



MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

OCTOBER 2017



Laura
Prather



Mark
Flores

The Libel Suit Strikes Back

Laura Prather and Mark Flores

Much has changed since 1972 when reporters Woodward and Bernstein exposed President Nixon of wrongdoing. Through their extraordinary reporting, the public learned of “dirty tricks,” criminal actions and a cover-up led by this country’s leaders inside the White House. All resources available to these reporters including unnamed sources of information provided details that fueled these stories. Strong journalism provided a new hope for those seeking the truth and the faith placed by the public in the Fourth Estate remained strong.

Fast forward 45 years later and now the media has become a political punching bag and scapegoat used to further an agenda. “Fake news” has further confused the issue eroding the trust between the media and the public. A certain segment of the population now believes the news media poses a greater threat to the United States than white supremacists. Perhaps not coincidentally, a rise in defamation suits against the media has occurred as the libel suit strikes back as seen in this survey of recently filed cases.

A. Fox News’ Eric Bolling Sues Huffington Post Reporter Over Reported Allegations of Sexual Harassment.

Huffington Post reporter Yashar Ali notified the world via a tweet: “Just received a summons. Eric Bolling is suing me for defamation - \$50 million in damages. I stand by my reporting + will protect my sources.” Ali later noted, via twitter, that Bolling did not choose to sue the Huffington Post but rather “he is coming after me personally” before promising to continue his aggressive reporting on Bolling and others.

Ali’s report stated that Bolling had sent unsolicited lewd text messages to female colleagues at Fox Business and Fox News. Various unnamed sources confirmed the text messages in Ali’s report. Bolling’s attorney told Ali that Bolling did not recall “such inappropriate communications,

does not believe he sent any such communications, and will vigorously pursue his legal remedies for any false and defamatory accusations that are made.” Regardless, Fox News suspended Bolling less than 24 hours after the publication of the report.

Ali’s attorney responded to the lawsuit with a statement that they would seek sanctions for the filing and potentially pursue a claim against Bolling for malicious prosecution. Ali tweeted once again that he looks forward to his attorney “taking his deposition and the discovery process.” It appears we will find out whether this suit has merit or “was filed for public relations purposes and to retaliate against Mr. Ali for uncovering the truth” as stated by Ali’s attorney.

B. Robert Murray sues John Oliver and HBO.

Robert Murray, CEO of coal company Murray Energy Corporation, chose to strike back at HBO, Time Warner, and John Oliver for calling him a “geriatric Dr. Evil,” among other things, on Last Week Tonight with John Oliver. Prior to the broadcast, Murray claims to have provided various statements and reports related to a mine collapse to Oliver for his on-air discussion. His lawyers also warned Oliver “to cease and desist from a broadcast of defamatory comments or any misguided attempt at humor regarding the tragic mine collapse.” Oliver proceeded to discuss the mine collapse while allegedly making no reference to the statements and reports provided by Murray in advance of the broadcast and making jokes at Murray’s expense. Murray claimed that the statements and omissions were “defamatory” and that they reflected “discredit upon the methods by which [he and his businesses] do business.” Murray sued for defamation, false light-invasion of privacy, and intentional infliction of emotional distress. Murray also moved for a temporary restraining order and preliminary injunction seeking a gag order that would restrain Oliver and HBO from “(i) re-broadcasting

the Defamatory Statements that are the subject of Plaintiffs’ Complaint, and (ii) publicly discussing the substance of this litigation” in order to protect Murray from the “John Oliver Effect.”

John Oliver, HBO and Time Warner sought to remove the case to federal court in the Northern District of West Virginia. The ACLU also sought leave to file an Amicus Brief opposing the Motion for a Temporary Restraining Order. The Northern District of West Virginia never considered the Amicus Brief or the merits of the case. Rather, the Northern District of West Virginia remanded the case back to the state court after rejecting Oliver, HBO and Time Warner’s argument that loosely associated corporations were fraudulently joined destroying diversity jurisdiction. The case will proceed in the state courts of West Virginia.

C. Sarah Palin unsuccessfully sues *The New York Times*.

A *New York Times* editorial written following the mass shooting at a practice of the Republican softball team in D.C. this summer gave rise to another defamation action filed by former vice-presidential candidate Sarah Palin against *The New York Times*. The editorial referenced a 2011 editorial regarding the shooting of Representative Gabby Giffords in Arizona and a map of targeted electoral districts erroneously associated with Palin’s political action committee. The reference erroneously described the map and stated that a connection had been established between the map and the shooting of Giffords. *The Times* corrected this error two times the day after publication of the editorial. Palin brought suit three weeks later alleging that the original uncorrected editorial defamed her.

The Times later stated that it regretted the errors in the editorial but that it was “pleased to see that the court acknowledged the importance of the

prompt correction [it] made once [it] learned of the mistakes.” After the unconventional move of holding an evidentiary hearing on a motion to dismiss during which the editor of *The New York Times* editorial page had to testify about his knowledge at the time of publication, the Southern District of New York quickly dismissed the claim based on the Palin’s failure to allege actual malice. The Court held that the Complaint failed “on its face to adequately allege actual malice, because it fails to identify any individual who possessed the requisite knowledge and intent and, instead, attributes it to *The Times* in general.” The Court also found that the immediate correction of errors contained within the quickly drafted editorial was “much more plausibly consistent with making an unintended mistake and then correcting it than with acting with actual malice.” The Court concluded *The Times* did not exhibit actual malice but maybe negligence, at worst, stating “[w]hat we have here is an editorial, written and rewritten rapidly in order to voice an opinion on an immediate event of importance, in which are included a few factual inaccuracies somewhat pertaining to Mrs. Palin that are very rapidly corrected.”

D. Conclusion

As the mantra of “fake news” continues to escalate and wealthy or high profile individuals put the media on the defensive through libel lawsuits over its critical reporting, the public’s faith in journalists continues to decline. The three lawsuits mentioned above highlight the need for the press to be vigilant in its fact checking and for its lawyers to pursue swift dismissal of meritless claims. The chilling effect that this exposure to libel suits may have on future reporting has yet to be determined. Regardless, it seems likely that media organizations should prepare for the use of libel suits to strike back at critical reporting in the near future.

Drone Journalism: Cleared for Take-off

Mark Flores



Mark
Flores

This Model Brief sets forth arguments and legal arguments meant to form the basis for a motion seeking media access to the executive branch. The Model Brief includes multiple **potential** constitutional arguments that could be made to obtain access to various activities of the executive branch. The authors do not anticipate that the media will use each of the sections set forth below in a single setting. Rather, attorneys using the brief must use their discretion to determine which potential constitutional argument should apply in the circumstances facing the media representative. In making the determination as to what parts of this Model Brief apply, the attorney will need to consider not only the specific right under attack but also the actor, as the authors drafted the Model Brief to be used to contest actions taken by both state actors, see 42 U.S.C. § 1983, and federal actors, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The potential constitutional arguments and a brief description of each of the arguments set forth in the Model Brief include the following:

- **First Amendment Retaliation:** Retaliation claims are most useful where a media plaintiff can point to previous publications which are objectionable to the defendant(s), and a previously held means of access has subsequently been denied, such as a denial of entry or revocation of a press credential.
- **First Amendment Right of Access:** Right of access claims are useful where access has been denied and special permissions such as press credentials are irrelevant. For example, if all media involved have passes but access is selectively denied to the plaintiff, see *CNN, Inc. v. ABC, Inc.*, 518 F. Supp. 1238, 1242 (N.D. Ga. 1981), or if press credentials are unnecessary for access, such as to a public space.

The qualified right may be asserted if there is a tradition of access (either by the public or press) to the event or activity, access is important, and it is not outweighed by other interests, such as safety or space requirements. Where press access has been denied to historically public forums, the affected party may also want to consider bringing a claim for a violation of their right of access. See e.g. *CNN, Inc. v. ABC, Inc.*, 518 F. Supp. 1238 (N.D. Ga. 1981) (television media representatives successfully obtained a preliminary injunction when the White House Press office excluded all television media representatives from covering certain White House and presidential events); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (newspaper successfully sued for right to access trial when a trial court closed the court room in a criminal case); *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) (finding that denying a reporter a White House press pass without the articulating a meaningful standard governing the denial violated the First Amendment); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002) (finding broad ban on members of the press and public from alien removal proceedings violated the First Amendment).

- **Due Process pursuant to the Fifth or Fourteenth Amendment:** Due process claims are useful to media plaintiffs who possess an interest (typically a press credential) which is denied or revoked, without sufficient process. Whether or not the interest is already recognized depends on your circuit, but *Sherill v Knight*, 569 F.2d 124, 128 (D.C. Cir. 1977), and *Nicholas v City of New York*, No. 15-CV-9592 (JPO), 2017 WL 766905 at *6, 2017 U.S. Dist. LEXIS 26995 at *18 (S.D.N.Y Feb. 27, 2017), note that a protected interest is especially likely to attach to a press credential given the First Amendment interests at stake. In addition to notice and opportunity to be heard, a final written decision may be required in your jurisdiction.

- **Equal Protection pursuant to the Fourteenth Amendment:** A claim for equal protection is useful to media plaintiffs who can point to disparate grants of access amongst journalists or organizations. The argument is strongest where information or access has been selectively denied to the plaintiff but is generally available (i.e. not discretionarily available.)

The federal Freedom of Information Act celebrated its 50th birthday on July 4, 2016, and Congress marked the occasion by passing improvements to the milestone law. The FOIA Improvement Act of 2016 establishes a “presumption of openness” on the part of the federal government, requires government agencies to accept emailed requests and requires government agencies to maintain their files in electronic format.

Given that the attorney will likely raise these issues while seeking injunctive relief, the authors have styled the Model Brief as one seeking injunctive relief. As a result, there is also law regarding the requirements to seek an injunction including the balance of the equities and the irreparable harm incurred upon a deprivation of a constitutional right.

This Model Brief is intended only as a starting point for practitioners preparing pleadings that address the issues described herein. Of course, an attorney making these arguments must tailor the arguments, authorities, and facts to the particular circumstances of the case being defended. Equally obviously, counsel must Shepardize/update the authorities in this Model Brief, as they are only valid and good law as of the date this Model Brief was published, in August 2017. The authors do not intend this Model Brief to constitute legal advice but rather provide this Model Brief as a resource for other attorneys to use as a framework for their own legal arguments.

To read more, you can download the [Model Brief on Access to the Executive](#).

Laura Prather in *ABA Journal*: How to Defend Against “Libel Bullies”

As a candidate, Donald Trump attacked what he called “fake news” from the mainstream media and vowed to “open up” libel laws to make it easier to sue the media and recover big judgments, the *ABA Journal* reported. Now as president of the United States, what damage might he do to the press, and what legal options do journalists have available to them to defend their speech? ...

These were the foremost concerns for the panelists of “Trump v. the Press and the First Amendment: Fake News, Government Leak Investigations, Alleged Biased Media Coverage, Trump’s SLAPP Libel Suits and His Pledge to ‘Open Up the Libel Laws’—Will the First Amendment Survive?” at the ABA Annual Meeting in New York City on Aug. 12. The Section of Litigation and the Forum on Communications Law sponsored the event.

George Freeman, executive director of the Media Law Resource Center, moderated the lively discussion between journalists and attorneys on the panel about the current state of libel laws, the constant leaks coming out about the administration, and the danger that Trump’s rhetoric presents to a free press, the *Journal* reported. ...

When it comes to Trump’s vow to “open up” libel laws, none of the panelists gave it much credence. There are no federal libel laws, and Congress would have to agree to pass new legislation. In fact, there has been momentum in the opposite direction at the state level for passing what are called anti-SLAPP laws, intended to discourage “strategic lawsuits against public participation.”

Laura Lee Prather, a partner with Haynes and Boone, LLP said that in her home state of Texas, there have been many successful uses of the state’s anti-SLAPP laws. ...

Prather said anti-SLAPP legislation has been an important defense against “libel bullies” and identifies Trump as a libel bully himself. Trump has brought seven libel suits against people and was unsuccessful in all but one, in which he achieved a default judgment in arbitration when the defendant failed to appear.

Prather said it is ironic that Trump has been so against the current libel laws because he has benefited from them. Many inflammatory statements and tweets the president has made against people can’t lead to lawsuits because he has First Amendment and libel protections. ...

Excerpted from the *ABA Journal*. To read the full article, click [here](#).

To view C-SPAN video of the panel, click [here](#).

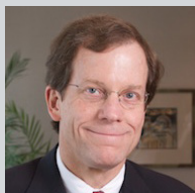
FEATURED SPEAKING ENGAGEMENTS

Tom Williams

Texas Advanced Paralegal Seminar

Speaker: The Anti-SLAPP Statute: Burdens of Proof, Evidence, Fee Shifting and More

October 4, 2017
Addison, Texas



ABA Forum on Communications Law Annual Conference

Faculty Member: Media Advocacy Workshop
March 1, 2018
Napa, California

Laura Prather

**Haynes and Boone Partner
Laura Prather was featured on C-SPAN for Trump v. Free Press:**

CSPAN Video - Trump Administration and the First Amendment



Texas Association of Broadcasters

Speaker: Texas Public Information Act Webinar
October 5, 2017

ABA Forum on Communications Law Annual Conference

Moderator: "Monitoring Online Content: Legal v. Social Responsibilities"
March 1-3, 2018
Napa, California

FOR MORE INFORMATION CONTACT:



LAURA LEE PRATHER

PARTNER

laura.prather@haynesboone.com
+1 512.867.8476



TOM WILLIAMS

PARTNER

thomas.williams@haynesboone.com
+1 817.347.6625