KEEPING ACCESS CASES AFFORDABLE: ALTERNATIVE FEE ARRANGEMENTS

Media Coalitions in the Research Triangle

HUGH STEVENS, AMANDA MARTIN, AND MIKE TADYCH

When life gives you lemons, make lemonade.

When life gives you the Internet and a recession that send your ad revenue into a tailspin, make coalitions.

In an era of reduced and ravished litigation budgets, the idea of joining forces to pursue access cases, resist gag orders, and fight subpoenas is a no-brainer for media organizations. Economic necessity has made coalitions the order of the day for many news organizations that often chose to go it alone in flusher times. Happily, experience demonstrates that the benefits of working together often go far beyond saving money. This is the story of how informal media coalitions arose and are working in one media market—Raleigh/Durham/Chapel Hill, i.e., the Research Triangle of North Carolina.

Tough Times

No one who reads this article needs to be reminded that economic times are tough for daily newspapers, local television stations, national television networks, and other advertising-based media outlets. Although the high-tech, research-based economy in which we live and work has been booming for the past forty years, our clients have not been immune to the economic tsunamis that have drowned many media companies in red ink in recent years. Raleigh's population has grown from around 250,000 to more than 400,000 since 1996, the year that the *News & Observer*, Raleigh's daily newspaper, won the Pulitzer Gold Medal for Public Service by exposing the environmental and health risks associated with the hog industry. During the same period, the size of the newspaper's editorial staff has declined from 250 to 93. With two notable exceptions, WUNC-FM and Time Warner Cable's 24/7 news channel, the area's electronic news media also have not been spared by the recession or competition from online news. The Research Triangle's NBC affiliate, for example, laid off 20 percent of its staff in 2009. Capitol Broadcasting's WRAL, the locally owned station that has dominated the market's television news ratings for decades, announced two years ago that it was cutting its expense budget by 15 percent and offering buyouts to an unspecified number of news department employees.

Prolonged sales declines, of course, are a problem for any business, regardless of whether it is selling widgets or automobiles or advertising. If a recession dampens the demand for refrigerators or automobiles, though, manufacturers can try to weather the storm by temporarily cutting prices, curtailing operations, and reducing inventories—all of which are painful, but none of which requires a fundamental restructuring of their business.

By contrast, media companies can cut costs and reduce "inventories" only by compromising the scope and quality of the news, analysis, and commentary that they produce. Layoffs and buyouts have long since removed movie critics, book editors, and editorial cartoonists from most newspaper staffs; and many print and broadcast reporters who formerly covered important specialized beats such as health care, courts, and technology now find their hard-won expertise and contacts going to waste as they rush about hither and yon at the direction of the general assignment desk. Meanwhile, "spell-check" software has replaced copy editors, leading to an explosion of bad grammar and misspelled words.

In these challenging economic times for many media companies, forum members have seen a sharp decline in the number of clients willing or able to support their newsgathering activities through legal action, especially in access and freedom of information matters, for purely economic reasons. This unfortunate development has prompted a number of law firms and clients to look at alternative fee arrangements for this type of work. The editors of *Communications Lawyer* asked attorneys involved in three successful, alternative approaches to share their experiences.

More Investigative Reporting Is Needed

The most regrettable and lasting consequence of reductions in newsroom staffs, of course, is the media's diminished capacity to investigate corruption, hold public officials and institutions accountable, and insist on government transparency and openness. Such diminished capacity sometimes makes it necessary to invoke the assistance of the courts in aid of the search for truth or in defense of press freedom and independence.

To make matters worse, the kinds of events and circumstances in our part of the world that require a legal response have proliferated even as our clients' litigation budgets have shrunk. Until a few years ago, sealed search warrants were rarities in North Carolina; now they are commonplace, particularly in high-profile homicide

Hugh Stevens, Amanda Martin, and Mike Tadych are partners in the Raleigh, North Carolina, firm of Stevens Martin Vaughn & Tadych, PLLC

cases. Autopsy reports and recordings and transcripts of 911 calls also have become frequent targets of sealing motions in criminal cases.

Public access also has become an issue in more and more civil cases of late; as this article was being written, national and local news organizations were seeking access to a series of sealed motions and a deposition transcript in a lawsuit brought by the mistress of former U.S. Senator John Edwards against former Edwards aide Andrew Young and his wife.

We also are seeing more fights with public officials over public records, including a case in which the University of North Carolina at Chapel Hill has attempted, thus far unsuccessfully, to use the Federal Educational Rights and Privacy Act to shield telephone records, campus parking tickets, and other records related to the suspension of several football players accused of accepting improper academic help from tutors and unauthorized gifts and benefits from sports agents.

Coalitions—Cui Bono?

Coalitions offer both economic and public interest benefits. In an era when legal budgets have been going lower and lower at the same time that barriers to access seemingly are being raised higher and higher, joining forces makes economic sense for media companies. By sharing and spreading the costs of litigation, news organizations literally can do more with less. Moreover, access litigation differs from other kinds of civil actions in that a win for one is a win for all; if a judge orders the release of public records, unseals a search warrant, or vacates a gag order, every news organization (and the public) shares in the benefits. Rick Willis, who oversees Time Warner's twenty-four-hour cable news channel and currently chairs the North Carolina Open Government Coalition, points out that cost sharing enables News 14, which he describes as "the 7-Eleven of news organizations," to participate in litigation over matters of significant public interest that it simply could not afford to pursue on its own.

Willis's characterization of media cooperation as both an opportunity and a necessity harkens back to 1991, when closure motions in a high-profile child sex abuse case engendered unprecedented cooperation among North Carolina news organizations. The controversial "Little Rascals" case (so called because that was the name of the day care center in Edenton where defendants worked) generated enormous public interest, both locally and nationally. The press coverage reflected a wide gulf in public opinion between those who believed that defendants had engaged in sordid behavior with dozens of children and those who thought that the criminal charges were grounded in mass hysteria fanned by paranoid parents. When the case against Little Rascals owner Robert F. Kelly came to trial in Farmville, a sleepy tobacco town 100 miles from Edenton, the prosecutors moved to close the courtroom during the testimony of approximately twenty alleged child victims, to bar camera coverage of the trial, and to prohibit public disclosure of some materials that the state had turned over to the defendant in discovery. With the support of the North Carolina Press Association and the North Carolina Association of Broadcasters, five newspapers, the Associated Press, and a Greenville, television station joined forces to successfully oppose all three motions.[1] Like the economic crises that would hit news organizations years later, the state's motions to conduct critical portions of the Little Rascals trial out of public view gave competing news organizations a compelling reason to join forces.

From Competition to Cooperation

Although the case demonstrated the benefits of cooperation between and among clients and attorneys (three law firms represented the media companies), competition for scoops and exclusive stories remained the norm for several years thereafter. The competition between the *News & Observer* and WRAL, each of which viewed itself as the preeminent news organization in the area, was particularly dogged. Professor Jim Hefner of the UNC School of Journalism and Mass Communication, who was WRAL's general manager from 2002 through 2008, acknowledged in an interview that historically the station and the newspaper had proprietary attitudes about particular beats and competed fiercely to be the first to break important stories. In those days, public records suits were the province of the *News & Observer*, which invariably acted alone.

According to Hefner, things began to change when the management of his station and their counterparts at the *News & Observer* realized that every news organization reaped the benefits of a successful outcome in an access case no matter who had paid the freight for it. As occasions arose and budget pressures mounted, they began to join forces, particularly to oppose gag orders, sealed search warrants, and closure motions. Over time, they began to reach out to other area news organizations such as AP, Time Warner Cable, and Media General.

As John Dresher, executive editor of the *News & Observer*, has noted, ". . . cooperation has proven to be enormously beneficial, not only from a financial standpoint, but also in terms of public perception. I don't know whether it matters to a judge when five or six news organizations join as plaintiffs in a public records suit, but I'm convinced that it sends an important signal to the public that something truly important is at stake and that the suit can't be shrugged off merely as one newspaper or one television station seeking grist for a story."

"In hindsight," Dresher said, "economic reality has forced us to do something that we would have been wise to do a long time ago. We are not just saving money by participating in coalitions; we are being smarter, too."

E-Mail Handshakes

In our area, the cooperation that has evolved out of the synergy between necessity and opportunity is fluid and informal. The coalition that fights for access in our market has neither a membership roll nor an organization chart. It operates on the basis of e-mail "handshakes," conference calls, and goodwill. In a typical case, it starts with a public official denying or stonewalling a public records request, a judge sealing the search warrants in a headline-grabbing murder case, or a defense lawyer issuing dozens of subpoenas to media companies in a vain attempt to support a motion for change of venue. As the matter unfolds, editors and news directors

begin talking to us and other lawyers about filing a lawsuit, a motion to unseal, or motions to quash. As the lawyers confer about strategies and estimate costs, the editors and news directors exchange e-mail and voice mail messages asking, "Are you in?" Eventually, the coalition for the matter is cobbled together, agreements about the rates and splits of legal fees are struck, and legal documents are drafted and circulated.

In many instances, a coalition's effectiveness can be enhanced by reaching out to media outlets that have special connections to the events or institutions involved. For example, in November 2009, the U.S. Army announced that the news media would not be permitted to cover a Sarah Palin book signing scheduled at Fort Bragg, one of the nation's largest military installations. The army said that prohibiting news organizations from interviewing Palin admirers who brought their books to the signing would deny her a platform from which to mount a political attack against President Obama. In an impeccable display of reverse logic, base spokesman Thomas D. McCollum said, "Because this book signing is turning into a political platform with the addition of media coverage, we are restricting the media coverage."

AP, the *News & Observer*, and other regular coalition members immediately reached out to the *Fayetteville Observer*, whose editors and reporters are very familiar with the base command structure and its public information officials. While AP's national editors lobbied their high-level Pentagon contacts, the *Observer*'s executive editor, Mike Arnholt, talked to his Fort Bragg neighbors. After initially offering to loosen its restrictions to allow pool coverage and having that offer rejected by our clients, the army gave in and lifted the media ban entirely.

The involvement of the *Daily Tar Heel,* the student newspaper at UNC, has proven similarly important in access cases related to the university. The newspaper's contacts within the UNC campus parallel those of the *Fayetteville Observer* at Fort Bragg, and the students' willingness to sue the very administrators who sign their diplomas adds credibility to the media's push for transparency.

Dealing with the Details

Logistics are the downside of cooperative action. As Dresher correctly observed, "strategy conferences where you have a dozen people on the telephone can be unwieldy." It's certainly true that matters in which we represent multiple clients, often with other law firms, present special challenges in communication and case management. In these situations, it's indispensable to have all communications to and from the coalition members go through one lawyer, preferably, but not necessarily, the lead attorney on the matter. If possible (and it often isn't), it's also helpful to have the coalition participants designate one or two of their members as go-to decision makers. Sometimes seemingly trivial case management issues, such as making sure that every coalition member is aware of the time and place of a hearing or conforming the invoice to a variety of corporate billing guidelines, can be as thorny and time-consuming as deciding whether to sue in the first place.

Representing multiple clients also can be daunting in other ways. As we drove to Winston-Salem for a federal court hearing in which we had filed motions to quash deposition subpoenas on behalf of fourteen clients, Amanda Martin spoke for all of us when she said, "We'd better win," she said, "because I surely don't want to have to call fourteen clients and tell them all we lost." Amanda argued the motions and won.

The most important thing about a media coalition is not who its members or its lawyers are or even whether it prevails in a particular case. The most important thing is that it exists because by coming together and joining forces, the members extend their reach with the courts and their credibility with their readers and viewers. As one of our client representatives put it, "News organizations today should remember Benjamin Franklin's admonition to the founders who gathered in Philadelphia in 1776. 'Gentlemen,' he said, 'we must all hang together, else we shall surely all hang separately.'"

Endnotes

1. The trial judge's order denying the state's motions is reported at 19 Media L. Rep. 1283 (1991). After a nine-month trial, Kelly, who operated the day care center with his wife Betsy was convicted of ninety-nine charges, including first-degree sexual offense, first-degree rape, taking indecent liberties with children, and crimes against nature. He was sentenced to twelve consecutive life sentences. The North Carolina Court of Appeals reversed the conviction in 1995. State v. Kelly, 456 S.E.2d 861 (N.C. Ct. App. 1995). Dawn Wilson, an employee of the day care center, also was convicted and sentenced to life in prison. Her conviction also was overturned on appeal. State v. Wilson, 456 S.E.2d 870 (N.C. Ct. App. 1995). In 1994, Betsy Kelly, who had been held in prison awaiting trial for more than two years, entered a plea of no contest and accepted a prison sentence of seven years. She was released in 1995. Eventually, the state did not prosecute five other defendants. The history of the case was chronicled extensively in three *Frontline* documentaries broadcast by PBS in 1991, 1993, and 1997. *See* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/.

Contingent Fee Access Litigation in Wisconsin

ROBERT J. DREPS

Wisconsin has a long and proud history of open government. In 1856, just eight years after statehood, the Wisconsin Supreme Court considered a records access statute that required every county officer "to keep his office open during business hours, Sundays excepted, and all books and papers required to be kept in his office shall be open for the examination of any person."[1] The court ruled this statute implicitly obligated Jefferson County to pay a bill that its clerk of courts had incurred for wood and candles. "To require these officers to keep their offices open during business hours, for the convenience of the citizens having

Robert J. Dreps is an attorney in the Madison, Wisconsin, office of Godfrey & Kahn S.C. and leads the firm's media law practice group.

business to transact in them, and yet provide no means of warming or lighting them, would be simply absurd."[2]

Today, Wisconsin's Open Records Law broadly presumes that virtually every record created or kept by a local or state government authority is open to public inspection, but the law allows those authorities to deny inspection by claiming that some public policy interest in secrecy outweighs the public's presumptive right of access.[3] It is a strong access statute. By preserving this common law balancing test, which must be applied case-by-case and document-by-document, however, Wisconsin's Open Records Law invites litigation.

Wisconsin courts have, with few exceptions, respected the legislature's mandate that the law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."[4] The news media have won the vast majority of records access cases decided since the Open Records Law became effective in 1983. My firm has been privileged to represent the media in dozens of those cases.

Enforcement Actions on the Decline

Beginning in 2008, however, requests by news media clients to bring enforcement actions under the Open Records Law began to decline sharply. We knew the government continued to deny records requests at about the same rate based on calls to the hotline service we have long provided for the Wisconsin Newspaper Association and Wisconsin Broadcasters Association. But the willingness of newspaper publishers and broadcast station managers to authorize and fund litigation to enforce the public's rights under the law nevertheless fell, in large part due to the economic challenges facing the media generally. By 2009, enthusiasm for public access and open records litigation had almost evaporated.

The same trend in Wisconsin was occurring nationwide. News media resources devoted to access and open records litigation had decreased substantially since 2005, according to a survey conducted by the Media Law Resource Center in conjunction with the National Freedom of Information Coalition.[5] Media organizations, forced to downsize because of declining revenue, found it difficult to justify simultaneously funding access litigation. Their public interest commitment to hold the government accountable using the records law had not diminished, of course, but the resources available to fulfill the watchdog role had dramatically declined.

A Feasible Alternative

We developed a partial, and perhaps interim, solution to the problem. In April 2010, we began representing news media clients in public records enforcement actions on a contingent fee basis. The client agrees to pay litigation expenses, like filing fees, and the opponents' taxable costs if the case is lost, but all fees for legal services are contingent upon success.

This alternate fee arrangement is feasible primarily because of the strong and frequently used fee shifting language in Wisconsin's Open Records Law: "[T]he court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action . . . relating to access to a record or part of a record."[6] Not surprisingly, many media clients enthusiastically accepted our offer.

We have brought nearly two dozen access cases for journalists in the last year, showing that immediate financial concerns were the principal, if not sole, cause of the decline in access litigation in Wisconsin. A surprising number of those cases settled shortly after filing, with the government disclosing the requested records and paying fees rather than defending the improvident decision to deny access. To date, only one case has been lost, and that ruling is under appeal. The program has been a resounding success for the media and, more importantly, for the public.

Green Bay Legal Services

The first case that did not settle sought access to the billing statements of outside counsel hired by the City of Green Bay in 2007 and 2008. The *Green Bay Press-Gazette* had requested records of payments for legal services from twenty-three communities in its coverage area and received complete, unredacted copies of law firm invoices from most. Only the City of Green Bay claimed that every entry on every bill was protected by the attorney-client privilege and provided the newspaper only the names of the nine law firms it paid for services performed in 2007 and 2008, the general description of the work each firm performed (e.g., "civil litigation defense work"), and the amount that the city paid each firm during the period.

We filed suit for the newspaper on July 23, 2009; and after the city answered, we promptly moved for summary judgment. The circuit court heard argument and granted the motion on September 18, 2009, after considering the parties' briefs and reviewing the billing records at issue in camera. The city elected not to appeal and paid $18,000 for the newspaper's litigation fees and expenses.

The Open Records Law worked as designed. The enforcement action was decided in less than two months, and the resulting newspaper series titled "Legally Taxed" was cited in the Lifetime Achievement Golden Gavel Award given by the State Bar of Wisconsin to reporter Andy Nelesen. The firm's contingent fee litigation program also worked as designed by enabling the *Green Bay Press-Gazette* to enforce the public's right of access to the government records that it wanted for the investigation.

Access to Prison Video Recording

We brought another notable case, this one for the Associated Press to obtain a video recording that the Wisconsin Department of Corrections (DOC) made of its officers using a stinger grenade to extract a noncooperative prisoner from his cell in a maximum security prison. A stinger grenade is a type of explosive device that, upon detonation, emits a loud blast accompanied by smoke and fires 180 small rubber balls in a fifty-foot radius. The device was intended by its manufacturer for outdoor use in crowd control and had never previously been used in any Wisconsin prison. AP learned of the incident and the video recording's existence from a decision by the federal court for the District of

Wisconsin that denied the guards' claims of qualified immunity in the prisoner's subsequent suit for injuring his hearing.[7] DOC first denied AP's request for the video by inaccurately claiming that its disclosure would reveal the surveillance capabilities of its security camera system. Upon being informed that the court decision states that the video was from a handheld camera, DOC switched its rationale for nondisclosure to preventing other inmates from learning about and devising strategies to resist staff during a planned use-of-force procedure.

We won a quick settlement for AP, after starting an enforcement action, by noting that DOC's public representation that it would never again use a stinger grenade for cell extraction defeated its asserted public policy rationale for secrecy. The public was able to see for itself how three guards in full protective gear managed to avoid injury at the hands of a 135-pound inmate, who had admittedly refused to follow their orders and stated his intent to play "Gangsta," by tossing a stinger grenade into his cell while they ran down the hallway.

The prisoner's suit forced DOC to alter its practices and won him a $49,000 settlement. AP's enforcement action, which might not have been possible without contingent fee representation, provided the public with the factual context necessary to evaluate DOC's conduct toward and settlement with the prisoner—just as the drafters of the Open Records Law intended.

Conclusion

Our approach has proven to be successful. It works because there is a strong fee shifting provision in Wisconsin's open records statute. In other places without the benefit of such a provision, this approach would involve a greater economic risk for the law firm. In those states, adoption of a strong, nondiscretionary fee shifting provision could provide a legislative solution that goes a long way toward addressing the problem of how the media can continue to pursue public access and open records cases in difficult economic times.

Endnotes

1. County of Jefferson v. Besley, 5 Wis. 134 (1856).

2. *Id.* at 136. The court explained, however, that this did not mean the clerk was "required to keep a tavern."

3. Wis. Stat. § 19.35(1)(a); *see generally* Comment, *The Wisconsin Public Records Law*, 67 Marq. L. Rev. 65 (1983).

4. Wis. Stat. § 19.31.

5. Nat'l Freedom of Info. Coal. (NFOIC), MLRC-NFOIC Open Government Survey, www.nfoic.org/uploads/foi_pdfs/MLRC-NFOIC-Open-Govt-Survey.pdf (last visited May 25, 2011).

6. Wis. Stat. § 19.37(2)(a).

7. Jackson v. Gerl, 622 F. Supp. 2d 738 (W.D. Wis. 2009).

Fixed Fees for Access Cases

NATALIE J. SPEARS

What will that access motion cost? With shrunken budgets and limited resources, it is often hard for newsroom editors or station directors to move forward with an access motion not knowing what it will cost them—really cost them, not just maybe or hopefully cost them if all goes as expected. These days, they need a concrete bottom line.

It's hard to criticize that request. Think about it. When we are buying services in our personal lives, we want to know what the service is going to cost up front. We don't want our accountant or roofer or hairdresser to tell us a wide range of possibilities based on how many hours and minutes it could take them to perform their services and then hope for the best price outcome.

Legal work is really not so different and certainly does not have to be. But getting away from the billable hour is a change. And any change can be a little frightening and requires some trust on both sides. However, the economic climate facing many of our media clients in the past few years has forced us to move in that direction in access cases, and, so far, it has worked for both sides.

A few years ago, one of my more well-known partners, Scott Turow, wrote an article for the *American Bar Journal* entitled "The Billable Hour Must Die." Scott has a flare for catchy titles. Some people might find the sentiment too strong, but, in my opinion, his title and point were right on.

The billable hour has come under attack on several fronts in recent years. Some critics, like Scott, have focused on the negative impact that the ever-escalating pressure to bill hours has on the quality of life lawyers lead and the inherent tension that the billable hour creates between the interests of clients and law firms. Others, like the Association of Corporate Counsel (ACC), have focused on the value to the client that is not captured in hourly increments and the common reality that the billable hour often does not lead to a final price tag that matches the value of the completed service to the client.

Today, a growing number of in-house lawyers are joining the alternative fee crusade, including the people who run newsrooms. It is not exactly a death march for the billable hour, but encouraging nonetheless. According to a survey by the ACC and the *American Lawyer*, "[t]wenty-nine percent of in-house counsel reported an increase in their use of alternative fee arrangements in 2010." ACC reports that "[a]lthough still a small percentage of total outside counsel spend[ing], the increase in the number of 'value-based' fees demonstrates legal departments' determination to continue to increase the use of alternative pricing and valuation methods, regardless of the market rebound." Other findings from the survey included that "[f]ifty-three percent of GCs surveyed said that they had used flat fee billing for an entire matter, up from 48 percent in 2009," and "[l]arge company GCs (working in companies with over $1 billion revenue) are generally more likely to expect alternative arrangements, with 62 percent using flat fees for an entire matter in 2010, up from 60 percent in 2009."

At SNR Denton, we increasingly use alternative fee arrangements on litigation matters of all kinds. But for quite some time now, we have utilized fixed flat fees for access matters. Fixed fees work particularly well for volume or repeat matters that are relatively predictable, well defined, and

Natalie J. Spears is a partner in the Washington, D.C., office of SNR Denton.

short-lived. Most access matters fall into this bucket. We typically set up three or four categories of fees for different types of access matters, which vary depending on the complexity of the issues, the number of briefs and court appearances anticipated, and the court or geographic location involved. When clients call with a potential access matter, we quickly analyze the issues and determine whether, for example, it is a Category I, II, or III matter; and we are able to quote a fixed fee for the work. This approach greatly enhances the ability of clients to assess the value of the effort and make the call on whether to approve it or not. If they do, they know exactly what it will cost and can budget accordingly.

As for the firm, over time, some access matters require more work than the fee charged (if measured in terms of recorded hours), and some require less. In the end, we are rewarded for our efficiency with the fixed fee and with more work from successful results. And, yes, there have been some matters over the years with unforeseen developments that resulted in dramatically more or less work than initially predicted. In those cases, we have done an informal review with the client and made fair adjustments. That's where the trust comes in. But it really is not a huge leap of faith. The attorney-client relationship is one fundamentally grounded in trust. If you don't trust your lawyer, you should get a new one. And if you don't trust your client, same advice. On the other hand, if you do, then perhaps it's time to kill the billable hour in favor of value-based fees. Access cases that otherwise might never be pursued for economic reasons are a great place to start.