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Federal Court Orders Documentarian to Turn Over All 600 Hours of Raw Footage from His Film "Crude: The Real Price of Oil"

Second Circuit to Hear Expedited Appeal in Journalist's Privilege Case

By Maura J. Wogan and Jeremy S. Goldman

The conflict between a journalist's right to safeguard his or her source materials from compelled disclosure and a litigant's right to obtain discovery in aid of a foreign proceeding is at the core of *In re Chevron Corp.*, 10-1918 (2d Cir.), a case currently pending before the Second Circuit Court of Appeals.

Background

Joe Berlinger, an award-winning journalist and documentary filmmaker, has appealed from a lower court order requiring him to produce to Chevron Corporation more than 600 hours of unreleased raw footage produced in connection with a documentary film entitled *Crude: The Real Price of Oil*.

Crude depicts the events surrounding the "Lago Agrio Litigation" – a class action lawsuit brought in Ecuador against Chevron by approximately 30,000 inhabitants of the Amazon rainforest for alleged environmental damage caused by Chevron's oil drilling operations in the 1960's and 70's and the company's inadequate remediation following its exit from the country. For more than three years, Berlinger and his crew travelled through the rainforests of Ecuador to investigate, film and document the people, places and events involved in the Lago Agrio Litigation, including the legal representatives from both sides of the controversy.

Crude debuted in January 2009 at the Sundance Film Festival and was later shown at over 80 national and international film festivals and in theaters. The 104-minute documentary film received numerous awards and was well-regarded by reviewers, many of whom focused on the film's even-handed and balanced treatment of the subject matter.

On April 9, 2010, Chevron and two Chevron employees filed applications in the Southern District of New York under 28 U.S.C. § 1782, seeking discovery in aid of a foreign proceeding. Among other restrictions, a person subject to a Section 1782 application "may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

The Chevron Parties' applications sought permission to issue to Berlinger and his affiliated companies subpoenas requiring them to turn over more than 600 hours of raw footage that were collected during the filming of *Crude*, as well as to provide testimony authenticating the footage. According to the Chevron Parties, they were seeking the raw footage as evidence in three foreign proceedings: the Lago Agrio Litigation, an international arbitration related to the Lago Agrio Litigation, and a criminal action in Ecuador against the two Chevron employees.

Berlinger opposed the applications on the ground that the undisclosed footage is protected by the journalist's privilege and that the applications did not satisfy the statutory requirements or discretionary factors under Section 1782. Counsel for the plaintiffs in the Lago Agrio Litigation also opposed the applications on similar grounds.

Berlinger argued that the raw footage he and his crew produced in connection with *Crude* – a film covering a newsworthy topic of considerable global importance – qualifies and indeed exemplifies the need for the protections of the journalist's privilege. Berlinger explained that requiring him to turn over his privileged materials would threaten his incentive and ability to engage in the documentary film process by deterring potential subjects from speaking freely to him, burdening him with subpoena compliance and conscripting him as an investigative arm of private litigants like Chevron.

Berlinger argued that the Chevron Parties did not meet their burden to overcome the journalist's privilege under the test enunciated by the Second Circuit in *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999), which held that both confidential and non-confidential materials are protected by the journalist's privilege. *Id.* at 35. Under *Gonzales*, where the material sought is confidential, the movant must make "a

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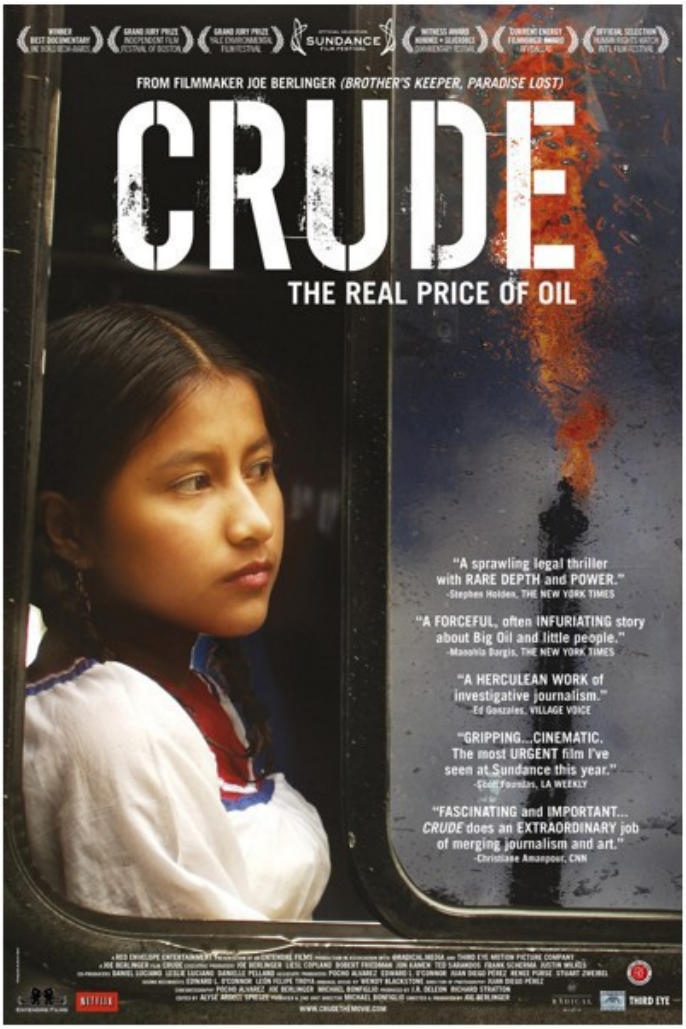
clear and specific showing" that "the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *Id.* at 33. Where the information is non-confidential, the movant must show that "the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Id.* at 36.

Berlinger contended that the more stringent standard for confidential materials should apply to his undisclosed footage because he had entered into agreements with several of his sources that he would not use certain footage in which they appeared. He also asserted that, either explicitly or implicitly, he had agreed with all of his subjects that he would not reveal any of the undisclosed outtakes to third parties other than as part of a documentary film he created. Finally, Berlinger argued that, even if the lower standard applicable to non-confidential materials applied, the Chevron Parties had not overcome their burden of showing the relevance of *all* 600 hours of outtakes to a significant issue in the foreign proceedings and that the materials were not obtainable elsewhere.



***Crude's* director, Joe Berlinger, argued that the raw footage he and his crew produced in connection with *Crude* – a film covering a newsworthy topic of considerable global importance – qualifies and indeed exemplifies the need for the protections of the journalist's privilege.**

To support their claim that the outtakes were of likely relevance, the Chevron Parties highlighted three types of scenes in the released film: scenes showing interactions between counsel for the Lago Agrio Plaintiffs with an Ecuadorian judge, the newly-elected president Raphael Correa, and a Spanish scientist who was later commissioned to conduct a neutral focus group study of cancer rates in the region. They alleged that these scenes – amounting to under 10 minutes of footage – documented improper conduct by the Lago Agrio Plaintiffs, and they were therefore entitled to obtain all 600 hours of unused footage. Berlinger contested the significance of those scenes to the foreign proceedings and argued that, even if those isolated segments were relevant, the Chevron Parties' claim that all of the remaining footage was likely relevant (including the footage completely unrelated to those three scenes) was pure speculation and a classic fishing expedition.

Furthermore, Berlinger argued that much of the raw footage was easily obtainable from other sources, such as shots of the environmental harm to the people and land of the Ecuadorian Amazon and public events attended and often independently filmed by Chevron. Finally, Berlinger argued that the two Chevron employee applicants who are facing criminal charges in Ecuador had not shown that anything in the film is relevant to their cases, much less that anything in the outtakes was likely to be relevant.

The District Court Order

By order entered May 6, 2010, Judge Lewis A. Kaplan granted the Chevron Parties' applications in their entirety, permitting them to subpoena all 600 hours of raw footage without, as Berlinger had requested, limiting the use of the footage to submissions to the foreign proceedings or prohibiting disclosure of the footage to third parties or the public at large.

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After holding that the statutory requirements under Section 1782 had been satisfied, the District Court examined the four discretionary factors enunciated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and held they too weighed in favor of granting the applications. With respect to the fourth factor, which looks at whether the subpoena contains unduly intrusive or burdensome requests, the District Court refused to "credit any assertion that the discovery of the outtakes by petitioners would compromise the ability of Berlinger or, for that matter, any other film maker, to obtain material from individuals interested in confidential treatment."

Turning to the journalist's privilege, the District Court first held that under the test established in *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987), *Crude* qualifies for the privilege because, to create the film, "Berlinger investigated 'the events and people surrounding' the Lago Agrio Litigation, a newsworthy event, and disseminated his film to the public."

The District Court next held that none of the raw footage is entitled to confidential treatment. The court found that Berlinger's assertions concerning his confidentiality agreements were "conclusory," even though Berlinger had submitted sworn testimony detailing the nature of those agreements. Also central to the finding of non-confidentiality was the court's determination that an unsigned form release submitted by Chevron suggested that Berlinger retained complete editorial control over the footage.

Having determined that the footage is not entitled to confidential treatment, the District Court analyzed whether the materials were "of likely relevance to a significant issue" in the foreign proceedings and "not reasonably obtainable from other available sources." *Gonzales*, 194 F.3d at 36. The District Court described the three types of scenes that Chevron had highlighted in its application and held that, because those scenes contained relevant material, Chevron had overcome its burden of proving the likely relevance of all 600 hours of raw footage.

The court also noted that Berlinger had supposedly been "solicited" to create the film by counsel for the Lago Agrio, who appear on the screen throughout the film, and that Berlinger had edited one scene in the film at their suggestion. The court also found that the Chevron employees had shown the likely relevance of all of the outtakes to the criminal proceedings against them, but without citing to even a single scene in *Crude* and ignoring Berlinger's testimony that the outtakes contain no material concerning the criminal prosecutions.

Finally, the District Court held that "the footage petitioners seek would not reasonably be obtainable elsewhere" because Berlinger "is in sole possession of the *Crude* outtakes" and the footage would contain "unimpeachably objective" evidence of the events that were filmed.

The Second Circuit Appeal

On May 13, 2010, pursuant to the District Court's order, the Chevron Parties served the subpoenas requiring Berlinger to turn over all of the raw footage on May 19, 2010. The next day, Berlinger appealed the order and sought a stay pending appeal, which the District Court denied. Berlinger immediately filed a motion for a stay in the Second Circuit, which the Court granted on June 8, 2010.

In his appeal, Berlinger argues that requiring him to produce all 600 hours of footage from *Crude* violates the journalist's privilege protecting his right to engage freely in the newsgathering process without the fear that his materials may be seized at any time by private litigants. In holding that the journalist's privilege had been overcome, the District Court erred in at least four ways:

1. The court failed to "credit" the substantial burden that the disclosure of even non-confidential materials would impose on Berlinger and other journalists, as the Second Circuit recognized in *Gonzales*.
2. The District Court's conclusion that all 600 hours of raw footage were of likely relevance to the foreign proceedings, based solely on the purported relevance of three scenes in the film, constituted an unwarranted leap in logic. Granting the Chevron Parties access to hundreds of hours of unreleased footage that does not relate to those isolated scenes authorized them to engage in a fishing expedition far exceeding the scope of any previous court order requiring the production of outtakes.
3. The District Court erred in holding that, to meet the "availability" test, the Chevron Parties need only show that the *footage* itself, rather than requiring

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them to establish that the *information* contained in the footage was not reasonably obtainable from another source.

4. The District Court erroneously held that all of the footage was non-confidential because the court ignored uncontroverted evidence that Berlinger had entered into confidentiality agreements with many of his subjects.

The case is scheduled for argument on July 14, 2010. A copy of the briefs filed by Berlinger in the Second Circuit can be found at http://www.fkks.com.

Maura J. Wogan and Jeremy S. Goldman, at Frankfurt Kurnit Klein & Selz, PC in New York, represent Joe Berlinger, Crude Productions, LLC, Michael Bonfiglio, Third -Eye Motion Picture Company, Inc. and @radical.media. The Chevron Corporation is represented by Randy M. Mastro, Scott A. Edelman and Andrea E. Neuman of Gibson Dunn & Crutcher LLP, NY.

New Yorker Reporter Cannot Be Compelled to Testify About Interviews With Plaintiff in Anti-Terrorism Lawsuit

By John B. O'Keefe and Betsy Koch

Reaffirming both the qualified testimonial privilege afforded to journalists by the First Amendment and the importance of protecting third parties from unreasonable burdens in civil discovery, a federal court in Washington, D.C., has held that a former reporter for *The New Yorker* magazine cannot be deposed about his interviews with an Israeli settler who is suing the Palestinian Authority under the U.S. Anti-Terrorism Act.

On March 15, 2010, the United States District Court for the District of Columbia granted the motion of reporter Jeffrey Goldberg to quash the subpoena served on him by the Palestinian Authority. *In re Subpoena to Jeffrey Goldberg*, No. 10-115, 2010 WL 893661 (D.D.C. 2010) (Facciola, M.J.). In so ruling, the court concluded that the Palestinian Authority had failed to show either (i) that the testimony it sought from the reporter was of central importance to its defense or (ii) that it had exhausted alternative sources for the same information, as required to overcome the reporter's qualified privilege.

The court further found that the reporter's testimony would be "unreasonably cumulative or duplicative" of the plaintiff's own testimony and that there were in any event other sources of similar testimony that undoubtedly would be "more convenient, less burdensome or less expensive" than deposing the reporter. Thus, the court held, "[w]hether one relies on cases pertaining to discovery from reporters or on a simple and straightforward analysis of the factors identified in Rule 26 [of the Federal Rules of Civil Procedure], the case against forcing Goldberg to give his deposition is appreciably stronger than the case for permitting it."

The subpoena to Goldberg was served in connection with civil litigation brought by Moshe Saperstein, a Jewish settler who was maimed in a 2002 terrorist attack in the Gaza Strip. Saperstein's suit contends that the Palestinian Authority is culpable under U.S. law for his injuries because, he alleges, it provided funding and material support to those who carried out the attack against him. Shortly before the close of discovery in that case, the Palestinian Authority subpoenaed Goldberg, who has spent decades covering the Arab-Israeli conflict, to testify about two interactions he had with Saperstein – one a brief conversation in 1990 that was referenced in Goldberg's 2006 book, *Prisoners: A Muslim & A Jew Across the Middle East Divide*, and the other a 2003 interview that was recounted in an article in *The New Yorker*.

The 1990 exchange between Goldberg and Saperstein, then colleagues at the *Jerusalem Post*, related to the assassination of Rabbi Meir Kahane – the Zionist firebrand who vehemently opposed the Mideast peace process and embraced the violent ouster of Arabs from Israel – and Saperstein's support for Kahane's ideology. *The New Yorker* article, which was an in-depth portrait of the settlement movement in Israel, quoted Saperstein at length discussing

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his unabashedly "extremist" views about the Palestinian-Israeli conflict, settlements in the disputed territories, and his decision to live in Gaza. The article included a number of caustic remarks about Palestinians made by Saperstein and his wife. Based on those published accounts, the Palestinian Authority asserted that Goldberg's testimony was material to the defense insofar as it would reveal the "biases" of Sapersteins – namely that they "have a bias against 'Arabs' generally, and against Defendants in particular" – and proof of such antipathy would be probative of the credibility of the Sapersteins' testimony at trial and of Saperstein's motive for bringing suit.

The court flatly rejected the Palestinian Authority's argument that the reporter's privilege did not apply to the testimony sought from Goldberg, and expressly affirmed that federal courts in the District of Columbia recognize a qualified privilege in civil actions for reporters to refuse to give evidence that would reveal even their *non-confidential* journalistic work product. The court then considered the three factors relevant to determining whether the qualified privilege could be overcome in a particular case: (1) "whether the information sought is central to the litigant's case"; (2) "whether the litigant has exhausted alternative sources of information"; and (3) whether "the reporter is a party" to the litigation. Each of the factors justified quashing the Goldberg subpoena, the court said.

With regard to centrality, the court found that, even though bias evidence "is almost always relevant" to the extent it bears on witness credibility, it did not follow that the plaintiff's bias against the defendant would be a significant disputed issue in the case. In fact, the court observed, Saperstein had not hidden his animosity towards Arabs; rather, he had "all but shouted his views, including his dislike of the PA, from the roof tops," and had testified in detail about those views at his own deposition. The central disputes in the underlying case, the court concluded, were likely to involve matters on which persons other than the plaintiff would testify – namely, causation and fault. "[T]he true question presented is how Saperstein will establish that the PA was responsible for the attack, which in turn is likely dependent on expert testimony from a historian, political scientist, or economist who will opine on the PA's complicity in the attack." For that reason, the court said, "Saperstein's bias will not be an important issue 'at stake in the litigation' and discovery from Goldberg about that bias will have little importance." In any event, even if Saperstein's credibility might be an important issue in the litigation, his own admissions of bias against Palestinians rendered Goldberg's testimony superfluous and thus objectionable even under the more liberal rules that apply to discovery of nonprivileged information. "Given [Saperstein's uncontested] statements, and under the balancing calculus required by Rule 26, probing Goldberg's recollections of other similar conversations with Saperstein . . . surely is to pile Pelion upon Ossa," the court said.

With regard to exhaustion of alternative sources of information, the court found that the Palestinian Authority had not demonstrated an inability to obtain the same information by means other than subpoenaing a reporter. "Given Saperstein's outspoken nature, it is likely that other [persons] in addition to Goldberg were also aware of his views; Saperstein can hardly be accused of keeping them a secret," the court said. Moreover, and all apart from the heightened requirements imposed by the qualified reporter's privilege, the ordinary rules of discovery justified quashing the subpoena where, as in this case, there were clearly more convenient and less burdensome methods of obtaining evidence of the plaintiff's bias. "[E]xploring them first is preferable to implicating a reporter's First Amendment rights," the court concluded.

Finally, the court said Goldberg's status as non-party to the ligation meant that "a more demanding weighing of these factors is imperative . . . . This is so whether the third party is a reporter, or a butcher, baker or candlestick maker."

For these reasons, the court held that "Goldberg *does* have a qualified reporter's privilege which defendants have failed to overcome, and that the burden of taking Goldberg's testimony outweighs what little use and significance it might have" in the underlying litigation. Accordingly, it quashed the subpoena. The Palestinian Authority did not file objections or otherwise appeal the ruling.

Reporter Jeffrey Goldberg was represented by Lynn Oberlander, general counsel for The New Yorker*, and Lee Levine, Elizabeth C. Koch, and John B. O'Keefe of Levine Sullivan Koch & Schulz, L.L.P. The Palestinian Authority was represented by Richard Hibey and Brian Hill of Miller & Chevalier.*

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Illinois Appellate Court Rejects Adopting Heightened Standard in Pre-suit Petitions to Unmask Anonymous Internet Commenters

By Michael Conway, Katherine E. Licup, Marilee Miller and Lori Taylor

With its opinion in *Maxon v. Ottawa Publishing Co., LLC*, No. 03-08-0805, 2010 WL 2245065 (3d Dist., June 1, 2010) (Holdridge, J.) the Third Appellate District became the first reviewing court in Illinois to set ground rules for trial courts to determine whether a plaintiff's putative defamation is sufficient to warrant unmasking anonymous Internet commenters.

Bucking a judicial trend in other jurisdictions, the court, in a 2-1 decision, rejected arguments for a heightened standard made by Ottawa Publishing Company, LLC ("OPC"), and adopted the Maxon Plaintiffs' ("Maxons'") position that Illinois' ordinary pre-suit discovery rules provide sufficient First Amendment protections to anonymous commenters faced with potential defamation lawsuits. With at least one similar suit pending in a different Illinois appellate court, this opinion is likely the beginning of a debate ultimately to be resolved by the Illinois Supreme Court.

Case Background

The Maxons sought to compel OPC, which publishes *The Times* and its online equivalent, *mywebtimes.com,* to disclose identifying information about Internet commenters who posted allegedly defamatory comments online about their efforts to change a city ordinance that prohibited them from opening a bed-and-breakfast. One reader, "FabFive From Ottawa" ("FabFive"), posted a comment on a March 2008 article about the ordinance proposal:

> *Way to pass the buck Plan Commission!! … How much is Don and Janet from another Planet paying you for your betrayal???? Must be a pretty penny to rollover and play dead for that holy roller…IF this gets anywhere NEAR being passed in favor for the Maxon CULT, you can bet your BRIBED BEHINDS there will be a mass exodus of homeowners from this town…*

A few weeks later, OPC posted an anti-ordinance letter-to-the-editor on *mywebtimes*. FabFive posted in response:

> *The plan should never had been pushed to the Town Council when several members of the [Ottawa Plan Commission] were not even present to vote on it in the new terms that the BRIBED members had created….*

(Emphasis and typographical errors were in the original Internet postings.) Another commenter, "birdie1," posted:

> *FabFive:*
> *The bribe has continued since you were last on!!*

On June 9, 2008, the Maxons filed a petition for pre-suit discovery, pursuant to Illinois Supreme Court Rule 224 ("Petition"), seeking an order requiring OPC to disclose information on FabFive and birdie1's identities. Rule 224 provides a mechanism by which a plaintiff can file an independent action for discovery to identify one who may be responsible in damages.

The Petition did not identify the alleged defamatory statements or indicate that the Maxons had made any extra-judicial effort to notify FabFive and birdie1 of the case. OPC notified FabFive and birdie1 of the pending action via their email addresses on file.

It also filed an opposition to the Petition, arguing that the Plaintiffs did not demonstrate any grounds sufficient to infringe upon FabFive and birdie1's rights to anonymous speech. In their allowed Amended Petition, the Maxons attached the Internet comments and alleged that they were defamatory *per se* because they falsely accused the Maxons

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of committing bribery.

OPC again opposed the Amended Petition, arguing that in the absence of any precedent in Illinois, the trial court should adopt a "summary judgment" standard to protect anonymous Internet commenters' rights. OPC further asserted that FabFive's statements were not actionable as a matter of law (FabFive never appeared by counsel; birdie1 did and the action involving her was dismissed). The Maxons countered that Rule 224 did not require any heightened showing and, even if it did, the statements were *per se* defamatory.

Trial Court Adopts Heightened Standard, Dismisses Petition

The trial court adopted the standard suggested by OPC and dismissed the Amended Petition. This so-called *Dendrite* standard, derived from a New Jersey case (*Dendrite Int'l, Inc. v. Doe 3,* 775 A2d 756 (N.J. Super. Ct. App. 2001)) and further parsed by the Delaware Supreme Court (*Doe v. Cahill,* 884 A2d 451, 460 (Del. 2005)), requires a trial court to conduct a four-part analysis to balance the competing rights of the petitioner and the anonymous Internet commenter.

First, efforts must be made to contact the anonymous commenter so that he or she can defend themselves. Second, the petitioner must set forth the exact statements that are purportedly defamatory. Third, petitioners must be able to show that their complaint could survive a hypothetical motion for summary judgment.

There, the trial court held that the Maxons fell short, because the context of the speech indicated that the statements were "screed … an exploration of [FabFive's] subjective viewpoint … he does not claim in these two [comments] to have objectively verifiable facts." (Oct. 2, 2008 hearing transcript at 22-24). The trial court did not reach the fourth step of the *Dendrite* analysis, which is to balance the parties' rights if the petitioner otherwise satisfies the prior three steps.

The Maxons appealed to the Third District. Citizen Media Law Project, Gannett Co., Inc., Hearst Corp., Illinois Press Assoc., Online News Assoc., Online Publishers Assoc., Public Citizen, Reporters Committee for Freedom of the Press, and Tribune Co. filed an *amicus* brief urging affirmance.

Appellate Court Reverses

In its *de novo* review, the appellate court held that "trial courts in Illinois possess sufficient tools and discretion to protect any anonymous inquiry into [an anonymous individual's] identity" because: 1) a Rule 224 petition must be verified, (2) it must state why the discovery is necessary, *i.e.* state with particularity facts that would establish a cause of action, (3) discovery is limited to only individuals who may be responsible in damages, and (4) importantly, the trial court must hold a hearing to determine whether the petition sufficiently states a cause of action for defamation. (Slip. op. at 9). The court held that trial courts should analyze Rule 224 petitions in defamation cases to the motion-to-dismiss standard for failure to state a cause of action pursuant to 735 ILCS 5/2-615 ("Section 2-615"). (Slip op. at 10 – 11). Thus, a plaintiff must present a *prima facie* case that defamation exists, a standard which the court noted is stringent in Illinois, a fact-pleading state.

The majority further held that because there is no constitutional right to defame, additional safeguards to protect anonymous speakers were unnecessary because there was no reason that "anonymous Internet speakers enjoy a higher degree of protection from claims of defamation than the private individual." (*Id.* at 11 – 12).

The court noted the *Dendrite/Cahill* analysis added nothing to the Rule 224 analysis and that a trial court "may, in its discretion, require either the petitioner or the subject of the petition to provide whatever notice would be in its power to provide." (*Id.* at 13). The court concluded that FabFive's statements could reasonably be interpreted as stating as actual fact. (*Id.* at 16 – 17).

In his dissent, Justice Schmidt stated that it is "anonymity itself that is equally worthy of protection" because of precedent recognizing the value of anonymous speech. (Dissent at 1 – 2). He further disagreed with the majority's selection of a motion-to-dismiss standard, stating that he would adopt the *Dendrite/Cahill* analysis because, "If 'facts' are pled that lead to the discovery of the speaker's identity, and then these facts cannot later be proven, the harm to anonymous speech is *fait accompli*." (*Id.* at 3 – 4). Justice Schmidt agreed with the trial court that the statements were non-actionable opinion. (*Id.* at 5 – 6).

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Out-of-Step With Illinois Law?

The Third District's ruling seems out-of-step with First Amendment jurisprudence in Illinois, which traditionally has guaranteed strong free-speech protection. The Illinois Supreme Court struck down a provision of the Election Code that required the name and address of a distributor be printed on political pamphlets, holding that it violated both the U.S. as well as the Illinois Constitution. *People v. White,* 116 Ill 2d 171, 506 NE2d 1284 (1987). Illinois has a strong tradition of protecting the free flow of information in other contexts, too. It is one of a few states to recognize the innocent construction rule, it has a long-standing Reporter's Privilege (codified at 735 ILCS 5/8-901 *et. seq.* (1985)), and a new, strong anti-SLAPP law (735 ILCS 110/1 *et. seq.* (2007) (the "Citizen Participation Act")).

The Third District's ruling also puts Illinois at odds with other federal and state courts. Most federal and state courts – such as those in Arizona, California, Delaware, the District of Columbia, New Jersey, New York, Louisiana, Pennsylvania, and Texas – that have addressed the issue have adopted some version of the *Dendrite/ Cahill* standard. *See USA Techs., Inc. v. John Doe*, --- F. Supp. 2d ---, 2010 WL 1980242 (N.D. Cal. 2010); *Best Western Int'l, Inc., v. John Doe*, No. CV-06-1537 -PHX-DGC (D. Ariz. 2006); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *In re Baxter*, No. 01-00026-M, 2001 WL 34806203 (W.D. La. Dec. 20, 2001); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Ottinger v. The Journal News*, No. 08-03892 (N.Y. Sup. Ct. July 8, 2008); *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Reunion Indus., Inc. v. Doe 1*, No. GD06-007965, 2007 WL 1453491 (Pa. Com. Pl. 2007); *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. App. 2007); *Cahill*, 884 A.2d at 451; *Dendrite*, 775 A.3d at 760-61.

Other courts – while not formally adopting the standard – have expressed their support for the soundness of this approach. *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205 (D. Nev. 2008). Most recently, the highest courts in New Hampshire and Maryland have adopted a version of the protective standard. *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 2010 WL 1791274, *7 (N.H., May 6, 2010) (it is the most "appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendants right to exercise free speech anonymously."); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. Ct. App. 2009).

Other courts, like the *Maxon* court, have adopted an intermediate standard which allows for the identity of an anonymous Internet commenter to be revealed if a plaintiff's defamation claim could survive a motion to dismiss. *Alvis Coatings, Inc. v. John Does One through Ten*, No. 3L94-CV-374H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *Columbia Ins. Co. v. Seescandy.com*, No. C-99-0745 DLJ, 1999 U.S. Dist. LEXIS 12652 (N.D. Cal. March 8, 1999); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).

As Internet communication evolves, there will certainly be additional clashes between the rights of commenters and their targets. The Maxon opinion, in leaving so much to the discretion of trial courts with wildly differing degrees of knowledge about defamation law and the pleading acumen of plaintiffs, does little by way of providing Illinois courts a more consistent approach to balancing these important, but sometimes conflicting, rights.

Although not in the Internet context, Wisconsin adopted this standard in a case involving an anonymous individual who had circulated a political mailer. *Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006). A Connecticut federal court also used the intermediate standard in the so-called "AutoAdmit" case, which involved sexually explicit and derogatory posts about two female Yale Law students made on the website AutoAdmit.com. *Doe I & Doe II v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008).

Finally, courts in Virginia, Washington, Missouri, and Connecticut have adopted a standard extraordinarily deferential to plaintiffs, allowing a court to order the identity revealed where a mere "good faith basis" for the defamation claim has been demonstrated. *Sedersten v. Taylor*, No. 09-3031-CV-S-GAF, 2009 WL 48025 (W.D. Mo. Dec. 9, 2009); *Doe v. 2theMart.Com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *La Societe Metro Cash & Carry France v. Time*

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Warner Cable, No. CV0301974005, 2003 WL 2262857 (Conn. Super. Ct. Dec. 2, 2003); In *re Supboena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds by America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d. 377 (Va. 2001).

First, But Likely Not the Last, Ruling on This Issue

Illinois has several pending cases that involve disclosing the identity of an anonymous Internet poster, the most developed of which is currently on appeal in Chicago. In that case, a suburban village trustee accused an anonymous commenter of posting defamatory comments about her son in comments posted on *dailyherald.com*, and sought identification information from the newspaper. The Cook County Circuit Court ruled in Stone's favor and ordered the *Daily Herald* to reveal the anonymous poster's e-mail and IP addresses. In December, the judge stayed the order pending the putative defendant's appeal. (*Stone v. Doe,* Appeal No. 09-3386, appeal from Cir. Ct. Cook County Case No. 09-L-5636.)

As Internet communication evolves, there will certainly be additional clashes between the rights of commenters and their targets. The *Maxon* opinion, in leaving so much to the discretion of trial courts with wildly differing degrees of knowledge about defamation law and the pleading acumen of plaintiffs, does little by way of providing Illinois courts a more consistent approach to balancing these important, but sometimes conflicting, rights. However, it will likely serve as a springboard for future Illinois case law on this subject.

Michael Conway and Katherine E. Licup, who served as defense counsel at the trial court and appellate court in this case, are attorneys in the Chicago office of Foley & Lardner LLP and are both graduates of Northwestern University Medill School of Journalism. Miller, also a Medill graduate, is an associate in Foley & Lardner's Washington D.C. office. Lori Taylor graduated from the University of Missouri – Columbia School of Journalism and is now a summer associate at Foley & Lardner and a rising third-year at Northwestern University School of Law.

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Ohio Supreme Court Finds Personal Jurisdiction over Defendant in Defamation Case Involving Statements Made on the Internet

By Jeffrey T. Cox and Melinda K. Burton

On June 10, 2010, a divided Ohio Supreme Court handed down a potentially significant decision, in Kauffman Racing Equipment, LLC v. Roberts, Slip Opinion No. 2010-Ohio-2551, relating to personal jurisdiction in defamation cases involving the Internet. Beyond the substantial due process concerns raised by the Court's finding of personal jurisdiction over a non-resident defendant where the allegedly defamatory statements were made solely on the Internet, *Kauffman Racing* highlights challenging, still unanswered (and unsettling) questions regarding First Amendment rights in this digital era.

Background

In *Kauffman Racing*, the defendant Roberts, a resident of Virginia who had never been to Ohio, purchased an engine block from the plaintiff Kauffman Racing Enterprises ("KRE"), an Ohio corporation. Eight months after the purchase, Roberts telephoned KRE and claimed that the block was defective (although the block was purchased by Roberts "as is."). KRE and Roberts agreed that KRE would inspect the block and if it was found defective, then KRE would repurchase it from Roberts. KRE inspected the block and discovered that Roberts had made substantial modifications to it and declined to buy it back. Dissatisfied by KRE's refusal to buy back the block, Roberts "posted numerous rancorous criticisms" of KRE on various websites (including eBay Motors).

Among his postings included comments such as "Now, I have and have had since the day the block was delivered, a USELESS BLOCK. I didn't say worthless! I plan to get a lot of mileage out of it[.] And when I'm [sic] done Steve Kauffman will be able to attest to its worth"; "What I loose [sic] in dollars I will make up in entertainment at their expence [sic]"; "I have a much bigger and dastardly plan than that and this is the perfect place to start"; "Basically this block is junk. . . . Also the service you would get from Steve Kauffman. . . is less than honorable. I brought the issues to his attention and he basically gave me the middle finger salute"; "I posted facts I can back up 100%".

KRE thereafter brought a defamation claim against Roberts in Ohio. The trial court dismissed the action for lack of personal jurisdiction over Roberts, a Virginia resident who had never been to Ohio. The Court of Appeals reversed. On review, the Ohio Supreme Court agreed with the Court of Appeals, holding that in this case, over this defendant, there was personal jurisdiction.

Beyond the substantial due process concerns raised by the Court's finding of personal jurisdiction over a non-resident defendant where the allegedly defamatory statements were made solely on the Internet, *Kauffman Racing* highlights challenging, still unanswered (and unsettling) questions regarding First Amendment rights in this digital era.

Ohio Supreme Court Decision

In finding that an Ohio court could exercise personal jurisdiction over Roberts in this case, the Supreme Court reiterated that the mere fact that allegedly defamatory statements are made on the Internet does not affect the way the Court approaches the personal jurisdiction analysis, which in Ohio involves a two-step examination. Under this approach, the court must determine first that the defendant is subject to personal jurisdiction under Ohio's long-arm statute and then second, that subjecting the defendant to personal jurisdiction in Ohio comports with due process.

Taking the traditional two-step approach to personal jurisdiction in Ohio, the Court first found that Ohio's long-arm statute conferred personal jurisdiction over Roberts for either of the following reasons: (1) the allegedly defamatory statements posted on the Internet were received and published in Ohio because at least 5 Ohioans saw the posts, or (2) the

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postings on the Internet were made with the intent to injure an Ohio resident.

The Court then moved to the second step in the analysis -- the due process inquiry. The Court found that due process was met in this case based on the application of the effects test for the purposeful availment requirement in defamation cases set forth by the United States Supreme Court in *Calder v. Jones*, 464 U.S. 783 (1984).

In *Calder*, two Florida-resident employees of the National Enquirer were subject to personal jurisdiction in California in a libel action brought against them due to the fact that the plaintiff was a California resident, the employees' wrote and edited an article that they knew would have potentially devastating impact in California because plaintiff resided and worked there, and California was the state in which the National Enquirer had the largest circulation (600,000 copies). Finding the case to be like *Calder*, the Ohio Supreme Court explained that Roberts blatantly intended to harm KRE's reputation and knew that the brunt of the harm would be suffered in Ohio because he knew that KRE was an Ohio corporation, and because at least 5 Ohioans saw his posts.

Noting that some commentators have criticized using the *Calder* effects test in Internet cases, because Internet-based activity can cause effects in most jurisdictions, the Ohio Supreme Court nonetheless rejected that criticism: "While the effects of Internet conduct may be felt in many [forums], the intent requirement allows a court to find a particular focal point."

The Ohio Supreme Court's 4-2 decision appears to be, and should be, limited to the particular facts of the case and this particular defendant (indeed, there is no particularly broad holding in this case). Chief Justice Thomas Moyer passed away unexpectedly on April 2, 2010, days before this case was argued and submitted. Newly-appointed Chief Justice Eric Brown joined the Court on May 3, 2010, but did not participate in the decision.

However, the Court's concluding statement bears cautious consideration**:** "We decline to allow a nonresident defendant to take advantage of the conveniences that modern technology affords and simultaneously be shielded from the consequences of his intentionally tortious conduct."

Indeed, the dissent warned of the potential breadth of the majority's decision. "Today, the majority has extended the personal jurisdiction of Ohio courts to cover any individual in any state who purchases a product from an Ohio company and posts a criticism of it on the Internet with the intent to damage the seller." The dissent noted "Roberts posted his comments on three general auto racing websites and an auction site, none of which have any specific connection to Ohio or are more likely to be viewed by a resident of Ohio than by a resident of any other state."

The dissent deemed Roberts' activity in this case "arguably the same" as that of "any individual who posts a negative review of a product or service in a public forum" and warned that not only does subjecting a person to personal jurisdiction in Ohio on that basis not comport with due process (even under the *Calder* effects test) but it also has the "practical impact" of "unnecessarily chill[ing] the exercise of free speech."

It will be interesting to see if Roberts decides to appeal this case to the United States Supreme Court and if that Court will agree to hear it. It also remains to be seen how courts in Ohio and in other jurisdictions will interpret this case – either limiting it to its facts, as arguably it should be, or applying it more broadly as the dissent fears, leading to a potential floodgate of this type of litigation and/or a chilling of Internet speech. If read broadly, then the case may be viewed as another step by the courts to further restrict or restrain First Amendment rights in this digital era.

Jeffrey T. Cox is a partner and Melinda K. Burton is an associate with Faruki Ireland & Cox P.L.L., with offices in Cincinnati and Dayton, Ohio. Plaintiff was represented by Brett Jaffe and Dennis C. Belli. Defendant was represented by William J. Kepko and Sherry M. Phillips, Kepko & Phillips Co., L.P.A..

MLRC Gratefully Acknowledges the Contributions of its 2010 Summer Interns to This Issue of the MediaLawLetter

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Nonresident Blogger Can Be Sued Over Defamatory Statements Accessible and Accessed by Floridians

By Ana-Klara H. Anderson

A nonresident blogger can be sued for allegedly defamatory statements about a Florida-based company posted on her website, the Florida Supreme Court has ruled unanimously.

On June 17, 2010, the court issued its decision in *Internet Solutions Corporation v. Tabatha Marshall*, No. SC09-272, 2010 WL 2400390 (Fla. June 17, 2010). The case involved a Washington state-based blogger who posted consumer-related material on her website, tabathamarshall.com, about a Nevada-based corporation that runs recruiting and Internet advertising businesses and has its principal place of business in Orlando, Florida.

The issue addressed by the Florida Supreme Court was: Does a nonresident commit a tortious act within Florida for purposes of section 48.193(1)(b) when he or she makes allegedly defamatory statements about a company with its principal place of business in Florida by posting those statements on a website, where the website posts containing the statements are accessible and accessed in Florida?

The Court concluded that posting defamatory material on a website alone does not constitute the commission of a tortious act within Florida for purposes of the long-arm statute. Rather, the court said, "the material posted on the website about a Florida resident must not only be *accessible* in Florida, but also be *accessed* in Florida in order to constitute the commission of the tortious act of defamation" within Florida's long-arm statute. The Court limited its analysis to the scope of Florida's long-arm statute and did not reach the issue of whether subjecting the nonresident to personal jurisdiction would violate due process.

Personal Jurisdiction Over a Nonresident

In August 2007, Tabatha Marshall posted critical reviews about Veriresume, a website operated by Internet Solutions Corp. (ISC). The posts were entitled, "Something's VeriRotten with VeriResume…." Third parties posted comments following Marshall's posts, and Marshall posted additional responses. Several of the third-party commentators, including "Mrs. C near OrlandoFL" and "Suzanne C-Orlando, FL" appeared to be from Florida.

ISC, which has its principal place of business in Orlando, sued Marshall in the Middle District of Florida for a variety of claims, including defamation. Arguing that she had insufficient contacts with Florida, Marshall sought to have the suit dismissed. As to the defamation claim, ISC asserted that Marshall's posts contained several defamatory statements, including that ISC "was, and is, engaged in on-going criminal activity," and that the defamatory statements "when taken as a whole, inculpate [ISC] with moral turpitude and charge [ISC] with unfitness and lack of integrity in the performance of its business."

To determine whether there was personal jurisdiction over Marshall, a nonresident, the District Court applied a two-part inquiry: 1) whether the exercise of jurisdiction is appropriate under Florida's long-arm statute; and 2) whether the exercise of personal jurisdiction would violate due process. The District Court found under the first prong that the exercise of jurisdiction was proper because Marshall had not adequately rebutted ISC's allegations that a tort was committed, and that an injury had occurred, in Florida.

However, under the second prong, the District Court determined that the exercise of personal jurisdiction would violate due process. Since the minimum contacts required for due process must be purposeful, the court reasoned that "[t]he fact that Marshall posted comments on her website…, which were accessible to residents everywhere does not indicate that Marshall could reasonably anticipate being haled into a Florida court." Therefore, the District Court dismissed the suit for lack of personal jurisdiction.

On appeal, the Eleventh Circuit Court of Appeals applied the same two-step inquiry applied by the District Court. In determining whether the exercise of jurisdiction would be appropriate under the state's long-arm statute, the Eleventh

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Circuit recognized that Florida's long-arm statute permits the exercise of jurisdiction over a cause of action arising out of a tortious act committed in Florida. Furthermore, Florida law does not require the defendant to be physically present in Florida for the tortious act to occur in Florida, and a defendant could commit a tortious act within Florida by sending telephonic, electronic, or written communications into Florida, provided the cause of action arose from those communications. Therefore, the Eleventh Circuit reasoned that Marshall would be subject to jurisdiction under the long-arm statute so long as her allegedly defamatory postings on her website constituted electronic communications "into Florida."

At that point, the Florida Supreme Court had never addressed whether posting of information on an out-of-state website about a company with its principal place of business in Florida constituted communications "into Florida." The Eleventh Circuit certified the question to the Florida Supreme Court. In doing so, however, the Eleventh Circuit did not address the second prong of the inquiry, which is whether the exercise of jurisdiction would violate due process.

Access Equals Publication

Arguing against jurisdiction, Marshall contended that her acts were completed in Washington and nothing was actually published to a Florida computer "unless (and until) the reader reached up into Washington and retrieved it." The court rejected this argument, saying that Marshall ignores the nature of the Web, "which is fundamentally different from a telephone call, an e-mail, or a letter – by posting on her website, Marshall made the material accessible by anyone with Internet access worldwide." Thus, the Court found, once a nonresident posts allegedly defamatory material about a Florida company on the Web and that information is accessible in Florida, this constitutes committing a tortious act within Florida, provided that the material is actually accessed – and thus published – in Florida. Applying this approach, the Florida Supreme Court found that Marshall's posting of allegedly defamatory material about a Florida company, which was accessible in Florida – and ultimately accessed there as well – constituted committing a tortious act within Florida.

Due Process Issue Not Examined

`The certified question to the Florida Supreme Court only addressed the first step of the inquiry – whether Florida's long-arm statute applies to confer personal jurisdiction. The second prong, which is more restrictive, precludes suit in any situation where the exercise of jurisdiction over the nonresident defendant would violate due process. The Court did not broaden the question from the Eleventh Circuit to include the due process inquiry, but it noted that the issues of whether Marshall targeted a Florida resident, whether she purposefully directed her post at Florida, or whether Marshall's website is "active" or "passive" could be properly considered in the due process analysis. The case now returns to the Eleventh Circuit to consider Marshall's other arguments – including whether subjecting her to jurisdiction in Florida violates her due process rights.

Conclusion

Although previous Florida cases have determined that phone calls and e-mails constitute "electronic communications into Florida," this is the first time a Florida court has found that blogs and other Web site postings do as well. The Court noted that "[i]n the context of the World Wide Web, given its pervasiveness, an alleged tortfeasor who posts allegedly defamatory material on a website has intentionally made the material almost instantly available everywhere the material is accessible." Nonetheless, the ruling has limited precedential value because it did not address constitutional issues, which will be decided in federal court.

Ana-Klara H. Anderson, J.D., Ph.D. is a law clerk for Thomas & LoCicero PL in Tampa, FL. Plaintiff was represented by Keith E. Kress and Myra P. Nicholson, Orlando, Florida, and Kevin W. Shaughnessy and Caroline M. Landt of Baker and Hostetler, LLP, Orlando, Florida. Defendant was represented by Marc J. Randazza, Miami, Florida.

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Defamation by Click: Hyperlinking and the Defense of the Single Publication Rule

By Drew Shenkman

Typically, a hyperlink is an innocent piece of text on a webpage or Internet document connecting readers to another webpage or another portion of a document. While on its face a hyperlink itself conceivably could constitute a defamatory communication (for example, "to read more visit www.johndoeisachildmolestor.com"), it is rare that a link on its face would convey a sufficiently defamatory message. However, defamation plaintiffs are increasingly bringing suit over fleeting references to third-party content simply through a hyperlink.

Such suits conflict with the longstanding view of the *Restatement (Second) of Torts* §§ 558 and 557, suggesting that the publication element requires that the matter published to a third-party is itself an actual defamatory communication. Yet, the *Restatement* does not take into account the ease with which the potential defamer can communicate, through hyperlinking, a defamatory message that is not his own. This article discusses three cases which deal with hyperlinking to defamatory content in quite different ways, and concludes that the single publication rule found in many states may act as a valid defense to "defamation by click" actions.

Recently, the U.S. Bankruptcy Court for the Southern District of Texas found that emailing hyperlinks directing others to view a third-party's blog is a sufficient "publication" to sustain a defamation claim under state law. The ruling in *In re Perry*, 423 B.R. 215, 269 (Bankr. S.D. Tex. 2010), arose during a bench trial on numerous defamation and fraud claims brought against a debtor, William Perry, in his Chapter 11 bankruptcy proceeding. A former partner of Perry's in a real estate venture, David Wallace -- who was also the mayor of Sugar Land, Texas, and a candidate for U.S. Congress -- brought one of the defamation claims.

Perry and Wallace's relationship had soured, and the partnership dissolved. The court focused on Wallace's claim concerning an email that Perry sent to several people containing hyperlinks to the *Rhymes with Right* blog. Perry had not written the blog; its author remains unknown. The blog contained a discussion of Wallace's prior associations with the son of former British Prime Minister Margaret Thatcher, which the court found falsely "insinuated . . . that Wallace was an arms dealer and was in league with Mark Thatcher in attempting to overthrow the government of Equatorial Guinea."

The court found that Perry's email containing hyperlinks to the blog met the "publication" element of a defamation claim under Texas defamation law: "a statement is published when it is said orally, put into writing or in print, and the statement was published in such a way that the third parties are capable of understanding its defamatory nature." Thus, the court found that "an email, just like a letter or a note, is a means for a statement to be published so that third parties are capable of understanding the defamatory nature of the statements." The court also found that Perry acted with actual malice and defamed Wallace by sending the links, together with other defamatory statements.

While the *Perry* decision remains troubling, it may simply be an outlier case. More in line with the expected result, and giving a road-map for one way to defend defamation-by-linking lawsuit, is the well-reasoned decision of the United States District Court for the Western District of Kentucky in *Salyer v. Southern Poverty Law Center*, 2009 WL 4758736, 37 Med.L.Rptr. 1693 (W.D. Ky. 2009).

At issue in *Salyer* were links added to the Southern Poverty Law Center's ("SPLC") website to a 2006 SPLC report charging the plaintiff, Robert Salyer, with "being a member of an extremist group [who] was dishonorably discharged from the military and disbarred from practicing before military courts as a result." Salyer complained to SPLC that the 2006 report was defamatory, and SPLC responded by removing his name from the original report. However, a subsequent 2008 SPLC web article linked to the original, un-edited 2006 report, which Salyer argued constituted "republication" of the 2006 report.

The court, however, disagreed, finding that the statute of limitations had run on the 2006 report. In Kentucky, publication of defamatory material is subject to the "single publication rule," which provides that "any form of mass communication or aggregate publication...is a single communication and can give rise to only one action for libel." Thus, the statement was "considered published and the statute of limitations runs as soon as the communication enters the

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stream of commerce," and linking to the original 2006 article in 2008 was not a defamatory communication under the rule.

Salyer, however, argued that linking to the article fell within the republication exception to the single publication rule. The republication exception, found in *Restatement* § 577A, requires that the "second publication is intended to and does reach a new group." The court noted that republication is generally found in the release of new versions of a book or periodical, editing a preexisting work, or placing it in a new form – all with the ultimate goal of reaching a new audience. Thus, Salyer argued that linking to the 2006 article was nothing more than attempt by SPLC to present the statements to new audience.

The court rejected Salyer's argument, holding that "a mere reference to a previously published article does not [republish it]. While it may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory contents* of the article to that audience." While the court noted that the intent element of republication "certainly appears present when a publisher creates a hyperlink," the original text of the 2006 article was not changed, but instead it was "simply a new means for accessing the referenced article."

While on its face a hyperlink itself conceivably could constitute a defamatory communication, it is rare that a link on its face would convey a sufficiently defamatory message. However, defamation plaintiffs are increasingly bringing suit over fleeting references to third-party content simply through a hyperlink.

The court therefore found that linking to the 2006 article, even if it made access to the article easier, without more, was not a republication of that article. The court rightly noted, however, that had the 2008 article restated the allegedly defamatory remarks, the 2008 publication could be the basis for Salyer's defamation claim.

Two other cases cited by *Salyer* support the same proposition that linking cannot itself constitute publication or republication under the single publication rule. *See Sundance Image Tech. Inc. v. Cone Editions Press, Ltd*. 2007 WL 935703 (S.D. Cal. 2007) (linking to third-party webpage "more reasonably akin to the publication of additional copies of the same edition of a book); *Churchill v. State of New Jersey*, 876 A.2d 311 (N.J. Super. 2005) (online press release inviting readers to click on link to allegedly defamatory report was not republication). These cases and *Salyer* suggest that in some cases the single publication rule can be an effective counter-argument to a defamation-by-linking lawsuit.

Finally, the Canadian Supreme Court is poised to hear the hyperlinking issue head-on in December. Canada's highest court agreed in April to hear the case of *Crookes v. Wikimedia Foundation Inc*., 2008 B.C.S.C. 1424 (British Columbia, Can. S.C. 2008), in which the appellee Wayne Crookes alleged that he was defamed by unrelated articles first appearing online in 2005. The appellant, Jon Newton, operator of the website p2pnet.net, authored an article titled "Free Speech in Canada" which linked one of the articles as well as the website containing other articles.

Newton's article was not aimed at Crookes personally, but instead discussed Crookes' other lawsuits targeting the authors of the linked-to articles and the implications for free speech on the Internet. Newton neither quoted the articles nor made any comment about Crookes' character or integrity.

Despite this, Crookes argued that by simply hyperlinking, Newton became the publisher of the linked-to articles. However, the British Columbia Supreme Court rejected Crookes' argument, holding 2-1 that the publisher of a hyperlink does not then also become the publisher of what the reader finds when they get to the linked website. The court first noted that publication was not met because Crookes could not prove that by linking, anyone actually clicked on the link and read the content, an essential element of publication being that the communication was actually received by a third-party. This reason appears to be somewhat tenuous though, because technology exists to track clicks on links, information which could ultimately be discoverable to prove that a third-party accessed the defamatory article through the link.

More convincing, however, was the British Columbia Supreme Court's reasoning that the simple act of creating a hyperlink to words which are defamatory is not a publication of those words. The court likened linking to an author citing a footnote in a printed text. The only difference between linking and a footnote, the court pointed out, was the ease at

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which a link allows the reader to instantly access the additional material. However, ease of access does not alone made the linking party the republisher of the defamatory publication, just the same as the footnoting party is not said to adopt and republish the entirety of the document cited in a footnote.

As in *Salyer*, the court, however, did not foreclose the possibility that linking could make a person liable for the contents of another website. For example, had Newton written "the truth about Wayne Brookes is found *here,*" and "here" is linked to the specific defamatory words, it might lead to a different conclusion.

Looking back to *In re Perry*, the court's reasoning may be explained in light of its separate finding of actual malice. It is thus possible that the court saw Perry's email containing the hyperlinks as something more than merely pointing the recipients to defamatory statements, which as both the *Salyer* and *Crookes* cases suggest may ultimately form the basis of a defamation action premised upon hyperlinking. However, like the *Salyer* case, the Perry emails could just have easily been subject to the single publication rule, and no liability found at all, had that issue been raised.

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Virgin Islands Superior Court Grants Judgment as a Matter Of Law In Favor of Newspaper Following Libel Trial in Case Brought By Former Judge

On May 27, 2010, Senior Judge Edgar D. Ross of the Superior Court of the Virgin Islands granted a newspaper's motion for judgment as a matter of law on the heels of a two-week jury trial in a defamation case brought by a former local judge. *See Kendall v. Daily News Publishing Co.*, 2010 WL 2218633 (V.I. Super. Ct. May 27, 2010).

In the case, Judge Leon A. Kendall claimed that *The Virgin Islands Daily News* and two of its reporters, Joy Blackburn and Joe Tsidulko, had defamed him repeatedly during his tenure as a judge. At the trial, the jury found in favor of Mr. Tsidulko, but rendered a verdict for Judge Kendall against Ms. Blackburn and The Daily News Publishing Co., which publishes the newspaper. *See MLRC MediaLawLetter* at 15-16.

Judge Ross's decision overturned the verdict in favor of the plaintiff. That decision stands as a strong statement of fundamental First Amendment principles, and a welcome ruling in a jurisdiction in which the Islands' leading newspaper is currently facing no fewer than three other libel suits brought by public officials.

Background

Judge Kendall's case against the Daily News focused on sixteen articles and one editorial that the newspaper published while he was a judge sitting on the Virgin Islands Superior Court. Those publications all addressed Judge Kendall's bail decisions and the fallout from those decisions.

Throughout his tenure on the Bench, Judge Kendall's views on bail were controversial. He was an outspoken critic of many Virgin Islands judges' bail practices, arguing that their practices were unlawful and denied defendants their basic rights. In contrast, Judge Kendall claimed to scrupulously follow the applicable bail law and, in doing so, routinely released criminal defendants on personal recognizance or unsecured bonds. Some of the defendants he released committed other, violent crimes while out on bail. The Daily News reported on those crimes, the controversy surrounding Judge Kendall, and the disciplinary complaints that were filed against him as a result of his bail rulings. Ultimately, after one of the men Judge Kendall released killed a little girl, the newspaper published an editorial calling on him to resign.

In his lawsuit, Judge Kendall claimed that the various news reports and the editorial falsely reported on his decisions and implied that he was violating the law. After Judge Ross denied the defendants' motion to dismiss and motion for summary judgment, the case proceeded to trial. (For a more complete description of the procedural history of the case and the trial, please see the April 2010 *MLRC MediaLawLetter*.)

The jury found in favor of one of the newspaper's reporters, Joe Tsidulko, but rendered a verdict against the

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Daily News and the other reporter, Joy Blackburn, awarding Judge Kendall $240,000 in compensatory damages. At the close of the evidence, the defendants had moved for a directed verdict, but the Judge did not rule on the motion. Instead, he deferred his decision until the jury had issued its verdict. Once the verdict was rendered, the Judge invited the parties to file supplemental briefs supporting their positions on the defendants' motion for judgment as a matter of law.

That motion was complicated by the fact that the parties had agreed to submit a general verdict form to the jury. Thus, to prevail on their motion, the defendants were forced to defeat Judge Kendall's claims arising from the eleven articles and one editorial at issue that Mr. Tsidulko had not written. In the end, Judge Ross ruled that the plaintiff could not prevail on any of those publications as a matter of law.

Decision Granting Judgment As A Matter Of Law

In his decision, Judge Ross recognized the "profound First Amendment implications" raised by Judge Kendall's defamation claims and separately discussed the evidence and law relating to each of those claims. This article, however, will only discuss the statements that featured most prominently at trial.

The Daniel Castillo Statement – In March 2007, Daniel Castillo appeared before Judge Kendall at an advise of rights hearing after he was charged with beating his ex-girlfriend. Judge Kendall released Castillo on his own recognizance. The following month, Castillo, who previously pled guilty to felony assault after being charged with repeatedly raping a mentally challenged woman at gunpoint, killed a twelve-year-old girl. The public was horrified by the murder and outraged when it learned that Castillo was out on recognizance at the time of the murder. Judge Kendall claimed that he was defamed by Ms. Blackburn's reporting on the case. He alleged that when Ms. Blackburn reported that Castillo was released "despite his history of violence," she falsely implied that Castillo's criminal history had been presented to Judge Kendall at the bail hearing in March and that he ignored it.

Judge Ross rejected that claim on several grounds. First, he ruled that "the articles [referring to the Castillo case] on their face are materially true" and protected by the fair report privilege because it was indisputable that Castillo had a violent criminal record and the Judge Kendall had released him. He also held that Judge Kendall's construction of the articles was not reasonable because nothing in them implied that Castillo's previous criminal record was presented to Judge Kendall at the bail hearing. Moreover, the phrase "despite a history of violence" – a phrase that was the heart of plaintiff's counsel's appeal to the jury – was protected opinion. Indeed, as Judge Ross aptly noted, plaintiff himself admitted on cross examination that "whether someone has a 'history of violence' is an 'opinion.'" Finally, the court concluded that plaintiff had failed to establish actual malice by clear and convincing evidence and that he failed to prove Ms. Blackburn had "intended to convey the implication that Plaintiff claims defamed him." In that portion of the ruling, Judge Ross chastised the plaintiff, stating that his arguments "entirely distort the relevant facts and legal issues" and would "self-servingly have this Court categorically ignore the relevant context of the articles."

Judge Ross' decision stands as a strong statement of fundamental First Amendment principles, and a welcome ruling in a jurisdiction in which the Islands' leading newspaper is currently facing no fewer than three other libel suits brought by public officials.

The Ashley Williams Statement – After Ashley Williams was convicted by a jury for brutally raping and sodomizing a homeless man, Judge Kendall allowed him to go home for the weekend to get his affairs in order. Judge Kendall made this decision despite the prosecutor strenuously objecting that Williams was a danger to the community who had even said that he would "prefer to die than go to jail." When the weekend was over, Williams failed to report to prison, and marshals came to arrest him. When they arrived, Williams barricaded himself inside his house, threatened to blow himself up with a propane tank, and started a five-hour standoff that caused the neighborhood to be evacuated and fifty emergency personnel to come to the scene. Judge Kendall claimed that the newspaper's reporting on this stand-off was false because it stated that he had released Williams into the "community unsupervised." According to Judge Kendall, Williams was actually released on house arrest.

Again, Judge Ross held that the newspaper's reporting

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was substantially true, noting that Judge Kendall "himself admitted that no one was supervising Williams at the time of the standoff." The court also ruled that the statement was protected by the fair report privilege because "the specific terms of Williams' release are immaterial" in light of the undisputed fact that Judge Kendall's "decision to release a convicted rapist, despite a prosecutor's warning . . . , resulted in the standoff." Finally, Judge Ross ruled that plaintiff had failed to meet his burden of proving actual malice, pointing out that, among other evidence, the newspaper had two sources for its report, its reporter was at the scene of the stand off, and Judge Kendall himself had not claimed that there was any error in the report during a lengthy interview with the newspaper on the day the challenged statement appeared.

The Paul Mills Statement – In another claim, Judge Kendall alleged that he was defamed by a headline stating "Man Released Without Bail by Kendall Fails to Appear in Court." According to plaintiff, this headline, and other Daily News headlines and articles that used the phrases "without bail" and "no bail," were false because personal recognizance is a form of bail. In Judge Kendall's view, the Daily News implied that he was violating the law by not imposing any form of bail.

Judge Ross summarily rejected this argument, finding that "plaintiff's interpretation is not reasonable." Indeed, as the court explained, two of Judge Kendall's own witnesses – a former Virgin Islands Attorney General and plaintiff's own wife – admitted on cross examination that "'bail' is commonly understood to mean money bail and is not commonly understood to include personal recognizance." Like the other articles, the court ruled that this publication was protected by the fair report privilege and that the record was "devoid of any evidence" of actual malice.

The Editorial – Judge Kendall claimed that an editorial calling on him to resign was false and defamatory. However, as Judge Ross ruled, the statements in the editorial on which plaintiff based his claim – for example, describing Judge Kendall as "biased" and commenting that he "routinely eliminates bail" for defendants facing charges for violent crimes – were "constitutionally protected opinion" and "supported by disclosed facts." Moreover, plaintiff failed to prove the editorial was published with actual malice.

Conclusion

Judge Ross's opinion articulates strong support for key First Amendment principles that are critical to a free and vibrant press. His opinion is particularly significant at this time in Virgin Islands history, when three other public official libel cases are pending against the Daily News.

The Virgin Islands Supreme Court, which was established less than four years ago and which has never ruled in a defamation case, will consider this case next, as Judge Kendall quickly appealed Judge Ross's decision to that court. In the meantime, the Daily News has filed a motion seeking its attorneys' fees under a Virgin Islands fee-shifting statute. That motion is currently pending.

Michael D. Sullivan and Michael Berry of Levine Sullivan Koch & Schulz, LLP represented the defendants, together with Kevin Rames of the Law Offices of K.A. Rames, P.C. Plaintiff was represented by Howard M. Cooper and Julie Green of Todd & Weld LLP together with Gordon Rhea, of Richardson, Patrick, Westbrook & Brickman.

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Florida Trial Court Throws Out $10.1 Million Libel Verdict on Motion for JNOV

"Insufficient Proof" to Sustain Judgment for Public Official

A Florida Circuit Court granted a newspaper publisher's motion for judgment notwithstanding the verdict, throwing out a $10.1 million jury libel verdict against the *St. Petersburg Times*. *Kennedy v. Times Publ. Co.*, No. 05-8034-CI-11 (Fla. Cir. Ct., Pinellas Co. June 16, 2010).

Last August a six person jury awarded a public official plaintiff $5,149,137 in compensatory damages ($1,673,137 in lost past earnings, $2,226,000 in lost future earnings, and $1.25 million for damage to reputation), and $5 million in punitive damages.

In a short one and a half page order, Judge Anthony Rondolino, who had presided over the trial, simply noted that the case involved constitutional considerations subject to "critical independent review" and that after reviewing the evidence presented at trial "the proofs were insufficient to cross the threshold required by the First Amendment."

The publisher's motion for JNOV argued that there was insufficient evidence of falsity or fault to support the verdict – and that the damage award was unsupported by the evidence and/or constitutionally excessive.

Background

At issue in the case was a December 4, 2003 *St. Petersburg Times* article headlined: "Bay Pines ousts chief of medicine. The doctor is reassigned as he is being investigated on accusations of misuse of money and sexual harassment." The article was one of many reports published in the newspaper about official investigations into mismanagement and misconduct at the Bay Pines Veterans Administration Medical Center in Florida.

The article went on to state that Dr. Harold Kennedy was under investigation by the Veterans Affairs Inspector General over allegations that he accepted money from pharmaceutical companies to pay for private parties and was facing "several Equal Employment Opportunity complaints, including allegations of sexual harassment and mental anguish." The article also quoted Kennedy confirming and explaining the existence of the investigations, including his statement that "he had done nothing wrong." The statements about Kennedy were repeated in two subsequent articles about conditions at Bay Pines.

Kennedy sued Times Publishing in December 2005 over all three articles, claiming that the term "ousted" in the headline falsely implied that he had been fired from the hospital; that the articles falsely implied that he had been reassigned because of the investigations; and that the articles falsely mischaracterized the nature of the federal investigations.

In a pretrial ruling, the plaintiff was held to be a public official because of his position at a government hospital. A motion for summary judgment was denied without opinion.

Libel Trial

The case was tried over five days in August 2009. Plaintiff argued that the articles were false because he was innocent of "sexual harassment" and had not stolen or used VA money for personal benefit. He also argued that the article falsely misrepresented his expressions of confusion and denial to the reporter as "confirmation" of the existence of investigations. Several VA sources for the articles denied specific recollection that they used the words "sexual harassment" and "misuse of money" when speaking to the reporter. Plaintiff's contract with the Veterans Administration was not renewed and he claimed that the newspaper articles were responsible for his losing several job opportunities with medical schools.

One of the complicating factors in the case was that the reporter on the story, Paul de la Garza, died before trial. The court precluded the publisher from introducing the reporter's handwritten notes for the story finding the publisher lacked independent evidence of the dates and circumstances of their creation. Plaintiff's testimony about his telephone conversation with the reporter was introduced without specific contradiction.

The publisher was not able to introduce evidence that the VA settled all of the EEOC complaints involving plaintiff's behavior at the hospital. However, the publisher introduced VA Inspector General reports that confirmed the existence of the investigations and criticized plaintiff for misusing federal funds and creating a hostile work environment. Plaintiff's lawyer has stated that he intends to appeal the JNOV ruling.

Alison Steele and Thomas E. Reynolds of Rahdert, Steele, Reynolds & Driscoll, P.A. in St. Petersburg, Fla. represented the newspaper. The plaintiff was represented by Timothy W. Weber of Battaglia, Ross, Dicus & Wein in St. Petersburg, Fla.; and Ira M. Berkowitz of St. Louis, Mo.

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New Federal Libel Tourism Bill Introduced in Congress

On June 22, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and Ranking Republican Jeff Sessions (R-AL) announced the introduction of a new federal libel tourism bill to prevent the enforcement of foreign libel judgments that are not compliant with the First Amendment and state constitutional protections for speech and press. S. 1318 is also sponsored by Senators Arlen Specter (D-PA), Charles Schumer (D-NY) and Joseph Lieberman (I-CT).

The "Securing the Protection of our Enduring and Established Constitutional Heritage Act," or "SPEECH Act" differs from the "The Free Speech Protection Act" (HR 1304 and SB 449), introduced last year also aiming to stymie libel tourism. The SPEECH Act eliminates the controversial damages remedy against foreign defamation plaintiffs; includes protections for interactive computer services; creates a declaratory judgment action; and provides for removal of enforcement actions to federal court.

The SPEECH Act provides that a domestic court shall not recognize or enforce a foreign judgment for defamation unless the court determines that:

1. "The defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located;" or
2. "the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located."

Defamation is defined as:

> "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person."

The SPEECH Act also provides that foreign defamation judgments cannot be enforced in U.S court unless it is determined that "the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States." The bill allows the party opposing recognition or enforcement of the judgment reasonable attorney's fees if the party prevails.

Moreover, the SPEECH Act extends to enforcement of judgments involving third-party content on the Internet, declaring that a domestic court "shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230) unless the domestic court determines that the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States."

The SPEECH Act also would create a declaratory judgment action for "a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States."

Jurisdictionally, the bill provides that any action to enforce a foreign defamation judgment can be removed from state to federal court under 28 U.S.C. §1441 "without regard to the amount in controversy between the parties."

The bill has been referred to the Senate Judiciary Committee.

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U.S. Supreme Court Allows Search of Employee's Text Messages

By Richard M. Goehler

In a unanimous 9-0 decision issued on June 17, 2010, the U.S. Supreme Court held that an audit by the City of Ontario of transcripts of an employee's text messages sent on a City-owned pager was a reasonable search under the Fourth Amendment. *City of Ontario v. Quon* (No. 08-1332).

The Court's ruling, however, was expressly on narrow grounds and closely tied to the facts in the case, with Justice Kennedy explaining for the Court,

> "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communications devices . . . The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear . . . At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."

Facts

The Ontario, California Police Department issued pagers to its SWAT Team members, allowing them to exchange text messages to coordinate responses to emergencies. SWAT Team Sergeant Jeff Quon used his department-issued text messaging pager to exchange hundreds of personal messages – many sexually explicit – with and among his wife, his girlfriend, and a fellow SWAT Team sergeant. Quon did so even though the City had a written policy that permitted employees only limited personal use of City-owned computers and associated equipment, including email systems, and warned them not to expect privacy in such use. Under the City's contract with its wireless provider, each pager had a monthly character limit. Any use above that monthly limit resulted in extra charges to the City. The supervising officer in charge of administration of the pagers had an informal verbal arrangement with his fellow officers whereby he would not audit pagers that had exceeded the monthly character limit if the individual officers agreed to pay for any overages. Certain officers, including Quon, regularly exceeded the monthly character limit. Subsequently, the City's Chief of Police ordered a review of the pager transcripts for the two officers with the highest overages – one of whom was Sgt. Quon – to determine whether the City's monthly character limit was insufficient to cover business-related messages. The Department then obtained the pager transcripts from the City's wireless provider and found that many of Quon's text messages were inappropriate and sexually explicit in nature. Quon subsequently sued the City, alleging Fourth Amendment violations and claims for invasion of privacy.

Lower Court Proceedings

The federal district court ruled that Quon and the other plaintiffs had a reasonable expectation of privacy in their text messages, but held a trial on the issue of the employer's intent in conducting the search. After the jury found that the employer's intent was to determine whether the character limit was appropriate, the district court entered judgment in favor of the employer. Quon and the others then appealed to the Court of Appeals for the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit found in favor of Quon, agreeing with the district court and ruling that Quon had a reasonable expectation of privacy with respect to his text messages. This was the first decision from a federal court of appeals finding in favor of privacy rights of employees using electronic devices provided by their employers. Until the Ninth Circuit's ruling in *Quon*, most courts had ruled that employers who provided electronic devices for their employees were entitled to control how those devices were used. Most employers, including the City of Ontario, had formal policies that said employees do not have a privacy right when they are sending emails or other electronic messages. The Ninth Circuit found, however, that the police department's formal policy had been overridden by the "operational reality" of the supervisor's informal verbal policy which led officers, like Quon, to believe that they could use their pagers for personal use.

Following the Ninth Circuit's ruling, the City of Ontario appealed to the U.S. Supreme Court.

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Supreme Court's Decision

The Supreme Court held in its unanimous decision that the City of Ontario's review of Quon's text messages was a reasonable search under the Fourth Amendment. In reversing the Ninth Circuit Court of Appeals, the Court found that the City's review of Quon's text message transcripts was reasonable because the audit conducted by the City had a clear non-investigatory, work-related purpose from its inception, that is, to evaluate whether the monthly character limit was sufficient for the City's needs and to ensure that employees were not paying out of pocket for work-related expenses.

In tailoring its narrow decision, for the reasons described in Justice Kennedy's comment above, the Court assumed for purposes of its ruling that Quon had a reasonable expectation of privacy in the text messages and that the City's audit of the messages constituted a "search" within the meaning of the Fourth Amendment. Nevertheless, even with these assumptions, the Court concluded that the review of the text message transcripts was reasonable.

"This Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment," the Court stated. "That rationale could raise insuperable barriers to the exercise of virtually all search -and-seizure powers, because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." The Court noted that Quon's superiors had limited the scope of their audit – for example, by redacting messages sent and received while Quon was off duty.

Two Concurring Opinions

In one of the two concurring opinions, Justice Stevens, consistent with his questions to counsel during oral arguments on April 19, noted that Quon's position as a law enforcement officer limited his expectation of privacy. During the oral arguments, Justice Stevens pressed Quon's counsel and questioned whether SWAT team members like Quon might be treated differently from other government employees because their records are often subject to disclosure in lawsuits under California's open records law. In his concurring opinion, Justice Stevens noted, "It is clear that respondent Jeff Quon, as a law enforcement officer who served on a SWAT team, should have understood that all of his work-related actions – including all of his communications on his official pager – were likely to be subject to public and legal scrutiny. He therefore had only a limited expectation of privacy in relation to this particular audit of his pager messages."

In a second concurring opinion, Justice Scalia opined that the proper threshold inquiry should not be whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers. Justice Scalia indicated his preference would have been for the Court to hold that government searches involving work-related materials or investigative violations of workplace rules – those that are reasonable and normal in the private sector – do not violate the Fourth Amendment.

Implications of the Decision and Recommendations for Employers

The Court's decision in *Quon* highlights the importance of clearly-drafted technology policies and legitimate, reasonable searches of employees' messages.

Even though the Court's opinion was issued on narrow grounds and tied specifically to the facts in the case, the *Quon* decision does provide important practice tips for employers, both public and private, who supply their employees with a means of e-communication.

First, it is critical that employers implement and distribute a clearly written technology policy that removes any privacy expectation employees may have when using employer-supplied equipment. Managers and supervisors should also be trained in the policy so as not to give employees the impression that their communications are, despite the policy's language, private. In addition, employers should consider the purpose and scope of their workplace searches. The Court approved the rationale behind the *Quon* search because the City had a legitimate interest in ensuring that their employees were not paying for work-related messages and that the City was not paying for extensive personal messaging. The Court noted that the scope of the search was appropriate. Significantly, the City only obtained a relatively small sample of Quon's messages and reviewed only messages sent during work hours. While private employers ultimately may not be held to the same legitimacy standards as the City in this case, such limited searches are more likely to be viewed favorably by courts in the future.

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The Other Side of the Pond: Updates on UK Developments

Libel Law Reform, Jury Trials, Defamatory Meaning

By David Hooper

Whither Libel Reform?

Going into the British General Election, both the Liberal Democrats and the Conservatives had committed themselves to libel reform. They are now in coalition and the coalition agreement includes "*the review of libel law to protect freedom of speech.*" The Conservatives had said that they would "*review and reform libel laws to protect freedom of speech, reduce costs and discourage libel tourism*." The Liberal Democrats committed themselves to "*to protect free speech, investigative journalism and academic peer reviewed publications through the reform of English and Welsh libel law including requiring corporations to show damage to their reputation and to prove malice or recklessness and by providing a robust responsible journalism defense*."

What has happened is that the Lord Lester of Herne Hill QC introduced to the House of Lords a private members libel bill which he had drawn up with the assistance of a former court of Appeal judge, Sir Brian Neill and the libel specialist, Heather Rogers QC. Such pieces of private legislation do not normally get far but this, it seems, will be different.

The bill is being supported by the coalition government and it is due for its second reading in the House of Lords on July 9th. Thereafter, it will be debated in the House of Commons where there is likely to be a majority for such reform. Lord Lester anticipates that libel reform could be enacted by the end of 2011. The key features of Lord Lester's bill is that it will codify and strengthen a number of the changes which have been emerging in the last few years. The Reynolds – responsible journalism – defense will be codified as will the defense of truth and honest opinion (previously fair comment).

The defense of innocent dissemination, presently Section 1 Defamation Act 1996 will be strengthened in that publishers who were not responsible as primary publishers such as, for example, ISPs, will have a period of 14 days to remove the offending material. It will be a defense that will be of significant assistance to broadcasters and facilitators. Lester's bill will also remove the presumption of jury trials in libel actions.

Perhaps the most important changes in the Lester bill are the introduction of the single publication rule, the requirement that companies suing for libel must prove substantial financial loss and, in the case of libel tourism cases, a claimant would have to establish that he had suffered substantial harm in England as a result of the amount of publication in England taking into account the publication elsewhere. In other words, a claimant such as Boris Berezovsky seeking to sue Forbes magazine would have to establish a harmful event in the UK which is defined as having caused substantial harm to the claimant's reputation in regard to the extent of publication elsewhere.

I suspect that the most controversial part of Lord Lester's bill is the requirement under Section 12 that a court must strike out an action for defamation unless the claimant shows that the publication of the words has caused substantial harm to his reputation or that it is likely that such harm will be caused. That, I suspect, may be a reform too far and may be successfully opposed on the grounds that it has the potential for generating a large amount of satellite litigation in the majority of libel actions.

Trial by Judge Ordered in Jacko Libel Action

Under the Lester bill, the normal presumption will be in favour of trial by judge alone. As things stand at present however, under Section 69 Senior Courts Act 1981 a libel action "*shall be tried with a jury unless the court is of the opinion that the trial requires any prolonged examination of documents*" and even then it has a discretion to order trail by jury. In the case of *Fiddes –v- Channel Four*, Mr Justice Tugendhat's decision that the case should be heard by judge alone was upheld by the Court of Appeal. *Fiddes –v- Channel Four Television*, [2010] EWCA Civ 730 (Court of

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Appeal June 10, 2010).

Tugendhat J's view was largely influenced by costs. There were due to be 40 witnesses. The case could have taken 4-6 weeks and the judge's view was that having a judge alone would shorten matters by two weeks as well as generally reducing the level of costs. The defense QC Adrienne Page made an application for trial by judge alone just before the trial was due to start in mid-June. The judge took a broad view of his powers under Section 69 making the point that the court would have to look at many hours of film footage as well as a lot of documents. He also made the point that since one of the issues was what was and was not acceptable journalistic practice, it would be as well to have a reasoned judgment which could, if need be, be reviewed by the Court of Appeal. The case involved the Jackson family – Tito Jackson primarily the improbably named brother of Michael, house-hunting in Devon and the programme was called *The Jacksons Are Coming*. By the time matters had reached court, costs, which included a conditional fee agreement, exceeded a total on both sides of £3 million.

Perhaps the most important changes in the Lester bill are the introduction of the single publication rule, the requirement that companies suing for libel must prove substantial financial loss and, in the case of libel tourism cases, a claimant would have to establish that he had suffered substantial harm in England as a result of the amount of publication in England taking into account the publication elsewhere.

The case had been ratcheted up by allegations that the television company had fabricated film footage. When the Court of Appeal upheld Tugendhat J's ruling the Claimant's counsel, Ronald Thwaites QC, who had been hired for his skills as a jury advocate – threw the towel in. There was a face-saving formula whereby Channel 4 accepted that Fiddes did not betray the Jackson family by selling stories about them and, for his part, he acknowledged that the programme was not faked.

Each side bore their own costs which, in the case of Channel 4, were reported to be £1.7 million. However, the tendency of courts to allow trial by judge alone was clearly an important principle for defendants to establish. On the whole, claimants do better in front of juries and defendants tend only to fight cases where they have a high degree of confidence in their prospects and defendants will tend to feel that they have a better prospect and a greater degree of certainty if the case is heard by a judge who will then give a reasoned judgment in support of his or her decision. The real losers here were the claimant's lawyers who had hoped for a bonanza under their conditional fee agreement and perhaps not many tears are being shed about that.

Single Meaning Rule Not Extended to Malicious Falsehood

Ajinomoto Sweeteners Europe –v- Asda Stores [2010] EWCA 609.

Ajinomoto, maker of an artificial sweetener called Aspartame, sued supermarket chain Asda over its "Good for You Food" promotion which said its food had "no hidden nasties" – no artificial colours or flavours, no Aspartame and no hydrogenated fat. Ajinomoto sued Asda for malicious falsehood and sought, under the single meaning rule, a ruling that this meant that Aspartame was an especially harmful or unhealthy sweetener which families would do well to avoid.

Mr Justice Tugendhat took the view that this was not an appropriate case for a single meaning rule and that views differed on this sweetener and that it should be open to the defendants to argue that there was a risk that aspartame was harmful and unhealthy, albeit that others took a different view. He took the view that one should not necessarily choose one defamatory meaning when there were other meanings available.

Media Organisations Intervene on Fair Comment

Three news organizations, Associated Newspapers, Guardian Media Group and Times Newspapers are intervening in the rejection of a fair comment defense by Mr Justice Eady which was upheld by the Court of Appeal in the case of Jason Spiller –v- Craig Joseph. This case is due to be heard in July.

Mr Justice Eady ruled that the comment must expressly or

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by implication, indicate in general the nature of the comment, what the facts are on which the comment is based and the reader should from the article be in a position to decide if the comment is well-founded. The interveners seek a more simplified test for fair comment and seek to revert to the point made by Lord Denning *in Slim –v- Daily Telegraph* [1968] 2QB 157 that the defense of fair comment must not be whittled down by legal refinement. In other words, the argument is that matters of comment should be looked at in the round and without a detailed analysis of the comment to see whether the ingredients upon which the comment is formulated are sufficiently spelled out. I will report on this case later but such amicus briefs are relatively rare in the UK.

Struck Out Claims – Jameel Grows Teeth

It has been noticeable that an number of claims have been struck out applying the principle in *Jameel –v- Dow Jones & Co Inc* [2005] QB 946 on the basis that to allow such insubstantial claims to continue would be an abuse of process or disproportionate. This is a significant change as hitherto the libel judges had been reluctant to avail themselves of this weapon. One such decision was that of Mr Justice Tugendhat in *Hays plc –v- Hartley* [2010] EWHC 1068.

This was a claim against a publicity agent who had passed a story to the Sunday Mirror. The Sunday Mirror had not been sued and the company's claim against the employees, who suggested that Hays plc was an institutionally racist company, had been settled. The claim was struck out as an abuse of process, as there was nothing of value which could be achieved by the litigation and the claimant had already received a vindication by a public statement which had in fact been published on the newspaper's website that the allegations were unfounded.

The judge also noted that the company did not claim to have suffered any financial loss. It seems that the reason the newspaper had not been sued was that there was potentially a Reynolds defense. The court found it unattractive that a potentially valid Reynolds defense could be circumvented by suing someone who was not a journalist. This is an important case from the perspective of analysing the objectives of a libel action against the cost and likely outcome and the judge struck a balance in favour of the defendants.

In *Budu –v- BBC* [2010] EWHC 616 Mrs Justice Sharp struck out a libel action based on three articles in the BBC online archive. The first of these had been published in 2004 and the claim was brought in 2009. In the absence of a single publication rule the claimant was, on the face of it, entitled to sue in respect of such publication as there had been in the 12 months preceding the commencement of proceedings. The judge was, however, persuaded that to allow such a claim to continue would have been disproportionate and she took the view that the action had no real prospect of success. She also took account of what was termed a "Loutchansky notice" where the nature of the claimant's complaint about the articles had been put at the foot of the offending articles. This is a step which defendants are wise to take in this jurisdiction. It give some form of right of reply to a claimant and balance to the article complained of. Furthermore, it is something that is easily accommodated in and suitable for a website.

In *Khader –v- Aziz and Davenport Lyons* [2010] EWCA 716 an order that a claim brought against the former wife of the Sultan of Brunei and the well-known media law firm, Davenport Lyons, regarding the report of the disappearance of a bracelet was struck out. The solicitors were covered by qualified privilege and the judge's decision that the costs of the claim was disproportionate to the issues and should be struck out was upheld. It was insufficient merely to contend that there were issues of fact which should go for trial.

To similar effect was the decision of Mr Justice Eady *in Kaschke –v- Osler* [2010] EWHC 1075. this claim brought a political activist against a blogger referring to her "Baader-Meinhof link" (a reference to a 1970s German terrorist group). In fact although she had spent three months in prison, she had been exonerated and compensated. Eady J decided, however, to apply the Jameel abuse of process argument. She had been given a right of reply and on analysis he considered that the article did not directly suggest that she was linked to terrorism. Furthermore, there had been an 11 month delay in bringing proceedings. One was dealing only with a very small publication. She could only sue in respect of hits within the 12 months preceding the commencement of proceedings. Damages would be so small as to be dwarfed by the legal costs and the view of the judge was that a two-week trial would be out of all proportion to the issues at stake.

These decisions show that the Jameel abuse of process

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defense has at last grown teeth.

A Higher Threshold for the Definition of Libel?

In *Thornton –v- Telegraph Media Group Limited* [2010] EWHC 1414, Mr Justice Tugendhat analysed the latest consideration of the definition of the meaning of defamatory words given by Sir Anthony Clarke, Master of the Rolls, in Jeynes –v- News Magazines Limited [2008] EWCA civ 130. The litigation arose out of a rather spirited review by Lynn Barber of Thornton's Book *Seven Days in the Art World* which referred, amongst other things, to the author's "*seemingly limitless capacity to write pompous nonsense*." The First Amendment principles of Brian Rogers and others may perhaps also be tested by the fact that Lynn Barber had sneered at the author as "*a decorative Canadian*."

The question which arose was how one should approach damage to reputation when it was not directed at the author's moral character but rather at the quality of her work and profession.

The argument for the defense was that there should be a threshold of seriousness and that if the remarks did not involve a reflection upon the author's personal character or the official professional or trading reputation of the claimant, they were not defamatory.

An analogy was drawn with sportsmen where criticism of the way they had played in a game was essentially a value judgement which might dent someone's pride rather than their personal reputation. In every race someone has to come last, losing in sport was, the defense submitted, an occupational hazard rather different from shaky hands for a surgeon or endangering the lives of your dental patients through an unproven anaesthetic.

Criticism of an author was closer to the sporting rather than the medical analogy. Tugendhat J took the view that a threshold of seriousness must be crossed and the bar must be set high enough to discourage frivolous claims. The judge concluded that the definition of defamation should be that the publication of which the claimant complains is defamatory of him because it substantially affects in an adverse manner the attitude of other people towards him or has a tendency to do so.

The judge referred back to the judgment of Lord Atkin in *Sim –v- Stretch* [1936] TLR 669 where Lord Atkin "expressly envisaged a threshold of seriousness. The judge gave summary judgment to the defendant newspaper. He may also have taken a significant step towards raising the bar for libel claim and discouraging trivial complaints which could be of considerable significance if Lord Lester's requirement of substantial harm does not survive the legislative process.

Beware of Over-pleaded Meanings

Only I suppose in England would a fund manager sue a newspaper for unkind comments about her decision to invest an embarrassingly large part of her hedge fund with the unlamented Bernie Madoff. This was what had happened in *Horlick –v- Associated Newspapers* [2010] EWHC 2010. Mr Justice Eady in dealing with what appeared to be a distinctly over-pleaded meaning, pointed out that one was looking for the natural and ordinary meaning the article would have conveyed to the ordinary reader who is neither naïve or unduly suspicious but capable of reading between the lines.

Eady J rejected the suggestion that the article imputed deception or that she was a charlatan. He noted that the article simply said that questions had been raised as to the extent of her due diligence.

The article was strong stuff and was headlined "*Final showdown for failing superwoman – Nicola Horlick faces her reputation in ruins as shareholders seek to oust board and put fund in liquidation.*" The real issue was whether what was written was capable of being fair comment and/or justified. Aggressive claimant lawyers do themselves no favours by over-larding the alleged meanings and substituting concepts of deception and charlatans when at heart the issue is one of due diligence and what was or was not said to the investors in question.

Case of the Month

This accolade must undoubtedly belong to a media solicitor, Mark Lewis, who is suing the Press Complaints Commission and the head of the PCC Baroness Peta Buscombe over criticisms of evidence to a Parliamentary Select Committee given in another media saga, namely the extent to which a discredited News Group journalist authorised the hacking into the mobile telephones of target celebrities. It all seems a little bizarre, but it will, I suppose, provide a lot of employment for many media lawyers and of harmless mirth for the media.

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

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Supreme Court of Canada Upholds Mandatory Bans on Bail Hearings

By Dan Burnett

American reporters would find it bizarre to be permitted to attend a Court hearing but be prohibited from reporting. That is exactly what happens in many Canadian pretrial hearings such as bail hearings. The ban on bail hearings (Criminal Code s. 517) is mandatory when the defense requests it. The judge has no discretion. It covers all of the evidence, representations and reasons, and cannot be tailored by the judge or revisited later. It even applies where the charge does not permit a jury trial. Yet the Supreme Court of Canada rejected a constitutional challenge and upheld the ban in a decision released June 10, 2010. *Toronto Star v Canada*, 2010 SCC 21.

Supreme Court of Canada Decision

The Supreme Court of Canada has a strong history on open courts, at least compared to the pre-Charter of Rights era when bans were easy to obtain. In the 1990's the Court issued several decisions placing a heavy onus upon those seeking discretionary bans, essentially requiring evidence that the ban was needed to avert a serious threat to the administration of justice, and even then only permitting a minimally infringing ban. The statutory ban on bail hearings would never meet that test, as it applies broadly to all sorts of non-prejudicial information, at a time usually a year or more before any jury would hear the case, without any need for justification.

The broad coalition of media organizations who challenged the bail hearing ban had high hopes for having it struck down and permitting bans on bail hearings only where the prosecutors or defense can meet the onus to justify a discretionary ban. However, the Supreme Court of Canada upheld the ban in its entirety. Only one judge, Justice Abella, dissented. She would have struck down the mandatory element of the ban, converting it into a discretionary ban.

One of the key distinctions between this case and the earlier strong anti-ban jurisprudence was that this was a mandatory ban enacted by Parliament, as opposed to a discretionary ban. The majority cited the objectives of the legislation as being to "safeguard the right to a fair trial" and to "ensure expeditious bail hearings." The court noted that evidence Crown may call at a bail hearing is not subject to the same evidentiary filtering as trial, and often includes bad character information, hearsay, untested similar facts and prior convictions and charges, all of which could prejudice a potential jury.

The majority held that the ban, though broad, was within the range of minimally-intrusive solutions chosen by Parliament, given the time sensitivity of bail and the difficult position of an accused. They rejected various other options such as a discretionary ban as unduly prolonging the bail process and incarceration of newly arrested individuals. They noted that the ban does not prevent reporting of the charges, the outcome of the bail hearing including bail conditions, and that the ban expires when there is a discharge or verdict.

Of course, this downplays the fact that it may be years before the ban expires, and in the meantime it means the media cannot even report on the reasons for releasing a person on bail, resulting in an inability to report the reasons for the release, amid the public outcry when a person charged with serious crime is released.

Considering the positives and negatives of the mandatory ban, the majority said that mandatory nature of the ban "limits the deprivation of liberty," "means that accused persons can focus their energy and resources on their liberty interests," "ensures the public will not be influenced by untested one-sided and stigmatizing information," and avoids "additional issues and adjournments."

The majority did acknowledge that: "The ban prevents full public access to, and full scrutiny of, the criminal justice process. Moreover, the bail hearing may attract considerable media attention and its outcome may not be fully understood by the public."

In the end, the majority ruled that "in the context of the bail process, the deleterious effects of the limits on the publication of information are outweighed by the need to ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information; in other words, to guarantee as much as possible trial fairness and fair access to bail. Although not a perfect outcome, the mandatory ban represents a reasonable compromise."

The majority ruling upheld a mandatory ban that would never meet the ordinary test for bans, and as such was a great disappointment. As we enter an era of instant Twittering and social media, the enforceability of this ban, and the definition of what constitutes "publication" as opposed to a private communication will undoubtedly become hot topics.

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Supreme Court of Canada Recognizes Limited Right to Access Government Documents

By Paul Schabas

The Supreme Court of Canada has recognized a limited constitutional right to access government documents. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* released on June 17 after an extraordinary 18 months under reserve, the Court held that the scope of s. 2 (b) *Charter* (freedom of expression) includes a right to access government documents, but only where access is necessary to permit meaningful discussion. The Court did not elaborate on what would constitute "meaningful discussion", and has left unanswered many other questions about when and how the constitutional right to access government information can be enforced.

Background

The case has a long history. In 1997, a judge of the Ontario Superior Court stayed murder charges arising from a mob "hit" in 1983, because of abusive conduct by police and prosecutors, issuing a scathing judgment critical of the police and Crown. The Ontario Provincial Police conducted a review of the investigation and subsequent prosecution. Nine months later, in a terse press release, the OPP declared it had found "no misconduct" on the part of state officials.

The stark contrast between the Court's decision and the OPP press release prompted the Criminal Lawyers' Association to request the OPP report and records underlying the OPP's investigation, pursuant to the Ontario *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

The Ministry of the Solicitor General refused the request, stating that the records were exempt from disclosure under law enforcement and solicitor-client privilege exemptions in *FIPPA*. Although s. 23 of FIPPA contains a "public interest override" whereby exempt records may be disclosed if "a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption," the override does not apply to the law enforcement and solicitor-client privilege exemptions.

The Information and Privacy Commissioner of Ontario upheld the Ministry's decision. The case went to the Ontario Divisional Court, where the CLA argued that the non-disclosure infringed freedom of expression under section 2(b) of the *Charter*. The Divisional Court rejected the CLA's arguments and upheld the non-disclosure, stating that there is no constitutional "right to know."

The Ontario Court of Appeal overturned the Divisional Court decision. A majority of the Court held that s. 23 infringed s. 2(b) of the *Charter* and should extend the public interest override to records related to law enforcement and solicitor-client privilege. In a strong dissent, Juriansz J.A. stated that s. 2(b) does not create a right of access to information in the possession or under the control of a government.

Supreme Court Decision

The Supreme Court decision gives and takes. The Court has recognized that a right of access exists "only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints." On the other hand, the Court refused to recognize a "general right of access", treating "access [as] a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."

It found that the limitations in s. 23 of *FIPPA* were constitutional, but seemed to do so on the basis that the public interest must be considered when considering the law enforcement and privilege exemptions under ss. 14 and 19, which are discretionary. As a result, the Court ruled that the matter should be reconsidered by the Information Commissioner, suggesting that at least some of the report and records should be released.

As the Court stated: "The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised."

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Conclusion

The good news is that the Court has recognized a limited constitutional right of access to documents and information from government. And it's also encouraging that the court has made clear that the public interest must be considered by government when exercising discretion whether to release information . So it is an important, albeit, baby step towards putting more teeth into access to information laws. As well, the referral back to the Commission suggests that the Court felt that more should be released in this case.

On the other hand, the court has given little guidance on when the Charter interest will be engaged, and it is quite troubling that s. 2(b) will only apply to "meaningful discussion of matters of public interest" whatever that is. This raises concerns about the court narrowing the scope of s. 2(b) generally. The Court was clearly concerned that the access right not be so broad that it extends into traditionally secret areas, such as cabinet deliberations or the inner workings of courts, and this may have motivated the unusual step it took in carving out limits within s. 2(b) of the Charter rather than analyzing exceptions under the reasonable limits clause in s. 1.

It is also disappointing that the Court did not recognize a general right of access to information under the Charter. This is the trend in most democracies and in international law – all of which was presented to the court by the Intervener, the Canadian Newspaper Association. The court has previously emphasized that freedom of expression includes the right to receive information, and recognized, of course, that access to information is very important in a democracy.

The Court had a great opportunity to send that message here, and its failure to do so confirms, sadly, that Canada – once a leader in promoting a right to information – now may lag behind other countries. More cases will need to be brought to the Court in order to bring more clarity to the issue. For example, the SCC is going to hear another major case this fall dealing with whether the federal Access to Information Act applies to Minister's offices and their immediate political staff.

Paul Schabas and Ryder Gilliland were counsel for the Interveners, Canadian Newspaper Association, the Canadian Association of Journalists and the Canadian Media Lawyers' Association. Their colleagues at Blake, Cassels & Graydon LLP, Catherine Beagan Flood and Iris Fischer, acted for the Intervener the British Columbia Civil Liberties Association.

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Google Executives Convicted in Italy for Privacy Law Violation

Google Held Responsible for Uploaded Video

By Gabrielle Russell

The owner of the wall is not liable for the writing on the wall, but he may be liable for the economic profit arising from the writing. – Judge Oscar Magi

In late February, an Italian court found three Google executives criminally liable for violating Italy's data privacy law in connection with a mobile phone video that had been posted to Google Video, a predecessor of YouTube. The executives – chief legal officer David Drummond, global privacy counselor Peter Fleischer and former chief financial officer George Reyes – were given suspended sentences of six months in jail. Another executive, the former head of Google Video Europe Arvind Desikan, was acquitted after trial. Judge Oscar Magi explained his reasoning in a 111-page decision released to the public on April 12.

Background

The mobile phone recording, shot by a student in Turin, Italy, in 2006, depicted a number of boys physically abusing and taunting a disabled classmate. The assailants can be heard calling their classmate, who suffers from autism and hearing and sight impairments, "mongolo," an Italian slur for people with Down Syndrome. At one point, they also refer to the "Associazione Vivi-Down," an Italian advocacy group for people with Down Syndrome.

Google removed the video within hours of being notified of its offensive content by the Italian Postal Police, and cooperated with local authorities to help identify the students involved in its filming. However, during the two months it spent on the website before its deletion, the video was downloaded frequently enough to achieve top-ranking in the site's "video divertenti" (funny videos) category.

The case against the Google executives was initiated in 2008 after an investigation into a complaint filed by Vivi Down, and the father of the victim. Because Italian law provides that company executives can be held responsible for the crimes of their company, Drummond, Fleischer, Reyes, and Desikan were charged with criminal defamation and privacy law violations despite having nothing to do with the posting of the video or its eventual removal. In fact, they had no knowledge of the video until after it was removed.

Application of Italian Law

The executives were charged with criminal defamation in violation of article 595 of the Italian Criminal Code. The victim in the video had withdrawn from the case, but prosecutors and the court allowed the prosecution to go forward on a group libel theory, i.e., that the members of "Associazione Vivi-Down" or anyone affected by Down syndrome was defamed by the video.

The Judge, however, acquitted the Google executives of this charge. Prosecutors had argued that Google had a legal obligation to control the videos that were uploaded to its website and that by failing to prevent the upload it was responsible for causing the defamation. The Judge rejected the claim that Google negligently allowed the defamation to occur, but largely followed this reasoning when addressing Google's responsibility under the privacy code.

Although Judge Magi's analysis of the applicability of Italian privacy law to the case was relatively brief, the issue was not clear-cut. One is only subject to the Italian Data Protection Code if the operation in question (in this case, the process by which Google facilitated the posting of the video to its website) was either "performed by an entity established in Italy" or "performed by an entity not established in the European Union using instruments that are located in Italy." According to Judge Magi, the first condition was satisfied in this case because of the relationship between Google, Inc. and Google Italy, a subsidiary of Google, Inc. established in Milan.

Technically, at the time the mobile-phone video was

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uploaded to Google Video, all of the data processing for the site was handled by servers located in the United States. Additionally, any and all content control was being performed by an Irish subsidiary of Google in Ireland. And yet, Judge Magi believed Google Italy was responsible for "processing the data" contained in the offending video because it participated in Google Video's general commercial scheme.

The Judge's reasoning was as follows. Google's AdWords system allows Google to customize its advertising according to the keywords entered into Google Video's search engine. A user enters a particular keyword, and alongside the relevant video search results appear links to related advertisers. Customized advertising leads to a higher number of clicks on advertiser links by Google users, which in turn leads to increased ad revenue for the entire Google family. Since Google Italy used AdWords to match sponsored links with specific Italian keywords, in the Judge's view it managed, indexed, and organized data in Google Video, and was thus responsible for "processing data."

Google had an obligation to inform users of their obligations under Italian law, including notifying them of their responsibilities with regard to the handling of personal information like health data.

Google's Profit Motive and Duty to Inform

Drummond, Fleischer, and Reyes were charged with the "illicit treatment of personal data," a crime described in art. 167 of the Italian Data Protection code. The crime covers those who process personal data in breach of certain of the code's provisions with the intent to either cause harm or obtain a benefit. Google Italy was found to have violated the provisions contained in articles 23 and 26, which state that sensitive data can only be processed after written consent is obtained from the data's subject, and authorization is received from the Data Protection Authority. "Sensitive data" is defined to include data which reveals the health condition of the data subject. In sum, the Google executives were convicted of processing, for profit, a video which revealed the health condition of a disabled teen without obtaining his consent or the authorization of the Data Protection Authority.

Google obviously never asked for the consent of the teen or his guardian, nor requested authorization from Italy's Data Protection Authority, to process the video posted to its site. However, this is not the failure to which Judge Magi attached fault. The Judge reasoned that in the case of user-generated content, the provider need not seek consent, since to do so would be impossible. Judge Magi also did not fault Google for failing to obtain authorization from the Italian authorities. Instead, he proposed that the source of Google's liability was its failure to take adequate measures to avoid privacy violations.

Accordingly, Google had an obligation to inform users of their obligations under Italian law, including notifying them of their responsibilities with regard to the handling of personal information like health data. "It is NOT enough to 'bury' information regarding the obligations resulting from privacy law in the midst of the 'terms of service'," he wrote, describing what he saw as Google's inadequacy with regard to their duty to inform. "This duty arises not only from the law (article 13 of the Privacy Code) but also from common sense, in its particular application to the management of a computing system." According to a number of critics, this interpretation of the privacy code is unique to Judge Magi, and quite controversial.

Google argued that it had no obligation to inform users about Italian law. According to Google, its legal obligations were met after it removed the offending video immediately upon notification by the authorities of its existence and illegal content.

Google had also argued that it was protected under the EU's Electronic Commerce Directive as a host service provider and was thus immune from liability for user generated content. Judge Magi had a different view of the service provided by Google on its video website. It was not, in his opinion, a mere host provider. Rather, it was an "active hoster," i.e. a content provider. His reasoning was similar to that offered in support of his conclusion that Google Italy was a data processor: Google indexed videos and linked them to advertising in order to turn a profit.

He also remarked that Google promoted the uploading of user-generated videos, and neglected to implement any

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system of control over the content, as a method of outpacing the competition. Magi thus determined that Google was subject to the privacy law, and was then left to decide whether Google acted with the requisite motive.

The final link in Judge Magi's chain of reasoning was Google's awareness of Google Video's financial interest in user generated content. Magi noted that "Google stated in point 17 of the 'terms of service and agreement conditions: some of the services are financed by advertisement and may display advertisements. The object of these advertisements may be the contents of the information recorded in the services." This and similar disclosures, demonstrated "a clear and knowing acceptance of the actual risk that data be uploaded and disseminated, including and in particular sensitive data that should have been the object of heightened care, and, moreover, an acceptance of the economic interest relating to such and acceptance of the risk and clear awareness of it."

Implications and Aftermath

Matt Sucherman, Google's vice president and deputy general counsel for Europe, the Middle East, and Africa, reaffirmed on Google's blog the company's belief that it is simply a service provider, and as such is shielded from liability under the relevant notice and take down provisions of European law.

He warned that if websites like Blogger, YouTube, and other social networks become subject to liability for the content they host, "then the Web as we know if will cease to exist, and many of the economic, social, political and technological benefits it brings could disappear."

He described Judge Magi's verdict as "astonishing," explaining that it "attacks the very principles of freedom on which the internet is built." One of the convicted Google executives, Peter Fleischer, expressed concern that "[i]f company employees like me can be held criminally liable for any video on a hosting platform, when they had absolutely nothing to do with the video in question, then our liability is unlimited."

While the negative implications of the decision for web platforms is clear, another threat to the freedom of website operators lurks in the decision's dicta. While Judge Magi found that Google had no duty to actively monitor the content uploaded to its site since to do so would be impossible given current technological limitations, he predicted a future when technological advancements would make such monitoring possible, and anticipated the emergence of a corresponding duty:

> [I]t appears to this author that this criminal prosecution constitutes an important signal that the criminal liability of webmasters is approaching a critical zone: technical advances in this area occur at such dazzling speed that it will doubtless be possible, sooner or later, to "monitor" in a more and more stringent and careful manner the uploading of data on the part of the website operator, and more and more refined and preventative filters will hold those who operate with these data to a higher degree of responsibility. In this case, the construction of criminal liability by omission (regardless of guilt or fault) will be easier to achieve than it is at present.
>
> In any event, this judge, as everyone else, remains in wait for a "good law" on the matter at case: the Internet has been and will continue to be a wonderful means of communication between people. Wherever there is freedom to communicate there is more freedom overall, insofar as communication is a vehicle for knowledge and culture, awareness and choice, but every exercise of the right related to freedom may not be absolute, or it degenerates into arbitrariness…."

Google has stated that it will "vigorously" appeal Magi's decision.

Gabrielle Russell is MLRC's 2009-2010 Legal Fellow. Sections of the Italian court decision were translated by MLRC Summer Intern Kahina Selmouni, Cornell University Law School and Université Paris I Sorbonne.

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Second Circuit Delineates the Parameters of the Law Enforcement Privilege

By Lauren Perlgut

Pursuant to a petition for writ of mandamus, a Second Circuit panel applied a law enforcement privilege to deny discovery of certain New York Police Department intelligence reports sought by plaintiffs in a civil rights lawsuit against New York City. *Dinler et. al. v. City of New York*, No. 10-0237 (June 9, 2010) (Cabranes, Wesley, Livingston, JJ.).

The Second Circuit articulated for the first time the test for whether a party's need for discovery outweighs a qualified law enforcement privilege, which protects, inter alia, information pertaining to law enforcement techniques and procedures, and information that could endanger individuals involved in an investigation.

The opinion also contains a lengthy discussion of the inadequacy of filing documents under seal in high profile cases covered by a "large and intrepid press corps." Slip op. 18-21.

Citing inadvertent disclosures in a variety of cases, from the ongoing trial against former Illinois Governor Rod Blagojevich to post 9-11 investigations, the panel noted that given "all too human lapses" the court did not have confidence that "sealing" would adequately protect the police intelligence reports.

The Second Circuit articulated for the first time the test for whether a party's need for discovery outweighs a qualified law enforcement privilege, which protects, inter alia, information pertaining to law enforcement techniques and procedures, and information that could endanger individuals involved in an investigation.

Background

The action against the city for civil rights violations arose from certain security measures taken by the NYPD at the 2004 Republican National Convention (RNC), held in New York City.

The plaintiffs were among 1,200 protestors at the RNC who were arrested and fingerprinted pursuant to the "Mass Arrest Processing Plan," a law enforcement strategy implemented for the RNC. In developing the Arrest Plan, the NYPD conducted research on the Internet into potential threats, which was compiled into "End User Reports," and undercover NYPD officers infiltrated various organizations to perform additional research, which was compiled into "Field Reports." The NYPD produced in discovery the End User Reports, but withheld the Field Reports, for which the plaintiffs filed a motion to compel.

After determining that the Field Reports were relevant, the magistrate judge determined that the law enforcement privilege would not bar disclosure under certain safeguards he designed: he redacted the documents, ordered that they be disclosed on an "attorneys' eyes only basis," and required that the documents must be stored at the offices of the New York Civil Liberties Union. The district court affirmed the magistrate's opinion granting the motion to compel, from which order the defendants sought relief in the Second Circuit.

Application of the Law Enforcement Privilege

The law enforcement privilege, the Court explained, is a common law privilege related to the executive privilege protecting the functioning of state agencies and the "informer's privilege" recognized by the Supreme Court, both which are the subjects of proposed Federal Rules of Evidence: 509 ("Secrets of State and Other Official Information"), and 510 ("Identity of Informer"). (Slip Op. at 25n-26n).

The privilege protects information pertaining to (1) "law enforcement techniques and procedures"; (2) information that would "undermine the confidentiality of sources"; (3) information that would "endanger witness and law enforcement personnel"; (4) information that would "undermine the privacy of individuals involved in an investigation"; or (5) information that would "seriously impair the ability of a law enforcement agency to con-duct future investigations." (Slip Op. at 30, 37) (internal citations

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and quotation marks omitted). Notably, the privilege protects even investigations that are closed or completed, if the information could impair future operations. (Slip Op. at 30.)

The Court found that the City had met its burden to show that the privilege applied to the Field Reports, as even redacted they contained information about "law enforcement techniques and procedures," and contained information about undercover operations that could be extrapolated to reveal the identities of undercover NYPD officers: "pulling any individual 'thread' of an undercover operation may unravel the entire 'fabric' that could lead to identifying an undercover officer." (Slip Op. at 31.)

Plaintiffs Did Not Overcome the Privilege

The Court stated that there exists a "strong presumption" against lifting the law enforcement privilege, and that a party seeking to overcome the privilege must show: (1) that its suit is "non-frivolous and brought in good faith," (2) that "the information sought is not available through other discovery or from other sources," (3) the party demonstrates a "compelling need" for the information sought, and (4) the "compelling need outweighs the public interest in non-disclosure." (Slip Op. at 32-33) (internal citations and quotation marks omitted).

The plaintiffs were unable to satisfy the third prong of the test: the Court conducted its own review and found that the Field Reports did not contradict the End User Reports which had been produced, and thus that plaintiffs had no compelling need for the additional documents. (Slip Op. at 34). The Court noted that ordinarily district courts must themselves review the documents in question to determine the applicability of the privilege and the need for the documents. (Slip Op. at 37).

The Inadequacy of Judicial Protections

In granting the defendants' petition for a writ of mandamus, the Court found that the writ of mandamus was the only adequate means to protect the city from the harms of disclosure of the Field Reports. (Slip Op. at 4). Specifically, the Court strongly criticized the efficacy of "attorneys' eyes only" and "under seal" filing protections, describing numerous examples of press access to and press articles about purportedly confidential material, including one New York Times article based on "attorneys' eyes only" material from earlier in the same litigation.

The Court thus deemed "attorneys' eyes only" protection to be a "deeply flawed process," which is better suited to either criminal litigation as a mitigating factor or commercial litigation where the motives behind any public disclosure by a competitor are easier to ascertain, and harms from disclosure easier to quantify and remedy. (Slip Op. at 16). Citing various examples of botched filings under seal, the Court also held that it could not "conclude with confidence" that filings under seal could protect the underlying confidential information. (Slip Op. at 21).

The Court found this to be the case even for an in camera review of documents to determine whether they qualified for privilege, urging district courts to require one party to bring the documents to the Court ex parte for an in camera review in Chambers, if appropriate to the circumstances, and for especially sensitive documents to require the party to retrieve the documents each evening and return them to the Court again as requested.

Conclusion

While on its face, the law enforcement privilege can be read fairly broadly, the scope of information that may be disclosed absent a "compelling need," is fairly closely aligned to the scope of information available to the general public. New York's Freedom of Information Laws exempt from disclosure information which would "(i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures." N.Y. Pub. Off. Law. § 87(2)(e).

And the Court in fact referenced this FOIA exemption, noting that the law enforcement privilege "has largely been incorporated into New York state statutory law" and that the Legislature "explicitly recognizes the importance of maintaining the confidentiality of certain law enforcement materials." (Slip Op. at 24-25).

Lauren Perlgut is an associate in the New York office of Cahill Gordon & Reindel LLP. Plaintiffs were represented by the New York Civil Liberties Foundation and Jonathan C. Moore, Beldock Levin & Hoffman LLP.

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Pennsylvania Court Establishes a Broad Definition of Governmental Function for Public Records Disclosure

Ruling in favor of a newspaper on an open records request, a Pennsylvania appellate court established a broad definition of governmental function for public records disclosure. *East Stroudsburg University Foundation v. Office of Open Records*, No. 886 C.D. 2009, 2010 WL 2025480 (Pa. Cmwlth., May 24, 2010). The court held that a private, non-profit foundation that contracted with a state agency was subject to the state's Right-to-Know law – stating that "all contracts that governmental entities enter into with private contractors necessarily carry out a "governmental function" – because the government always acts as the government."

Background

Under a section of the Pennsylvania Right-to-Know Law, 65 P.S. §67.506(d)(1), "[a] public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a 'governmental function' on behalf of the agency, and which directly relates to the governmental function . . . shall be considered a public record of the agency . . . ."

Pursuant to this section of the statute, *The Pocono Record* (*The Record*) requested that East Stroudsburg University release documents containing the minutes of meetings held by the East Stroudsburg University Foundation (Foundation) and information on those who have donated to the Foundation. The Foundation is a private, non-profit corporation that contracted with the University to provide a variety of fundraising and development services. After the University denied the request, *The Record* appealed to the Office of Open Records (OOR) and argued that the Foundation performed "government services" on behalf of the University and, therefore, documents related to those activities were subject to the Right-to-Know Law.

The OOR found that the Foundation was performing governmental functions on behalf of the University and ordered the University to provide information on financial pledges, payments made, outstanding balances, and any records of donation or other transactions. However, the OOR clarified that any information that would reveal the identity of specific donors was exempt from disclosure. The OOR also determined that the minutes of the Foundation were not public records because they were not from public meetings and the Foundation was not an agency that was required to conduct public meetings.

"Essential" Governmental Functions

The University and the Foundation appealed the decision to the Commonwealth Court of Pennsylvania and argued that the OOR had inappropriately identified the fundraising efforts of the Foundation as a "governmental function." In their view, the Foundation's activities are "proprietary business functions that the University is not required to perform by law."

The Court, however, rejected the argument that the statute was limited to "proprietary" functions, noting the statute's clear reference to "governmental functions." Thus "all contracts that governmental entities enter into with private contractors necessarily carry out a 'governmental function.'"

The Court relied on an Iowa Supreme Court access decision involving a similar public university foundation. *Gannon v. Board of Regents,* 692 N.W. 2d 31, 39 (Iowa 2005). In *Gannon,* the Iowa Supreme Court found that the ISU Foundation was performing a government task pursuant to its contract with the ISU and that a "government body may not outsource one or more of its functions to a private corporation and thereby secret its doings from the public."

Here the records request was analogous to that in *Gannon* because both dealt with public access to records "that related to carrying out normal government business." Therefore, because it was undisputed that the Foundation was carrying out fundraising on behalf of the University, any records of the fundraising efforts are subject to review.

Additionally, the Court held that the newspaper was entitled to disclosure of the Foundation's minutes to the extent they related to management of university money because "the raising and disbursing of funds is a governmental function that the Foundation is performing on behalf of the University."

In a concurring opinion, two judges on the seven judge panel agreed in the result but not in the governmental function analysis which they wrote was too broad. "Surely, government agencies enter into some, if not many, contracts that do not implicate a governmental function," according to the concurrence.

The respondents were represented by Suzanne C. Hixenbaugh of Saidis, Flower & Lindsay in Carlisle, Pennsylvania. The Office of Open Records was represented by Corinna V. Wilson of the Commonwealth of Pennsylvania Office of Open Records in Harrisburg, PA..

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New Jersey League of Municipalities Not Subject to Open Public Records Law

A New Jersey appellate court recently held that a nonprofit, unincorporated association that exists to promote "the general welfare of the municipalities" of New Jersey is not subject to the state's Open Public Records Act. *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, No. A-1200-08T3, 2010 WL 2089650 (N.J. App. May 26, 2010) (Skillman, Gilroy, Simonelli, J.).

Background

The New Jersey State League of Municipalities (League) is an organization that was formed to, among other things, "[promote] the general welfare of the municipalities of [the State of New Jersey,]" improve municipal administration, provide information on the function of municipal government, and advocate for or against legislation that would affect the municipalities. All the municipalities of New Jersey are members of the League.

The Fair Share Housing Center (Fair Share), an advocate for affordable housing policies, requested that the League produce documents and studies in its possession relating to its position on changes to the state's affordable housing rules. After the League denied the request, Fair Share brought a complaint alleging that it was entitled to the documents under New Jersey's Open Records Act (OPRA) as well as the common law.

The trial court held that the League is not subject to OPRA because it "is [a] non-profit association organized for the purpose of advancing the interest of local government before the three branches of State government and providing educational and other services to its member municipalities and local government officials." The court explained that the League is more akin to a lobbying group than a governmental actor and, therefore, is not subject to OPRA.

Appeals Court Decision

The Appellate Division agreed with the lower court and held that the League is not required under OPRA to provide public access to any document that is generated in the course of its operations. First, the Court rejected the argument that the League constituted a "combination of political subdivisions." They cited a Supreme Court decision where a political subdivision was described as an entity that provides a governmental service. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009). Government services include providing education, police protection, road maintenance, urban renewal, etc. Accordingly, the court held that a "combination of political subdivisions" could only be a group of entities that "provide a governmental service that otherwise would be provided by a single political subdivision." The Court explained that the League does not provide any of these services "or perform any other function that would be recognized as a government service." Even though the members are all municipalities, the organization exists to advocate on the behalf of the municipal governments and is similar to a private association.

Fair Share made additional arguments that the League should be considered an "office" or "instrumentality" or "agency" of the municipalities, but the Court rejected these arguments for the same reason. They explained that "the League does not provide any governmental service ordinarily provided by a municipality or group of municipalities. Instead, [its] role is purely to advise municipalities and municipal officials and to advocate the positions of its membership before the Legislature, administrative agencies, and the courts." Thus, they held that the League is not an "office," "instrumentality," or "agency" that would be subject to OPRA.

Additionally, the same reasoning was applied to the argument that there was a common law right of access. The Court held that, because the League did not perform a governmental function, its documents were not common-law public documents.

Fair Share Housing Center, Inc. was represented by Kevin D. Walsh of Fair Share Housing Center, Inc. in Buffalo, NY. The New Jersey State League of Municipalities was represented by Trishka Waterbury of Mason, Griffin & Pierson in Princeton, NJ, and William John Kearns, Jr. of Kearns, Vassallo & Kearns in Willingboro, NJ.

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Maryland Ordinance Banning Fortunetelling Violates First Amendment

The Maryland Court of Appeals, the state's highest court, this month held that a county ordinance that prohibits profiting from fortunetelling is an unconstitutional restriction of the First Amendment right to freedom of speech. *Nefedro v. Mongomery County*, 2010 WL 2302311 (Md. 2010).

Background

Montgomery County Code § 32-7, criminalized "the acceptance of remuneration for the performance of fortunetelling." Under the Code a person would be subject to punishment for a class B violation if they were to "demand or accept any remuneration or gratuity for forecasting or foretelling or for pretending to forecast or foretell the future by cards, palm reading or any other scheme, practice or device[.]"

The ordinance explained further that "in any warrant for a violation of [the ordinance], it shall be sufficient to allege that the defendant forecast or foretold or pretended to forecast or foretell the future by a certain scheme, practice or device without setting forth the particular scheme, practice or device employed[.]"

The plaintiff, Nick Nefedro, sought to open a fortunetelling business in the County and challenged the ordinance on First Amendment grounds. After hearing arguments on cross motions for summary judgment, the trial court granted the County's motion and held that this was a valid exercise of the County's police power, that the County had a substantial interest in creating the rule, and that the ordinance was narrowly drawn to serve that interest.

Following the trial court's grant of summary judgment, Nefedro filed a timely appeal to an intermediate appellate court. However, the Maryland Court of Appeals, on its own motion, issued a writ of certiorari before the Court of Special Appeals could hear arguments in the case.

Regulation of Conduct or Speech?

The County argued that the ordinance was a regulation on accepting payment for a service and, therefore, was a regulation on conduct rather than speech. The Court, however, rejected this argument relying on the Supreme Court's decisions in *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995) and *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).

In *National Treasury*, the Supreme Court struck down as unconstitutional a ban on federal employees receiving honoraria for non-work related speeches, writings and appearances. The majority held that the ban on receiving honoraria implicated the First Amendment even if content neutral because it created a disincentive to engage in First Amendment protected activity. In *Simon & Schuster*, the Supreme Court held that "a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."

Fraudulent Nature of the Speech?

The County also defended the ordinance by describing fortunetelling as an "inherently fraudulent" activity that should not be protected by the First Amendment. Although the Court agreed that fraudulent statements are not protected by the First Amendment, it did not accept that fortunetelling is always fraudulent. While "some fortunetellers may make fraudulent statements, just as some lawyers or journalists may, we see nothing in the record to suggest that fortunetelling always involves fraudulent statements."

Instead, the Court described fortunetellers as providers of entertainment and "other benefit[s] that [do] not deceive those who receive their speech." To support its position, the Court cited cases from many other jurisdictions where it had been held that bans on fortunetelling violated the freedom of speech. The County had cited several cases upholding bans on fortunetelling as "inherently fraudulent" but the Court distinguished these cases for their lack of First Amendment analysis.

Fortunetelling Not Commercial Speech

After it was determined that the ordinance regulates speech, the Court addressed arguments from the County that the law was constitutional because it only affected commercial speech. The Court acknowledged that the line

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between commercial and non-commercial speech may sometimes be difficult to draw, but rejected the view that speech is automatically commercial if it is made for financial benefit.

The Court found that fortunetelling can provide entertainment, information, or some other benefit to the individual. Thus even though a fortuneteller may receive money for his or her revelations, the purpose is not "solely related to the economic interests of the speaker."

Ordinance Not Narrowly Tailored

The County's stated purpose for creating the ordinance was to combat fraud that accompanied fortunetelling. However, the Court explained that there were less restrictive, but equally effective, means for combating fraud. Specifically, the Court pointed to speech-neutral fraud laws like those that already existed in Maryland and most jurisdictions. Accordingly, because the County had not advanced any legitimate governmental interest that could not be cured without intruding upon the freedom of speech, the Court determined that the ordinance was not narrowly tailored and violated the First Amendment.

Dissent

In his dissent, Judge Harrell argued that fortunetelling is an inherently fraudulent activity, citing to cases from other jurisdictions restricting fortunetelling as an inherently fraudulent activity. Additionally, he cited an unpublished memorandum opinion from the Maryland federal district court, *Mitchell v. Harford County*, No. L-01-3998 (D. Md. 2002), upholding a nearly identical ordinance as constitutional.

In *Mitchell*, the court had agreed that the practice was inherently fraudulent, but also explained that they were going to defer to the judgment of the legislature that had determined that fortunetelling is an inherently fraudulent practice.

Judge Harrell criticized the majority for "deeming itself more insightful about the nature of commercial fortunetelling than the largely factual assessment of the Montgomery County government [and substituting] its judgment for that of the legislative body."

Nick Nefedro was represented by Edward Amourgis of Grant, Riffkin & Strauss, P.C. in Rockville, Maryland and Ajmel Quereshi of the ACLU of Maryland. Montgomery County was represented by Clifford L. Royalty in Rockville Maryland.

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Ethics Corner: What Does It Mean to be a "Partner"?

By Andrew I. Dilworth and Sarah J. Banola

I. Introduction

In response to the recent economic downturn, law firms have increasingly created changes to the traditional partnership model. They have demoted less productive capital partners to "non-equity" status, reduced the number of capital partners being promoted, created multiple tiers of partnership with different levels of participation, management and profit sharing, and even required capital contributions from non-equity partners.

While attorneys may be adjusting to such changes, the general public's awareness and understanding of these changes may not be keeping pace. As law firms modify their business models, they need to consider ethical issues that can result from changes in law firm structure. One important consideration is compliance with communication and advertising rules, which have been implemented in one form or another by every state in the country.

As firms reduce their capital partnership ranks and develop alternative partnership tracks, cautious lawyers and law firms need to consider whether their representation that a non-capital or non-equity partner is a partner, without qualification, might mislead the public.

II. Overview of Pertinent Rules and Statues

Every state prohibits the making of false or misleading statements about a lawyer or a lawyer's services. The vast majority of states have adopted the ABA Model Rules, including ABA Model Rules 7.1 and 7.5. Rule 7.1 titled "Communications Concerning a Lawyer's Services" states:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The comments to Rule 7.1 make clear that application of the rule is not limited to advertising. See Comment [1] ("This Rule governs all communications about a lawyer's services, including advertising …. Whatever means are used to make known a lawyer's services, statements about them must be truthful."). The comments to the rule also clarify that an affirmatively false statement of fact is not necessary to violate the rule.

> Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make a lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

Comment [2].

In addition to rules of professional conduct that prohibit false or misleading statements, some states, such as California, also have statutory prohibitions against such representations. See, e.g., Cal. Bus. & Prof. C. §6157.1 (prohibiting advertisements that contain "any false, misleading or deceptive statement or omit to state any fact necessary to make the statements made, in light of the circumstances under which they are made, not false, misleading or deceptive"). In some jurisdictions, violations of these statutory provisions can subject the lawyer to injunctive and civil penalties under state Unfair Practices Acts. See, e.g., Cal. Bus. & Prof. C. §§17203-17205, 17500.

Model Rule 7.5 (d) states that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact."

III. Analysis

Viewing the issue through the lens of these recognized ethical and civil prohibitions, is a non-equity lawyer that

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holds him or herself out as a "partner" in a law firm potentially violating these prohibitions? The threshold issue in analyzing this question is whether the representation that a non-equity partner is a "partner" is false or misleading within the meaning of the ethical rules or other applicable statutory schemes.

If a firm has actually implemented a multi-tier partnership model, which includes traditional partners, it can be argued that the statement that the non-equity partner is a partner cannot be false. On the other hand, if a non-equity partner were to affirmatively state that he or she was an "equity partner," it would clearly be a false statement of fact.

As noted above, even a true statement can be misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. Thus, one must consider not only whether the statement is true, but also what specific conclusions the assertion that one is a "partner" would lead a reasonable person to formulate about the lawyer and his or her services. Rule 7.1.

One could argue that failing to distinguish between different tiers of partnership status is not misleading because the public does not draw such distinctions and/or does not care about the formalities of internal firm structure. This argument, however, may prove too facile. Since a true statement can be misleading if it omits a fact necessary to make the statement considered as a whole not materially misleading, the more appropriate question may be whether the distinction (or qualification) regarding the non-equity partner's status, if known to the consumer, would cause the consumer to reach a materially different conclusion about the lawyer or his or her services.

There is no doubt that clients draw distinctions between associates and partners. It is not uncommon, for example, for a client to request that the lawyer representing her, or managing her case, or handling a particular aspect of her case, such as trial or an important hearing, be a partner. In this context, it can be argued that the designation of partnership status is being equated by the consumer with a certain level of experience, expertise, and/or responsibility. Partners typically charge higher, sometimes significantly higher, rates than associates and the consumer is presumably getting something of value for that increase.

The aura of partnership status may also carry with it a suggestion that a firm values the services and qualities of the lawyer to such a degree that it imputes to him or her greater responsibilities and participation in firm management, control, operations and profits. Not everyone makes partner, and it is possible that those who do may be perceived by the public as being more reliable or experienced in the eyes of their firm colleagues. Partnership status also frequently carries a level of autonomy not commensurate with that of associates. Partners are less likely to supervise each other's work, and are more inclined to focus on supervising the work of junior lawyers.

The Model Rules echo these types of conclusions to some extent. Model Rule 5.1, for example, refers to a partner as someone with "managerial authority." Because of that status, a partner and other lawyers with "comparable managerial authority" are responsible for seeing that there are reasonable measures in place to ensure that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 1.0 titled "Terminology" provides "[p]artner denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law." Rule 1.0(g). A non-equity partner whose responsibilities and liabilities do not differ in any material respect from that of an associate might not be viewed as comporting with these principles.

Whether there is a substantial likelihood that these types of conclusions could, or should, be reached by a reasonable person is debatable. See Rule 7.1, Comment [2]. However, the more attenuated evolving law firm models become from established principles embodied in traditional partnerships (such as membership in, and a higher level of management and control of, the organization) the greater consideration a non-equity lawyer should give to determining whether additional information might be appropriate to prevent the representation of his or her status as a "partner" from being potentially misleading.

An associate who falsely holds him or herself out as a partner in a firm to induce his or her retention would undoubtedly be held to have engaged in unethical conduct. Is the non-equity partner who presents him or herself as a partner, without qualification, that much better off? The answer may rest, in part, on the factual circumstances regarding the non-equity lawyer's involvement in the particular organization.

If, for example, the non-equity partner has no involvement in, liability for, or relationship to the partnership, that is distinguishable from an associate, it is more likely the non-equity partner's representation that she is a partner could be deemed misleading. On the other hand, non-equity partners who are signatories to a partnership agreement, or who participate in firm management may be more insulated from such criticism.

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If representation that a non-equity lawyer is a partner were deemed false, a secondary consideration is whether the alleged falsity is material. As noted above, clients draw distinctions between partners and associates. To the extent the core qualities a reasonable client would equate with partnership are not embodied by certain tiers of a firm's partnership structure, failure to distinguish this fact might be perceived as material.

In addition to a client being concerned about the partnership status of a particular lawyer handling his or her case, it might also be material to a client that the responsibility for conduct carried out by the firm and its lawyers is spread over a larger group of individuals. Thus, for example, a firm whose capital contributions come from several lawyers, rather than a few, might be perceived to be more stable in the wake of individual lawyer departures and structural changes in law firms.

Similarly, it may be material to a client that a firm has a greater number of lawyers who are potentially liable for the actions of the firm. A client who looks at a firm website and sees 50 individuals identified as partners when in fact only a handful have traditional partnership responsibilities or liabilities might consider such representations misleading.

As firms reduce their capital partnership ranks and develop alternative partnership tracks, cautious lawyers and law firms need to consider whether their representation that a non-capital or non-equity partner is a partner, without qualification, might mislead the public.

Consider the recent events surrounding the South Florida law firm of Rothstein Rosenfeldt Adler. The firm made national headlines after Scott Rothstein was disbarred and criminally charged with using the firm to run an alleged $1.2 billion dollar ponzi scheme involving investments in purportedly non-existent settlements. According to some news reports, at least 35 of the firm's 70 lawyers were held out as partners or shareholders while only two of the firm's lawyers were reported to be actual owners.

Representations that non-equity partners are partners could potentially result in malpractice liability for a firm and its purported partners if the representations were considered to be materially false statements of fact and were found to have caused injury to a client.

Finally, even if representations of partnership status are not material to a client's retention of, or relationship with, the attorney, it is not clear that a lack of materiality would necessarily preclude the lawyer from potential exposure under civil statutes that prohibit false, misleading or deceptive advertising since such statutes don't always embody (at least facially) the materiality requirement articulated in Rule 7.1.

Substantive state law regarding the requirements of partnerships, and what it means to be a partner, may also influence the ethical ramifications of such representations. If, for example, a lawyer holds herself out as a partner when in fact she does not satisfy the legal requirements of being a partner in the given jurisdiction, the lawyer is necessarily engaging in unethical conduct. *See, e.g.*, Model Rule 8.4(c) ("It is professional misconduct for a lawyer to … engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); see also Rule 8.4(d) ("It is professional misconduct for a lawyer to … engage in conduct that is prejudicial to the administration of justice").

Rule 7.5(d) may also apply to representations of partnership status. If there is a legitimate partnership and the non-equity partner practices with a group of lawyers that comprise an actual partnership, a statement or implication that one practices "in a partnership" is accurate. See Rule 7.5. Comment [2] to the Rule states "[w]ith regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example 'Smith & Jones,' for that title suggests that they are practicing law together in a firm."

This comment could be interpreted to mean that the thrust of Rule 7.5(d) is directed at situations where there is in fact no partnership at all. When a non-equity partner states that she is a "partner" without qualification, however, she is not simply stating that the organization with which she practices is a partnership. The partner is also stating that the individual lawyer is herself a partner in that organization. Thus, even if Rule 7.5(d) does not apply to such representations, a lawyer must still be cognizant of the prohibitions discussed under Rule 7.1 and the other authorities cited above, which generally prohibit false, misleading or deceptive statements.

Various ethics opinions have skirted the perimeter of these issues, primarily in the context of analyzing situations where lawyers who do not function as a partnership hold themselves out to be a partnership (see, e.g., PA Eth. Op. 90-131), or in analyzing unauthorized practice of law issues where an out-of-state law firm has no partner admitted to

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practice in the particular jurisdiction in which the firm's satellite office is located. See, e.g., NY Eth. Op. 814.

In Informal Opinion No. 90-131, the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility responded to an inquiry whereby a firm proposed to enter into a relationship with a non-equity, contract partner who would be compensated on the basis of excess of fees attributable to him from his clients and work performed by him for other Law Firm clients, after deduction of all expenses allocated to him.

While the non-equity partner would be permitted to attend partner meetings, he would be given no vote. All fees received from his clients would be deposited into a Law Firm account, all trust monies would be held in the Law Firm's escrow account, the Law Firm's professional liability insurance policy would cover him and all income and expenses relating to him would be reflected on the Law Firm partnership tax return. His name would appear on the letterhead below the names of the full equity partners and above the names of Law Firm associates.

The Committee concluded that the proposed contractual relationship did not violate the Pennsylvania Rules of Professional Conduct. Although the Opinion contains little substantive analysis, the Committee noted that concerns were raised by the inquiring party about the application of Rule 7.5 (d) of the Rules of Professional Conduct. The Committee explained that such concerns "which appear in practice, relate to the unfortunate, but not unusual practice, of having lawyers who are not partners (or lawyers who are partner and associate) hold themselves out as partners. Such statements are misleading to clients and to prospective clients and have been the subject of investigation and prosecution by the Office of Disciplinary Counsel …." Op. 90-131 at 1.

Nevertheless, the committee concluded "[t]he contractual, non-equity partnership which you have described in your inquiry does not, in my opinion, create any problem for the Law Firm, its partners, inclusive of its non-equity partner." *Id.*

The Pennsylvania Opinion suggests that Rule 7.5(d) should not apply where there are traditional equity partners with whom the non-equity partner is associated. The Opinion however addresses the manner in which the non-equity partner will be held out to the public only in the context of the Law Firm's letterhead, indicating that the non-equity partner will be placed on the letterhead in a fashion which presumably distinguishes him from the equity partners and the associates (i.e., below the names of the full equity partners and above the names of Law Firm associates). The Opinion does not address whether the non-equity partner, in interacting with potential and actual clients, may, without more, present himself simply as a "partner" of the law firm.

This issue is reflected in a recent opinion from the New York State Bar Association in the unauthorized practice of law context. In Opinion 814, the Committee on Professional Ethics found that a New York office of a multi-state firm could be staffed solely by a non-partner who is admitted in New York, where the non-partner is supervised by an out-of-state partner admitted in another state.

The Committee expressly overruled an early opinion in which it had held that a multi-state firm could practice in New York under a firm name that included names of non-New York lawyers *only if* the firm had an active partner admitted in New York. Opinion 814 posited a hypothetical in which a lawyer admitted to practice in New York was contemplating becoming an "associate or of counsel" to what would be a two-person law firm, with offices in New York and New Jersey. The New York attorney would be paid a salary and would work out of and manage the New York office, but would not share in the overall profits and liabilities of the law firm. The firm would practice in the name of the New Jersey attorney, who is not admitted in New York.

New York State Bar's Committee explained that its earlier decision was predicated in large part on the perceived need to avoid the danger of franchising an out-of-state law firm's name, and the risk of misleading the public that all named partners were admitted to practice law in New York. Op. 815 at 1. Opinion 815 notes that in 1984 the New York Court of Appeals reached a similar conclusion under New York Judiciary Law section 478, which prohibits the unauthorized practice of law. See *New York Criminal and Civil Courts Bar Association v. Jacoby & Meyers*, 61 N.Y.S.2d 130, 136 (N.Y. 1984). Op. 815 at 2.

The Court in *Jacoby & Meyers* did not explain the source of its qualification that a New York firm must have an active partner who is admitted to practice in New York. *Id.* The Committee cautioned that its jurisdiction did not extend to interpreting New York's statutes on the unauthorized practice of law and that to the extent the court's proviso in *Jacoby & Meyers* was based on such statutes, the Committee expressed no opinion on the question other than to observe that if the conduct is illegal, it is also unethical. *Id.*

The Committee proceeded to re-examine its earlier decision and concluded that amendments to the New York Lawyer's Code of Professional Responsibility and changes in law firm practice over the last 37 years warranted overruling the Opinion. In reaching this conclusion, the Committee emphasized that there is nothing in the Code stating that

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partnership is the only permissible professional relationship between a New York lawyer and an out-of-state lawyer or firm. "To the contrary, while the Code repeatedly mentions 'partners' and 'associates,' the Code generally imposes the same ethical obligations on all lawyers whether they are partners or not. In general, under the Code a New York lawyer is a New York lawyer regardless of the titles bestowed upon the lawyer by the lawyer's firm." Op. 815 at 2.

The Committee further emphasized that since it earlier decision and the decision in *Jacoby & Meyers*, the Code had been amended to provide for explicit regulation of law firms "as entities," rather than just New York lawyers. "To the extent the conclusion in Opinion 175 was based on a concern that only a partner can ensure that lawyers in a firm confirm with ethical standards, these amendments substantially undermine that conclusion." *Id.*

The Committee also stressed the ongoing evolution of the legal profession, pointing out that in the years since its earlier opinion the bar and users of legal services had become familiar with the presence in New York of firms originating or having their principal offices outside of the state, and the wide variety of employment and partnership arrangements that had become common in the industry including "contract partners," "non-equity partners," "contract lawyers" and other denominations. *Id.*

These developments, taken together, the Committee concluded called into question the continued viability of its earlier opinion that a New York office operating without a New York-admitted partner was inherently misleading. "Examining the question against the backdrop of legal practice today, we do not think that the presence of a New York office implies that the out-of-state firm has a New York partner as opposed to a New York lawyer who is, for example, *an associate or a non-equity partner*." *Id.* (emphasis added). Nevertheless, in concluding its opinion, the Committee noted that the firm's letterhead and advertisements "*must not misleadingly state or imply that the associates or of counsel who work in the New York office are partners.*" *Id.* (emphasis added).

Opinion 814 recognizes the evolving nature of different types of partners within law firm structures and consumers' familiarity with these changes. At the same time, the Opinion recognizes that representations about one's status as a partner can, under certain circumstances, be considered misleading, noting, for example, that a lawyer who is "of counsel" to the firm could not state or imply that he or she is a partner. While the Committee's conclusion speaks to whether the presence of a New York office implies that the out-of-state firm has a New York partner "as opposed to a New York lawyer who is, for example, an associate or a non-equity partner," its subsequent warning that the firm's letterhead and advertisements "must not misleadingly state or imply that the associates or of counsel who work in the New York office are partners" makes no reference to non-equity partners.

It is not clear if this is an intentional omission since the hypothetical involves a New York lawyer who will be "an associate or of counsel" even though the opinion references "non-equity partners." The Opinion also notes that substantive law, such as that governing the unauthorized practice of law, could impact the ethical analysis. Significant emphasis is placed on the fact that New York's Code was amended to permit direct regulation of law firms as entities. Most state's regulatory schemes, however, continue to be directed at individual lawyers and not law firms.

IV. Conclusion

The realities of legal practice in today's profession require flexibility, and firm business models will undoubtedly continue to evolve as the economy and technology continue to develop. Many law firms already have one or more tiers of partners that are not equity partners in the traditional sense. This fact, by itself, should not render the representation of the non-equity lawyer as a "partner" in the firm false or misleading from an ethical standpoint.

As non-traditional models continue to evolve, however, firms and lawyers should not lose sight of the public's perception of what it means to be a partner in a law firm. To the extent business models diverge significantly from what consumers understand to constitute the core principles of partnership, or blur any material distinction between associates and non-equity partners, further consideration should be given to more specifically delineating a non-equity partner's status in representations made to the public and to clients.

Lawyers must also ensure that their representations comport with substantive law in their jurisdiction, such as partnership law or statutes governing the unauthorized practice of law.

Andrew I. Dilworth practices with Cooper, White & Cooper LLP in San Francisco. He concentrates his practice on the law governing lawyers. He is also an adjunct professor for the University of San Francisco School of Law and serves as Special Counsel to his law firm. Sarah J. Banola practices with Cooper, White & Cooper LLP in San Francisco. She concentrates her practice in the areas of employment law and professional responsibility.

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