Minnesota Court of Appeals held that the fair-report privilege protected Defendants’ news reports that accurately summarized and fairly abridged statements made by law enforcement at an official press conference and in an official news release.

Defendants reported that a police officer was shot and killed while conducting a welfare check on a suicidal man. The report continued that the police identified Plaintiff as the man who ambushed the office and shot him twice, killing him. Later reports detailed that investigators determined there was insufficient evidence to further detain Plaintiff, and released him. Investigators ultimately officially cleared Plaintiff as a suspect.

The court held that the district court incorrectly concluded that the fair report privilege did not apply to this case. As a matter of first impression, the court determined that the privilege applies to protect news reports that accurately and fairly summarize statements made by law enforcement during an official press conference and in an official news release. It reasoned that a law enforcement press conference is a meeting open to the public that deals with a public concern. The court also determined that there were genuine issues of fact whether Defendants’ statements were accurate summaries or fair abridgements of the law enforcement statements because Defendants used terminology and cited some facts not mentioned during the conference or news release. The court held that the district court erred in vacating the jury’s verdict that
Defendants’ statements were not false and erred in ordering a new trial. Thus, the court reinstated the jury’s verdict and remanded for entry of judgment in favor of Defendants.

On July 17, 2018, the Minnesota Supreme Court granted Plaintiff’s petition for further review of the decision of the Court of Appeals and the Defendants’ petition for conditional cross-review. The matter is currently being briefed.

6. Trump “Liar” Cases

Courts across the country continued to grapple with defamation claims based on allegations made during political campaigns or high-profile controversies, in which one side alleged that the other side was lying. Decisions in two cases involving President Donald Trump illustrate the challenges courts face in applying the opinion/hyperbole doctrines in these circumstances, particularly where the challenged statements were made in social media.


Stephanie Clifford, an adult film star who performs under the stage name “Stormy Daniels,” filed a libel suit against Donald Trump over a tweet by the President in which he referred to an alleged incident she had reported as a “total con job.” Clifford alleges that she had an affair with Trump in 2006. In 2011, she provided an account of the affair to a magazine, after which she claims she and her daughter were threatened in a Las Vegas parking lot. In 2016, after Trump was elected President, Clifford worked with a sketch artist to depict the man who had allegedly threatened her. She released the sketch publicly in April 2018.

    Trump responded by tweeting: “A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!” Clifford sued, alleging that Trump’s tweet attacked the veracity of her account of the threatening incident and suggested that she falsely accused someone of committing a crime against her. The suit was filed in the
Southern District of New York, but transferred to the Central District of California, where the parties were litigating another suit over the enforceability of a nondisclosure agreement. Trump filed an anti-SLAPP motion to dismiss. Based on a choice of law analysis, the court held that the Texas anti-SLAPP statute applied.

Trump argued that the tweet was rhetorical hyperbole protected by the First Amendment. Applying what it described as the "Bentley/Milkovich" analysis—based in part on the Texas Supreme Court’s decision in Bentley v. Bunton, 94 S.W. 3d 561 (Tex. 2002) and in part on the U.S. Supreme Court’s decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)—the court held that the tweet contained two verifiably true/false statements. These included: “(1) that the man who threatened Ms. Clifford in 2011 does not exist and therefore, that Plaintiff is lying about her encounter with him; and (2) that Ms. Clifford is engaging in a “con job” or is lying to Mr. Trump, the public, and the media about the threat (and by implication her affair with Mr. Trump).” But the court nevertheless held that those statements were not actionable because they constituted rhetorical hyperbole. According to the court, Trump’s tweet “displays an incredulous tone, suggesting that the content of his tweet was not meant to be understood as a literal statement about [Clifford].” The court suggested, however, that the analysis might have been different if Trump had made a sustained attack on Clifford’s credibility over a series of statements, contrasting such a situation with a single excited utterance.

The court denied Clifford leave to amend her complaint. Clifford appealed the next day.


Summer Zevos, a former participant on the reality television show, The Apprentice, claims that Donald Trump assaulted her and solicited sex in a Beverly Hills hotel in 2007. After the infamous Access Hollywood audio recording of Trump bragging of sexual assault was
In response, Trump responded to these and similar allegations by other women on his campaign’s website, in his tweets, and at campaign events, as follows:

That very day, [Trump] responded in a statement that was widely reported and appeared on his campaign website: “‘To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a person and it is not how I’ve conducted my life.’” Later on, at a North Carolina campaign rally, [Trump] stated “‘these allegations are 100% false . . . They are made up, they never happened . . . . It’s not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes, or for the simple reason they want to stop our movement. They want to stop our campaign. Very simple. These claims defy reason, truth, logic, common sense. They’re made without supporting witnesses. No witnesses. Hey you know, 28 years ago, 10 years ago, 14 years ago, 12 years ago. Not me. Believe me. Not me. Not me.’”

At a rally in New Hampshire on October 15, 2016, [Trump] reported that [Zervos’s] cousin “wrote a letter that what she said is a lie.” He stated that many of the allegations against him had already been “proven so false,” referred to another story in the media about him and insisted: “we can’t let them get away with this .... Total lies.... [You’ve] been seeing total lies.” He said “you have phony people coming up with phony allegations, with no witnesses whatsoever.”

[Trump] tweeted about “100% fabricated and made up charges” and that nothing “ever happened with any of these women. Totally made up nonsense to steal the election.” He lamented over Twitter about losing large numbers of women voters “based on made-up events that never happened.”

On October 17, 2016, [Trump] tweeted: “Can’t believe these totally phony stories, 100% made up by women (many already proven false) and pushed big time by press, have impact!” He also re-tweeted a statement by someone else about plaintiff, which included a picture of her and set forth “this is all yet another hoax,” adding his own comment: “Terrible.” At 4:31 that afternoon, [Trump] tweeted: “New polls are good because the media has deceived the public by putting women front and center with made-up stories and lies, and got caught.”
At the next presidential debate, on October 19, 2016, [Trump] answered a question about reports by nine women of nonconsensual kissing or groping. He stated: “those stories are all totally false . . . I didn’t know any of these women. I didn’t see these women. These women, the woman on the plane, the woman on the—I think they want either fame or [the Clinton] campaign did it . . . I believe . . . [Hillary Clinton] got these people to step forward. If it wasn’t, they get their ten minutes of fame, but they were all totally—it was all fiction. It was lies and it was fiction.”

Finally, on October 22, 2016, at a Pennsylvania rally, defendant declared: “Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.”

Zervos filed suit for defamation, alleging that Trump’s statements branded her a liar. Trump moved to dismiss. After holding that the President could be sued in state court in a civil suit, the court rejected Trump’s argument that the challenged statements were nonactionable opinion and rhetorical hyperbole. The court held that Trump had used “specific, easily understood language to communicate” a message that Zervos had fabricated allegations to pursue her own interests. Notably, the court pointed out that Trump’s statements “were not made through op-ed pieces or letters to the editor but rather were delivered in speeches, debates and through Twitter, a preferred means of communication often used by [Trump.]” And the court stated that the context of the statements, in a political campaign, did not make them any less actionable.

In a footnote, the court distinguished Trump’s statements relating to Zervos with his statements had made about another woman, Cheryl Jacobus, which had been held nonactionable a year earlier in Jacobus v. Trump, 156 A.D.3d 452, 453, 64 N.Y.S.3d 889 (1st Dept. 2017). In that case, Jacobus, a political strategist and public-relations consultant, had appeared on CNN to criticize Trump’s debate performances and his threat to boycott one of the Republican presidential primary debates. The Trump campaign responded by making various public
statements accusing her of being upset about not having been hired by the campaign. Specifically, Trump tweeted that “@cherijacobus begged us for a job. We said no and she went hostile. A real dummy!” and that “Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!” Trump’s then-campaign manager, Corey Lewandowski, also stated on MSNBC’s *Morning Joe* program that Jacobus “came to the office on multiple occasions trying to get a job from the Trump campaign, and when she wasn’t hired clearly she went off and was upset by that.”

Jacobus sued, alleging that Trump’s and Lewandowski’s comments falsely accused her of unprofessional conduct and caused her to lose professional opportunities. She alleged that, although she had inquired about a position with the Trump campaign, she had elected not to pursue the opportunity after she determined that she would be unable to work productively with Lewandowski.

The court dismissed Jacobus’s claims, holding that the challenged statements were nonactionable opinion. It held that the statement that Jacobus “begged” for a job is best “viewed as a loose, figurative, and hyperbolic reference to [her] state of mind and is therefore, not susceptible of objective verification.” In doing so, it took into account the tone of Trump’s tweet and the “anything-goes” style of Internet communications, as well as “spirited” give-and-take of television talk shows. In this context, Trump’s and Lewandowski’s statements were reasonably understood as expressions of opinion in an “imprecise and hyperbolic political dispute *cum* schoolyard squabble,” and thus could not give rise to a viable defamation claim.

7. **Anonymous Speech Cases to Watch**

The Texas Supreme Court is set to decide the standard for unmasking anonymous speakers. Andra Group filed a request for a pre-suit deposition of Glassdoor, which operates a website platform for users to post jobs, ratings, and reviews of companies. Andra sought to use the deposition to discover the identities and account information of the persons who wrote allegedly defamatory reviews. According to Andra, there were ten reviews in question, several of which were posted by people who claimed to be Andra employees. Some of the reviews had been posted more than one year before Andra filed its request for a pre-suit deposition. (The Texas statute of limitations for libel actions is one year, while certain business disparagement claims may be subject to a two-year limitations period.)

The trial court granted Andra’s requests as to two of the reviews, limiting the topics of the depositions to the following statements within those posts: (i) Andra’s hiring practices are illegal, (ii) Andra is violating labor laws, (iii) Andra is engaged in harassment based upon race and sexual orientation, (iv) illegal immigrants are working at Andra, and (v) Andra’s supervisor Jorge is racist and sexist. On appeal, Glassdoor argued that the limitations period for a libel claim had already expired and that Andra had failed to offer sufficient evidence of special damages to support a business disparagement claim. The Dallas Court of Appeals rejected this argument, citing, for example, testimony from Andra’s owner and employees that the reviews required the company to hire a recruiter to fill positions. The court also rejected Glassdoor’s argument that the statements were nonactionable opinion or hyperbole, citing alleged violations of labor law by Andra. Although the court did not apply any First Amendment-based standard for unmasking the anonymous reviewers, it held that Andra had met its burden under Texas civil rules to demonstrate a sufficient need for obtaining the discovery by identifying at least one viable legal claim against the anonymous speaker(s). Finally, the Dallas Court of Appeal
assumed without deciding that a request for pre-suit deposition was subject to Texas’s anti-SLAPP statute, the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001 et seq., the court held that Andra had satisfied its prima facie burden under the statute.

The Texas Supreme Court granted review. It heard argument on September 19, 2018. In addition to determining the standard for unmasking anonymous speakers, the Court’s opinion could decide whether a request for pre-suit deposition (called a “Rule 202 petition” in Texas law) is a “legal action” within the meaning of the anti-SLAPP statute.

- **Stephen Elliott v. Moira Donegan and Jane Does (1-30), No. 18-Civ-5680 (E.D.N.Y. filed Oct. 10, 2018)**

In October 2018, a prominent writer and filmmaker, Stephen Elliott, filed a defamation suit against the creator of the “Shitty Media Men” list, a crowdsourced document identifying men in the media industry who allegedly assaulted or harassed women. The list, which was a Google spreadsheet that could be edited by anyone, was started by Moira Donegan “to create a place for women to share stories of harassment and assault without being needlessly discredited or judged. The hope was to create an alternate avenue to report this kind of behavior and warn others without fear of retaliation.” The existence of the document was revealed by BuzzFeed and its contents were later posted on Reddit.

Elliott was one of the men named on the list. The entry accused him of “[r]ape accusations, sexual harassment, coercion, [and] unsolicited invitations to his apartment[.]” Elliott’s name was also highlighted in red, a designation intended to identify “men accused of physical sexual violence by multiple women.” Elliott denied that he had ever raped anyone or had been accused of rape. He sued Donegan and several “Jane Doe” defendants for libel, intentional infliction of emotional distress, and negligent infliction of emotional distress. Elliott
seeks at least $1.5 million in damages and a court-ordered retraction from each person who originally published the challenged statements.

Elliott’s complaint states that he will attempt to identify the posters during initial discovery. The scope of that initial discovery is unclear, although it is broadly described in the complaint (“Plaintiff will know, through initial discovery, the names, email addresses, pseudonyms and/or ‘Internet handles’ used by Jane Doe Defendants to create the List, enter information into the List, circulate the List, and otherwise publish information in the List or publicize the List.”). Google has stated that it “will oppose any attempt by Mr. Elliott to obtain information about this document from [the company[.]


On June 14, 2017, a gunman opened fire on members of Congress and congressional aides who were playing baseball at a field in Alexandria, Virginia, leaving Republican House Majority Whip Steve Scalise critically wounded. That evening, the *New York Times* published an editorial on the shooting, which included the following paragraphs:

Was this attack evidence of how vicious American politics has become? Probably. In 2011, when Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl, the link to political incitement was clear. Before the shooting, Sarah Palin’s political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.

Conservatives and right-wing media were quick on Wednesday to demand forceful condemnation of hate speech and crimes by anti-Trump liberals. They’re right. Though there’s no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right.
Within a day of publication, the *Times* twice revised the text of the editorial, deleting the phrases “the link to political incitement was clear” and “[t]hough there’s no sign of incitement as direct as in the Giffords attack” and adding “[b]ut no connection to that crime was ever established.” The *Times* also issued two corrections noting that no link between political rhetoric and the shooting of Giffords had been established and that the map distributed by Palin’s PAC “depicted electoral districts, not individual Democratic lawmakers, beneath stylized crosshairs.”

Palin filed a defamation suit against the *Times* in the Southern District of New York, alleging that the original editorial implied she was responsible for the shooting of Giffords. The case was assigned to Judge Jed Rakoff, who directed the *Times* to file a motion to dismiss on an expedited schedule. The *Times*’ motion argued, among other things, that Palin had failed to adequately plead actual malice.

After the motion to dismiss was briefed, Judge Rakoff convened an evidentiary hearing pursuant to Federal Rule of Civil Procedure 43(c), at which the primary author of the challenged statements, *Times* editorial page editor James Bennet testified. Judge Rakoff explained that the purpose of this hearing was “[t]o help inform the Court of what inferences are reasonable or unreasonable in this context.” As Judge Rakoff noted in his subsequent decision, “neither party at any point objected to the Court’s holding the hearing or to the Court’s considering (at least for the limited purpose of deciding this motion) such facts there developed that are not in dispute. As to any disputed fact, however, the Court, as it advised the parties at the hearing, makes no credibility determinations, and takes those facts most favorably to plaintiff.”

Judge Rakoff granted the motion to dismiss with prejudice, holding that neither the complaint on its face nor the evidence gleaned from the hearing satisfied “the high degree of particularized proof that must be provided before plaintiff can be said to have adequately alleged
clear and convincing evidence of actual malice.” Judge Rakoff subsequently denied Palin’s request for leave to amend the complaint.

On November 21, 2017, Palin filed an appeal. The Second Circuit heard oral argument on September 21, 2018. At oral argument, the three judges—John Keenan, John M. Walker, Jr, and Denny Chin—repeatedly referred to Judge Rakoff’s evidentiary hearing as “unusual.” The judges also expressed doubt that the decision could be affirmed under Twombly and Iqbal for the failure to sufficiently plead actual malice.

8. Courts Decide Constitutionality of Revenge Porn Laws

Courts in Wisconsin and Texas considered constitutional attacks on those states’ revenge porn laws, with different results.

- *State of Wisconsin v. Culver, 918 N.W.2d 103 (Wisc. App. 2018)*

On the list of negative consequences of the internet age, “revenge porn” has to rank high. For the unaware, revenge porn is when a former significant other posts intimate photos following a breakup. It is hurtful, invasive and any number of other adjectives. Many states (40 plus the District of Columbia) have enacted statutes to address the problem.

But the question persists, are those statutes constitutional? Like it or not, the practice implicates the First Amendment.

The most recent case to address the issue comes from an appellate court in Wisconsin. That court decided recently that the Wisconsin statute is constitutional. The court concluded the statute was sufficiently narrow to survive the challenge.

The case presented fairly typical facts. The defendant, Norris Culver, posted nude photos of a woman identified in the court’s opinion as “A.A.L.” online without her permission. Culver

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1 This comment on *Culver* was originally published by Jack Greiner in [https://www.cincinnati.com/story/news/2018/09/05/revenge-porn/1200268002/].
admitted he posted the photos out of anger. A.A.L. told police Culver also was a felon who had
firearms at his residence.

In June 2015, Culver was charged with one count of posting or publishing a private
depiction of a person contrary to WIS. STAT. §§ 942.09(3m)(a)(2).

In August of that year, Culver entered a guilty plea to the “post or publish” charge. The
court imposed a sentence of nine months in jail.

Culver filed a motion for post-conviction relief, arguing that the statute is overly broad
and impermissibly vague. The trial court denied the motion, and Culver appealed.

The appellate court quoted the key portion of the statute. It says:

Whoever does any of the following is guilty of a Class A misdemeanor: …. Posts, publishes, or causes to be posted or
published, a depiction of a person that he or she knows is a private
representation, without the consent of the person depicted.

(b) This subsection does not apply to any of the following:

3. A person who posts or publishes a private representation that is
newsworthy or of public importance.

The statute defines “private representation” as:

[A] representation depicting a nude or partially nude person or
depicting a person engaging in sexually explicit conduct that is
intended by the person depicted in the representation to be
captured, viewed, or possessed only by the person who, with the
consent of the person depicted, captured the representation or to
whom the person depicted directly and intentionally gave
possession of the representation.

According to the appellate court, several elements of the statute saved it. First, the
parameters of “private representation” were limited to nudity, partial nudity or sexual conduct.
This plainly limited its application to discreet and personal depictions. Second, the “intent”
provision was a limiting feature. The photo had to be expressly intended for an audience of one.
And the statute applies only to persons who knows the photo was a private representation.
Finally, the statute carves out posting photos that are “newsworthy or of public importance.” So, if Stormy Daniels has photos of her and the President, for example, she’d likely not be subject to prosecution for posting them. In Wisconsin at least.

Given these limitations, the court concluded:

[The statute] encompasses only a particular type of image, which must be intended to be private, which must be captured with consent, which the publisher must know is private, and which is published without consent nonetheless. With its focused scope, we see no showing that the statute prohibits or even chills a substantial amount of free expression.

States and municipalities looking to outlaw revenge porn consistent with the Constitution may want to model their law after the Wisconsin statute.

- *Ex parte Jones*, No. 12-17-00346, 2018 WL 2228888 (Tex. App.—Tyler May 16, 2018), discretionary review granted July 25, 2018

Jordan Jones was charged with violating Texas’s “revenge porn” statute, Texas Penal Code § 21.16(b). He brought a facial challenge to the constitutionality of the statute under a writ for habeas corpus. The Texas statute provides:

A person commits an offense if:

(1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person’s intimate parts exposed or engaged in sexual conduct;

(2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;

(3) the disclosure of the visual material causes harm to the depicted person; and

(4) the disclosure of the visual material reveals the identity of the depicted person in any manner[.]
“[I]ntimate parts” is statutorily defined as “the naked genitals, pubic area, anus, buttocks, or female nipple of a person.” Tex. Penal Code § 21.16(a)(1). “Visual material” includes “any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide.” Id. § 21.16(a)(5)(A).

Jones argued that the statute violated the First Amendment’s right of free speech and that it was unconstitutionally overbroad. The court began its analysis by noting that the statute proscribed the disclosure of visual material, which was expressive activity protected by the First Amendment. It also noted that the statute was a content-based regulation of speech. The State argued that the speech was unprotected because it was “contextually obscene,” a concept the State based on the nonconsensual nature of the disclosure. The court rejected this argument, noting that Texas already has an obscenity statute and that the “revenge porn” statute failed to give a trier of fact sufficient basis to classify the regulated speech as “obscene.”

Applying the strict scrutiny test, the court agreed the privacy was a compelling state interest, but held that the statute was not the least restrictive means of protecting that interest. In doing so, the court noted that the statute criminalized the disclosure of covered images regardless of whether the person responsible for the disclosure knew that the person depicted had not consented to disclosure or whether the disclosing party intended to cause harm. For the same reasons, the court held that the statute was unconstitutionally overbroad.

The State requested discretionary review by the Texas Court of Criminal Appeals, the highest court in the Texas criminal justice system. Review was granted on July 25, 2018.