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SUPREME COURT

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LIBEL & PRIVACY

Citizens United:
Campaign Cataclysm or Politics as Usual?

By Jerianne Timmerman

On January 21, the Supreme Court announced its long-awaited decision in *Citizens United v. Federal Election Commission*, No. 08-205. The closely-divided Court overruled its precedent in two cases and overturned federal law restricting the political speech of, and spending on campaign advertising by, corporations and labor unions. As a result, corporations and unions may now expressly advocate for the election or defeat of a federal candidate without limitation as to the types and amounts of monies expended, the proximity to the election, or the medium chosen.

This decision will affect campaigns for federal office in myriad ways and significantly restrict Congress' ability to enact further campaign finance reform legislation. As the Court broadly stated, the "First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker and the content of the political speech." *Citizens United* also has legal and practical implications for media entities, particularly broadcasters.

A Quick Primer on Federal Election Law Restrictions on Corporate and Union Speech

Prior to the *Citizens United* decision, federal law prohibited corporations and unions from using their general treasury funds to make independent expenditures (*i.e.*, expenditures not coordinated with a campaign) for speech that expressly advocates the election or defeat of a federal candidate through any form of media, or for speech that is an "electioneering communication." 2 U.S.C. § 441b. An electioneering communication is "any broadcast, cable, or satellite communication" that even "refers to a clearly identified candidate for Federal office"; is made within 30 days before a primary or 60 days before a general election; and is publicly distributed. 2 U.S.C. § 434(f)(3)(A).

Although barred from using general treasury funds for express advocacy or electioneering communications, corporations and unions could establish a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. 2 U.S.C. § 441b(b)(2). The monies received by these segregated funds are limited to donations from stockholders and employees of the corporation (or members of the union).

In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the Supreme Court narrowly upheld the ban on electioneering communications that Congress had adopted in the Bipartisan Campaign Reform Act of 2002 (BCRA). The Court in *McConnell* relied on the earlier holding in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that political speech may be banned based on the speaker's corporate identity. In *Austin*, the Court upheld 5-4 a Michigan law that prohibited corporate independent expenditures that supported or opposed any candidate for state office, given the government's interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." 494 U.S. at 660.

The Challenge from Hillary: The Movie

In January 2008, Citizens United, a nonprofit corporation, released *Hillary: The Movie*, a 90-minute documentary critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's Presidential primary elections. Anticipating that it would make *Hillary: The Movie* available on cable television through video-on-demand within 30 days of primary elections in 2008, Citizens United produced television ads to run on broadcast and cable television to encourage viewers to purchase the film.

Concerned that both the film and the ads would be covered by Section 441b's ban on corporate-funded independent expenditures, thereby subjecting it to civil and criminal penalties, Citizens United in December 2007 sued in federal court. It sought declaratory and injunctive relief against the FEC, arguing that Section 441b was unconstitutional as applied to *Hillary: The Movie*. The federal district court denied Citizens United's motion for a preliminary injunction and then granted the FEC's motion for summary judgment.

Citizens United sought Supreme Court review. Following oral argument in the case in March 2009, the Court requested

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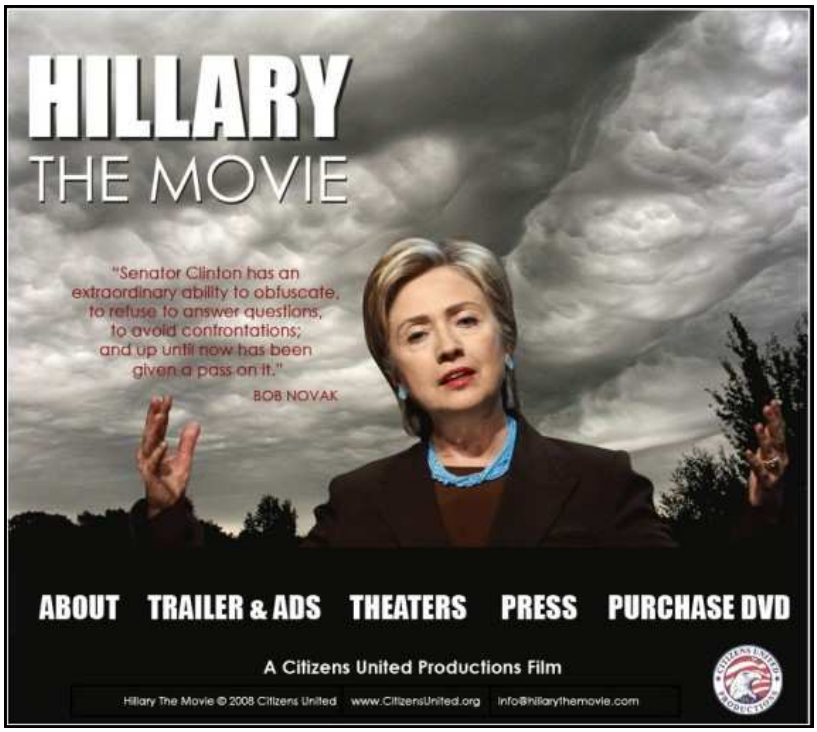
the parties to file supplemental briefs addressing whether it should overrule either or both *Austin* and the part of *McConnell* that addressed the facial validity of 2 U.S.C. § 441b. The Court heard reargument in early September 2009.

The Court's Decision Rejecting Limits on Corporate Political Speech

As an initial matter, the Court addressed whether Citizens United's claim that Section 441b cannot be applied to *Hillary: The Movie* may be resolved on other, narrower grounds. In an opinion by Justice Kennedy, and joined by the Chief Justice and Justices Scalia, Thomas, and Alito, the majority concluded that various narrower arguments were not sustainable under a fair reading of the statute and that the case could not be resolved on a narrower ground without chilling political speech.



As an initial matter, the Court addressed whether Citizens United's claim that Section 441b cannot be applied to *Hillary: The Movie* may be resolved on other, narrower grounds. In an opinion, the majority concluded that various narrower arguments were not sustainable under a fair reading of the statute and that the case could not be resolved on a narrower ground without chilling political speech.

In this regard, the Court focused on the complexity of the FEC's regulations, including its multi-factor test for determining whether a communication was the functional equivalent of regulable express advocacy. Indeed, the Court went so far as to equate the FEC's complex regulatory scheme with a prior restraint (perhaps an interesting precedent for future claims that other complex governmental regulatory schemes chill speech).

Turning to the constitutional issues, the majority stressed that Section 441b was an outright ban on speech, backed by criminal penalties. Focusing on the particular importance of speech as "an essential mechanism of democracy," the Court stated that "political speech must prevail against laws that would suppress it." An examination of both "history and logic" leads to the conclusion that "in the context of political speech," the government may not "impose restrictions on certain disfavored speakers," including corporations.

In his concurring opinion, Justice Scalia, joined by Justices Alito and Thomas, stressed the point that the First Amendment "is written in terms of 'speech,' not speakers," and thus its "text offers no foothold for excluding any category of speaker," including corporate ones.

Applying strict scrutiny, the Court then rejected all three interests asserted by the government to justify Section 441b's restrictions on speech, finding none of them compelling.

First, the Court rejected the "anti-distortion" rationale adopted in *Austin*. The majority reasoned that the "rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speakers' identity."

Of particular interest to media entities, the majority further reasoned that the "anti-distortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations." Although media corporations were exempted from Section 441b's otherwise generally applicable prohibition on corporate political speech, Chief Justice Roberts and

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Justice Alito stressed in their concurring opinion that "this is simply a matter of legislative grace."

The Court also found insufficient here the traditional interest asserted by the government to justify campaign finance restrictions – preventing corruption or its appearance. The majority determined this rationale insufficient because independent expenditures by corporations or others (which, by definition, are not coordinated with a campaign) do not represent the same risk of *quid pro quo* corruption (or its appearance) as do direct contributions to candidates or parties.

Finally, the Court quickly dispensed with the third rationale offered by the government – its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. The majority noted that this rationale would allow the government to ban the political speech of media corporations. In addition, the Court found the rationale to be both underinclusive (the electioneering communications prohibition banned corporate speech in only certain media at certain times) and overinclusive (the statute covers corporations with only single shareholders).

Concluding that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," the Court overruled *Austin*. With *Austin* set aside, the Court found invalid the federal laws limiting corporate independent expenditures (whether made for express advocacy or electioneering communications). As a consequence, the Court also overruled the portion of *McConnell* that had upheld BCRA's ban on electioneering communications.

The vigorous dissent by Justice Stevens, and joined by Justices Ginsburg, Breyer and Sotomayor, took issue with the majority's "proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation." The dissenting Justices found "the distinction between corporate and human speakers" in the "context of election to public office" to be "significant," and rejected the majority's "conceit that corporations must be treated identically to natural persons in the political sphere" as "inaccurate" and "inadequate to justify the Court's disposition of this case." In particular, the dissent argued that the majority's approach to corporate electioneering "marks a dramatic break from our past," noting that Congress had placed special limitations on campaign spending by corporations since 1907 and contending that the majority relied primarily on individual dissenting opinions to overrule or disavow a large body of case law.

Disclosure Requirements Upheld

Citizens United further challenged BCRA's disclaimer and disclosure requirements. These provisions (1) obligate corporations spending more than $10,000 on electioneering communications within a calendar year to file detailed disclosure statements with the FEC, and (2) require third-party political ads (*i.e.*, ads other than those made or authorized by the candidates themselves) to include a statement identifying the person or entity responsible for the content of the ad. *See* 2 U.S.C. § 434(f) and 441d(d)(2). *McConnell* had previously upheld these provisions against a facial challenge.

By an 8-1 vote with only Justice Thomas disagreeing, the Court upheld these disclosure requirements as applied to *Hillary: The Movie* and the broadcast and cable ads for the movie. Noting that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," the Court rejected Citizens United's claims that BCRA's requirements were underinclusive because they applied only to ads in certain media; were not justified by the government's asserted informational interest; and could chill donations to organizations by exposing donors to retaliation. The Court explained that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages," including corporate ones.

Impact of Citizens United on Broadcast Regulation

Unexpectedly, the majority opinion contains language casting some doubt on the long-standing rationales for affording broadcast television and radio lesser constitutional protection than print or other electronic media. Citizens United contended that Section 441b should be invalidated as applied to movies such as *Hillary* shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do ads on conventional television. The Court rejected this argument, explaining at length that

> any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and

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> speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639 (1994). Courts, too, are bound by the First Amendment. *We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker*. (emphasis added).

As legal commentators have pointed out, this language calls into question the "second-class First Amendment status" of broadcast television and radio stations – which, of course, has been based on "constitutional lines" drawn according to the "particular media or technology used to disseminate" political and other speech. *See* Eugene Volokh, *Citizens United on the Second-Class First Amendment Status of Broadcast TV and Radio?*, volokh.com (posted Jan. 21, 2010). The lesser First Amendment protections afforded to broadcasters has resulted in the courts upholding myriad types of broadcast regulation, from the Fairness Doctrine (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)) to limits on the ownership of media outlets (*FCC v. NCCB*, 436 U.S. 775 (1978)) to indecency restrictions (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

Many practitioners and scholars have long been critical of the rationales (including the supposedly unique scarcity of broadcast spectrum and pervasiveness of the broadcast media) used to justify lower levels of First Amendment protection for over-the-air radio and television. The above language from *Citizens United* will no doubt be cited in cases (including broadcast indecency cases currently pending in the Second and Third Circuit Courts of Appeal) to support arguments that constitutional distinctions based on technological differences should be eliminated, especially given continuing rapid changes in communications technologies.

Campaign Cataclysm or Politics as Usual?

Press coverage and pundit reaction to the Court's decision has ranged from predictions of the death of democracy to shrugs of "politics as usual" to celebrations of the vindication of First Amendment rights. Although the ultimate impact of the *Citizens United* case on political advertising, campaigns and election law will not be known with certainty for some time, some initial predictions can reasonably be made now.

Impact on Political Advertising

The decision allows corporations and unions to make unlimited independent expenditures, at any time and in any media, to engage in both issue advocacy and express advocacy (*i.e.*, a direct appeal to vote for or against a federal candidate). A very large number entities may now purchase political advertising without restriction, including unions and for-profit corporations big and small, non-profit corporations and tax-exempt political entities organized as corporations.

As a result, it is highly likely that the number of political ads disseminated via all media will increase – particularly ads on broadcast stations in the periods just before elections that BCRA had previously restricted. However, it is also likely that many traditional business corporations will choose not to engage in direct political advertising, especially publicly traded corporations with large numbers of shareholders and board members (not to mention customers) with diverse political views. A number of commentators have stated that national trade associations (*e.g.*, the U.S. Chamber of Commerce) will be more likely than individual companies to increase their spending on political ads. Some have also speculated that smaller corporations that did not expend the resources to set up PACs may become more involved in political advocacy because they can now do so directly.

Impact on Campaigns, Elections and Future Legislation

Although a number of commentators have decried the expected flood of corporate money into the political system as a result of the *Citizens United* decision, others have contended that the "floodgates were already open." Nathaniel Persily, *The Floodgates Were Already Open: What Will the Supreme Court's Campaign Finance Ruling Really Change?*,

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slate.com (posted Jan. 25, 2010). The Supreme Court had already narrowed the applicability of BCRA's restrictions on corporations and unions in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007). Even under pre-*Citizens United* law, corporations were not forbidden from promoting their political agendas – among other avenues, they could establish PACs for engaging in political advocacy. And BCRA and other campaign finance laws do not restrict corporations' and unions' use of resources for lobbying federal office holders, in contrast to advocating for or against their election.

Nonetheless, the implications of the *Citizens United* decision and its reasoning on campaigns and elections in the U.S. will be significant, especially over time, for several reasons. First, the Court's rationale casts great doubt on the continued validity of similar campaign finance laws enacted by almost half of the states. *See* Ian Urbina, *24 States' Law Open to Attack After Campaign Finance Ruling*, New York Times (Jan. 23, 2010). Although the Court's decision does not overturn all these state laws, these laws will in time be subjected to court challenge or repealed by state legislatures. Thus, elections for state offices, including state judicial elections, will be directly affected by *Citizens United*.

Second, *Citizens United* will affect political parties. Many observers have opined that political parties' power relative to outside groups funded by corporations and unions has diminished, especially given that BCRA's severe restrictions on the ability of parties to raise and spend soft money remain in place (at least for now). With more entities and groups advocating for and against candidates and issues, parties and candidates will tend to have less control over federal election campaigns and the messages expressed in them. This has lead some commentators also to predict an increase in negative and inaccurate political ads funded by outside groups.

Third, the reasoning behind *Citizens United* leads one to wonder if other campaign finance restrictions may also be vulnerable. For example, the long-standing ban on direct corporate and union contributions to candidates for federal office remains, as do BCRA's limitations on parties' solicitation and spending of soft money. The Supreme Court, however, has considerably narrowed the range of governmental interests sufficient to sustain these or other types of campaign finance regulation. Future challenges to at least some of the remaining campaign finance restrictions appear almost certain.

Fourth, the Court's rationale obviously restricts the ability of Congress to enact new campaign finance reform legislation. Although President Obama stated that his Administration will get to work immediately with Congress to develop a bipartisan response to *Citizens United*, their options appear limited.

Various proposals already have been proffered, such as requiring shareholders to vote their approval before corporations could use treasury funds for campaign expenditures. The government could ban campaign expenditures by corporations substantially owned by foreigners or by the U.S. subsidiaries of foreign corporations. Suggestions have been made to prohibit corporations with government contracts, or those taking federal bail-out money, from engaging in campaign advocacy, although proposals along these lines may raise issues of unconstitutional conditions.

More likely to survive constitutional challenges post-*Citizens United* would be increased disclosure requirements. Most radically, some have called for the public financing of congressional elections and enhancing the public financing arrangements for presidential elections. That option appears unlikely to be enacted in the near future, particularly given the public's apparent lack of support for public financing – only a small and declining number of citizens participate in the voluntary and cost-free public financing of presidential campaigns through the checkoff on the income tax form.

One Certainty – This Debate Will Continue

The controversy over the Supreme Court's recent decision is merely the latest chapter in the century-long effort to limit the role of money in U.S. elections. Many strongly believe that campaign finance restrictions are necessary to temper the corrupting influences of well-funded special interests in our political system. Others believe that campaign finance laws are largely ineffective in addressing these concerns. As Justice Kennedy wrote in *Citizens United*, "[p]olitical speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws."

As this election year progresses, the impact of the Court's decision on campaigns and on this continuing debate will become more clear. One thing is certain – *Citizens United* has made the 2010 campaign even more interesting, whether it turns out to be a cataclysm or just politics as usual.

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Supreme Court Addresses Right of Access to Voir Dire

Courts Must Independently Consider Alternatives to Closing Court Proceedings

By Amanda M. Leith

In a *per curiam* decision handed down in January, the Supreme Court ruled that trial courts have an obligation to consider, *sua sponte*, alternatives prior to closing a court proceeding, if the none of the parties propose alternatives. *Presley v. Georgia*, 558 U.S. __ (Jan. 19, 2010). The Court's ruling affirmed that *voir dire* proceedings are subject to a public right of access, under both the First and Sixth Amendments, regardless of whether any party has asserted the right.

Background

The *Presley* ruling arose in the context of a criminal trial in which the courtroom was cleared before the potential jury pool was brought in. Before starting jury selection, the trial court observed a man seated in the gallery and instructed that he must leave the courtroom because prospective jurors were about to enter. Upon questioning him, the court learned that the man was the defendant's uncle and reiterated that he could not be in the courtroom during jury selection and would, in fact, have to leave that floor of the courthouse.

In response to an objection from defendant's counsel to the exclusion of the public, the court responded that "there just isn't space for them to sit in the audience," as each of the rows would be occupied by the 42 prospective jurors, and defendant's uncle could not "sit and intermingle with the members of the jury panel."

Following his conviction, defendant moved for a new trial based on the exclusion of the public from the juror *voir dire*. He presented the trial court with evidence that 14 prospective jurors could fit in jury box and that the remaining 28 could have fit in the seating on one side of the gallery, leaving adequate room for the public without risk of intermingling.

The trial court denied defendant's motion, stating that "it preferred to seat jurors throughout the entirety of the courtroom, and 'it's up to the individual judge to decide . . . what's comfortable.'"

On appeal, the Georgia Court of Appeals agreed, finding "no abuse of discretion," where "the trial court explained the need to exclude spectators at the *voir dire* stage of the proceedings" and permitted the public to return when those proceedings were concluded. *Presley v. Georgia*, 658 S.E.2d 773 (Ga. App. 2008). The Georgia Supreme Court also affirmed, with two justices dissenting, finding that "the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during *voir dire*." *Presley v. Georgia*, 674 S.E. 2d 909 (Ga. 2009). The court rejected defendant's argument that trial court was required to consider alternatives to closing the courtroom. Noting that "the United States Supreme Court has not provided clear guidance regarding whether a court must, *sua sponte*, advance its own alternatives to closure," the court found that it was defendant's obligation "to present the court with any alternatives that he wished the court to consider," and as he had not done so, the trial court had not abused its discretion by failing to independently raise its own alternatives.

Decision

The United States Supreme Court reversed, holding that courts have an affirmative obligation to consider less restrictive alternatives, *sua sponte*, prior to closing a court proceeding.

The Court's ruling strongly endorsed the scope of the public access right recognized in its earlier rulings. Citing *Press-Enterprise I*, 464 U.S. 501 (1984) and *Waller v. Georgia*, 467 U.S. 39 (1984), the Court noted that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question," and declined to say "whether or in what circumstances the reach or protections of one might be greater than the other," but found that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." The Court held therefore, that the Georgia Supreme Court correctly had assumed that the Sixth Amendment right to a public trial extends to *voir dire* proceedings.

The Court then considered the standards courts must ap-

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ply before excluding the public from any stage of a criminal trial. It found "[t]he conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that 'the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'"

The Court held that "[t]he public has a right to be present whether or not any part has asserted the right," and thus "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."

The Court observed that nothing in the record demonstrated the trial court could not have accommodated the public during juror *voir dire* and suggested several possible alternatives, including reserving one or more rows for the public; dividing the jury venire panel; or instructing prospective jurors not to interact with audience members.

Finally, the Court considered defendant's second claim of error: whether the trial court had identified any overriding interest sufficient to justify the closure of *voir dire*. It observed that "[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors.

If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."

The Court thus reaffirmed that a "particular interest, and threat to that interest, must be 'articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

The Court ultimately found, however, that it need not rule on this claim of error, because "even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure," and the failure to do so was sufficient to warrant reversal.

Justices Thomas and Scalia filed a dissenting opinion, asserting that the Court's precedents were not clear and thus the case should not have been decided summarily.

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Supreme Court To Hear First Amendment Challenge to State Public Records Act

By Eric M. Stahl

The U.S. Supreme Court has granted review in *Doe v. Reed*, a case involving the potential disclosure of the identity of individuals who petitioned to place an anti-domestic partnership referendum before Washington state voters last year. The case challenges the constitutionality of Washington's Public Records Act, and poses a threat to public disclosure laws everywhere. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *review granted*, 2010 WL 144074, 78 USLW 3295 (U.S. Jan. 15, 2010).

Background

The plaintiffs in *Doe* are Protect Marriage Washington, the organization that sponsored the ballot referendum, and two anonymous individuals who signed the referendum petition. The measure, known as R-71, proposed to overturn Washington's "everything but marriage" domestic partnership statute. R-71 was defeated by Washington voters last November.

Under Washington law, a referendum qualifies for the ballot if it is supported by a petition signed by a specified number of state voters. The petition must include each signer's name and address of voter registration. The sponsors of R-71 submitted petitions from over 138,500 individuals.

State election officials determined that R-71 qualified for the ballot, and several groups and individuals subsequently submitted public records requests for the petitions. Among the requesters were opponents of the referendum (*i.e.*, supporters of the domestic partnership law) who publicly stated that they intended to publish the names of petition signers on the Internet in order to encourage "personal" conversations with supporters of the measure. As one R-71 opponent put it, "These conversations can be uncomfortable for both parties, but they are desperately needed to break down stereotypes and to help both sides realize how much they actually have in common."

The state determined that the petitions were subject to disclosure under Washington's Public Records Act ("PRA"). The statute, a strongly worded mandate favoring disclosure of public records, was enacted in a 1972 voter initiative that declared, "The people, delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created."

In response to the PRA requests, the R-71 sponsors brought suit in federal court, claiming that release of petition signers' identifying information would violate the First Amendment. Judge Benjamin Settle of the Western District of Washington granted a preliminary injunction. Applying strict scrutiny, he held that the plaintiffs were likely to succeed on their claim that, as applied to referendum petitions, the PRA regulates "anonymous political speech" in a manner that is not narrowly tailored to serve a compelling government interest. *See Doe v. Reed*, 2009 WL 2971761 (W.D. Wash. Sept. 9, 2009).

The Ninth Circuit reversed, and ordered the petitions be released as required by the PRA. Noting that the case presented a "novel issue," the Ninth Circuit held, first, that the referendum petition process is not "anonymous speech." The court noted, among other things, that signatures are not gathered in a manner that offers signers any confidentiality. On the contrary, the petitions can be viewed readily by other signers, and are subject to verification by state officials.

The Ninth Circuit also held that even if disclosure of the signer's identity implicated "speech," the PRA

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was not subject to strict scrutiny; rather, the appropriate standard was the intermediate scrutiny applicable in cases in which speech is combined with non-speech elements. 583 F.3d at 678 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Applying this standard, the Ninth Circuit held that the disclosure mandated by the PRA was no greater than necessary to further the two "important interests" identified by the state: preserving the integrity of elections by promoting government transparency and accountability, and providing Washington voters with information about who supports a ballot referendum.

On October 20, 2009, the Supreme Court stayed the Ninth Circuit ruling. On January 15, the Court agreed to hear the case on the merits.

The questions presented in the case are:

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.

2. Whether compelled public disclosure of identifyng information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

For the news media and open government advocates, the Supreme Court's decision to hear the case is troubling for several reasons. A broad ruling in favor of an individual's right to protect his or her identifying information could upend established public records law in states, like Washington, in which privacy-based exemptions to disclosure require a showing that there is no legitimate public interest in disclosure.

Moreover, the petitioners are urging the Supreme Court to recognize a constitutionally significant distinction between public records containing "private disclosure to the government" and those containing "public disclosure." Were the Supreme Court to accept this distinction, many public records that are routinely available to journalists today – for example, those containing identifying information about public employees or about private businesses that are regulated by state agencies – could be off-limits simply because they contain "private disclosures."

The heart of the R-71 opponents' case is a claim that referendum supporters might be subjected to harassment, or at least "uncomfortable conversations," in the event their identities become publicly known. This position, if accepted by the Court, would set a remarkably low bar for privacy-based constitutional exemptions to public records statutes. Yet, as the Supreme Court's recent decision to bar broadcast of the Proposition 8 trial in California suggests, the Court may be receptive to such arguments, at least in the context of such controversial measures as state gay rights legislation.

Were the Supreme Court to accept the distinction between public records containing "private disclosure to the government" and those containing "public Disclosure," many public records that are routinely available to journalists today could be off-limits simply because they contain "private disclosures."

The petitioners in *Doe v. Reed* are represented by James Bopp of Terre Haute, Indiana. The respondent State of Washington is represented by its Deputy Solicitor General William Berggren Collins. The other respondents in the case are Washington Families Standing Together, represented by Kevin Hamilton of Perkins Coie in Seattle, and the Washington Coalition for Open Government, represented by Frederick J. Dullanty Jr. of Witherspoon Kelley in Spokane.

Eric M. Stahl is a partner in the Seattle office of Davis Wright Tremaine, which is preparing an amicus brief in Doe v. Reed on behalf of a coalition of news media organizations.

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An Analysis In Favor of Camera Access

A Deeply Split Supreme Court Bars Cameras in Prop. 8 Same-Sex Marriage Trial

By Jeff Glasser, Thomas R. Burke and Rochelle L. Wilcox

By a 5-4 vote, on January 13, 2010, the U.S. Supreme Court prohibited video coverage to five overflow federal courtrooms of proceedings in a federal non-jury civil trial taking place in San Francisco involving a federal constitutional challenge to California's Proposition 8, which banned same-sex marriage. *Hollingsworth v. Perry*, 558 U.S. __ (Jan. 13, 2010).

Notwithstanding the Supreme Court's extraordinary intervention, open trial proceedings themselves are being observed, blogged and "tweeted" real time by a large collection of reporters covering these high profile trial proceedings.

In an unsigned, 17-page "per curiam" opinion representing the views of Chief Justice John G. Roberts, Jr. and Justices Antonin Scalia, Clarence Thomas, Anthony M. Kennedy and Samuel A. Alito, Jr., the majority observed, "It would be difficult – if not impossible – to reverse the harm of those broadcasts." The Court's majority was critical of U.S. District Chief Judge Vaughn Walker and what it called his "eleventh hour" decision to "allow the broadcasting of this high-profile trial," agreeing with the defendants that witnesses, including paid experts, might suffer harassment and be "less likely to cooperate in any future proceedings" if video footage of the otherwise open trial proceedings was allowed to be seen in five overflow courtrooms in Portland, Pasadena, Seattle, Chicago and Brooklyn.

The 10-page dissent, written by Justice Stephen G. Breyer and joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Sonia Sotomayor, accused the majority of "micromanag[ing]" Judge Walker. "The Court today issues an order that will prevent the transmission of proceedings in a nonjury civil trial of great public interest to five other federal courthouses," Justice Breyer wrote for the dissenting justices. "The majority's action today is unusual. It grants a stay in order . . . to intervene in a matter of local court administration that it would not (and should not) consider. It cites no precedent for doing so. It identifies no real harm, let alone 'irrepararable harm' . . . and the public interest weighs in favor of providing access to the courts."

More than four decades after televisions became ubiquitous in American living rooms, fifteen years after the Internet was adopted into general use by the population, two years after members of the public were able to ask the presidential candidates questions over YouTube during one of the debates, and at a time when all 50 states allow cameras in the courtroom for at least some proceedings and 42 states and two federal district courts give judges discretion to televise civil non-jury trials, the Supreme Court majority in *Perry.* stubbornly clung to the notion that the broadcasting of "sensitive" lower court proceedings to even five overflow courtrooms was harmful and suggested in dicta that it must be stopped.

Not only were the majority's statements regarding televising trials gratuitous (the majority admitted the issue was not before them), but the majority nevertheless intruded into the kind of administrative issue that has been left to the exclusive province of the Circuit Judicial Councils – including the Judicial Council of the Ninth Circuit – for decades.

On a technical level, the Supreme Court's holding was narrow: the trial on the constitutionality of Proposition 8 could not be streamed live to five overflow courtrooms because the Northern California district court did not give the public adequate notice and an opportunity to comment on the change to Local Rule 77-3. This local rule merely administratively authorized the Northern District of California to participate in the Ninth Circuit's recently announced pilot program for experimenting with the use of cameras in certain civil, non-jury cases. The rule change was not specific to the *Perry* trial. The local rule change garnered some 138,574 comments during the nine days allowed for comments (all but 32 of them in favor of electronically transmitting the proceedings).

Nevertheless, in what will surely be remembered as one of the most heavily voted upon and closely-watched changes to a federal district court's local rules, the Supreme Court held that the nine-day period for comments (five business days) was insufficient. The minimum period under federal law was 30 days, the Court stated, and the attempted invoca-

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tion by the district court of the "immediate need" exception to the 30-day period for rules changes was unjustified.

If the Supreme Court's holding is taken at face value, then the issue of cameras in Ninth Circuit district courtrooms is still likely to recur later this year: district courts in the Ninth Circuit can notice rule changes allowing camera coverage on a pilot basis for 30 days of comment, adopt the revisions, and select cases for public broadcast. Yet those cases chosen for broadcasting through the pilot program are likely to see challenges from opponents of camera coverage emboldened by the Supreme Court's dicta in *Perry*. Without any specific evidence and in a summary proceeding, the Supreme Court was willing to credit the claims of Proposition 8 proponents that streaming live video of the trial to five courtrooms in other federal courthouses around the country would jeopardize the security of defense witnesses participating in this non-jury trial. (Oddly, a day before signing on to the majority opinion in *Perry*, Justice Clarence Thomas had criticized the majority's use of a similar summary proceeding in *Presley v. Georgia* to decide that the First Amendment affords a right of access to jury *voir dire*.)

Not only were the majority's statements regarding televising trials gratuitous (the majority admitted the issue was not before them), but the majority nevertheless intruded into the kind of administrative issue that has been left to the exclusive province of the Circuit Judicial Councils for decades.

The Supreme Court majority made this assertion even though dozens of journalists and bloggers are live blogging and tweeting the witnesses' public testimony at the Proposition 8 trial and beaming their observations to the public across the country. Given these instantaneous digital forms of communication, it would seem that the camera ban is an ineffective remedy for the stated safety and security concerns of these expert witnesses. Despite the flimsiness of the asserted countervailing interest and the ineffectiveness of the majority's camera ban, these safety and security interests carried the day with the Supreme Court, and are likely to be raised again in future appeals of the broadcasting issue.

A related enduring mystery is why Justice Anthony M. Kennedy, who has been a champion of the public's rights of access to court proceedings, would sign on to the majority's per curiam opinion. After all, it was Justice Kennedy who testified before Congress in 1996 that one "can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom, and it is the outside coverage that is really the problem. In a way, it seems perverse to exclude television from the area in which the most orderly presentation of the evidence takes place." And it was then-Judge Kennedy who authored one of the most cited opinions in the Ninth Circuit on the public's right of access to courts, finding in *Associated Press v. District Court* that even a 48-hour delay in the release of presumptively public court records relating to car maker John DeLorean's alleged drug use "is a total restraint on the public's first amendment right of access even though the restraint is limited in time."

The most benign explanation for Justice Kennedy's apparent turnabout is that Justice Kennedy was offended by the Ninth Circuit's and the district court's lack of fealty to the set procedures for changing court rules. The Supreme Court majority opinion in *Perry* begins by stating that it was staying the broadcast of the Proposition 8 trial to other courthouses "without expressing any view on whether such trials should be broadcast." In turn, the second section of the *Perry* opinion states, "We do not here express any views on the propriety of broadcasting court proceedings generally." These statements and context would suggest that Justice Kennedy and the others in the majority were focusing on the narrow procedural issue rather than the broader substantive issue of whether federal courts should broadcast court proceedings.

Yet this explanation for Justice Kennedy's joining in the majority seems incomplete, as Kennedy joined the majority opinion that went well beyond the technical issue and instead sought to cabin district court judges' discretion in determining whether to broadcast court proceedings. The majority opinion signed by Justice Kennedy makes no effort to analyze what incremental harm was created by Judge Walker's plan to broadcast the trial proceedings to the five overflow courtrooms. One is left with the distinct impression that the majority, including Justice Kennedy, simply did not want wider distribution of *these* particular trial proceedings – or

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the inherent national debate that allowing the trial proceedings to be observed outside of San Francisco might engender.

Despite the majority's initial claims that the Court was not passing judgment on the propriety of broadcasting federal court proceedings, the majority asserts at the end of the opinion that "high profile" and "sensitive" court proceedings – those that provoke "intense debate" or are "divisive" – are not fit for broad public consumption through broadcasting. By taking this stance, the majority seeks to turn any public right of access to view federal court proceedings on television and the Internet into a hollow right, as under the Supreme Court's reasoning anything that falls within the nebulous terms "high profile" or "sensitive" would not be fit for broadcasting.

Contrary to this circumscribed view and of what the public can see and hear, in high-profile cases it is often critical that the public be given true access to proceedings to judge for themselves the fairness and conduct of the proceedings. As one New York state court observed in allowing camera coverage of the racially divisive, high profile, and extremely sensitive trial of four policemen who had shot an unarmed-man, Amadou Diallo, "denial of access to the vast majority will accomplish nothing but more divisiveness while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary." If the public's understanding of the judicial process is not enhanced in *Perry*, a case that involves a high profile federal due process challenge that will decide whether gays and lesbians have a right to marry in California, one wonders how allowing cameras in a more mundane trial will advance the public's interest.

While some may argue that the Supreme Court majority's dicta could prove problematic for media organizations seeking to broadcast federal court proceedings, the common-sense principle recognized by the New York court in *People v. Boss* and by the vast majority of other state courts around the country – that broadcasting of proceedings affords the greatest number of people the ability to judge for themselves the conduct of public court proceedings – is far more reasoned and reflective of a judicial system that values transparency and openness. The Supreme Court's swift action in *Perry* brought a startling end to the first case sought to be televised under the Ninth Circuit's pilot program, but the Ninth Circuit's experimental program will live on – at least to provide camera coverage to a boring non-jury civil trial in the near future.

Thomas R. Burke and Rochelle Wilcox are partners with Davis Wright Tremaine LLP in the firm's San Francisco and Los Angeles offices. Jeff Glasser is an associate with the firm in Los Angeles. On behalf of a national media coalition consisting of ABC News, KGO TV, KABC TV, CNN, In Session (formerly known as Court TV), Fox News, NBC News, CBS News, the Hearst Corporation, Dow Jones & Co. Inc., the Associated Press and the Northern California Chapter of the Radio-Television News Directors Association, Messrs. Glasser and Burke filed a motion for camera access in Perry. On behalf of the media coalition, Mr. Burke and Ms. Wilcox later defended Judge Walker's order as respondents in expedited proceedings in the Ninth Circuit Court of Appeals and the U.S. Supreme Court.

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MLRC/Southwestern Law School Entertainment and Media Law Conference

Charting the Unknowns: Digital Entertainment, Content Regulation and Crisis Management

MLRC and Southwestern Law School held their 7th Annual Entertainment and Media Law Conference in Los Angeles, California, earlier this month. The conference's three panels discussed developments in digital entertainment; content regulation by the FCC, FTC, and Congress; and recent high-profile crises that have impacted studios, networks and production companies.

MLRC thanks the Planning Committee: Vincent Chieffo, *Greenberg Traurig*; David Cohen, *ABC*; Kent Raygor, *Sheppard Mullin Richter & Hampton*; and Steve Rogers, *Showtime Networks Inc.*

We thank the sponsors for their generous support: Chubb Group of Insurance Companies; Davis Wright Tremaine; Fox Rothschild; Frankfurt Kurnit Klein & Selz; Hiscox Media Insurance; Lathrop & Gage; Leopold, Petrich & Smith; Sidley Austin.

And thanks to the moderators and panelists.

PANEL 1: THE NEW FRONTIER IN DIGITAL ENTERTAINMENT

Moderator: David Halberstadter, *Katten Muchin Rosenman*
Panelists: Steve Rogers, *Showtime Networks Inc.*; Leon Schulzinger, *CBS*; and Anthony Segall, *Rothner, Segall, Greenstone and Leheny*

Photos by Liz Reinhardt, Southwestern Law School

Left to right: Segall, Schulzinger, Rogers, Halberstadter

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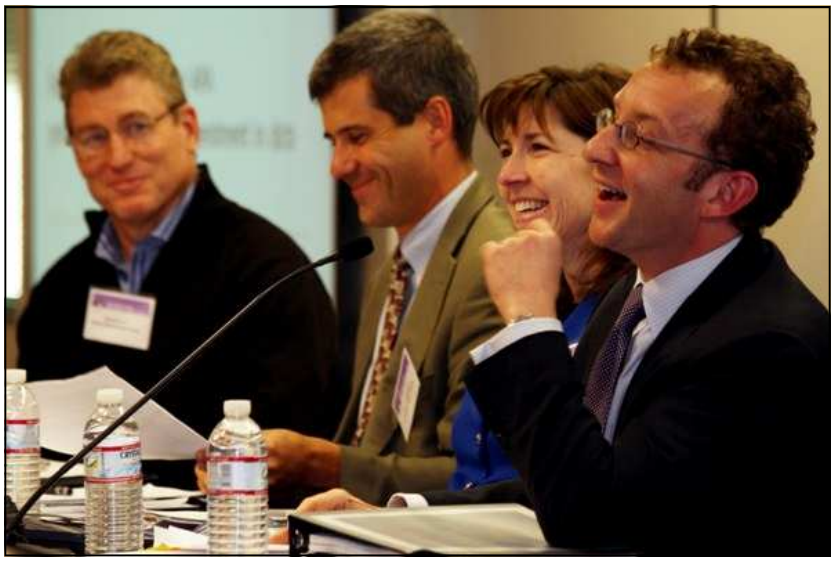
PANEL 2: SEX, MINORS AND VIDEOTAPE

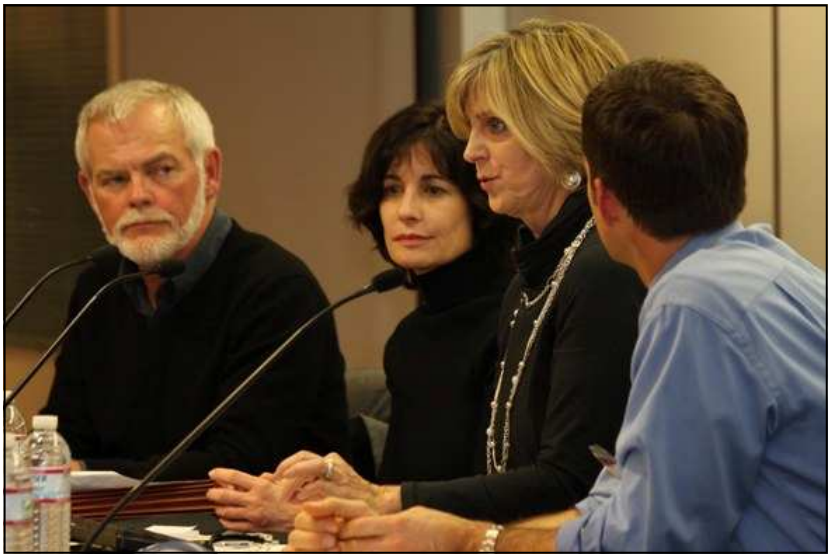
Moderator: Jonathan Anschell, *CBS*
Panelists: Elizabeth Casey, *Fox*; Jim Dietle, *Playboy*; and Alan Simpson, *Common Sense Media*



Left to right: Dietle, Simpson, Casey, Anschell

PANEL 3: CATASTROPHES: CASE STUDIES – CAN ATTORNEYS WORK WELL WITH OTHERS TO MANAGE AND SURVIVE BIG PROBLEMS?

Moderator: Alonzo Wickers, *Davis Wright Tremaine*
Panelists: Hope J. Boonshaft, *Hill & Knowlton*; Karen Magid, *Paramount*; and Vincent Chieffo, *Greenberg Traurig*



Left to right: Chieffo, Magid, Boonshaft, Wickers

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Massachusetts High Court Hold Fair Report Privilege Applicable To Reports Of Confidential Government Actions Based On Anonymous Sources

By Jonathan M. Albano and Laura K. Langley

On January 7, 2010, the Massachusetts Supreme Judicial Court issued a decision holding that the fair report privilege applies to fair and accurate reports of confidential government actions and proceedings, even if the reports are based on information provided by confidential sources. *Howell v. Enterprise Publishing Company, LLC*, 455 Mass. 641 (2010).

As the Court stated, "[o]ur common law considers fair and accurate reports of official actions to be privileged because we value the light the press shines on those charged with stewarding the public trust. The nature of the privilege is such that we cannot pick and choose when to engage its protections; either it must apply all the time or it will never apply at all." 455 Mass. at 670 (citation omitted). The Court also reaffirmed that a plaintiff cannot circumvent the fair report privilege by veiling a failed defamation claim under another theory of recovery.

Background - Howell's Termination

In May 2005, plaintiff James Howell, then the Sewer Superintendent for the Town of Abington, Massachusetts, was placed on paid administrative leave pending an investigation into whether Town computers he used contained material inappropriate for the workplace.

Two months later, after a forensic review of the computers used by Howell, the Town notified Howell of four formal charges levied against him: (1) misusing a Town computer for personal business purposes; (2) storing "photographs and cartoon-style pictures of a pornographic nature" and other non-work related materials on Town computers; (3) distributing "inappropriate and/or objectionable email(s), of a pornographic nature" to a subordinate, and (4) violating state conflict of interest laws by ordering personal items through a Sewer Department vendor.

The Sewer Commission held confidential, executive session hearings on the matter, after which it sustained the first three charges and terminated Howell's employment. Howell appealed the Sewer Commission's rulings to the Town's Board of Selectmen. After holding two public hearings, the Board sustained the Commission's findings.

The Enterprise Articles

Two days after Howell was placed on administrative leave, the *Enterprise* began running a series of articles reporting on the charges against Howell. Four of the articles were published before the public Selectmen hearings and relied in part on anonymous Town officials. Other articles concerned the public Selectmen hearings and compared Howell's case to that of another local official in a neighboring community who had lost his job after child pornography was found on his computer.

Howell's Suit Against The Enterprise

Howell's complaint was based on eleven articles published by the Enterprise, and asserted claims for defamation, invasion of privacy and infliction of emotional distress. Among other things, Howell claimed that description of images on his computer as "pornographic" was false and defamatory because none of the images depicted persons engaged in sexual intercourse. In addition, he claimed that comparing his case to one involving child pornography amounted to a false and defamatory accusation that he too was a child pornographer. His complaint also alleged that articles concerning confidential Sewer Commission proceedings invaded his privacy and that the defamatory publications and privacy invasions also constituted the infliction of emotional distress.

After the Superior Court denied its motion for summary judgment, the *Enterprise* successfully petitioned the Appeals Court for interlocutory appellate review. The Appeals Court reversed the Superior Court's denial of summary judgment on the invasion of privacy claim, holding that the articles' focus on Howell's "past performance and his fitness for his public duties, as well as his possible continued employment" consti-

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tuted matters of legitimate public concern regardless of whether the proceedings reported on were open to the public. *Howell v. Enterprise Publ'g Co., LLC*, 72 Mass. App. Ct. 739, 750, 893 N.E.2d 1270, 1282 (2008). The Appeals Court refused to dismiss the defamation and emotional distress claims, however, ruling that whether the images were pornographic presented a jury issue and that Howell's infliction of emotional distress claims presented jury issues even assuming that the defamation claims were privileged fair reports. 72 Mass. App. Ct. at 743-49, 753, 893 N.E.2d at 1277-1281, 1283-84.

The Supreme Judicial Court granted the *Enterprise's* petition for further appellate review of the Appeals Court's rulings on the defamation and infliction of emotional distress claims. In the meantime, in a separate action, Howell obtained a $405,000 verdict against the Town for wrongful termination.

Supreme Judicial Court's Decision

The Court began its analysis by discussing the policy animating the fair report privilege. By fairly and accurately reporting on government actions and statements, the Court observed, the press serves as a check on governmental power and promotes accountability. The privilege therefore applies when the press "acts as the public's eyes and ears," reporting on official occurrences the public could have witnessed themselves. 455 Mass. at 652-53. The Court did not limit the privilege's application to such instances, however, and instead clearly stated that "[s]erving as a check on the power of government frequently may require reporting on events outside the public eye or ear." Given the important supervisory role of the press, and the concomitant chilling effect posed by threatened litigation, the Court acknowledged the importance of construing the privilege "liberally and with an eye toward disposing of cases at an early stage of the litigation."

Deploying a two-step analysis, the Court first held that the *Enterprise* reported on "official" Town actions or statements, rather than unprivileged "unofficial" talk.

The Court broadly articulated the contours of "official" action as the formal use of governmental power to "cause events to occur or to impact the status of rights or resources," regardless of whether the action is taken in public. 455 Mass. at 654. The Court also held that basing reports of secret government action on confidential sources does not by itself vitiate the privilege so long as the defendant can independently prove that the reports are both fair and accurate. *Id.* at 657-58.

The Court then compared the articles to the official record of the Town's proceedings against Howell and held that, with one exception, the articles fairly and accurately summarized the governmental actions and proceedings involving Howell. 455 Mass. at 659-72. Reduced to essentials, because the official records of the proceedings showed that the Town indeed had accused Howell of having and distributing "pornographic" images, the *Enterprise's* use of the terms "porn" and "pornography" in describing the Town's actions *vis-à-vis* Howell were both fair and accurate report of government action regardless of whether the images were, in fact, pornographic. *Id.* at 665-66.

The Court also held that the Enterprise had not expressly or impliedly accused Howell of being a child pornographer by reporting in the same articles that a neighboring town official recently had been terminated on such charges. *Id.* at 669. With respect to the one factual error found by the Court, Howell's failure to offer any evidence of actual malice required judgment for the defendants. *Id.* at 664. Finally, the Court also ordered entry of summary judgment for the *Enterprise* on Howell's intentional infliction claim, holding -- contrary to the Appeals Court's prior ruling -- that the applicability of the fair report privilege mandated dismissal of alternative claims predicated on the same articles. *Id.* at 672-73.

Justice Spina wrote a dissenting opinion objecting to the Court extending the fair report privilege to articles concerning confidential government proceedings. According to Justice Spina, the policy behind permitting a governmental body to consider the discipline of a public employee private is "good government," and neither an official who violates that policy by disclosing details of close proceedings or a newspaper that publishes such details before the records are officially made public deserves special protections from liability. 455 Mass. at 673-74 (Spina, J., dissenting).

Jonathan M. Albano and Laura K. Langley of Bingham McCutchen, LLP, Boston, MA represented The Enterprise, Elaine Allegrini and Allan Stein. Amici Reed Elsevier, Inc. and The Associated Press were represented by Paul Bender, Michael R. Klipper, & Christopher A. Mohr, of Meyer, Klipper & Mohr, PLLC, Washington, DC, & William S. Strong & Amy C.M. Burke, of Kotin, Crabtree & Strong, LLP, Boston, MA. Plaintiff was represented by John G.H. Coster of Boston, MA.

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Texas Weekly Loses Battle in 7-Year War to Protect Sources and Avoid Libel Trial

Newspaper Needs Help Raising Money for Imminent Trial

By John K. Edwards

A small weekly Texas newspaper, the *West Fort Bend Star* ("Star"), its publisher Bev Carter, and reporter LeaAnne Klentzman, have fought heroically for nearly seven years to defend against a libel suit brought by Wade Brady, the son of Chief Deputy Craig Brady of the Fort Bend County, Texas Sheriff's Department. After the case was filed over an article published in the *Star* on January 15, 2003, Ms. Carter and Ms. Klentzman approached the law firm of Jackson Walker L.L.P. seeking pro bono representation – the publisher and reporter simply did not have the money to adequately defend themselves.

Lead Jackson Walker attorneys Nancy Hamilton and John K. Edwards, along with Charles L. "Chip" Babcock, agreed to the representation and have twice successfully obtained orders from the trial court denying the plaintiff's request to compel the disclosure of the reporter's confidential sources in the Sheriff's Department. The fight has resulted in extensive discovery, including multiple depositions and hearings, and ultimately led to the filing of two motions for summary judgment, both of which were denied by the trial court.

The second motion was appealed under the Texas interlocutory appeal statute, which permits media defendants to immediately appeal an adverse summary judgment ruling where a defense is based in whole or in part on the free speech clause of the First Amendment to the U.S. Constitution. On December 31, 2009, however, a retired justice sitting by assignment authored an opinion that affirmed the denial of summary judgment. *LeaAnne Klentzman and Carter Publications, Inc. d/b/a The West Fort Bend Star, Inc. v. Wade Brady*, No. 01-07-00520-CV (Tex. App.—Houston [1st Dist.] n.p.h., December 31, 2009). The case now appears headed to trial.

The article at issue, entitled "*Deputy Brady's tape collecting called 'Roadside Suppression'*" (the "Article") and written by Ms. Klentzman, discussed questionable meetings that Chief Deputy Brady had with deputies involved in the ticketing of Brady's son for Minor in Possession ("MIP") of alcohol and the subsequent collection by Chief Deputy Brady of clandestine audiotapes of those meetings. During the course of the article, several details concerning Chief Deputy Brady's son, Wade, were discussed to give context to the article, including the MIP incident and another run-in that the son had with a Texas Department of Public Safety ("DPS") Officer who handcuffed the young Brady during a traffic stop. While the Court held that the gist of the Article concerned the public official father and ***not*** his son (the plaintiff), the Court nevertheless held that there were fact issues as to whether the gist of the Article was true or substantially true. The Court further held that the plaintiff was not a limited purpose public figure for purposes of the Article and, thus, was not required to prove actual malice.

The appellate court's decision will almost certainly force defendants to trial, an expensive proposition for a small town newspaper and reporter that will threaten the continued existence of the *Star*. While Jackson Walker will continue its pro bono representation, Ms. Carter and Ms. Klentzman are seeking donations to help defray out-of-pocket expenses that will necessarily be incurred in preparing and trying this important free speech case to a jury. If you wish to help with this worthwhile cause, please contact counsel for the *Star* and Ms. Klentzman, John K. Edwards, at 713-752-4319 or by email at jedwards@jw.com.

Background

According to the pleadings and discovery developed in the case, on February 10, 2002, Wade Brady was cited for being a minor in the possession of alcohol. The MIP charge was the culmination of events beginning the day before at Mardi Gras in Galveston, Texas, which later resulted in Wade Brady traveling in a vehicle with a cooler containing beer. Wade Brady and another friend were stopped by deputies from the sheriff's department after Brady's friend threw a bottle out of the window of Brady's truck. When one of the

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deputies saw the cooler in Brady's truck, he asked and was given permission to search the cooler. Because he was underage at the time, Brady received a ticket for being a minor in possession of alcohol.

Testimony reveals that soon after Wade Brady received the MIP Charge, his father, Chief Deputy Craig Brady, met with the deputies who issued the ticket. In the Article, Klentzman described this meeting and subsequent meetings that occurred between Chief Deputy Brady and one or more of the deputies and questioned the reason for the meetings. Unbeknownst to the other participants at the time, Chief Deputy Brady and the deputies each secretly audio taped these conversations. After these meetings, Wade Brady went to trial on the MIP Charge in a Justice of the Peace Court in Fort Bend County, Texas.

Ms. Klentzman attended the trial and summarized some of the testimony in the Article. Wade Brady was ultimately acquitted of the MIP Charge and, several months later, received an order from the Justice of the Peace expunging the occurrence from his record. According to the Article, Chief Deputy Brady circulated the expunction order to the deputies involved in the MIP incident to round up the clandestine audio taped recordings.

The appellate court's decision will almost certainly force defendants to trial, an expensive proposition for a small town newspaper and reporter that will threaten the continued existence of the *Star*.

In a nutshell, the Article questions the propriety of Chief Deputy Brady having first met with the deputies involved in the MIP incident, and then trying to collect the audiotapes at issue.

The other incident involving the young Brady that Ms. Klentzman wrote about in the Article related to a DPS traffic stop in which Wade Brady was placed into temporary custody after he, his brother Cullen, and another person were pulled over by a DPS trooper. In the Article, Ms. Klentzman relates, based on a DPS dashboard video that she reviewed, that the Brady sons had let the trooper down the streets of Rosenberg to their riverside home, and based on conduct during the stop, the trooper handcuffed Wade Brady.

Wade Brady subsequently filed a defamation suit, alleging that the Article defamed him by misrepresenting the factual circumstances surrounding the MIP ticket and the DPS traffic stop.

Summary Judgment & Appellate Rulings

After substantial discovery and motion practice, Defendants moved for summary judgment in the trial court on several grounds, including absence of evidence of the essential element of falsity, the substantial truth defense, and the absence of Constitutional "actual malice" based on plaintiff being a limited purpose public figure. The trial court, Judge Thomas Culver presiding, denied the motion.

Defendants appealed. The appellate panel consisted of Justices Evelyn Keyes, Elsa Alcala, and Tim Taft, with retired Justice Taft authoring the opinion. The Court affirmed the trial court's denial of appellants' no-evidence and traditional motions for summary judgment, and remanded the case to the trial court for further proceedings.

With respect to substantial truth, appellants contended that even if particular underlying statements in the Article were inaccurate, the "gist" of the Article was nevertheless substantially true. Appellants contended that the gist of the Article was that "Chief Deputy Brady repeatedly contacted, in an unusual and atypical manner, the deputies that issued [Wade] a ticket and subsequently circulated an expunction order to round up clandestine audiotapes of those meetings." Brady argued in response that even if particular underlying statements in the Article are literally true, the gist of the Article was false because, through omission of material facts, it created a substantially false impression.

Brady asserted that the gist of the Article was that the young Brady "was using his Father to 'suppress' the justice system" and that "the meetings between [Chief Brady] and the Deputies were for the purpose of 'roadside suppression' of evidence of [Wade's] guilt for minor in possession." Brady thus contended that the Article painted a picture of Brady and his brother as "a sort of drunken 'Dukes of Hazard' tandem who are fortunate enough to have Fort Bend County's version of 'Boss Hogg' as their Father to put the 'fix' on the system."

The Court first observed that the heading of the Article reflected that the Article was about Chief Deputy Brady, and

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the subject of the Article was the alleged demand by Chief Deputy Brady for deputies to turn over certain audiotapes and the propriety of such alleged action. Thus, the emphasis was on Chief Deputy Brady's reaction to incidents involving his son, and not on Wade Brady himself. After construing the Article as a whole, the Court concluded that the gist of the Article was that "Chief Brady, in an effort to help his son, Wade, abused his official position by intervening on his son's behalf in an effort to "suppress" evidence, specifically, by intimidating and coercing the deputies who issued Wade a ticket and illegally demanding and requiring them to turn over to him audiotapes related to the incident."

The Court affirmatively stated that while "many details regarding Wade's encounters with law enforcement appear in the Article, the 'gist' of the Article is not Wade's alleged misdeeds; Wade is a secondary character, portrayed as the beneficiary of his father's purportedly improper actions, whose dealings with the law provided the catalyst for his father's alleged misconduct."

Nevertheless, the Court proceeded to evaluate the substantial truth of the gist of the Article with respect to Chief Deputy Brady, and not with respect to the actual plaintiff, Wade Brady. The Court concluded that sufficient summary judgment evidence had been presented in the form of deposition testimony and affidavits to defeat the no-evidence motion. With respect to the traditional summary judgment motion, the Court concluded that accepting Brady's evidence as true, "Chief Brady did not intimidate or coerce the deputies in an effort to improperly "suppress" evidence in order to help Wade." This evidence, being contrary to the gist of the Article, would give an average reader the impression that Wade Brady was the beneficiary of, and reason for, Chief Brady's abuse of his public position through intimidation, coercion, and improper "suppression" of evidence.

The Court "cannot conclude that this gist is not more harmful to Wade's reputation in the mind of the average reader than the presumed truth that Wade was not the beneficiary of, nor the catalyst for, any official misconduct on the part of Chief Brady because no such intimidation, coercion, or improper "suppression" of evidence for Wade's benefit ever took place."

Finally, the Court rejected the argument that Brady was a limited purpose public figure and, thus, must prove actual malice. "The evidence does not support a finding that there was any "public controversy," involving "people discussing a real question," "the resolution of which was likely to impact persons other than those involved in the controversy." Moreover, "the mere fact that Wade's father is a public official and, thus, that Wade's behavior might be more "newsworthy" than a teenager whose father was not a public official, does not mean that any alleged misbehavior in which he might have engaged made Wade a limited-purpose public figure with respect to the particular controversy at issue in this litigation."

Ms. Klentzman and The West Fort Bend Star are represented in this matter by Nancy Hamilton, John K. Edwards, and Chip Babcock of Jackson Walker LLP, Houston, TX. Plaintiff is represented by John Zavitsanos of Ahmad, Zavitsanos & Anaipakos, Houston, TX.

MLRC Upcoming Events

Our 30th Anniversary
1980-2010

MLRC/Stanford
Digital Media Conference
May 6-7, 2010 | Stanford University
Palo Alto, CA
For more information, click here.

NAA/NAB/MLRC
Media Law Conference 2010
September 29-October 1 | Chantilly, VA
For more information, click here.

MLRC Annual Dinner
November 10 | New York, NY

DCS Annual Meeting
November 11 | New York, NY

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New Jersey Appellate Court Holds That Truth Is a Defense to Defamation Claim Despite Expungement

By Carolyn Conway

In a case of first impression, a New Jersey appellate court recently held that the defense of truth is available to a defendant who publishes a statement relating to a plaintiff's criminal conviction, even if the conviction had been expunged at the time of the statement. *G.D. v. Kenny et al.*, No. 3005-08 (N.J. App. Div. Dec. 21, 2009) (Wefing, P.J., Grall, LeWinn, JJ.).

Background

This case arose out of events surrounding the 2007 Democratic primary election for the New Jersey state senate. One of the Democratic candidates was Brian Stack, who in 2007 was a member of the State Assembly and served as the mayor of Union City. Years earlier Stack had served on the Hudson County Board of Freeholders, and Plaintiff G.D. had worked as a part-time aide for him. Despite their prior political connection, G.D. apparently was not working on Stack's 2007 campaign.

Although Stack was a Democrat, the Hudson County Democratic Organization (HCDO) did not support Stack's candidacy and instead backed another candidate. The HCDO hired Neighborhood Research Corporation (NRC) to assist them in opposing Stack's candidacy.

Through means that are unclear, NRC uncovered that in the early 1990s, G.D. had been charged with possession and distribution of a controlled dangerous substance. According to a 1993 judgment, G.D. was ultimately convicted of second degree possession of a controlled dangerous substance with intent to distribute, and sentenced to five years. G.D. had this record expunged in 2006; however, as late as August 2008, the information was readily available on the Department of Corrections' website. The HCDO decided to utilize this information by publicizing it in two campaign flyers distributed during the primary election, each containing information about G.D.'s conviction.

The first flyer, which included a picture of G.D. and was printed in both English and Spanish, stated in relevant part: "IT'S THE COMPANY YOU KEEP. And the sleazy crowd Brian Stack surrounds himself with says a lot about who Stack is. COKE DEALERS AND EX-CONS…. [G.D.] is also a DRUG DEALER who went to JAIL for FIVE YEARS for selling coke near a public school."

The second flyer, also in English and Spanish, stated in relevant part: "We all know the threat that drugs and illegal guns have in our communities. But not Brian Stack. He continues to surround himself with one shady character after another -- not one but two convicted drug dealers and ex-cons, whom Stack got a high paying county job and a drugged out gun running lowlife who was his campaign manager." Although the second flyer did not mention G.D. by name, it also contained his picture. Approximately 17,000 copies of each flyer were disseminated.

Trial Court Decision

In his first lawsuit, G.D. sued the HCDO and its chief executive officer Bernard Kenny for defamation and intentional infliction of emotional distress based on the flyers' reference to G.D.'s 1993 conviction. In a second lawsuit, brought over a year later in May 2008, G.D. sued Craig Guy, the executive director of the HCDO; Howard Demellier, Raul Garcia and Nicole Harrison-Garcia, who had assisted the HCDO in the 2007 primary election; and NRC along with its principals, Richard Shaftan and CareyAnn Shaftan. This second lawsuit claimed: defamation, negligent or intentional infliction of emotional distress, invasion of privacy, misappropriation of one's name and civil conspiracy.

All parties filed cross-motions. The HCDO and Kenny filed motions to dismiss while the other defendants moved for summary judgment. G.D. filed a motion to prohibit all defendants from relying on truth as a defense.

The trial court judge denied the motions, ruling that an issue existed as to the fault standard G.D. was required to prove. All parties sought leave to appeal and the appellate court agreed to interlocutory review of the trial court's decision.

Appellate Court Decision

The appellate court began its analysis by noting that under New Jersey law, a defamation claim has three elements:

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1) a false and defamatory statement, 2) that was published, 3) with fault at least amounting to negligence. Defendants argued on appeal that G.D. could not satisfy the first element, because the statements were true, while G.D. argued that the expungement rendered any statement regarding his conviction false. The court observed that the trial court judge had mistakenly focused solely on the third element and ignored the first two.

Rather than focusing on the third element, as the trial court had done, the appellate court first analyzed whether the statement was defamatory. The crux of the issue as the appellate court viewed it was whether the expungement rendered the statement false. Expungements in New Jersey are governed by *N.J.S.A.* 2C:52-1 to -32. The statute provides that although an expunged record, such as a conviction, is "deemed not to have occurred," *N.J.S.A.* 2C:52-27, there are certain instances in which the information may still be used, such as in setting bail or parole hearings. The statute does not address whether an expunged conviction can be relied upon as evidence in a defamation claim.

Without statutory guidance from the New Jersey Legislature, the court examined expungement statutes from other states. The appellate court found two state statutes, California's and Oregon's, relevant to its inquiry. In California, a minor's sealed misdemeanor record is allowed to be opened for purposes of proving truth in a defamation claim. *Cal. Penal Code* § 1203.45(f). Oregon's statute is even more expansive, allowing a court to disclose an expunged record to refute any claim to which truth is an affirmative defense. *Or. Rev. Stat.* § 137.225(9). As the *G.D.* court noted, an Oregon appellate court relied on that statute to hold that a newspaper could successfully assert truth as a defense to a defamation claim based on an expunged conviction. *Bahr v. Statesman Journal Co.*, 624 *P.*2d 664 (Or. Ct. App.), *review denied*, 631 *P.*2d 341 (Or. 1981).

The court also looked to other out-of-state decisions. In *Stephens v. Van Arsdale*, 608 *P.*2d 972, 986 (Kan. 1980), the Kansas Supreme Court noted in *dictum* that "a district court might in its discretion permit the release of certain documents contained in an expunged file in order to achieve the ends of justice." The Supreme Judicial Court of Massachusetts also rejected the notion that a sealed conviction cannot be used to assert the truth of the conviction. *Rzeznik v. Chief of Police of Southampton*, 373 *N.E.*2d 1128, 1130 (Mass. 1978) (noting that the sealing statute allowed sealed records to be maintained, and additionally provided for their use in certain circumstances).

The *G.D.* court noted an important similarity between the *Bahr* and *Rzeznik* cases: the plaintiff in both cases admitted the truth of the conviction. The court pointed out that although G.D. did not explicitly admit that the statements about his conviction were true, he did present the expungement order as an uncontested fact. "Thus," the court opined, "like the Oregon and Massachusetts courts before us, we see no value in permitting plaintiff to use the expungement statute as a sword, rather than the shield it was intended to be." *G.D.*, No. A-3005-08 (slip op. at 18).

G.D. also argued that the flyers, even if properly based on an expunged conviction, were defamatory because they inaccurately depicted him as dealing drugs near a school and erroneously alleged that he had served five years in jail. The appellate court rejected this argument, noting that in order to be considered truthful, a statement need only be "fairly accurate." Because an individual anywhere in Union City is near a school, the court found that statement to be fairly accurate. Likewise, the court found the statement concerning G.D.'s incarceration to be fairly accurate since he was sentenced to five years in prison, regardless of the fact that he served less than the full sentence.

The court rejected G.D.'s additional claims of emotional distress, privacy torts and civil conspiracy on the basis of defendants' valid truth defense. The court also dismissed G.D.'s claim of misappropriation, asserted only against the Shaftan defendants, stating that there must be a commercial purpose behind the use of a name for such a claim to succeed. The court found that the Shaftan defendants' incidental financial gain from producing the flyers did not amount to a commercial purpose that would overcome the political nature of the flyers' message.

Carolyn R. Conway is an associate at the law firm Wiley Malehorn Sirota & Raynes in Morristown, New Jersey, and is the former 2007-2008 MLRC Legal Fellow. Defendants Bernard Kenny, The Hudson County Democratic Organization,Inc., Craig Guy, Harold E. Demellier, Raul Garcia and Nicole Harrison-Garcia were represented by McManimon & Scotland, L.L.C. Defendants Neighborhood Research Corp., Richard K. Shaftan, and CareyAnn Shaftan were represented by Michael Patrick Carroll. Plaintiff was represented by Cohn Lifland Pearlman Herrmann & Knopf, L.L.P.

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Summary Judgment for Newspaper Affirmed on Appeal

Denial of Anti-SLAPP Motion Not Law of the Case on Summary Judgment

A California appellate court this month affirmed summary judgment in a libel case against a local newspaper, finding insufficient evidence of actual malice. *Portner v. Sullivan*, No. A120387, 2010 WL 109518 (Cal. App. 1st Dist. Jan. 13, 2010) (Margulies, Marchiano, Banke, JJ.).

The court found that plaintiff's evidence of alleged bias on the part of the newspaper was insufficient to defeat summary judgment. In addition, the court reaffirmed the principle that the denial of an anti-SLAPP motion is not law of the case for determining a subsequent motion for summary judgment based on an expanded evidentiary record.

Background

The plaintiff, Bruce Portner, owned and operated a minor league baseball team in Vacaville, California. In 1999, plaintiff and local officials agreed on a development deal for a subsidized stadium. The venture ultimately soured and plaintiff declared bankruptcy in 2002. During this time, the Fairfield Daily Republic published numerous articles criticizing plaintiff's business dealings. Plaintiff sued the newspaper and individual reporters and editors for libel and slander. Among the statements at issue were reports that plaintiff had failed to maintain proper liability insurance for the team and that a bench warrant was issued for his arrest for failure to appear in one of the litigation proceedings surrounding the collapse of his team ownership.

In 2003, the trial court denied the defendants' motion to strike the complaint under the state anti-SLAPP statute, Cal. Code 425.16; and the appellate court affirmed in an unpublished ruling issued in December 2004. The anti-SLAPP motion was denied because of plaintiff's allegations of bias and improper motive on behalf of the newspaper and reporter. Among other things, the plaintiff claimed that the reporter was biased because the reporter had previously been fired from a job by plaintiff. Plaintiff's claims of bias, however, were not substantiated during discovery and the trial court granted summary judgment to the defendants.

Court of Appeal Decision

On appeal, the plaintiff argued that the trial court should have applied the law of the case doctrine to the findings on the motion to strike. The Court, however, found that this restrictive application made little sense.

> Portner's rule would penalize defendants for filing anti-SLAPP motions. If the defendant did not prevail on the motion, he would most likely forfeit the opportunity to bring a summary judgment motion after conducting discovery and be forced to incur the expense of a trial. A prudent defendant would feel compelled to forego an anti-SLAPP motion, and wait until he had taken discovery and learned more about the plaintiff's case, before seeking to have it dismissed. This would frustrate the objectives of the anti-SLAPP statute. *Portner* at *5.

In this case, the evidence on summary judgment was substantially different than the evidence used to decide the 2003 motion to strike. Among other things, plaintiff's deposition testimony confirmed the truth of several allegations.

As for actual malice, the Court agreed that plaintiff's evidence on summary judgment provided no support for his claim. Plaintiff sought to rely on an editor's emails referring to plaintiff as a "retraction king" (because of the number of corrections plaintiff had requested); and stating that there was "[n]o need to ever write another thing about him except maybe his obituary." At most these comments suggested frustration with the time spent dealing with plaintiff's complaints about the paper's coverage of his business dealings. They did not suggest the paper or reporter had a motive to publish knowingly false articles.

Moreover, plaintiff's claim that the reporter was biased failed to pan out after discovery. The reporter worked as mascot for plaintiff's minor league team for a few games for purposes of writing an article, but there was no firing. "Losing out on a $25 per game stipend," the Court noted, "does not seem like a plausible reason for a professional journalist to knowingly expose himself and his employer to the risk of liability for defamation."

Finally the Court denied plaintiff's motion for reconsideration based on his trial counsel's alleged oversight to use favorable deposition testimony to oppose summary judgment. Reconsideration, the Court concluded, is not a catch-all remedy for every case of poor judgment.

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Fourth Circuit Affirms Consumer Website's Section 230 Immunity in Defamation Action

By Cameron Stracher and Alissa B. Kelman

In a victory for consumers and free speech, a divided Fourth Circuit panel affirmed a decision by the Eastern District of Virginia granting defendant's motion to dismiss in *Nemet Chevrolet, Ltd v. Consumeraffairs.com, Inc*, 2009 WL 5126224 (4th Cir. 2009) (King, Agee, Jones, JJ.).

The Fourth Circuit held that defendant, a consumer website that encourages users to post complaints about businesses, was immune from liability under section 230 of the Communications Decency Act for allegedly defamatory postings about automobiles sold or serviced by plaintiff, New York City automobile dealer Nemet Chevrolet.

Although section 230 clearly provides immunity to websites that merely act as a forum for comments posted by others, there has been a trend by plaintiffs to characterize interactive websites as "information content providers" in order to evade the strictures of the statutory scheme since the Ninth Circuit's decision in *Fair Housing Council v. Roommates.com*, LLC, 521 F.3d 1157 (9th Cir. 2008). Thus, plaintiff Nemet did not challenge Consumer Affairs' standing as an "interactive service provider" under section 230, but did argue that Consumer Affairs was also an "information content provider" under the statute because it encouraged, prompted, and even wrote some of the postings at issue.

Specifically, Nemet argued that Consumer Affairs was responsible for the creation and development of twelve posts at issue, in whole or in part, through the structure and design of its website which solicited consumer complaints and steered the complaints into a specific category designed to attract attention by class action lawyers. Citing the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 199 S. Ct. 1937 (2009), however, the Fourth Circuit held that Nemet's Amended Complaint did not "even intimate" that Consumer Affairs materially contributed to the allegedly defamatory aspects of the posts through the structure and design of its website. The Fourth Circuit noted that in *Roommates.com* the website encouraged, and even required, users to provide information that was allegedly unlawful, while the complaints submitted to the Consumer Affairs website, even if used to develop data for class action lawsuits, was not unlawful.

Alternatively, Nemet argued that Consumer Affairs was an information content provider because of its participation in the preparation of consumer complaints. Nemet alleged that Consumer Affairs contacted consumers to ask follow-up questions about their complaints and to help draft or revise complaints. In analyzing the sufficiency of the facts pled regarding Consumer Affairs' role in the preparation of consumer complaints, the Fourth Circuit held that reaching out to consumers to ask questions does not constitute developing or creating content within the meaning of the CDA. Drawing on its holding in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the court held that threadbare and conclusory allegations that Consumer Affairs redrafted consumer complaints could not meet the requirement that Consumer Affairs went beyond the traditional editorial and self-regulatory functions of an online publisher.

In addition, Nemet also argued, "on information and belief," that eight other posts on the website were fabricated by Consumer Affairs. Nemet claimed it could not find the customers who made the posts in its own records, based on the date, model of car, and first name of the customer. The Fourth Circuit, however, held that *Iqbal* required more than mere conclusory allegations about defendant's actions. Specifically, the court held that Nemet's argument that Consumer Affairs fabricated the posts and created fictitious customers in order to attract other consumer complaints, amounted to nothing more than "pure speculation."

In his dissent, Judge Jones (sitting by designation) argued that allegations in the Amended Complaint were sufficient to set forth a claim that Consumer Affairs fabricated the eight posts.

The dissent warned that the *Iqbal* pleading standard was not intended to merge pleading requirements into a probability standard like that used to determine a motion for summary judgment. While liability at the pleading stage must be plausible, Judge Jones argued, it need not be probable. Accordingly, although there might be other plausible explanations that point away from liability, alternative explanations should not be considered a bar to an action or few cases will survive the pleading stage.

Consumeraffairs.com is represented by Cameron Stracher. The case was handled by Jonathan Frieden of Odin, Feldman & Pittleman, PC. Plaintiff was represented by Benjamin Chew and John Hilton of Patton Boggs, LLP.

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Pennsylvania Court Dismisses Libel Lawsuit Arising From Satire in Legal Newspaper

No Evidence of Actual Malice

By Robert C. Clothier

Another Pennsylvania court has dismissed a defamation lawsuit against a newspaper on actual malice grounds, showing that the filing of dispositive motions on those grounds remains a viable option despite a recent Pennsylvania Supreme Court decision that had language appearing to make such motions much harder to win.

The lawsuit was based on a satire submitted by an attorney to a legal newspaper for publication that responded to a satire that the plaintiff, also an attorney, had submitted. The parties bifurcated discovery, focusing first on the issue of actual malice. The court granted the paper's summary judgment motion, rejecting the plaintiff's contentions that actual malice was shown by (1) the paper's knowledge that the commentary was satirical, and technically not truthful, and (2) the paper's failure to investigate whether the commentary's hyperbolic statements were premised on and implied false and defamatory facts. *See Leber v. Young, et al.*, Nos. 2003-CV-2153 & 2003-CV-2855 (Dauphin County Court of Common Pleas, Pa.).

One Satire Breeds Another

In 2002, Jeff Leber, the part-time district attorney for a rural Pennsylvania county, submitted a commentary to the Pennsylvania Law Weekly, a weekly legal newspaper disseminated throughout Pennsylvania. In the commentary, Leber "shared his wisdom" on how to be a part-time D.A. based on his "years of doing it the wrong way." He complained that "Aunt Verna and Aunt Ethel fired" him because "surly miscreants in the jail are plotting" to make his life too busy to leave time for his private law practice. Accordingly, he proposed that part-time D.A.'s should "scale down your job to fit your pay" and to "free up … time so that we can do what lawyering is really about – making money."

Believing it to be purely satirical, the paper published the commentary and gave it an appropriate title: "Confessions of a Part-Time D.A.: A Modest Proposal for Running a Prosecutor's Office in Your Spare Time."

In response, defendant Bonnie Sue Young, a local attorney, submitted her own commentary that poked fun at Leber (calling him "Jeffrey the Great") and gave her own "few tips to … part-time district attorneys." For example, she suggested that they "hunt" down their "enemies" and "eliminate [e] anyone who may actually defend the scum" charged with crimes, and that they could keep the jails full by making "it clear that raising your voice is a felony."

Believing that this piece was also pure satire, the paper published it with the title: "Rebuttal to a Modest Proposal: A Potter County Attorney Makes Light of the Plight of the Potter County Part-Time D.A."

While the plaintiff thought his piece was satirical, he took a very different view of Young's commentary, bringing a defamation lawsuit against her and the paper in the Dauphin County Court of Common Pleas in Harrisburg, Pa. He claimed that it accused him of "criminal conduct," "dishonesty," "greed," "suborning perjury," "official oppression and obstructing administration of law," and "violation of his oaths as District Attorney."

Defendants' Early Dispositive Motions Denied

Defendants' initial motions to dismiss the lawsuit were unsuccessful. First, defendants filed motions to dismiss arguing that Young's commentary was rhetorical hyperbole that could not reasonably be interpreted to state facts about the plaintiff and, as a result, was incapable of defaming him as a matter of law. That motion was denied. While the trial court issued no opinion, one of the three judges at oral argument seemed to believe that if just one person, perhaps a person close to both the plaintiff and defendant Young, thought that the commentary stated defamatory facts about him, then the plaintiff had a cognizable claim.

Second, defendants filed a motion for judgment on the pleadings, arguing that the plaintiff had failed to allege facts that would establish actual malice by clear and convincing evidence. This motion was prompted by a then-recent Pennsylvania Supreme Court decision that imposed the legal obligation on a defamation plaintiff to allege facts showing actual malice or suffer dismissal at the motion to dismiss stage. *See Tucker v. Philadelphia Daily News*, 848 A.2d 113 (Pa. 2004).

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Defendants contended that the plaintiff had alleged nothing more than a failure to investigate, which is insufficient to show actual malice. That motion was denied without an opinion.

The parties then agreed to bifurcate discovery, focusing first on the issue of actual malice. (Perhaps influencing counsels' agreement was the fact that all of the evidence on the issue of truth and damages lay in Potter County, a remote county in north central Pennsylvania that is virtually inaccessible except by car and which is snowed in most of the winter.) Plaintiff took the deposition of the reporter and editors involved in the commentaries at issue, and defendants deposed the plaintiff.

Defendant Young was not deposed, as she passed away during the pleadings' stage. The plaintiff admitted at his deposition that he had had a "reconciliation" with Young before she died. But despite efforts to mediate the case, no settlement was reached. Her death, however, meant that the truth of any facts in her commentary was going to be much harder to establish.

Motions for Summary Judgment

All defendants filed motions for summary judgment on the issue of actual malice. The media defendants argued that the application of the actual malice test required two steps. First, the plaintiff had to establish that the defendants actually believed that Young's commentary stated facts about him. Second, the plaintiff had to prove that the defendants knew that any such facts were false or entertained serious doubts about their truth.

The plaintiff could not get past the threshold issue. His primary argument was that the commentary was "absurd" and an obvious "personal attack" and put the paper on notice that there was more to what she was saying. But the evidence showed that the paper's reporters and editors did not know the two lawyers, had no idea about the prior feuds between them, and had no reason to think that that Young's piece was anything other than a satire.

The plaintiff argued that if the paper had investigated further, it would have easily determined that what Young was saying was based on real incidents arising between the plaintiff and defendant Young. But defendants argued, and the court agreed, that such failure to investigate was insufficient to show actual malice.

Plaintiff made the argument that can create problems in satire cases. He claimed that because the papers' reporters and editors believed Young's commentary to be satirical and non-factual, they therefore knew it to be false. Defendants argued that by that logic, all satire would, by definition, be published with actual malice, which made no sense and isn't the law. Moreover, when pushed, the plaintiff was never able to identify any particular fact in the commentary that the paper knew to be false. The bottom line was that the paper simply didn't know if any facts claimed to be in the commentary were true or not.

Defendant Young's summary judgment motion -- which primarily argued that the Dead Man's Act effectively precluded plaintiff from offering evidence of actual malice on her part -- was denied. But she and the plaintiff later reached a settlement. Plaintiff never appealed the court's dismissal of the paper, and, as a result, the trial court never wrote a supporting opinion explaining the reasoning for any of its decisions.

Observations

Three observations can be drawn from this case. First, Pennsylvania courts continue to dismiss defamation lawsuits on actual malice grounds despite a recent Pennsylvania Supreme Court decision, *see Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 907 (Pa. 2007), that led some to fear that such dispositive motions were simply no longer going to be granted. Second, counsel should consider agreements or court orders that bifurcate discovery and permit a dispositive motion on a particular legal issue without the need for full-blown discovery on all relevant issues. In this case, such an agreement saved quite a bit of time and expense.

Lastly, media publications must always remain especially wary of satires or jokes made or submitted by others, especially when they don't know a lot about the personalities in play. Here, in hindsight, the paper may have done things differently.

Robert C. Clothier of Fox Rothschild LLP, and Allison Hoffman, S.V.P. & Chief Legal Officer of ALM Media, Inc., represented the media defendants, American Lawyer Media Holdings, Inc., American Lawyer Media, Inc., American Lawyer Media, L.L.C., The New York Law Publishing Company and the Pennsylvania Law Weekly. Richard C. Angino and Daryl E. Christopher of Angino & Rovner, P.C., in Harrisburg, Pa., represented the plaintiff, Jeff Leber. Thomas E. Brenner, Esquire of Goldberg Katzman P.C. in Harrisburg, Pa., represented defendant Bonnie Sue Young.

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Southern District of West Virginia Declares Rigorous Standard of Review

By Patricia Foster

A federal district court in West Virginia ruled that libel-by-implication claims will be held to a rigorous standard. *Tomblin v. WCHS-TV8*, 2010 U.S. Dist. LEXIS 4769 (S.D. W. Va. Jan. 21, 2010). Defamation claims premised on true statements must be dismissed unless evidence indicates that a defendant intended or endorsed the claimed implication.

Background

The case originated from a news report ("News Report") broadcast on July 17, 2008 by WCHS-TV8 regarding allegations of abuse that led to a state agency's investigation into Kim's Kids Child Care ("Kim's Kids") in Barboursville, West Virginia. A mother complained to West Virginia's Department of Health and Human Resources ("DHHR") that her child was abused in a sexual nature by another boy while at Kim's Kids. Although the alleged perpetrator of the abuse was a child, the mother's anger and the DHHR investigation both focused on Kim's Kids and its duty to supervise the children in its care.

In its investigative report, DHHR documented in graphic terms the mother's allegation that a boy "touched [her child] inappropriately by sticking his finger into [her child's] rectum and grabbing [her child's] genitals." The DHHR discovered and documented numerous infractions during its investigation into Kim's Kids including worker inattentiveness and smoking on the premises. The DHHR investigation concluded that "although a finding of child neglect cannot be made at this time, the possibility that such an incident could occur is likely." As a result of the DHHR investigation, Kim's Kids was ordered to close, but that order was later rescinded on appeal.

On July 17, 2008, with a copy of the DHHR investigative report in hand, the mother met with Elizabeth Noreika, reporter for WCHS-TV8. The mother repeated her allegation that her son was sexually abused by another child while at Kim's Kids and expressed her anger that the daycare abused her trust and her child. After meeting with the mother, Noreika proceeded to Kim's Kid's seeking comment. In an exchange filmed by a WCHS-TV8 cameraman, an unnamed woman who opened the door to Kim's Kids invited Noreika inside for this purpose. However, once inside, this woman who was in fact owner Kim Tomblin, refused comment except to say that the allegations were not true. Both before and after seeking comment from Kim's Kids, Noreika spoke with John Law, Communications Director of DHHR, about the allegations and how they would be reported by WCHS-TV8. Law agreed to be interviewed on camera and, in an unusual turn of events, previewed the entire News Report before it was broadcast.

WCHS-TV8 broadcast its News Report about Kim's Kids on July 17, 2008 stating, "[A mother] alleges her son was sexually abused while at Kim's Kids Child Care." The report described the mother's belief that the daycare "abused her trust and her child." WCHS-TV8 knew that the alleged sexual abuse occurred between two children, but did not mention this fact or any details about the alleged perpetrator. Without identifying Kim Tomblin, the News Report briefly depicted her as she opened the door of Kim's Kids to Noreika. The News Report described the Daycare's position that "any and all allegations aren't true." Showing footage including the interview with John Law, the News Report described the DHHR investigation and its finding relevant to the alleged sexual abuse of only worker

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inattentiveness. Finally, the News Report discussed the status of Kim's Kids and a pending appeal.

Kim Tomlin sued WCHS-TV8 claiming that the News Report stated or falsely implied that she or a worker at Kim's Kids sexually abused a child. Tomblin primarily argued that a false impression to this effect was created by WCHS-TV8's silence regarding the known fact that a child, not an adult, was accused as the perpetrator of the sexual conduct. She also claimed falsity and defamation in WCHS-TV8's characterization of the mother's allegations as "sexual abuse" and in its report of the mother's belief that the daycare "abused her trust and her child." Further, she claimed that the inclusion of video footage of her opening the door "juxtaposed" her image with the story involving sexual abuse in such a way as to implicate her as the alleged abuser and portray her in a false light. Further, Tomblin claimed that she was caused actionable emotional distress by the broadcast.

Summary Judgment

On summary judgment, U.S. District Judge Robert C. Chambers dismissed Tomblin's claims in their entirety. *Tomblin v. WCHS-TV8*, 2010 U.S. Dist. LEXIS 4769 (S.D. W. Va. Jan. 21, 2010). At the outset, Judge Chambers determined that all statements broadcast by WCHS-TV8 were literally true. As a matter of law, WCHS-TV8's characterization of the allegations as involving "sexual abuse" was factually accurate regardless that the DHHR's investigative report did not contain those words. The mother's opinion that the daycare "abused her trust and her child" in failing to safeguard her child was accurately recounted, attributed to the mother, and comprised no false statement.

In addressing Tomblin's argument that WCHS-TV8's silence as to the alleged perpetrator implicated her or her employees, Judge Chambers extended the 4th Circuit's interpretation of Virginia law to impose a rigorous standard on West Virginia libel-by implication plaintiffs. *See Chapin v. Knight-Ridder Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993). To be liable for implied defamation, a broadcaster must do something beyond the mere selective reporting of materially true facts. Courts should dismiss libel-by-implication claims absent evidence that the defendant intended or endorsed the claimed implication.

Judge Chambers determined that WCHS-TV8's omission of details regarding the alleged perpetrator injected no opinion or endorsement, but merely mirrored the mother's and the DHHR's focus on the daycare rather than the accused child. Further, WCHS-TV8's broadcast of exculpatory facts negated any claimed implication of wrong-doing by the daycare. Judge Chambers concluded that, while some viewers might have formed an incorrect assumption that a daycare worker was accused of sexual abuse, WCHS-TV8's News Report did not intend, create or endorse that assumption.

As to Tomblin's other theories of liability, Judge Chambers found no defamatory implication or false light in the broadcast of Tomblin's image as she opened the door to Kim's Kids because Tomblin had a legitimate connection to the news being reported and nothing suggested she played a larger role in the allegations. Judge Chambers also concluded that Tomblin's claims for emotional distress were merely derivative of her speech related claims and meritless.

In sum, West Virginia defamation law now clearly declares that a meritorious libel-by-implication claim requires more than the selective reporting of true facts and attributed opinion. A court cannot impose liability upon a broadcaster for every possible claimed inference or assumption that might be drawn from the reporting of true facts. Using a rigorous standard, courts should dismiss libel-by-implication claims absent evidence that the defendant intended or endorsed the claimed implication or insinuation.

Richard M. Goehler and Patricia Foster of Frost Brown Todd LLC, Cincinnati, Ohio and James D. McQueen, Jr. of the firm's Charleston, West Virginia office represented Sinclair Media III.

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Damage Award in Michael Jackson Illegal Videotape Case Overturned

An award of over $20 million against a chartered jet company owner who secretly videotaped Michael Jackson and his criminal defense lawyers in-flight was overturned by a California Court of Appeal earlier this month. *Geragos v. Borer*, No. B208827 (Cal. App. Jan. 11, 2010) (Kitching, Crosky, Aldrich, JJ.).

The court affirmed liability for the illegal videotaping, but found that the compensatory and punitive damage awards were excessive.

Background

Jeffrey Borer, owner of the now-defunct XtraJet, Inc., had audio-video recording equipment secretly installed on the plane that Jackson and his attorneys, Mark Geragos and E. Pat Harris, had chartered for the purpose of delivering Jackson to the Santa Barbara Sherrif's Department for his scheduled arrest in November, 2003. Intending to sell the flight footage, which contained no audio component due to a failure to install some of the necessary equipment, Borer began soliciting bids from the media

Geragos and Harris first learned of the recording from Fox News reporter Greta Van Sustern, who claimed to have heard from "somebody at Fox" that the videotape was being shopped around for between $1 million and $2 million dollars. When Borer's and XtraJet's lawyer, Lloyd Kirschbaum, refused Geragos and Harris' subsequent request to turn over the tape, they filed a civil complaint against Borer and XtraJet with the Los Angeles County Superior Court for, among other things, invasion of privacy and use of name and likeness. Plaintiff Michael Jackson dismissed his claims before the trial.

Superior Court Ruling

Geragos and Harris brought suit against Borer, XtraJet, an affiliated company called "Pavair," and a travel agent who was allegedly involved in the scheme, Cynthia Montgomery. The superior court granted a temporary restraining enjoining dissemination of the tape, and at the end of a bench trial entered judgment in the plaintiffs' favor on all counts. The defendants were ordered to destroy the original and any copies of the tape, and were permanently enjoined from its sale and dissemination. Additionally, the trial court awarded Geragos $2 million in compensatory damages against the defendants and $8 million in punitive damages each against Borer and XtraJet. Harris was awarded $250,000 in compensatory damages against the defendants and $1 million in punitive damages each against Borer and XtraJet.

Borer moved for a new trial, arguing that there was insufficient evidence to support the trial court's high damages awards, and that the punitive damages award violated his constitutional right to due process. His motion was denied, and he appealed.

Appellate Decision

The California Court of Appeal opened its analysis by applying a substantial evidence standard to the trial court's decision regarding plaintiffs' causes of action for common law and statutory misappropriation of name and likeness. Finding no evidence to support an argument that defendants used the videotape or the plaintiffs' likenesses for commercial gain, as defendants did not actually sell or otherwise profit from the recording—despite their intentions—the court determined that the ruling below was erroneous as to those two causes of action. However, the court pointed out that this error would not be sufficient to warrant reversal unless it was prejudicial. There was no prejudice because the five remaining causes of action could independently support the judgment below.

For the five remaining causes of action, plaintiff was entitled to receive tort damages equal to the "amount which will compensate for all the detriment proximately caused [by the tortuous conduct], whether it could have been anticipated or not." Both Geragos and Harris testified as to the nature and extent of that detriment. Geragos described the incident as "embarrassing," "extremely upsetting" and "enormously offensive," and claimed that it lead him to go to extreme, often

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costly lengths to safeguard the secrecy of his conversations with later clients. Harris testified that the incident injured his and Geragos' professional reputations, and also blamed the incident for a new atmosphere of paranoia at his law firm.

The court reasoned that while this testimony entitled plaintiffs to some non-nominal measure of damages, the amount awarded them by the trial court was outsized to the degree that it "shocks the conscience." Neither plaintiff was seriously injured physically or psychologically, and neither of them sought treatment for their claimed psychic trauma. There was no evidence that more than a handful of people had viewed the recording, and the tape had no audio component. Also relevant to the court was the absence of tangible evidence that plaintiffs' business was in fact detrimentally impacted by the incident. In addition, the court found that the extreme precautions taken by the plaintiffs in the wake of the incident were disproportionate to Borer's conduct, and therefore not proximately caused by it. The combination of these factors prompted the court to rule that the compensatory damages awarded at the trial below were excessive as a matter of law.

Borer's constitutional challenge to the punitive damage awards set by the superior court also met with considerable success. As the appellate court noted, quoting *Bullock v. Philip Morris USA, Inc.* "the due process clause of the Fourteenth Amendment prohibits grossly excessive or arbitrary punishment of a tortfeasor and therefore limits the amount of punitive damages that a state can award." 159 Cal. App. 4th 655, 689. In assessing the reasonableness of a punitive damages award, courts often consult five key factors bearing on the reprehensibility of conduct:

> (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident. *Major v. Western Home Ins. Co*, Cal. App. 4th 1197, 1223 (2009).

The court deemed Borer's conduct reprehensible, noting that he acted with malice and violated the sacrosanct privilege between attorney and client for the sole purpose of making money. Additionally, the court found that punitive damages were appropriate in this instance not only to punish the defendants, but also to serve as a deterrent to others who would breach a privilege to turn a profit. And yet, the court noted that most of the reprehensibility factors weighed against a high punitive damages award.

To calculate the proper measure of punitive damages due plaintiffs, the court employed a rule of thumb adopted by the United States Supreme Court. According to the high court, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Auto Ins. v. Campbell*, 538 U.S. 408, 425 (2003). It also acknowledged a commonly-used 3 or 4 to 1 ratio as instructive. The appellate court reasoned that since it had determined compensatory damages for Geragos and Harris should not exceed $100,000 and $50,000, respectively, and given the minor reprehensibility of Borer's actions, exponentially higher punitive damages awards could hardly be justified. As such, it declared that the punitive damages award granted the plaintiffs by the superior court violated Borer's due process rights.

Outcome

The Court of Appeal presented Geragos and Harris with a choice of outcomes. Should they take no more action, the judgment would be reversed and the case remanded for a new trial to determine appropriate damages. However, within thirty days of the court's decision, either Geragos, Harris, or both, were given the option of filing a written consent to a reduction in damages against Borer, as a result of which the judgment would be modified to reflect those revised amounts and affirmed accordingly.

For Geragos, the elective compensatory damage amount was set at $100,000, with punitive damages of $400,000, against Borer. For Harris, the amounts were $50,000 compensatory and $200,000 punitive against Borer. The decision of either plaintiff to accept or refuse the reduction would have no binding effect on the other.

Defendant was represented by Law Offices of Lloyd Kirschbaum. Plaintiffs were represented by Shelley Kaufman, Tina Glandian, Geragos & Geragos, Los Angeles, CA; and Brian S. Kabateck and Richard L. Kellner, Kabateck Brown Kellner.

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Florida Appellate

Court Rules Reporter Can Blog Live From Trial

By Timothy J. Conner

A Florida Appellate Court has ruled that a reporter may use a laptop to blog live from the courtroom during a high profile criminal trial, overturning a trial court's order. In a ruling issued on an emergency basis the Court quashed the order of the trial court which had prohibited the reporter from using a laptop to "communicate outside the courtroom," and sent the matter back to the trial court "with directions to allow [the reporter] the use of a laptop computer in the courtroom unless the court finds a specific factual basis to conclude that such use cannot be accomplished without undue distraction or disruption." *Morris Publishing Co., LLC v. State of Florida, Tajuan Dubose, et al., Case No. 1D10-226* (January 20, 2010).

Advised of the Appellate Court's ruling during the lunch recess, the trial court allowed the reporter to begin blogging from the courtroom once the trial resumed.

The case arose in the context of a high profile murder trial in which three brothers were accused of a drive by shooting of an eight year old girl, DreShawna Davis, in Jacksonville, Florida, in 2006. DreShawna was inside her grandmother's house watching a "Cat In The Hat" video with her two younger cousins.

Police said that DreShawna shielded her cousins with her body as 29 bullets ripped through the house in what police called a revenge killing effort directed at DreShawna's uncle who was in the house but not hurt. The three brothers were arrested, charged with first degree murder, and if convicted face the death penalty.

At the time of the murder it was a crime that galvanized the community. Jacksonville had been named as the city with the highest per capita murder rate in Florida, and public pressure to do something was enormous. The Mayor referred to the slaying as "the most devastating event since I've been mayor," and pledged $5 million to boost police presence in high risk neighborhoods. Community efforts to identify and address the causes of the high murder rate went into high gear.

Three and half years later the trial began on January 11, 2010. As part of its coverage of the trial, *The Florida Times-Union* operated a blog reporting in real time from the courtroom along with showing live streaming video of the trial provided by a pool camera. The blog is interactive so that people who are online can ask questions about the proceedings, and the reporter can give answers and insight about what is happening and why. The blog became the most popular destination on the paper's web site, jacksonville.com, and traffic to the web site spiked dramatically.

Three days later, on January 14, the trial judge threw *The Florida Times-Union* reporter out of the courtroom initially saying that the reporter was creating a distraction, and then that the rule regulating the use of technology in Florida courts (which does not address the use of laptops) limited the devices that could be used to two, a pool camera and a still camera. At a hastily called hearing that afternoon, however, the judge entered an order stating that the reporter could not use a laptop in the courtroom in order to "communicate outside the courtroom," the very purpose of the blog. Interestingly, the judge admitted that he had been reading the blog during breaks.

The following morning the judge entered a supplemental order reciting that the rule on use of technology in Florida courtrooms did not mention laptops, and therefore they would not be allowed.

On Friday, January 15, *The Florida Times-Union* filed an emergency petition for review of the trial judge's orders with the First District Court of Appeal. On January 20 the Appellate Court made its ruling on an emergency basis "[g]iven the exigencies of time." The Appellate Court held:

The order on review found that Florida Rule of Judicial Administration 2.450 included within its purview the prohibition of a laptop computer. The rule does not apply to the use of laptop computers, regardless of whether the device is used to transmit information outside the courtroom. The trial court retains authority, however, to prohibit the use of any device which as a factual matter, the court finds causes a distraction to the jury or otherwise causes a disruption of proceedings. Here, the trial court stated that the use of the device caused a distraction, but the court later issued an order which relied on an incorrect interpretation of [the rule].

> Accordingly, the petition is granted in part, the order denying motion to allow

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> access of reporter to trial with laptop and the addendum thereto are quashed, and the matter is remanded with directions to allow petitioner's reporter the use of a laptop computer in the courtroom unless the court finds a specific factual basis to conclude that such use cannot be accommodated without undue distraction or disruption.

The Appellate Court acted on an emergency basis because the trial was on-going. Confronted with the ruling, the trial judge allowed the reporter to resume blogging from the courtroom. A number of people following the blog, and its temporary interruption, posted comments about how much they enjoyed the blog, and the explanations from the reporter.

In the late 1970s, the Florida Supreme Court was one of the first to allow cameras in the courtroom. The enactment of a special rule governing technology for use in reporting on courtroom proceedings soon followed, attempting to strike a balance between the public's right of access and maintaining decorum.

The rule, however, does not address laptops; blogging and the internet did not exist when the rule first came into being. In another context, passing on standards for electronic access to court files, the Florida Supreme Court stated just last year that:

> The judicial branch of Florida has long embraced the use of information technologies to increase the effectiveness, efficiency, and accessibility of the courts. Technology holds great promise for both the courts and court users. Technology has and will continue to impact court operations, similar to the way in which technology has changed business practices in other organizations.

By holding that a reporter with a laptop computer is allowed to report live via blog from the courtroom in an ongoing trial, the Appellate Court has recognized that the use of blogs is but another way technology is providing the long cherished right of access for the public, a type of access that broadens who can observe public proceedings, and provides commentary and education for the public in general.

It is believed that this is the first appellate ruling of its kind addressing the use of laptops to blog live from the courtroom in an on-going trial.

George D. Gabel, Jr., Timothy J. Conner, and Jennifer A. Mansfield, of the Jacksonville, Florida office of Holland & Knight LLP, were counsel for Morris Publishing, which publishes The Florida Times-Union, a newspaper of daily circulation in Jacksonville.

Opposite Outcomes in Two High Profile Illinois Access Cases

By Damon E. Dunn

Illinois courts in two recent high profile criminal cases have taken vastly different approaches in dealing with pretrial publicity. The First District Appellate Court affirmed Cook County Circuit Judge Vincent Gaughan's closing of a series of pretrial evidentiary hearings in celebrity singer R. Kelly's child pornography case. *People v. R. Kelly*, No. 1-08-1728, 2009 WL 4795808 (Dec. 11, 2009). Notwithstanding the *Kelly* decision, Will County Circuit Judge Stephen D. White denied former police officer Drew Peterson's motion to close hearings to determine the admissibility of hearsay evidence in his trial for the murder of one of his wives.

People v. Kelly

Kelly was acquitted in 2008 on charges that he videotaped himself performing sex acts with a minor victim. Approximately a month before jury selection, the State filed a sealed motion to allow evidence of other crimes including the testimony of another woman who claimed Kelly had videotaped three-way sexual encounters involving her and the alleged victim. Other filings – including the parties witness lists and jury questions – were also filed under seal, though neither party moved to seal records and the court entered no written order authorizing the sealings.

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The court held three closed hearings during which the other crimes evidence, along with numerous other matters, was discussed. The court also imposed a decorum order restricting the attorneys involved in the case from discussing matters beyond the charges and scheduling. The court entered no written or verbal findings aside from a mention of the proximity of the trial date in open court before the second sealed hearing.

The day after the third closed hearing, the Chicago Sun-Times, Chicago Tribune, and Associated Press filed an emergency petition to intervene, seeking access to future hearings and transcripts of the past closed hearings and challenging the decorum order. The petition relied on *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), as well as its Illinois progeny, to argue that closures of pretrial proceedings must be justified in advance by specific factual findings, with the public being given opportunity to contest the closure, and that any closure must be narrowly tailored.

Judge Gaughan allowed the media petitioners to intervene but declined to treat the matter as an emergency and held a fourth closed hearing without ruling on the motion. Before that hearing, he stated that the hearing would be closed because testimony would involve sex acts with a minor and because "it is important that the jury pool not be contaminated." The transcript later revealed that no such testimony was offered at the hearing. Instead the hearings involved prior contacts between a new witness for the prosecution and certain defense attorneys.

After the closed hearings had concluded, Judge Gaughan heard the media intervenors' motion but declined to unseal any records. The judge ruled that *People v. LaGrone*, 361 Ill.App.3d 532 (4th Dist. 2005) (requiring *Press-Enterprise II* findings to close pretrial evidentiary hearings) was not binding on the trial court because "[i]t's a different district."

The judge's order denying the motion claimed that hundreds of media outlets had applied for press credentials to cover the trial and that open hearings could inform potential jurors of "wholly inadmissible" information. Shortly after the ruling and before the jury was seated, however, Sun-Times reporters broke the story about the "mystery witness" who told prosecutors that she had been paid off to return other incriminating videotapes to Kelly.

The First District affirmed the trial court. The appeals court did make important holdings that media intervenors had standing to appeal closures and that the appeal was not moot which lay a road map for future challenges. The court, however, held that the *Press-Enterprise II* presumption of access did not apply to the "unique" Kelly hearings. The court cited *Press-Enterprise* II's instruction to consider "whether the place and process have historically been open to the press and general public" and found that the hearings did not "resemble a full-scale bench trial," as they "concerned primarily argument by counsel, with a few questions asked by the trial court itself, to one witness, on a very limited issue."

The appellate court relied primarily on *People v. Pelo*, 384 Ill.App.3d 776 (4th Dist. 2008), which involved evidence depositions. It distinguished *LaGrone*, which involved hearings on motions to bar hearsay and character evidence in a murder trial, claiming, that *LaGrone* did not consider whether the presumption of access applied before it held closure was not justified. *LaGrone* did, however, discuss courts' widespread application of the *Press-Enterprise II* presumption of access to pretrial hearings, and held that, "[a]ccordingly, the standard set forth in *Press-Enterprise II* is the standard we will apply."

The appellate court further held that, in any event, Judge Gaughan's fact findings satisfied *Press-Enterprise II*. It acknowledged that the trial court did not enter formal findings *before* it began closing hearings, but held that "a reviewing court may affirm the closure even if the trial court failed to make a 'formal declaration' of findings, if the reasons are both obvious from the record and sufficient to justify closure."

Further, the court held that the trial court sufficiently considered alternatives to closure, even though the first con-

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sideration of alternatives appeared several weeks *after* the closed hearings, in the order denying the media intervenors' motion.

People v. Peterson

Peterson was charged with the drowning death of his third wife in *People v. Peterson*, No. 09-CF-1048 (Will Cty. Cir.), after Peterson's fourth wife disappeared under suspicious circumstances. The notorious case has received significant local and national media attention, arguably more than Kelly's trial, and much of which Peterson himself has sought out.

The State moved to admit hearsay evidence, including statements by Peterson's deceased third wife and missing fourth wife, pursuant to 725 ILCS 5/115-10.6, which provides that "A statement is not rendered inadmissible by the hearsay rule if it is offered against a party that has killed the declarant … intending to procure the unavailability of the declarant as a witness in a criminal or civil proceeding." The statute has been referred to as "Drew's Law" and its 2008 enactment was, some say, in direct response to the Peterson murder investigations.

The statute requires a hearing at which the proponent of the hearsay statement must prove by a preponderance of the evidence that the "adverse party murdered the declarant and that the murder was intended to cause the unavailability of the declarant as a witness." In the Peterson case, these hearings, which began January 19, 2010, are expected to last several weeks and include testimony from 60 witnesses regarding approximately 15 hearsay statements.

After Judge White denied a defense motion to have the hearsay law declared unconstitutional in October, 2009, the defense moved in early January to close the hearsay hearings and seal the records thereof. The motion relied on *Kelly* to argue that the court should close the hearings "to protect the parties' right to a fair trial, and to keep the jury pool from hearing what may be inadmissible matters through the media."

The Sun-Times, Tribune, and Associated Press again moved to intervene and again cited *Press-Enterprise II* and its progeny to argue that the possibility of pretrial publicity alone is insufficient to justify closure of pretrial proceedings. The media intervenors distinguished *Kelly* on the grounds that that case involved other crimes evidence, rather than hearsay statements, and because the *Kelly* case cited unique concerns regarding minor victims.

During oral arguments on January 8, 2010, defense attorneys Joel Brodsky and George D. Lenard argued that, if the statements were found inadmissible at the hearing, they should not be made available to potential jurors through "sensationalist" media coverage. If the statements were found admissible, on the other hand, the court's statutorily required finding that a preponderance of the evidence supports the conclusion that the defendant had murdered one of his wives would be particularly prejudicial to potential jurors. The defense asked that, if the hearing could not be closed outright, the court consider gagging those who attended or excluding the press only.

Will County States Attorney James Glasgow, along with the media intervenors, argued that *Press-Enterprise II* and *LaGrone* should control over *Kelly* (Will County is in a different appellate district). Both emphasized that, though the defense framed the issue as a "balancing test," the trial court actually was required to determine that there was a substantial likelihood that openness would prevent the defendant from having a fair trial and that no narrower alternatives, including voir dire, change of venue (which Judge White had previously denied), and jury instructions could remedy the problem. Further, whereas the *Kelly* appellate court noted that that hearing only involved brief testimony from one witness on a "limited" issue, the Peterson hearings would involve dozens of witnesses' testimony regarding issues at the core of the case.

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Kansas Court Orders Reporter to Disclose Confidential Source

State Supreme Court Issues Emergency Stay Pending Appeal

By William A. Hurst, Michael J. Grygiel and Michael Giardine

In a decision which has already chilled newsgathering activities in the State of Kansas, the Hon. Daniel L. Love, District Court Judge for the 16th Judicial District centered in Ford County, Kansas, held that the government can overcome the constitutional reporter's privilege whenever the information the government seeks is "relevant" to a criminal investigation – even where the investigation seeks to determine *whether* a crime has been committed and not to gather evidence concerning a crime *already* committed, and in the absence of any attempt to gather the information through alternative sources.

The question is now before the Kansas Supreme Court. *GateHouse Media Kansas Holdings II, Inc. v. The Hon. Daniel L. Love, Judge of the 16th Judicial District, Ford County, Kansas, et al.*, No. 103,699 (Kan. 2010).

Background

On Labor Day of 2009, Sam Bonilla was walking with his son and nephew in a remote part of Dodge City, Kansas known as the Arkansas Riverbed. A pickup truck traveling the same road appeared to veer towards Bonilla and his companions – an act which drew an obscene gesture from Bonilla. The pickup truck turned around, the men exchanged words, and, during the ensuing altercation between Bonilla and the

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Judge White sided with the State and media, noting that the court had taken several steps to ensure that the trial would be fair and would send another letter to potential jurors to remind them of their obligations. The judge did note that the defense could renew its motion if particular concerns, such as the privacy interests of a minor, were to arise during the hearings. The judge also stated, however, that if the court were to close a hearing in the future, it would be necessary to enter *Press-Enterprise II* findings.

In media interviews, Peterson's attorneys stated that they believed the court's decision to keep the hearings open provided grounds for an appeal if Peterson were convicted.

Conclusion

The *Peterson* case serves as the first test of *Kelly*'s reach and indicates that Illinois trial courts may limit *Kelly* to the unique facts of that case.

Despite *Kelly's* attempt to marginalize *LaGrone*, the opinions are obviously at odds and courts may have a difficult time reconciling them. Moreover, *Kelly* provided no guidance regarding what factors a trial court should consider in determining whether proceedings are sufficiently trial-like for *Press-Enterprise II* to apply. Further, *Kelly* upheld conclusory findings of the sort that other courts have expressly held inadequate and did not explain when a trial court's reasons for closure are "obvious" enough that formal fact findings are unnecessary. While *Kelly* ensures that the media will be able to bring access challenges and appeal the resultant rulings, it offers very little certainty in regards to the outcome.

Damon E. Dunn and Neil M. Rosenbaum of Funkhouser Vegosen Liebman & Dunn Ltd. (FVLD) represented the media intervenors in People v. Kelly. Assistant State's Attorney Mary L. Boland argued on the State's behalf in the appellate court. In People v. Peterson, Damon E. Dunn and Seth A. Stern of FVLD represented the media intervenors. George D. Lenard and Joel Brodsky lead Peterson's defense team, and Will County State's Attorney James W. Glasgow is the lead prosecutor.

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two men – later identified as Tanner Brunson and Steven Holt – Bonilla drew and fired several shots from his licensed .22 caliber revolver. Steven Holt died from his injuries. Brunson was injured but survived.

Later that day, Bonilla – a well-known and respected local business-man – turned himself in to Dodge City law enforcement authorities, and claimed that the shootings of Brunson and Holt were justified based on self-defense. Bonilla was immediately incarcerated, where he remains, and was charged by the Ford County Attorney's Office with second-degree murder and lesser offenses.

Several weeks after the altercation, Bonilla contacted Claire O'Brien, a reporter from the Dodge City *Daily Globe*, and requested a jailhouse interview. The ostensible reason for requesting the interview was Bonilla's fear that being Hispanic, he would not be given a fair trial in predominantly white Ford County. Reporter O'Brien conducted the jailhouse interview of defendant Bonilla on October 7, 2009.

On October 13, 2009, the *Daily Globe* published an article under the headline "Arkansas Riverbed Shooter Claims Self-Defense." The article mainly restated Bonilla's self-defense claim made to law enforcement authorities several weeks earlier, which he repeated during his jailhouse interview. Additionally, the October 13, 2009, reportage contained the following statements:

> The bail bondsman who was prepared to bond out Sam Bonilla, the man charged with second-degree murder on the Labor Day shooting death of Steven Holt, said Monday that she would have posted his bond by now if she were not concerned for his safety.
>
> Rebecca Escalante said Monday that although she and many other local business owners are convinced that Bonilla acted in self-defense, she has been warned by several people that he will be in danger if he is released.
>
> A source who is known to the Globe but who did not wish to be publicly identified said Monday that Tanner Brunson, who was wounded in the shooting, has a base of support that is well-known for its anti-Hispanic beliefs. The same source stated he has seen evidence that Brunson's support base has a supply of semi-automatic weapons.

The Subpoenas

On October 27, 2009, reporter O'Brien was served with subpoenas of that date returnable on November 3, 2009, in a proceeding styled, "In the Matter of an Inquisition to Inquire into Certain Alleged Violations of the Laws of the State of Kansas." Remarkably, the Inquest has little to do with the criminal charges against Bonilla – it centers upon the published allegations made by reporter O'Brien's confidential source that Tanner Brunson's so-called support base "has a supply of semi-automatic weapons."

The first inquisition subpoena commands the reporter to appear on the return date "before the DISTRICT COURT of the Ford County, State of Kansas . . . to give testimony and bring with you and produce in court the following: all notes, audiotapes or any memoranda of your interview conducted on October 7, 2009, of Sam Bonilla which took place at the Ford County Detention Center," and thus ostensibly requires reporter O'Brien to disclose unpublished notes of that interview, and further requires reporter O'Brien to offer testimony regarding any (and presumably all) unpublished statements made to her by Mr. Bonilla.

The second inquisition subpoena, although not limited by its terms, which further command Ms. O'Brien "to give testimony then and there under oath at an inquisition authorized by this Court," ostensibly requires the reporter to disclose the identity of the confidential source referred to in the October 13, 2009, reportage, who spoke to reporter O'Brien on condition of anonymity. (Id.)

Procedural History

On or about November 2, 2009, the Newspaper served and filed its motion to quash the subpoenas. The Newspaper's supporting memorandum of law established that the

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testimony the government seeks to compel pursuant to the subpoenas relates directly to news gathered and reported by a professional journalist while on assignment, and that, as such, it is protected by a reporter's privilege derived from the federal Constitution, as established by the Kansas Supreme Court in State v. Sandstrom, 224 Kan. 573, 574 (1978) ("We believe that a newsperson has a limited privilege of confidentiality of information and identity of news sources, although such does not exist by statute or common law"), cert denied, In re Pennington, 440 U.S. 929 (1979) ("In re Pennington"). Notably, In re Pennington is the only Kansas state appellate court decision applying the constitutional reporter's privilege recognized in Justice Powell's concurrence in Branzburg v. Hayes, 408 U.S. 665 (1972). Thus, the reporter's privilege has not been addressed by the Kansas Supreme Court in more than 30 years.

In addition to relying on Branzburg and Pennington, supra, the Newspaper presented the trial court with applicable (and seemingly controlling) precedent from the United States Court of Appeals for the Tenth Circuit, including Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977). The Silkwood Court applied Branzburg's balancing test using the factors set forth by then Judge Potter Stewart (later a Supreme Court Justice who called for the broadest recognition of the reporter's privilege in his dissent in Branzburg) more than two decades earlier in Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).

In sum, the Newspaper claimed that the government cannot overcome the constitutional reporter's privilege given the availability of other potential witnesses to the alleged criminality reported in the October 13, 2009, news article. In other words, the prosecutor had other available sources to provide testimony concerning Tanner Brunson's alleged "anti-Hispanic" bias as reported and/or affiliation with other individuals sharing that bias who may be in possession of semi-automatic weapons (the ostensible reason given by the government for seeking to compel the reporter's testimony and production of her unpublished notes) – all of whom can presumably testify based on their direct, first-hand knowledge as to what they knew or observed.

The Ford County Attorney filed its response and opposition to the Newspaper's motion to quash on November 17, 2009, and essentially claimed that whenever the government believes that a reporter has information that is possibly relevant to a criminal case, the constitutional privilege must yield - without regard to whether the government has exhausted alternative sources for obtaining the information. The District Court heard oral argument of the Newspaper's motion to quash at a hearing held on December 1, 2009.

On December 9, 2009, the District Court entered its Memorandum Order denying the motion to quash in all respects. The Court misconstrued the holding of the Kansas Supreme Court in In re Pennington, supra, and ignored other applicable authority, holding that to overcome the constitutional reporter's privilege in a criminal case, where the reporter's privilege is allegedly "more tenuous," "the information held by the news reporter only must be relevant**…"** (Id.) (Emphasis in original). Based on its application of this erroneous legal standard, the Court held that "the information must be divulged." (Id.)

Bond to Obtain a Statutory Stay

The Newspaper immediately filed a Notice of Appeal from the trial court's adverse ruling. In order to stay the reporter's compelled testimony pending appeal, the Newspaper also applied to the Court, pursuant to KSA 60-2103(d)(1), for approval of a supersedeas bond. Pursuant to KSA 60-262(d), the automatic stay becomes effective "when the supersedeas bond is approved by the court." Id.

Because there was no money judgment to be secured pending the Newspaper's appeal to this Court, the Newspaper requested that the bond amount be set at zero dollars. The Ford County Attorney opposed the Newspaper's request and subsequently attempted to schedule reporter O'Brien's testimony for January 5, 2010.

On January 4, 2010, before reporter O'Brien was compelled to testify, the Court heard argument on the Newspaper's request to set the amount of the supersedeas bond at zero dollars. The Court chose to dispense with the bond requirement altogether – a determination which should have resulted in an automatic stay of enforcement of the subpoenas under KSA 60-262(d). However, the lower court then denied the Newspaper's statutory right to a stay, and later embodied that erroneous ruling in an Order.

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Because the lower court refused to comply with the automatic stay provisions of KSA 60-262(d), the reporter's testimony pursuant to the subpoenas was rescheduled to January 20, 2010.

Accordingly, the Newspaper filed a motion to the Kansas Supreme Court for an emergency temporary stay, which was granted on January 19, 2010, and has also filed a Petition for Writ of Mandamus which seeks to compel entry of a statutory (or common law) stay pending the Newspaper's expedited appeal to that Court.

To date, several groups have filed motions seeking amicus status on the Newspaper's appeal, including a coalition consisting of the Kansas Associated Collegiate Press, the Kansas Scholastic Press Association, the University Daily Kansan, and the Kansas State Collegian. The Society of Professional Journalists has also filed a motion seeking amicus status.

Apparently undeterred by the stay and other activity in the State's highest court, the Ford County Attorney served two (2) trial subpoenas on reporter O'Brien – in person and through a Sheriff's deputy – on January 20, 2010, although the subpoenas were dated January 4, 2010. Those subpoenas will also be the subject of a motion to quash by the Newspaper, which may result in a consolidated appeal of both sets of subpoenas to the Kansas Supreme Court.

As a result of the trial court's ruling here – which by-passes the constitutional reporter's privilege based on a showing of mere relevance – several potential sources have already informed reporter O'Brien that they will not disclose any additional information on this – or any other topic - until this matter is finally resolved.

Accordingly, those sources of newsworthy information are no longer available, and the information they hold will never be published.

Consequently, the "free flow of necessary information" has already been restrained, and "the public's understanding of important news and events [has been] hampered in ways inconsistent with a healthy republic." *Ashcroft v. Conono, Inc*., 218 F.3d 282, 287 (4th Cir. 2000).

William A. Hurst and Michael J. Grygiel, Hiscock & Barclay, LLP, Albany, NY; and Michael Giardine and Jae M. Lee, Curtis E. Campbell, Chartered, Cimarron, KS, represent GateHouse Media Kansas Holdings II, Inc. and reporter Claire O'Brien.

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The Other Side of the Pond

Lord Justice Jackson Libel Report Produces Important Changes For Defendants

By David Hooper

On 14 January 2010 Lord Justice Jackson, an English Court of Appeal Judge, produced his final report on costs in civil litigation, He had been appointed in 2008 by Lord Neuberger, the Master of the Rolls (the senior judge in the Court of Appeal) to investigate the high cost of civil litigation in the UK. Jackson had produced his preliminary report on 8 May 2009. The final report deals with the whole range of civil litigation in the UK but there is a separate section on defamation and privacy cases together with an analysis of the libel and privacy cases that were brought in 2008 (Appendix 17). The changes recommended by Jackson go a significant way towards reducing the imbalance that has, since 2000, led to ever increasing Claimant costs with the result that claims often had to be settled because of the ransom or blackmail effect of such costs.

Jackson's report is likely in very large measure to be adopted. The Lord Chief Justice (the well-named Lord Judge) described it "*as a remarkable analysis*" and Lord Neuberger hoped that it would be adopted by the Ministry of Justice.

At the Ministry of Justice the Lord Chancellor and Secretary of State for Justice, Jack Straw MP, described it as "*a remarkable piece of work*" and in particular singled out Jackson's recommendations regarding After The Event insurance (ATE) and Conditional Fee Agreements (CFA) as "*interesting and constructive proposals*".

The Ministry of Justice (MoJ) has itself produced on 19 January 2010 a paper entitled *Controlling Costs in Defamation Proceedings*. This is a consultation document and requires response by 16 February 2010. The key proposal on which the MoJ wants views is whether the success fee should be capped at 10%. That is to say a significant reduction on the present 100%. It is also less than then 25% cap recommended by Lord Justice Jackson. It may be that the MoJ has in mind that the 10% success fee could be recoverable from Defendants whereas Jackson's 25% cap would have to be paid by the Claimant and would not be recoverable from the Defendant.

These steps follow the earlier MoJ report published on 24 February 2009 *Controlling Costs in Defamation Proceedings*. That was followed by the MoJ's response to that consultation document published on 24 September 2009 which resulted in rule changes about which I wrote in October. Those changes were fairly modest compared to the recommendations of Lord Justice Jackson in that they introduced a 42 days cooling off period before an ATE policy could be taken out, so that Defendants had the opportunity of settling claims before becoming liable to pay the ATE premium. Claimants were also then required to notify Defendants that they had taken out an ATE. There were also procedures put in place to control costs in libel actions.

The MoJ has also set up an expert panel of journalists, in-house lawyers and Claimant and Defendant media lawyers to report on concerns that the current law was having a "*chilling effect*" on freedom of expression. That working group is expected to report by the middle of March.

Additionally the Parliamentary Culture, Media and Sport Select Committee is due to report shortly.

The most dramatic changes suggested by Jackson LJ relate to CFAs and ATE. Jackson was distinctly unimpressed by the CFA regime, it was "*the major contributor to disproportionate costs*" and he was particularly scathing about ATEs "*the present system for achieving costs protection for Claimants is in my view is that it is the most bizarre and expensive system that it is possible to devise ….*" Jackson took into account representations by Claimant lawyers that CFAs did result in access to justice for Claimants with limited means who were thereby able to take on powerful media organisations. However, Jackson did observe that CFAs were used indiscriminately and could equally well be used by wealthy celebrities.

What Jackson in effect has proposed is turning the clock back to 2000 before the introduction of the Access to Justice Act 1999, when ATEs and CFA success fees became recoverable from Defendants.

At the same time he has built in safeguards for Claimants

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to enable them to bring libel claims against powerful media organisations which certainly was not easy prior to 2000. A balance has therefore had to be struck between two conflicting situations, Claimants' access to justice and disproportionate costs falling upon Defendants. The way he suggests this is achieved is as follows:

- Success fees in CFAs and ATEs will no longer be recoverable by successful Claimants from Defendants. Claimants will have to bear the expense of success fees and ATEs themselves. This is a very considerable significance for Defendants as success fees were almost invariably 100% resulting in Claimant lawyers happily charging up to £1,000 per hour. ATEs were expensive involving £67,000 premium for £100,000 of cover and were of limited value to Defendants, as there were many exemption clauses and a real risk that Claimants would not in any event take out sufficient ATE cover to protect the Defendant's exposure to costs.

- Success fees in CFAs will be capped at 25% of the damages awarded or recovered in the case, furthermore they (and ATE premiums) will have to be paid by the Claimant out of the sum he or she recovers. Jackson considered that this was not unreasonable bearing in mind that libel claims are about the vindication of reputation rather than compensation for continuing loss, as might be the case in personal injury. It was not in his view unreasonable to expect the Claimant to pay for the benefit of having had his lawyer act on this contingent basis. Jackson also considered that this arrangement would not impact in any significant way on Claimants' access to justice. Jackson noted that in many jurisdictions abroad Claimants were not able to recover their own legal costs at all and therefore had to pay them out of the damages they had recovered and that was not thought to be a bar to bringing such claims. Jackson envisaged that henceforward CFAs would be a matter of negotiation between the Claimant and his lawyers. He would be likely to enter into an agreement that the success fee would be X% of the lawyers' base costs subject to a cap which would be Y% of the damages (with a maximum of 25%). That in fact was roughly the way that CFAs worked when they were originally introduced before the floodgates were opened in 2000 in favour of avaricious Claimant lawyers, happily clocking up copious extremely well-paid hours. Jackson realised that there needed to be some counterbal ance to these changes which should assist the Claimants.

- He recommended that damages in libel and privacy cases should be increased by 10%. This would produce a larger pool out of which success fees or ATE premiums could be paid.

- Defendants who had rejected lower settlement offers by Claimants than the court and ultimately awarded in court should also find that the damages were increased by 10% in addition to the existing regime permitting indemnity costs with interest of up to 10% over base rate being awarded on those costs.

- He also suggested a regime of qualified one way costs shifting which is not perhaps quite as complicated as it sounds. Jackson felt that this was a better and less expensive way of achieving the social objectives of striking a fair balance between Claimant and Defendant in litigation than the existing regime of CFAs and ATE. What it means is that before an unsuccessful Claimant is ordered to pay the Defendants costs the court should, bearing in mind that ATE insurance is likely to be less used in the future in view of its cost and that it will not be recoverable from Defendants, therefore take account of the financial resources of all the parties to the proceedings and the conduct of the parties in the litigation. This means that the court will have a degree of discretion before it awards costs and it may often result in Defendants recovering only a small fraction of the costs that they have had to incur. Any exercise of discretion is open to the criticism that it reduces certainty, but on the other hand, that formula is one that was used for 50 years under the Legal Aid and Assistance Act 1949, when the court had to decide what proportion of the costs should be borne by an unsuccessful legally aided litigant.

- Defendants will unquestionably do better as a whole under the Jackson regime, albeit that they will not recover all of their costs against the Defendant. Under the existing system with recoverable CFAs and ATEs the costs

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> burden on Defendants is so crippling that Defendants were having often to settle cases against the justice of the situation. This Jackson proposal means that Claimants will still have access to justice in that they will be able to bring their case to court knowing that the judge will take those factors into account before awarding crippling costs against them if they do not succeed.

In Jackson's recommendations which apply to all civil litigation in England, he recommends a much greater degree of costs control by judges with caps on the amount of costs that can be awarded in smaller claims. He also envisages the creation of a Costs Council which would supervise and regulate the costs of civil litigation.

Although it was very much on the periphery of his terms of reference, Jackson felt that the inherent right to trial by jury in libel actions should be reconsidered. He noted that jury actions tended to cost 20-30% more than trials by judges alone. He also observed that there was an increasing tendency for cases to be heard by judges.

In 2008 there had been four contested libel actions heard by a jury and four by a judge alone. In 2009 at the time that Jackson wrote his report, there were four heard by a jury but 9 heard by judge alone. One of the advantages of trial by judge alone was that one had a reasoned judgment against which it was possible to appeal if there was an injustice.

Interestingly, Jackson also discovered the extent of contingent libel litigation in Ireland. Over 90%, and probably 95% of Irish privacy and libel cases were conducted on, as he put it, a "*no foal, no fee basis*". It was rather as we had all thought.

Jackson also analysed 154 libel and privacy cases which were resolved by settlement or judgment in 2008. The Claimants incidentally were successful in all 154 cases. 27 of these (17.5%) were conducted with CFAs. In the 16 cases where the overall costs were known to exceed £100,000, 11 of those cases (70%) were being conducted with CFAs. Jackson appears to have concluded from the statistics that the degree of risk said by Claimant lawyers to justify an uplift of 100% was baloney. However, being a judge that was not quite the word he used. He felt the level of success fees was disproportionate to the risk involved.

The statistics for 2008 showed that of the 27 CFA cases none failed and almost all were settled. In those CFA cases Claimant costs averaged 314% of the damages awarded whereas the defence costs were 125%. There were 200-250 libel claims started in the English High Court every year (with probably ten times that number which were resolved without the need for court proceedings).

The final irony of these controversies is that Claimant lawyers have established a body called Lawyers for Media Standards, committed to preserving freedom of speech. They have, with the help of two academies, produced a report with a suitably Shakespearean title "*Something Rotten in the State of Libel Law*."

Have the scales really fallen from their eyes – not for the first time I suggest readers do not hold their breath!

David Hooper is a partner with Reynolds Porter Chamberlain in London.

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French Court Rules That Google Books Violates French Law

By Delphine de Chalvron and Jean-Frédéric Gaultier

On December 18, 2009, Google, Inc. and Google France were ordered to pay damages of 300,000 € (approx. $419,000 U.S.) for digitizing and making available on the Internet certain French books as part of its Google Books project.

The French publisher, Editions la Martinière, initiated an action before the Paris Civil Court seeking an order prohibiting Google, Inc. and Google France from digitizing certain books and making some pages thereof, including the cover pages, available on the Internet for referencing purposes, without the authorization of the authors.

A crucial factor in the case was the determination of the applicable law. French copyright exceptions are more restrictive than US copyright law. After declining to apply US law, the French court ruled that Google's digitization was an act of reproduction that violated the French Intellectual Property Code. The short-quotation exception under French copyright law raised by Google in defense was rejected by the Court.

Choice of Law Analysis

After noting that the applicable law can be that of the territory of the event causing liability or that of the territory where the damage was suffered, the Court acknowledged the fact that the extracts at issue were made available in France on a website, accessible under a ".fr" domain name (http://books.google.fr), written in French, referencing French books and thus intended for the French public. The Court thus considered that France had the closest links with the litigation and consequently decided to apply French law to the whole dispute, despite the facts that books had been digitized in the US, and Google's servers are located there.

With respect to making the pages at issue available to the public on the Internet, the position of the Court is in line with the majority of current French case law with respect to Internet litigation: when there is a link with French territory (e.g. the website is intended for the French public, written in French and/or products can be ordered for delivery in France), French Courts tend to consider that French law is applicable. *See, e.g.*, TGI Paris, March 11, 2003, *SA BDMultimedia v/s Monsieur Joachim HORNIG*, JurisData n° 222875; TGI Paris Jan. 7, 2005, RLDI, 2005/2, n°54; TGI Paris, ord. Réf., July 8, 2005, *PMU v/s Eturf, Zeturf*, Comm. Com. Elect. 2005, comm.172, note Grynbaum confirmed in appeal Jan. 4, 2006.

However, this decision remains questionable regarding application of French law to the digitization of the books which took place in the United States. It is, further, in contradiction with the decision handed down by the Paris Civil Court on May 20, 2008 in a matter where Google was sued for reproducing on its Internet search engine "Google Image," accessible under the "google.fr" domain name, several works in small format. The Court decided to apply the law of the place of the event causing liability, namely US law, rather than the law of the place where the damage was suffered, taking into account the fact that the main activities at stake were the search engines business operated by Google, Inc. whose registered office is located in the United States, the place where all the decisions are taken.

The question of applicable law is very likely to be further discussed at appeal (which involves a *de novo* trial) as the outcome of the case for Google may depend on whether the fair use exception provided by US law applies.

In the Google Image decision of May 20, 2008 cited above applying US law, the Paris Court ruled that Google could benefit from the fair-use exception in view of the non-commercial character of the Google search engine, its free access, the small format of the reproductions and the positive impact of such reproductions on the notoriety of the authors and of their works.

In the present case, Google could not rely on US law and based its defense on the short-quotation exception provided for by Article L 122-5 -3 (a) of the French Intellectual Property Code. In accordance with this article, copyright owners cannot prohibit short quotations of their copyrighted work if they are justified by the informational, critical, scientific or educational purposes of the work within which they are incorporated.

This line of defense was rejected by the Court "*as the cover books are communicated to the public in their entirety,*

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even though in a small format." Under French law, cover pages could be assimilated to a work of graphic art. This decision is therefore consistent with the position of the French Supreme Court, which considers that when works of plastic or graphic art are reproduced in their entirety even for information purpose (and subject to the exception provided by Article L522-5-9 of the Intellectual Property Code on the reproduction of works of plastic or graphic art made in press media to illustrate current affairs (news) exclusively), the said reproduction cannot qualify as a "short quotation" (e.g. reproduction of paintings in an auction catalogue (Cass. Ass. Plen. Nov. 5, 1993 Fabri vs. Loudmer); reproduction of paintings to report the opening of an exhibition (Cass. Civ. 1st, Nov 13, 2003, Société Nationale de Télévision France 2 vs. Fabri); reproduction of a coat to illustrate renovation works at the Fashion Museum (Cass. Civ. 1st, Jan. 25, 2005 Groupe Express vs. L et M Services)).

The Court further considered that the extracts from the books available on the Internet cannot fall within the scope of the short quotation exception either as "*the random selection of the extracts exclude any information purpose as provided for in Article L122-5-3 of the Intellectual Property Code.*" Here again, this decision is in line with the position of French courts, which traditionally consider that the inclusion of a short quotation in a previous work for "educational, informational or scientific purposes" requires some intellectual input. *See* TGI Marseille, June 26, 1979 – TGI Paris, Feb. 11, 1988 - TGI Paris, May 1997.

In the present case, the court considered that the random character of the selection operated by Google excluded such intellectual work.

In any event, one may wonder why Google Books and Google Image should be treated differently, books and images being both copyrightable, both digitized in the US, and both displayed on google.fr website.

Last, the Court refused to take into account the Google Book Settlement Agreement put forward by the defendants, considering that it was not yet into force and that, in any event, it had not been demonstrated that it would be applicable to French books, since the Settlement Agreement refers to books published in the US, UK, Canada and Australia only.

Failing relevant provisions in the publishing agreements, it remains to be determined whether this Settlement Agreement would be enforceable in France against French publishers owning translation rights in US, British, Canadian or Australian copyrighted works or having transferred their translation rights over French copyrighted work for publication in UK, USA, Canada and Australia.

Delphine de Chalvron and Jean-Frédéric Gaultier are lawyers in the Paris office of Clifford Chance.

English Court of Appeal Refuses to Enforce US Copyright Judgment or Hear US Copyright Infringement Claim

By Loretta Pugh

Late last year the English Court of Appeal handed down its judgment in the case of Lucasfilm Limited v Ainsworth [2009] EWCA Civ 1328, better known as the "Star Wars" or "Stormtrooper helmet" case.

This article will concentrate on the parts of the judgment that addressed whether the English Courts have jurisdiction to enforce US copyright and whether the English Courts would enforce a US monetary judgment made in earlier US proceedings.

Background

In 2004 Mr Ainsworth set up a website selling certain replica helmets and armor, the originals of which had been used as costumes in the 1977 "Star Wars" film. His website emphasised that he made the original helmets and armor for the film and that his replica helmets were produced from the original molds used to make the helmets seen on the screen.

Ainsworth advertised his replicas in the US and some of his products were sold and delivered to US customers. These activities attracted the attention of Lucasfilm, the production company associated with the Star Wars movie series. In 2005, proceedings were commenced against Ainsworth in the US District Court, Central District of California, claiming relief in respect of copyright infringement, unfair competition and trademark infringement.

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Ainsworth unsuccessfully challenged the California district Court's jurisdiction, but did not participate further. On 26 September 2006, a default judgment was ordered against him in the sum of $5 million for copyright infringement, $5 million for trademark (Lanham Act) infringement and unfair competition, and an additional $10 million to treble the Lanham Act damages. This was despite Ainsworth's admitted sales in the US being worth merely $14,500. Lucasfilm was also awarded injunctive relief.

As Ainsworth was resident in England, Lucasfilm sought to enforce its US judgment in England. If that failed, Lucasfilm sought to claim through the English Courts in respect of infringements of US copyright.

The English Case at First Instance

At first instance (being the first trial that considered the matters in question), Lucasfilm sought to enforce its US judgment in England to the extent of the damages awarded, but without the trebling effect, i.e. to confine its claim to $10 million. One of the defenses posed by Ainsworth to this claim was that he did not submit to the jurisdiction of the US Courts and did not have sufficient presence in the US to enable Lucasfilm to rely on the judgment in an English action.

Of key concern was whether Ainsworth's actions constituted sufficient "presence" in the US for the US judgment to be relied on in an English Court. The Court at first instance found not. The judge found that authorities required there to have been a physical presence in the US and that advertisements in the US, a website accessible in the US and sales to US customers were not sufficient to amount to a physical presence.

In order for Lucasfilm to claim successfully for direct enforcement of US copyright infringement, the judge would have to find infringement in the US under US copyright law. The judge firstly considered whether the English Court had jurisdiction to hear such a claim.

The judge held that a claim for infringement of a foreign copyright should be justiciable in England. On the merits of the US claim, the judge held that copyright subsisted in the Stormtrooper helmets sold by Ainsworth because they were notutilitarian or functional under US copyright law. He also found that the US copyright had been infringed. This is in stark contrast with the judge's findings in respect of infringement in England under English copyright law. The judge held that because the Stormtrooper helmets were not "sculptures" under English copyright law they were not copyrightworks and thus there could be no infringement by Ainsworth under English copyright law.

The consequences of the determination that US copyright existed and had been infringed would have been followed through in a further hearing, however prior to that, the case was appealed.

The Court of Appeal Decision

Lucasfilm appealed the first instance finding that copyright did not subsist in the helmets under English law. The Court of Appeal upheld the decision of the judge at first instance on this point. In relation to the US issues, Lucasfilm appealed the decision not to enforce the US default judgment. Ainsworth cross-appealed the decision that the English Court could enforce the US copyright.

Enforcement of the US Judgment

In determining whether the US judgment could be enforced, the Court of Appeal, like at first instance, looked at whether Ainsworth had sufficient "presence" in the US.

Lucasfilm contended that Ainsworth's website had been particularly targeted at US customers and this indicated presence in the US. Prices were quoted in US dollars before being expressed in sterling. No other currencies were quoted. Also, shipping charges for the US (and Canada) were specified before shipping charges to the UK and elsewhere.

The Court considered whether a website was fundamentally different from other means that have enabled businesses to present themselves and their products where they are not themselves present, for example such as advertisements, the post, telephone and fax. The Court decided that there was no difference. Indeed, it went on to state that the omnipresence of the internet would suggest that it does not create, outside the jurisdiction in which the website owners are present, that presence necessary to suggest allegiance to the laws of another country, which has been recognised as necessary for the enforceability of that country's judgments in the English Courts.

Accordingly, the Court dismissed Lucasfilm's appeal on this point.

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Enforcement by English Courts of US Copyright

It was undisputed between the parties that Lucasfilm owned US copyrights in the helmets and armor and that Ainsworth had infringed them. What was to be decided was whether the English Court had jurisdiction to hear a claim in respect of those US copyrights. Having determined that there was no binding authority on the point, the Court had to decide itself whether claims for infringement of foreign, non-EU (or Lugano) copyrights are justicable under English law.

The Court found that such claims are non-justicable. Its reasoning included the following:

- Infringement of an IP right (especially copyright which is largely unharmonized between the US and UK) is essentially a local matter involving local policies and local public interest. It is a matter for local judges.

- Extra-territorial jurisdiction will involve a restraint on actions in another country – an interference which prima facia a foreign judge should avoid.

- If national courts of different countries all assume jurisdiction, there is far too much room for forum-shopping.

- Those concerned with international agreements about copyright have refrained from putting in place a regime for the international litigation of copyrights by the courts of a single state. A system of mutual recognition of copyright jurisdiction and of copyright judgments could have been created, but it has not.

The Court of Appeal was not impressed by the supposed difference in principle between questions of subsistence of the copyright and its infringement, i.e. that although a court may not have jurisdiction over the former; it should, over the latter. It is said that questions as to subsistence and registration, call in to question a sovereign act, whereas infringement does not. However, adjudicating on infringement will itself often require the foreign court to decide on the scope of the right granted by the foreign sovereign state. Questioning the scope of intellectual property rights granted by a sovereign state in a foreign court carries with it the foreign court ruling on the scope of a sovereign act, which is not different in kind from ruling on its validity. It makes no difference whether the right is one which requires registration.

The Court of Appeal concluded that for sound policy reasons the supposed international jurisdiction over copyright infringement claims does not exist. If it were to be created it should be by treaty with all the necessary rules, for example about mutual recognition.

Comment

The Court of Appeal brings an uneasy outcome for Lucasfilm. Not only is it unable to enforce its US copyright judgment in England, the English Court of Appeal has declined jurisdiction to hear Lucasfilm's claim in respect of infringements of US copyright. As a result Lucasfilm has no financial remedy against Mr Ainsworth for the infringing acts committed by him in the US, which the US Court amounted to $20 million in damages.

This may well be seen as an unsatisfactory position, but unless or until a treaty is agreed to alter the justiciability of foreign copyright infringements and/or enforcement of foreign judgments in the circumstances of this case, it is a position that may well arise again and arguably undermines the value of intellectual property rights in certain cases.

Loretta Pugh is an associate at Taylor Wessing LLP in London. Lucasfilm was represented by Michael Bloch QC and Alan Bryson (instructed by Harbottle Lewis). Ainsworth was represented by Alastair Wilson QC and George Hamer (instructed by Simmons Cooper Andrew LLP).

Any developments other MLRC members should know about?

Let us know.

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Ethics Corner

The "Prospective Client" Under Model Rule 1.18 and Motions to Disqualify

By William L. Chapman

This is the third article published in the *Ethics Corner* discussing Model Rule 1.18, "Duties to a Prospective Client." The first article, "ABA Model Rule 1.18: Lawyering and the "Prospective Client," written by the author, appeared in the March 2007 MediaLawLetter. It addressed such issues as who is a prospective client, the duty of confidentiality to a prospective client, significantly harmful information and the ethical consequences of having such information.

The second article, "Unsolicited E-mail and Website Design," written by Gary L. Boswick, appeared in October 2009. It discussed the prospect of senders of unsolicited e-mail becoming prospective clients and the conflict of interest issues raised thereby. The article reviewed several state ethics opinions that dealt with whether a lawyer who had received an unsolicited e-mail was disqualified from representing the sender's adversary. Drawing on those opinions, the article suggested that to minimize the likelihood of disqualification websites should contain a prominent disclaimer warning visitors not to send confidential information until a conflicts check had been completed and the lawyer has agreed to take on the representation.

Model Rule 1.18, or a variant of it, has been adopted in most jurisdictions. Courts in jurisdictions that have not adopted the rule have looked to it for guidance in resolving issues concerning prospective clients. The rule is of interest to media lawyers who are involved in newsgathering issues and prepublication review, counseling that often has them working with at least several of their clients' employees. Plaintiffs suing their clients often name as additional defendants anyone they believe was involved in the article at issue. In such cases, media lawyers usually prefer to represent all the defendants to present a united front and unified defense strategy and theme. Transactional work also can raise issues concerning Rule 1.18 in this time of downsizing, media consolidation and collaboration between "old" and "new" media.

Since "forewarned is forearmed" this article will discuss how courts have addressed motions to disqualify based on Rule 1.18. The cases indicate that prospective client issues continue to arise out of a variety of everyday, face-to-face communications.

Conn v. United States Steel Corporation
2009 WL 260955 (M.D. Ind. 2009):

In an employment termination case, the plaintiff sought to disqualify an attorney who represented the plaintiff's bargaining unit. In that capacity the attorney met with the plaintiff to discuss her termination, after which he recommended she file a sex discrimination case against her employer. The plaintiff filed a sex discrimination case but it was against the union, not her employer, and moved to disqualify the attorney from representing the union.

The court cited Seventh Circuit law "caution[ing] that disqualification is a prophylactic device employed to protect the attorney-client relationship … 'which courts should hesitate to impose except when absolutely necessary.'" *Id*. at *4. It added that while courts should "resolve doubts in favor of disqualification," motions to disqualify "'should be viewed with extreme caution for they can be misused as techniques of harassment.'" *Id*.

Turning to Rule 1.18, the court noted that the plaintiff did not claim she was a prospective client of the attorney; rather, she alleged that the attorney had offered to assist her in filing a discrimination case against her employer. *Id*. at *5. Of importance to the court, however, was the plaintiff's failure to identify "any information the attorney learned during the meeting that "he did not already know through his ongoing representation as the Union's attorney" or "any information he received from her … that 'could be significantly harmful to her in this matter,'" citing Rule 1.18(c). *Id*. at *6. Given those findings, the court denied the motion to disqualify.

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Chemcraft Holdings Corp. v. Shayban
2006 WL 2839255 (N.C. Super. 2006)

In another employment termination case, the employer-plaintiff filed a declaratory judgment action to determine whether certain provisions of its former president's employment agreement were valid and enforceable. After receiving notice of the case, the former president spoke with an attorney and faxed him three documents that discussed his employment, his interpretation of the agreement, reasons for entering into it, settlement possibilities and possible claims against the plaintiff. *Id*. at *2. But the attorney had a conflict of interest and referred the former president to a second attorney, to whom he e-mailed the three documents.

The second attorney received the e-mail but claimed not to have read the documents. He spoke with the former president by telephone, and the court noted that what was discussed was "in great dispute." *Id*. at *3. According to the former president, the conversation lasted more than 20 minutes and "included discussion of 'substantive matters' involving the lawsuit, as well as Defendant's thoughts and perspectives on the claims and counterclaims," after which the second attorney agreed to represent him. *Id*. For his part, the second attorney denied there was a substantive discussion or that he had agreed to represent the former president. *Id*. Instead, he stated he disclosed that he had represented the plaintiff and stated he would need a waiver of conflict. The former president asked him to inquire about a waiver, but when the attorney did the plaintiff refused to grant one. *Id*.

About a month later the second attorney was asked to represent the plaintiff in the case. He sought an opinion from the state bar, which responded that if he had not received any confidential information he could undertake the representation. At that point the attorney still had not read the three documents attached to the e-mail and undertook the representation. The former president then moved to disqualify him.

In ruling on the motion, the court stated it would be guided by three principles. First, "attorneys practicing before the courts bear the burden of ensuring the absence of any conflicts," citing Rule 1.7. *Id*. at *4. Second, attorneys "are responsible for reading what is sent to them. This is not only good practice, it is also part of a lawyer's duty to avoid conflicts." *Id*. Finally, to maintain "public confidence in our system of justice demands that courts prevent even the appearance of impropriety and thus resolve any and all doubts in favor of disqualification." *Id*.

The court ruled that the former president was a prospective client and looked to Rule 1.18 to decide the motion. It stated that the problem arose from the second attorney not discovering the attachments to the e-mail and the sensitive information they contained. *Id*. at *5. "This represents one example among many this Court sees regularly of problems created by email that would not have existed with paper documents. The reality is that much legal business and correspondence is done by e-mail, and lawyers must learn to use it with the same degree of care they formerly gave to paper documents they created or received." *Id*. at 5. The court added: "By receiving the email, [the second attorney] … was on constructive notice of his possession of sensitive documents and should have taken steps to avoid a conflict of interest related to those documents." *Id*.

The court relied on the significant harm standard in Rule 1.18(c) in ordering disqualification. It ruled that although there is no evidence the second attorney had used or revealed the information in the attachments, he "has retained possession of it for a period of months ... namely Defendant's thoughts and litigation strategies, [which]certainly could be 'significantly harmful' to Defendant if used against him in the present action." *Id*. at *7.

Beckenstein Enterprises-Prestige Park, LLC v. Lichtenstein
2004 WL 196683 (Conn. Super. 2004)

The plaintiffs sought to disqualify the law firm representing the defendant based on a 25-minute conversation with an attorney in the firm. According to the plaintiffs, the conversation concerned litigation they contemplated bringing and was "'directly incident to the establishment of a formal attorney-client relationship.'" *Id.* at *4. Although Connecticut had not then adopted Rule 1.18, the court analyzed the motion under Rule 1.18, which, it stated, embodies "prescripts" that "may appropriately serve as guides to the resolution of the issues before this Court." *Id*.

The court ruled that while no attorney-client relationship had been formed, the attorney had "received potentially harmful confidential information" during the conversation. *Id*. at *5. Looking to Rule 1.18(d)(2), the court found that the attor-

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ney had taken "reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent" the plaintiffs. *Id*. at *5. Further, the attorney and his firm took "the steps necessary to both preserve the confidentiality of that information and allow for the firm's representation of an adversary." *Id*.

Initially, the telephone conversation dealt with identifying the individuals and entities involved so the attorney could determine whether a conflict existed. *Id*. The conversation then turned to the merits of the plaintiffs' case, with the plaintiffs at one point stating their intention to sue another law firm. The attorney "promptly stated that he could not represent them due to his relationship with the law firm and the telephone conversation ended." *Id*. According to the court, the attorney did "everything that could be expected of him to avoid learning confidential information beyond that necessary to decide if representation was appropriate." *Id*. at 5.

The court also ruled that the law firm "timely and effectively screened" the lawyer from participation in the case. After being informed of the disqualification issue, the firm "promptly sent a memo to all attorneys and employees of the law firm instructing them that they are prohibited from discussing this action or its subject matter with [the attorney]… no confidential information has been conveyed … to anyone else in the firm and, in light of his present lack of memory, he possesses no confidential information to convey." *Id*. And, as required by Rule 1.18(d)(2), the court ruled that the law firm gave "timely and adequate written notice" to the plaintiffs. *Id*. at *6.

Capital Pop Associates, LLC v. Capital City Economic Development Authority

2006 WL 1391382 (Conn. Super. 2006)

A non-party, a prospective deponent moved to quash a deposition subpoena on the ground of conflict of interest. After the plaintiff brought suit over its termination as the developer of a city project, the defendants asked the non-party whether his company might take over the project. The non-party decided to retain counsel to negotiate an agreement with the defendants. He met with an attorney who disclosed that his firm, through a different attorney, represented the plaintiff, but did not disclose that it was in connection with the suit against the defendants.

The court found that the meeting with the attorney was for more than an hour and included discussions about a number of confidential matters, such as how the defendants solicited the non-party's interest in the project, the financial condition of his company, modifications to the existing project plans, environmental and community issues, estimated project costs, time constraints, and the financial structure of an agreement with the defendants. *Id* at *2.

The following day, the non-party met with the defendants and mentioned the possibility that he would retain the attorney's law firm. The defendants responded that the law firm could not act as the non-party's counsel because it represented the plaintiff in the case. The non-party then told the attorney his firm was out, refused the attorney's request to reconsider the decision and retained another law firm.

About three months later, the attorney's law firm subpoenaed the non-party for deposition. The non-party moved to quash on the ground that the law firm "cannot examine him in an adversarial setting because of duties owed to him" by virtue of the meeting he had with the attorney. *Id*.

In analyzing the issue, the court first observed that disqualification "'is a remedy that serves to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information.'" *Id*. at *3. It added that the "interests in play in a motion to disqualify are (1) the former client's interest in protecting confidential information; (2) the present client's interest in protecting counsel of its choice; and (3) the public's interest in the scrupulous administration of justice." *Id*.

The court, following the lead of the court in the *Beckenstein* case (discussed above), looked to Model Rule 1.18 and granted the motion to quash. It stated that none of the "timely prophylactic efforts" taken by the law firm in *Beckenstein* were taken by the attorney in the present case. The court ruled that the non-party's "relationship with the defendants and his preliminary conversations with them [are] significant from an evidentiary standpoint and placed [the non-party] … in an adversarial position with respect to the plaintiff even though he is not a defendant in this case." *Id*. at *6. It stated that absent waivers from the non-party and the plaintiff, the meeting with the attorney should not have taken place. *Id*. The court held that "a third-party deposition of a

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former client is unethical because it is likely 1.) to pit the duty of loyalty to one client against the duty to another, and 2.) risks breaking the duty of confidentiality to the deponent." *Id*. at *7.

Factory Mutual Insurance Co. v. Apcompower, Inc.
2009 WL 3234128 (W.D. Mich. 2009)

The defendant moved to disqualify the law firm representing the plaintiffs. Michigan had not adopted Rule 1.18, but the court stated that "the similarities of …Rule 1.18 and MRPC 1.9 suggest that Rule 1.18 espouses the same principles as MRPC 1.9 ... Both rules bar representation in 'the same or a substantially related matter when the parties' interests are materially adverse'… Rule 1.18 bars disclosure of confidential information 'except as Rule 1.9 would permit with respect to information of a former client.' The primary difference between the rules is that representation is not barred by…Rule 1.18 unless 'the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.'" *Id*. at *3.

The court ruled that the law firm had received significantly harmful, confidential information when it received an engineering expert report from the defendant's insurance company, Allianz, and spoke with the engineer by phone. *Id*. at *4. However, it ruled that the defendant had waived any conflict because the law firm had disclosed that it was representing the plaintiffs and that disclosure "was sufficient to inform Allianz of all the potential material adverse effects arising out of the representation." *Id*. at *4.

Lee v. Cintron
2009 WL 3199222 (N.Y. Sup. 2009)

The plaintiff moved to disqualify the defendant's attorney in a case where she alleged intentional infliction of emotional distress and other torts. Two years earlier, the plaintiff had consulted with the defendant's attorney about representing her in a custody and support case concerning a child she had with the defendant, but did not retain the attorney *Id*. at *1.

The court stated that a party's right "to be represented by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing by the movant that disqualification is warranted ... any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification…an attorney must avoid not only the fact, but also the appearance of representing conflicting interests." *Id*.

At the time the disqualification issue arose, New York had not adopted the Rules of Professional Conduct. For this reason, the court ruled that the plaintiff's reliance on Rule 1.18 was misplaced. Nevertheless, the court stated that "it is well established that the fiduciary relationship existing between attorney and client extends to preliminary consultation by a prospective client with a view toward retention of the attorney, even where actual employment does not arise." *Id. at *2 (citing, among other authorities, Code of Professional Responsibility EC 4-1).*

The court ruled that although the "ultimate issues are not identical, both the prior child custody and support action, for which plaintiff originally sought legal services from [the attorney] … and the present litigation involve, at their core, the nature of the relationship between plaintiff and defendant." *Id*. at *2. It noted that there was a dispute as to what was actually disclosed during the preliminary consultation and that the attorney stated he had no recollection that confidential secrets had been revealed. But it concluded that "the plaintiff has alleged the disclosure of the type of information that could, even inadvertently, provide a strategic advantage to defendant in this case. … It is also reasonable to infer that, during the course of the preliminary consultation, [the attorney] … obtained confidential or strategically valuable information about the parties' alleged abusive relationship." *Id*. The court ruled that "the prudent action under the circumstances is to disqualify [the attorney] … from further representation of defendant in this action." *Id*.

What guidance can media lawyers take from these decisions when faced with a motion to disqualify filed by a prospective client?

- Even if they practice in a jurisdiction that has not adopted Rule 1.18, the court likely would look to the rule in deciding the motion, given the rule's overlap with Rule 1.9 and Restatement (Third) of the Law Governing Lawyers §15 (2000).

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- Disqualification motions are prophylactic devices to protect confidential information communicated during an attorney-client/prospective client consultation.

- Because such motions can be misused, courts should view them with caution and grant them only when necessary.

- Although "appearance of impropriety" no longer is a standard in the Model Rules, courts remain sensitive to appearances to instill public confidence in the administration of justice.

- During an unsolicited or initial consultation with a prospective client, a lawyer should first determine who the prospective adversaries are to do a conflict check before obtaining any confidential information. *See* Rule 1.18(d)(2).

- If a lawyer does not undertake the representation but has received confidential information from the prospective client, the screening and notification requirements of Rule 1.18(d)(2) must be effected to avoid disqualification.

At least one state court has ruled that attorneys "are responsible for reading what is sent to them," including e-mail. *Chemcraft Holdings Corp.*, 2006 WL 2839255 at *4. As discussed at the outset of this article, Gary Boswick's article suggests that unsolicited e-mail should not convert the sender into a prospective client where the attorney's website carries a prominent disclaimer.

Unsolicited e-mail sent directly to a lawyer's e-mail address, not through the firm's website, should be promptly returned to the sender as soon the attorney realizes the sender is seeking representation.

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Notes

1.The decision contains a fairly extended discussion of the court's responsibility to maintain public confidence by being sensitive to "the perception created by the lawyer's conduct," noting that the defendant "reasonably could be concerned" because the second lawyer "had in his possession for months a memorandum containing his thoughts on his claims and litigation strategy … and without any consultation withhim about a conflict, suddenly appeared as his opponent …." *Id*. at *6.

2. Connecticut adopted Rule 1,18 in 2006, effective January 1, 2007.

3. The court also referred to the Restatement (Third) of The Law Governing Lawyers, §15(2)(2000), which it stated "recognizes similar obligations of a lawyer with respect to a prospective client." *Id*. at *5.

4. The firm received notice on March 29, 2004 of the potential conflict, investigated and replied one month later that the lawyer had been screened. *Id*. at *6.

5. The defendants sought to disqualify the attorney's law firm from representing the plaintiff on the basis of the meeting with the non-party, but the court held that the defendants lacked standing to bring the motion. It rejected the argument that the law firm "will gain an advantage from its own impropriety, and this disadvantage to the defendants confers upon them standing to move for disqualification," ruling that the law firm "owes no duty of confidentiality to the defendants …." *Id*. at *8.

6. The court cited *Banner v. City of Flint*, 99 Fed Appx. 29 (6th Cir. 2004), for the proposition that consultation with an attorney "'establishes a relationship akin to that of an attorney and existing client.'" *Id*. at *2.

7. The court ruled that Allianz's waiver was binding on the defendant because it "was cooperating with Allianz in preparing for litigation," that the waiver was unequivocal, and "Allianz was, in a very real sense, acting for, or at least jointly with, AP, AP should be bound by the waiver." *Id*. at *5.

8. New York adopted its version of the Rules of Professional Conduct, including Rule 1.18, on April 1, 2009.

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