

CASE STUDY

MEDIA LAW RESOURCE CENTER, UNITED STATES



Name of the Organisation: Media Law Resource Center, Inc. (MLRC)

Location: New York, New York

Case Study Provided By: Jeffrey P. Hermes, Deputy Director, MLRC

About This Case Study

This case study is published by the Centre for Law and Democracy as part of our project Supporting the Establishment of Networks of Media Lawyers Globally, funded by the Global Media Defence Fund run by UNESCO. This project aims to foster the development of national-level networks of media lawyers. These networks bring legal professionals together to advocate for media freedom and freedom of expression in their countries, and to serve as a forum for professional collaboration and knowledge-sharing. To learn more about this project, visit <https://www.law-democracy.org/live/projects/media-lawyers-networks/>. The case studies provide examples of the work of national level media networks, along with successes and lessons learned.

Background Information

The MLRC was founded in 1980 (under its original name, the “Libel Defense Resource Center”) as a tax-exempt professional membership non-profit. The MLRC’s primary purpose is to strengthen freedoms of speech and the press by supporting and educating attorneys who represent media outlets as they deal with breaking developments and emerging trends in media law.

Membership is by organisation, with all attorneys working for a member organisation entitled to receive member benefits. The MLRC has two primary membership categories: the Defense Counsel Section, which includes law firms that represent media organisations as outside counsel; and the Media Members, which include a wide variety of local, national and international publishers and distributors of news and/or entertainment content in all media, as well as other organisations that support the goals of the Center. As of June 2022, the MLRC has approximately 200 member firms in our Defense Counsel Section and more than 140 Media Members, collectively covering several thousand individual media attorneys.

No member firm of the Defense Counsel Section may undertake representation that includes litigation asserting defamation, privacy or related claims against a media outlet, or steps in anticipation of such litigation. We have a separate “Associate Member” category for non-U.S. firms which, due to the nature of legal practice in their countries, cannot abide by this condition. Associate Members receive limited member benefits.

MLRC Membership benefits include the following:

- Access to our regular publications, including: the *MediaLawDaily*, our daily e-mail briefing on media law developments; the *MediaLawLetter*, our monthly newsletter with analysis of recent important cases; the *MLRC Digital Review*, a mostly-monthly roundup of developments at the intersection of technology and media law; and the *MLRC Bulletin*, our thrice-yearly legal journal with deeper discussion of important media law issues.
- Invitations to MLRC's Zoom series of virtual meetings on law, journalism, entertainment, and technology issues. Launched initially as a way to keep our members connected during the COVID-19 pandemic, this popular and continuing series has featured top legal scholars, journalists and authors.
- Discounts on our MLRC 50-State Surveys of Media Libel Law, Media Privacy Law and Employment Libel/Privacy Law. Prepared and updated annually by MLRC members, the 50-State Surveys provide comprehensive coverage of media libel, media privacy, and employment libel and privacy laws across the 50 states that make up the United States, and are fixtures in the offices and libraries of media defense attorneys, media organisations, employment attorneys, law schools and courts around the country.
- Eligibility for participation in MLRC member committees, such as our Newsgathering, Copyright/ Trademark and Litigation committees.
- Access to all reports and publications of the MLRC committees, including practice guides, checklists and model briefs.
- Access to the MLRC listserv, our active members-only discussion thread in which practitioners trade tips, strategies and resources relating to legal issues they are facing.
- Invitations to our members-only events, including our three-day Media Law Conference in Virginia and our two-day International Media Law Conference in London, held in alternating years in September.
- Discounts on registration for our annual MLRC conferences that are open to the public, including our Digital Law conference, our Entertainment Law conference and our conference focusing on special issues in Latin American media.

If you are interested in learning more about our conferences and other events, you can see upcoming events here: <https://medialaw.org/events/>

Examples of MLRC’s Work and Successes Over the Years

Much of the MLRC’s work occurs behind the scenes, supporting attorneys as they fight for the First Amendment and other media-related rights (in the United States, the First Amendment protects freedom of expression). Our primary success has been in building and maintaining the media defense bar as a cohesive and mutually supportive community of attorneys, bringing media organisations and their counsel together to support their common values despite the highly competitive nature of the marketplace. That cohesiveness simply does not exist in the same way in other areas of legal practice and has allowed our members to coordinate efforts across the country (and around the world) to advance arguments in court and to push for legislation such as anti-SLAPP laws and improved rules on access to government proceedings and records.

In addition, the MLRC does itself occasionally develop focused responses to particularly urgent issues threatening First Amendment rights. In those cases, the MLRC leverages the extensive knowledge and skills of its member network, preparing resources and developing strategy in situations such as the following:

Example 1: White Paper on the Importance of New York Times v. Sullivan

Over the last few years, Justice Thomas of the U.S. Supreme Court has in several cases called on the Court to revisit its 1964 decision in *New York Times v. Sullivan*, the landmark case in which the Court applied the First Amendment constitutional protections for freedom of expression to defamation actions brought by public officials. The Court held in *Sullivan* that the First Amendment requires government officials who bring such claims to prove “actual malice”, i.e. knowledge on the part of the alleged defamer that the statement is false or at least reckless disregard of its truth or falsity.

Sullivan is a foundational holding for the modern press, insulating the press against undesirable self-censorship in their reporting on public officials and governmental affairs. More broadly, *Sullivan* is the key decision that holds that the First Amendment can put constitutional guardrails on lawsuits between private parties over the publication of information. It was therefore very disturbing when, in 2021, Justice Gorsuch joined Justice Thomas in calling for the reconsideration of *Sullivan*, in a dissent from the Court’s decision not to consider a case in which Gorsuch made illogical criticisms of, and inaccurate statistical claims about, *Sullivan* and blamed it for the pernicious environment of online disinformation.

The MLRC responded by rallying some of the most experienced and respected attorneys among its membership to publish a rigorously detailed legal and statistical analysis of the effects of *Sullivan*, entitled *New York Times v. Sullivan: The Case for Preserving an Essential Precedent*, <https://medialaw.org/issue/new-york-times-v-sullivan-the-case-for-preserving-an-essential-precedent>. This paper responded directly to the arguments advanced by Justices Thomas and Gorsuch, backed that up with a statistical review of the effect of the actual malice standard on libel cases, reviewed the modern practice of libel litigation based on the experience of the two largest media law firms in the United States, and compared the U.S. legal system under *Sullivan* to defamation law in the United Kingdom.

The MLRC white paper was highlighted by numerous media outlets and its arguments have been mentioned as a possible reason why Justice Gorsuch appears to have backed off from supporting Justice Thomas' calls for reconsideration of *Sullivan*, for example deciding not to join his dissenting opinion in another more recent decision not to hear a case (see <https://www.washingtonpost.com/opinions/2022/06/27/supreme-court-clarence-thomas-still-going-after-new-york-times-v-sullivan/>).

Example 2: Model Brief on Access to the Executive Branch

Anticipating that the press would face unprecedented legal challenges in attempting to cover the White House during the Trump administration, the MLRC tasked its Newsgathering Committee with the development of a model brief that could be used in the event that journalists were denied access to the executive branch in retaliation for publications deemed critical of the president. The brief covers potential legal arguments under the First Amendment as well as due process and non-discrimination concerns.

This project proved prescient, when journalist Jim Acosta of CNN had his press pass revoked by the White House in 2018, and MLRC member attorneys successfully argued for the return of the pass by advancing the arguments detailed in the model brief.

Example 3: Report on Espionage Act Prosecutions Against the Press

In 2019, the threat of potential prosecutions of journalists and news organisations for reporting on confidential information related to national security reached a peak. The Trump administration was actively hunting anonymous leakers, while federal law enforcement had been frustrated in efforts to pursue charges against hard-to-reach individuals such as Edward Snowden and Julian Assange,

both living abroad. Under the circumstances, it appeared very possible that law enforcement might shift its focus to the much more accessible U.S.-based journalists who reported national security information from such sources and bring prosecutions under the Espionage Act for the publication of that information.

In preparation for such an event, the MLRC brought together its Newsgathering, Litigation and Criminal Law Committees to develop a report on the current state of the law with respect to Espionage Act prosecutions and marshalling the First Amendment and other defences that could be advanced. The report included a detailed analysis of the legislative history of the Espionage Act, a review of the history of the publication of government secrets in the United States, and sample arguments based on a variety of First Amendment and criminal law doctrines.

Advice for Networks Supporting Pro Bono Legal Services

- Respect your lawyers' volunteered time. For one thing, lawyers should only be asked to take on clients with legal issues that need individual attention. Potential clients who are merely looking for generalised advice or an explanation of the law can often be redirected to various online resources and asked to return when their issues are better developed. Moreover, it is important to vet potential clients closely for the legitimacy of their legal issues and, frankly, their temperament before they are introduced to an attorney. Lawyers who volunteer their limited time will be left with a bad impression of the network if asked to handle clients who are unstable or asking for impossible things. Finally, check to see if the client has any applicable insurance (including in potentially unexpected places such as homeowners policies). Lawyers should not be expected to give up their time for free if there is insurance; meanwhile, insurers can often help clients locate an attorney.
- Under no circumstances should any client feel that you are guaranteeing them a lawyer or that they cannot look elsewhere, and I strongly recommend clear, conspicuous and repeated disclaimers to that effect. Clients should be offered a realistic estimation of the likelihood of an attorney taking their matter and how long it might take, and also be pointed toward other channels they can simultaneously pursue to find a lawyer while you are trying to place their matter.
- Understand that not all legal matters are equal in terms of the time and resources that they require to resolve. Litigation matters take longer to place because many lawyers do not have the time to add a longer-term matter to their caseload. Also, note that academic clinics (such as those at law schools) might not be in a position to take such cases unless they have

summer/holiday programs, because litigation does not stop when the academic year does. In addition, litigation often requires substantial expenditures covering everything from court fees to copying costs and postage; these are not trivial costs and lawyers will not expect to foot that bill for their *pro bono* clients.

- Recognise that your definition of a good *pro bono* matter is likely not the same as that of a large law firm; firms typically consider *pro bono* cases to involve services for indigent clients, not journalists. You might have difficulty getting firms to join your network unless you find a friendly lawyer who can advocate internally for the importance of freedom of expression and media rights as being worthy of *pro bono* effort.
- Be prepared to handle clients seeking assistance outside of your network's stated scope. When someone is desperate for legal help, they do not pay too much attention to the details of what your network was established to do. It helps to have a set of resources at hand to which you can refer people so that they do not feel like they are being left out in the cold. Bar associations are particularly useful in this regard.

Other Advice for Lawyers Starting a Media Lawyers' Network

Prior to joining the Media Law Resource Center, I supervised a media lawyer referral network (the Online Media Legal Network) at the Berkman Center at Harvard University. Between 2009 and 2014, we placed more than 530 matters for more than 260 clients to a network of more than 300 media lawyers in all 50 U.S. states. A detailed discussion of the history and the work of the OMLN, including lessons that we learned during the network's operation, can be found here: <https://www.dmlp.org/sites/dmlp.org/files/OMLN%20at%20500.pdf>. Additionally, the extremely powerful backend code that operated the OMLN's referral network is free for others to use; please email hello@cyber.harvard.edu if interested.

The OMLN was a very successful service that ended before its time due to foundation grants falling through at a critical juncture. I strongly advise that you diversify the financial support for your network and recognise: (1) no charitable foundation wants to keep funding any project indefinitely; and (2) foundation support depends heavily on the individuals with whom you are working at the foundation, and those individuals can and do leave those positions with little notice.

