

THE AM LAW LITIGATION DAILY

Litigators of the Week: A Defense Win for the New York Times in the Re-Trial of Sarah Palin's Libel Case

By Ross Todd

April 25, 2025

Our Litigators of the Week are **Felicia Ellsworth** of **Wilmer Cutler Pickering Hale and Dorr** and **David Axelrod** of **Ballard Spahr**, who won a defense verdict this week for The New York Times Co. in the second trial in a libel lawsuit brought by former Alaska Gov. Sarah Palin.

Palin sued the paper and the former head of its editorial board, James Bennet, in the wake of a 2017 editorial about gun violence. The editorial initially incorrectly said an image circulated by Palin's political action committee, which showed cross-hairs over certain congressional districts, had a "clear" link to a 2011 shooting in Arizona where Democratic U.S. Representative Gabby Giffords was critically wounded and a federal judge was killed. The paper fixed the error and issued a correction the day after the editorial was published.

Axelrod and his team at Ballard Spahr won a defense verdict in the prior trial in 2022. The Second Circuit, however, revived the case last year after finding evidentiary errors by Senior U.S. District Judge Jed Rakoff.

How did this matter come to you and your firms?

Felicia Ellsworth: WilmerHale has represented The New York Times on a range of matters over



Courtesy photos

Felicia Ellsworth, left, of WilmerHale, and David L. Axelrod, right, of Ballard Spahr.

the years, so there was a pre-existing relationship and familiarity with our expertise and experience that created the opportunity for our firm to join the team. In particular, our trial practice has deep experience winning high-profile cases with high stakes, like this one, which made us especially well-suited for this case.

David Axelrod: Ballard Spahr has a nationally recognized media and entertainment law practice and has represented news outlets across the country, including The New York Times, in a wide variety of First Amendment cases over

decades. When Sarah Palin filed the suit in 2017, The Times brought Ballard on to defend them. In that trial, the Ballard team obtained rulings disqualifying Ms. Palin's damages expert and precluding punitive damages. In February 2022, Judge Rakoff ruled that Ms. Palin's legal team had failed to meet the high legal standard for actual malice and the jury agreed, ruling in The Times' favor. We continued to handle the case on appeal.

Who all was on your team and how did you divide the work?

Axelrod: We worked seamlessly with the WilmerHale team, who were great partners. On the Ballard side, we had a great team of the best media lawyers in the country, including **Jay Ward Brown, Tom Sullivan, Jacquelyn Schell** and Kenison Lay. And trial wouldn't have been successful without the outstanding work of paralegal extraordinaire **Gianni DiMezza**.

Ellsworth: This was a case study for the virtual law firm, and we worked seamlessly with the phenomenal Ballard team to form a great trial team. From WilmerHale, **Andy O'Laughlin** was a critical contributor to overall strategy and played a key role in witness preparation and cross-examination strategy. Senior paralegal **Hillary Greene** kept everything running like a Swiss clock, and we all benefited from the invaluable wisdom of **Bill Lee**.

David, what did you and the team take from having tried this case one time successfully already? How much were you drawing from that prior experience?

Axelrod: Because we already had prevailed once, we knew that Palin's team faced an uphill battle. So the challenge was taking what we knew worked in the 2022 trial and making it stronger and smoother.

Felicia, as someone coming to this case for the first time for this trial, what were your key concerns in making the defendants' case to jurors?

Ellsworth: The team had put together a great record, so we came in with a head start to be sure. We were hyperaware that today's environment is far more charged as compared to 2022, when the case was first tried. We took a hard look at the evidence and case themes to ensure we were thinking of it through the 2025 lens, and, as with any trial, wanted to be sure that we could tell as clear and simple a story through The Times's witnesses as possible. We carried those themes and that simple story through in the presentation of evidence and were hopeful that it resonated with the jury. We were gratified they reached their verdict so quickly.

David, you put James Bennet on the stand during the earlier trial and did it again here. What are the advantages and challenges of having that sort of repeat assignment?

Axelrod: In the 2022 trial, James Bennet's testimony successfully demonstrated how much he cared about his work and about journalism as a profession. Given that testimony, we knew that James was a great communicator who could connect with the jury. But the challenge (as with every sequel) is repeating that success and suppressing complacency.

Felicia, what was your approach to cross-examining Sarah Palin? What were your goals for that cross-examination and how did you go about accomplishing them?

Ellsworth: Our goal with the cross-examination was to demonstrate to the jury that the publication of the editorial had no impact on Governor Palin. We had a great roadmap from the first trial, and the benefit of three more years of Governor Palin's active participation in the political and cultural arenas. We used this to our advantage to demonstrate the lack of harm. We otherwise approached it like any cross-examination and worked to craft tight questions with good control. I have great respect for Governor Palin's achievements, and we strived to achieve our litigation goals through the cross-examination

while affording her the respect that she has earned.

There are those on the plaintiffs' side of the defamation bar who would like the Supreme Court to reconsider the "actual malice" standard laid out in its seminal *New York Times v. Sullivan* decision. Do the broader potential First Amendment implications of a particular case factor into how you litigate a matter like this?

Ellsworth: Many of our cases have broader implications to keep in mind as we litigate. At the same time, you need to focus on what's happening in the courtroom and ensure broader implications don't distract you from litigating your case. We focused on executing our game plan and achieving a successful outcome for The Times.

Axelrod: The media must be free to report on the conduct of public officials without fear of frivolous libel suits. That's why public figures are subject to a higher standard of proof for actual malice. The Times issued a swift correction in the case of its 2017 editorial. *Sullivan* allows breathing room for robust debate on matters of public importance, making it a key protection for free speech and freedom of the press. In a ruling granting our motion prior to the initial trial, Judge Rakoff held that New York's amended Anti-SLAPP statute—which requires as a matter of state law that a plaintiff must prove actual malice—applied in this case. That ruling, which was untouched by the appeal, meant that this case could not be a vehicle for challenging *Sullivan*. This is a major win for the First Amendment and helps to ensure that the American people have visibility into the actions of their elected officials. We understood the broader implications for *Sullivan* when we were trying this case.

What can media organizations like the Times and journalists like Bennet take from this outcome?

Axelrod: Journalists must always strive for truthful, accurate and fair reporting. When they make a mistake, as every human being inevitably does, there is a value in recognizing and correcting it quickly. That's what happened here. Without the protections afforded by the *Sullivan* and *Palin* cases, there would have been a chilling effect on reporting that would significantly diminish the constitutionally-protected information provided to the American people. In addition, there are extensive checks and balances within a newsroom to make sure that reporting is fair, accurate and balanced. That will continue. But this case helps to ensure that news gathering and reporting is not constrained by fear of retribution.

Ellsworth: The Times and James Bennet have shown throughout this case how seriously the institution and its journalists take their responsibilities in a free society with strong press protections. Those responsibilities include a steadfast commitment to accuracy and getting it right, while quickly fixing honest mistakes when they do happen. I believe the jury could see that commitment in the witness testimony.

What will you remember most about this matter?

Ellsworth: As with any case, this all came down to the witnesses and the people. Working with James Bennet and the other Times witnesses, as well as the members of our trial team, was an absolute pleasure. Beyond the attention and successful outcome, the camaraderie and positivity all around made this case a memorable one.

Axelrod: The best part about being a lawyer and representing clients who are true professionals and are so clearly guided by doing the right thing. James Bennet and his Times colleagues are great journalists and wonderful people, and it was our pleasure helping to vindicate them.