

EXHIBIT A

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART: 17

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JOSEPH RAKOFSKY, and RAKOFSKY LAW FIRM, P.C.,

Plaintiffs,

-against-

THE WASHINGTON POST COMPANY
KEITH L. ALEXANDER
JENNIFER JENKINS
CREATIVE LOAFING MEDIA
WASHINGTON CITY PAPER
REND SMITH
BREAKING MEDIA, LLC
ABOVETHELAW.COM
ELIE MYSTAL
AMERICAN BAR ASSOCIATION
ABAJOURNAL.COM
DEBRA CASSENS WEISS
SARAH RANDAG
MYSHINGLE.COM
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THE COURT: Good afternoon, everyone.

COUNSEL: (Collectively) Good afternoon, your Honor.

THE COURT: This feels to me like the U.S. Supreme Court awaiting a fundamental decision with regard to healthcare --

MR. BRICKMAN: This is more important, your Honor.

THE COURT: -- but it's not. I have a courtroom of about 30 or 40 attorneys sitting here in the matter of Joseph Rakofsky versus The Washington Post Company, et al. I have to say "et al" or take up all the time of the Court.

Who is the first person to start the motion practice? We'll do it by sequence number.

MR. PATIL: Your Honor, if the Court is willing, the defendants have conferred among themselves and in light of the substantial overlap between or among their arguments, we would propose a plan by which I would argue the application of the fair report privilege, Mr. Harris would argue the republication defense, several of the other defendants will argue jurisdictional issues unique to their clients.

THE COURT: How many attorneys will be arguing for the defendants?

MR. PATIL: I believe there will be a total of six.

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THE COURT: How much time would you each need?

MR. PATIL: Your Honor, I think the fair report privilege and the publication defense would probably need a little bit longer given that those address --

THE COURT: How about this. It is now approximately 3:10 or so. We have to close up by 4:30. That gives us an hour and 20 minutes.

How much time would the defendants need to present their case in total? Would it be more than a half hour? Would it be 40 minutes?

MR. PATIL: Let's say 40 minutes, your Honor.

THE COURT: And how much time would you need, to be fair?

MR. GOLDSMITH: I'd say around 20 -- 20 to 30 minutes.

THE COURT: Okay. It looks like we can do it. Okay. So why don't you start. I guess you're the first person that wants to speak. What is your name, sir?

MR. PATIL: My name is Chetan Patil.

THE COURT: And who do you represent?

MR. PATIL: I, along with Mr. Baine, Mr. Lupkin and Miss Nicholson, represent The Washington Post, Keith Alexander and Jennifer Jenkins.

THE COURT: And what issue are you talking about?

MR. PATIL: The application of the fair report

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privilege.

THE COURT: Counsel, you can start whenever you're ready.

MR. PATIL: Your Honor, in light of the several small trees that are on your desk, if it's okay, I can hand you up the four documents that we think are the key documents in the case. I have a copy for Mr. Goldsmith.

THE COURT: Please give it to my officer.

MR. PATIL: These consist of the two Washington Post articles in question, the transcript from the Deaner proceeding and Mr. Rakofsky's e-mail. These were all exhibits to our motion to dismiss.

Your Honor, by way of background, this case arose from the Post report of a felony murder trial in the District of Columbia. The plaintiff, Mr. Rakofsky, was the attorney for the criminal defendant Dontrell Deaner. In the middle of trial, he approached Judge Jackson and informed him that certain irreconcilable differences had arisen between he and his client. Mr. Deaner made a subsequent request for new counsel and the next day Judge Jackson granted that request. In granting the request, Judge Jackson stated that he was doing so, in part, because of those irreconcilable differences, but also in part, quote, "alternatively" because he concluded that Mr. Rakofsky's performance on the record was incompetent.

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2 In addition, during the course of those
3 proceedings, an e-mail was brought to the attention of the
4 court through a filing made by Mr. Rakofsky's investigator
5 in the case that indicated that Mr. Rakofsky had instructed
6 the investigator to trick a witness or trick an individual,
7 a potential witness -- excuse me -- in connection with the
8 case.

9 Based on that record, this case is a simple
10 straight forward one. There are two things Mr. Rakofsky
11 complains about. He complains about statements made to the
12 effect that he was dismissed and a mistrial was granted
13 because he was deemed incompetent by Judge Jackson, and he
14 complains about statements related to this e-mail in which
15 he had asked the investigator to trick this individual in
16 connection with the case.

17 THE COURT: Repeat those two again?

18 MR. PATIL: They are statements made to the effect
19 that Mr. Rakofsky was dismissed and a mistrial granted
20 because Judge Jackson declared him incompetent --

21 THE COURT: So the incompetence issue.

22 MR. PATIL: Exactly. The incompetence issue and
23 the tricking issue, as a matter of shorthand.

24 THE COURT: Okay.

25 MR. PATIL: With respect to the incompetence
26 issue, I think it's important to look at exactly what Judge

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2 Jackson stated on the record.

3 In announcing the mistrial, he stated that he was
4 granting it, quote, "alternatively" based on his
5 observation of the conduct during the course of the trial.
6 He stated that Mr. Rakofsky's performance was below what
7 any reasonable person could expect in a murder trial; that
8 it was below any -- not up to par under any reasonable
9 standard of competence under the Sixth Amendment; that he
10 was astonished that Mr. Rakofsky would purport to represent
11 someone having never tried a case before -- represent
12 someone in a murder trial -- excuse me -- and that
13 Mr. Rakofsky lacked a good grasp of legal principles and
14 legal procedures that enured to the detriment of
15 Mr. Deaner. He even went so far as to say that had
16 Mr. Deaner been convicted, he would have sua sponte granted
17 a motion for a new trial. Thus, based on that record, it's
18 clear that the Post account captures the gist or the sting
19 of the official record.

20 Now, Mr. Rakofsky claims that oh, this is just
21 dicta, that Judge Jackson could have ruled on Mr. Deaner's
22 request without ever reaching the incompetence issue. But
23 the fair report privilege never required --

24 THE COURT: Let me stop you for a second. You
25 gave me four documents. One document is a transcript --

26 MR. PATIL: Um-hmm.

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2 THE COURT: -- of a session before Judge
3 Jackson --

4 MR. PATIL: Yes, your Honor.

5 THE COURT: -- of April 1st, 2001. By the way,
6 it's April Fools Day, I wonder why.

7 Is that what you're relying upon?

8 MR. PATIL: Yes, your Honor.

9 THE COURT: Okay.

10 MR. PATIL: The fair report privilege has never
11 required reporters to wade into the thicket of issues like
12 what is holding versus what is dicta. And for the purposes
13 of fair report privilege, it doesn't matter why Judge
14 Jackson said what he said. All that matters is that he
15 said it and the Post was entitled to report on that fact.
16 And Mr. Rakofsky's papers are also replete with references
17 to slanderous comments made by Judge Jackson, that Judge
18 Jackson had formed a "blatant alliance" with the
19 prosecution, and that just goes to show that Mr. Rakofsky's
20 real gripe here is with Judge Jackson and not with the Post
21 and not with any of the other defendants who merely
22 reported the statements that Judge Jackson made on the
23 record.

24 Now, with respect to the trick e-mail, that too
25 is --

26 THE COURT: I want to stop you for a second. I

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2 just want to read a portion --

3 MR. PATIL: Sure.

4 THE COURT: -- of that transcript because I want
5 it clear for the record.

6 MR. PATIL: Yes, your Honor.

7 THE COURT: This is a document that I just stated
8 is April 1st, 2011, and this is the court speaking. The
9 court is identified as the Honorable William Jackson. I
10 don't want you to paraphrase. I want to state the actual
11 words for the record.

12 MR. PATIL: Yes, your Honor. I would direct you
13 to page 4, the text of the statement. I think line number
14 10 is --

15 THE COURT: Let me read it because you may be
16 sued.

17 MR. PATIL: Sure.

18 THE COURT: They can't sue me.

19 "It appeared to the Court that there were theories
20 out there -- defense theories out there, but the inability
21 to execute those theories. It was apparent to the Court
22 that there was a -- not a good grasp of legal principles
23 and legal procedure of what was admissible and what was not
24 admissible that inured, I think, to the detriment of
25 Mr. Deaner. And had there been -- If there had been a
26 conviction in this case, based on what I had seen so far, I

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2 would have granted a motion for a new trial under 23.110.

3 "So I am going to grant Mr. Deaner's request for
4 new counsel. I believe both -- it is a choice that he has
5 knowingly and intelligently made and he has understood that
6 it's a waiver of his rights. Alternatively, I would find
7 that they are based on my observation of the conduct of the
8 trial manifest necessity. I believe that the performance
9 was below what any reasonable person could expect in a
10 murder trial."

11 Is that what you were talking about?

12 MR. PATIL: Yes, your Honor.

13 In addition, on page 5, beginning at line 15, the
14 remainder of that paragraph, I think, is --

15 THE COURT: Let me read through.

16 MR. PATIL: Sure.

17 THE COURT: This way it's a continuing statement
18 from Judge Jackson.

19 "So I'm going to grant the motion for new trial.
20 And I must say that just this morning, as I said, when all
21 else, I think, is going on in this courtroom, I received a
22 motion from an investigator in this case who attached an
23 e-mail in this case from Mr. Rakofsky to the investigator.
24 I, quite frankly, don't know what to do with this because
25 it contains an allegation by the investigator about what
26 Mr. Rakofsky was asking the investigator to do in this

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2 case.

3 "So that's where we are. And I'll figure out what
4 to do about that case. But it just seems to me that -- so,
5 I believe that based on my observations and, as I said, not
6 just the fact that lead counsel had not tried a case
7 before; any case. It wasn't his first murder trial; it was
8 his first trial. And I think that the -- As I said, it
9 became readily apparent that the performance was not up to
10 par under any reasonable standard of competence under the
11 Sixth Amendment.

12 "So I'm going to grant the motion. We'll set this
13 over -- Do you want to retain a lawyer, another lawyer or
14 do you want me to appoint you another lawyer?"

15 And the rest of it is not relevant to our
16 discussion.

17 MR. PATIL: Yes, your Honor.

18 Those passages are what we were referring to in
19 discussing the incompetence.

20 THE COURT: You can continue. I just wanted to
21 make it clear what we were talking about.

22 MR. PATIL: So, as you can see, and as you just
23 read from the record, Judge Jackson made the statements
24 about Mr. Rakofsky's incompetence that Mr. Rakofsky now
25 complains about.

26 With respect to the trick e-mail, the gist of the

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2 statement in the Post account and in the actual e-mail
3 itself are the same. He says, "Please trick the old lady"
4 in the e-mail, and in the Post account it says, "Please
5 trick the old lady."

6 THE COURT: Okay. Let me stop you, as I stopped
7 you earlier, with regard to the second statement. Where is
8 that statement -- strike that.

9 Where is that e-mail located?

10 MR. PATIL: The e-mail is located --

11 THE COURT: Is it one of the four documents?

12 MR. PATIL: It's one of the four that I gave you,
13 yes. In fact, it's right there.

14 THE COURT: Okay. And this document is annexed to
15 your papers?

16 MR. PATIL: Yes.

17 THE COURT: Okay. So I want to make sure. And
18 counsel for plaintiff has this document.

19 MR. PATIL: Yes. I believe it's Exhibit E to our
20 motion to dismiss.

21 THE COURT: Okay, good.

22 MR. PATIL: He says --

23 THE COURT: Again, I want to read the entire
24 e-mail.

25 MR. PATIL: Sure.

26 THE COURT: Because I don't want to paraphrase. I

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2 want to read the entire item into the record.

3 It says "from" and "to" in it and it's blacked
4 out. Is there a reason for that?

5 MR. PATIL: The Post -- this was hyperlinked to
6 the Post's website. They redacted the name of the
7 plaintiff and the --

8 THE COURT: Is it permissible to say who this is
9 from?

10 MR. PATIL: Your Honor, I don't believe the
11 plaintiff would dispute who it's from. There has never
12 been a dispute.

13 THE COURT: Okay.

14 MR. PATIL: It was announced --

15 THE COURT: Do you know if this is from Mr. -- is
16 there any dispute that this document was sent by Mr. Joseph
17 Rakofsky, the plaintiff?

18 MR. PATIL: No, your Honor.

19 THE COURT: Is plaintiff's counsel disputing that
20 fact?

21 MR. GOLDSMITH: No.

22 THE COURT: Okay. Then it's not necessary. And
23 the date is Wednesday, October 6, 2010. And then there's a
24 time I don't think it's relevant. And subject is "Deaner
25 murder case." And there is a name right below it. Is that
26 relevant?

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2 MR. PATIL: That's only the name of the
3 investigator.

4 THE COURT: Adrian is the investigator?

5 MR. PATIL: Yes.

6 THE COURT: It says, "Adrian, thanks for helping.
7 Please trick" -- and then the name of the person is blacked
8 out.

9 MR. PATIL: Yes.

10 THE COURT: And then, "'(old lady)' into
11 admitting: A, she told the two lawyers that she did not
12 see the shooting, and B, she told two lawyers she did not
13 provide the government any information about the shooting.
14 This happened a couple of months ago."

15 Is that what was reported? Because it looks like
16 the rest is --

17 MR. PATIL: Yes.

18 THE COURT: -- inapplicable.

19 MR. PATIL: Yes, your Honor. That is the -- those
20 are the statements at issue.

21 THE COURT: And, "thank you." It says "Joseph,"
22 and then the last name, it looks like it's blacked out
23 below the word "Joseph."

24 MR. PATIL: Yes. I believe that might also be his
25 e-mail address.

26 THE COURT: Okay. That's what it is. But there's

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2 no dispute this came from the plaintiff.

3 MR. PATIL: Yes, that's correct.

4 THE COURT: Let's move on.

5 Now you can tell me exactly what is your argument
6 vis-a-vis this e-mail.7 MR. PATIL: The Post account says, quote, "Thank
8 you for your help. Please trick the old lady to say that
9 she did not see the shooting or provide information to the
10 lawyers about the shooting."11 The gist of the alleged defamation there is the
12 fact that he said "trick the old lady," that he advocated
13 the use of deception in dealing with what Mr. Rakofsky
14 concedes was at least a potential witness. The Post fairly
15 and accurately reported that, and as such the fair report
16 privilege applies.17 THE COURT: Is it the exact words? Because it
18 looks like almost the exact words.19 MR. PATIL: No, your Honor, there are some minor
20 inaccuracies here.

21 THE COURT: It's a paraphrase of this e-mail?

22 MR. PATIL: Yes, your Honor.

23 THE COURT: Is the word "trick" in there?

24 MR. PATIL: Yes, the word "trick" is in both the
25 e-mail and the Post account.

26 What's more so is, if anything, the Post account

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2 was milder than the actual record. Mr. Rakofsky concedes
3 in his opposition and in his amended complaint that the
4 filing from the investigator to which this e-mail was
5 attached, which was sent to the court, contained the
6 allegation --

7 THE COURT: Stop there for a second. How did this
8 e-mail get to the court?

9 MR. PATIL: The investigator, Mr. Bean --

10 THE COURT: Adrian's last name is Bean?

11 MR. PATIL: Yes.

12 THE COURT: Spell his last name, please.

13 MR. PATIL: B-e-a-n.

14 THE COURT: Okay.

15 MR. PATIL: Mr. Bean was making an application for
16 funds that Mr. Rakofsky had refused to pay him and had
17 brought it to the attention of the court that way.

18 THE COURT: So it was the investigator that gave
19 this document to the court.

20 MR. PATIL: Yes, your Honor.

21 THE COURT: Okay.

22 MR. PATIL: In that filing, as Mr. Rakofsky
23 concedes, the investigator alleged that Mr. Rakofsky had
24 instructed him to, quote, "trick" a witness into changing
25 her testimony.

26 THE COURT: Let's stop you again because I don't

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2 know all the facts. Are you telling me as part of the
3 record before Judge Jackson, he submitted his own affidavit
4 which provided the e-mail and then he stated that under
5 oath in a subsequent affidavit?

6 MR. PATIL: I'm not sure, your Honor, if it was an
7 affidavit or if it was a filing.

8 THE COURT: Did you mention affidavit? Because I
9 thought I heard you use that word, unless I mis --

10 MR. PATIL: I don't believe I did, but if I did, I
11 apologize.

12 THE COURT: Maybe I misunderstood.

13 MR. PATIL: He, in fact, sent this application to
14 Judge Leibovitz, who is a judge who had had the case prior
15 to Judge Jackson before it was transferred to Judge
16 Jackson. Judge Leibovitz sent the filing and the e-mail
17 along to Judge Jackson. So the Post report never reported
18 that Mr. Rakofsky had asked Mr. Bean to change a witness'
19 testimony or to trick a witness into changing her
20 testimony. The reading that Mr. Rakofsky attributes to the
21 Post report is something that would have been a quote of
22 Mr. Bean in that instance. Would have been a quote of the
23 official record.

24 THE COURT: I don't understand what you just said.

25 MR. PATIL: Okay.

26 THE COURT: The Washington Post reported,

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2 allegedly reported that the contents of the e-mail used the
3 word trick the old lady into admitting that she did not see
4 the shooting --

5 MR. PATIL: Um-hmm.

6 THE COURT: -- and that she did not provide the
7 government any information about the shooting. Is that
8 correct?

9 MR. PATIL: Yes, that's correct.

10 THE COURT: That's the sum and substance of the
11 e-mail.

12 MR. PATIL: Yes.

13 THE COURT: So why isn't that open and cut? It's
14 the truth that you went ahead.

15 MR. PATIL: It is, your Honor.

16 THE COURT: What does the fair reporting have to
17 do with anything about this?

18 MR. PATIL: Nothing, your Honor.

19 THE COURT: Okay. I thought so.

20 MR. PATIL: It's a report of the official
21 proceeding.

22 THE COURT: Okay. So fine.

23 MR. PATIL: Your Honor, the e-mails and the Post
24 account stand next to each other and one need only compare
25 the two, and you can see that the report is what the e-mail
26 says.

1 Proceedings

2 THE COURT: Okay. So you're talking about the
3 incompetence issue is the fair reporting.

4 MR. PATIL: Yes.

5 THE COURT: And this is just a simple is-it-true-
6 isn't-it-true analysis.

7 MR. PATIL: Mr. Rakofsky claims that the minor
8 inaccuracies in the Post transcription of the e-mail
9 render -- pushes this, our report, outside --

10 THE COURT: What are the minor changes?

11 MR. PATIL: It says in the e-mail, quote, "She
12 told the two lawyers that she did not see the shooting."
13 The Post account says, quote --

14 THE COURT: Which? You gave me two documents.
15 One is dated April 1st.

16 MR. PATIL: April 1st.

17 THE COURT: Okay.

18 MR. PATIL: The Post article states, quote, "to
19 say that she did not see the shooting or provide
20 information to the lawyers about the shooting."

21 Mr. Rakofsky's e-mail says, quote, "She told the
22 two lawyers that she did not see the shooting and she told
23 the two lawyers she did not provide the government any
24 information about the shooting. This happened a couple of
25 months ago."

26 Those are the differences. The difference has

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2 nothing to do with the fact that he asked the investigator
3 to trick this individual in connection with the case.
4 That's the gist of it.

5 THE COURT: I didn't hear a difference. What was
6 the difference?

7 MR. PATIL: There are minor syntax differences.

8 THE COURT: So you're telling me that we're
9 fighting over syntax? Most people don't know what syntax
10 means.

11 MR. PATIL: That's our position, your Honor.

12 THE COURT: Okay.

13 MR. PATIL: The gist of the e-mail, the key
14 question for the purposes -- for our purposes --

15 THE COURT: Isn't the law about reporting
16 accurately? And I never saw a case that held someone
17 liable for defamation based upon syntax.

18 MR. PATIL: That's correct, your Honor. I believe
19 the phrase in the case law is you're not supposed to use a,
20 quote, "lexicographer's precision."

21 THE COURT: Correct.

22 MR. PATIL: Yes. And that is what we are here --

23 THE COURT: So if you use the word "the" versus
24 "a" or "and" versus "a" or "he" versus "she."

25 MR. PATIL: I agree, your Honor.

26 Mr. Rakofsky also claims that the omission of the

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2 statement, "This happened a couple of months ago" renders
3 the fair report privilege inapplicable in this case. That
4 we don't think has anything to do with the actual gist of
5 the defamation here. The gist of the defamation here is
6 the use of the word "trick," the advocacy of deception.
7 And that comes across in the Post article just the same way
8 as it came across in the e-mail, in Mr. Bean's filing, and,
9 in fact, in Judge Jackson's statement where he said that
10 this e-mail, quote, "raised ethical issues."

11 THE COURT: Is there another issue with regard to
12 the April 9th article?

13 MR. PATIL: No, your Honor. Mr. Rakofsky's
14 complaints with respect to the April 9th article go to the
15 incompetence issue which we addressed already.

16 THE COURT: Anything else you want to say?

17 MR. PATIL: Yes, your Honor.

18 Mr. Rakofsky has three additional claims on top of
19 his defamation claim. One is intentional infliction of
20 emotional distress and intentional interference with a
21 contract. As your Honor has recognized in prior cases,
22 it's well settled under New York law that you can't plead
23 around defamation by pleading other torts. They fail under
24 the fair report privilege.

25 THE COURT: So you found one of my cases then that
26 said that.

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2 MR. PATIL: Yes. Suson v. NY Post.

3 In addition, Mr. Rakofsky has a claim for improper
4 use of his name for the purposes of trade, but it's
5 undeniable that a murder case is newsworthy. Mr. Rakofsky
6 has not and cannot respond to that.

7 If your Honor is --

8 THE COURT: I have no questions. I understand
9 what you said. Any time that I don't understand I
10 interrupt you, which is my method, so I apologize for
11 interrupting you because I don't want the record to be
12 unclear. And at times where I thought that I wasn't
13 understanding you, I asked you. I think what you said was
14 clear and I think we should turn it over to the next
15 individual --

16 MR. PATIL: Yes, your Honor.

17 THE COURT: -- to argue the second part.

18 MR. PATIL: I would like to reserve a few minutes
19 of rebuttal if need be and if we have time.

20 Thank you.

21 THE COURT: The way we're going, we're not going
22 to have time. But let's move on.23 MR. HARRIS: Good afternoon, your Honor. Do you
24 want me to speak from here?

25 THE COURT: Off the record.

26 (Discussion off the record.)

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THE COURT: Back on the record.

Counsel, you can continue the argument for the defendants.

MR. HARRIS: Thank you, your Honor.

I'm Mark Harris from Proskauer Rose for the American Bar Association, abajournal.com, Debra Cassens Weiss and Sarah Randag.

THE COURT: What issue are you going to be addressing today?

MR. HARRIS: I'm going to be addressing primarily the republication, the republisher's privilege.

Just to make it clear, your Honor, the reason we set it up this way was that the arguments that the Post made in one form or another apply, I think, to everybody here. Everybody, more or less, has the position that what they published was a fair report.

In addition, I believe all of the defendants, except for the Post, have an argument which is called a republisher's privilege, which says that you can rely on reporting that's from somebody else as long as it was not grossly irresponsible to do so. So what I'm going to do is lay out that argument.

THE COURT: Let's make it perfectly clear that you are republishing the articles from The Washington Post.

MR. HARRIS: Pieces of them, yes, that's correct,

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2 your Honor.

3 So in the case of the ABA, there are two articles
4 that we published that Mr. Rakofsky took issues with,
5 specifically a sentence from each one of them. And
6 basically, to use your Honor's labels, one of them is the
7 e-mail issue, the tricking issue, and the other one is the
8 competence issue. And that's all he's challenging for both
9 of them.

10 Again, I'm not going to go through the arguments
11 that your Honor just heard about fair report, although we
12 certainly believe what we published was a fair report.

13 THE COURT: We purposely -- strike that.

14 I allowed you to do it this way so we should not
15 do these arguments over multiple times. I think everyone
16 joins in. The papers state it. This is just oral argument
17 to enhance the arguments that were made in the papers.

18 MR. HARRIS: So the republisher privilege says
19 that when there's a -- let me take it in two pieces.

20 When there's a story about a private individual
21 regarding a matter of public concern, the law in this
22 state, under a case called Chapadeau, is that the standard
23 for liability is gross irresponsibility. The plaintiff
24 must show that the publisher exercised gross
25 irresponsibility in order to establish liability for
26 defamation. That's a higher standard than recklessness,

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2 which is the federal constitutional standard. In addition,
3 there's a principle that for republishers, a republisher is
4 allowed to rely on the research of the first publisher, and
5 source material, unless there's substantial reason to
6 question the accuracy of the original article or of the
7 bona fides of the reporter.

8 So the argument that I'm making before your Honor
9 is that it's impossible for Mr. Rakofsky to meet that
10 standard. He can't show gross irresponsibility because the
11 ABA was entitled to rely on the reporting of The Washington
12 Post concerning what happened in the Deaner case.

13 THE COURT: Let me stop you for a second.

14 MR. HARRIS: Yes.

15 THE COURT: What is the standard? What does gross
16 irresponsibility mean?

17 MR. HARRIS: Gross irresponsibility, I think, when
18 combined with the second standard I mentioned, is that
19 there has to be some -- more than warning flags, more than
20 red flags that either the source material shouldn't be
21 trusted or that the -- either the material itself or the
22 person who's -- the speaker shouldn't be trusted. More
23 than warning flags.

24 THE COURT: Is there a case that sets forth what
25 that means and under what circumstances that would occur?

26 MR. HARRIS: I'm not sure, your Honor. There

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2 actually is not. There's less law on this than one would
3 think. But the case that talks about substantial reasons
4 to question the accuracy of articles or the bona fides of
5 the reporter is a case called Karaduman v. Newsday. It's a
6 1980 Court of Appeals case.

7 I think what the case law shows, and we cite some
8 of this, your Honor, is that relying on a publication such
9 as The Washington Post, which Mr. Rakofsky himself concedes
10 in his briefs one is entitled to do and one is not
11 unreasonable for doing, certainly has to satisfy the
12 standard.

13 Just to make that point clear, the first article
14 that the ABA published, the article itself refers
15 explicitly to The Washington Post story. The story says,
16 it says, allegedly -- it links through a hyperlink to The
17 Washington Post.

18 THE COURT: Is there case law that says that if
19 you republish a story from a major reporting agency, such
20 as The Washington Post, that would automatically give you a
21 right to republish unless there were other factors that
22 mitigated it?

23 MR. HARRIS: I believe the Karaduman case, which
24 was about Newsday, does establish that principle, your
25 Honor. And again, as I said, Mr. Rakofsky concedes this on
26 page 29 of his brief in opposition to the motion to

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2 dismiss, which I can pull up, if your Honor would like me
3 to.

4 THE COURT: He's willing to grant your motions of
5 all the republications?

6 MR. HARRIS: I'm sorry, your Honor?

7 THE COURT: So as a result, Mr. Rakofsky's willing
8 to grant, does not oppose your motion to dismiss with
9 regard to the republication.

10 MR. HARRIS: Well, it seems -- I think I'll let
11 his lawyer speak for him. But I think what he's saying, I
12 think he concedes that where there's a direct reliance on
13 the Post, it seems to me he doesn't challenge it.

14 THE COURT: I assume that he's not going to do so.

15 MR. HARRIS: Right.

16 THE COURT: There's a reason why I ask that
17 question.

18 MR. HARRIS: To be honest, your Honor, I'm not
19 sure how he gets around what he said, which was that we
20 have basis --

21 THE COURT: I'll let you continue.

22 MR. HARRIS: Okay.

23 In the case of that first article, the ABA is
24 relying on The Washington Post explicitly, cites it,
25 hyperlinks to it.

26 The second article that Mr. Rakofsky challenges is

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2 one which the only word, or the only two words in it that
3 he challenges are the statements that his performance was
4 poor and that that prompted the mistrial. "Poor" and
5 "prompted." That --

6 THE COURT: Incompetence?

7 MR. HARRIS: Incompetence.

8 THE COURT: This goes back to the incompetence
9 argument.

10 MR. HARRIS: This is incompetence, yes.

11 THE COURT: So the transcript of Judge Jackson
12 where he specifically states, "I believe that the
13 performance was below what any reasonable person could
14 expect in a murder trial" is not poor?

15 MR. HARRIS: It's poor.

16 THE COURT: I would say it's even --

17 MR. HARRIS: It's worse than poor.

18 THE COURT: I think that's a blessing.

19 MR. HARRIS: Yes.

20 THE COURT: Rather than making it worse for
21 Mr. Rakofsky.

22 MR. HARRIS: In this case of the second article,
23 there is no hyperlink directly to The Washington Post
24 article. The reason why there isn't is by that time the
25 story had developed.

26 THE COURT: Was it referred to as The Washington

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Post story?

MR. HARRIS: In this second article I'm mentioning?

THE COURT: Yes.

MR. HARRIS: No. I don't believe so. For the ABA, it has a hyperlink to an earlier ABA story. That earlier ABA story refers to the first ABA story which is based, as I mentioned before, on The Washington Post.

THE COURT: Let me stop you.

The second ABA report has a hyperlink to the first Washington Post story of April 1st?

MR. HARRIS: No. I guess what I'm trying to say is that the second ABA article indirectly gets you to the Post.

THE COURT: How so?

MR. HARRIS: It links to an earlier ABA article which was the second in a series of three which he doesn't challenge. And that second ABA article links back to the first ABA article which is the one that hyperlinked to the Post.

The republisher privilege, I think, makes it clear that indirect chains like that are fine as well. And it's also quite clear that it is summarizing what the overall impression was of all of the different sources, all of which agreed that the performance was at least poor and

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2 that it at least prompted what happened here.

3 THE COURT: How many defendants are here regarding
4 republication? Is there a lot?

5 MR. HARRIS: Yes. I don't know if it's everybody
6 but it's a number, yes.

7 THE COURT: It's Washington Post and everyone
8 else? The Washington Post is the first reporter?

9 MR. HARRIS: Yes.

10 THE COURT: And everyone else is a republication?

11 MR. HARRIS: Yes. Although not --

12 THE COURT: Is that what the defendants are
13 arguing?

14 MR. HARRIS: I'm not sure if every single
15 defendant is arguing the republisher privilege.

16 THE COURT: Or many. Most of them. Can we say
17 that?

18 MR. HARRIS: Certainly many, yes.

19 THE COURT: And it's the same in terms of giving a
20 hyperlink?

21 MR. HARRIS: I don't know for every single one
22 it's the same.

23 THE COURT: Anything else you want to say?

24 MR. HARRIS: No. That's the only thing, your
25 Honor.

26 THE COURT: Thank you.

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MR. HARRIS: Thank you.

THE COURT: Who is the third person that is going to argue for the defendants?

A DEFENSE COUNSEL: Your Honor, the next issue is jurisdiction, I think, for some of the defendants. Do you want to hear jurisdiction or do you want Mr. Goldsmith to respond?

THE COURT: I'd rather you deal with your whole case and then respond, rather than go back and forth. Let's get the defendants in --

A DEFENSE COUNSEL: Sure.

THE COURT: -- and hear all the arguments.

MR. BALIN: My name is Rob Balin from Davis Wright Tremaine for the defendants CL Washington, Inc., Creative Loafing, Inc., Rend Smith.

CL Washington, Inc. is the publisher of a paper called the Washington City Paper, and as the name indicates, it's a local Washington paper.

I think the issues that relate to our article, my clients, will probably relate to several of the other clients and several of the other defendants who have jurisdictional issues.

Washington City Paper, as its name denotes, is distributed in the Washington metro area; D.C., Virginia, Maryland, 73 thousand copies a week free.

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2 THE COURT: You're arguing long-arm jurisdiction?

3 MR. BALIN: We are.

4 There is no -- and Mr. Goldsmith can save us some
5 time. I believe his client is not arguing general
6 jurisdiction. If he is, then I'll address that. If he's
7 not -- we seem to think he has waived it. That's what most
8 of the defendants read from his papers. So if you can
9 enlighten us, if he's not arguing general jurisdiction, we
10 won't bother taking up the Court's time with that.

11 MR. GOLDSMITH: No, there have not been arguments
12 with regard to general jurisdiction.

13 MR. BALIN: Okay. So it really is long-arm
14 jurisdiction.

15 Your Honor may know that in this particular area,
16 New York's long-arm statute is narrower, particularly with
17 respect to defamation claims. The usual long arm bases
18 that someone committed a tortious act outside the state
19 causing injury in the state, or committed a tortious act in
20 this state, that's 302(a)(2) and (3). There's an explicit
21 exception for defamation claims. That's number one. So,
22 they cannot rely on typical long-arm jurisdiction, the
23 usual tortious act outside the state --

24 THE COURT: What is the thrust if there's no long-
25 arm jurisdiction?

26 MR. BALIN: The thrust is the only provision which

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2 is left, which is 302(a)(1), which is transacts business in
3 the state of New York. There are two important principles.
4 Obviously, you've got to be transacting some business; and
5 secondly, that the cause of action has to arise from the
6 transaction of that business.

7 The case law, including most recently Justice
8 Lippman, the Court of Appeals, back in February in the
9 SPCA of Upstate New York case, has held that with respect
10 to Internet libel claims, and that's what we're talking
11 about with my client and most of the others, the mere
12 publication of an article by a non-domiciliary on its
13 website, such as the Washington City Paper in D.C., is not
14 transacting business in the State of New York merely
15 because it's accessible in the State of New York. Sure,
16 it's accessible in New York. It's also accessible in Ohio
17 and Zimbabwe and the rest of the world. And just to give
18 you a sense, your Honor, because I think this case probably
19 illustrates the point, the name of the title of the
20 article, of my client's article, it's in the city section
21 of the Washington City Paper, "New Jersey Lawyer Does Not
22 Care What D.C. Thinks of Him." It has nothing to do with
23 New York other than the fact that it's on the Internet and,
24 I assume, some readers can read it here.

25 Mr. Rakofsky acknowledges that principle as he
26 must. The law is really settled in this area. The only

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2 thing he argues as to my client, possibly as to some other
3 clients, and I think I can illustrate it, your Honor, best
4 by showing this to you. If I could hand up a document to
5 you. I'll give Mr. Goldsmith a copy.

6 (Handing to the Court and to Mr. Goldsmith.)

7 MR. BALIN: He argues that, well, okay, your
8 advertisements are largely based, you know, they're
9 targeted to D.C. area residents. They're largely local
10 advertisements. But every once in a while when you're on
11 an Internet website you'll have a national advertiser who
12 may sell business in New York. And he pointed out Urban
13 Essentials. You'll see on the front page there's a picture
14 of an Urban Essentials ad for a sofa that's on the online
15 version of my client's article and with an address for the
16 store in D.C., 1330 U Street Northwest, Washington, D.C.
17 And the argument is that because Urban Essentials may do
18 business in New York, somehow that's a basis for
19 jurisdiction.

20 I think your Honor's facial reaction really says
21 it all. Even when an out-of-state defendant in a
22 defamation suit is directly engaging in advertising with
23 New York based advertisers - we don't even have that - with
24 New York based advertisers, what the courts say under the
25 transacting business section is, even if they were
26 transacting business, this lawsuit is not about the Urban

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2 Essentials advertisement. To predicate jurisdiction on the
3 transacting business section of 302(a)(1), the claim has to
4 arise out of the transaction of the business in New York.
5 There's no lawsuit, as far as I know, over any
6 advertisements in the Washington City Paper.

7 I'm not going to belabor the point, your Honor.

8 THE COURT: Thank you.

9 MR. BALIN: Okay.

10 THE COURT: Who is the next defendant who is going
11 to argue?

12 MR. GOLDSTEIN: Thank you, your Honor.

13 Jacob Goldstein from Levine Sullivan Koch & Schulz
14 on behalf of Allbritton Communications Company and its
15 website TBD.com.

16 We move to dismiss on the grounds that there was a
17 lack of personal jurisdiction, and also on the grounds that
18 there was improper service. The personal jurisdiction
19 arguments were just ably argued by Mr. Balin. I'll just
20 focus on the unique issues for service on Allbritton.

21 As an initial matter, the plaintiffs consent to
22 the dismissal of claims against TBD.com as a defendant
23 since it's an unincorporated just mere website, not an
24 entity that can be sued. And in addition, as far as
25 service, there's no proper service on Allbritton
26 Communications. The only response to our argument on this

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2 point is a citation of CPLR 308, which is a statute that
3 deals with service on natural persons. Allbritton
4 Communications is a company. There's no proper service in
5 this case. That's spelled out in our papers. And even if
6 there had been service, there's no personal jurisdiction.

7 THE COURT: Okay. Thank you.

8 Who is the next person that wants to argue?

9 MR. RANDAZZA: Your Honor, Marc Randazza. And
10 I'm here on behalf of 35 of the defendants. I provided the
11 court reporter with a list of them. Most of them attorneys
12 who write law blogs.

13 As a preliminary matter, on the issue of personal
14 jurisdiction a number of them have that argument, but many
15 of them want to waive that so that they can simply have a
16 decision on the merits here. So, Carolyn Elefant would
17 like to waive that; Eric Mayer from Kansas would like to
18 waive that; Jeffrey Gamso from Ohio would like to waive
19 personal jurisdiction. The defendant identified at this
20 point only sued pseudonymously as "Tarrant84" would like to
21 waive that; Brian Tannebaum from Florida would like to
22 waive that, and Antonin Pribetic and his firm Steinberg
23 Morton, they waive personal jurisdiction. However, I do
24 represent some clients who are from states with good
25 anti-SLAPP statutes, such as Avvo from Washington State
26 does not wish to waive. So unless stated, they waive.

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2 I do have one client who has a unique position in
3 this case, and that is banniNation. Although the other
4 clients have been, really I would just be repeating my able
5 co-counsels' arguments with respect to them, banniNation is
6 an online message board and therefore cannot be held liable
7 for the statements of its users under 47 U.S.C., section
8 230, which makes it amply clear that the statements of
9 those users cannot be imbued to them.

10 THE COURT: For the record, what is a message
11 board?

12 MR. RANDAZZA: It is an online service where
13 somebody can sign up for a membership and then can post
14 whatever they like. It's a place where people have online
15 discussions.

16 THE COURT: It's a forum.

17 MR. RANDAZZA: It's been called that. Yes, your
18 Honor. It's an online forum.

19 We have briefed this. I don't want to repeat all
20 my briefing, but we have briefed this on pages 15 and 16
21 and 17.

22 THE COURT: So, with respect to your client --

23 MR. RANDAZZA: Yes.

24 THE COURT: -- there are others that posted
25 comments or articles regarding the plaintiff. Is that why
26 that client is being sued?

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2 MR. RANDAZZA: Correct, your Honor. They have
3 been named because Mr. Rakofsky takes issue with what third
4 parties posted. This is classic section 230 defense.

5 THE COURT: And are the writers of those -- strike
6 that. Are the persons that put the information on the
7 message board being sued as well?

8 MR. RANDAZZA: One of them is being sued
9 pseudonymously as "Tarrant84." So he would not have a
10 section 230 defense, your Honor.

11 THE COURT: Thank you.

12 Any other defendants?

13 Just for the record, I'm going to give you another
14 ten minutes. By 4:00 all defendants have to wrap up
15 because I want to give Mr. Goldsmith an opportunity to
16 respond.

17 MR. GOLDSMITH: Thank you.

18 MR. CATALANO: Your Honor, I'll be brief. I
19 represent a California attorney, Michael Doudna, and his
20 law firm.

21 COURT REPORTER: Your name, sir?

22 MR. CATALANO: Thomas Catalano, Lester Schwab.

23 We have just moved on jurisdictional grounds
24 leaving it to other counsel to rely on the other issues,
25 more substantive issues.

26 Mr. Doudna is simply a solo practitioner in

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2 California. He's not admitted in New York. As a matter of
3 fact, he never even stepped foot in New York. You have an
4 affidavit from him. He has absolutely no connection to New
5 York whatsoever. So on that basis, your Honor, we're
6 moving for lack of jurisdiction.

7 In addition, we have moved for sanctions under the
8 CPLR, and also under section 130. Your Honor, if there's
9 ever a case that calls out for sanctions, it is this case.
10 Just look around you. Look at this room. Spending what?
11 We're into probably six figures by now.

12 THE COURT: Are you the only person moving for
13 sanctions?

14 MR. CATALANO: I think I might be. I don't know.

15 MR. RANDAZZA: Your Honor, we have reserved that
16 as well.

17 THE COURT: There are others.

18 So you moved in your papers for that, or did you
19 seek it as -- strike that. Did you put as part of the
20 notice of motion appropriate language that puts the
21 plaintiff on notice that you're seeking sanctions pursuant
22 to 130? Not in your papers. As a part of the notice of
23 motion.

24 MR. CATALANO: Notice of motion, yeah, I have it.

25 THE COURT: And I'm asking, are there others that
26 are similarly situated? I know that everyone must have

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2 said at the end of the papers this is sanctionable conduct.

3 Did anyone move pursuant to 130?

4 MR. RANDAZZA: My 35 defendants intend to make a
5 separate motion for that, but we have reserved it in our
6 papers.

7 THE COURT: Okay. But you haven't made the
8 motion.

9 MR. RANDAZZA: No.

10 THE COURT: Counsel, have you made that motion?

11 MR. TESCHNER: I represent two clients who have
12 put in answers --

13 THE COURT: Why don't you state your name for the
14 record.

15 MR. TESCHNER: John Teschner.

16 We interposed answers. And in the answer we
17 affirmatively pled 130 sanctions and asked for them.

18 THE COURT: The case law is very clear that you
19 have to move for it. Pleading it is not sufficient. I
20 researched that myself once before; that's why I know it.
21 I researched that already. That's a simple issue. You
22 have to move affirmatively for that.

23 MR. TESCHNER: I'll ask for it later.

24 THE COURT: But it doesn't mean you can't do it
25 later. It just means for this court proceeding you cannot.

26 So really the only one who sought it is --

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MR. CATALANO: One more.

MR. ROSENFELD: Jim Rosenfeld, Davis Wright Tremaine. I represent Jeanne O'Halleran, a blogger down in Georgia, and her law firm, Law Offices of Jeanne O'Halleran. And we did move for sanctions also. I think we made it clear in the notice of motion. If we didn't, we will make a separate motion.

THE COURT: Yeah, I have so many motions here it's very difficult to pull it out now. I will check. But unfortunately, many people what they do is, they say this is sanctionable conduct and the last paragraph says that you should sanction them. Unfortunately, the case law says that unless there is a notice of motion putting the opposing party on notice that you're seeking sanctions, I have no jurisdiction. Unless the sanctionable conduct took place in front of me. Then I could do it. But if it was a past event, I have no jurisdiction. Current event, I can do so without any motion as long as I put them on notice that I'm going to do so and give them an opportunity to be heard.

Counsel, you can continue.

MR. CATALANO: Your Honor, the reason sanctions are so appropriate in this case, aside from the obvious, what his tactic was to sue everybody regardless if there's any basis, and then send them a letter saying, pay me

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2 \$5,000 and then I'll let you go. And then what's even
3 worse is that when we show him in our papers, show him
4 there's absolutely no basis for a passive website to be
5 held liable, especially recently there's a Court of Appeals
6 case on that, but there's no case to the contrary.
7 Instead, he tries to mislead the court by putting in his
8 affidavit that there's some sort of missing links between
9 or links among other defendants that simply don't exist,
10 and he's actually attempted to mislead the court.

11 And I'd also like to point out, your Honor, that
12 the First Department has held, "Once there is a finding of
13 frivolousness, sanction is mandatory especially in the wake
14 of frivolous defamation litigation." This is Nyitray
15 against New York Athletic Club. It's on page 10 of our
16 reply. And, your Honor, in this particular case it's
17 especially appropriate given the number of parties involved
18 and what he has done.

19 Thank you.

20 THE COURT: Thank you.

21 Any other defendants that want to be heard?

22 MR. TESCHNER: I need a minute, Judge.

23 THE COURT: State your name for the record and who
24 you represent.

25 MR. TESCHNER: My name is John Teschner. I'm only
26 going to address an issue --

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THE COURT: Who do you represent?

MR. TESCHNER: Well, I represent two separate defendants, an attorney in Las Vegas named Mace Yampolsky, and I do have a motion to dismiss on this unfair reporting act. I'm not going to mention that. I also represent a law firm in Minnesota named Reiter & Schiller that became aware of this cross-motion for a default after it was made. And one of the reliefs requested in the default motion -- excuse me -- in the cross-motion is a request for a default against certain defendants, one of which is Reiter & Schiller.

When I got retained, I immediately contacted Mr. Goldsmith and I received back from him a stipulation extending our time to answer to today and I immediately put in an answer. I asked Mr. Goldsmith by e-mail whether he was going to withdraw the cross-motion and he said there is no cross-motion pending. So I had to put in papers to tell the Court the history of what I just repeated, and I just want to make sure that these papers that I put in are not lost or misplaced.

THE COURT: I cannot tell from the mass of documents in front of me whether it's here or not. What I do is, I'll invite you on another date to come and look at it because we're going to close up promptly at 4:30.

MR. TESCHNER: I have nothing else to say.

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2 MR. BALIN: And your Honor, could I just have ten
3 seconds to state one thing on the record that may not have
4 been said by any of the parties, just so that it's on the
5 record?

6 THE COURT: I'd rather someone else get an
7 opportunity. At the end, if they haven't said anything
8 we'll try to do that because we heard from you on that
9 issue. And I also want to try to give plaintiff an
10 opportunity to speak because he hasn't said a word. At
11 least plaintiff's counsel.

12 MR. WESTFIELD: Good afternoon, your Honor. I
13 just need a minute. My name is Edward Westfield. I
14 represent Gamso, Helmick & Hoolahan, which is an
15 unincorporated association of lawyers in Toledo, Ohio.

16 We challenge on personal jurisdiction. Other
17 counsel has addressed why there's no transaction of
18 business. And additionally, we're challenging service of
19 process because the plaintiffs never completed the mailing
20 part of deliver and mail under 308(2). So, jurisdiction
21 was never acquired over these defendants.

22 The alleged act of defamation took place on April
23 2, of 2011, I believe. And the statutory limitations
24 period of one year has long since run. And it's run on
25 each and every cause of action against my defendant in both
26 the proposed amended complaint and the amended complaint

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2 that's before the Court today. The law is clear that those
3 claims cannot be revived by permitting amendment after the
4 expiration of the limitations period.

5 Unless the Court has any question, I'll rest.

6 THE COURT: Could you repeat what you just said?
7 You're arguing against the proposed amendment?

8 MR. WESTFIELD: Yes, your Honor. I also have --

9 THE COURT: I never heard an argument like that.
10 You're saying that -- I thought that the statute stops
11 running.

12 MR. WESTFIELD: But he never served them.

13 THE COURT: Let's assume, for argument sake,
14 there's jurisdiction. I know that there's a million
15 arguments against it. Once the cause of action, the
16 complaint is filed, that stops the statute. I never heard
17 of anyone saying that you can't move to amend based upon
18 that. I'd love to hear some case law on that. Then that
19 would stop how many complaints from being filed?

20 MR. WESTFIELD: A case called Oxley, your Honor.
21 It's in our papers.

22 THE COURT: Where is it from? Is it a New York
23 case that says that?

24 MR. WESTFIELD: A New York case, yes.

25 THE COURT: I never heard of such a case. Please
26 cite the case.

Proceedings

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2 MR. WESTFIELD: Oxley v. City of New York,
3 240 AD2d 643.

4 THE COURT: Where is that from, what Department?

5 MR. WESTFIELD: That is the Second Department.

6 THE COURT: I'll have to read the case. Okay.
7 Thank you.

8 MR. WESTFIELD: Thank you.

9 THE COURT: Anything further from defendants? We
10 literally have one more minute. Anyone else want to be
11 heard?

12 MR. RANDAZZA: Your Honor, my colleague here
13 wanted to throw in that we do oppose the amendment. But
14 also one issue that hasn't been discussed here is the
15 status of the plaintiff. The plaintiff is a public figure.
16 A court proceeding is a public event. Therefore, to any
17 extent that this Court gets past the fact that everything
18 that everybody's written is directly supported by quotes
19 from the Judge, and to the extent you decide you want to
20 analyze whether it's defamatory or not, it has to be
21 examined as a public figure plaintiff under New York Times
22 versus Sullivan, not as a private figure.

23 THE COURT: Okay. Anyone else want to say
24 anything? Literally, 30 seconds.

25 Did you want to say something that wasn't
26 addressed?

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MR. BALIN: Just to add one bit of substance.

THE COURT: Just state your name for the record.

MR. BALIN: It's Robert Balin again for the Washington City Paper defendants.

It's that all the defendants have opposed the motion to amend. And in the motion to amend, just for the record, the plaintiff seeks to add claims for tortious interference with prospective business relations, injurious falsehood, negligence, and last, prima facie tort. All the parties have dealt with each of the individual elements of each of those torts as to why they don't state a claim, but more important, your Honor, just as we stated with respect to the original claim, you know, the duck principle is a libel claim. There are plenty of cases that hold, whether it's injurious falsehood or negligence or prima facie tort, you can't get around the requirements of the defenses to a libel claim by trying to replead it as something else.

THE COURT: I think I said that in Suson v. New York Post.

MR. BALIN: As you did, your Honor.

THE COURT: Mr. Goldsmith, your opportunity.

MR. GOLDSMITH: Thank you, your Honor.

Is there somewhere that the Court would like me to begin?

THE COURT: I don't know where you should begin.

Proceedings

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2 MR. GOLDSMITH: Okay. I didn't know if the Court
3 wanted me to address one issue first or just --

4 THE COURT: Whatever you think is important.

5 MR. GOLDSMITH: Okay.

6 THE COURT: I won't tell you how to deal with your
7 own case. I think you will develop your own strategy for
8 your plaintiffs.

9 MR. GOLDSMITH: Okay.

10 First, I'd just like to address The Washington
11 Post's argument with regard to the fair report privilege.

12 Now, the report that was cited, which consists of
13 the statements that The Washington Post alleges are not
14 defamatory, it isn't the statements on their face that are
15 defamatory. We don't take issue with, for instance, the
16 characterization of the e-mail, "Please trick the old lady
17 to say that she did not see the shooting." It's instead the
18 way that the statements are phrased and their casual
19 connection with what happened in the case.

20 So, for example, one of the --

21 THE COURT: Do you know what defamation is?
22 Defamation are words --

23 MR. GOLDSMITH: Yes.

24 THE COURT: -- that were said that cause injury to
25 someone.

26 MR. GOLDSMITH: Right. And it's the words -- it's

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2 not just the words that The Washington Post are alleging.
3 It's the words in conjunction --

4 THE COURT: You mean it's innuendo that you are
5 seeking is damage?

6 MR. GOLDSMITH: It's the words. It's two facts
7 that are combined.

8 For instance, the Post states that a mistrial was
9 declared over an attorney's competence. Now, it's clear
10 from the record that a mistrial was the result of a motion
11 to withdraw due to a conflict.

12 THE COURT: Please tell me what the standard for
13 defamation is. Because you have to go within the
14 defamation standard.

15 MR. GOLDSMITH: Yes.

16 THE COURT: If you want to look at my Suson versus
17 New York Post, I set forth -- it's a very simple standard.

18 MR. GOLDSMITH: Right. It must be a fact -- there
19 must be a fact. This is not an opinion. It has to be
20 capable of being proven. And there must be either a false
21 publication and a standard of negligence with special harm
22 or negligence per se.

23 THE COURT: Okay. So try and tell me in that
24 rubric how is it defamation?

25 MR. GOLDSMITH: Okay. Well, here -- I mean, there
26 are many different causes of action that are alleged.

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2 There are about nine different causes of action.

3 THE COURT: You said you wanted to address The
4 Washington Post. I think it's a good idea maybe dealing in
5 the same categories so we can match it up. Because that's
6 really the crux of their motions and that's really the
7 heart of whether or not there is defamation or not.

8 MR. GOLDSMITH: Okay. So I'll take the Post's
9 statements one by one.

10 One is that a mistrial was declared after the
11 Judge is astonished by Touro grad's incompetence. This is
12 a statement of fact that is false.

13 THE COURT: Why is that false?

14 MR. GOLDSMITH: Because the mistrial was declared
15 after a motion to withdraw due to a conflict was filed.
16 The mistrial was not due to the judge being in any way
17 astonished. There was no record of the judge being
18 astonished by his incompetence. He does state ancillary
19 that there was -- that he did believe -- Judge Jackson
20 believed that his performance fell below a reasonable
21 standard, but this was not the impetus for the mistrial,
22 which is the characterization that The Washington Post
23 makes.

24 THE COURT: As a matter of fact, Judge Jackson
25 used the word "astonished," and as a matter of fact, Judge
26 Jackson said even if there was a conviction, Judge Jackson

Proceedings

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2 would have granted a motion for a new trial under 23.110,
3 which I assume is for incompetent counsel.

4 MR. GOLDSMITH: Right. But --

5 THE COURT: How is it not true?

6 MR. GOLDSMITH: Because that was not the reason
7 why the mistrial was granted. He said hypothetically that
8 he would have or may have. But the report by The
9 Washington Post was that was the reason for the mistrial.

10 THE COURT: That was the reason for the mistrial.

11 MR. GOLDSMITH: Well, I mean, the reason for the
12 mistrial, as Mr. Rakofsky alleges in his papers, was
13 because there was a conflict between him and his client.
14 He brought a motion to withdraw.

15 THE COURT: Why was there a conflict between him
16 and his client?

17 MR. GOLDSMITH: During the course of the
18 proceedings his client wanted him to ask certain questions
19 that Mr. Rakofsky believed were improper and he decided not
20 to ask those questions. And on that basis, the client
21 wanted to seek new counsel. And Mr. Rakofsky brought this
22 to the attention of Judge Jackson on the Thursday, I
23 believe it was April -- I'm sorry -- on March 31st. Judge
24 Jackson reserved decision until April 1st; and then on
25 April 1st declared the mistrial based on the motion to
26 withdraw.

Proceedings

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2 THE COURT: A mistrial occurred because
3 Mr. Rakofsky was no longer representing the client and if
4 there was no incompetence, that's all he had to do was just
5 allow another trial lawyer to come in and take over. The
6 reason that there was a new trial was because of what Judge
7 Jackson said. It was, "I believe that the performance was
8 below what any reasonable person could expect in a murder
9 trial." That's why there was a mistrial.

10 MR. GOLDSMITH: Well, that was what Judge
11 Jackson --

12 THE COURT: And I'm just citing his words because
13 I don't want to be sued.

14 MR. GOLDSMITH: Okay. I mean, that was in the
15 alternative. He said, "Alternatively, I would find" --
16 but, I mean, it seemed clear that the court from the record
17 did base this on this conflict and not directly due to --

18 THE COURT: Can you show me anywhere in the record
19 that Judge Jackson based his determination on any other
20 factors except what was reported by The Washington Post?

21 MR. GOLDSMITH: Well, also based on the fact that
22 the day before, which these proceedings, these minutes are
23 for the following day. In my motion papers the actual
24 motion to withdraw --

25 THE COURT: Are you denying the fact that Judge
26 Jackson declared a mistrial, at least in part, maybe not in

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2 entirety, was due to the observation by Judge Jackson that
3 Mr. Rakofsky's "performance was below what any reasonable
4 person could expect in a murder trial"? And again, I'm
5 quoting the language of Judge Jackson.

6 MR. GOLDSMITH: Well, I mean, I think that
7 would -- I would have to speculate --

8 THE COURT: Even if it's partially correct that
9 would still be true, and that would be a fair reporting of
10 the transaction that occurred in court.

11 MR. GOLDSMITH: Well, without speculating into
12 Judge Jackson's intent, I do just want to point out for the
13 Court that on Thursday, the day before the motion was
14 granted, when Mr. Rakofsky did make this motion on Thursday
15 before Judge Jackson, Judge Jackson was very reluctant to
16 grant the motion based on the conflict.

17 THE COURT: Okay. So I'm going to repeat my
18 question again, which I didn't get an answer to.

19 MR. GOLDSMITH: Okay. I'm sorry.

20 THE COURT: It may be because I was long-winded.
21 Let me make it very simple.

22 Are you contending on behalf of your client that
23 Judge Jackson's motion -- strike that -- the motion
24 before -- strike that -- plaintiffs' motion before Judge
25 Jackson, that Mr. Rakofsky's performance was not the reason
26 why he granted the mistrial?

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2 MR. GOLDSMITH: Yes. We do not believe that that
3 was the reason why the mistrial was granted at all.

4 THE COURT: Do you have anything in the record?
5 Let me do the reverse now.

6 MR. GOLDSMITH: Okay.

7 THE COURT: Do you believe that in part Judge
8 Jackson relied upon the performance of the plaintiff in
9 granting the motion?

10 MR. GOLDSMITH: I don't. I believe that Judge
11 Jackson made those statements after consideration of the
12 motion and said maybe in dicta or just as a side note that,
13 you know, discussing Mr. Rakofsky's performance; but I do
14 believe that the motion was granted based on the conflict
15 based on the prior proceedings.

16 THE COURT: Can you point in the record where
17 Judge Jackson said that he's basing his ruling solely on
18 the conflict issue and not upon his verbose statements
19 about the performance of the plaintiff?

20 MR. GOLDSMITH: Well, it's our position that the
21 record in its entirety from both March 31st and April 1st,
22 except for that one paragraph that is cited by The
23 Washington Post, does answer that question in that the
24 entire discussion with regard to the motion to withdraw was
25 based on this conflict and there's no other mention of
26 Mr. Rakofsky's abilities as the reason for the granting of

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the motion.

THE COURT: If you believe that the two are not related --

MR. GOLDSMITH: Yes.

THE COURT: -- and I'll be very specific, that Mr. Rakofsky's performance is not related to the motion, why did Judge Jackson spend two to three pages on the record on that topic?

MR. GOLDSMITH: I believe that it was a concern. I mean, as we state in the papers, that this was an issue that, I guess, was looming throughout the course of the trial where the Judge had stated -- I mean, even in the opening statements there were, you know, I guess, some acknowledgements of Mr. Rakofsky's inexperience.

THE COURT: Let's assume for argument that you're correct.

MR. GOLDSMITH: Yes.

THE COURT: That Judge Jackson based his decision solely on the conflict of interest.

MR. GOLDSMITH: Yes.

THE COURT: Isn't it not true, independent of Judge Jackson's statement, that -- strike that.

Are you saying that the reason that it is defamatory is because they stated that the motion was granted based upon his incompetence?

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MR. GOLDSMITH: I'm sorry?

THE COURT: You're stating that the reason there is defamation --

MR. GOLDSMITH: Yes.

THE COURT: -- is because the incompetence issue is dicta, according to you.

MR. GOLDSMITH: Right. Yes.

THE COURT: And the motion was granted because of a conflict of interest.

MR. GOLDSMITH: Yes.

THE COURT: If Judge Jackson stated this on the record, why would that not be a fair reporting, at least to whether or not he was incompetent? Let's say it doesn't go to the motion to dismiss -- strike that -- a motion for a mistrial, but nonetheless, everything reported except for that minor point procedural would be true.

MR. GOLDSMITH: But with regard to all the -- there are many statements that are alleged in the complaint with regard to defamation and I'll just, without --

THE COURT: I'll be very clear. What do I care if there's a mistrial? Mr. Deaner cares there's a mistrial. The only thing that would be defamatory is the incompetence. So if I subtract the dross, I subtract the irrelevancies in the reporting --

MR. GOLDSMITH: Yes.

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2 THE COURT: -- the bottom line is, there can be no
3 special damages or any damages because there was a
4 mistrial. There can only be damages for your client if
5 there was a defamatory statement about his reputation and
6 about his incompetence. If the incompetence is true, why
7 do I care about the mistrial? You cannot get any damages.
8 Let's say it's untrue. But so what? Who cares? You
9 cannot recover based upon the lack of -- the, let's call
10 it, misreporting of the specific procedural niceties of the
11 trial.

12 MR. GOLDSMITH: Right.

13 THE COURT: Well, who cares?

14 MR. GOLDSMITH: I mean, that's only one statement.

15 THE COURT: Okay. Let's move on.

16 MR. GOLDSMITH: Okay. So, I mean, there were
17 other statements that The Washington Post made. That Judge
18 Jackson allowed the defendant to fire his New York based
19 attorney. I mean, Mr. Rakofsky was not fired. He made a
20 motion to withdraw based on a conflict and the motion to
21 withdraw was granted.

22 There are other statements that were made that
23 Mr. Rakofsky engaged in behavior that raised ethical issues
24 basically impugning on his ethical standards.

25 THE COURT: Do you believe it's unethical for
26 someone to write, the investigator to trick an old lady

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2 into saying that she did not see the shooting and that she
3 told the lawyers not to provide the government any
4 information about the shooting?

5 MR. GOLDSMITH: Well, there are two issues with
6 that. One is, what The Washington Post knew when they
7 posted the article is unclear. It's unclear whether or not
8 Washington Post did an investigation of the e-mail. There
9 was one fact that The Washington --

10 THE COURT: Why would that matter if we have the
11 e-mail? The e-mail exactly states that. It's basically
12 telling me that you did this investigation. The
13 investigation is quite clear. It's true.

14 MR. GOLDSMITH: Well, I just want to give some
15 more of the factual background as to what happened.

16 Mr. Rakofsky -- on the date that the motion to
17 withdraw was granted, the Judge stated -- the Judge noted
18 the motion that the investigator, Mr. Bean, had brought to
19 the court's attention. At that time, the Judge stated on
20 the record, "Mr. Rakofsky, there is an e-mail attached to
21 this motion that may raise ethical issues." And that
22 was --

23 THE COURT: Judge Jackson said that?

24 MR. GOLDSMITH: Yes.

25 THE COURT: So why is it not true?

26 MR. GOLDSMITH: Well, at that point, The

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2 Washington Post, after the proceeding -- that was all that
3 was mentioned. After that point, the proceedings -- after
4 the proceedings ended, Mr. Rakofsky and The Washington Post
5 reporter went outside and The Washington Post reporter
6 asked is it true that there are ethical issues; are Judge
7 Jackson's allegations true. Mr. Rakofsky said, "No
8 comment." At that point, The Washington Post reporter
9 said, well, I'm going to make you regret not saying that.
10 I'm going to publish -- sum and substance, I'm going to
11 publish this and you're going to be upset or, you know,
12 you're going to regret not posting this, something to that
13 extent. So, I mean, this would explain his actual malice,
14 but also the fact that he was relying on only that
15 statement. And then to characterize that --

16 THE COURT: Are you saying that The Washington
17 Post reporter cannot rely upon the judge of a court in
18 terms of reliable statements in terms of ethical conduct?
19 Who would be the one that determines ethical conduct but
20 for the court?

21 MR. GOLDSMITH: Well, the Judge only stated that
22 the e-mail -- that there was an e-mail that made -- that
23 had -- that there were ethical issues regarding an e-mail.
24 It didn't state that Mr. Rakofsky had at that point written
25 the e-mail, what the e-mail was about. All that was
26 reported was that, in sum and substance, that Joseph

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2 Rakofsky acted unethically. They took it a step further,
3 as opposed to --

4 THE COURT: Do you believe that Joseph Rakofsky
5 acted unethically?

6 MR. GOLDSMITH: No.

7 THE COURT: Was he ever brought up by any ethical
8 board as a result of this?

9 MR. GOLDSMITH: No, he was not.

10 And he does explain in his papers what he meant by
11 trick. See, the import of the statement is that he was
12 asking the investigator to trick a witness into lying. But
13 that is not -- and Mr. Rakofsky clarifies that what he
14 was -- what his meaning is, a lot of times, you know,
15 defense attorneys have investigators who approach
16 witnesses. Witnesses do not want to speak to defense
17 attorneys/investigators, so they will withhold who they are
18 working for or not state that they are, you know, working
19 for the defendant and not -- you know. And so
20 unfortunately --

21 THE COURT: You're really saying it's -- I'll take
22 the word out -- please have the old lady tell the truth in
23 admitting the statements. Is that what you're saying?

24 MR. GOLDSMITH: Yes, I am because --

25 THE COURT: So trick to saying the truth.

26 MR. GOLDSMITH: Yes. Because the statements that

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2 he's asking -- I mean, why it is -- even though the choice
3 of words is very unfortunate, which Mr. Rakofsky
4 acknowledges, the witness did make those statements
5 beforehand to a different investigator and then made the
6 same statements to a different investigator after.

7 THE COURT: Let's move on.

8 MR. GOLDSMITH: Okay.

9 THE COURT: Anything else you want to say? I
10 don't want to take up all your time.

11 MR. GOLDSMITH: Okay. So that's with regard to --
12 you know, there are many different causes of action.

13 In the cause of action for defamation we try to,
14 you know, differentiate every statement and explain why
15 those statements are actually misrepresentations of fact
16 and are defamatory. So it goes straight forward for each
17 cause of action.

18 THE COURT: Let me ask you two questions --

19 MR. GOLDSMITH: Yes.

20 THE COURT: -- I think the way I did earlier with
21 The Washington Post defendants. There are two categories
22 that we isolated that allegedly is the basis for the
23 defamation lawsuit.

24 MR. GOLDSMITH: Right.

25 THE COURT: One is incompetence. Does your client
26 deny that there was a sufficient record of Judge Jackson

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2 that The Washington Post and others can say that your
3 client's performance was below what any reasonable person
4 could expect in a murder trial, the incompetence issue; and
5 then two, the e-mail talks about trick and is that fair
6 reporting?

7 MR. GOLDSMITH: Okay. With regard to the e-mail,
8 the characterization of the word trick an old lady, "Please
9 trick the old lady," yes, that is a fair report of what the
10 e-mail stated. However, again, that was not the reason for
11 Mr. Rakofsky's -- Mr. Rakofsky was not fired based on that,
12 he was not found to have acted unethically based on that,
13 which are the statements that are alleged. Merely, Judge
14 Jackson just stated that this e-mail raises ethical
15 questions.

16 THE COURT: Okay. Let me ask you one last
17 question.

18 MR. GOLDSMITH: Yes.

19 THE COURT: Did Mr. Deaner at any point in time
20 ask that Mr. Rakofsky no longer be his attorney?

21 MR. GOLDSMITH: Only when that issue with the
22 questions came up with Mr. Rakofsky.

23 THE COURT: So what does the word "fire" mean to
24 you?

25 MR. GOLDSMITH: Well --

26 THE COURT: When you dismiss someone as your

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2 attorney, or dismiss someone as your employee, that's the
3 slang way of saying you terminate employment.

4 MR. GOLDSMITH: Well, I mean, to fire --

5 THE COURT: I wouldn't say the word "fire." It
6 doesn't sound good. But let's say if the Post used the
7 word terminated his employment, would that be better?

8 MR. GOLDSMITH: Well, Mr. Rakofsky withdrew as
9 counsel for the defendant.

10 THE COURT: Was there a report? Was there a
11 record that states that Mr. Deaner sought to terminate or,
12 I'll use the word in The Washington Post, "fire" Mr. --

13 MR. GOLDSMITH: No.

14 THE COURT: -- Rakofsky?

15 MR. GOLDSMITH: No. Mr. Rakofsky made the motion
16 to withdraw.

17 And just a quick background.

18 Throughout the case, as I stated, there was --
19 you know, Mr. Rakofsky's inexperience did become an issue
20 and Judge Jackson repeatedly asked: Mr. Deaner, do you
21 want Mr. Rakofsky to remain as your attorney? And he said
22 yes. And he assented to that.

23 THE COURT: As to any point. There may have been
24 a point where, obviously, he was retained by -- strike
25 that. Mr. Deaner retained Mr. Rakofsky; we know that. Was
26 there any point in the trial that Mr. Deaner sought to

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2 terminate the relationship?

3 MR. GOLDSMITH: No. I believe that Mr. Rakofsky
4 made a motion to withdraw. There was a conversation
5 between the Judge, Mr. Rakofsky and the defendant Deaner.
6 This was discussed. And eventually, while Judge Jackson
7 was inclined to grant the motion, I do believe his consent
8 was given to the motion, but he never sought affirmatively.

9 THE COURT: He never asked the Judge -- he never
10 told Mr. Deaner that -- strike that.

11 Mr. Deaner never told Mr. Rakofsky that you're
12 fired.

13 MR. GOLDSMITH: No.

14 THE COURT: And he never asked the Judge to fire
15 Mr. Rakofsky.

16 MR. GOLDSMITH: No. This was based on --

17 THE COURT: Okay. We'll have to get rebuttal
18 afterwards on that.

19 MR. GOLDSMITH: Okay.

20 THE COURT: Let's move on.

21 MR. GOLDSMITH: Okay. So just moving to the next
22 point.

23 So there was very -- you know, just a quick
24 mention of -- actually, strike that.

25 Now, with regard to republication which is,
26 obviously, one of the main issues that was discussed here.

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2 All of the defendants -- many of the defendants are basing
3 their motions to dismiss by seeking protection under
4 republication. Now, while the standard -- the standard
5 which was just cited is that, you know, the publishers can
6 rely on reporting from someone else.

7 THE COURT: What is the standard of republication?
8 Do you agree?

9 MR. GOLDSMITH: Unless there's a standard of --
10 yes, of gross irresponsibility.

11 THE COURT: So what's the gross irresponsibility?

12 MR. GOLDSMITH: Well, our position is that this is
13 not an issue of gross irresponsibility. This is an issue
14 where the individual statements of the defendants are
15 mischaracterized and are defamatory independently of the
16 republication.

17 For example, the statements of the ABA, since they
18 were arguing, they stated, "The Judge declared a mistrial
19 after reviewing a court filing of an investigator claiming
20 that the plaintiff fired him for refusing to trick a
21 witness at his discretion."

22 Again, this was not reported by The Washington
23 Post. This is an independent statement of fact where it's
24 saying that the mistrial was declared based on Rakofsky
25 refusing -- based on an investigator refusing to trick a
26 witness. That was never at any point the reason for the

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2 withdrawal, the granting of the withdrawal motion of
3 Mr. Rakofsky. Mr. Rakofsky, as I stated earlier, stated
4 that he made a motion to withdraw based on a conflict. In
5 dicta the Judge had stated that his -- you know, discussing
6 his experience, but at no point was that e-mail ever
7 mentioned again or was it in any way the reason for the
8 mistrial.

9 Again, in the motion papers we allege that each
10 republisher does make these different types of statements
11 which are independently defamatory.

12 There's another statement in one of the blogs that
13 Mr. Rakofsky was "grotesquely incompetent." This was never
14 reported by The Washington Post. This was not a
15 republication that they have to, you know, investigate
16 exactly what happened. They're mischaracterizing the
17 actual quote itself and bringing the level of incompetence
18 which, first of all, I mean, I understand that the other
19 counselors are stating that the level of poor is somewhat
20 analogous to falling below reasonable standards, but it
21 would seem that poor is at the absolute lowest end of the
22 spectrum, where falling under reasonable standards is more
23 towards the middle, and grotesquely incompetent would be
24 even below poor. I mean, these are mischaracterizations of
25 Mr. Rakofsky's performance that were never reported.

26 THE COURT: Did you look at the April 9th report

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2 of The Washington Post that talks about certain alleged
3 ethical violations? It's all over April 9th. This was
4 reported by -- not in the first one. Initially, it was
5 reported somewhat, but then it goes into detail about the
6 ethical violations.

7 MR. GOLDSMITH: Yes.

8 THE COURT: So why wouldn't that be republication?

9 MR. GOLDSMITH: Well, as to which statement?

10 THE COURT: About the ethical -- the reason that
11 he was fired was for ethical problems.

12 MR. GOLDSMITH: Because, one, he was not fired.
13 And also that the --

14 THE COURT: I'll read you a quote.

15 MR. GOLDSMITH: Okay.

16 THE COURT: "Deaner told Jackson that he was
17 terminated from the case after refusing to request to trick
18 a government witness saying that she did not see Deaner in
19 the area where the shooting occurred."

20 MR. GOLDSMITH: Right.

21 THE COURT: There's more in the April 9th. I
22 won't belabor the point.

23 MR. GOLDSMITH: Okay. But, I mean, the
24 characterization is that -- I mean, just generally with
25 regard to that article, and others as well, is that
26 Mr. Rakofsky somehow acted unethically and because --

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2 THE COURT: You're saying because the words
3 changed a little but you say it's not a republication, it's
4 an initial defamation.

5 MR. GOLDSMITH: Yes.

6 THE COURT: That's what you're saying.

7 MR. GOLDSMITH: Yes.

8 THE COURT: Let's deal with personal jurisdiction.
9 Why is there long arm over everybody?

10 MR. GOLDSMITH: Okay. With regard to long-arm
11 jurisdiction, yes, it is -- the point's conceded that we
12 are seeking jurisdiction under CPLR 302(a)(1) with regard
13 to non-domiciliaries.

14 Now, what was not mentioned by counselors for the
15 defendants which, I believe, is very important and is
16 alleged in the motion papers, is with regard to links on a
17 website and the standard under what exactly are business
18 transactions.

19 Now, if acts are not targeted at New York and are
20 passive, then that is one issue. However, under the rubric
21 of website content, once there -- there has to be two
22 standards met. One is the posting of defamatory material.
23 That's one. Now, there's another. It's called defamatory
24 material plus more standard. The plus is that if there is
25 a commercial nature that generates income or a commercial
26 benefit to the website, and there is a case called

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2 Rescuecom which is actually cited by some of the defendants
3 that state hyperlinks that link to these other websites,
4 whether it's to The Washington Post or to any other
5 website, do confer a commercial benefit and would
6 ostensibly make that website situated with the website that
7 it is linked to.

8 THE COURT: I don't understand. How would that
9 give me jurisdiction in New York? That would be -- that
10 was related to Washington Post in Washington, D.C.

11 MR. GOLDSMITH: Well, I mean, Washington Post --

12 THE COURT: What income do they get from New York?

13 MR. GOLDSMITH: Well, Washington Post does not
14 contest that there is no long-arm jurisdiction against
15 them. So when you have other websites that are linking to
16 a website that is of a stature like The Washington Post
17 which does, you know, transact business in New York and
18 they do derive a commercial benefit --

19 THE COURT: Let's take, for example, the
20 washingtoncitypaper.com.

21 MR. GOLDSMITH: Yes.

22 THE COURT: They have a hyperlink, let's say, to
23 The Washington Post and they have advertisement on it to,
24 let's say, Washington, D.C. or Washington commercial
25 transactions.

26 MR. GOLDSMITH: Yes.

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2 THE COURT: I missed your point. So how do they
3 get to New York?

4 MR. GOLDSMITH: Okay. So if there's a
5 hyperlink -- if there's a defamatory statement and there's
6 a hyperlink to The Washington Post article, that link to
7 The Washington Post article would confer upon them
8 jurisdiction because The Washington Post's article was --

9 THE COURT: Jurisdiction where?

10 MR. GOLDSMITH: In New York.

11 THE COURT: Why would The Washington Post have to
12 do with New York?

13 MR. GOLDSMITH: Because they hyperlink to The
14 Washington Post and The Washington Post does transact
15 business in New York.

16 THE COURT: So, if you hyperlink to any -- that's
17 a new standard.

18 MR. GOLDSMITH: Well, no. It's if you hyperlink
19 and you derive a commercial benefit from that, from that
20 hyperlink.

21 THE COURT: So that means any particular Internet
22 site that hyperlinks to any business, to The New York
23 Times, let's say, I have jurisdiction? That gets even
24 better.

25 MR. GOLDSMITH: If they derive a commercial
26 benefit.

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THE COURT: Wow.

MR. GOLDSMITH: If they're getting paid for those hyperlinks. This is a Rescuecom case that we've cited.

THE COURT: That would change the very fabric of the law if that were true.

MR. GOLDSMITH: I mean, I would ask the Court to review this. I mean, the --

THE COURT: I thought the Court of Appeals limited the Internet use in terms of transacting. Now you're widening the scope.

MR. GOLDSMITH: Well, in the Rescuecom, and there's another case, Bensusan, which is a Second Circuit 1997 case which found that a logo and a link to New York from a Missouri site was enough to confer jurisdiction because it was a commercial benefit that was being conferred upon the person.

Again, if there's --

THE COURT: Even though the link had nothing to do with New York.

MR. GOLDSMITH: Well, there was a link -- it was a link to a New York site.

THE COURT: Okay. That's a different story. I don't disagree with that. If you're linked -- I shouldn't say that. I may disagree with it but it's more understandable. But if you link to Washington Post which

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2 has nothing to do with New York, then you have no
3 jurisdiction.

4 MR. GOLDSMITH: Okay. Well, there are two issues
5 with regard to that. One, I mean, it's our argument that
6 Washington Post does transact business in New York. So
7 linking to Washington Post would confer jurisdiction on
8 them because in fact --

9 THE COURT: So through an agent you can transact
10 business.

11 MR. GOLDSMITH: But the other issue that we
12 cite in our --

13 THE COURT: So you're making that -- so basically
14 you're having the Washington City Paper become an agent of
15 The Washington Post who transacts business in New York,
16 from triple associates and agents.

17 MR. GOLDSMITH: If they're deriving a commercial
18 benefit.

19 THE COURT: Let's say there's 500 links and one of
20 the 500 links at the end is to a New York organization.

21 MR. GOLDSMITH: Yes.

22 THE COURT: That means you would get jurisdiction.
23 You have these hyperlinks because one links to the other.

24 MR. GOLDSMITH: Well, that's exactly what --
25 that's the other portion of my argument that's being
26 alleged, is that when these articles came out there was an

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2 entire network of links that -- and there are, you know,
3 countless websites of defamatory material that are all
4 linking to each other, and The Washington Post site and the
5 ABA is linking to articles, and it's not just an article
6 about Joseph Rakofsky and saying oh, we're citing The
7 Washington Post. They're saying, here are all of the links
8 that are being reported on Joseph Rakofsky.

9 THE COURT: I'm going to cut you off because I
10 have very little time.

11 MR. GOLDSMITH: Okay.

12 THE COURT: Let me hear about the new amendment.
13 I thought that you can't disguise a defamation cause of
14 action by any other means. This is defamation, and now you
15 have prima facie tort, and then you have one I never heard
16 of. Injurious falsehood?

17 MR. GOLDSMITH: Yes.

18 THE COURT: That is a tort in the statement of
19 torts?

20 MR. GOLDSMITH: Well, it's essentially a
21 defamatory statement that causes a business --

22 THE COURT: You just said, you're disguising a
23 defamation case.

24 MR. GOLDSMITH: Well, no. I mean, one is a
25 defamation for him as a person. He's being defamed. And
26 also his business interests were being defamed. Also, with

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2 regard to the Internet or -- I'm sorry.

3 THE COURT: Are you arguing that his company is
4 part of the defamation now, or are you saying the
5 individual?

6 MR. GOLDSMITH: No, the -- well, the individual
7 and his practice as a lawyer as a business. Under the
8 prima facie tort, while there is no --

9 THE COURT: Is that negligence? I never heard of
10 a defamation for negligence. The standard is very
11 different.

12 MR. GOLDSMITH: Well, I guess that would be --

13 THE COURT: What was the negligence?

14 MR. GOLDSMITH: Well, that would be one of the
15 other arguments, I guess, would go into whether or not he's
16 a public figure.

17 THE COURT: Negligence?

18 MR. GOLDSMITH: Oh, I mean -- I thought you were
19 talking about the standard.

20 THE COURT: There's a negligence cause of action.

21 MR. GOLDSMITH: Yes.

22 THE COURT: What is the negligence?

23 MR. GOLDSMITH: The negligent posting of the
24 articles.

25 THE COURT: That's defamation. That's not
26 negligence.

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2 MR. GOLDSMITH: Yes. That is essentially
3 defamation. We added it as a separate cause of action as
4 well in case, you know, if the Court were to find that the
5 statements were not defamatory.

6 THE COURT: Have you ever seen a defamation case
7 where they disguise it as negligence? I've never seen
8 that.

9 MR. GOLDSMITH: Well, it wasn't -- I mean, it
10 wasn't disguised. We were just arguing in the alternative.

11 Now, as far as the prima facie tort, this is one
12 issue that is not really -- there's not much case law on
13 this. One of the defendants does state that there is no
14 cause of action for cyber bullying, but under prima facie
15 tort which is alleging essentially a, you know, a
16 repeated -- I mean, Mr. Rakofsky was -- aside from the
17 defamatory statements there is a number of just heinous
18 pictures and characterizations of him and -- I mean --

19 THE COURT: This again is defamation.

20 MR. GOLDSMITH: Well, we're saying -- well,
21 they're not statements. So that's why --

22 THE COURT: Let me stop you. What is the
23 intentional interference with a contract? What is the
24 contract?

25 MR. GOLDSMITH: Well, it's with future contracts
26 as a result of these --

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2 THE COURT: The 34th cause of action says
3 intentional interference with a contract.

4 MR. GOLDSMITH: Yes.

5 THE COURT: Rakofsky has valid business contracts
6 with existing clients. This is interfering with them.

7 So they went to those clients and told them not to
8 hire him?

9 MR. GOLDSMITH: Well, because of those actions
10 they --

11 THE COURT: Isn't that defamation? Isn't it
12 reporting that you're saying that caused the intentional
13 interference with the contract? Again, isn't it a disguise
14 for defamation?

15 MR. GOLDSMITH: Well, no. It's one of the
16 statements, and the other is the entire characterization of
17 him on the Internet. I mean, I just want to explain to the
18 Judge, at this point --

19 THE COURT: Now, emotional distress.

20 MR. GOLDSMITH: Yeah, the emotional distress also
21 goes into the prima facie tort.

22 See, your Honor, at this point when --

23 THE COURT: Aren't they all inextricably
24 intertwined with the defamation claims?

25 MR. GOLDSMITH: They're related but they're not --
26 they're not all defamation because a lot of these

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2 characterizations are pictures and they are opinions. Some
3 of the characterizations are opinions but they're
4 malicious. They are, you know, done intentionally to cause
5 Mr. Rakofsky harm.

6 THE COURT: Is your client a public figure or not?

7 MR. GOLDSMITH: No, he is not a public figure.

8 However --

9 THE COURT: Did he ever give a news report to any
10 reporter?

11 MR. GOLDSMITH: Never.

12 THE COURT: He never in this trial made any media
13 statements?

14 MR. GOLDSMITH: None. He told the -- the only --
15 when he was approached by The Washington Post he repeatedly
16 stated "no comment" and at that point was told, You're
17 going to regret your decision.

18 THE COURT: Okay. Sanctions.

19 MR. GOLDSMITH: Yes.

20 THE COURT: Don't you think it's sanctionable to
21 couch a defamation case in negligence?

22 MR. GOLDSMITH: No. No, because we were not --

23 THE COURT: Do you have any case law to back up a
24 cause of action that stems in defamatory statements and
25 then couch it as negligence?

26 MR. GOLDSMITH: Well --

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2 THE COURT: What gave you the legal right to call
3 this negligence? Tell me the duty, the breach. You know
4 what the cause of action for negligence is.

5 MR. GOLDSMITH: Yes.

6 THE COURT: Duty, a breach and then there's
7 damages.

8 MR. GOLDSMITH: Yes.

9 THE COURT: What is the duty and what is the
10 breach?

11 MR. GOLDSMITH: Well, the duty of the newspapers,
12 or whoever the defendants, the defendants that were alleged
13 in the complaint, we're arguing negligence in the
14 alternative as opposed to defamation not only --

15 THE COURT: No, I'm asking you to tell me what was
16 the duty of these defendants.

17 MR. GOLDSMITH: The duty of the defendants to
18 report accurately.

19 THE COURT: Whatever the cause of action you're
20 talking about, tell me what the duty is. In order to have
21 negligence -- we all went back to law school. Let's go
22 back to Law School 101. I have an intern here. My intern
23 could tell you what negligence is. Negligence is a duty,
24 it's some type of a duty or omission of something.

25 MR. GOLDSMITH: Yes.

26 THE COURT: And it has to be foreseeable. And

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2 then there has to be a breach of that duty. And then you
3 have to have damages. Tell me what the duty was.

4 MR. GOLDSMITH: There was a duty to report this
5 fairly.

6 THE COURT: Isn't that defamation?

7 MR. GOLDSMITH: It's partially defamation,
8 partially of the civil rights law, yes, but we're also -- I
9 mean, we just argued it in the alternative.

10 THE COURT: I forgot about the civil rights law.
11 What was the violation of the civil rights law?

12 MR. GOLDSMITH: That it was not a fair and
13 accurate -- first of all, it was not a true report based on
14 the statements that were made.

15 THE COURT: Civil rights law is taking a picture,
16 no?

17 MR. GOLDSMITH: No.

18 THE COURT: So under what rubric do you have the
19 civil rights law? What gives you the right to sue under
20 the civil rights law?

21 MR. GOLDSMITH: That this was not a fair report.

22 THE COURT: Isn't that again defamation? You keep
23 on going back to it.

24 MR. GOLDSMITH: No. That was not -- it's a
25 defamation claim because the statements were defamatory
26 against Mr. Rakofsky and his business, but they were also

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2 not fairly reported within the civil rights law, which are
3 two causes of action that can stand.

4 THE COURT: I'm going to give you an opportunity
5 to speak to your client and go over those elements of
6 negligence, civil rights law and to withdraw it. And if
7 you don't withdraw it there may be possible sanctions at
8 the end of the case.

9 MR. GOLDSMITH: Okay. I mean --

10 THE COURT: I'm going to review it because I've
11 never seen. Unless you can back it up.

12 MR. GOLDSMITH: I mean, I just -- from our view of
13 the case law, while if --

14 THE COURT: I'm going to review the case law. I
15 haven't looked at it. But I'm giving you an opportunity on
16 the record because I cannot think of any cause of action
17 that would not be frivolous to say this is negligence. I
18 cannot think of a civil rights violation. This would not
19 be negligence. This would be all defamation. I went back
20 to it. You cannot give me one.

21 MR. GOLDSMITH: I mean, the cases that we do
22 cite -- I mean, I have seen where defamation and the civil
23 rights law are pled.

24 THE COURT: Can you give me one case where they
25 pled a defamation case as negligence?

26 MR. GOLDSMITH: I would have to look.

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2 THE COURT: I'll allow you to send me a copy of
3 it, along with copies to the 40 other people who are here.

4 MR. GOLDSMITH: Absolutely. I will.

5 THE COURT: And if you can find me a case
6 saying -- I'd like to see anyone that's pled it ever like
7 this and then get sanctioned.

8 MR. GOLDSMITH: Okay. But, I mean, I would submit
9 to the Court that we argued these causes of action in the
10 alternative; but to state that -- you know, if they're
11 dismissed it's one issue, but not that it's sanctionable to
12 argue in the alternative.

13 THE COURT: No. You're missing the point.

14 MR. GOLDSMITH: Right.

15 THE COURT: If it's frivolous or not frivolous.
16 You're allowed to argue something that has some basis in
17 law or in fact, and I want to know what the basis in law or
18 in fact to negligence is.

19 MR. GOLDSMITH: Okay.

20 THE COURT: I don't see any.

21 MR. GOLDSMITH: Okay.

22 THE COURT: There's been no duty. You want to say
23 it's defamation. That may be arguable. I don't know.
24 That I can live with because I haven't really reviewed it.
25 But to tell me that The Washington Post was negligent and
26 that is not negligence -- I mean, that is not frivolous

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conduct?

MR. GOLDSMITH: All right. So I will brief that issue.

THE COURT: And I suggest that you speak to your client and I'm putting you on notice now that unless you have some semblance of law or fact that supports your argument, there may be ramifications at the end of this case.

MR. GOLDSMITH: Okay. Do we have the right to withdraw that negligence cause of action before a decision as to frivolousness?

THE COURT: I'm just letting you know that I am seriously considering the cross-motions for sanctions. Because when I saw negligence, and I know what negligence is and you know what negligence is and this ain't it. And you know it and your client should know it. He's an attorney.

MR. GOLDSMITH: Yes.

THE COURT: And you're an attorney.

MR. GOLDSMITH: Yes.

THE COURT: So, to say this is negligence is beyond the pale of professional practice.

MR. GOLDSMITH: Okay.

THE COURT: You want to call it negligence? Strike that. You want to call it defamation? It's

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2 arguable. At least there were words. Is it defamatory or
3 not, that's something for a determination. You may lose at
4 the end of the day or win at the end of the day but
5 nonetheless, there may be some factual thing or some legal
6 argument. But what is the legal argument for negligence?
7 What is the legal argument for all the others?

8 Injurious falsehood. I don't know any of that.

9 MR. GOLDSMITH: Okay. Well, I mean, they are
10 briefed in our papers, but I will discuss --

11 THE COURT: To be fair to you, I have not read all
12 the papers in this proceeding. But at the end of the day
13 if you're telling me that there is a cause of action for
14 negligence, then I'll look at it. But if there is no
15 semblance of law or fact dealing with that, I will
16 seriously consider a sanction motion at the end of the day.
17 I may deny it. I'm not telling you what I'm doing.

18 MR. GOLDSMITH: Okay.

19 THE COURT: But I want you to think hard and
20 fast --

21 MR. GOLDSMITH: We will.

22 THE COURT: -- with regard to that issue.

23 MR. GOLDSMITH: With regard to the negligence,
24 okay.

25 THE COURT: And also the way you package the other
26 causes of action.

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MR. GOLDSMITH: Okay.

THE COURT: It also looks like it's all defamation and you're going back to the same thing.

MR. GOLDSMITH: Okay. How much time would the Court like us to --

THE COURT: You will write -- if you want, you can contact -- strike that.

Off the record.

(Discussion off the record.)

THE COURT: Back on the record.

Is there anything in the record that showed that Mr. Deaner fired --

MR. PATIL: Yes, your Honor.

THE COURT: -- the plaintiff?

MR. BRICKMAN: Yes. Page 2 and 3 of the April 1st proceeding.

MR. PATIL: And 4.

MR. BRICKMAN: And maybe 5.

THE COURT: Can someone read that to me, please, slowly?

MR. BRICKMAN: Yes, your Honor. It says here --

COURT REPORTER: Could I have your name, sir?

MR. BRICKMAN: David Brickman on behalf of Seddiq Kennerly Beasley firm and Koehler.

"The Court: Mr. Deaner, when we adjourned

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2 yesterday -- right before we adjourned yesterday, you said
3 that you wanted a new lawyer in this particular case, and
4 we had -- I had explained to you that if I did give you a
5 new lawyer, we would have to abort the trial, let's say.
6 We will have to dismiss the jury. I also explained to you
7 that the Government would be able to prosecute you again
8 for these charges. And you said you understood that, but
9 you still, nonetheless, wanted another lawyer.

10 "I also explained to you that it could probably
11 result, more than likely, in your continued detention until
12 this case is actually -- the other -- the case is tried.
13 And you said you understood that."

14 THE COURT: That's enough.

15 MR. BRICKMAN: Okay.

16 THE COURT: Is that language that I asked you for,
17 and I didn't read the entire record, would you consider
18 that a request by Mr. Deaner to terminate the relationship
19 of your client?

20 MR. GOLDSMITH: Based on that statement only, yes.
21 But not when reading this in the totality of the record.
22 I mean, that was how it was being phrased, but this was
23 not -- Mr. Deaner wanted Mr. Rakofsky as his attorney
24 except for this one conflict. And then when he was posed
25 the question as to whether or not -- it was phrased as --
26 it may have been phrased that way, but this was a motion to

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2 withdraw on Mr. Rakofsky's behalf.

3 THE COURT: I have to tell you, I have to look
4 seriously at the cross-motion for sanctions even with
5 regard to defamation claims because right now every time
6 you state one argument, it's then specifically in the
7 record where it's true.

8 MR. GOLDSMITH: Well, I mean, two issues with
9 that. I mean, one is -- I mean, I ask the Court to review
10 the record --

11 THE COURT: I'm going to read everything.

12 MR. GOLDSMITH: -- and to note that The Washington
13 Post, when they published this article about firing him,
14 they based this not on that record. They did not receive
15 that record at the time they made the publication.

16 THE COURT: But it's all true.

17 MR. GOLDSMITH: But our theory is that it's not
18 true.

19 THE COURT: Do you know that there is a complete
20 defense to defamation and that is truth?

21 MR. GOLDSMITH: Absolutely.

22 THE COURT: Whether or not they investigated it,
23 they knew about it, but if it's true? Here, every single
24 allegation that was made by The Washington Post looks like
25 it's true. They have a complete defense to your claims.

26 What I suggest you do is speak to your client

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2 regarding this. It doesn't matter if they paraphrased. It
3 doesn't matter if it happened at this point or that point.
4 It looks like they have a complete defense to this. And if
5 you want me to render a decision, I'll do so, but it
6 doesn't look like it's going to be in your favor.

7 MR. GOLDSMITH: Okay. But, I mean, I'm just
8 explaining to the Court --

9 THE COURT: Unless I can find something in the
10 record that shows the defamation. Right now there's a very
11 high standard to hold a newspaper liable for -- pardon the
12 pun -- for libel, l-i-b-e-l.

13 MR. GOLDSMITH: Yes.

14 THE COURT: I don't see how you make that burden.
15 And what I suggest is, is that you seriously speak to your
16 client about withdrawing all these claims. And at the end
17 of the day, I'm going to make a decision. I don't think
18 it's going to be -- based upon this argument, and I'm not
19 making a ruling now, it doesn't look like it's going to be
20 in your favor.

21 MR. GOLDSMITH: Your Honor, the statements that
22 The Washington Post made, this was not -- Mr. Rakofsky --
23 just to summarize, Mr. Rakofsky made a motion to withdraw.
24 The motion was granted. He was not fired for ethical
25 issues. He was not fired for incompetence. The Judge did
26 not find him to be unethical. These are the statements

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2 that are being made. And Mr. Rakofsky made a motion to
3 withdraw that was granted.

4 THE COURT: Counsel, what you're making me do is
5 making a finding that he was incompetent was true; what
6 you're making me do is making a finding that your client
7 was unethical, and that's what you're forcing me to do.
8 You realize that. And after I do that, there may be
9 serious ramifications for your client which I think you
10 should explain to him.

11 MR. GOLDSMITH: I will. I mean, I'll explain that
12 to him.

13 THE COURT: And I'm not even talking about
14 sanctions. If I find that it's true that he was
15 incompetent in the way he went ahead and tried a case, that
16 may lead to more serious issues for him. And if I find
17 that the e-mails were unethical -- it's true that it was
18 unethical, that may lead to further action on behalf of
19 others. So, what I suggest you do is speak to your client
20 and advise him what is the ramifications of my decision.

21 MR. GOLDSMITH: Okay.

22 THE COURT: I don't think you're going to like my
23 decision and I don't think that it's going to bode well for
24 your client at the end of the day because you're exposing
25 him and he's exposing himself to further scrutiny by other
26 agencies.

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2 MR. GOLDSMITH: I want the Court to just recognize
3 two other facts that are in the motion. One is that
4 Rakofsky, throughout this trial, was second sat by an
5 attorney named Mr. Grigsby, who is a murder trial attorney
6 with many years of experience who was with him throughout
7 this entire trial second seating him. This was not like
8 Mr. Rakofsky was by himself and, you know --

9 THE COURT: I don't even want to get into the
10 details of the trial. This is about fair reporting. Judge
11 Jackson did state that his performance was below what is
12 expected in a murder trial. I didn't say it. Mr. Grigsby
13 didn't say it. It's Judge Jackson who said it and The
14 Washington Post reported that. That is true.

15 MR. GOLDSMITH: But not that it was poor.

16 THE COURT: I'm sorry?

17 MR. GOLDSMITH: Not that it was poor or
18 grotesquely incompetent. Just that it was below a
19 reasonable standard.

20 THE COURT: No. He said that even if there was a
21 motion to set aside the trial he would do it because its --
22 do you know, did you research the law on setting aside a
23 trial? It's got to be a very high standard of incompetent.
24 Did you know that?

25 MR. GOLDSMITH: Yes. But the Judge did not
26 decide --

1 Proceedings

2 THE COURT: He said it.

3 MR. GOLDSMITH: Excuse me. Can you please stop?
4 It's very distracting.

5 THE COURT: Everyone stop. Everyone stop. It's
6 not polite.

7 MR. GOLDSMITH: It's rude.

8 THE COURT: I'm saying the Judge had already
9 determined that if there was such a motion, he would grant
10 it based upon the skill level of your client.

11 MR. GOLDSMITH: But that was not the reason for
12 the motion.

13 THE COURT: Okay.

14 MR. GOLDSMITH: That was not the reason for --
15 we're talking in circles.

16 THE COURT: Thank you. It is submitted.

17 MR. LUPKIN: Your Honor, off the record, if I may?

18 THE COURT: Yes.

19 (Discussion off the record.)

20 * * *

21 C E R T I F I C A T E

22 I, Vicki K. Glover, RMR, an official
23 court reporter of the State of New York, do
24 hereby certify that the foregoing is a true and
25 accurate transcript of my stenographic notes.

26 
VICKI K. GLOVER,
OFFICIAL COURT REPORTER

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