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MEDIA LAW LETTER

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Second Circuit Rules FCC's "Fleeting Expletives" Indecency Enforcement Policy Unconstitutional

Broadcast Indecency Issue Likely Headed Back to Supreme Court

By Elizabeth Spainhour & Julia Ambrose

On July 13, 2010, the U.S. Court of Appeals for the Second Circuit declared the Federal Communications Commission's "fleeting expletives" indecency enforcement policy "unconstitutionally vague" and therefore a violation of the First Amendment. The decision in [*Fox Television Stations, Inc. v. FCC*](#) is a victory for broadcasters in the ongoing legal battles related to the Commission's indecency policy.

Background

The FCC indecency determinations before the Second Circuit in *Fox* involved a single use of the F-word by Cher in her acceptance speech during the 2002 Billboard Music Awards show and the use of the F-word and S-word by Nicole Richie when she appeared as a presenter during the 2003 Billboard Music Awards show. Both shows were broadcast live by the Fox Network and its affiliates.

The FCC determined that both broadcasts were actionably indecent, notwithstanding the fact that the challenged expletives were brief, isolated, and unscripted. The Commission applied its indecency standard, which proscribes language that the Commission finds, "in context," to be "patently offensive as measured by contemporary community standards for the broadcast medium." "Patent offensiveness," in turn, is determined by application of a three-factor test: (1) whether the material is graphic or explicit, (2) whether the material is dwelled upon or repeated at length; and (3) whether the material panders to, titillates, or shocks the audience.

The Commission's 2006 findings in the Billboard Music Awards order reflected a change in its indecency enforcement policy after decades of "restrained" indecency enforcement, during which the Commission refused to find "fleeting" expletives indecent under its "contextual" indecency standard. Broadcasters challenged the Commission's 2006 indecency determinations on procedural, statutory, and constitutional grounds.

On its initial review of the case, the Second Circuit held in 2007 that the FCC had failed to offer a "reasoned basis," as required by the Administrative Procedure Act ("APA"), for changing its prior "restrained" indecency enforcement policy and for the first time in 2004 imposing liability for a single, fleeting expletive. The Second Circuit, accordingly, struck down the Commission's new indecency policy on procedural grounds without conclusively deciding the First Amendment issues raised by broadcasters. The appellate court did, however, express doubt that the indecency policy would withstand constitutional scrutiny under the First Amendment.

In 2009, the U.S. Supreme Court reversed the Second Circuit's 2007 decision on APA grounds. In a 5-4 decision authored by Justice Scalia, the Supreme Court held that the Commission had adequately acknowledged and explained the reasons for its newly-expanded indecency enforcement policy regarding fleeting expletives. As the Supreme Court found no procedural violation by the FCC, the Court remanded *Fox* to the Second Circuit for consideration of the constitutional issues previously raised by broadcasters but not decided by the Court of Appeals.

Second Circuit Opinion

In its decision striking down the FCC's indecency enforcement policy, the Second Circuit primarily relied on the vagueness doctrine, according to which a government regulation cannot withstand constitutional scrutiny if the regulation's prohibitions are not sufficiently clearly defined. A law or regulation will be found impermissibly vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." The constitutionally-required specificity both gives the regulated public fair notice of what is legally prohibited so that they may act accordingly and guards against subjective and discriminatory enforcement by regulators. According to the Second Circuit, the Commission's fleeting expletives indecency enforcement policy failed on both counts.

The FCC argued before the Court of Appeals that the

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agency's indecency policy, set forth in its 2001 Industry Guidance and subsequent FCC decisions interpreting and applying that policy (including the Billboard Music Awards show orders), gave broadcasters sufficient notice of what speech will be considered indecent, so that the policy could survive the broadcasters' vagueness challenge. Broadcasters disagreed, arguing that "the policy is impermissibly vague and that the FCC's decisions interpreting the policy only add to the confusion of what will be considered indecent."

The Second Circuit agreed with broadcasters that the FCC had not given adequate notice of what speech is prohibited under the fleeting expletives indecency policy, and in particular which words or expressions would be deemed "patently offensive" and thus indecent. Reviewing the FCC's 2006 order applying its new indecency policy, the Court of Appeals found that although the FCC cited one or more of the factors from its three-factor "patently offensive" test, the Commission failed to discuss *how* it had applied those factors to reach its conclusions.

The Second Circuit observed that, according to the Commission, "the word 'bullshit' is indecent because it is 'vulgar, graphic and explicit' while the words [*sic*] 'dickhead' was not indecent because it was 'not sufficiently vulgar, explicit, or graphic.' This hardly gives broadcasters notice of how the Commission will apply the factors in the future."

More broadly, the FCC argued in favor of its current "flexible" approach to fleeting expletives rather than its former categorical approach whereby, for a time, only the infamous "seven filthy words" uttered by George Carlin (and reviewed by the Supreme Court in *FCC v. Pacifica Foundation* in 1978) were considered actionably indecent. According to the Commission, its new flexible approach would prevent broadcasters from finding creative ways to "circumvent the prohibition on indecent speech." In other words, the FCC would decide what is and what is not

actionably indecent on an *ad hoc* basis, rather than working from a pre-determined list of prohibited words. The Second Circuit rejected that argument:

The observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC's crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so. And while the FCC characterizes all broadcasters as consciously trying to push the envelope on what is permitted, . . . [broadcasters] have expressed a good faith desire to comply with the FCC's

indecency regime. They simply want to know with some degree of certainty what the policy is so that they can comply with it. The First Amendment requires nothing less.

The Second Circuit likewise rejected as impermissibly vague the Commission's presumptive prohibition on the F-word and S-word and the two exceptions to that presumptive prohibition recognized by the agency—the ill-defined "*bona fide* news" exception and the

"artistic necessity" exception. According to the Court of Appeals, the FCC had not adequately explained either of the exceptions, leaving broadcasters to guess whether an expletive might fall into one of the two exempt categories. According to the Second Circuit, "[t]he 'artistic necessity' and '*bona fide* news' exceptions allow the FCC to decide, in each case, whether the First Amendment is implicated. The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently."

In addition to the problem of inadequate "notice" to broadcasters of what speech is prohibited, the Second Circuit also found that the FCC's "indiscernible standards come with the risk that such standards will be enforced in a

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Second Circuit Senior Judge Pierre Leval listening to oral arguments in *Fox v. FCC*. For streaming video of the hearing, [click here](#).

(Continued from page 5)

discriminatory manner,” compounding the vagueness problem. (As discussed above, one of the underpinnings of the “vagueness doctrine” on which the Second Circuit relied is the importance of guarding against discriminatory government enforcement.)

According to the Court of Appeals, “[i]f government officials are permitted to make decisions on an ‘ad hoc’ basis, there is a risk that those decisions will reflect the officials’ subjective biases. . . . We have no reason to suspect the FCC is using its indecency policy as a means of suppressing particular points of view. But even the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment.”

Given the insurmountable vagueness inherent in the FCC’s fleeting expletive indecency enforcement policy, the Second Circuit found that the policy had a chilling effect on speech. Under the FCC’s current policy, broadcasters are left to choose whether to air programming and face significant fines (and even place their licenses in jeopardy) or not to air or to censor potentially controversial programming rather than risk such fines. In those circumstances, the Court found the choice made by broadcasters “not surprising.”

To illustrate the point, the Second Circuit cited a 9/11 documentary certain broadcasters declined to air and a reading by Tom Wolfe of his novel *I am Charlotte Simmons* that was first cancelled, then rescheduled to air after 10 p.m. (during the “safe harbor” period), based on a complaint about “adult” language in the book. The court expressed special concern about the chill created for live broadcasts, such as the two Billboard Music Awards shows at issue as well as news and public affairs programming. Broadcasters could reasonably decide to shy away from certain guests or presenters during live broadcasts for fear that fleeting expletives might be uttered and result in substantial indecency fines.

According to the Second Circuit, “[i]f the FCC’s policy is allowed to remain in place, there will undoubtedly be countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether to avoid the FCC’s fines. This chill reaches speech at the heart of the First Amendment.”

Notwithstanding the extent of its opinion, the Second Circuit did not invalidate the federal indecency statute or the Supreme Court’s 1978 *Pacifica* decision. The indecency

statute and the basic legal framework of *Pacifica* that permits the FCC to sanction indecent material remain intact, so the July 13 decision does not mean the end of indecency regulation. The Second Circuit was careful to point out that its decision in *Fox* does not necessarily put an end to indecency enforcement. According to the court, “[w]e do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC’s current policy fails constitutional scrutiny.”

What’s Next?

Fox is only one of three indecency cases currently pending in the federal appellate courts. The Janet Jackson Super Bowl case remains pending before the Third Circuit Court of Appeals; that case, like the Second Circuit’s *Fox* case, was remanded by the Supreme Court for consideration of the constitutional issues in that case. (Like the Second Circuit, the Third Circuit held in the Janet Jackson case that the FCC had not provided a legally adequate basis for the change in its “fleeting images” indecency enforcement policy.)

Briefing in the Third Circuit’s Janet Jackson case has closed, but, as of July 23, 2010, no decision has been released.

In addition, the *NYPD Blue* fleeting nudity case still remains pending in the Second Circuit. That case involved a shower scene in which an actress’s buttocks were briefly revealed. A separate panel of Second Circuit judges heard oral argument in the *NYPD Blue* case in February 2009. Broadcasters have argued to that panel that the *Fox* decision compels a similar result in *NYPD Blue*.

Whatever the outcome in the Janet Jackson and *NYPD Blue* cases, it is quite likely that one or more of the indecency cases will make their way back to the U.S. Supreme Court, squarely presenting for decision the constitutionality of the FCC’s broadcast indecency enforcement policy.

Elizabeth Spainhour and Julia Ambrose are attorneys at Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. The firm represented intervenors ABC Television Affiliates Association in the case. Carter Phillips, Sidley Austin, LLP, Washington, D.C., on behalf of Fox Television; and Miquel Estrada, Gibson Dunn Crutcher LLP, Washington, D.C., on behalf of intervenor NBC Universal, argued the case before the Second Circuit. Jacob Lewis, FCC Associate General Counsel, argued on behalf of the government.

Federal District Court Rules That DMCA “Safe Harbor” Protects YouTube

General Awareness of Infringement Does Not Deprive Service Provider of Defense

On June 23, 2010, a New York federal district court issued its long-awaited decision in the copyright infringement suit between Viacom and YouTube. See [*Viacom Int’l Inc. v. YouTube, Inc.*](#), No. 07 Civ. 2103, 2010 WL 2532404 (S.D.N.Y. June 23, 2010). On cross motions for summary judgment, Judge Louis Stanton sided squarely with YouTube, holding that it was protected by the “Safe Harbor” provision of the Digital Millennium Copyright Act, codified at 17 U.S.C. Sec. 512 (c), against allegations of massive infringement of Viacom’s copyrighted works.

In reaching his decision, Judge Stanton identified the critical question as whether the statutory phrases in the Safe Harbor provision – “actual knowledge that the material or an activity using the material on the system or network is infringing,” and “facts or circumstances from which infringing activity is apparent” – mean that a general awareness of infringements will deprive a service provider of the defense; or that actual or constructive knowledge of specific and identifiable infringements of individual items is required to lose the defense.

The evidence in the case showed that YouTube was well aware that users were wrongfully uploading copyrighted content and took no action based on such general knowledge of these infringements. On the other hand, YouTube promptly removed video clips from its site upon complaint.

Quoting at length from the DMCA and its legislative history (one-third of the 30 page decision consists of quotations from these sources), Judge Stanton concluded that mere knowledge of prevalence of infringement will not deprive a service provider of the Safe Harbor protection.

To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users’ postings infringe a copyright would contravene the structure and operation of the DMCA.

2010 WL 2532404 at *15.

Citing to recent cases interpreting the Safe Harbor provision, Judge Stanton moreover concluded that “General knowledge that infringement is ‘ubiquitous’ does not impose a duty on the service provider to monitor or search its service for infringements.” *Id.* at *20 citing *Perfect 10 v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *UMG Recordings, Inc., v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004); *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

Finally, Judge Stanton distinguished the Supreme Court’s decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) and its progeny, categorizing these cases as involving peer-to-peer filing sharing networks designed to foster infringement – and not covered by the Safe Harbor provisions of the DMCA. The *Grokster* model, Judge Stanton concluded, has “little application here” because YouTube did not exist solely to provide the site and facility for copyright infringement.

Viacom v. Google: Federal District Court Grants Summary Judgment to Google

A Deeply Troubling Decision

By Cliff Sloan

[Viacom v. YouTube](#) is an important case about the protection of creative content in the online world. The district court's recent opinion granting summary judgment to YouTube and Google creates massive loopholes in copyright law for sites that embrace rampant copyright infringement. The decision should be deeply troubling for all content companies. The good news is that the case and the issues now are headed to the United States Court of Appeals for the Second Circuit for resolution.

Viacom alleges that YouTube built its business on a business model of copyright infringement. According to Viacom, YouTube's founders knowingly amassed a large audience through pervasive copyright infringement of popular videos. Even the district court, in finding for YouTube, held that a jury could find that YouTube "welcomed" copyright -infringing videos on its site.

Here are some striking examples of the evidence:

- ◆ One YouTube founder objected to the removal of "obviously copyright infringing stuff" by noting that 80% of YouTube's user traffic depended on infringing videos. He emphasized that "if you remove the potential copyright infringements . . . site traffic and virality will drop to maybe 20 % of what it is."
- ◆ The same YouTube founder responded to a concern about "steal[ing] . . . movies" by saying, "[W]e need to attract traffic. . . [T]he only reason why our traffic surged was due to a video of this type."
- ◆ Another YouTube founder exhorted his colleagues to "concentrate all of our efforts in building up our numbers as aggressively as we can through whatever tactics, *however evil*." (emphasis added)
- ◆ In response to the Supreme Court's *Grokster* decision (*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)), which reaffirmed liability for inducement of copyright infringement, YouTube's founders adopted a plan in which some infringing clips would be taken down, but many would not: "That way, the perception is that we are concerned about this type of material and we're actively monitoring it. [But the] actual removal of this content will be in varying degrees. That way . . . you can find truckloads of . . . copyrighted content . . . [if] you [are] actively searching for it."
- ◆ One YouTube founder noted that another founder was "blatantly stealing content from other sites and trying to get everyone to see it."
- ◆ A YouTube senior official e-mailed a colleague that "the truth of the matter is probably 75 -80% of our views come from copyrighted material." The same senior official noted that "the fact that I started like 5 [YouTube] groups based on copyrighted material probably isn't so great."

Viacom sent YouTube specific notices about many infringing videos, and YouTube took down the videos listed in
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Viacom's notice. But it was a game of whack-a-mole. For every infringing video taken down, more infringing videos popped up.

YouTube maintained that, as long as it took down videos in response to specific notices, it was immune from liability under the Digital Millennium Copyright Act (or "DMCA"). Its position was that it had no further obligation with regard to the infringing content.

The district court agreed with YouTube. It drew a distinction between what it called "general knowledge" of copyright infringement, which it said does not give rise to copyright infringement, and knowledge of specific instances of copyright infringement. The court held that, in this case, since YouTube responded to notices of specific copyright infringements by taking the specified videos down, YouTube was immune from liability.

The district court's opinion rests on serious legal errors. I'll highlight three of the major errors, but there are other problems as well.

First, actual knowledge. The DMCA requires that, if an entity has "actual knowledge" of copyright infringement, it must take down the infringing content, or it loses immunity. 17 U.S.C. 512(c)(1)(A)(i). This is a separate and distinct requirement from the requirement to take down material enumerated in a specific notice, 17 U.S.C. 512(c)(1)(C). But the district court's opinion collapses these two separate requirements. The court's opinion holds that actual knowledge means "knowledge of specific and identifiable infringements of particular items," as in the required notice for a notice-and-takedown. It thus effectively eliminates actual knowledge as a separate requirement from the notice-and-takedown.

Second, "red flags" knowledge. In still another requirement, the DMCA mandates that, even if an entity does not have actual knowledge of infringement, but has what is called "red flags" knowledge, it must take down the infringing content. 17 U.S.C. 512(c)(1)(A)(ii). Under the statute, red flags knowledge is awareness of "facts or circumstances from which infringing activity is apparent." But, here too, as with actual knowledge, the district court's opinion collapses the provisions. The court again requires knowledge of specific instances, as in a formal takedown notice. It thus also effectively eliminates red flags knowledge as a meaningful separate requirement.

Third, the district court's decision is, at the very least, in serious tension with the Supreme Court's *Grokster* decision. In *Grokster*, the Supreme Court emphasized that inducement of copyright infringement gives rise to contributory liability. Under the district court's opinion, however, in the DMCA context, *Grokster* is completely eviscerated. Notice and takedown provide complete immunity, despite, for example, the abundant evidence of YouTube's explicit reliance on infringing content to attract an audience and build a business.

The district court's opinion thus conflicts with the language and the statutory architecture of the DMCA. But the district court's decision also conflicts with a primary purpose of the DMCA -- to provide effective tools to combat online piracy. The legislative history of the DMCA is replete with examples of Congressmen and Senators emphasizing the importance of this goal. Ironically, the district court's opinion converts the piracy-combatting legislation of the DMCA into a license for piracy as long as notice and takedown are complied with.

Viacom v. YouTube is a defining case about the future of digital media. As Justice Kennedy observed to *Grokster*'s counsel in the *Grokster* oral argument, "from an economic and a legal standpoint, [it] sounds wrong to me" to suggest "that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product." But that is exactly what Viacom alleges happened here -- YouTube used infringing content as "the startup capital" to build its business, which it then promptly sold to Google for \$1.8 billion. Contrary to the district court's opinion, the DMCA does not provide immunity for such conduct simply because a specific notice-and-takedown procedure is followed.

Viacom has strong grounds for its appeal.

Cliff Sloan is a partner in intellectual property and litigation at Skadden, Arps, Slate, Meagher & Flom. He filed an amicus brief in support of Viacom on behalf of a coalition of content owners and public interest organizations.

Use of 7-Second Historic TV Clip in Broadway Show Deemed “Fair Use”

Federal Judge Grants Jersey Boys’ Motion for Summary Judgment in Copyright Action

By Itai Maytal and David S. Korzenik

A Broadway production’s display of seven seconds of historic footage during its reenactment of a famous rock-and-roll group’s television debut is fair use, a California federal district court judge ruled last week.

In the copyright infringement case, [*Sofa Entertainment Inc. v. Dodger Productions, Inc.*](#) No. Civ. 08-2616 (C.D. Cal July 12, 2010), Judge Dolly M. Gee granted summary judgment in favor of the defendant producer of the musical, *Jersey Boys*, finding its use of an introduction by the late television variety show host, *Ed Sullivan*, was fair use. Judge Gee explained that the use of the seven-second television clip in the stage-version introduction of the band, *Frankie Valli and The Four Seasons*, was “decidedly transformative,” was not “the heart” of the copyrighted work at issue, and could not reasonably usurp an “existing or potential market” for the plaintiff-copyright owner.

The 7-Second Clip Controversy

Jersey Boys is a dramatic work of biographical and cultural history that has been staged in multiple cities including New York, Chicago, Las Vegas, London and Los Angeles. The two-and-a half hour production tells the story of *Frankie Valli and The Four Seasons* and their impact on popular culture in the early 1960s. It traces how the group was formed and how its members struggled out of the Jersey swamps to make their way to success. For example, the musical recounts the band members’ youthful criminal indiscretions as they brushed with both the law and the mob, illustrates the genesis of some of their major hits, and how the band found their way through the daunting maze of the record business in the 1960’s.

The show also covers many of the band members’ personal problems involving their marriages, their financial difficulties, and the death of Valli’s daughter. In addition, the musical illustrates their setbacks from the U.S. arrival of *The Beatles* and other British performers during the “British

invasion,” their comeback, and their later break-up.

This lawsuit arose from the musical’s unauthorized use of a 7-second copyrighted video clip of host *Ed Sullivan* introducing *The Four Seasons* on the January 2, 1966 episode of *The Ed Sullivan Show* (“the Clip”). The Clip is displayed on a large screen at the end of the musical’s first act. Immediately before the Clip is played, an actor portraying *The Four Seasons’* member Bob Gaudio addresses the *Jersey Boys* audience and says:

“Around this time there was a little dust -up called The British Invasion. Britannia is ruling the air waves, so we start our own American Revolution. The battle begins on Sunday night at eight o’clock and the whole world is watching.”

As these lines are spoken, the actors portraying *The Four Seasons* are seen preparing themselves to perform on *The Ed Sullivan Show*. Old-style CBS cameras bearing the CBS logo roll across the stage. The audience is led to feel they are backstage with the band-performers, setting up their instruments, facing the back of the stage as if the *Sullivan* audience is in front of them.

Then, just as the actor playing Gaudio completes his line “...the whole world is watching,” the Clip is played in the middle of three video screens above the stage—which display stills and video images from the 1960s throughout the show. In the Clip, a black-and-white head-shot of *Ed Sullivan* appears and says: “Now, Ladies and Gentlemen, for all the youngsters in the country, The Four Seasons.” Mr. Sullivan then waves his left hand toward where *The Four Seasons* are to perform, at which point the Clip ends and the actors in *Jersey Boys* perform a song on stage.

There is no further use of the Clip and no other segments from *The Ed Sullivan Show* appear in the musical. Moreover, the Clip has no music nor does it

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display any images of the original *Four Seasons* or performances of any kind. It is simply a pedestrian headshot video depiction of Mr. Sullivan providing these ordinary words of introduction.

In 2008, Plaintiff Sofa Entertainment, owner of *The Ed Sullivan Show* library, filed a complaint in district court in the Central District Court of California, asserting a single copyright infringement claim against Defendant Dodger Productions for its use of the Clip in the *Jersey Boys* musical. Upon receipt of the claim, it was decided not to remove the Clip from the show. The parties then filed cross motions for summary judgment.

Fair Use Granted

On July 12, 2010, Judge Gee granted Dodger Productions' motion for summary judgment and denied Plaintiff's partial summary judgment, finding the Defendant's use of the Clip was fair. In so ruling, the Court considered each of the four statutory factors for fair use. 17 U.S.C. §107.

(1) Purpose and Character of the Use

Judge Gee found that the first factor weighed in favor of the Defendant, noting the use of the Clip was "decidedly transformative." Judge Gee cited to *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and held that "the more transformative the use of a copyrighted work, the more likely it is that the use will come within the protection of the fair use defense."

Specifically, Judge Gee found that the use of the Clip was transformative as it "served as a historical reference point in *The Four Seasons*' career, which use the Ninth Circuit has contrasted with uses that 'serve the same intrinsic entertainment value that is protected' by the copyright in the copied work" quoting *Elvis Presley*

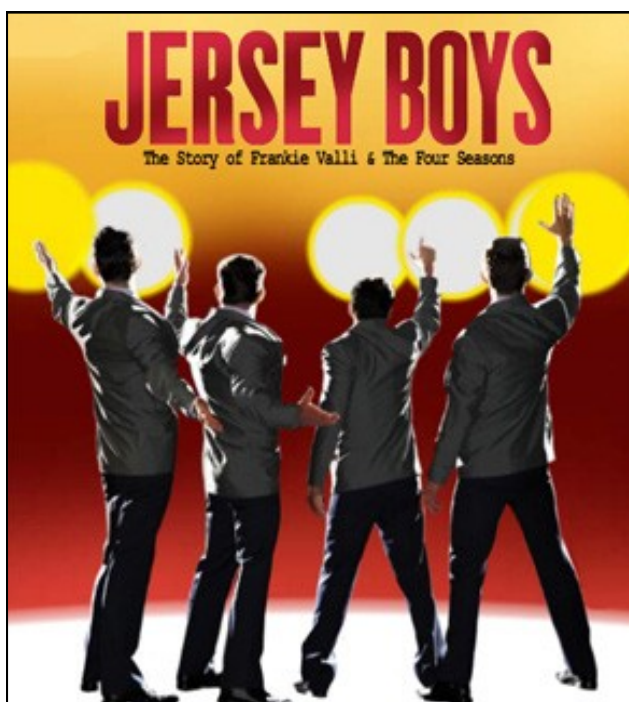
Enterprises, Inc v. Passport Video, 349 F.3d 622, 629 (9th Cir. 2003). She rejected Plaintiff's argument that the Clip was merely a re-broadcasting of a portion of a copyrighted episode of *The Ed Sullivan Show*, noting that the lines spoken by the actor portraying *The Four Seasons*' member Bob Gaudio prior to the Clip's appearance had served to "frame the transformative use" of the Clip in the musical. She also rejected Plaintiff's argument that Ninth Circuit case law required a voice-over or other explicit "introductions" to render a use transformative.

While Judge Gee observed that *Jersey Boys*' use, a "dramatic production intended to entertain," was not among the examples of fair use set forth in the preamble of §107 (works reproduced "for purposes such as criticism, comment, news reporting teaching..., scholarship, or research"), Judge Gee recognized that the list was not exhaustive.

Against the urging of the Plaintiff, the Judge refused to distinguish between documentaries and dramatizations of historical events for the purposes of fair use. Though Judge Gee saw a commercial dimension to *Jersey Boys* which could weigh against fair use, she did not accord this aspect of the first factor great weight as the Defendants sought "to profit in very small measure by the inherent entertainment value of *Ed Sullivan*'s [short] introduction of *The Four Seasons*."

(2) Nature of the Copyrighted Work

Judge Gee found that the second factor weighed only slightly in favor of fair use. She explained that the fact the Clip at issue had already been broadcast weighed in favor of Defendant, given that unauthorized use of a previously published work is more likely to constitute a fair use than an unpublished work.



Judge Gee's decision confirmed that there was no basis for Plaintiff's claim that the use of a seven - second historic clip in the context of a two-and-one-half hour biographical and historical play was in any way improper.

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(3) Amount and Substantiality of the Portion Used

As to the third factor, Judge Gee found this favored fair use, not only because the Clip represented quantitatively a small portion of the episode at issue, (1/400th or 0.0023 percent of the 45 to 50 minute episode (excluding advertisements), by Defendant's calculation), but because it was not the heart of Plaintiff's copyrighted work. Judge Gee held that "the actual performances by featured talent were, and are, the heart of *The Ed Sullivan Show* generally, and that is true of the episode on which *The Four Seasons* performed."

She ruled that the introduction by *Ed Sullivan* at most could be an "artery to the heart of the episode." Finally, even if the Clip were to be the "heart" of the recording of Plaintiff's full episode, Judge Gee concluded that there was no evidence in the record that would lead a reasonable jury to conclude the Clip is "the heart" of the *Jersey Boys*. (It certainly occupied an infinitesimal amount of the musical itself, accounting for nothing more than 1/100th or 0.0009 percent of its 130 minute runtime.)

(4) Effect on the Market

Finally, Judge Gee found the effect upon the potential market, weighed in Defendant's favor. She recognized that the "marketability of *Jersey Boys* cannot reasonably be said to be primarily dependent on Defendant's transformative use of the Clip." Judge Gee ruled that the extent to which the Defendant profited from the use of the Clip itself was minimal and they used none of it to market the Show. She further noted that Plaintiff introduced no evidence that it currently licensed or planned to license the Clip in support of its argument that Defendant's use was depriving it of income from licensing fees.

Judge Gee agreed with Defendant that the notion any such market existed for the introductions of *Ed Sullivan* was "speculative at best." Further, Judge Gee noted that to the extent that "any existing or potential derivative market [for the Plaintiff] is, in fact, one for similarly transformative uses [like the Defendant's], this factor is less likely to weigh in Plaintiff's favor." This is because "the market for potential derivatives uses includes only those that creators of the original works would in general develop or license others to develop." quoting *Campbell*, 510 U.S. at 592. The loss of revenues from the transformative market cannot count for market impact

under the fourth factor.

In short, Judge Gee found all four fair use factors favored a ruling that the Defendant's use of the Clip was fair. The fact that (1) the use of the Clip was decidedly transformative in nature, (2) the short Clip was published and (3) not the heart of Plaintiff's work, and (4) the use of the Clip had no credible effect on the value of the original copyrighted work, led Judge Gee to reject Plaintiff's copyright claims on fair use grounds.

Conclusion

At least for the Plaintiff, this decision was foreshadowed by a ruling in one of its previous copyright cases. In the Ninth Circuit's decision, *Elvis Presley Enterprises, Inc v. Passport Video*, 349 F.3d 622 (9th Cir. 2003), the court made a "close call" against a fair use defense where some 30 minutes of Elvis TV performances were used by a defendant. But, it also ruled that a use of a "small number of clips to reference an event for biographical purposes seems fair" and that it would be "permissible" to use Elvis clips from television shows "to note their historical value." Here, only one 7 -second clip of historic import was used by the Defendant. Unlike the *Elvis Presley* case, this was not a close call at all.

Indeed, Judge Gee's decision confirmed that there was no basis for Plaintiff's claim that the use of a 7 -second historic clip in the context of a two-and-one-half hour biographical and historical play was in any way improper. Plainly, the use of the Clip played a transformative role in the *Jersey Boys* telling of the cultural history and life stories of the band members. The limited use of the Clip, a single, fractional excerpt of Plaintiff's copyrighted work, helped transport the audience back to the cultural and historic setting of the 1960s so that their understanding of the events presented in the musical was meaningful; and it did so without any significant economic consequence to the Plaintiff.

David S. Korzenik of Miller Korzenik Sommers LLP and Walter R. Sadler of Leopold, Petrich & Smith represented the Defendant. Mr. Korzenik was supported by his firm associates Mona Houck and Itai Maytal. Mr. Sadler was supported by his firm associate Nicholas Morgan. Plaintiff was represented by Jeffery McFarland, George Hedges and Noah Helpen of Quinn Emanuel Urquhart Oliver & Hedges, LLP. and by Jaime Marquart of Baker Marquart Crone & Hawxhurt.

U.S. Supreme Court Rejects Broad Constitutional Challenge to Washington's Public Records Act

By Eric M. Stahl and Bruce E.H. Johnson

In an 8-1 decision, the U.S. Supreme Court ruled that public disclosure of ballot referendum signatures does not, as a general matter, violate the First Amendment. *Doe v. Reed*, ___ S. Ct. ___, 2010 WL 2518466 (June 24, 2010).

For news organizations, the opinion is most significant for what it does not say: the court turned a deaf ear to the *Doe* plaintiffs' broad arguments that strict constitutional scrutiny is required whenever disclosure of individual identifying information is sought under a public records law. Although the decision allows for "as applied" constitutional challenges, that holding is limited to requests seeking the identity of referendum signers, and the burden on plaintiffs bringing such claims is high. The opinion seems unlikely to have any impact on other types of public records requests.

Doe concerned a Washington ballot referendum, R-71, that sought to overturn the state's domestic partnership ("everything but marriage") statute. Sponsors of the measure gathered voter signatures on a referendum petition, obtaining enough to qualify the measure for the November 2009 ballot.

State officials subsequently received multiple public records requests for the petitions, including from opponents of the referendum (*i.e.*, supporters of the domestic partnership law), whose stated intent is to publish the names of petition signers on the Internet in order to encourage difficult "conversations." 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"). Before the records were released, however, the R-71 sponsors, and two of the 138,500 voters who signed the

petitions, brought suit in federal court, claiming that release of petition signers' identifying information would violate the First Amendment both facially and as applied.

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 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*, 661 F. Supp. 2d 1194 (W.D. Wash. 2009).

The Ninth Circuit reversed, and ordered the petitions be released as required by the PRA. 586 F. 3d 671 (9th Cir. 2009).

The appellate court held, first, that the referendum petition process is not "anonymous speech," given the public manner in which signatures are gathered and verified. The Ninth Circuit also held that even if disclosure of the signer's identity implicated "speech," the disclosure mandated by the PRA was no greater than necessary to further two "important" interests: preserving the integrity of elections by promoting government transparency and accountability, and providing Washington voters with information about who supports a ballot

referendum.

The Supreme Court affirmed. The Court rejected the plaintiff's facial challenge, which alleged that release of ballot referendum signature in any context violated the signer's First Amendment rights of association. But the Court held that disclosure might be unconstitutional in some circumstances.

Seven justices joined the lead opinion by Chief Justice Roberts, which holds that "disclosure of referendum petitions ... does not as a general matter violate the First Amendment." The Court found that the state's asserted interest in

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Although the decision allows for "as applied" constitutional challenges, that holding is limited to requests seeking the identity of referendum signers, and the burden on plaintiffs bringing such claims is high.

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“preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability” sufficed to overcome the plaintiff’s argument that the PRA was facially unconstitutional. (The majority found it unnecessary to address the state’s other asserted interest in providing information to the electorate about who supports the petition.)

The majority opinion holds that disclosure of referendum signatures “is subject to review under the First Amendment” and may be unconstitutional if those resisting disclosure show “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.”

The as-applied challenge to disclosure of the R-71 signatures thus will continue, with the plaintiffs attempting to prove that such a “reasonable probability” of harassment exists.

The majority construed the issue before it narrowly. Most significantly, the ruling that an as-applied First Amendment challenge could proceed is rooted in concerns over protecting participation in the political process. Nothing in the decision suggests that such challenges would be allowed with respect to public records requests outside the electoral context.

Moreover, the Court did not address the *Doe* plaintiffs’ broader arguments regarding public disclosure of individual information. The plaintiffs had argued, for example, that strict constitutional scrutiny is required any time personal information is disclosed, and suggested that open government principles must be reconsidered because technology makes information too accessible.

The decision does not resolve the precise showing plaintiffs would need to make in order to block disclosure of signatures on First Amendment grounds, though a majority appears to believe that any such challenge would be difficult. Justice Roberts’ opinion suggests that nondisclosure should be the exception: “There is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.”

Justices Sotomayor, joined by Justices Ginsburg and Stevens, suggested that plaintiffs faced a “heavy burden,” and that evidence of any threats of harassment would have to be

direct and significant. On the other hand, Justice Alito (in a concurrence joined by no other justice) stated his belief that the R-71 plaintiffs have a “strong argument” that they would be subject to harassment if the petitions were disclosed.

Justice Scalia concurred separately, finding that the plaintiffs have no First Amendment claim whatsoever. In his view,

There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Justice Thomas cast the lone dissenting vote. He would have accepted the plaintiffs’ facial challenge.

As a result of the multiple *Doe* opinions, future public records requests for ballot measure petitions could result in litigation, and a case-by-case determination as to whether disclosure would subject signers to threats and harassment (except in California, where disclosure of ballot measure petitions is barred by statute). Outside this narrow context, however, *Doe* appears to pose no general threat to public records access.

Eric M. Stahl and Bruce E.H. Johnson are partners in the Seattle office of Davis Wright Tremaine, which submitted an amicus brief in Doe v. Reed on behalf of a coalition of news media organizations.

The petitioners in Doe v. Reed were represented by James Bopp of Terre Haute, Indiana. The respondent State of Washington was represented by its Attorney General, Rob McKenna. The other respondents were represented by Kevin Hamilton of Perkins Coie in Seattle.

Supreme Court Rejects Challenge to Enron Conviction Predicated Upon Pretrial Media Coverage

By Tom Curley

In a decision issued late last month, the Supreme Court rejected an appeal by former Enron executive Jeffrey Skilling to have his criminal convictions overturned because of intensive pretrial media coverage that Skilling contended poisoned the jury pool. *Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (June 24, 2010).

In so holding, the Supreme Court reiterated that widespread media coverage can rarely (if ever) prejudice a criminal defendant's Sixth Amendment right to a fair trial.

"Prominence does not necessarily produce prejudice, and jury *impartiality*, we have reiterated, does not require *ignorance*." *Id.* at *14. See also *id.* at *23 n.35 ("News coverage of civil and criminal trials of public interest conveys to society at large how our justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented.").

Skilling's appeal arose out of his prosecution following Enron's spectacular collapse in 2001. The Supreme Court granted certiorari on two discrete issues. The first concerned the constitutionality of Skilling's convictions under a federal anti-fraud statute. The Court agreed with Skilling that his convictions under this statute were improper and it remanded his case for a determination as to whether some or perhaps all of his convictions must be voided.

The second issue accepted for certiorari arose out the trial court's denial of Skilling's motions to transfer venue out of Houston. Given the shocking nature of Enron's collapse, there was intensive media coverage concerning the energy company, (not only in Houston where the company was based, but nationwide). Much of the local media coverage was factual in nature, but some of it was directed personally at Enron's top executives. In addition, and aside from the media coverage, Enron's collapse had a devastating financial impact on the lives of its employees and their families, an

impact which roiled the Houston area. Before the trial court, Skilling argued strenuously but unsuccessfully that the jury pool in Houston was so prejudiced against him that a transfer of venue was constitutionally mandated.

The precise question presented to the Supreme Court was as follows:

When a presumption of jury prejudice arises because of ... massive, inflammatory pretrial publicity, whether the government

may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was prejudiced.

While this question dealt specifically with a legal issue concerning the nature of the government's burden in demonstrating that a given jury is impartial, the resolution of the issue involved consideration of the impact of media coverage in high-profile cases, as well as the effectiveness of *voir dire* and other measures in eliminating prejudice.

How the justices addressed these issues could have significantly impacted media access in criminal proceedings. For

example, if the Court were to take an expansive view of when juror prejudice should be presumed – and then conclude such a showing could not be rebutted – new pressures would be placed on judges to close pretrial proceedings, gag lawyers and restrict access to records in order to avoid a transfer of venue.

Media Amici File Brief

Accordingly, a coalition of publishers, broadcasters, and First Amendment organizations (listed below) filed an amicus brief in the *Skilling* case urging that "[a]ny standard for

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In the Supreme Court's first fair trial/free press ruling in almost two decades, the Justices reaffirmed that pre-trial publicity alone can rarely, if ever, make it impossible to seat an impartial jury, especially when the trial is held in a large metropolitan area like Houston.

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identifying when a presumption of prejudice to the jury pool exists must limit the presumption to the rare case where extraordinary factors beyond just the volume and tenor of pretrial press coverage raise specific and concrete concerns about the ability of jurors to reach a verdict based upon the evidence presented in court.”

The *amici* also argued that, even if the high threshold for the finding of a presumption of prejudice is met – such a presumption should be *rebuttable* given the effective remedial tools that are available to a trial court to address concerns that typically arise in a high profile criminal prosecution. Most notably, *voir dire* is an effective device for screening out potentially biased jurors and those who may have prejudged a defendant’s guilt or innocence. And other steps, such as calling a larger initial venire, allowing additional preemptory challenges, and strict instructions by the trial court can protect the defendant’s fair trial right in most all circumstances.

Concerns Overstated

While the *amici* took no position on whether Skilling’s conviction should be overturned, they noted that criminal defendants regularly object to all manner of publicity about their prosecutions, and defendants often (erroneously) point to extensive media coverage as sufficient grounds for restricting public access to criminal proceedings.

In the overwhelming number of cases, however, these concerns are overstated and are properly rejected by trial courts under the existing standards governing the constitutional access right. Indeed, as the *amici* demonstrated, an extensive record of fair and open trials conducted in the most intensely followed cases – resulting in both acquittals and convictions – confirms the ability of trial courts to ensure fair trials before unbiased juries, especially in a metropolitan area where the jury pool is large.

Amici’s Position Adopted

Justice Ginsburg authored the opinion of the Court, joined by Chief Justice Roberts, and Justices Scalia, Kennedy and Thomas. The Court’s opinion embraced the principles urged by *amici*; indeed the Court observed that the impact of media coverage on jurors – even in closely followed cases – tends to

be exaggerated.

Citing the amicus brief in a footnote, the majority noted that “[R]emarkably in the eyes of many,” “[c]ases such as those involving the Watergate defendants, the Abscam defendants, and ... John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which ... were satisfactorily disclosed to have been unaffected (indeed, in some instances blissfully unaware of or untouched) by that publicity.” *Id.* at *19 n.28 (citation omitted).

Denial of Transfer Challenged

At the heart of the case was the question whether it was possible for Skilling to receive a fair trial in the place of Enron’s home, Houston. The trial court rejected Skilling’s repeated motions to transfer venue, concluding that – with a potential jury pool of several million people – it could seat an unbiased jury. The court began the winnowing process with a 77-question, 14-page questionnaire sent to prospective jurors. The candidates who survived the questionnaire were then brought in for a *voir dire* lasting about five hours in which the trial court further questioned them.

Skilling’s trial went forward in 2006 and he was ultimately convicted after the jury deliberated for about five days following a four-month trial. Skilling was found guilty on 19 counts, but the jury acquitted him on nine other counts.

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed Skilling’s convictions but expressed concern about the potential for prejudice in the jury pool. Indeed, the Fifth Circuit disagreed with the trial judge and held that Skilling should have been entitled to a presumption of prejudice under the circumstances. The trial court had concluded no such presumption arose. But the Fifth Circuit – emphasizing not just the media coverage but also the financial impact of Enron’s collapse on Houston and a guilty plea by a different Enron executive on the eve of Skilling’s trial – held a presumption of prejudice did indeed arise. Nevertheless, the Fifth Circuit held that the jury questionnaire and *voir dire* process employed by the trial court were sufficient to rebut that presumption.

In the Supreme Court, Skilling took direct aim at the Fifth Circuit’s holding that once a presumption of prejudice arises, it could be rebutted through *voir dire*. Skilling argued that

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the presumption could *not* be rebutted and a transfer of venue was constitutionally compelled. Alternatively, Skilling attacked the trial court's *voir dire* and questionnaire as thoroughly inadequate to root out juror bias.

Presumption Rarely Arises

Supreme Court precedent suggests that *voir dire* (and other remedial measures) always have a role to play in rebutting a presumption of prejudice in the jury pool. But, as Skilling emphasized, there have been a very few egregious cases in which the Court has indicated that even the most thorough *voir dire* would not have been enough to ensure that a criminal defendant received a fair trial in a particular venue.

The paradigmatic case in which the importance of *voir dire* recedes (or perhaps even becomes irrelevant, as Skilling contended) is one involving sensational media coverage of a heinous crime in a small community and/or one in which the trial proceedings themselves have been corrupted. *See generally Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Justices distinguished those anomalous cases from Skilling's, noting that (1) Houston is a far larger community with a diverse population; (2) the news coverage in Houston contained no confession by Skilling or other similarly prejudicial information; (3) four years had passed between Enron's collapse and Skilling's trial; and (4) the jury did not convict Skilling on all counts with which he was charged. *See Skilling*, 2010 WL 2518587, at *15-16.

Whatever the continuing viability of an argument that *voir dire* cannot serve to rebut a presumption of juror prejudice in certain extreme circumstances, the Supreme Court concluded that Skilling's case did not give rise to such a presumption. *Id.* at *17.

"At the time of Skilling's trial, more than 4.5 million individuals eligible for jury duty resided in the Houston area. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empanelled is hard to sustain," the Court wrote. *Id.* at *15 (citations omitted).

Ultimately, the majority did not reach the question of whether a presumption of prejudice, once it has arisen, may be rebutted. Instead, the Supreme Court concluded that the Fifth Circuit had erred in concluding that such a presumption

was warranted in Skilling's case. Turning next to the question of "whether actual prejudice infected Skilling's jury," *id.* at *17, the Court proceeded to closely examine the jury questionnaires and the *voir dire* process to hold that, regardless of whether such a presumption arose, the jurors seated were not actually biased against Skilling.

The three dissenters on the pretrial publicity issue, in an opinion authored by Justice Sotomayor, were in accord with the majority that Skilling was not entitled to a presumption of prejudice. But in a lengthy opinion of their own – also closely parsing the questionnaires and the *voir dire* – the dissenters came to the conclusion that, "[w]hile the procedures employed by the District Court might have been adequate in the typical high-profile case, they did not suffice in the extraordinary circumstances of this case to safeguard Skilling's constitutional right to a fair trial before an impartial jury." *Id.* at *49. Accordingly, the dissenters would have reversed Skilling's convictions on this basis.

Conclusion

The Court's thorough and detailed analysis, and ultimate approval of, the means by which the trial court empanelled the jury in Skilling's case vindicates the principle that judges have at their disposal a panoply of measures – short of change of venue – to weed out tainted or prejudiced jurors, even in high-profile, so-called "Trials of the Century," that generate a tremendous volume of press coverage. In the Supreme Court's first fair trial/free press ruling in almost two decades, the Justices reaffirmed that pre-trial publicity alone can rarely, if ever, make it impossible to seat an impartial jury, especially when the trial is held in a large metropolitan area like Houston.

The amici were represented by David A. Schulz, Steven D. Zansberg, Thomas Curley and A. Zack Rosenblum of Levine Sullivan Koch & Schulz, L.L.P.

The amici were ABC, Inc., Advance Publications, Inc. The Associated Press, Bloomberg L.P., Cable News Network, LP, LLLP, The California Newspaper Publishers Association, Dow Jones & Company, Inc., The First Amendment Coalition, Gannett Co., Inc., The Hearst Corporation, The McClatchy Company, Media Law Resource Center, Inc., MediaNews Group, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press, The Tribune Company and The Washington Post.

Washington Court of Appeals Rejects Defamation by Implication through the Juxtaposition of True Statements

By Jonathan Donnellan and Stephen Yuhon

Earlier this month, in [*Yeakey v. Hearst Communications, Inc.*](#), No. 39263-1-II (Wash. Ct. App. July 7, 2010), the Washington Court of Appeals held that Washington law does not recognize a cause of action for defamation by implication through the juxtaposition of true statements where there is no claim that the alleged false impression could be contradicted by omitted facts.

In its decision, the court rejected the plaintiff's argument that the Washington Supreme Court had expanded Washington defamation law in *Mohr v. Grant*, a 2005 case in which the court recognized the viability of defamation by implication through a material omission and, in doing so, had quoted a passage from Prosser's treatise on Torts making reference to defamation by juxtaposition.

Post-Intelligencer's Coverage of Crane Collapse

Yeakey arose out of a series of news articles published in the Seattle Post-Intelligencer (the "PI"), a Hearst newspaper, concerning a fatal 2006 crane collapse at a Bellevue construction site. Immediately following the collapse, state officials began an investigation. Their first step was to require Warren Yeakey, the crane's operator, to undergo a drug test.

The following day the PI ran a series of stories concerning the accident and its possible cause, before the drug test results were known. The lead article reported the several avenues of investigation, including operator error and structural failure. It was entitled "Man completed mandated rehab program after his last arrest in 2000" and led with a discussion of Yeakey. It recounted the drug test just given and reported Yeakey's extensive public record of drug use, including six convictions, as well as his employer's "zero tolerance" drug policy.

The article ran with other accident coverage on the front page, above which was a banner headline, "Operator in crane wreck has history of drug abuse," a photograph of the collapsed crane and emergency crews, and a side feature entitled, "GAPS IN SAFETY CONTROLS" listing potential safety failures, including statements that "[t]he state does not require drug tests before crane operators are hired" and "[c]ranes must be inspected before each use, but it is usually done by the operator." The PI also ran a front-page story about the man who died in the crane collapse, including the man's picture.

Yeakey sued the PI, alleging defamation, false light, negligent infliction of emotional distress, and outrage. Though he conceded that all of the statements in the articles were true and that his claims were not based on any omission of facts, Yeakey contended that the juxtaposition of the lead article's statements with the headlines, photographs of the accident and the deceased, and the graphic entitled "GAPS IN SAFETY CONTROLS" falsely implied that Yeakey was responsible for the collapse due to his drug use, operator error, or failure to properly inspect the crane.

Significantly, the Article reported that the cause of the collapse was not yet known at the time of publication (it later turned out to be a structural defect), that the results of Yeakey's drug test were not yet known (they turned out negative), that it was not known whether Yeakey had

inspected the crane on the day of the collapse or if any inspection had been performed improperly, and that it was not known whether operator error was a factor in the collapse.

The PI's Motion to Dismiss

The PI moved to dismiss, arguing, among other things,

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The court observed, "we have held that a plaintiff may not base a defamation claim on the negative implication of true statements."

The court rejected Yeakey's argument that "our Supreme Court expanded the rule of law as articulated in *Lee* to allow his defamation by implication claim here."

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that Washington does not recognize a claim for defamation by implication based on juxtaposition of truthful statements. The PI cited to *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538 (1992), in which the Washington Court of Appeals held that “[d]efamatory meaning may not be imputed to true statements.”

In opposition, Yeakey relied on *Mohr v. Grant*, 153 Wn. 2d 812 (2005), in which, he argued, the Washington Supreme Court recognized defamation by juxtaposition. Yeakey cited to one sentence in *Mohr*, in which the court quoted Prosser’s treatise on Torts, which mentioned defamation by implication through juxtaposition along with defamation by implication through omission: “Defamation by implication occurs where ‘the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.’” *Id.* at 823 (quoting Prosser & Keeton on the Law of Torts 116, at 117).

In *Mohr*, the issue for the Washington Supreme Court was whether the plaintiff had met his burden to establish that newscasts had created a false implication by omitting certain facts. In that case, a retail store owner brought a defamation claim against a television station based on three reports concerning an altercation between the owner and a mentally handicapped man. 153 Wn. 2d 816-17.

The owner claimed that the newscasts had created a false, defamatory implication by failing to state the handicapped man had made violent threats against him. *Id.* at 819-20.

The court recognized the validity of a claim for defamation by implication through the omission of material facts, but held that two of the three challenged newscasts could not support such a claim because they contained information that “negated any [alleged false] impression,” *id.* at 828-29. It also rejected the claim based on the third newscast because the alleged omitted facts were not material – they would not have negated the claimed false impression even if included.

The PI pointed out that *Mohr* addressed defamation through omission only, and that *Mohr*’s passing reference to the juxtaposition theory in its quotation from Prosser was *dictum*. The PI argued that the *Mohr* court did not intend to—and did not—change Washington law to recognize defamation by juxtaposition.

The trial court denied the PI’s motion and its subsequent motion for reconsideration. The PI sought and was granted discretionary review from the Washington Court of Appeals.

Court of Appeals Decision

The “sole question” before the Court of Appeals was “whether Washington recognizes a cause of action for defamation by juxtaposition in a case where all the statements are true and where there is no allegation that a false impression could be contradicted by omitted facts.” (slip op. at 4.)

Citing to *Lee v. Columbian*, the court observed, “we have held that a plaintiff may not base a defamation claim on the negative implication of true statements.” (*id.* at 5.) The court rejected Yeakey’s argument that “our Supreme Court expanded the rule of law as articulated in *Lee* to allow his defamation by implication claim here.” (*id.*) The appeals court noted that the holding in *Mohr* was that “the relevant concern is whether the article leaves a provably false impression contradicted by the inclusion of omitted facts.” (*Id.*) Pointing out that “*Mohr* does not mention *Lee*” (*id.* at 6), the appeals court went on to hold that “the Prosser and Keeton quotation in *Mohr* was dicta and did not serve to change the standard articulated in *Lee*” (*id.* at 5 (quoting *Kish v. Ins. Co. of North Am.*, 125 Wn. 2d 164, 172, for the proposition that “court is not bound by language in a court opinion when the court did not address or consider the issue directly”).).

The court concluded, “Yeakey bases his argument on the mistaken belief that *Mohr* expanded the defamation tort to include defamation by implication through juxtaposition of truthful statements. Washington courts have not recognized such claims, and we decline to do so here because *Lee* remains the law.” (*Id.* at 6.) To date, Yeakey has not yet indicated whether he intends to petition the Washington Supreme Court to review the decision from the court of appeals.

The PI was represented by Hearst in-house counsel Jonathan Donnellan, Courtenay O’Connor and Stephen H. Yuhon, and also Stephen A. Smith of K&L Gates in Seattle. Yeakey was represented by Matt Renda of Tacoma, WA.

Summary Judgment Granted to History Channel

Statement Concerning Federal Prisoner's Gang Affiliations Substantially True

By Steve Zansberg

Two different (but related) violent and racist prison gangs are sufficiently similar, for purposes of defamation law, to be materially indistinguishable. So held a United States District Court. *Bustos v. United States, et al.*, No. 08-cv-153 (D. Colo. May 20, 2010).

Judge Lewis T. Babcock accepted the recommendations of a United States Magistrate Judge that summary judgment be granted to the A&E Television Networks ("AETN") on the libel and civil conspiracy claims of Jerry Lee Bustos, a federal prisoner serving a thirty-year term and housed at the SuperMax Federal Penitentiary in Florence, Colorado.

Background

The case arose out of a 2007 cablecast of the series *Gangland* on the History Channel cable television network. The program in question, "Gangland: Aryan Brotherhood," focused on the violent and racist prison gang, the Aryan Brotherhood, and its influence on both federal and state prisons throughout the country. In the documentary, the plaintiff, Jerry Lee Bustos, is shown briefly at various points in the documentary engaged in a fistfight with an African-American prisoner on the prison recreation yard.

The fight between prisoner was captured on a surveillance camera at the Florence ADX maximum federal penitentiary in November 1998. In the documentary, the narration accompanying the prison surveillance camera footage refers to the Aryan Brotherhood as among "the most infamous" of the gangs in America prisons, and that its members "have carried out contract killings [and] dominated the drug trade."

Bustos, who is a Mexican-American, filed various claims against the United States of America, the Bureau of Prisons, and various prison officials, and also asserted invasion of privacy claims against AETN. The Court had granted AETN's motion to dismiss Bustos' invasion of privacy claims on intrusion, publication of private facts, and misappropriation theories. *See Bustos v. United States*, No. 08-cv-153-LTB-MEH, 2009 WL 2602640, 38 Media L. Rptr. 1198 (D. Colo. Aug. 21, 2009).

Following the taking of the plaintiff's deposition, AETN moved for summary judgment on Bustos' libel claim, arguing

alternatively (1) that the statements of and concerning the plaintiff contained in the broadcast were substantially true, (2) that the statements at issue were libel *per quod* under Colorado law, (if defamatory at all), requiring the plaintiff to prove special damages, which he had not done, and (3) because of Bustos' criminal past and conduct as a federal prisoner, he is a "libel -proof plaintiff" for purposes of AETN's cablecast concerning him.

Magistrate's Recommendation

The United States Magistrate Judge (Michael Hegarty) recommended that AETN's motion for summary judgment be granted on grounds of substantial truth; the Magistrate Judge also found that the statement purportedly accusing Bustos of being affiliated with the Aryan Brotherhood was libelous *per se*; the Magistrate Judge did not address AETN's argument that Bustos is a libel-proof plaintiff. (Because the entirety of Bustos' deposition transcript was designated as confidential under the protective order entered in the case, the Magistrate Judge's entire recommendation is under seal.)

Bustos filed objections to the Magistrate Judge's recommendation, arguing that the judge had erred in finding that AETN's program was substantially true. AETN filed counter-objections arguing that the broadcast, which did not on its face accuse Bustos of having committed any crimes while in prison, was at worst libelous *per quod*, and, alternatively, Bustos is libel-proof.

District Court Decision

On May 20, 2010, following *de novo* review, Judge Babcock issued an order accepting the Magistrate Judge's Recommendation. *See Bustos v. U.S.*, No. 08-cv-153-LTB-MEH, 2010 WL 2017724, and 2010 U.S. Dist. LEXIS 49790 (D. Colo. May 20, 2010). Judge Babcock held that AETN is entitled to summary judgment on Bustos' libel claim (and the civil conspiracy claim) on grounds that AETN's broadcast was substantially true.

As Judge Babcock said, "[Bustos] contends that

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Gangland depicts him as an Aryan Brotherhood member carrying out violent acts on behalf of the Aryan Brotherhood, so he asserts that as a direct result of this *Gangland* broadcast, he received threats of violence and death on several occasions from the Aryan Brotherhood, D.C. Blacks, and Mexican-American gang members. And, he says that he is now perceived as an undercover Aryan Brotherhood enforcer, making him a target of violent acts of revenge.”

Although he accepted the Magistrate Judge’s reasoning that the statement at issue is defamatory *per se*, not *per quod*, Judge Babcock further held that “the statement is substantially true, in that the effect of the statement on the viewer would be no different in light of plaintiff’s representations that he holds himself out to be a member of the Mexicanemi gang, which is allied with the Aryan Brotherhood.” [Readers interested in learning more about the Mexican Mafia (of Texas) gang, a/k/a the Mexicanemi, should see *United States v. Valles*, 484 F.3d 745, 747 (5th Cir. 2007)].

AETN’s motion for summary judgment relied upon the body of case law holding that the defamatory nature of a statement is judged by the likely impact of the communication on “right -thinking persons” or among “a considerable and respectable class of people,” as opposed to a prison population. *Saunders v. Bd. of Dirs., WHYY-TV (Channel 12)*, 382 A.2d 257, 259 (Del. Super. Ct. 1978); *Restatement* § 559, cmt. e (1977); *Agnant v. Shakur*, 30 F. Supp. 2d 420, 424 (S.D.N.Y. 1998); *Michtavi v. New York Daily News*, 587 F.3d 551, 552 (2d Cir. 2009).

Rejecting Bustos’ objections to the Magistrate Judge’s recommendation, Judge Babcock found and concluded “that the Magistrate Judge’s thorough and reasoned analysis leading to his ultimate conclusions is correct.” Accordingly, Judge Babcock granted AETN’s motion for summary judgment, dismissing with prejudice Bustos’ claims for libel and for civil conspiracy.

Bustos has filed a notice of appeal to the U.S. Court of Appeals for the Tenth Circuit, and is seeking a Rule 54(b) certification of the District Court’s Order so that he may appeal it prior to resolving the remaining claims against the federal defendants.

AETN was represented by Tom Kelley and Steve Zansberg of Levine Sullivan Koch & Schulz, L.L.P., Denver. Jerry Lee Bustos was represented by Buck Beltzer, David Scott Martinez, and John Kevin Bridston, of Holland & Hart, LLP in Denver.



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Libel Complaint Against Local Newspaper Over Police Blotter Item Dismissed

Lawyers are typically flagged as potential plaintiffs when vetting copy. Cautious media lawyers may want to add law firm librarians to that category. The federal district court in New Jersey recently dismissed a law librarian's complaint against a local newspaper over a police blotter item, but it allowed the librarian's claims against her former employer to go forward. [*Ciemniecki v. Parker McCay*](#), No. 09-6450, 2010 U.S. Dist. LEXIS 55661 (D. N.J. June 7, 2010) (Kugler, J.) (unpublished).

The plaintiff, a former librarian with the Parker McCay law firm in New Jersey, was arrested and fired from her job after the firm's CFO accused her of setting off a false fire alarm. The local newspaper covered the arrest in a brief police blotter item which appeared in a section entitled "On the Record." The article read in full:

Woman arrested for making false alarm

A Haddonfield woman faces charges after pulling a fire alarm at a township office building. Sheila Ciemniecki, 51, of Rhoads Avenue was charged with making a false public alarm. On June 2, at 11:33 am township police and fire departments responded to 3 Greentree Centre for a report of an activated fire alarm and discovered that it had been false. The alarm activation caused the building's evacuation and a temporary interruption of the business there. Police did not give a reason as to why Ciemniecki pulled the fire alarm. She was later released to await a hearing in municipal court.

The law firm and police initially claimed that surveillance video showed plaintiff pulling the alarm, but prosecutors later dropped all charges based on their review of the tape. Ciemniecki sued the newspaper for libel and false light; and sued Parker McCay and local police for libel, privacy and related claims.

Police Blotter Item Was True

Granting the newspaper's motion to dismiss for failure to state a claim, the district court reasoned that read as a whole the article was true. The court acknowledged that if viewed in isolation the first and next to last sentences in the article seemed to accuse plaintiff of actually pulling the alarm. ("A Haddonfield woman faces charges after pulling a fire alarm at a township office building." "Police did not give a reason as to why Ciemniecki pulled the fire alarm.")

In context, however, the article could not reasonably be understood as stating that plaintiff pulled the fire alarm. It appeared in a section entitled "On the Record," the headline and first sentence emphasized that plaintiff was merely facing charges; and readers would not mistake the item for a "work of independent investigative journalism."

Plaintiff argued that the newspaper should have liberally inserted the word "allegedly" in the article. While the failure to do so may have created a "fine example of sloppy journalism," the article did not convey that plaintiff actually pulled the fire alarm.

Claims Against Employer Go Forward

The district court denied the law firm's motion to dismiss the complaint and the bulk of the district court's lengthy decision involves discussion of these claims. Among other things the court rejected the law firm's argument that plaintiff was a limited purpose public figure – who should have pled actual malice – because she held a press conference in connection with her lawsuit. A press conference to publicize the filing of litigation did not make plaintiff a limited purpose public figure retroactively, the court concluded.

The district court also rejected the law firm's argument that the actual malice standard applied because the case involved a matter of public concern under New Jersey law. While a false fire alarm is "no trivial matter," the complaint did not allege facts making "this particular false fire alarm squarely in the realm of a substantial public concern," the court stated.

Less Protection for Anonymous Online Commercial Speech, According to Ninth Circuit

The Ninth Circuit this month issued a lengthy ruling on First Amendment protection for anonymous speech, concluding that heightened protection is not necessary for anonymous commercial speech. [*In re Anonymous Online Speakers*](#), No. 09-71265 (9th Cir. July 12, 2010) (Thomas, McKeown, Bybee, JJ.). “The right to speak, whether anonymously or otherwise,” the Court stated, “is not unlimited ... and the degree of scrutiny varies depending on the circumstances and the type of speech at issue.”

Procedurally the decision came on cross petitions for mandamus review of a district court order permitting discovery of the identities of three anonymous bloggers. The district court had applied the heightened standard set out by the Delaware Supreme Court in *Cahill v. Doe*, 884 A.2d 451 (Del. 2005), requiring plaintiffs to give notice and allege sufficient facts to survive a hypothetical summary judgment motion.

The Ninth Circuit held that the district court did not clearly err in making its discovery decision under the *Cahill* standard, but found that in the context of commercial speech *Cahill* “extends too far.”

Background

The underlying case involves tortious interference and related claims brought by Quixtar, a multi-level marketing company, against Signature Management Team, a competing company founded by ex-Quixtar employees. The plaintiff alleged that defendant orchestrated an online smear campaign via anonymous blogs and online videos. Among the statements at issue:

“Quixtar has regularly, but secretly, acknowledged that its products are overpriced and not sellable”; “Quixtar currently suffers from systemic dishonesty”; “Quixtar is aware of, approves, promotes, and facilitates the systematic noncompliance with the FTC’s Amway rules.”

Quixtar alleged that these anonymous blog statements were made by defendant’s employees or agents. The district court granted plaintiff’s motion in part, ordering defendant’s online content manager to testify about the identity of three of five anonymous bloggers. The three anonymous bloggers petitioned for mandamus review; and Quixtar cross-petitioned for disclosure of the identities of the remaining two anonymous bloggers.

Ninth Circuit Decision

The Ninth Circuit undertook a lengthy review of anonymous speech and the First Amendment, starting with the Federalist Papers through *Cahill* and the U.S. Supreme Court’s recent decision in *Doe v. Reed*, No. 09-559 (June 24, 2010).

Looking at these cases, the Ninth Circuit concluded that “the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes;” adding that “the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle.”

As for the nature of the speech at issue, the Court briefly concluded that the “Internet postings and video at issue in the petition and cross-petition are best described as types of “expression related solely to the economic interests of the speaker and its audience” and are thus properly categorized as commercial speech. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

Finally, the Court dismissed Quixtar’s cross-petition, finding that it was “a garden variety discovery dispute: it offers no extraordinary circumstance that merits exercising our mandamus power.” Thus neither party was entitled to the requested relief.

Petitioners were represented by John P. Desmond, Jones Vargas, Reno, NV. Quixtar was represented by Cedric C. Chao, Morrison & Foerster LLP, San Francisco, CA.

Texas Appeals Court Upholds Preliminary Injunction in Online Libel Case

Alleged Defamatory Accusations Against Doctor Cause “Irreparable Harm”

A recent decision in a non-media libel case illustrates the ongoing strains in applying traditional prior restraint law to online cases. A Texas Court of Appeals panel affirmed a preliminary injunction against a libel defendant, prohibiting her from repeating, pending trial, a host of alleged defamatory statements about a doctor. [Townsend v. Liming](#), No. 06-10-00027 (Tex. App. July 14, 2010) (Morris, C.J., Carter and Moseley, JJ).

Applying a simple abuse of discretion standard, and not referencing any First Amendment law, the court found that the injunction was warranted because repetition of the statements would cause irreparable harm. The court further found that defendant’s objection that the injunction was “overbroad, vague and ambiguous” was not specific enough to preserve a constitutional objection on appeal.

Background

As with many online libel cases, litigation followed in the footsteps of a personal dispute. The plaintiff, Dr. John Liming, a doctor in Paris, Texas, had been in a relationship with a friend of the defendant. After the relationship ended, defendant created a blog where she referred to plaintiff as “aka Dr. Sliming,” and accused him of “drinking alcohol while practicing medicine, stalking women, theft, lying, and being fired from multiple doctors’ offices.” Defendant also published these accusations on other websites.

Liming sued for defamation, seeking damages and injunctive relief. The trial court granted an ex parte temporary restraining order and a preliminary injunction after a contested hearing. According to a newspaper report, the injunction prevents the defendant from repeating any of the alleged defamatory statements. (The Court of Appeal decision, however, only references the injunction as barring defendant from contacting plaintiffs employers and patients).

Appeals Court Decision

On appeal, the court applied an abuse of discretion standard, stating that a “trial court does not abuse its discretion as long as there is some evidence to support the trial court’s decision” to issue a preliminary injunction.

The evidence of irreparable harm seemed decidedly mixed. One of plaintiff’s colleagues testified that the statements “did not change his opinion of Liming at all and that he continued his collaboration with Liming.” Plaintiff testified that while he had not lost any contacts “yet,” he was concerned about pending applications for privileges at three hospitals and stated he would “not go back to hospitals where [his] reputation [was] not established.” More concretely, he testified that defendant’s statements caused nurses to have a lesser opinion of him.

The court held this was sufficient evidence of irreparable harm under the circumstances where damage to reputation could be presumed based on the nature of the statements. Moreover, “by their very nature, it is likely that Liming might never even be aware of specific patients and business contacts lost.”

As to the First Amendment, at the preliminary injunction hearing defendant argued that the injunction had “completely wiped away” her right to free speech and that “it’s overbroad, it’s vague and ambiguous.” The appellate court found that this failed to state “any specific objection to the injunction’s constitutionality or otherwise reference her right to free speech,” and that any constitutional objection was not preserved for review.

Plaintiff is represented by Kenton Hutcherson, Hutcherson Law, Dallas. Defendant is represented by Chris Davis.

How Long is a Long Arm?

Tenth Circuit Grants a New Mexico Court Personal Jurisdiction Over a Florida Blogger

By Nathaniel T. Haskins

In a recent diversity of citizenship case, the United States District Court for the District of New Mexico dismissed plaintiff David Silver's slander, defamation of character, and duress claims against two defendants, Matthew Brown and Jack McMullen. In that case, Mr. Silver alleged that the defendants established a blog intended to slander Mr. Silver's character and ruin his New Mexico business, Santa Fe Capital Group ("SFCG"). The district court dismissed the case for two reasons. First, it dismissed the case against Mr. McMullen individually, finding that there was not sufficient factual support to show that Mr. McMullen was associated with the blog. Second, it also held that New Mexico lacked personal jurisdiction over the defendants because neither defendant had contacts with New Mexico sufficient to grant a New Mexico court jurisdiction over them. On appeal, the Tenth Circuit affirmed the district court's ruling with respect to the dismissal against Mr. McMullen and reversed its decision with respect to Mr. Brown. [*Silver v. Brown, McMullen, and Growth Technologies International*](#), Case No. 10-2005 (10th Cir. June 14, 2010).

Mr. Silver's claims arose out of a business dispute between himself and the defendants. Mr. Silver is the president of SFCG, a New Mexico business. Mr. Brown is the chief executive officer of Growth Technologies International, Inc. ("GTI") and Mr. McMullen is a member of GTI's board of directors. The parties entered into a contractual relationship whereby SFCG was contracted to assist GTI in raising capital from private investors in exchange for a service fee. Sometime thereafter, the parties had a falling out. Mr. Silver believed that he was entitled to additional fees for services rendered and Mr. Brown and Mr. McMullen believed that they were entitled to a refund.

Mr. Brown subsequently created a blog regarding the party's dispute, intended to negatively impact the reputation of Mr. Silver and SFCG. The blog's domain name was "David SilverSantaFe.com." The first page of the blog stated "[t]his site is dedicated to providing a blog and information regarding Companies that have dealings with David Silver and Santa Fe Capital Group." The front page proceeded to summarize some of the specifics of the dispute between SFCG and GTI and then went further, stating that it hoped that other companies did not "fall prey to what appears to be

a scheme to prey on those needing to raise capital through David Silver's group." The blog also contained hyperlinks with titles such as "David Silver is a thief," "David Silver," and a CNN blog (which allegedly contained an article about SFCG).

The court also had before it email correspondence between Mr. Brown and Mr. McMullen and Mr. Silver. In the emails, Mr. Brown threatened to have the blog up for years if Mr. Silver did not refund their money. Those emails also showed that Mr. Brown was attempting to optimize the blog to get the most search engine exposure. Mr. Silver's emails to Mr. Brown requested that he be paid the compensation Mr. Silver believed he was owed and further threatened to file suit if the blog was posted. The blog was posted on or about May 5, 2009. Mr. Silver sent an email to Mr. McMullen on May 20, 2009, stating that he was counting the monetary damage done to his reputation

and the reputation of SFCG. Mr. Silver further informed Mr. McMullen that he would be personally named in a suit filed against GTI.

On appeal, the Tenth Circuit began by affirming the district court's dismissal of Mr. Silver's claims against Mr. McMullen. The court held that Mr. Silver had waived a

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The court held that the location of the servers and equipment running the blog was not relevant; rather, what mattered was that injury occurs to Mr. Silver when a person searching for this Mr. Silver comes across Mr. Brown's blog. It therefore concluded that allowing a New Mexico court to have jurisdiction over this case did not offend the traditional notions of fair play and substantial justice.

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challenge to the district court's dismissal of his claims against Mr. McMullen because Mr. Silver had not challenged the court's finding that Mr. McMullen was not significantly associated with the blog and did not control it in any way.

The court next turned to the question of whether the district court erred in holding that Mr. Brown's posting of the blog did not provide the district court with jurisdiction over him. In analyzing this question, the court began with New Mexico's long-arm statute, noting that the statute is coextensive with the constitutional limitations imposed by the due process clause. The court then turned to the requirements of the United States Supreme Court that, in order to exercise jurisdiction in accordance with due process, defendants are required to have "minimum contacts" such that having to defend a lawsuit in the forum state would not "offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The court held that Mr. Brown's contacts with New Mexico were sufficient to find that New Mexico had specific jurisdiction over the case.

In so finding, the court recognized that specific jurisdiction requires "first, that the out-of-state defendant must have 'purposefully directed' its activities at residents of the forum state, and second, that the plaintiff's injuries must 'arise out of' defendant's forum-related activities." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). They further acknowledged that even if these factors are satisfied, the granting of personal jurisdiction must also be consistent with "traditional notions of fair play and substantial justice." *Id.*

Regarding the first requirement for specific jurisdiction, the court asked whether Mr. Brown had directed his activities at the forum state. The court found that he had. In so finding, the court stated that in the tort context, a defendant directs his/her activities at a forum state when the following are found.

- (a) an intentional action (writing, editing, and publishing the article), that was
- (b) expressly aimed at the forum state [...], with
- (c) knowledge that the brunt of the injury would be felt in the forum state [...].

The court held that all of these factors were satisfied in

this case.

First, the blog posting was an intentional act aimed at threatening Mr. Silver and damaging the reputation of Mr. Silver and SFCG, hoping to convince Mr. Silver to refund money that Mr. Brown believed was owed to GTI. Second, the blog was directly aimed at New Mexico in that it was about a New Mexico Company and a New Mexico resident. Further, the blog complained of a failed business deal occurring primarily in New Mexico and was widely available to New Mexico over the internet. Third, the court acknowledged that, in spite of Mr. Silver's business contacts outside of New Mexico, most of the injury would be felt in New Mexico, as Mr. Silver worked and had most of his business and business relationships in New Mexico.

The Tenth Circuit's holding was in direct opposition to that of the district court, which found that most of Mr. Silver's injury would not be in New Mexico. The district court based its decision on its belief that a blog is not a website that is directed solely at the people of New Mexico and therefore the number of people accessing the website in New Mexico in comparison to those able to access the blog worldwide is nominal. The district court further held, in spite of the blog's domain name, that there were other men named David Silver and other businesses using Santa Fe in their name. The Tenth Circuit, however, stated that the district court's analysis ignored the ubiquitous nature of search engines. The nature of search engines, it noted, is such that people who are searching for information on this particular David Silver would end up reading Mr. Brown's blog and Mr. Brown was aware of this fact, as evidenced by his desire to have his blog optimized for discovery through search engines. Thus, the court held that this was not a simple case of untargeted negligence that just by chance caused injury in New Mexico.

The court next considered the second requirement for specific jurisdiction — whether Mr. Silver's injuries arose out of Mr. Brown's contacts with New Mexico. The court held that they did since Mr. Brown's blog was aimed directly at Mr. Silver and his New Mexico-based business, intending to cause him injury there. Therefore, it held that the contact with the forum state by means of the blog was both the cause-in-fact and the legal cause of Mr. Silver's injuries. (In this section, the court noted that there is a circuit split concerning the test required under the "arise out of" prong of the jurisdictional analysis. It, however, decided that it did not

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need to address this split because, relying on *Tamburo v. Dworkin*, 601 F.3d 693, 709 (7th Cir. 2010), it held that Mr. Brown's directed conduct satisfied even the most rigorous standard of the "arise out of" prong.)

Lastly, the court considered whether exercising jurisdiction over Mr. Brown would offend traditional notions of fair play and substantial justice. In making this consideration, the court first recognized that the factors to be considered in this analysis are:

- (1) the burden on the defendant, (2) the forum state's interests in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effectual relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states . . . in furthering fundamental social policies.

Dudnikov, 514 F.3d at 1080.

Pursuant to these factors, the court found that the burden on Mr. Brown in defending in New Mexico was no greater than the burden that would be placed on Mr. Silver in prosecuting the case in Florida. It then recognized New Mexico's significant interest in providing its residents a forum to seek redress for tort injuries suffered within the state. It further recognized New Mexico's interest in applying its laws to discourage the deception of its citizens. The court then acknowledged that although Mr. Brown was attempting to injure Mr. Silver's reputation everywhere, the most significant damage would be done in New Mexico. Thus, it held that the location of the servers and equipment running the blog was not relevant; rather, what mattered was that injury occurs to Mr. Silver when a person searching for this Mr. Silver comes across Mr. Brown's blog. It therefore concluded that allowing a New Mexico court to have jurisdiction over this case did not offend the traditional notions of fair play and substantial justice.

Nathaniel T. Haskins is an associate at Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Oklahoma City, OK. Plaintiff, Aaron David Silver, is not represented by counsel. The defendants, Matthew A. Brown, Growth Technologies International, and Jack McMullen are collectively represented by Kristofer C. Knutson and Christopher M. Grimmer of Scheuer, Yost & Patterson, Santa Fe New Mexico.



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Reporting Criminal Investigations in the United Kingdom Just Got Riskier

Court of Appeals Rejects Reynolds Defense for Investigative Report

On July 13, 2010, the UK Court of Appeal ruled that mere reporting of serious allegations without further investigation will not be covered by the defense of *Reynolds* qualified privilege. [*Flood v. Times Newspapers Ltd.*](#) [2010] EWCA Civ 804.

The Reynolds Defense

This particular strain of qualified privilege arises from a House of Lords case, *Reynolds v Times Newspapers Limited* [2001] 2 AC 127. It was formulated by the House of Lords in 2001 as a defense which will protect defendants in respect of damaging information which the defendant cannot justify (either because it is untrue or because he cannot amass the evidence needed to run a successful justification defence) provided always that the publisher/broadcaster had a duty to publish/broadcast defamatory allegations and that the public had a legitimate interest in receiving that information, true or not.

Lord Nicholls distilled this duty/interest test to the question “whether the public was entitled to know the particular information.” Lord Nicholls identified 10 criteria that courts should bear in mind when considering whether the public were entitled to know the information: (1) the severity of the allegation; (2) the nature of the information and the extent to which the subject-matter was a matter for public concern; (3) the source of the information; (4) the steps taken to verify the information; (5) the status of the information; (6) the urgency of the matter; (7) whether comment was sought from the claimant; (8) whether the article contained the gist of the claimant's side of the story; (9) the tone of the article; and (10) the circumstances of the publication, including its timing.

These criteria have become known as the Reynolds criteria. The criteria have since been interpreted narrowly such that few defendants have been able to rely on the defence successfully at trial.

Following the *Reynolds* case, *Jameel v Wall Street Journal Europe Sprl* [2007] was the next opportunity that the House of Lords had to consider the defence. The case was decided in favour of *Wall Street Journal*. It was held that the defence should be approached in the following way:

♦ Is the material of public interest? The judge should consider the article as a whole rather than the separate allegations contained within the article.

♦ If the article was in the public interest, the next question is whether it was justifiable to include the defamatory allegation. Allowance should be given to the professional judgment of an editor or journalist. The defense is still available if the judge “with the advantage of leisure and hindsight, might have made a different editorial decision.” Having said this, the inclusion of a defamatory statement should make a “real contribution to the public interest element in the article.” The graver the allegation, the more important the contribution should be.

♦ The Court must then look at “whether the defendant behaved fairly and responsibly in gathering and publishing the information.” The standard of care required is that which a responsible publisher/broadcaster would take to verify the information published. It is at this stage that the 10 Reynolds factors are of assistance. Lord Hoffman referred to the criteria as a “well known non-exhaustive list of 10 matters which should in suitable cases be taken into account. They are not tests which the publication has to pass.”

In giving her judgment in *Jameel*, Baroness Hale commented “we need more such serious journalism in [the UK] and defamation law should encourage rather than discourage it.” It was hoped that the *Jameel* case would have this effect, with the House of Lords recognising that latitude needed to be given to editorial and journalistic judgment when considering the public interest test and the *Reynolds* criteria.

The Flood Case

In the case of *Flood*, the article in question concerned a police investigation into an allegation that an officer in the extradition unit had been corrupted by a former police officer now working on behalf of very wealthy and controversial Russians living in England. The investigation eventually exonerated Flood after the Times’ publication of the Article.

In writing the article, the journalists went beyond a brief

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police press statement advising that the police were investigating allegations that a serving officer had made unauthorized disclosures of information to another in exchange for money. It also reported the nature of the allegations made to the police and named the officer in question. Without these additions, the article would not have been particularly newsworthy.

The Times was partially successful in relying on *Reynolds* qualified privilege before the trial judge, Mr. Justice Tugendhat. He held that reporting the allegations “was within the range of permissible editorial judgments which the court is required to respect. It is not the function of the court to express views on whether it was a good judgment or not, and I do not do so.” [*Flood v. Times Newspapers Limited*](#), [2009] EWHC 2375 (QB) at ¶ 217. He found that the *Reynolds* defense applied to the hard copy publication of the article, but not to the online version which remained uncorrected after the claimant was cleared of wrongdoing.

However, the Court of Appeal overturned his decision on applying *Reynolds*. The Court of Appeal was unimpressed with the journalists’ checks and found that they “do not seem to have done much to satisfy themselves that the allegations were true.”

Lord Neuberger MR held that the publication of the allegations was “no more than unsubstantiated unchecked accusations, from an unknown source, coupled with speculation.”

The Court of Appeal commented that the facts were not comparable with those in the *Jameel* case where the Wall Street Journal successfully relied on the defense of *Reynolds* qualified privilege. In that case, the journalist reported that the Saudi Arabian Monetary Authority was monitoring around 150 bank accounts of prominent businessmen to prevent them being used wittingly or unwittingly for funnelling terrorist funds and it identified some of the companies and individuals involved. The article did not contain any of the allegations or information on which the Authority had proceeded.

Lord Neuberger MR held that:

“it would be tipping the scales too far in favour of the media to hold that not only the name of the claimant, but the details of the allegations against him, can normally be published as part of a story free of any right in the claimant to sue

for defamation just because the general subject matter of the story is in the public interest. The fair balancing of Article 8 and Article 10 [of the European Convention on Human Rights] would normally require that such allegations should only be freely publishable if to do so is in the public interest and the journalist has taken reasonable steps to check their accuracy.”

In summary, the Court of Appeal expects the media to stick to fair and accurate reporting of police statements (and thereby rely on statutory qualified privilege) or, where they step outside statutory qualified privilege and report allegations that have been made to the police, journalists will need to make very real efforts to verify those allegations. In practice, this will often be difficult to achieve without mirroring the police investigation, with the result that the media will have to wait for the results of that investigation before a report can be made.

Reynolds qualified privilege has historically been very difficult to rely on and this decision is in keeping with that trend. In 2007, the *Jameel* case gave the media hope that the defense could give it the flexibility it needs to report on matters of public interest. However, it should not be forgotten that the House of Lords’ judgment in that case described the substantial lengths that the journalist went to in attempting to verify his story prior to publication. The success of the defense should be seen in that context. The standard of journalism seen in that case is likely to be expected of publishers/broadcasters who are to rely on *Reynolds* qualified privilege with success.

It is understood that Times Newspapers Limited is appealing to the Supreme Court. If the Times is unsuccessful, the media will be looking to the legislature for a solution. In his recent Private Member’s Defamation Bill, Lord Lester sought to codify the *Reynolds* defence as a defence of “Responsible publication on matters of public interest.” If the media want to be free to report investigations as they unfold rather than waiting for the end result, amendments may be needed to clause 1 of that Bill.

Niri Shan and Lorna Caddy are lawyers with Taylor Wessing LLP in London. The claimant was represented by barristers James Price Q.C. and William Bennett, instructed by Edwin Coe LLP. Times Newspapers was represented by barristers Richard Rampton Q.C. and Miss Kate Wilson, instructed by Times Newspapers Limited.

European Court of Justice Rules Data Protection Trumps EU Access Law

Names of Lobbyists and Officials Properly Withheld from Disclosure

In a complex case stemming from litigation over beer import regulations, the European Court of Justice (“EJC”) ruled that a company was not entitled to have access to the names of lobbyists and trade officials who had met to discuss the issue. Case C-28/08 P, *Commission v Bavarian Lager Co., Ltd.*, Judgment of June 29, 2010.

The EJC, the highest court on matters of EU law, ruled that data protection laws trumped the EU’s access to information regulations, and that the requester failed to show that it had a legitimate interest to obtain such “personal data” i.e., the names of the lobbyists and officials.

The decision has been criticized by advocates for access to information because of the application of stricter data protection requirements over principles of transparency.

Background

In 1993, Bavarian Lager, a company specialized in the importation of German beers for pubs in the United Kingdom, lodged a complaint with the European Commission regarding a United Kingdom regulation that effectively prevented most beers produced outside of the country from being sold to pubs tied by exclusive purchasing contracts.

The Commission instituted proceedings against the United Kingdom in 1995, and, in October 1996, representatives of the Commission’s Directorate -General “Internal Market and Financial Services” (DG IMFS) met with delegates from the UK Department of Trade and Industry (DTI) and a private beer industry group, the Confederation des Brasseurs du Marche Commun (CBMC). The Commission denied Bavarian Lager access to the meeting. After the DTI proposed to amend the contested regulation, the Commission informed Bavarian Lager in 1997 that it would not continue the proceedings against the UK government.

Bavarian Lager thereafter requested access to the submissions made by 11 organizations during the proceedings. The Commission denied this request. Bavarian Lager also sought to obtain the names of the delegates of the

CBMC that had attended the October 1996 meeting and the names of the companies and persons that had made submissions to the Commission relating to the procedure. The Commission supplied the names and addresses only of people who had given their consents to such disclosure.

In 2000, Bavarian Lager again requested access to both submissions and names, pursuant to Article 2 of Regulation 1049/2001 which provides that “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this regulation.” See Regulation 1049/2001, art. 2.

While Article 6(1) states that “[t]he applicant is not obliged to state reasons for the application,” Article 4(1)(b) provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of ... privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”

The Commission provided Bavarian Lager with the minutes of the October 1996 meeting, but only after blanking out the names of participants who had either expressly refused that their identities be disclosed or could not be reached by the Commission. Bavarian Lager renewed its request for the full minutes of the meeting. The Commission denied this request on the ground that it did not meet the conditions for disclosing personal data that Regulation 45/2001 laid out.

Regulation 45/2001 governs “the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.” Regulation 45/2001, 2001 O.J. (L 8). Article 2 of the regulation defines “personal data” to “mean any information relating to an identified or identifiable natural person.” Article 8(b) further provides that personal data may be transferred to a third-party recipient only if the recipient “establishes that the data are necessary for the performance of

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a task carried out in the public interest or subject to the exercise of public authority” or “establishes the necessity of having the data transferred and if there is no reason to assume that the data subject’s legitimate interests might be prejudiced.”

Court of First Instance Decision

The Court of First Instance (CFI, now the General Court) reversed the Commission’s decision, taking the view that:

where personal data are transferred in order to give effect to Article 2 of Regulation No 1049/2001, laying down the right of access to documents for all citizens of the Union, the situation falls within the application of that regulation and, therefore, the applicant does not need to prove the necessity of disclosure for the purposes of Article 8(b) of Regulation No 45/2001. Case T-194/04, & 107.

According to the CFI, to require applicants to prove the necessity of disclosure would directly undermine the very objective of Regulation 1049/2001, “namely the widest possible public access to documents held by the institutions.”

Moreover, the CFI considered that the exception to the right of access created by Article 4(1)(b) had to be interpreted restrictively, so that it would apply only to “personal data that were capable of actually and specifically undermining the protection of privacy and the integrity of the individual” as laid out by Article 8 of the European Convention on Human Rights and relevant case law.

Grand Chamber Decision

On appeal, the Grand Chamber of the Court approved the Commission’s refusal to disclose the meeting minutes in their entirety. *Id.* ¶¶ 79–81

The Court agreed with the Commission that the CFI’s interpretation of Regulation 1049/2001 rendered ineffective Article 8(b) of Regulation 45/2001. The Court thus went on to find that by releasing the minutes of the October 1996 meeting with the names of five participants removed, the Commission had sufficiently fulfilled its duty of openness

under Regulation 1049/2001. Moreover, by requiring Bavarian Lager to establish the necessity for the transfer of the personal data of the five persons who had not given their express content, the Commission complied with Article 8(b) of Regulation 45/2001.

The Court thus outlined the proper procedure for requesting the disclosure of personal data contained in documents held by a European institution. As a threshold matter, the applicant must provide “an express and legitimate justification,” or at the very least “a convincing argument,” to demonstrate the necessity of the disclosure. Once the applicant provides this justification, the institution must balance the interests of the applicant against those of the subjects of the personal data in deciding whether to grant the applicant’s request.

MLRC GRATEFULLY ACKNOWLEDGES THE WORK OF OUR SUMMER INTERNS

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Thank you for your contributions to
the *MediaLawLetter* and to
MLRC as a whole.

Good luck in the fall!

Wisconsin Enacts Reporters' Shield With Whistleblower Protection Act

By Robert Dreps and Aaron Seligman

On June 1, 2010, Wisconsin became the 39th state to enact a shield law for journalists. After the bill failed to get a hearing in the previous session, legislators reintroduced Wisconsin's "Whistleblower Protection Act" in early 2009 and found surprisingly little opposition. The new law, Wis. Stat. § 885.14, establishes an absolute privilege for confidential sources or information, and a qualified privilege for other information and sources.

Law Protects Confidential Sources and Information

Based on MLRC's model shield law, the Wisconsin law defines a "news person" as a "business or organization" that disseminates information to the public on a regular basis, or an individual engaged in the newsgathering process for such an entity. The law covers information disseminated through any medium, which includes online publications and bloggers, but individuals who are not incorporated or affiliated with a news organization fall outside the definition.

The new statute provides an absolute privilege against disclosing the identity of a confidential source, information that would tend to identify the source, or information prepared in confidence. The law also provides a qualified privilege for non-confidential information and sources.

The law is expected to significantly reduce the number of newsroom subpoenas because only a court, rather than an attorney, can issue a subpoena for disclosure. The court may authorize a subpoena only if the requester proves by clear and convincing evidence that the information is highly relevant, necessary to a party's claim or defense, not obtainable from another source, and there is an overriding public interest in disclosure.

Before issuing a subpoena, the court must also provide the reporter notice of the request and an opportunity to respond.

The new statute supersedes the qualified privilege Wisconsin courts recognized under the federal and state

(Continued on page 33)

Update: Second Circuit Orders Partial Disclosure of Documentary Outtakes

In a mixed result for documentary filmmaker Joe Berlinger, a Second Circuit panel this month ordered him to turn over some, but not all, of the outtakes from his film *Crude: The Real Price of Oil*, in connection with ongoing civil and criminal cases in Ecuador. [*In re Chevron Corp.*](#), 10-1918 (2d Cir. July 15, 2010) (Leval, Parker, Hall, JJ.).

Berlinger's documentary covers a long -running class action lawsuit brought against Chevron in Ecuador over environmental damage from its oil drilling in the 1960s and 70s. The film includes interviews with lawyers from both sides of the controversy. In April, Chevron and two employees filed applications in the Southern District of New York seeking discovery in aid of a foreign proceeding, under 28 U.S.C. § 1782. They claimed the outtakes likely contained relevant evidence of improper collusion between the lawyer for the class action plaintiffs and Ecuadorian officials. A full discussion of the facts was published in last month's newsletter. See *MediaLawLetter* June 2010 at 3.

In May, a federal district court [granted](#) the discovery request, and ordered Berlinger to turn over 600 hours of outtakes. Following an expedited appeal, the Second Circuit narrowed the discovery order. In a short four paragraph order, with a detailed opinion to follow, the Court limited disclosure to outtakes showing: (a) counsel for the plaintiffs in the Ecuadorian case of *Maria Aguinda y Otros v. Chevron Corp.*; (b) private or court-appointed experts in that proceeding; or (c) current or former officials of the Government of Ecuador.

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constitutions, the history of which is summarized in *Kurzynski v. Spaeth*, 196 Wis. 2d 182 (Wis. Ct. App. 1995).

Unlikely Support – Near Unanimous Passage

Not surprisingly, the bill sponsored by Representative Joe Parisi and Senator Pat Kreitlow had strong support from media groups like the Wisconsin Newspaper Association, Wisconsin Broadcasters Association and the Wisconsin Freedom of Information Council. The bill's supporters were successful at framing the law as "whistleblower protection," rather than as special protection for journalists.

The news media groups expected law enforcement interests to oppose absolute protection for confidential sources in criminal prosecutions, as they had recently in other states. But Dane County District Attorney Brian Blanchard,

who has since been elected to serve on the Wisconsin Court of Appeals, testified in support of the bill that the public benefits when the law encourages whistleblowers to disclose public or private wrongdoing. Even if a prosecutor cannot compel identification of the anonymous source, he testified, news reports provide leads to investigators and encourage others to come forward with corroborating information about crimes that might otherwise go undetected.

In the end, the legislation passed on voice votes in both chambers with almost no opposition. The statute was signed by Governor Jim Doyle, who previously served three terms as Wisconsin Attorney General, and became effective on June 2, 2010.

Robert Dreps is a shareholder in the Madison, Wisconsin office of Godfrey & Kahn, S.C. Aaron Seligman is a summer associate at the firm attending the University of Wisconsin Law School.

Seventh Circuit Confirms Presumption of Access To Juror Names During Trial

Blagojevich Judge Must Hold Hearing to Make "Considered Decision" on Juror Anonymity

In a groundbreaking decision issued earlier this month, the Seventh Circuit held that there is a presumption of access to the names of jurors as soon as they are seated. [*United States v. Blagojevich*](#), No. 10-2359, 2010 WL 2778838 (7th Cir. July 12, 2010), *amending and superseding* 2010 WL 2649879.

The decision arose from the highly-publicized (and still ongoing) corruption trial of former Illinois governor Rod Blagojevich. The experienced district judge presiding over the case, James B. Zagel, opted to keep the names of the jurors anonymous from the press and the public until the jurors reached a verdict.

The Chicago Tribune, The New York Times Company, and other press organizations moved to intervene for purposes of objecting to the anonymous jury. Judge Zagel denied the motion, expressing concern that, in view of the case's high profile, and the existence of e-mail and Internet social media, jurors would be harassed (electronically and otherwise) by bloggers and other Blago-obsessed gadflies. The court "elliptically" observed that members of the public had even

tried to contact him (via phone and email) regarding the case.

On the press intervenors' expedited appeal, the Seventh Circuit vacated denial of the motion, holding there is a "presumption in favor of disclosure" of juror identities that "comes not only from the common-law tradition of open litigation but also from the Jury Selection and Service Act, 28 U.S.C §§ 1861 -78," and the jury selection plan the Northern District of Illinois has adopted thereunder. The Northern District's jury selection plan provides that "the names of the seated jurors and alternates will be [revealed to the public] as soon as they are sworn to service," and will be held in confidence thereafter only upon a showing that "the interests of justice so require."

Finding the presumption of access had not been overcome in the Blagojevich case because the district judge had not conducted a hearing or heard evidence, the Seventh Circuit ordered the district court to hold a hearing to determine whether the juror names should be disclosed while the trial is

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still ongoing.

Although the Court did not reach its decision on constitutional grounds, the standard it articulated for overcoming the presumption of access essentially mirrors the First Amendment test articulated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). Namely, to overcome the presumption of access to juror names, the Seventh Circuit ruled that the Government, as the party seeking non-disclosure, “must advance an overriding interest” in the confidentiality of the jurors’ names. Even if there is such an overriding interest, the Seventh Circuit instructed that any closure ordered “must be no broader than necessary to protect that interest,” and that the trial court must consider “reasonable alternatives.”

The exact contours of the hearing were not specified, but the opinion suggests that the important questions to be considered include: “Have jurors in other publicized cases been pestered electronically (email, instant messaging, or phone calls), or by reporters camped out on their door steps? If judges in other high-visibility cases have told the jurors to ignore any unsolicited email or text messages, have those instructions been obeyed? If not, do any practical alternatives to sequestration remain?”

The Seventh Circuit’s opinion, authored by Judge Easterbrook, was not without controversy. A week later, the panel amended its opinion to make clear that answers to the questions it had suggested were not “indispensable” to a decision, and to generally soften the onus on the district court in conducting the hearing.

However, the amended opinion continued to mandate that the district judge find an “unusual risk to justify keeping jurors’ names confidential”; the court’s “elliptical” observations and generic risks present in every criminal trial were “not enough.” There had to be an “opportunity for the parties (including the intervenors) to make their views known in detail, followed by a considered decision that includes an explanation why alternatives to delayed release of the jurors’ names would be unsatisfactory.”

In a further bizarre turn, two days after the amended decision was filed, Judge Posner issued an [18-page dissent](#) to the *en banc* Seventh Circuit’s denial of an unnamed judge’s *sua sponte* petition for rehearing by the full court. See 2010 WL 2767760 (7th Cir. July 23, 2010). The dissent found the panel’s reasoning to be “unsound.” According to Judge Posner’s dissent, there should be no presumption in favor of

disclosure of juror names before verdict and a hearing is simply unnecessary: “[w]hether to protect the jurors’ identities until the end of the trial ... call[s] for an exercise of judgment rather than a taking of evidence.”

As required by the Seventh Circuit’s opinion, Judge Zagel held a lengthy hearing on July 22, 2010, to determine whether the presumption of access has been overcome, and is set to rule imminently.

Although, in view of the tremendous publicity the Blagojevich case has attracted and the fact that Judge Zagel feels strongly about having already promised the jurors anonymity during trial, the ultimate result may be that the jury remains anonymous for the duration of this trial, the Seventh Circuit’s decision is significant for future access cases. In the wake of this opinion and the now-established presumption in favor of disclosure, courts in the Seventh Circuit can no longer assume that withholding juror names during trial is a matter for their unbounded discretion. To empanel an anonymous jury, the courts, and any party opposing disclosure, must demonstrate, at a hearing governed essentially by the First Amendment standard, why alternatives to an anonymous jury are inadequate.

James A. Klenk, Natalie J. Spears, and Gregory R. Naron of Sonnenschein Nath & Rosenthal LLP represented the press intervenors in the district court and in the Seventh Circuit.



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Drafted by the MLRC
 Newsgathering Committee

Court Grants Access Motion Unsealing 9/11 Property Damage Settlement Details

By Jacob P. Goldstein

For \$1.2 billion, American Airlines, United Airlines, their security contractors, and other defendants (the “Aviation Defendants”) settled several lawsuits against them for property damage and business interruption losses related to the September 11, 2001 terrorist attacks. This settlement information was revealed in early July when U.S. District Judge Alvin K. Hellerstein partially granted The New York Times Company’s motion to unseal documents submitted to the court in conjunction with the settling parties’ motion for approval of their settlement. [World Trade Center Properties LLC v. United Airlines, et al.](#), No. 08-3719 (S.D.N.Y. July 1, 2010).

Judge Hellerstein ruled that the common law and First Amendment rights of access apply to the settlement approval filings, noting that the amount of the settlement is the critical factor in the adjudication of the approval motion. Judge Hellerstein helpfully clarified Second Circuit authority that had suggested to some a weaker presumption of access to settlement materials, explaining that different considerations apply to final settlement documents that are the subject of an approval motion than to preliminary settlement materials not subject to judicial action.

Background

Judicial approval of the settlement was necessary because of the Air Transportation Safety and System Stabilization Act (“ATSSSA”), which Congress passed immediately after September 11. ATSSSA directs that all lawsuits relating to the attacks be brought in the Southern District of New York, limits the liability of the airlines and other aviation defendants to their insurance coverage, and requires the court to ensure the fairness and reasonableness of each settlement

“in the context of all other settlements and all remaining outstanding claims.” (ATSSSA also separately established the Victim Compensation Fund headed by Kenneth Feinberg to provide relief to wrongful death and personal injury claimants.)

After substantial pre-trial discovery and several court rulings in the lawsuits brought by more than 80 property damage plaintiffs against the Aviation Defendants, the parties engaged in mediation overseen by retired federal judge John

Martin. Judge Martin ultimately proposed a \$1.2 billion settlement to resolve all but a handful of lawsuits, with this amount representing a 72% discount of the settling plaintiffs’ combined claims of \$4.4 billion in damages. The parties accepted Judge Martin’s proposal and announced their agreement in principle in January 2010. The settlement did not encompass claims by developer Larry Silverstein’s companies (the “WTCP Plaintiffs”), which were the leaseholders of the World Trade Center itself, nor those of two other plaintiffs.

Before executing their agreement, the settling parties asked Judge Hellerstein to seal three categories of information: (1) the aggregate settlement amount; (2) the allocation of that amount among the various Aviation Defendants’ insurers contributing to the settlement; and (3) the amounts to be paid to each of the settling plaintiffs. The Aviation Defendants had initially sought to make confidentiality of

these terms a condition precedent to the settlement. But the settling plaintiffs rejected that, and so the parties agreed to make a joint motion for confidentiality before executing the settlement.

In an initial ruling in February, Judge Hellerstein granted their motion to seal these terms. However, he noted that the “delicate balancing” required to decide such a motion “is best

(Continued on page 36)

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done when opposing interests present a clash of viewpoints.” Lacking the benefit of any opposition, he “reserved the right to review this ruling if, in the future, a motion for reconsideration is presented to me, either by parties to this litigation or other representatives of the public.”

With this limited sealing order in hand, the settling parties executed their agreement and moved for approval of the settlement. The WTCP Plaintiffs opposed approval of the settlement on several grounds, including that it violated ATSSSA by leaving insufficient funds to satisfy their claims. The WTCP Plaintiffs also argued that the February sealing order should be vacated so that the public could more easily understand this and other objections to the settlement. Judge Hellerstein deferred decision on how much of the approval motion papers must remain confidential and instructed the parties to file their briefs under seal for the time being.

Media Motion to Unseal

The Times then moved to intervene and unseal the settlement details, asserting the public’s First Amendment and common law rights of access to judicial documents. The Times argued that there was immense public interest in these materials as they are fundamental to monitoring the Court’s adjudication of the disputed approval motion, necessary to evaluate the policy choices enacted by Congress in ATSSSA, and significant for their effects on the redevelopment of Lower Manhattan.

The Aviation Defendants opposed unsealing on the grounds that (1) they had reasonably relied on the February sealing order before executing their settlement; (2) limited confidentiality was essential to the settlement, which was merely a private business decision; and (3) disclosure would place them in a false light by suggesting some culpability for the damage caused by the terrorist attacks.

At the oral argument on The Times’s motion, Judge Hellerstein reserved decision and ordered that the next day’s hearing on the settlement approval motion be closed to the public because he had not had time to decide what, if any, settlement terms should be disclosed. In justifying the closing, he said that the amount of insurance coverage is commercially sensitive and disclosure might taint a jury pool in any subsequent trial.

One month later, Judge Hellerstein approved the

settlement and granted in part The Times’s motion to unseal the settlement approval motion papers, finding that both the qualified common law and First Amendment rights of access applied. Judge Hellerstein rejected the Aviation Defendants’ argument that The Times must show a compelling need for unsealing because they had reasonably relied on the February sealing order. That order, with its express reservation, was too limited to support any reliance argument.

“The interest in furthering settlement,” he held, “does not outweigh the strong common law and constitutional presumptions of public access that attaches to information bearing directly on my adjudication.” The Court went on to state that despite the public’s “strong interest in resolution through settlement of complex and expensive cases,” it “must be skeptical of” claims of the necessity of confidentiality because even more might be disclosed if the litigation advanced to trial and, in this case, the parties indicated that they would “go forward with their settlement even if the Court grants the motion to unseal.”

Judge Hellerstein also rejected as “speculative and unlikely” the Aviation Defendants’ false light fear. He found that the settling parties had offered “no persuasive reason for presuming that the public will be unable to understand” that the settlement “is unrelated to culpability and reflects a very substantial discount,” “practical considerations and not any adjudication or concession of liability nor claims of victory.”

Judge Hellerstein did, however, rule that two aspects would remain under seal: the amounts of individual recoveries by each plaintiff and preliminary settlement documents exchanged in discovery and mediation. He held that the settling plaintiffs’ privacy interests outweighed the presumption of access to the allocation of the settlement among them. And although the WTCP Plaintiffs had filed several preliminary settlement materials along with their opposition papers, Judge Hellerstein ruled that these documents did not bear on his adjudication and the potential chilling of settlement negotiations would outweigh any presumption of access that might attach merely from the fact that they were filed with the approval briefing.

The New York Times was represented by in-house lawyers Jacob P. Goldstein and David E. McCraw. The Aviation Defendants were represented by Desmond T. Barry, Jr., of Condon & Forsyth LLP. The WTCP Plaintiffs were represented by Richard A. Williamson of Fleming Zulack Williamson Zauderer LLP.

New York's High Court Grants Newspaper Access to Police Gun Purchase Records

Records Not Exempt From Disclosure As Police "Personnel Records"

By Jonathan Donnellan and Eva Saketkoo

Earlier this month, overturning the rulings of both the trial court (Albany County Supreme Court) and the Third Department Appellate Division, the New York Court of Appeals ordered the City of Albany (the "City") to produce police department records requested by the *Albany Times Union* (a Hearst newspaper) and its reporter (collectively, "Petitioners") under the New York Freedom of Information Law ("FOIL"). [*Capital Newspapers Div. of the Hearst Corp., et al., v. City of Albany, et al.*](#), No. 126, 2010 WL 2605137 (July 1, 2010).

The records at issue relate to the purchase of assault rifles and other weapons by Albany police officers through police department channels for their own personal, non-official purposes. Included in the responsive documents are so-called "gun tags" (or evidence tags) – containing only containing only a police officer's name and two serial numbers – that were purportedly affixed to guns that were retrieved from the officers by the department during an internal investigation into the guns purchases.

The City and the Police Officers' Union, which intervened in the trial court, (collectively, "Respondents") argued that because the records clearly relate to potential misconduct by police officers, they are police "personnel records" and exempt from disclosure under Civil Rights Section 50-a. Both the trial court and the Appellate Division agreed with Respondents and held that the records were exempt from disclosure under Section 50-a.

Section 50-a provides, in relevant part: "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency . . . shall be considered confidential and not subject to inspection or review without the express written consent of

such police officer . . . except as may be mandated by lawful court order."

New York Civil Rights Law 50-a

The Court of Appeals noted in three prior decisions interpreting Section 50-a as an exemption under FOIL that, in order to qualify as "personnel records" under Section 50 -a, documents must (1) have the "nature" of personnel records and (2) be "used" to evaluate performance toward continued employment or promotion. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562 (1986); *Prisoners' Legal Servs. v. New York State Dep't of Corr. Servs.*, 73 N.Y.2d 26 (1988); *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145 (1999). In addition, based on the legislative intent that Section 50-a provide only a narrow exemption to FOIL, the Court imposed a third requirement, not present in the statute's text, limiting Section 50 -a's application to personnel records which on their face present a "substantial and realistic" potential for abusive use against the officers. *Daily Gazette Co.*, 93 N.Y.2d at 159; *Prisoners' Legal Servs.*, 73 N.Y.2d at 31-33.

The only evidence in the record submitted by the City to support its claim that the "gun tags" satisfied the "nature" and "use" requirements of Section 50 -a is affidavit testimony from the Albany Police Chief. The Chief's affidavit states that he first learned about the alleged gun purchases when he received Petitioners' FOIL request, at which time he commenced

an investigation into the matter. The affidavit provides some testimony about an "investigation file," but did not specifically identify or describe the "gun tags" or any of the contents of that file other than to say the file includes

(Continued on page 38)

The City and the Police Officers' Union argued that because the records clearly relate to potential misconduct by police officers, they are police "personnel records" and exempt from disclosure under Civil Rights Section 50-a. Both the trial court and the Appellate Division agreed with Respondents and held that the records were exempt from disclosure.

(Continued from page 37)

officers' names. The Chief further states in the affidavit that officers involved in the gun purchases under investigation could not and would not be subject to any disciplinary proceedings based upon the statute of limitations found in the Collective Bargaining Agreement between the City and the Union. However, he states in the affidavit without elaboration that the gun purchase "investigation file" would be "used to evaluate performance toward continued employment" in the future.

Respondents argued (and prevailed in both courts below) that because the records relate to misconduct of the police officers, they would necessarily be part of an involved officer's personnel file and are exactly the type of records the Legislature intended to be exempt from disclosure under Section 50-a.

The Court's Decision

In an unanimous decision, the Court disagreed with both lower courts and held that "Respondent City of Albany failed to meet its burden of demonstrating that the gun tags are 'personnel records' under Civil Rights Law § 50-a. The Police Chief's conclusory affidavit did not establish that the documents were 'used to evaluate performance toward continued employment or promotion,' as required by that statute." 2010 WL 2605137, at *1.

Petitioners are represented by Hearst in-house counsel Eve Burton, Jonathan Donnellan and Eva Saketkoo. Respondent the City of Albany is represented by Jeffrey Jamison of Albany's Corporation Counsel. Respondent the Albany Police Union is represented by Matthew Ryan of the New York State Law Enforcement Officers Union.

Camerawomen Wins \$1.732 Million Jury Award Against LAPD

Was Beaten By Police While Covering 2007 Immigration Rally

By Browne Greene and Robert D. Jarchi

A Los Angeles Superior Court jury, after one-day of deliberation, awarded Patricia "Patti" Ballaz \$1.732 million in damages in her civil lawsuit against the City of Los Angeles and the Los Angeles Police Department. *Mecozzi vs. City of Los Angeles, et al.*, No. BC377597 (Cal. Sup. Ct. July 1, 2010).

A camerawoman for KTTV FOX 11 news, Ms. Ballaz was repeatedly battered by members of the LAPD while covering the May Day 2007 Immigration Rights Rally at MacArthur Park in Los Angeles, sustaining severe physical and emotional injuries.

Wearing press credentials, Patricia Ballaz was working as a camera operator for KTTV FOX 11 News alongside reporter and co-worker Christina Gonzalez, covering the May 1, 2007 Immigration Rights Rally in Los Angeles' MacArthur Park. An annual event, the May Day Rally has had its share of unrest in the past. Thus, the LAPD was out in force, dressed in riot gear and wielding batons and rifles with rubber bullets. The day had gone relatively smoothly, with only one arrest made, not for any violent or threatening conduct, but because an individual was climbing up a flag

pole. That afternoon, Rally marchers assembled in MacArthur Park.

Listening to the police scanner while they sat in their parked media van, Ms. Ballaz and Ms. Gonzales heard that some demonstrators were throwing rocks and bottles at the police officers stationed at MacArthur Park. Around 6:00 PM, they left the van and went to the scene to report on the situation, standing within a police-designated press area. While filming the event, Ms. Ballaz was repeatedly struck without justification by baton-wielding LAPD officers, who knocked both her and her camera to the ground, causing her to sustain severe injuries. LAPD officers attacked her because she was a member of the news media who was capturing an out-of-control LAPD on film. The police also shot rubber bullets at or near her body, as well as at other members of the news media.

The LAPD never used its right of arrest to subdue the crowd, so that whoever was in the park was going to get hit, beaten or shot at by the police, including the news media covering the event.

In fact, the LAPD illegally called a dispersal order in

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violation of its own policy and procedures. Instead, they used unreasonable, unnecessary force against the media as a panic-stricken public began streaming out of the park at the first signs of trouble. A subsequent investigation conducted by the LAPD revealed that its officers used unreasonable, illegal force at MacArthur Park.

In 2007, Ms. Ballaz brought a civil suit against the City of Los Angeles and LAPD for civil rights violations, negligence, and assault and battery, alleging that the LAPD used unjustifiable and excessive force against her while she was lawfully covering the May Day Rally. The Ballaz case was consolidated with other similar lawsuits brought by journalists injured at the rally, including those from KTTV FOX News, KCBS/KCAL TV, and Telemundo TV network.

The Defendants filed a Motion for Summary Judgment regarding liability, which the Hon. William F. Highberger refused to grant. The defense also sought to exclude evidence on liability including statements of Mayor Antonio Villaraigosa and then LAPD Police Chief William J. Bratton, but failed. It also tried to keep out admissions of illegal force

contained in the LAPD's post-event 85-day report on the May Day riot and, again, it did not succeed.

At trial, the Plaintiff had to overcome the jury's general prejudice towards the news media, believing that news reporters and paparazzi are of the same ilk. To turn around this misconception, the Plaintiff emphasized the importance of our Constitutional rights and the crucial role that the Freedom of the Press plays in bringing transparency to controversial events and in protecting all citizens against excess and corruption of any kind, including police brutality. This reasoning also helped to deflate the Defendants' argument that the Plaintiff should have gotten out of the LAPD's way even though the LAPD's own policy calls for it to support the media and not inhibit its ability to report important news events such as skirmishes and riots.

The *Ballaz* trial is believed to be the first of its kind in which a police department was found responsible for using excessive force in violating a member of the news media's First Amendment rights. As the poet Juvenal asked: "Quis custodiet ipsos custodes? Or, who will guard the guardians? The jury.

Photography Restrictions Run Rampant

By Mickey H. Osterreicher

Although the First Amendment has been under constant attack since its ratification, incidents occurring over the past few months might lead one to believe that the War on Terror is taking its toll on a mistaken enemy. In Houston, a homeowner filed a civil rights complaint because he was arrested for "illegal photography" after a taking pictures of a police sergeant who followed him into his own home. A student photographer at Ohio State University was handcuffed and charged with criminal trespass by university police after attempting to photograph two cows that were roaming the campus. School employees and police told him he was not allowed to take pictures of the incident, despite the fact that he was a student photojournalist working for the school paper and he was on public property.

In Miami two photojournalists were told by private security for the transit system and Miami-Dade police officers that they were not allowed to photograph in and around the metro stop. Police also barred the pair from entering the station although they had metro tickets and threatened them with arrest if they did not comply. Another

similar incident occurred in Atlanta where a person was ordered off a train and off MARTA property by a transit employee for taking pictures. Almost as disturbing was a subsequent post by a MARTA customer service representative who justified the action as a result of "the 9 -11 attack and the subway bombings in Spain and the UK."

Illinois, Maryland and Massachusetts are just three states where police are using obscure wiretap laws to prosecute people for recording the activities of police officers on public streets and roadways. In Boston one man was arrested for "illegal electronic surveillance" after he recorded audio of police officers making a drug arrest. In Baltimore, several people face felony charges for recording their own arrests. All of these incidents happened in public.

There were numerous reports of government interference with press coverage of the Deepwater Horizon disaster in the Gulf of Mexico. A CBS camera was ordered away from a beach in South Pass, Louisiana by a boat of BP contractors with two Coast Guard officers on board. The crew was threatened with arrest by the Coast Guard, who said that they

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were just enforcing “BP’s rules.” A freelance photographer shooting for ProPublica was detained by Texas City, Texas police after taking photos of a BP refinery on the grounds that taking photographs that included the refinery “could threaten national security.” He was followed by a BP employee in a truck and then blocked by two police cars when he pulled into a gas station, where police asked to review his digital photographs and took down his personal information after demanding identification.

In early July the Coast Guard issued a policy setting up a 65 foot “safety zone” around booms deployed along the gulf coast, restricting news coverage of the story. There have also been reports that the media have been told that they were not allowed to speak with any BP workers or contractors involved in the clean-up efforts.

While these incidents only create anecdotal evidence, they do seem to point to a shift in how free speech is viewed by both law enforcement and the public. In many cases police officers make up new laws. In other incidents the police and the public seem to truly believe that they are enforcing or articulating laws or unwritten policies that do not actually exist. Still other cases appear to be an abuse of discretion as authorities ignore well founded constitutional principles. It is therefore incumbent upon the legal community to directly address these cases as soon as possible.

In both the Atlanta and Miami incidents letters were sent to the appropriate authorities pointing out that their respective municipal rules and regulations did not prohibit non-commercial photography. While expressing an appreciation for safety concerns it is also important to point out that photography/videography by itself is not a dangerous or pernicious activity unless accompanied by other behavior giving rise to probable cause or reasonable suspicion that would merit further investigation. Equating photography with terrorism creates an atmosphere of initial distrust and unnecessary suspicion. Public photography/videography is a protected First Amendment right of free expression limited only by reasonable time, place and manner restrictions.

Additionally, it should pointed out that any limitation on permitted photography should be governed by the amount of disruption such activity causes, such as blocking access to

walkways for extended periods of time or interference with operations or personnel. It should not be based upon a dislike of these activities by individuals or officers. It should also be recognized that when a person has finished taking photos/videos in a reasonable manner, without having done anything else, stopping that person for questioning may cause more of a disruption than the activity itself.

In an apparent reaction to such media complaints the Coast Guard modified its 65 foot safety zone policy. Approximately a week after implementing its rule retired Coast Guard Adm. Thad Allen announced, “I have put out a direction that the press are to have clear, unfettered access to this event, with two exceptions - if there is a safety or security concern.” Although that statement leaves room for arbitrary and capricious interpretation and enforcement most

believe it a step in the right direction and is an example of what constructive criticism can accomplish short of litigation.

Other examples of successful interventions were with the Manhattan Transit Authority where the media opposed a proposed rule change that would have banned photography and videotaping in its subways and bus systems. Also with Amtrak which revised its photography guidelines and police general order regarding photography and more recently with the Toledo Police Department which made sweeping changes to its media policies as part of a settlement of a federal

civil rights lawsuit brought by two photojournalists who were illegally arrested in 2005 while covering a Nazi demonstration.

While assaults on the First Amendment continue it also appears that a commonsense approach in individually redressing even the most egregious of these abridgements has yielded some positive results. Continuing vigilance against this uninformed attitude along with efforts to make the general public and law enforcement aware of the dangers that accompany such infringements will help protect these precious freedoms.

Mickey H. Osterreicher is the general counsel for the National Press Photographers Association (NPPA). He has been a photojournalist for more than thirty-five years and drafted letters to the Miami-Dade Police, MARTA and the USCG on behalf of the NPPA, as well the revised Amtrak Photography and Toledo Police Media Guidelines.

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Wisconsin Court Upholds Exclusive Rights Contract

Rejects First Amendment Challenge to High School Athletics Internet Deal

By Robert Dreps

In a case of first impression, the U.S. District Court for the Western District of Wisconsin rejected a constitutional challenge to the Wisconsin Interscholastic Athletic Association's ten-year exclusive rights contract to stream coverage of high school athletic tournament events over the Internet.

The June 3, 2010 ruling by newly appointed judge William Conley, who began serving only a month earlier, found that "the exclusive license American Hi-Fi purchased from WIAA does not violate the First or Fourteenth Amendment because it poses no threat to the rights and values embodied in those constitutional provisions."

[*Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*](#), No. 09-155, 210 WL 2264952 (W.D. Wis. June 3, 2010).

WIAA Media Policies

The WIAA is a state actor that organizes 25 state tournaments in various sports for boys and girls, in individual and team competitions, for its mostly public school members. Events are held on public property and members of the public may attend upon payment of an admission fee. Media organizations are issued credentials for reporting the events, without charge, which includes the right to use up to two minutes of video. Fees are charged for the right to transmit video in excess of two minutes, for all radio and television productions, and for transmitting "play-by-play" text.

The WIAA in 2005 granted American Hi-Fi the exclusive right to produce, sell and distribute video by any medium for all tournament events except football and hockey state finals, and the entire state-level basketball tournaments, the rights to which were already held by others. The contract established goals for "television quality" productions by American Hi-Fi – 100% of state finals, 50% of sectional events and 25% of regional events – but in practice fewer than 4% of the eligible events were produced by American Hi-Fi or its licensees. As to licensing, the WIAA's 2009-10 Media Guide states that

"[a]ll permission granted, policies enforced and fees required will be at the sole discretion of the WIAA and American Hi-Fi."

The Lawsuit

WIAA and American Hi-Fi sued Gannett Company and the Wisconsin Newspaper Association in 2008 after several Gannett newspapers streamed live video coverage of four regional-level football tournament games without permission. The newspapers removed the case to federal court and counterclaimed for declaratory and injunctive relief, arguing that the plaintiff's exclusive rights contract and the unfettered discretion it granted over licensing others to stream events violated their rights of free speech and to access on the same terms as American Hi-Fi.

The newspapers objected in particular to American Hi-Fi's right to cherry-pick the events it chooses to produce and the requirement that licensees surrender the right to market their own work product to American Hi-Fi in exchange for permission to stream declined events.

The court rejected the newspapers' facial challenge to the WIAA's exclusive streaming rights policies, finding that "this is a case about commerce, not free speech." The court reached this result by narrowly defining the public forum at issue to include Internet streaming alone, rather than media access to and coverage of tournament events generally. In reaching this conclusion, the court chose to ignore the WIAA's Media Guide, which promised to open tournaments to all "legitimate news gathering representatives" and to assist them "in providing comprehensive coverage to their communities."

Instead, the court concluded the WIAA did not intend to create a limited public forum to promote media coverage of the events where Internet streaming was concerned, but rather, "to create and grow an additional source of revenue." In this non-public web streaming "forum," the court found

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the WIAA's interest in generating revenue alone sufficient to justify exclusivity.

The plaintiffs' contract actually failed to achieve the WIAA's revenue or coverage goals. Like the vast majority of tournament events, the four games Gannett streamed without permission were not produced by American Hi-Fi or any licensee. The contract itself never generated any revenue for the WIAA, moreover, since it required American Hi-Fi to make payments only after its costs were covered which the company claims never occurred. American Hi-Fi nonetheless gave \$60,000 to the WIAA after the lawsuit was commenced, saying the parties had renegotiated their deal (without formally amending their contract), which the court relied upon in finding the Internet streaming forum's principal purpose was to generate revenue.

The court gave short shrift to the newspapers' "unbridled discretion" argument under the First Amendment, despite the absence of standards and the Media Guide's explicit statement of plaintiff's "sole discretion" over video license policies and fees, because it found the plaintiffs had no history of denying licensing requests or charging excessive fees.

The court declined to apply the First Amendment principle that a licensing scheme without explicit standards is invalid as a prior restraint "even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988).

The court saw no basis for "serious concern" over viewpoint discrimination in the WIAA's licensing scheme, so excused its failure to adopt written standards. The court did not address American Hi-Fi's additional requirement that licensees surrender their right to sell their video work product to American Hi-Fi, which inhibited the newspapers and others from seeking a license through American Hi-Fi. The newspapers appealed the ruling to the U.S. Court of Appeals for the Seventh Circuit on July 7, 2010.

Robert Dreps and Monica Santa Maria, Godfrey & Kahn, S.C., represented the Wisconsin Newspaper Association and Gannett Co., Inc. WIAA and American Hi-Fi were represented by John S. Skilton, Jeff J. Bowen and Autumn N. Nero, Perkins Coie LLP, by Gerald O'Brien, Anderson, O'Brien, Bertz, Skerene & Golla, and by Jennifer S. Walther, Mawicke & Goisman, S.C.

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FTC Discussion Paper Outlines Potential Solutions to Save Journalism

“Hot News” and Limitations on Fair Use on the Discussion Agenda

The Federal Trade Commission recently released a [discussion paper](#) that includes a number of legal and policy proposals to rescue, reinvent and reinvigorate journalism in light of the business challenges of the Internet age. The discussion paper was the culmination of a year of FTC workshops that included scholars, journalists, media owners and other interested parties debating possible solutions and the pros and cons of such actions.

The paper was released at the end of May, before the final scheduled workshop and outlined a number of proposals that had been suggested and discussed at some length. The FTC invited additional public comment and this month Google responded with [comments](#), rejecting the thrust of the legal and policy proposals and instead writing that “business problems require business solutions, rather than regulatory ones.”

The discussion paper describes the state of the journalism as “moving through a significant transition in which business models are crumbling,” and includes a number of controversial suggestions such as expanding the “hot news” misappropriation doctrine, limiting the fair use defense, licensing of news articles, and additional government support. The paper focuses on the newspaper industry, but also includes online news websites within its scope. The FTC discussion paper carefully notes that it is not endorsing or suggesting any of these proposals.

Protecting Newspapers

In reviewing the threats to the news industry, the workshop participants considered the free-rider problem that was created due to search engines and news aggregators that use information from news outlets without paying for that use. To combat this problem, it was suggested that federal and/or state “hot news” legislation could be enacted or that the Copyright Act be amended to include a federal “hot news” exception.

It was further suggested that the Copyright Act could be amended in a way that would clarify the “fair use” doctrine and allow certain causes of action against aggregators and

search engines who habitually copy the protected work of news organizations.

However, it was also argued that these types of changes to the Copyright Act would inevitably raise unintended problems for newspapers as well as the aggregators. If such changes applied to newspapers as well as aggregators, access to news and public discourse could be limited, impinging First Amendment rights. Furthermore, if applied to search engines, there would be a significant impact upon a very useful tool that society has developed.

The workshops also discussed the possibility of an industry-wide licensing system that would allow news entities to collect usage fees from aggregators and search engines that used their materials. The paper stated, however, that this kind of system is problematic because it would require significant effort from the news entities and the development of a new division in the Copyright office to collect these fees.

Aside from the potential protections to the intellectual property rights of newspapers, the paper also discusses changes in antitrust laws to allow newspapers to coordinate on pay walls and access to their work. Some participants noted that small media companies could suffer under such a system; and moreover there is uncertainty whether consumers will pay for online news.

Creating Revenue

The workshops also created a significant amount of discussion regarding potential ways to create revenue for news entities. The paper explains that, although there is a firmly held belief that the government should not be able to interfere with truthful news reporting, federal and state governments have supported journalism through direct and indirect means for years and it may be possible to expand that support.

The suggestions for increasing government funding are aimed at increasing local reporting, supporting existing media, and planning for the future. For example, it was suggested that grants to universities could allow students to

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conduct investigative journalism or that a division devoted to journalism could be established within AmeriCorps. Funding for the Corporation for Public Broadcasting could be increased to establish newsrooms at state levels. FCC telecom and related fees could be used to create a fund for local news. There were also proposals to allow tax credits to news organizations for employing journalist.

In addition to increasing government funding, participants in the workshop also argued that current government funding could be used more productively. These proposals included ideas like allowing the Small Business Administration to insure loans that would fund new non-profit journalism organizations; increasing postal subsidies for newspapers and periodicals; and allowing content that has been developed for international broadcasting to be broadcast domestically.

Finally, it was argued that public funding for journalism could be increased through a series of taxes that would be placed in a “Citizenship Media Fund” and distributed to news entities. The suggested taxes would be imposed upon those who use of the broadcast spectrum, purchase consumer electronics, advertise on the broadcast spectrum, use cell phones, and on the auction sales prices for the commercial communication spectrum.

Expanding Journalism

Another consideration revolved around how to increase the number of media outlets and develop business models that would allow them to survive. To meet this goal the paper describes proposals to have the tax laws altered or interpreted in a way that would clarify how an entity could engage in journalism, but still qualify as a tax-exempt entity.

Specifically, the paper focused on three gray areas that needed to be clarified. First, the paper explains that it remains unclear whether news reporting qualifies as a tax-exempt purpose. Furthermore, it is unclear how a newspaper would need to structure itself so that it could be considered as operating in a tax-exempt manner. Finally, it is unclear where political endorsements would jeopardize a tax exemption. Clarity on these points would allow the industry to experiment with new business models and potentially have a significant impact on the industry.

Additionally, there was some discussion about hybrid corporations and how newspapers could possibly be promoted as the types of organizations that provide a public

good, but are still allowed to use for-profit business strategies. These organizations include flexible purpose corporations, benefit corporations, and L3C’s. The paper suggested that if the federal government worked with state governments, they could clear up any problems that news entities would face if they attempted to be recognized as one of these types of organizations.

Increasing Efficiency

Finally, the paper notes the significant discussions about increasing government records online. For example, it was suggested that governments at every level could take steps to maximize the amount of information online and make that information easily searchable on public websites.

Google’s Response

In line with its position that business solutions, rather than new government regulations are necessary, Google wrote about the newspaper industry:

The large profit margins newspapers enjoyed in the past were built on an artificial scarcity: Limited choice for advertisers as well as readers. With the Internet, that scarcity has been taken away and replaced by abundance. No policy proposal will be able to restore newspaper revenues to what they were before the emergence of online news. It is not a question of analog dollars versus digital dimes, but rather a realistic assessment of how to make money in a world of abundant competitors and consumer choice.

Moreover, Google pointed out that the collapse of classified advertising revenue for newspapers had “nothing to do with copying or free-riding and everything to do with the emergence of a new, more effective and more efficient product into the marketplace.”

The response continued: “The FTC would ordinarily regard such a situation as a cause for celebration – consumers are getting a better product at a lower price – not an opportunity to slow down that innovation through regulation.”

Ethics Corner: Practical Advice for Documenting Conflict Waivers

By Lucian T. Pera

Is it possible to practice law anymore, no matter your practice setting, without drafting or reviewing waivers of conflicts of interest from time to time?

For those of us old enough to remember, back in the last century, there was actually a time before the ABA amended its Model Rules of Professional Conduct to require documentation of waivers of conflicts of interest under the core conflicts rules for current- and former-client conflicts, Model Rules 1.7 and 1.9. Those days are now gone.

Today, the ethics rules in almost 40 American jurisdictions require that waivers of conflicts under Rule 1.7 be accompanied by some form of writing, whether signed by the client or not.¹ Moreover, our malpractice carriers, ethics partners, and corporate clients all relentlessly push us in the same direction, advising that any conflict waiver should be memorialized in writing.

All in all, this is a salutary development. Writings should mean better and clearer lawyer-client communication, fewer misunderstandings, and more protection for both lawyers and clients.

But the increased use of and demand for written conflict waivers means that we need another new skill not widely known when some of us started practicing law, and still virtually never taught in law school: The techniques for effectively and appropriately documenting the waiver of conflicts of interest.

Over the last decade, as more and more jurisdictions' rules have mandated written waivers, we have all learned more about how to document waivers. What have we learned? This article will distill from experience some practical advice and offer basic guidance about the best ways to communicate in writing about waivers and the most effective ways to create a paper (or electronic) record reflecting them.

What constitutes a conflict or the precise, technical requirements of the ethics rules are not our topic, however.² We will touch briefly on what the rules say about which conflicts are consentable, for example, but whether a particular rule requires a writing signed by the client or not we leave for your other reading and research. Careful lawyers can identify these standards. More importantly, the

rules form only a minimum standard for us as lawyers, and good lawyers strive to exceed that floor whenever possible.

How does a good lawyer effectively document a waiver of a conflict of interest?

Consent is a process. Some lawyers seem to think that consent is a letter, typically a form letter. In truth, the ethics rules in every jurisdiction make clear that obtaining consent or waiver is a *process*, not a letter. Once a conflict is recognized, a lawyer has a duty to inform the client about it, discuss with the client the consequences of the conflict, and, if a waiver is permissible, the lawyer *may* – but, of course, is not required to – request that the client consent to, or waive, the conflict. The pre-2002 ABA Model Rules spoke in terms of “consent after consultation;” the amended Model Rules now speak in terms of “informed consent.”³ The rules in every jurisdiction, under either formulation, clearly contemplate a discussion, most probably oral, between client and lawyer, in which the client is given all the information and advice the client needs to make an informed decision about the possible waiver. Consent is more than a piece of paper; consent is an intelligent, informed discussion between lawyer and client.

Check the ethics rules. In every jurisdiction, the numerous rules about conflicts of interest vary a bit, with some requiring merely a confirming writing that need not be signed by the client (*e.g.*, often described as “confirmed in writing”),⁴ while other conflict rules may require that a writing be signed by the client.⁵ Other rules give some guidance on who must consent or sign, such as the rule touching on representing a corporation and one of its officers or employees.⁶ The individual conflict rules in each jurisdiction also have slightly differing substantive standards to be met before a conflict may be waived (*e.g.*, demanding the ability “to provide competent and diligent representation to each affected client” for current -client conflicts),⁷ but no real standard for former client conflicts).⁸ Before you draft, identify and read carefully the applicable rule.

Electrons can be a perfectly adequate substitute for ink. Many of us still struggle with all the different media options presented to us for communication with clients, but the rules in virtually every jurisdiction permit email as a

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substitute for an old-fashioned paper letter.⁹ The lawyer's personal communications style matters and often dictates what medium is used, but a lawyer should consider a more important question: What medium of communication will allow the client to best receive and most effectively process the information? Moreover, the rules in virtually every jurisdiction probably permit a reply to an email to substitute for an ink signature on paper sent by U.S. Mail.

Carefully identify who should give the waiver. Of crucial importance to the consent process is correctly identifying who should – or who must – waive the conflict. Typically, an affected client will be required to provide the waiver, but who is the “client”? For individuals, the answer is usually easy, but what about a corporation? With one notable exception, this question is completely external to the ethics rules, and a lawyer must look to underlying law governing the organization's operations – corporate law for corporations, for example, plus the corporation's charter or bylaws. The exception? ABA Model Rule 1.13(g) requires that a lawyer jointly representing an organization and an officer or employee to be sure someone *other than* the represented employee give any conflict waiver required to bless the joint representation.

Be sure to clearly identify in the writing who is giving the waiver. For anyone other than an individual client, once the lawyer has identified the organization or entity giving the consent and the person doing so on its behalf, state this clearly and accurately, whether in the body of the waiver or in a signature area. Indeed, for individual clients, it is also conceivable that someone other than the client – a guardian, conservator, or attorney-in-fact, for example – may be consenting for the client, and this person's name and capacity should be clearly and accurately stated.

Consider whether the consent process should include independent counsel. The amended ABA Model Rules, as adopted in most jurisdictions, now expressly recognize the long-understood principle that conflict waivers given with the advice of independent counsel – that is, counsel not burdened by any conflict of interest – are superior to uncounseled waivers. Some particular conflict rules (e.g., ABA Model Rule 1.8(a) on business transactions with clients) even require that a lawyer tell a client that they should talk with another independent lawyer. This clearly can be good advice in many discussions about waivers. Lawyers seeking conflict waivers should always consider recommending that the client consult

with independent counsel, even if the client is unlikely to follow that advice, and the lawyer should certainly memorialize any such recommendation.

Some lawyers, in some conflict situations, feel so strongly about the value of a counseled waiver that they will even offer to pay for the client's consultation with “conflicts counsel” themselves, and they believe it to be money well spent. Remember, too, that many clients already have other lawyers handy who could readily advise a client on a waiver – e.g., in-house counsel for a corporate client, even when they are not working on the matter, or a lawyer already hired by an individual client to do other work, such as estate planning or domestic relations work.

Think about how many writings to use. If more than one client or person must waive a conflict, how many writings are needed? Well, that depends. Usually, this question has more to do with a lawyer's communications style, or with the manner in which the recipients of the writing will respond to a joint or separate letter. But there are clearly some situations in which a single, joint communication to two clients is a powerful communications tool – for example, a single letter to two jointly-represented co-defendants can be a healthy signal to them each that they are, in fact, equal in the lawyer's eyes, as they are being told the same thing, at the same time. On the other hand, there are situations in which two clients must consent, but where each must be told different things, given their different situations, or where confidential information of one of the two clients should not be shared with the other client. In those situations, using different writings is very important.

Identify the conflict. It sounds so basic, but it is truly remarkable how many conflict waivers fail to clearly identify the conflict that is being waived. What case or deal is involved? Whose interests or what interests conflict? Spell it out clearly.

Describe the conflict accurately and completely. Also remarkable are the number of occasions on which smart, experienced lawyers do not work to the same level of accuracy and completeness in a conflict waiver that they would in drafting an answer or contract. The lawyer must get it right. Any material inaccuracy means, quite simply, that the waiver might not be valid – after all, even if the lawyer accurately described the conflict in a face-to-face meeting and obtained consent, will that waiver be effective if the written evidence of it incorrectly describes it? Just as

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important as basic accuracy is that the lawyer should be straightforward about whether there is a conflict: Don't overstate or understate the conflict.

Some lawyers love the phrase "potential conflict," apparently as a device to downplay its seriousness. But, if a conflict is only "potential," who needs a "real" waiver? Just as importantly, if the lawyer has no present conflict, but wants to carefully (and prudently) alert the client to the possibility of one in the future, be careful not to say that there is a present conflict.

Carefully present advance waivers as distinct from waivers of existing conflicts. Special issues relating to waivers of conflicts of interest that may only arise in the future, called "advance waivers," deserve their own article.

One such special issue is that a writing memorializing an advance waiver needs to be very clear that the conflict being addressed does not presently exist, but may (of course, it may not) arise in the future. Virtually all the other guidance about waivers still applies, sometimes with even more force. For example, the true test of an advance waiver is commonly whether the parties accurately had in their active contemplation the conflict that ultimately arose, and the most convincing evidence of this is often the writing that survives.

Disclose the primary risks and benefits of waiver. Perhaps the hardest part of drafting a waiver is putting down in writing for a client both the risks and benefits of giving the waiver. Some of these are easy – *e.g.*, benefits of joint representation is cost-savings and easier coordination of tactics and strategy. Some are harder for lawyers to bring themselves to commit to writing – *e.g.*, one risk of one client allowing a lawyer to represent it adverse to another of the lawyer's client (assuming that the second client agrees) is that the lawyer may "pull punches" for fear of offending the second client.

More significantly, how much detail must a lawyer put in writing about risks and benefits? There is no clear answer, but, because the purposes of a writing include both current communication and establishing a record for the future, there is an argument for clear identification of risks and benefits, even if a lengthy treatment is left for oral discussion, with only a summary reflected in the writing. Finally, it serves both the lawyer and the client well when the writing consistently tracks the oral discussion between them, even if there is less depth to the written discussion.

Address confidentiality, and address it clearly.

Especially in joint representations, but also in many other situations, the treatment of attorney-client confidentiality can be crucial. Every joint-representation conflict waiver letter should carefully explain that confidential information may and will be shared between the joint clients, but not with others. In other waiver situations, it may be that a condition of the waiver is that one client's confidential information will be tightly confined within one law firm; if so, this should be carefully laid out in the writing.

State any conditions to consent. Many times, clients will consent, but will condition their waiver. For example, the client hiring the large law firm's specialized Connecticut state tax expertise may willingly agree that the law firm may nevertheless be adverse to the client on other unrelated matters; indeed, that may be the only basis on which the law firm may be willing to take on the state tax matter. In that situation, the client may well be willing to let the firm be adverse, but only up to the point of litigation. Or the client may be willing to consent, but not willing to let the particular tax lawyer (or the tax department) working on its matter be adverse. Any such conditions should be clearly memorialized in the writing.

Use plain, clear language. Need we say more? If so, then only this: The immediate audience of the waiver must understand it, but that is not enough for a good waiver letter; any later readers must also understand it, whether they be judges, jurors, or disciplinary counsel. There is no substitute for plain, clear language. (And, by the way, a little repetition is more valuable to clarity than some might think.)

Try viewing the writing retrospectively. None of us can always accurately predict the future. Still, any prudent lawyer will try to draft any conflict waiver not only for its immediate audience – the consenting client – but also for the potential future audience, whether that be disciplinary counsel, a judge considering a motion to disqualify, a juror in a malpractice case, or even the same client re-reading the waiver months down the road to recall what was agreed to. There is no substitute for one last re-reading of a waiver with an attempt at independent, retrospective vision. Sometimes, for similar reasons to those that lead some firms to require second-partner review of opinion letters, having an uninvolved colleague read the waiver cold can also be helpful.

Consider using the writing as a script. Many

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experienced lawyers realize that the process of preparing a writing concentrates and clarifies thinking on the conflict. Using this exercise *before* a substantive conversation with a client can dramatically assist the lawyer in preparing a cogent presentation for the client, even if the presentation only last a few minutes on the telephone. Preparing the writing confirming the conflict before the crucial conversation also allows the lawyer to very promptly put the writing before the client for review and consideration.

Send it promptly. Highlighting our first point – that consent is a process, not a piece of paper – the ethics rules clearly say that consent is required before a lawyer move forward with a representation when there is a conflict of interest. Under most ethics rules, the writing may then follow within a reasonable time.¹⁰ Inevitably, some lawyers use this nuance as an excuse for failing to get any writing at all. Prudent lawyers understand, however, that the waiver – even if only a confirming letter is to be sent after the fact – should be sent promptly to be most effective.

Consider a waiver signed by the client, even if the rules don't require it. Neither the ABA Model Rules nor the rules of any American jurisdiction require that clients sign all waivers of conflicts of interest. Some rules require no writing at all; others require a confirming writing that does not have to be signed by the client; still others do require a writing signed by the client. In any particular jurisdiction, different conflict rules require different writings, too. On this point, comply with the applicable ethics rule, but do not stop there without some thought, as there may be very fine reasons for going further than the particular rule requires.. There are

many good reasons to require that a client sign a waiver, including the fact that a lawyer's asking anyone to sign anything injects a sometimes appropriate level of seriousness or even drama into an act – for some waivers, drama and seriousness are just what is needed. Indeed, some law firms actually have policies that require all conflict waivers to be signed by the client.

If you plan on getting it signed, then actually get it signed. For gosh sakes, if you determine to have a client sign a waiver, insist that the client do so. In the dispute that may arise later, in whatever context, how will you explain that you thought the waiver was a serious enough matter that you should ask the client to sign, and even put a blank signature area for the client on the writing, but that you then didn't follow up and get it signed? Was there really agreement? Was it not that important? Of course, if the ethics rules do require a client signature in the particular instance, you may also have violated the ethics rule by moving forward without ever getting it signed. Finally, it should be safe in most jurisdictions to consider that a response to an email may be an appropriate substitute for a pen-and-ink signature.

While you're at it, use the writing as an engagement letter. Finally, if you do all the mental work needed to prepare a written conflict waiver at the outset of a representation, and if you have not separately done an engagement letter, use the opportunity to add to the waiver letter the key elements of an engagement letter. Even just a few additional paragraphs dealing with fees and the scope of representation, for example, can save a lawyer much heartache down the road.

Be careful out there.

Notes

1. ABA Model Rule 1.7(b)(4) requires that a waiver of a current-client conflict be “confirmed in writing,” which does not require that a client sign the writing. See also, ABA Model Rule 1.0(b) and cmt. [1] (defining “confirmed in writing”). For an accurate review of the various jurisdictions' adoptions of Rule 1.7, see the survey regularly maintained by the ABA Center for Professional Responsibility, “Variations of the ABA Model Rules of Professional Conduct: Rule 1.7,” available at www.abanet.org/cpr/pic/1_7.pdf (updated as of March 9, 2010; last accessed July 22, 2010).

2. For an excellent resource on the law of waivers of conflicts of interest, including comprehensive citations to case law across the country, see William Freivogel's unsurpassed website, www.FreivogelOnConflicts.com, especially the section entitled “Waivers/Consents.”

3. See, e.g., ABA Model Rules 1.7(b)(4) (current rule; requires that “each affected client give[] informed consent”), 1.0(e) and cmt. [6] and [7] (defining “informed consent”).
4. See, e.g., ABA Model Rule 1.7(b)(4) (current-client conflicts).
5. See, e.g., ABA Model Rule 1.8(a) (business transactions with clients).
6. See, e.g., ABA Model Rule 1.13(g) (in joint representation of organization and its constituent, where conflict must be waived, a second constituent must waive).
7. See, e.g., ABA Model Rule 1.7(b)(1).
8. See, e.g., ABA Model Rule 1.9(a).
9. See, e.g., ABA Model Rule 1.0(n) (defining “writing” to include electronic records).
10. See, e.g., ABA Model Rule 1.7 cmt. [20] (“If it is not feasible to obtain or transmit the writing at the time the client gives

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