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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through February 25, 2011

LIBEL & PRIVACY

REPORTERS PRIVILEGE

UPCOMING EVENTS 2011

Section 230: A 15 Year Retrospective
March 4 | Santa Clara, CA

MLRC/Stanford Legal Frontiers in Digital Media Conference
May 19-20 | Stanford, CA

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Truth Defense Includes Expunged Materials, New Jersey High Court Rules

Expungement Does Not Make a True Fact False

By Bruce S. Rosen

New Jersey's High Court, in the second of five major media decisions it is considering, declared the federal and state constitutions required that defendants be entitled to use expunged records in order to assert a defense of truth. *G.D. v. Kenny*, No. A-85-09 (Jan. 31, 2011).

Eight months after reinforcing and strengthening the state's fair report privilege in *Salzano v. North Jersey Media Group*, the N.J. Supreme Court ruled unanimously in *G.D. v. Kenny* that defendants accused of defaming a political operative as a felon as part of a campaign flyer were free to show his sealed record even though the material was expunged. The plaintiff/appellant, whose conviction was expunged after he entered a pretrial diversion program, had argued that the expungement statute itself, NJSA 2C:52-30, required the forced fiction of non-acknowledgement of an expunged record. While the statute makes it a misdemeanor to reveal "to another the existence of an arrest, conviction or related legal proceeding with knowledge that the records … have been expunged," the Court said that a literal and over-broad reading of the statute likely would violate the federal and state constitutions.

"It is true that under the expungement statute, as a matter of law, an expunged conviction is "deemed not to have occurred," wrote Justice Barry Albin. "But the expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. It cannot banish memories. It is not intended to create an Orwellian scheme whereby previously public information – long maintained in official records – now becomes beyond the reach of public discourse in a defamation action."

Although the Appellate Division opinion similarly held the materials could be used for a defense of truth, it had based that holding on a brief passage in a 1994 N.J. Supreme Court decision, *Ward v. Zelikovsky,* which in turn was based on a line pulled from a treatise. The *G.D.* Court, at the urging of media amici, instead cited the string of U.S. Supreme Court cases protecting publication of truthful information, including *Florida Star v. B.J.F.* and *Smith v. Daily Mail,* as well as cases and statutes in Massachusetts and Oregon.

The Court pointed out that the expungement statute itself was not absolute, allowing use of the materials by law enforcement in certain circumstances, and that it did not even require certain state agencies from removing expunged records from their files. Even if it did, the Court reasoned, there was no way that the media could be expected to excise past convictions or arrests from their archives, any more than the judiciary was going to razor from its bound volumes records of criminal cases. The situation was compounded, the court said, by data aggregators, who collected the information, and by of course, the Internet.

"The expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary..."

"All of the beneficial purposes of the expungement statute – enacted at a time when law enforcement and court documents may have been stored in the practical obscurity of a file room – must now coexist in a world where information is subject to rapid and mass dissemination," wrote Albin.

Citing numerous federal circuit cases, the Court also rejected arguments from the Appellant and the Electronic Privacy Information Center ("EPIC") that the expungement statute created a right of privacy and ruled that "the expungement order did not and could not create a reasonable expectation of privacy in matters so long in the public domain." The Court also relied on its *Salzano* decision in rejecting arguments that the campaign flyers were not true, because they were substantially accurate.

Supreme Court's Media Law Docket

The Court is in the midst of a number of media-related

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cases, probably the most in such a short period in almost 20 years. In January, Court heard argument in a case involving the sufficiency of proofs for a summary judgment on actual malice, *Durando v. the Nutley Sun.* In early February, the Court heard argument in *Too Much Media v. Hale*, a case expected to decide whether bloggers and/or posters can be considered journalists under the state Newspersons' Shield.

The Court also recently granted certification in a case involving presumed damages in a case involving a purported private libel, *W.J.A. v. D.A.*

Bruce S. Rosen and Kathleen A. Hirce of McCusker, Anselmi, Rosen & Carvelli, P.C., represented amicus North Jersey Media Group Inc., in both the Appellate Division and Supreme Court. Plaintiff was represented by Charles R. Cohen of Cohn Lifland Perlman Herrman & Knopf of Saddle Brook, N.J. Defendants were represented by William Northgrave of McManimon & Scotland in Newark, N.J. Amicus curiae EPIC was represented by Grayson Barber of Princeton, N.J. Thomas J. Cafferty, Nomi Lowy and Lauren James-Weir of Gibbons PC, Newark, N.J. represented amici N.J. Press Association, Associated Press, ACLU-NJ, ASNE, and the Association of Capitol Reporters and Editors.

Sheriff Candidate Has No Privacy Claim Over Disclosure of Annulled Conviction

The New Hampshire Supreme Court affirmed dismissal of a private facts claim based on the disclosure of an annulled criminal conviction. *Lovejoy v. Linehan et al*., No. 2010-343 (Feb. 23, 2011). Ruling on non-constitutional grounds, the court held that the state's annulment statute does not create a private civil cause of action and disclosure of plaintiff's p rior conviction was a matter of legitimate public concern.

At issue was an October 2008 article published in the *Portsmouth Herald* entitled "Candidates on attack in county sheriff race." The article contained information leaked by the incumbent to the press, stating in relevant part "A record provided t o the Herald said Lovejoy was involved in a case of simple assault and was convicted in 1989. Lovejoy said the case was annulled and was thrown out of court by the judge."

New Hampshire's Annulment of Criminal Convictions statute, N.H. RSA 651:5, applies to certain non-violent crimes and allows courts to annul a record of arrest or conviction. The statute provides that the "person whose record is annulled shall be treated in all respects as if he had never been arrested, convicted or sentenced" and makes it a misdemeanor to disclose or communicate the existence of such record, except for certain law enforcement purposes.

After Lovejoy lost the election he sued his opponent, other state officials and reporter Karen Dandurant for disclosure of private facts and related claims. The trial court dismissed for failure to state a claim, finding that "the fact that a reco rd of arrest and conviction may not now be open to the public does not make it disappear as though it never happened."

On appeal, plaintiff argued that under RSA651:5, he "had the expectation that his criminal conviction was effectively erased from any possibility of further public discourse." The Supreme Court held, however, that the statute does not create a civil remedy and "does not shroud the record itself with a cloak of secrecy." Slip op. at 3, *citing, e.g*., *Nilson v. Layton City,* 45F.3d 369, 372 (10th Cir.1995) (noting that"[a]n expungement order does not privatize criminal activity. While it removes a particular arrest and/or conviction from an individual's criminal record, the underlying object of expungement remains public ...[and therefore an expunged record] is not entitled to privacy protection.").

With regard to plaintiff's private facts claim, the court noted that he was a candidate for public office and placed his qualifications for that office at issue. His prior assault conviction was obviously relevant to his qualification to serve as county sheriff.

Plaintiff was represented by Chuck Douglas, Douglas, Leonard & Garvey P.C., Concord, N.H. Defendant James Linehan was represented by Orr & Reno, P.A., Concord, N.H. Defendant Mark Peirce was represented by McNeill, Taylor & Gallo, P.A., Dover, N.H. Defendant reporter Karen Dandurant was represented by Greg Sullivan, Malloy & Sullivan, Manchester, N.H.

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Virginia Student Wins $5 Million Libel Damage Verdict

Newspaper Article Implied He Bullied High School Student

A Virginia jury awarded five million dollars to a student who claimed a report in *The (Norfolk) Virginian-Pilot* had falsely "implied and insinuated" that he had "routinely bullied" a fellow student. *Webb v. Virginia-Pilot,* (Va. Cir. Ct. jury verdict Feb. 11, 2011).

The December 18, 2009 article was published a day after the Circuit Court sentenced plaintiff on misdemeanor assault and trespassing charges involving the fellow student's father.

In the article, reporter Louis Hansen stated that Kevin Webb, the then-17-year-old plaintiff, had "regularly shoved and taunted [Patrick] Bristol, a special education student," and vaguely described an attempt by Bristol to contact Webb at his home on November 8, 2008.

> Two days later, Kevin Webb, then 17, and his older brother Brian paid an early morning visit to the Bristol home. The Webbs drew Robert Bristol from his home and beat the 53-year-old father of three. Patrick awoke and came down the stairs. He, too, was beaten.
>
> Kevin Webb, a minor, was charged as an adult with malicious wounding, assault and trespassing. His brother was charged with three felonies. In August, a Circuit Court judge found Kevin Webb guilty of misdemeanor assault and trespassing, and Brian Webb guilty of misdemeanor assault.

Following these paragraphs, the article noted that Patrick Bristol had to drop out of school and get his GED, but had been on track to graduate before that despite "a few discipline problems." Near the end of the article, the reporter noted that Bristol had not been alone on his November 8 visit to the Webb house, and noted that while Bristol said he had "five or six" friends with him, according to court papers filed by the Webbs it was more like 20 -30 people. The article also reported that Webb had been charged with two assaults when he was 15 and 16 (but the charges had been dismissed), and that prosecutors had said he was part of a "gang" called the "Bum Fight Klub." The article also noted that Webb had not been suspended or expelled from high school. Webb's father, Phillip D. Webb, was an assistant principal at another area high school.

Following the article, both Kevin Webb and his father filed libel suits against The Virginian-Pilot and Hanson, the reporter; both suits sought $5,000,000 in compensatory and $350,000 in punitive damages. Phillip Webb's suit is still pending, but Kevin Webb's suit went to trial on February 4 before a seven -member jury, presided over by Chesapeake Circuit Court Judge Randall D. Smith.

The case was tried under the negligence standard. On the seventh day of trial, after a two-hour deliberation, the jury awarded Kevin Webb $5,000,000. The case was submitted to the jury on the narrow question of whether plaintiff had bullied Patrick Bristol.

After the verdict, Kevin Webb filed another lawsuit against the reporter, Hanson, who had been dismissed as a defendant from the earlier suit. Meanwhile, Phillip Webb, whose case against the paper and Hanson is still pending, filed an amended complaint that doubled his compensatory damage request to $10,000,000.

The Virginian-Pilot is contesting the jury's decision, and as of February 24 the verdict had not yet been recorded.

The Virginian-Pilot was represented by Conrad Shumadine of Willcox & Savage; Jeremiah Denton III, Virginia Beach, VA, represents both Webb plaintiffs.

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Florida Jury Socks Radio Show Host with $1.61 Damage Award

Defendant Found Liable for Defamation; Malicious Prosecution and Abuse of Process

A Florida state court jury this month rendered a verdict in favor of a businessman on a defamation claim against a radio talk show host who stated that plaintiff was "trolling for children" in a trailer park. *Mask v. Guetzloe,* No. 2007-CA-016024-O (Fla. Cir. Ct. jury verdict Feb. 23, 2011).

The jury also found against the defendant on malicious prosecution and abuse of process claims growing out of a prior copyright lawsuit he brought over the recording of his radio show.

Background

Defendant Doug Guetzloe is a political consultant and anti-tax activist who hosts a weekday radio talk show called the "Gueztloe Report" on AM radio in Winter Garden, Florida. The plaintiff Richard Mask is a local businessman and former local planning board member. A local controversy existed about the future of a Winter Garden, Florida trailer park community. Guetzloe had accused Mask and local officials of planning to close the community.

At issue in the case were statements made during a January 10, 2006 broadcast. Gueztloe stated that a listener told him that Mask was seen visiting the trailer park and talking to some young boys. Gueztloe went on to state:

> ""I've urged the people of Trailer City to go ahead and call the sheriff's department, in this case the police department, and report Mr. Mask for potentially trying to pick up young boys out of Trailer City, because that apparently is the case… I don't know what his problem is, but he needs to stay away from young boys and he needs to quit cruising Trailer City looking for trouble…. We've got to do something to get this Richard Mask to stop trolling for children or something over there in Trailer City."

Mask filed a defamation suit in March 2006, alleging the broadcast falsely implied he was a pedophile or child abuser. At approximately the same Gueztloe filed a copyright infringement claim against Mask and Monique Bollhoefer, a women who had recorded the radio show and alerted Mask about the statements. The copyright case was dismissed for failure to state a claim. Mask and Bollhoefer later added claims against Gueztloe for malicious prosecution and abuse of process, arguing that Gueztloe brought the copyright claim to pressure Mask to abandon the defamation suit.

Defamation Trial

The case was tried over seven days this month before a six person jury. Orange County Circuit Court Judge Jose R. Rodriguez presided. Judge Rodriguez ruled that plaintiff was a limited public figure with respect to the controversy over the Winter Garden trailer park. A key issue at trial was the meaning of the words at issue. Jurors listened to the entire hour long broadcast to hear defendant's statement in context. Plaintiff's counsel argued that the broadcast clearly meant that plaintiff was a child abuser. Defendant argued that his remarks were equivocal and did not state as a fact that plaintiff was a pedophile.

In closing plaintiff's counsel argued that "Mr. Guetzloe makes his living as a wordsmith. He knows how to character assassinate, and that's exactly what he did" depicting plaintiff as a "pervert or sexual deviant… There's no human being lower on the face of this earth than a pedophile or a person abusing young children."

The jury awarded plaintiff $500,000 in compensatory damages and $500,000 in punitive damages. He also received $187,000 in compensatory and $250,000 in punitive damages on his malicious prosecution and abuse of process claims. The women who recorded the broadcast received $173,000 in compensatory damages.

Plaintiff was represented by Howard S. Marks, Burr Furrman LLP, Winter Garden, FL. Defendant was represented by Fred O'Neal.

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Washington's Right of Publicity Statute Struck Down as Unconstitutional in Part

Choice of Law Provision Violates Due Process, Commerce Clause

By Shelley Hall

A federal district court struck a portion of Washington's Personality Rights Act ("WPRA") as unconstitutional. Judge Thomas S. Zilly of the U.S. District Court for the Western District of Washington issued a comprehensive order in *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd*, Case No. C09-285Z (dated Feb. 8, 2011), 2011 WL 564300, the ongoing saga over Jimi Hendrix's legacy. The order also addressed an unsettled First Amendment immunity issue related to the right to petition.

The right of publicity ruling stemmed from a dispute over choice of law. Plaintiffs argued that rights to Hendrix's name and likeness had passed to them under the WPRA, which was amended in 2008 to state that publicity rights do not expire upon death "regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death." RCW 63.60.010. As such, Plaintiffs argued that they owned rights to Hendrix's name or image and that Defendants could not sell products containing Hendrix's picture.

Defendants argued that New York law, which extinguishes publicity rights upon death, applied and allowed them to sell the products. They contended that the WPRA's choice of law section violated a panoply of constitutional provisions: (1) Due Process Clause; (2) Full Faith and Credit Clause; (3) Privileges and Immunities Clause; (4) Commerce Clause; (5) Takings Clause; (6) First Amendment; and (7) Copyright Clause. The court agreed with Defendants on the Due Process, Full Faith and Credit, and Commerce Clause standards. It declined to analyze the remaining challenges.

On the Due Process and Full Faith and Credit challenges, the court applied a "significant contact" test, which requires that the state have sufficient interests in the legislated issue. Although Plaintiffs argued that the WPRA's survivability provision applies only to persons in the state, the court held that plain language of the statute extends to all individuals. It then held that the extensive breadth of the statute contradicts the majority rule on right of publicity and the traditional rule regarding descendability of other types of property, both of which apply the law of the state of domicile. The court concluded that applying the WPRA's law to deceased persons outside the state would lead to "inconsistent and unjust results" and even "state -specific self-censorship" if people could use images in some states but not Washington. It declared the choice-of-law provision related to post-mortem rights of publicity "arbitrary and unfair" and in violation of both the Due Process and Full Faith and Credit clauses.

The upshot of the court's decision was a declaration that New York's right of publicity statute applied to the case because Hendrix died in New York, and that New York law did not prevent Defendants from selling products containing Hendrix's image.

The court also analyzed the WPRA's choice-of-law provision under the Dormant Commerce Clause test and again found it unconstitutional. Defendants argued that the WPRA created a national right-of-publicity body of law centered in Washington. The court agreed that the WPRA tried to govern transactions outside Washington's borders, such as testamentary succession of rights. Because these transactions occur "wholly outside" the state borders, the choice -of-law provision regarding survivability of rights of publicity violates the Dormant Commerce Clause as well.

The upshot of the court's decision was a declaration that New York's right of publicity statute applied to the case because Hendrix died in New York, and that New York law did not prevent Defendants from selling products containing Hendrix's image.

The same order also ruled on the scope of First Amendment protection for statements made regarding litigation. Defendants counterclaimed for defamation and

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tortious interference because Plaintiffs had sent third party retailers copies of orders in the case and had sent cease and desist letters to retailers. Defendants alleged that the communications contained false and defamatory information.

Plaintiffs asserted *Noerr-Pennington* immunity to the claims. The *Noerr-Pennington* doctrine derives from the First Amendment's right to petition and protects "petitioning conduct." The question here was whether Plaintiffs' actions qualified as petitioning conduct.

The court first had to determine the scope of *Noerr-Pennington* immunity, which remains unsettled. It concluded that the doctrine does not extend to all statements about litigation made to non-parties. The court reasoned that "to decide otherwise would provide carte blanche to engage in a host of business torts veiled as 'petitioning conduct.'" Looking at the communications at issue in the case, the court held that immunity applied to letters to third parties enclosing copies of court orders and to letters accompanying third-party subpoenas. It found that these fit within the rubric of legitimate petitioning activities.

But it held that the doctrine did not protect statements made in press releases about the litigation or in a cease and desist directive sent to a third-party retailer. Those statements were unrelated to the party's right to petition, and allowing claims to proceed against those statements would not chill legitimate petitioning conduct. The court allowed both the defamation and tortious interference claims to proceed only regarding statements in those documents.

The court's decision on the scope of *Noerr-Pennington* immunity differs from conclusions reached by some other courts. Some courts reason that immunity should apply to all statements made to third parties about the litigation, and that only knowingly false statements made to the court itself should result in claims. Other courts have held that immunity cannot apply to any statements to third parties.

It remains to be seen if the *Hendrix* court's middle position gains traction with others. In any event, the litigation over Hendrix's legacy will continue, as several claims on both sides remain unresolved.

Shelley Hall is a partner with Stokes Lawrence in Seattle, WA. Plaintiff was represented by David L Martin, Lee Smart PS Inc., Seattle, WA; and John D. Wilson, Jr., *Wilson Smith Cochran & Dickerson, Seattle, WA. Defendant was represented by Thomas T Osinski, Jr, Osinski Law Offices, Tacoma, WA.*

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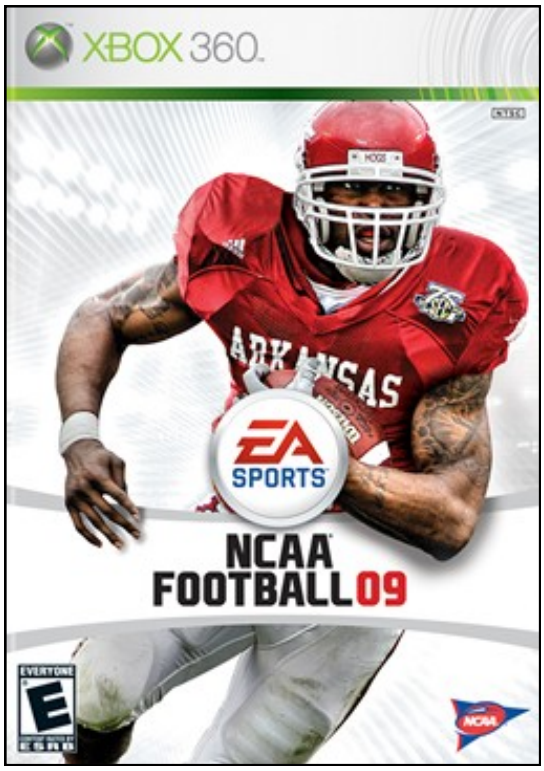
"Monetizing a Virtual Identity": Ninth Circuit Hears Appeal of Right of Publicity Suit

By Stacy Allen

If good facts make bad law and a sympathetic plaintiff is worth more than good law on point, then the case of *Keller v. Electronic Arts,* now on appeal before the Ninth Circuit, may well extend the nebulous "right of publicity" into the interactive digital ether. For nothing has done more to advance the development of the right of publicity doctrine, which purports to protect against the uncompensated commercial exploitation of one's likeness or identity by another, than the seeming inequity resulting from trading on a sports star's persona for profit (and without payment to the non-consenting celebrity). Indeed, the first case to recognize a right of publicity (*Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,* 202 F.2d 866 (2d Cir. 1953)) involved the "publicity value" of star athletes' pictures on baseball cards.

Fast forward to *Keller v. Electronic Arts, Inc.*, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), a class action in which former Arizona State quarterback Sam Keller has sued video game publisher Electronic Arts ("EA") and the NCAA among others, claiming that his unique athletic image and those of other college athletes are portrayed in EA's popular NCAA football and basketball video games, without compensation to him and his fellow players.



Keller has sued video game publisher Electronic Arts and the NCAA among others, claiming that his unique athletic image and those of other college athletes are portrayed in EA's popular NCAA football and basketball video games, without compensation to him and his fellow players.

According to Keller, EA has done little to conceal its misappropriation, making its unnamed virtual players as much like the real players as possible – right down to their height, weight, hair color, jersey numbers, home states, playing styles, and even their idiosyncratic equipment preferences (for wristbands, facemasks, visors and the like) gleaned from questionnaires to NCAA team equipment managers. (Plaintiff further alleges that consumers may access online services to download team rosters and players' names and then upload them into the games themselves, and that EA has included features that facilitate such uploads in more recent iterations of its games. *Keller,* 2010 WL 530108, at *1).

Keller also points to an ironic double-standard, with the NCAA licensing EA's reproduction of college team logos, uniforms, mascots and fight songs on the one hand, and adopting rules prohibiting paid endorsements by amateur college athletes on the other. Consistent with these rules, the licensing agreements allegedly contain express prohibitions on the use of NCAA athletes' names or likenesses in NCAA-branded videogames – prohibitions which Plaintiff contends EA and the NCAA ignore. Appellee's Brief at 7-8, *Keller v. Electronic Arts, Inc.,* No. 10-15387 (9th Cir.).

Plaintiff pleads claims against EA for violations of California's statutory and common law rights of publicity (among other theories), and charges the NCAA and its licensing agent Collegiate Licensing Company ("CLC") with conspiring with and facilitating EA's purported misappropriations.

In its motion to dismiss under Fed. R. Civ. P. 12(b)(6), EA did not contest the sufficiency of Plaintiff's claims, but instead argued that those claims were barred by the First Amendment and California law. The district court denied EA's motion, ruling that EA's videogame had not sufficiently

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transformed the athletes' images into a creative work worthy of First Amendment protection as a matter of law. *Keller,* 2010 WL 530108, at *5. The district court also rejected EA's "public interest" defense (protecting publication of matters in the public interest, predicated on the public's right to know), finding that "the game does not merely report or publish Plaintiff's statistics and abilities." *Id.* at *5-6.

Under California's "transformative use" test, a work is protected by the First Amendment if it contains significant transformative elements or has value that does not derive primarily from the celebrity's fame; put differently, the product must be so transformative that it has become primarily the defendant's own expression rather than the celebrity's likeness. The transformative use defense has its origins in copyright's fair use defense. *See Winter v. DC* Comics, 30 Cal.4th 881, 885-888, 134 Cal.Rptr.2d 634, 69 P.3d 473 (2003); Comedy *III Productions v. Gary Saderup, Inc.,* 25 Cal.4th 387, 404-407, 106 Cal.Rprt.2d 126, 21 P.3d 797 (2001).

Ninth Circuit Appeal

On appeal, EA argues that the lower court blew the call by focusing only on the similarities between Keller and his virtual counterpart and not the game as a whole, which EA insists qualifies as a creative work. In doing so, EA likens its alleged incorporation of sports stars into its game with Simon and Garfunkel's reference to sports icon Joe DiMaggio in their hit song "Mrs. Robinson."

Keller counters that commercial gain, not artistic expression, was EA's sole motivation for making its virtual characters virtually indistinguishable from the real life stars they are based on; in fact, he argues, it is this "heightened realism" which distinguishes EA's games from competitors, spurring greater sales and revenues for EA (and increased royalties for the NCAA and CLC). These competing contentions demonstrate how blurred the lines between the right to publicity, copyright law, and the right to free speech have become.

Given the stakes involved, it is no surprise that dozens of interested by-standers have weighed in as *amicus* supporters for each side. Media companies like ESPN, Viacom, and newspaper and video game publishers have sided with EA, while the Screen Actors Guild and professional players unions – including the NFL Players Association, which is itself alleged to have a licensing deal with EA for use of its members' names and likenesses in EA's popular Madden NFL video game worth $35 million a year – have lined up in Keller's corner.

Like other "new media," interactive gaming did not exist when the contours of the right of publicity were first outlined, leaving creative lawyers room to argue for expansion or limitation of the doctrine. Significantly, the United States Supreme Court has remained mostly on the side line, having issued only one decision on the right of publicity in 1977, in which it ruled that the First Amendment did not preclude suit by "human cannonball" Hugo Zacchini against a television station which aired footage of his entire circus act on its 11 o'clock news broadcast without his consent. *Zacchini v. Scripps-Howard*, 433 U.S. 562, 574-575 (1977). Justice White's majority opinion established no balancing test, but merely held that "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." *Id.*

Some have suggested that the time for further guidance is overdue, and the Roberts Court has shown a keen interest in First Amendment cases. Could the inevitable writ for certiorari by the loser in *Keller* be the opportunity that the High Court has been waiting for?

Stacy Allen is a partner resident in the Austin, Texas office of Jackson Walker L.L.P. Audio of the oral argument before the Ninth Circuit is available here and here

Upcoming Events 2011

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Not-So-Posh Libel Outcome for David Beckham

Private Conduct of Public Interest

By Kevan Choset

On February 14, 2011, District Judge Manuel Real of the Central District of California gave soccer legend David Beckham a not-so-happy Valentine's Day present when he dismissed Beckham's defamation and intentional infliction of emotional distress claims against In Touch Weekly magazine's publishers and editor-in-chief. *Beckham v. Bauer Publishing Company, L.P., et al.*, 10-cv-07980 (C.D.Cal.).

Background

The case arose out of an article In Touch Weekly published in September 2010, alleging that Beckham had sex with prostitute Irma Nici on two separate occasions in 2007, one of which involved a "threesome" with another prostitute. In Touch Weekly's article quoted Ms. Nici – who spoke on the record – in depth, and also featured confirmation from the other prostitute (who chose to remain anonymous) and Kristin Davis, the famed madam (linked to the Eliot Spitzer scandal) who arranged for the second prostitute's presence.

Because Beckham could not demonstrate "by clear and convincing evidence" that Bauer acted with actual malice, the Court granted Bauer's motion in its entirety.

In Touch Weekly publisher Bauer filed an anti-SLAPP motion under California Code of Civil Procedure Section 425.16. Beckham claimed that the anti-SLAPP statute, which protects against lawsuits aimed at chilling speech on matters of public interest, did not apply to In Touch Weekly's report, because his sex life was private, not public. Relying on a series of cases not related to defamation or the anti-SLAPP statute, Beckham argued for a rule that would place celebrities' sex lives off limits.

Private Conduct of Public Interest

However, following a series of cases including *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) that show how broadly the California statute is interpreted, the court found that Beckham's conduct, even if taking place in the supposed privacy of a bedroom, is of public interest for the purposes of the anti-SLAPP statute: "Plaintiff is a world-renowned soccer star who is no stranger to the media, and he has put himself in the public spotlight. Allegations of Beckham's affairs would be a topic of interest to a wide variety of people."

Since the anti-SLAPP statute applied, the burden shifted to Beckham to show a likelihood of prevailing on the merits of his defamation claim. As an indisputable public figure, he would have to show that Bauer acted with actual malice in publishing the article. In its moving papers, Bauer put forth the full narrative of its research into the article, including: interviews with the two prostitutes and madam Kristin Davis; research into Beckham's history of reported marital infidelity, with at least three separate women, none of which led to Beckham suing or anyone

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retracting their stories; and corroboration of facts in prostitute Nici's story, including Beckham's presence in New York and London on the dates Nici claimed she slept with him in those cities, dates of soccer matches, and Beckham's father's health.

Additionally, at the time the Nici story came to light, In Touch Weekly had at least three separate leads about Beckham's affairs with at least three other women. (One of those alleged affairs, with the mother of one of the students at Beckham's sons' school, has since come to light in that woman's divorce proceedings.) Finally, after obtaining all of this information, the magazine went to Beckham himself, who provided only a blanket denial.

While Beckham would have to show that Bauer acted with actual malice in publishing its story, his complaint lacked: (1) any evidence that the story was even false; and (2) any evidence that Bauer knew the story was false or had serious doubts as to its truthfulness at the time of publication. Accordingly, Beckham was left to rely on a broad net of discovery in an attempt to discover any shred of evidence that Bauer doubted its story. While the anti-SLAPP statute automatically stays all discovery in an action, Beckham filed a motion seeking such discovery despite the statute.

While some courts apply Federal Rule of Civil Procedure 56(d) to anti-SLAPP discovery disputes in federal court, the courts seem to agree that the ultimate standard is the same: the party seeking discovery must show that "(1) it has set forth in affidavit form the specific facts that it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home & Finance Center, Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). Since Beckham entered the litigation with no reason to think Bauer ever doubted its story, but only sought a fishing expedition into Bauer's files in a hope that something would turn up, he could not meet this high standard for discovery. Accordingly, the Court denied him any discovery.

Denied discovery, Beckham was left to oppose Bauer's anti-SLAPP motion with no evidence that Bauer ever doubted its story. In his opposition papers, for the first time, Beckham put forth declarations giving the purported timelines of his trips to New York and London, which supposedly showed that he could not have slept with Nici. Putting aside the gaps in these timelines, they related only to falsity, and not to actual malice, as Bauer was of course unaware of them at the time of publication (and the information was solely within the control of Beckham and was not readily available to the publisher).

Thus, with no evidence that Bauer doubted its story's accuracy, Beckham instead listed every aspect of the reporting process that he might have done differently. The Court rejected Beckham's list of supposed "red flags," noting that "a failure to investigate does not in itself establish actual malice." More generally, the Court found that "none of the evidence that Beckham puts forth demonstrates whether the Bauer Defendants had any doubt as to the truthfulness of the Article." Accordingly, because Beckham could not demonstrate "by clear and convincing evidence" that Bauer acted with actual malice, the Court granted Bauer's motion in its entirety.

Since California's anti -SLAPP statute provides for mandatory fee-shifting, Bauer is currently seeking reimbursement from Mr. Beckham of all of its fees in defending this lawsuit. Beckham has stated that he will appeal the ruling. Meanwhile, Beckham's case against Irma Nici, who was also a named defendant in the action, continues, as does her counterclaim against Mr. Beckham. Immediately after the court dismissed his claims against the publisher, Mr. Beckham was served with a notice of deposition by Mr. Nici's counsel.

Elizabeth A McNamara, Alonzo Wickers IV and Kevan Choset of Davis Wright Tremaine LLP represented Bauer Publishing. David Beckham was represented by Richard Kendall and Bert Deixler of Kendall, Brill & Klieger in Los Angeles, CA.

2011 Upcoming Events

Section 230: a 15 Year Retrospective
March 4 | Santa Clara, CA

MLRC/Stanford Legal Frontiers in Digital Media Conference
May 19-20 | Stanford, CA

MLRC London Conference
September 19-20
(In-house counsel breakfast Sep 21st)
London, England

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U.S. District Court in Minnesota Grants Summary Judgment in Favor of CBS

Sponsor of $1.8 Million Home Giveaway Was Limited Purpose Public Figure Who Could Not Demonstrate Actual Malice

By Jeanette Melendez Bead

A federal judge in Minnesota recently granted summary judgment in favor of CBS Broadcasting Inc. and WCCO-TV reporter Esme Murphy in a defamation action arising from a television news report that raised questions about a $1.8 million home giveaway. Concluding that the plaintiff, the sponsor of the contest, had voluntarily thrust himself to the forefront of the pre-existing controversy over the legality of the contest, the court deemed the plaintiff a limited purpose public figure and determined that he could not satisfy his burden to prove actual malice. *Stepnes v. Ritschel*, 2011 WL 97983 (D. Minn. Jan. 12, 2011) (Montgomery, J.).

Background

In May 2008, plaintiff Paul Stepnes, a self-described Minnesota real estate developer, devised a plan to recoup the costs he had incurred to build a $1.8 million house near Minneapolis' famed Lake of the Isles and redeem the home from foreclosure. Stepnes launched what he dubbed the "Big Dream House Giveaway" contest. For $20, entrants would guess the number of variously sized and shaped nails, screws and other fasteners in a container; the contestant stating the closest number (without going over) would "win" the house.

In July 2008, WCCO's Esme Murphy reported that Stepnes had been arrested; police believed the contest was illegal; the prize home was in foreclosure (a fact that had not been revealed on the contest website or in other contest publicity); the charitable foundation supposedly associated with the contest did not exist; and an advertised "weekly prize" had never been awarded. Stepnes responded by canceling the contest – claiming it could not proceed successfully in light of the WCCO-TV report – and filed this lawsuit, asserting civil rights claims against the City of Minneapolis and individual officers arising from his arrest and defamation claims against WCCO owner CBS Broadcasting Inc. and Murphy arising from the broadcast.

With regard to the broadcast, Stepnes argued that it was actionable because, among other things, it portrayed him as shady; inaccurately stated that he was arrested for charitable gambling when he was actually arrested for running an illegal lottery; and implied that he had not been forthcoming about the fact that the home was in foreclosure. He also argued that an anchor lead-in stating that "police say the only place that man could be moving is to jail" was false and defamatory because police never used those words and because there was no possibility that he would serve jail time for the alleged crime, which was a misdemeanor.

Plaintiff's Motion to Add a Punitive Damages Claim

After the close of discovery, plaintiff moved, as was required under Minnesota law, for permission to add a claim for punitive damages. Defendants argued that plaintiff's motion could only be granted if he proffered clear and convincing evidence of actual malice. Magistrate Judge Jeffrey Keyes adopted a lesser standard, however, concluding that Stepnes could add a claim for punitive damages under Minnesota law if he proffered prima facie evidence that defendants had "knowledge of facts" creating "a high probability" that a statement in the broadcast was false. Because there was no such evidence, Magistrate Keyes denied the motion, a decision affirmed by the district court on appeal.

The Summary Judgment Decision

Shortly thereafter, defendants moved for summary judgment, arguing that many of the statements were not capable of bearing a defamatory meaning; that plaintiff could not meet his burden of proving material falsity; and that, plaintiff, a limited purpose public figure, could not meet his burden on actual malice. In this regard, defendants asserted that because Stepnes had failed to proffer *prima facie* evidence of a deliberate disregard of his rights for purposes of

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his punitive damages motion, he certainly could not sustain his burden at the summary judgment stage of proffering clear and convincing evidence under the more exacting actual malice standard.

The District Court's Decision

Judge Montgomery agreed with defendants that Stepnes was a limited purpose public figure for purposes of his claims arising from the WCCO broadcast. In doing so, Judge Montgomery assessed the facts under a mixed standard, combining the requirements under Eighth Circuit law that the court (1) identify the particular public controversy giving rise to the speech in issue and (2) examine the nature and extent of the plaintiff's involvement in the controversy, with the requirement under Minnesota law that the court determine whether the alleged defamatory statements related to a public controversy. (The latter requirement is actually subsumed within the Eighth Circuit test.)

First, the district court found that the pre-existing public controversy over the legality of the contest impacted current and potential contestants, other homeowners who might have chosen to conduct similar contests, and local homeless women and children, since the stated goal of the contest initially was to pay off the mortgage of a homeless shelter.

Second, the district court found that Stepnes voluntarily participated in the public controversy "by discussing the issues with local journalists," and attempted to influence its outcome. The district court rejected plaintiff's argument that he was merely defending himself, stating that Stepnes "did not limit his role in the controversy to simply denying the allegations against him . . . [h]e also discussed the merits of his position and raised allegations of police misconduct."

Finally, the district court had no difficulty finding that the challenged statements related to the existing public controversy.

Turning to the actual malice question, the district court agreed with defendants that the issue had already been resolved in their favor, but for a different reason. According to the district court, the standard applied on plaintiff's motion for punitive damages did not differ in any meaningful way from the actual malice standard. Thus, "because Stepnes is a limited purpose public figure who cannot establish a prima facie showing that the CBS Defendants acted with actual malice, his claim for defamation fails."

The court also dismissed plaintiff's claims against the City of Minneapolis defendants, finding, among other things, that police had probable cause to believe that Stepnes was conducting an illegal lottery and that the City of Minneapolis defendants were entitled to qualified immunity and official immunity.

CBS Broadcasting Inc. and Esme Murphy were represented by Michael D. Sullivan, Jeanette Melendez Bead and Chad R. Bowman of Levine Sullivan Koch & Schulz, L.L.P., as well as John P. Borger and Leita Walker of Faegre & Benson's Minneapolis office.

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DCS Meeting & Lunch
November 10 | New York, NY

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Pennsylvania Court Sets Standard for Unveiling Anonymous Internet Defamation Defendants

Adopts Test Based on Dendrite and Cahill

By Raphael Cunniff

In the first Pennsylvania appellate court decision to address the standard for requiring the disclosure of the identities of anonymous defamation defendants, the Pennsylvania Superior Court recently formulated a four-part test based on *Dendrite Int'l, Inc. v. Doe*, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), and *Doe No. 1 v. Cahill*, 884 A.2d 451 (De. 2005). Pennsylvania courts will require reasonable notice to the anonymous defendant, an affidavit asserting the necessity of disclosure, sufficient evidence to establish a *prima facie* case against the anonymous defendant, and a balancing of the strength of that evidence against the defendant's First Amendment rights. *Pilchesky v. Gatelli*, No. 39 MDA 2009 (Pa. App. Jan. 5, 2011).

Pennsylvania courts will require reasonable notice to the anonymous defendant, an affidavit asserting the necessity of disclosure, sufficient evidence to establish a *prima facie* case against the anonymous defendant, and a balancing of the strength of that evidence against the defendant's First Amendment rights.

Background

The case of began when Joseph Pilchesky, the proprietor of a political criticism blog/message board, filed a defamation lawsuit against Judy Gatelli, the sitting President of the City Council of Scranton, Pennsylvania. According to Pilchesky's complaint, Gatelli publicly accused Pilchesky of terrorism, harassment, stalking, and making death threats. Gatelli counter-sued Pilchesky, along with approximately 100 John Doe defendants who had posted comments on Pilchesky's message board.

Pilchesky's website, dohertydeceit.com, appears to be largely devoted to criticism of Scranton Mayor Christopher A. Doherty and describes Gatelli as one of several "unethical Doherty cronies who turn their backs on the taxpayers" and a "two-faced, betrayer to the people." Numerous postings on the website's message board, authored by individuals identified by presumably pseudonymous usernames, were even more blunt in their criticism of Gatelli, repeatedly calling her a "Doherty blowjob," among other unpleasant names.

Anonymous posters were required to register with dohertydeceit.com, supplying names and email addresses, and Gatelli moved to compel Pilchesky to disclose this information. Six of the John Doe defendants, represented by an attorney associated with Public Citizen Litigation Group, were granted permission to intervene, and opposed Gatelli's motion, but the remaining anonymous defendants were not represented.

The trial court, relying on two prior Pennsylvania Court of Common Pleas decisions, denied Gatelli's motion without prejudice and ordered her to submit an amended motion specifying the pseudonym of each alleged defamer, the words they posted, evidence sufficient to establish a *prima facie* case against each poster, and to supply an affidavit asserting that the information was sought in good faith and was unavailable by alternative means. The trial court granted Gatelli's amended motion in part and ordered Pilchesky to disclose the identities of six of the unrepresented John Doe defendants.

Appellate Court Decision

On appeal, after briefly reviewing several decisions discussing the First Amendment right to speak anonymously, the Superior Court examined both *Dendrite* and *Cahill*, and chose to adopt a standard incorporating aspects of each decision.

The court summarized *Dendrite* as holding that a plaintiff must "(1) provide sufficient notice to anonymous or

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pseudonymous posters that they are the subject of an application to disclose their identity; (2) identify the exact statements, which purportedly constitute actionable speech; and (3) provide the court with sufficient evidence to establish a prima facie case." Thereafter, "(4) the court must balance the defendant's First Amendment right against the strength of the prima facie case presented." *Cahill*, the court noted, required the defamation plaintiff to supply evidence sufficient to defeat a motion for summary judgment, but did away with parts 2 and 4 of the *Dendrite* test, deeming them unnecessary because they were subsumed within the summary judgment standard.

Like the *Dendrite* court, the Superior Court developed a four-part test. First, the "reviewing court must ensure that the John Doe defendant receives proper notification of a petition to disclose his identity and a reasonable opportunity to contest the petition."

The Superior Court affirmed the trial court's order requiring Pilchesky to forward relevant materials to the John Does via the email addresses they supplied when registering with dohertydeceit.com. The court noted, however, that the most effective manner of notice would vary depending on the circumstances of the case, and may well include notice by publication in a newspaper. It was unclear from the court's decision whether any particular party should bear the burden of providing notice.

Second, a plaintiff must present a *prima facie* case, which the court held was synonymous with presenting sufficient evidence to defeat a motion for summary judgment. The court emphasized that a plaintiff may not simply rely on her pleadings; she must present actual evidence. In particular, the Superior Court noted that there was no evidence of actual damages in the record before the trial court. "More is required than a bald assertion that the defamatory statements harmed a plaintiff's reputation 'in the social, civil, professional and political community.'"

Not every necessary element of a defamation claim must be addressed, however. The court cited with approval the *Cahill* court's holding that a public figure plaintiff need not present evidence of actual malice at this stage because "[w]ithout discovery of the defendant's identity, satisfying this element may be … impossible."

Third, the court required the party seeking disclosure to "submit an affidavit asserting that the requested information is sought in good faith, is unavailable by other means, is directly related to the claim and is fundamentally necessary to secure relief."

This requirement, the court stated, would impress upon a plaintiff the importance of the interests at stake, while allowing internet posters some additional protection from lawsuits being brought solely to chill anonymous speech. Notably, the decision did not discuss the extent to which a court would critically examine such an affidavit or entertain arguments that disclosure is not essential or that the information is available by other means.

Finally, the court adopted the balancing test set forth in *Dendrite* and rejected the *Cahill* court's argument that this balancing was accomplished through the summary judgment standard. "In balancing the equities, the reviewing court should examine the defamatory nature of the comments, the quantity and quality of evidence presented, and whether the comments were privileged."

In particular, comments on matters of public concern should receive "robust protection." "By imposing upon the trial court the task of balancing these interests, First Amendment considerations are brought into proper focus."

A footnote at the conclusion of the court's opinion supplied trial courts with the flexibility to impose additional requirements as necessary. For example, the trial court's requirement that Gatelli set forth each allegedly defamatory statement was warranted given the large number of statements in question.

Moreover, this information should already have been included in a well-pleaded complaint.

The Superior Court remanded to the trial court for proceedings consistent with its newly established standards. Precisely how these new rules will be applied in this case and future cases remains to be seen.

Raphael Cunniff is an associate with Pepper Hamilton LLP in Philadelphia. Judy Gatelli was represented by George Arthur Reihner and Molly D. Clark of Dixon Wright & Associates. Joseph Pilchesky proceeded pro se and six John Doe defendants were represented by Paul Alan Levy of Public Citizen Litigation Group and George R. Barron, a solo practitioner.

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New Jersey Justices Lean Toward Narrow Definition of "News Media" at Argument

By Bruce S. Rosen

If oral argument is any indication, the New Jersey Supreme Court appeared ready to narrow the definition of "news media" in the state's broadly -interpreted Shield Law, indicating that bloggers and posters would not automatically qualify for the shield.

The Court on February 8 heard argument in the much anticipated case of *Too Much Media LLC v, Shellee Hale*, a Washington State blogger and private investigator who claimed to have been investigating the porn industry and invoked the shield to avoid revealing her sources for posts she made about Too Much Media, a New Jersey software company, on an industry website.

Several justices appeared to reject arguments from Hale's counsel and the ACLU-NJ that the statute required protections for anyone who gathers news with the intent to disseminate it, and said that such a broad reading could apply to most any posting on the Internet. The justices appeared to focus on N.J.S.A. 2A:84A-21, which provides:

> "Unless a different meaning clearly appears from the context of this act, as used in this act:
>
> a. 'News media' means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public."

A majority of the five justices present for the argument (two had recused themselves) seemed to support an interpretation of the 1977 provision that would require an applicant for the shield to be affiliated with a "News Media" that was "similar" to newspapers, magazines, radio or television as we know it.

Too Much Media sued Hale for defamation concerning the posts. Hale claimed she was well-published and was gathering information for an investigative report on the porn industry when she accused the software company of criminal activity in posts on Oprano.com, an industry website. While Hale submitted a certification to the trial court stating her qualifications for the shield law, the trial court judge did not rule whether the certification presented a prima facie showing under the statute.

Instead, he held a plenary hearing where Hale was grilled by her own counsel and plaintiffs' counsel. Ultimately, he ruled that Hale lacked credibility and was simply posting like a person writing a letter to the editor and he denied her shield law protection.

The Appellate Division affirmed but went further, stating Hale "exhibited none of the recognized qualities or characteristics traditionally associated with the news process." The Appellate panel then created a checklist of such qualities, such as proof of credentials such as affiliation with any recognized news entity, demonstrating adherence to any standard of professional responsibility regulating institutional journalism, such as editing, fact-checking or disclosure of conflicts of interest.

The Court also listed as a criteria a requirement that a defendant identify herself to her sources as a reporter or journalist so as to assure them their identify would remain anonymous and confidential, and endorsed the trial court's use of the hearing process.

The N.J. Press Association and North Jersey Media Group Inc. were critical in their amici brief not only of the Appellate Division's "checklist," for who qualifies to be a journalist, but of its endorsement of the intrusive hearing and its failure to recognize that the shield law protects the news process and non-confidential sources, not just confidential sources.

Amici did not take a position on the issue in its briefs, but when pressed told the court that its interpretation of the "news media" clause was roughly correct, and that while a lone blogger could qualify for the privilege, his or her newsgathering and dissemination should be "imbued" with a news process, and that the statute cannot simply apply to all bloggers. In the end, amici urged the court to continue to interpret the statute's language broadly.

Justice Barry Albin appeared to recognize some of the problems with the Appellate Division's "checklist," for who is a journalist, but more than one justice asked for guidance as to the proper criteria. Based upon previous practice, a decision will likely be issued by the summer.

Bruce S. Rosen, McCusker Anselmi, Rosen & Carvelli, P.C. in Florham Park, NJ, argued for media amici. Jeffrey Pollock of Fox Rothschild, Princeton, NJ argued for Appellant Shellee Hale. Joel Kreizman of Evans, Osborne & Kreizman in Oakhurst argued for Too Much Media, LLC. Ronald Chen, a professor at Rutgers Law School Newark, NJ, argued for the amicus ACLU-NJ. The Reporters Committee for Freedom of the Press, joined by several media entities and organizations, filed a brief but did not argue.

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N.Y. Trial Court Finds Criminal Defendant's Sixth Amendment Rights Trump State Shield Law for Identity of Confidential Source

Newspaper Elects Not to Appeal

By Jay Adkins

In January, a Brooklyn, New York, trial judge took the unprecedented step of ruling that, in the "exceptional circumstances" of the case before him, a criminal defendant's Sixth and Fourteenth Amendment rights trumped the state Shield Law's absolute privilege protecting the identity of reporters' confidential sour-ces. *In re Subpoena [People v. Diaz]*, 2011 WL 445809 (Sup. Ct. Kings Co. Jan. 11, 2011). The court directed the New York *Daily News* to disclose *in camera* whether its confidential law enforcement sources included either of the arresting officers and, if so, which one. After evaluating its prospects on appeal, the newspaper complied.

Background

Following a December 2009 altercation with two police officers in Brooklyn, Angelo Diaz was charged with, *inter alia*, attempted murder under a theory of accomplice liability. According to the prosecution, he shouted "Shoot the cop! Shoot the cop!" as his co -defendant Angel Rivera struggled with an NYPD officer over control of Rivera's gun. But in its story the day after the arrest, the *Daily News* had quoted a confidential police source as saying the "shoot the cop!" statement was made by Rivera's mother -- not Diaz, whom the article did not mention. Rivera's mother was taken into custody on an obstruction charge, according to the *News* article. (It is unknown whether any criminal case is pending against her.)

Diaz served a subpoena on the *Daily News* seeking the identity of the unnamed law enforcement officer(s) quoted in the article. The paper moved to quash, arguing that because any such source was confidential, the information sought was absolutely privileged under the state Shield Law, N.Y. Civil Rights Law Section 79-h(b), and numerous state court precedents. (It also asserted that notes and other documents requested by the subpoena were, in any event, long ago destroyed.)

During briefing of the motion, defendant's attorney narrowed Diaz's demand to seek disclosure of the source's identity only if the source was one of the two arresting officers.

The court then went on to state that "any number of state and federal decisions have concluded that the interests of the press protected by constitutional and statutory privileges may have to give way when weighed against a criminal defendant's claim that protected information is vital to his defense."

Trial Court's Opinion and Order

The court conceded that New York constitutional and statutory law was clear in its support for the *Daily News*' position and would preclude any prosecution subpoena for the same information. But it elected to treat the Shield Law privilege as a "rule of evidence," citing *Chambers v. Mississippi*, 410 U.S. 284 (1973), for the proposition that "under some extreme circumstances, rules of evidence must be subordinated to a defendant's due process right to a fair trail." The court then went on to state that " any number of state and federal decisions have concluded that the interests of the press protected by constitutional and statutory privileges may have to give way when weighed against a criminal defendant's claim that protected information is vital to his defense."

While all of the cases cited in this regard had either

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analyzed a *conditional* statutory or common law reporter's privilege or concluded that the persons invoking the privilege were ineligible to do so, the *Diaz* court nonetheless distilled from them a new conditional privilege -- applying "even if the information is confidential" -- that "must give way in the face of the Sixth Amendment" when "a criminal defendant seeks press information that (1) is highly material, (2) is critical to the defendant's claim, and (3) is not otherwise available."

The court declared the case before it to be "a textbook example of circumstances requiring that the press privilege be overridden." First, "the People's claim that [Diaz] was an accomplice to serious crimes is almost completely dependent on the ["shoot the cop!"] statement at issue." Second, defendant's claim that someone else made the statement "is critical to his defense." And third, assuming without saying that one or both of the arresting officers would lie about whether he was the source if in fact he had been, the court concluded that the *News* reporters alone possessed the "crucial information" whether one of those officers had told them that somebody other than Diaz made the statement – thus opening the officer to impeachment if he testified to the contrary at trial.

The court limited the required disclosure to the sole question of whether the newspaper's source was an arresting officer, and if so who -- to be communicated to the court *in camera*. by the *News*' counsel. Only if counsel responded in the affirmative, and then only if the named officer (if any) actually testified at trial, would the identity of the source be revealed to the defense.

Decision Not to Appeal

In the absence of on-point appellate authority in New York, a variety of considerations went into the *Daily News*' decision about whether to comply with the court's order or appeal it – among them the quality of the court's legal reasoning, the facts of the case, New York cases that have weighed other privileges against Sixth Amendment rights, and on-point decisions from other jurisdictions. The newspaper concluded that while the opinion's legal analysis was certainly open to challenge on several grounds, other factors weighed against an appeal.

The *Diaz* facts put the defendants' Sixth Amendment rights in a sympathetic light; the arresting officers' attribution of the "shoot the cop!" statement to Diaz is apparently the prosecution's sole evidence of his accessory liability on the attempted murder count – and access to contrary evidence (if it exists) could be seen by a reviewing court as an interest strong enough to overcome even an absolute privilege. And that higher court could formulate a more sweeping rule, going beyond the narrow *Diaz* facts, to govern confrontations between the Shield Law's confidential source provisions and the Sixth Amendment; indeed the very appellate department that would hear any appeal of *Diaz* has held that a criminal defendant could, under the Sixth Amendment, pierce a different absolute privilege if he met a test similar to the one the *Diaz* court formulated.

Moreover, the *News*' research found that at least one other state's highest court, facing precisely the same question, reached the same result as the judge in *Diaz*, at least to the extent of requiring the journalist to turn over all materials requested by the criminal defendant for *in camera* review to determine their relevance and materiality to the defense.

Finally, a reported decision emanating from the same trial court that issued *Diaz* firmly rejected a criminal defendant's claim that, notwithstanding the Shield Law, his due process and Sixth Amendment rights entitled him to a taped confidential interview conducted by a news organization of the victim he was accused of raping on the ground that the victim might have made statements in the interview that could be used to impeach her at trial. *People v. Hendrix*, 12 Misc.3d 447 (Sup. Ct. Kings Co. 2006). The interests asserted by the *Hendrix* defendant were arguably less compelling than those here, and the case stands as a counterweight to efforts by criminal defendants to expand the scope of the *Diaz* decision – which, as it stands, has minimal precedential effect in any case.

Jay Adkins is the 2010-2011 Daily News Media Fellow and a third-year student at NYU Law School. The Daily News was represented by its Deputy General Counsel Anne B. Carroll; Rob Balin and Victor Hendrickson of Davis Wright Tremaine assisted in evaluating the newspaper's prospects on appeal. The defendant was represented by Laurie Dick of the Legal Aid Society.

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Supreme Court of Canada Addresses Group Libel

By Paul Schabas and Erin Hoult

The Supreme Court of Canada continues to actively review defamation law (see, e.g., Paul Schabas and Erin Hoult, "Supreme Court of Canada Creates Defense of Public Interest Responsible Communication", MLRC MediaLawLetter, pp. 29-32, December 2009).

In its latest decision, *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 (February 17, 2011), the Court confirmed that group libel cases can rarely be brought, finding that membership in a group about whom "offensive comments" have been made is not a sufficient basis to claim reputational harm. Rather, plaintiffs in a group action for defamation must be able to establish individual personal injury to reputation.

Although *Bou Malhab* is a Québec action, and therefore governed by the *Civil Code of Québec*, not the common law, it will have broad application in Canada. Although there are "major differences" between the two legal systems, the Court observed that each system may look to the other for inspiration as the "two legal communities have the same broad social values. Indeed, there is a striking similarity between the civil law and the common law approaches."

Facts and Judicial Background

Farès Bou Malhab commenced a class action against Diffusion Métromédia CMR inc. and André Arthur over comments Mr. Arthur (a 'shock jock' radio host and now independent Member of Parliament) made on the radio about taxi drivers in the City of Montréal. Among other things, Mr. Arthur said:

> [TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that's French and English? . . . I'm not very good at speaking "nigger" . . . [T]axis have really become the Third World of public transportation in Montreal. . . . [M]y suspicion is that the exams, well, they can be bought. You can't have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams … Taxi drivers in Montreal are really arrogant, especially the Arabs. They're often rude, you can't be sure at all that they're competent and their cars don't look well maintained.

Mr. Bou Malhab brought a class action alleging damage to all Montréal taxi drivers whose mother tongue was Creole or Arabic. The class was estimated at 1,100 members. Certification of the class action was initially refused by the Québec Superior Court. The Court of Appeal reversed, however, certified the class, and sent the action back to the Superior Court for hearing on the merits.

At trial, the Superior Court granted judgment to the plaintiffs and awarded $220,000.00 in damages, to be paid to a non-profit organization for taxi drivers. A majority of the Court of Appeal allowed the appeal and dismissed the action, finding (among other things) that there was no injury to the reputation of individual taxi drivers as the ordinary person would not have believed the comments. By a 6-1 majority, the Supreme Court upheld the dismissal of the action.

The Requirement of Personal Injury

In order for a group to sue for libel the Court held that each plaintiff (or class member) must have suffered a 'direct and personal' injury. This requirement cannot be circumvented by relying on a "non -personal interest" based on injury to a "group as a group", or by relying on the collective recovery mechanism available in class actions.

Injury is a required element of the action, as protection of reputation is "an individual right that is intrinsically attached to the person, whether the person is legal or natural. A group without juridical personality does not have a right to the safeguard of its reputation." However, direct proof of personal injury to each plaintiff/ class member is not required – it can be inferred where there is "an element of damage common to everyone". While personal injury is required, "unique" injury is not. A statement can injure more than one person.

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The majority stated that the requirement that there be *personal* injury to each claimant contributes to maintaining the balance between the competing values of freedom of expression and protection of reputation.

Factors for Determining Injury

The majority set out seven "non -exhaustive" factors that have emerged from both civil and common law cases, which assist in the determination of whether members of a group have sustained personal injury as a result of the impugned comments. No single factor is determinative. The question to be answered is "whether an ordinary person would believe that the remarks, when viewed as a whole, brought discredit on the reputation of the victim. The general context remains the best approach for identifying personal attacks camouflaged behind the generality of an attack on a group." The seven factors are:

1. *Size of the group* – generally, the larger the group, the more difficult it is to prove that personal injury has accrued to each member. But the size of the group is not decisive, and there is no maximum group size beyond which recovery is not possible;

2. *Nature of the group* – it will be easier to establish personal injury to individual members of a "strictly organized and homogeneous" group than a "highly heterogeneous" one. It may also be easier to establish individual injury where the group is comprised of easily identifiable/ visible members or, in certain circumstances, of persons who have historically been stigmatized;

3. *Plaintiff's relationship with the group* – a plaintiff with a particular status within, or who is a well-known member of a group may be more likely to suffer damage;

4. *Real target of the defamation* – "The precision or generality of the allegations will influence the analysis of the personal nature of the injury. The more general, evasive and vague the allegations, the more difficult it will be to go behind the screen of the group. For example, attacks on a doctrine, policy, opinion or religion must be distinguished from attacks on the persons supporting it, since proving personal injury will be complicated in the former situation." Also, it will be more difficult to establish personal injury to all members of a group where the "allegations apply to only one segment of a group" (i.e. statements concerning "some" or "a few" members);

5. *Seriousness or extravagance of the allegations* – "'the more serious or inflammatory the allegation, the wider may be its sting'". But serious allegations that rely on excessive generalizations can have the opposite effect as "'the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds [and] the words are occasionally intended to be a facetious exaggeration'";

6. *Plausibility of the comments and tendency to be accepted* – an allegation that, in context, is plausible or convincing is more likely to be accepted by the ordinary person and therefore, to cause injury; and

7. *Extrinsic factors* – such as the maker of the comments (and his/her credibility), the medium used, the target and the general context, "can cause comments that appear to be general to be attached to certain persons in particular and defame them personally."

Applying the above factors to the case, the majority noted that the comments were general and vague, subjective in tone, touched on the taxi industry (rather than just drivers) and were made on a sensationalist radio show by a "known polemicist." Given these facts and the size and heterogeneity of the group targeted, the majority found Mr. Arthur's comments, while "scornful and racist", would not have been believed by the ordinary person to apply to each class member personally. As Justice Dechamps cautioned,"[i] ndignation is not a substitute for the requirements of civil proof or, more generally, the law of civil liability." Accordingly, the majority found for the defendants and dismissed the appeal.

Justice Abella dissented, finding that the plaintiff had sufficiently established injury on the present facts. She emphasized the seriousness of the allegations, the relative ease with which group members could be identified, and the fact that the group was comprised of persons from historically vulnerable communities.

Defamation and Quebec Law

Justice Abella also took issue with the Court of Appeal's finding that the ordinary person is someone who, for example, is concerned about protecting freedom of expression and reputation, and is aware of not just overt discrimination or prejudice but also systemic discrimination in society. In her view, such an approach "inappropriately elevates the attributed characteristics of an ordinary person to

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those of an ordinary third-year law student."

This discussion of the ordinary person was also addressed by the majority due to the unique features of Quebec defamation law.

Under the *Civil Code of Québec*, a plaintiff must establish the general elements of an action for a civil wrong – fault, injury and a causal connection between the fault and the injury. The analysis is three-staged: (1) would a reasonable person have made the impugned remarks in the same context?; (2) if not, would an ordinary person believe that the statements tarnished the plaintiff's reputation (and, in the case of alleged group libel, the reputation of each member of the group); and (3) if so, is there a causal connection between the fault (#1) and the injury(#2)?

Fault / Injury

Justice Deschamps stated that fault will be found where there is "conduct that departs from the standard of conduct of a reasonable person". In discussing fault, she highlighted some of the significant differences between defamation under civil and common law – including, significantly, that truth is not a complete defence to an action under civil law. Rather, true statements may be actionable if they "have been made in a wrongful manner".

Turning to the issue of injury, as at common law, defamation under the civil law is concerned with damage to reputation. The test for whether injury has occurred is objective: would an "'ordinary person believe[] that the remarks made, when viewed as a whole, brought discredit on the reputation'" of the plaintiff.

Justice Deschamps stated it was preferable to describe the standards applied to the fault ("reasonable person") and injury ("ordinary person") inquiries differently. She explained:

> ...even though the standard is an objective one in both cases, it is preferable to use two different terms — reasonable person and ordinary person — because they are concepts that relate to two distinct situations: assessing the conduct and assessing the effect of that conduct from society's perspective. The questions asked at these two stages are different.

Defining the "reasonable person" with precision is difficult, as the components are fluid and vary with the context, as they are based on society's values, beliefs and attitudes. After reviewing the concept of the reasonable person under French law, and the common law standard of the "right -thinking person" taken from the well -known English case of *Sim v. Stretch*, [1936] 2 All E.R. 1237 (H.L.), the majority held that the following characteristics of the "reasonable person" could be emphasized: 1) Acts in an ordinarily informed and diligent manner. 2) Shows concern for others and takes the necessary precautions to avoid causing them reasonably foreseeable injury. 3) Respects fundamental rights and therefore cannot disregard the protection established in the federal and provincial charters of rights. 4) Is careful not to violate the rights of others

It does not seem that the "ordinary person" is significantly (if at all) different from the "reasonable person" in substance. (Rather, the different terms appear intended to reinforce that there are two separate questions to be answered at the fault and injury stages.) The ordinary person standard incorporates the reasonable person standard of conduct. However "care must be taken not to idealize the ordinary person and consider him or her to be impervious to all negligent, racist or discriminatory comments, as the effect of this would be to sterilize the action in defamation." Further, the ordinary person is "neither an encyclopedist nor an ignoramus." That said, the "ordinary person is only an expedient used to identify damage to reputation"; the test must be sufficiently flexible that actual damage to reputation, where it occurs, is recognized.

Conclusion

Bou Malhab offers a useful summary of differences between civil and common law libel, and of the factors that should influence a court's decision as to whether defamatory comments made about a group are sufficiently connected to one or all of the individual members – or, in common law parlance, whether they are 'of and concerning' the plaintiff(s) – to be actionable.

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Other Side of the Pond: Developments in UK and European Media Law

Libel Tourism, Phone Hacking, Privacy and More

By David Hooper

After a period in the shadows, libel tourism has recently resurrected its head. The claimant lobby assert that such cases are rare. However, the fact that a low threshold of publication can support an internet-based action certainly does have a chilling effect on publication. With the legal costs potentially so large even with a very small number of internet hits which are not commercially directed at a British audience, it is scarcely surprising that defendants tend to back off when such claims are made so that such claims tend not to find their way into legal statistics.

However, there has recently been a notable success for media defendants in a case brought by a Ukrainian billionaire, Dimitry Firtash – a person wholly unknown to the vast majority of the citizens of this country but someone who apparently had made donations to Cambridge University and had apparently on one occasion dined at an occasion graced by the Queen of England. Anyhow he sued the Kyiv Post over an article which suggested that his gas company, RosUkErgo, was involved in massive corruption.

Having in the past been blasted by a libel claim, the Kyiv Post blocked their website in the United Kingdom, but even so 21 people had downloaded the article including, no doubt, a few cronies of Mr Firtash. Master Leslie (a procedural judge) flung the case out considering that Firtash's links with this jurisdiction were tenuous in the extreme and forming the view that the action amounted almost to an abuse of process.

In the libel tourism field Sheikh Mohammed Hussein Ali Al Moudi who is either of Saudi Arabian or Ethiopian extraction is set to be taking action for unflattering references to his daughter in the US-based Ethiopian Review which is likewise accessible to a minute readership in this country by the internet. Time will tell how he proceeds.

Another quasi - libel tourism case brought by the exotically-named His Holiness Sant Baba Jeet Singh Ji Maharaj questioning the Maharaj's credentials as a leader of a cult and suggesting that he might have been an imposter has bitten the dust when he failed to pay £250,000 as security for costs. He was suing a freelance journalist Hardeep Singh in relation to an article Singh had written for the Sikh Times. Singh's legal costs are said to exceed £100,000 and he may well have difficulty in obtaining reimbursement of his legal costs as Maharaj is said not to have any assets in this country.

Are Things Worse Elsewhere?

If one says France, Italy and Northern Ireland, the answer is probably yes. In France there has been a libel action before the Tribunal de Grande Instance de Paris where a verdict is awaited on March 3rd over, bizarrely, a not particularly hostile review of a law book entitled "*The Trial Proceedings of an International Criminal Court* " written by a Law Profession Karin Calvo Goller who is a French citizen as well as being a law lecturer in Israel. She took exception to a review on a website called Global Law Books which spoke of "*rehashing existing legal set-ups*" and questioned her "*conceptual grasp*" of certain concepts. This led Goller to launch a criminal complaint against the reviewer, a seemingly highly respectable law professor at the University of Cologne, Professor Thomas Weigand, and also against Professor Weiler who published it.

The case would appear to raise two issues, one as to whether there should be claims in respect of what most would perceive as matters of pure comment, and perhaps even more worryingly, why it is necessary to invoke the criminal law in such cases.

In Italy the parents of Amanda Knox who was, after a long controversial trial in Italy, convicted of murder and sentenced to 26 years, now found themselves prosecuted for repeating to an English Sunday newspaper the allegations of their daughter that she was mistreated by the police and subjected to violence and deprived of food and water. Whether or not these allegations are correct, again it is difficult to see what role the law of libel has in such a case.

An interesting statistic has been produced by a Northern Irish lawyer Olivia O'Kane that in 2010 in Northern Ireland there were no less than 43 libel actions of which 25 were against broadcast or print media defendants. Northern Ireland has a population of 1.8 million which means one libel claim for

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every 42,000 people. The comparable statistics in the UK were 298 libel claim forms issued, that is to say 1 per 184,000 of the population. The problem with Northern Ireland claims is that they tend to be costly. The publication numbers tend to be very low, the juries tend to be rather generous with defendants' money. The pressure therefore to settle such claims regardless of the merits is considerable.

Schadenfreude Corner

Libel litigation has led to the downfall of yet another politician who has followed Jeffry Archer and Jonathan Aitken to Her Majesty's prisons. Tommy Sheridan, the former head of the Scottish Socialist Party and a member of the Scottish Parliament, is now serving a sentence of three years having been convicted of lying in a libel action he brought against the News of the World when he had recovered £200,000 damages. In that libel action he complained about allegations that he was a serial adulterer given to visiting swingers clubs. What was striking about the case was his gall in bringing the action and in accusing so many people of conspiring to destroy him politically when they recounted not only what they had seen, but also what they had heard of Mr Sheridan's sexual boasts.

Reform of the Libel Laws

The decision of the European Court of Human Rights in the *Campbell* case does seem to have marked the death throes of recoverable success fees and After the Event Insurance. In *Campbell,* the wealthy Naomi Campbell sought to recover £1,086,295 in respect of the claim in which she recovered the less than princely sum of £3,500 damages and in respect of the two-day House of Lords hearing £594,470 of which the success fee accounted for £279,281. Lord Justice Jackson has recommended that success fees and ATE premiums should no longer be recoverable from defendants. The Ministry of Justice has indicated that it is considering the ECHR ruling and has indicated that it will take time to change the regime. The consultation period for commenting upon Lord Justice Jackson's recommendations ended on 14 February 2011.

Lord Justice Jackson himself has responded to the earlier comments made on his proposals by the government. Jackson says that the present CFA system generates disproportionate profits for a significant number of lawyers which impose excessive costs burdens on the public (or one might add in the media field on media defendants). His view - significant in view of the access to justice argument by the claimant lobby - is that solicitors will not cease taking on risky cases if recoverability of success fees and ATE were abolished. He noted that the vast majority of cases which were regarded as unsuccessful were dropped at a very early stage. Some might think that this really means that the game is up.

There is still a good living for claimant lawyers even without recoverable success fees, but the thing that has really emerged out of the process is that claimants' solicitors very rarely take on CFA cases where there is a significant level of risk, and if they do and the case looks like being unsuccessful, they drop them. Jackson also noted that the instances of well-resourced claimants taking out ATE and thereafter conducting risk-free litigation seem to be on the increase. The process will all take time and there are some areas which will require legislative change as opposed to changes in the rules, but the days of obscenely costly libel litigation are numbered.

A salutary reminder of the cost of libel litigation - in this instance a case where there was not a CFA in place - was a spat over the question of whether the claimant had or had not charged for work he should or should not have done for nothing amongst rail enthusiasts devoted to preserving steam engines. Quite what they were doing in the libel courts or why they had to involve themselves in such costly litigation is not clear. In any event, the claimant had won his case and £7,500 damages, the costs had amounted to £335,000, resulting in the much-loved steam engine having to be sold to pay for this indulgence.

Phone Hacking

The whole issue of the alleged phone hacking of celebrities' voicemails is proving to be something of a nightmare for News International. It dates back to the jailing of a freelance investigator, Glen Mulcaire, and News International's then royal correspondent, Clive Goodman, when it was established that they had hacked into the voicemails of Princes William and Harry. News International's defence was that this was the action of a rogue reporter. That defence was weakened when it was reported that the publicist Max Clifford had received £1 million in costs and damages to settle his privacy claim

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followed by a similar settlement reported to be £700,000 to Gordon Taylor, the former chief Executive of the Professional Footballer's Association.

A large number of celebrities and politicians and their lawyers have also made claims. The editor of the News of the World at the time, Andy Coulson, who had resigned his post has likewise now stood down from his next job as Director of Communications at 10 Downing Street. A senior news editor has resigned after having been named in various communications in a way which suggested that he had rather more knowledge than he cared to recollect.

There have also been a number of actions in the High Court of which the latest was *Gray –v- News Group* [2011] EWHC 349 where Mr Justice Vos has made a number of swingeing orders whereby the ex-convict Mulcaire has to produce details of how he obtained the various telephone and pin numbers, who was involved in the case, who he gave the information to and who had given him instructions. This all has the potential of being very costly litigation and readers of this column will be pleased to hear that the claimant lawyers who look like facing a lean time with the loss of their conditional fee agreements do have this very profitable sideline.

Tweeting in Court

On 20 December 2010, the Lord Chief Justice, the appropriately named Lord Judge, has given guidance allowing the use of Twitter in court proceedings for the purpose of fair and accurate reporting. The posting must be made discreetly and not interfere with the administration of justice. It might be disallowed in criminal cases where there was the risk of a witness being tipped off as to the questions that he might be asked. Tweeting was an important part of the Guardian's coverage in the Assange hearings. Tweeters should ask the court's permission. There are still restrictions which prevent the use of private sound-recordings or the taking of photographs in court and mobile telephones have still to be switched off in court.

Will Courts Uphold Contracts for Vetting of Content?

The case of *Viscount Monckton –v- BBC* January 31, 2011 suggests that the courts may well be reluctant to do so. Monckton is a slightly batty global warming sceptic. He had an agreement for a right of reply and for the fair representation of his views when he agreed to take part in a programme. However, he accepted that the BBC had editorial control. The Court ruled that the threshold for granting an injunction in such cases would be a high one. A court would be extremely reluctant to rule on fairness where the balance of justice did not require an injunction. The terms of the obligations of the BBC have been sensibly kept vague by the BBC and it would evidently require very unequivocal words for a court to be willing to become involved in the content of programmes and forming a view as to whether or not the particular part of the media had complied with its obligations.

Upcoming Cases in the Supreme Court

The Supreme Court has given permission to appeal against the Court of Appeal's decision in *Flood –v- Times Newspapers* [2010] EWCA 804 provided that the Times agrees to pay Flood's legal costs whatever the outcome of the case. The case appeared to restrict the operation of the Reynolds defence and to suggest that there could be instances in which there was a duty of verification and that there was insufficient justification for having reported in detail the matters which were being investigated concerning a police officer, Gary Flood.

Permission to appeal is also being sought in the case of *Clift –v- Slough Borough Council* [2010] EWCA Civ 1171 on the question of qualified privilege. The Court of Appeal upheld the decision of Mr Justice Tugendhat that the defence of qualified privilege did not apply where there was publication of material by a public authority in breach of the Claimant's rights under the European Convention to someone who had an insufficient interest in receiving the information such as a trade union official. What the Council had in effect done was to circulate too widely the fact that the Claimant had been put on a Violent Persons Register.

Permission has also been granted in a malicious falsehood case *Sweeteners Europe –v- Asda Stores* [2010] EWCA Civ 609 where it was held that the single meaning rule did not apply in malicious falsehood cases.

Libel Statistics – How Many Cases Are There?

The most recent official judicial statistics show that 298

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defamation writs were issued in the High Court in London in 2009 as opposed to 259 in 2008 – a significant percentage increase. There was a pattern of increase over a three year period. However, in 2010 there were only 4 libel cases which actually reached trial and none of them involved a jury. The earlier decision of Mr Justice Tugendhat in the *Fiddes –v- Channel 4* [2010] EMLR 26 case involving the Michael Jackson industry, has perhaps tipped the balance against jury actions. There the Judge's decision that the case would involve a prolonged examination of documents was upheld by the Court of Appeal and the case settled very shortly thereafter. In 1990 there had been 16 libel actions which reached trial, the overwhelming majority of which were heard before a jury. In 2010 there were 18 hearings in libel actions before a High Court Judge which resulted in the final disposal of libel actions. Media representatives may be interested to know that the defendant succeeded in 15 and in two of the three cases where the claimant succeeded the defendant did not appear and in the third the defendant appeared in person which is normally an unwise thing to do in our arcane libel litigation. Libel statistics available here and here.

Claimants Going Nowhere (Mostly)

Unsuccessful claimants among those who have recently failed in their libel claims, include a former MP, Jacqui Lait in *Lait –v- Evening Standard* [2010] EWHC 3239. The Judge ruled that some fairly mild criticisms of her expense claims as a Member of Parliament by the paper were bound to succeed on the question of fair comment. The paper had wrongly stated that she was compelled to pay back the £25,000 she had made on the profit of her house which had been in part funded by the tax payer. She had done so voluntarily, but the court had no doubt that overall the criticism of her conduct on such a controversial matter was bound to succeed as an issue of fair comment.

In *Hayden –v- Charlton* [2010] EWCA 2144, Mrs Justice Sharp struck out a claim where, in her view, there had been deliberate non-compliance and delay in the pursuit of the claim. Mrs Justice Sharp also reached a similar decision in the case of *Apsion –v- Butler* 23 February 2011 (unreported) where the libel claim was struck out on the basis of abuse of process and limitation. Defendants do not, however, have it all their own way. In *McKeown –v- Attheraces Limited* [2011] EWHC 179, however, there was a television interview with a jockey who had previously been found guilty of holding back his horse by the disciplinary panel of the British Horse-racing Authority. It was suggested in the race that was then being filmed that the jockey had done the same thing again and that this was one more instance of him ensuring that his horse did not win. At that stage the decision of BHA was still being challenged. When he sued for libel there was an attempt to strike out his case as an abuse of process or raise judicator. Mr Justice Tugendhat felt, however, that this was aimed at a different audience, it involved different circumstances and different parties and so that jockey will have his day in court.

Mosley and Privacy

Argument has now been heard before the Fourth Section of the European Court of Human Rights. The issue is whether papers planning to write about matters which engage the law of privacy are bound to contact the subject of the article for their comments. In the Mosley case had the News of the World done so, Mosley would almost certainly have sought and obtained an injunction on the grounds of privacy. Mosley's lawyer, Lord Pannick QC put his argument very graphically depicting the tabloid newspapers as "*journalistic Taliban able to insist on forcing their wary into the bedrooms of consenting adults and to frustrate the rule of law by preventing these persons protecting their right to their private life.*"

The claim is based under Article 8 the Right to Private Life and Article 13 the Right to Have Effective Redress. As against that the government are arguing, through James Eadie QC that it should be up to various jurisdictions as to where the balance is struck between freedom of speech and Article 8 rights. Mosley may well be successful in persuading European judges well-versed in privacy that people in his position should have the possibility of preventing such private matters being published, which is the real remedy litigants such as him want.

Anonymity in Privacy Cases and Super-Injunctions

This has produced a large amount of litigation. The most recent case is *JIH –v- News Group Newspapers Limited* [2011] EWCA 42. The subject has been extensively covered in the RPC privacy blog . In *JIH* the court laid down the

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principles for anonymizing the parties. It was recognized that this was a derogation from the principle of open justice and that celebrities were not entitled to any preferential treatment. However, there would be cases where publishing the litigant's name could undermine the remedy sought and could draw people's attention to the nature of the allegations being made.

In *JIH* the matter was further complicated by the fact that similar allegations had been made against the claimant by another woman and that it would be possible to engage in a form of jigsaw identification. The court thought that on balance it was better to outline the nature of the allegations and the fact that they were made against a well-known sportsman rather than leaving the reporting so vague as to what the allegations were and who was involved that the legal principles might be difficult to follow. Where there is any suggestion that the claimant is seeking improperly to profit from revealing private information either by selling the story to a tabloid newspaper or even in extreme cases by threats of blackmail, the courts will readily grant injunctions.

The principles were outlined in *CDE –v- MGN* [2010] EWHC 3308 and *DFT –v- TFD* [2010] EWHC 2335. The CDE case was rather remarkable in that the anonymity extended not only to the defendant's solicitor and PR advisers and one of the journalists with whom the defendant had had a series of meetings, as this, it was felt by the court, could lead to a jigsaw identification of the claimant's identity.

Procedural Changes

There have been two significant procedural changes. By Practice Direction 51D the Defamation Proceedings Cost Management Scheme is extended for a six month period to 30 September 2011, which requires parties to file estimates of future costs with potential sanctions if the estimates are exceeded, to enable the Ministry of Justice to collect further data. This reflects the wish to control and reduce the costs of libel actions.

By Practice Direction PD53 the existing provisions for Statements in Open Court to be made in cases of libel actions are extended to misuse of private or confidential information claims. This is a new weapon in Claimants' armouries and may become a standard demand, although they will no doubt be worded fairly opaquely to keep the particular private cat in the bag, while warning the media to back off their client. Obviously if their client is anonymised this remedy loses its attraction.

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Criticism Submitted to Florida Bar on Proposed Regulation of Electronic Devices in Courtrooms

By Jennifer A. Mansfield

The Judicial Administration Rules Committee of the Florida Bar proposed a new rule that would allow judges and quasi-judicial officers to remove electronic devices from jurors during trial and deliberations, to confiscate any electronic devices during proceedings, and order deletion of recordings or images on electronic devices. After a one month comment period, the committee received 177 comments, 172 of which expressed opposition to the new rule. Only 2 comments expressed approval of the proposed rule, while 3 comments pointed out editorial corrections. Opposition to the rule came from a variety of sources, including journalist organizations and First Amendment attorneys.

The proposed rule defines electronic devices broadly and allows judges to remove electronic devices from jurors during trial. It also states that the chief judges retain authority to control the use of electronic devices in courthouses, and would allow individual judges and quasi-judicial officers to control the use of or temporarily confiscate any electronic device during a judicial proceeding. At the time such a device is returned, the judge or quasi-judicial officer may order the owner of the device to delete any recordings or images taken of the proceedings prior to confiscation or to delete "recordings or images that the judge determines should be deleted." If the owner of the device objects to deletion, the rule allows the judge to keep the device until a hearing can be held on the issue of whether the recording or image is to be deleted.

Finally, the proposed rule exempts professional journalists from its application, providing that the existing Rule 2.450 would govern the use of electronic devices by them. The entire text of the proposed rule can be found on the website for the Rules of Judicial Administration Committee at www.flabar.org.

The Florida Press Association, the First Amendment Foundation, the Florida Association of Broadcasters, and the Reporters Committee for Freedom of the Press submitted a joint letter in opposition to the proposed rule. Their opposition focused on the proposed rule's incorporation of the definition of "professional journalist" from Florida's reporter's privilege law, which limits "journalists" to salaried employees or independent contractors for traditional news establishments. It points out that the proposed rule would thus apply to a substantial array of non-salaried or non-contracted journalists, such as free-lance journalists, community association reporters, book authors, citizen bloggers, and journalists working for web-based news organizations. Thus, they point out that the rule could have the effect of preventing coverage of the court proceedings of the day, resulting in a serious intrusion on public access and press freedoms. "The rule as written is of special concern in light of today's fast-moving digital world where 'traditional' media is difficult -- if not impossible -- to define, has many moving parts, and certainly cannot be limited to salaried journalists as defined in the shield law." Furthermore, without a specific standard articulated in it, the rule leaves an opening for unintended abuse.

Media attorneys at Holland & Knight LLP also submitted comments in opposition, pointing out many constitutional infirmities in the proposed rule. For example, since First Amendment jurisprudence holds that media representatives do not enjoy any special rights of access, the proposed rule is in conflict with the law because it purports to treat professional journalists differently than others. That conflict would cause confusion as to which rules do apply to journalists. Compounding that confusion is the fact that the proposed rule refers journalists to another rule that regulates only television cameras, still cameras, and radio broadcasting equipment. Thus, it actually refers journalists to a rule inapplicable to most electronic devices. The Holland & Knight attorneys also noted that allowing judges to confiscate devices and order deletion of files does not provide due process protections prior to confiscation and endorses the use of prior restraints to control information leaving the courtroom under a lesser standard than that required by law.

Among others opposing the proposed rule are the Criminal Law Section of the Florida Bar, the Florida Bar's Rules of Civil Procedure Committee, the Broward County Bar Association Bench Bar Committee, the non-profit Citizens for Sunshine, Inc., Florida attorneys, and 164 individuals who object to the prohibition of the use of electronic devices by "citizen journalists." Those objections

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focused on the rule's overbreadth, judges' unfettered power to delete images on electronic devices, and the lack of evidence demonstrating a need for such regulation. The Civil Procedure Rules Committee specifically commented that "a vigilant and assertive trial judge" is a better means to prevent improper use of electronic devices during judicial proceedings than the over broad provisions in the proposed rule.

The comments have been referred back to a Florida Bar subcommittee, which will consider the public input, potentially make changes based on that input, and then submit a final revised proposal to the full Rules of Judicial Administration Committee.

Jennifer A. Mansfield is a media partner in Holland & Knight LLP's Jacksonville, Florida office.

Supreme Court Assumes Constitutional Right to Informational Privacy, But Allows Broad Background Checks on Government Contractors

By Gerron L. McKnight

On January 19, 2011, the U.S. Supreme Court unanimously held that NASA's background checks of its contract employees did not run afoul of the *assumed* right to informational privacy. *NASA v. Nelson*, 131 S.Ct. 746 (2011). The Government, acting as "proprietor" and manager of NASA's Jet Propulsion Laboratory (JPL), rather than in its capacity as regulator of the citizens at large, had greater latitude in regulating JPL's activities. Thus, the Government was allowed to ask "reasonable" rather than "necessary" questions in furthering its interests in identifying capable employees.

In *NASA v. Nelson,* contract employees of JPL questioned the constitutionality of two inquiries made within the Government's National Agency Check with Inquiries (NACI). The NACI background check posed questions regarding: 1) drug treatment or counseling of the employee, and 2) whether an employee's provided references had "any reason to question" the employee's "honesty or trustworthiness" or had any "adverse information" concerning the employee.

The contract employees were not subjected to government background checks when they began employment at JPL, but were required to undergo such a check after Presidential mandate. The employees filed suit prior to the last day they could complete the NACI. Employees not completing the NACI before the deadline would be locked out of JPL and terminated by the California Institute of Technology which operated JPL under a government contract.

The employees' suit asked for a preliminary injunction alleging that the Government's inquiries violated their constitutional right to informational privacy. The federal district court denied the preliminary injunction, but the Ninth Circuit Court of Appeals reversed that decision. The Ninth Circuit held that the question regarding drug treatment or counseling furthered no legitimate government interest, and that the broad inquiry into honesty, trustworthiness, and adverse information was not narrowly tailored to meet the Government's interest in verifying contractors' identities and ensuring JPL's security. Thus, the Ninth Circuit held that both inquiries likely violated the employees' informational privacy rights.

U.S. Supreme Court Decision

In a unanimous decision, the U.S. Supreme Court reversed the Ninth Circuit and held that the Government's background check did not violate the employees' right to informational privacy. In doing so, the Roberts Court followed Supreme Court precedent established over 30 years ago by not deciding whether the Constitution provides a right to informational privacy. Instead, the court assumed that the Constitution provides such a right, and ruled based on that assumption.

In making its ruling, the Court quickly dismissed the employees' attempt to distinguish themselves from the civil servants who were already subject to the NACI check. The Court found that the contract employees had "duties functionally equivalent to those performed by civil servants," and executed some of NASA's most critical projects.

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The Court went on to state that as "proprietor" and manager of JPL's "internal operation," the Government had more latitude in regulating JPL and thus could make employment-related background checks regarding drug treatment and counseling. The Court reasoned that NASA is "entitled to have its projects staffed by reliable, law -abiding persons who will 'efficiently and effectively' discharge their duties." According to the Court, questions regarding illegal drug use "are a useful way of figuring out which persons have these characteristics."

Additionally, the broad, open-ended questions posed to references of the employees were "an appropriate tool for separating strong candidates from weak ones." As the Court noted, the questions asked by the Government are similar to those used in background checks "used by millions of private employers."

The Court went on to hold that the inquiries did not have to meet the standard of "necessary" to be asked, but the lower standard of "reasonable." The Court then found that both the drug and reference inquiries were "reasonable, employment -related inquiries that further the Government's interests in managing its internal operations." Finally, dispelling concerns regarding potential misuse of the information, the Court referenced the federal Privacy Act which provides "substantial protections" against the public disclosure of personal information.

Concurrence

Though Justice Scalia concurred in the judgment, he (joined by Justice Thomas) would have definitively decided that the Constitution provides no right to informational privacy and denied relief to the employees on that ground. According to both Justices, the Constitution does not provide a right to informational privacy through the Fifth Amendment Due Process Clause, as the employees argued in front of the Court, or otherwise.

Thus, Justices Scalia and Thomas would have decided this case solely on the ground that the Constitution does not textually provide a right to informational privacy. Justice Scalia opined that the Court's opinion "harms [the Court's] image, if not [the Court's] self -respect, because it makes no sense."

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Plaintiffs in Girls Gone Wild Civil Suit Allowed to Proceed Anonymously

Potential for Harm Outweighs Interest in Openness

The Eleventh Circuit this month granted a request by four young women plaintiffs to proceed anonymously in their civil lawsuit against the producers of the Girls Gone Wild video series. *Plaintiff B v. Joseph R. Francis*, No 10-10664 (11th Cir. February 1, 2011) (Dubina, Anderson, Moody, JJ.). Florida Freedom Newspapers intervened at the trial level and Court of Appeals to argue that plaintiffs' identities should be revealed in open court even if the media exercised its judgment not to publish plaintiffs' names. The defendants also opposed the request for anonymity.

The plaintiffs in the case are four women who were under 18 at the time they exposed their breasts or engaged in sexual activity in front of the Girls Gone Wild cameras. They sued for privacy and related claims and filed a motion to remain anonymous throughout the trial. The district court denied their motion, finding that the presumption of a trial's openness overrode potential concerns related to disclosing "information of the utmost intimacy." The district court found that their on camera sexual activity was not "the type of fundamentally personal issue that warrants the imposition of anonymity like abortion, birth control, or religion." The court further failed to find any significant evidence of harm that plaintiffs woul d suffer due to having their identities revealed.

Applying an abuse-of-discretion standard, the Court of Appeals reversed, finding that the district court improperly characterized some of plaintiffs' conduct as casual and voluntary and discounted expert evidence of harm. The Court acknowledged that there is a strong presumption in favor of openness, but it may be overridden by demonstrating a substantial privacy right, judged by all the circumstances of a case.

The district court failed to give proper weight to the intimate information that would arise during plaintiffs' testimony, including details about their nudity and sexual encounters, as minors, during the filmed events at issue. For two of the plaintiffs who flashed their breasts, the lower court should have considered whether they would be revealing information of the utmost intimacy, even if their conduct was not eventually classifiable as sexual in nature. For the other two plaintiffs, the Court of Appeals determined that the district judge improperly deemed their actions as casual and voluntary, after finding that both engaged in graphic sexual activity.

The Court of Appeals also found that the district court failed to properly consider the plaintiffs' expert evidence on harm from the loss of anonymity. Such evidence included the psychological damage of being labeled a "slut," a permanent connection to the videos through websites like IMDB.com, and the public's ability to discover their association with the videos through search engines. The Court noted that all these problems would be exacerbated by the videos' continuing availability on the marketplace, on sites such as Amazon.com, and the plaintiffs would suffer a lifetime as "subjects to any online shopper's desire for underage nudity."

The court further noted that the defendants did not show that anonymity would result in any harm and would likely be unable to do so. Furthermore, because the defendants are themselves aware of plaintiffs' identities, they are not constricted in conducting full discovery in this case in preparation for trial.

The court ordered the district judge to allow two of the plaintiffs who engaged in sexual activities to remain anonymous and to reconsider the requests of the other two plaintiffs in light of the opinion. The Court explicitly did not address the issue of whether allowing anonymity here would serve as a prior restraint in violation of the First Amendment but directed the district court to do so. In a brief partial concurrence and partial dissent, Judge Moody opined that the district court did not abuse its discretion in not allowing the first two plaintiffs to proceed anonymously, as their acts of flashing on a public street did not meet the utmost intimacy standard.

Charles Marshall, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Raleigh, NC represented Florida Freedom Newspapers in this matter.

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Court Invalidates $1 Million Fee for Access to Electronic Public Records

By Sigmund D. Schutz

The trial-level round of Maine's most complex and hard - fought right-to-know case in recent memory ended in victory for the public with a decision issued on February 22, 2011. *MacImage of Maine, LLC v. Androscoggin County*, Slip Op., CV-09-605 (Cumb.Cty.Sup.Ct. Feb. 20, 2011) (Warren, J.). The case pit a business owner and entrepreneur who seeks to build a website providing efficient public access all Maine land records against six counties intent on preventing competition by what the counties considered to be an interloper.

In a thirty-eight page decision following a five day trial Superior Court Justice Thomas Warren addressed a range of issues of interest to the media.

The Little Guy Takes on County Government

In September of 2009, MacImage of Maine, LLC sent six identical public records requests to six Maine counties. MacImage is a one-man operation that offers internet access to land records and owns the www.registryofdeeds.com domain. MacImage requested all electronic data files containing scanned copies of all recorded land records and grantor-grantee indexes, a total of more than 25.8 million pages of records (excluding indexes).

The operative Maine statue as applied to MacImage's request limited copy charges to a "reasonable fee." 33 M.R.S.A. § 751. The Maine Legislature amended the statute by P.L. 2009, ch. 575 (effective July 11, 2010), to set out a list of factors "relating to the cost of producing and making copies available" to be considered in setting a "reasonable fee."

One county offered a copy of its microfilm for a charge of $96,962 plus labor. The remaining five counties quoted a collective price tag of $912,853.15 plus various incidental charges.

Right of "Bulk Access" to Electronic Records Vindicated

MacImage's position was, essentially, that copying data files from one computer to another can be done easily, quickly, and inexpensively. As a result, the fees set by the counties for copies were not reasonable.

The Counties countered with a slew of arguments including: (A) that a reasonable fee may be based on the overall cost of maintaining data in electronic form; (B) that the public is not entitled to a copy of an electronic database if given access to a website that allows the public to search for and retrieve individual records; and (C) that contracts with outside computer vendors responsible for their computer systems prevented copying. The counties' arguments failed across the board.

(A) *Fees Based on Overall Costs of Maintaining Electronic Data*. Reasoning that government incurs costs to create and maintain electronic records whether or not copies of a record are ever requested or provided to the public, the Court rejected the argument that a copy fee could be "based on the overall cost of maintaining their data in electronic form." *Id*. at 15. Maintenance costs do not relate to copying since counties incur such costs regardless of whether there is ever a request for a copy of a record. "The court also understands the counties' and the registers' evident desire to maintain the integrity of their registries against an entity they perceive as an interloper and to protect their sources of revenue against competition. However, that does not permit them to charge fees that cannot be justified under the Freedom of Access Law . . . ." *Id*. at 16.

(B) *Whether the Public Is Entitled to a Copy of a Database*. The counties argued that their public access obligations were fulfilled by offering to the public an opportunity to inspect and copy any land record at their websites, which allow the public to search for and retrieve any individual record. The court disagreed. "[T]he copying of individual records from the website on an image by image basis" did not "substitute for [MacImage's] right under the Freedom of Access Law to obtain a copy of the electronic data compilations maintained by the counties." *Id*

(C) *The Right to Pass on Vendor Charges*. A few counties took the position "that it is not unreasonable . . . to charge a fee that simply passes along its vendor's charges"

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for making the requested electronic copies. *Id*. at 24. The court was not convinced.

> [T]he court cannot accept Cumberland's argument that [the vendor] has a legal right to exercise a veto power over any request for copying of Cumberland's electronic land records and indexes. A governmental entity cannot place public records subject to the Freedom of Access Law beyond the request of requests by using an outside contractor to manage that data . . . .

Id. at 26. Likewise, a county "cannot insulate data from a Freedom of Access request by maintaining it with [a contractor] in a [ ]proprietary form." *Id*. at 28-29.

The Court issued a sweeping mandatory injunction requiring that each county respond to MacImage's request and limiting the amount that may be charged to no more than a few thousand dollars per county, less than 2% of the amount initially quoted.

Implications for the Media

As government records go digital the media faces new hurdles and opportunities in the fight for public access. The problem of excessive fees should diminish when electronic records are at issue since the cost of making digital copies is nominal.

As *MacImage* demonstrates, the media should not stand for new and creative ways of ratcheting up fees for digital copies. Government databases are a great tool for gathering statistics and other information shedding light on the functioning of government. Those databases are public records. Access to individual files in hard copy or electronic form is not an acceptable substitute.

Finally, government agencies often contract with computer vendors to maintain websites, databases, and computer systems. The involvement of a non-governmental vendor is a complication, but cannot impede public access to electronic public records.

Sigmund D. Schutz of Preti Flaherty LLP in Portland, Maine represents MacImage of Maine, LLC. The six defendants were represented collectively by five different Maine-based law firms.

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Refresher on Legal Ethics for Media Lawyers – The "Corporate Miranda" Warning

By Richard M. Goehler

At the recent workshop on legal ethics for media lawyers at the ABA Forum on Communications Law's 16th Annual Conference in Palm Springs, Jonathan Anschell, Bob Lystad and Bruce Johnson facilitated an excellent session which included a lively discussion on the "Corporate Miranda" warning. The discussion provided a very timely and useful refresher on important ethical issues which arise in the context of corporate internal investigations and corporate personnel matters.

Fundamentally, the relevant ethical issues which arise in the context of a corporate internal investigation involve the question of "who is the client?" Under ABA Model Rule 1.13, a lawyer retained by an organization represents the organization acting through its duly authorized constituents. In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents which whom the lawyer is dealing.

In situations in which an individual employee's interests may be different and/or adverse to the company's, such as investigations of alleged wrongdoing – the employee should be advised that:

1. counsel represents the company, not the individual;
2. communications between counsel and the individual are privileged, but…
3. the attorney-client privilege belongs to the company, which alone can decide whether to waive the privilege.

This type of warning or admonition is intended to clarify the loyalty of the lawyer conducting the investigation. That lawyer owes a duty of loyalty to the company and not to the employees. At the initial stages of an investigation, some lawyers may attempt to represent both the company and its employees, so long as the company and the employees are fully informed of potential conflicts and consent to multiple representations. There are advantages to this type of multiple representation, such as avoiding duplication of efforts; enhancing employee cooperation and saving on attorneys fees. Many legal ethics experts, however, caution against such dual or multiple representations in the internal investigation context because such dual representation may jeopardize the company's reason for conducting an internal investigation, which often is to cooperate with authorities and waive the attorney-client privilege if necessary to avoid a criminal indictment.

Since these corporate Miranda warnings have become increasingly important, it is worthwhile to take a look at what a "model" warning could look like. Consider the following:

> I am a lawyer for Corporation A. I represent only Corporation A and I do not represent you. If you want an attorney, you must hire your own. Your communications with me are protected by the attorney-client privilege. The attorney-client privilege, however, belongs solely to Corporation A. Accordingly, Corporation A may elect to waive that privilege and reveal your communications with me to third parties, including the government, at its sole discretion. See Association of Corporate Counsel Advisory (September 2005).

Another example of a model corporate Miranda warning, somewhat harsher in its tone, might look as follows:

> As I am sure you know, I and other members of this office represent the Corporation. We do not represent you personally. Based on what you have said, your personal interest may be in conflict with that of the Corporation, and we in the corporate counsel's office cannot represent you. In addition, I have an obligation to pass on to the Corporation everything you have told me and will tell me. The Corporation may then choose to disclose it or use it adverse to your interest. I recommend that you seriously

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> consider retaining a lawyer. Only your own personal lawyer can promise you that your discussions with him or her will remain strictly confidential. Because of my position as a lawyer for the Corporation, I am not your lawyer and cannot give you that assurance. See Association of Corporate Counsel "Docket" (September 2006).

Careful lawyers will memorialize this warning and many legal ethics experts recommend that a written form reflecting the Corporate Miranda warning be prepared so that after orally giving the warning the lawyer can hand the form to the employee and ask the employee to sign the form and affirm that the warning has been received and understood.

In re Grand Jury Subpoena, 415 F. 3d 333 (2005), decided by the Fourth Circuit Court of Appeals, is an illustrative case analyzing the key issues associated with a lawyer's ethical obligations in these situations. In that case, AOL – Time Warner's outside counsel interviewed numerous employees in connection with an internal investigation into the corporation's dealings with Purchase Pro, Inc. When AOL later decided to cooperate with the government's investigation it sought to turn over memoranda generated by outside counsel summarizing these interviews. Several of the employees sought to enjoin the sharing of this information claiming that their conversations with the company's outside counsel were protected by the employees' attorney -client privilege.

The Fourth Circuit ultimately refused to enjoin the corporate disclosure, finding that the corporate Miranda warning issued by outside counsel was sufficient to preclude a finding that the individual employees had an objectively reasonable belief that the corporation attorneys represented them personally. The court noted that the statement "we can represent you in addition to AOL if there is not a conflict" to be logically distinct from telling the employees that "we do represent you," especially in the context of the entire warning, in which the attorneys made explicit that the attorney-client privilege belonged solely to AOL.

Although In re Grand Jury Subpoena appears to implicitly reject the need for Corporate Miranda warnings as extensive as that set forth in the model statements provided above, counsel may nonetheless be advised to take additional precautions. The Fourth Circuit itself felt compelled to note that it did not by its opinion intend to endorse the "watered down" warnings the investigating attorneys gave the appellants referring to them as "a potential legal and ethical minefield." See Association of Corporate Counsel Advisory (September 2005). The court's cautionary message is especially well taken in light of state ethical rules patterned on Rule 4.3 of the ABA's Model Rules of Professional Conduct. Rule 4.3 places an affirmative duty on attorneys "to make reasonable efforts to correct" an unrepresented person's misunderstanding as to the attorney's role whenever the attorney "knows or reasonably should know" of such misunderstanding. These misunderstandings may arise because of the lawyer's prior representation of the employee on a personal matter or because of the mistaken belief that the corporate employer and employee share a common interest when the corporation is represented by counsel. When it is apparent that a misunderstanding exists, the lawyer has an obligation under Rule 4.3 "to make reasonable efforts to correct the misunderstanding."

The discussion at the ABA Forum's recent ethics workshop provided a helpful reminder of the critical importance of issuing carefully worded and unambiguous corporate Miranda warnings prior to interviewing employees when allegations of wrongdoing are present and the employer's culpability is in question. Corporate counsel must be familiar with the rules of ethics binding in all jurisdictions in which their employees operate and must remain current on any recent cases or proposed revisions to the governing rules.

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2011 Upcoming Events

Section 230: a 15 Year Retrospective
March 4 | Santa Clara, CA

MLRC/Stanford Legal Frontiers in Digital Media Conference
May 19-20 | Stanford, CA

MLRC London Conference
September 19-20
(In-house counsel breakfast Sep 21st)
London, England

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