



# LIBELLETTER

Reporting Developments Through April 19, 1999

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**Helping Reporters to Lie:  
*The Media Lawyer's Road to Disbarment***

By Ralph Gregory Elliot

Q: How do you know when a lawyer is lying?  
A: His lips are moving.

When Winston Churchill was a member of the Liberal Party, he rose in the House of Commons to defend his party against a charge that they had deliberately misrepresented the Conservative Party by accusing them of practicing slavery in South Africa because they had kept native laborers in barbed-wire compounds. Churchill conceded that "the term 'slavery' might be a terminological inexactitude," to which Joseph Chamberlain responded, "I prefer the ugly little English three letter word — l-i-e."

Humankind is fascinated by lying. Everybody lies at one time or another, and in doing so feels at least a twinge of conscience. We have been taught from infancy that lying is wrong. And yet . . . how

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PUBLISHED BY THE

LIBEL DEFENSE RESOURCE CENTER

404 Park Ave. South, NY, NY 10016 212.889.2306

### Helping Reporters to Lie

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convenient to plead a non-existent prior engagement when invited to join a boor or a bore. How liberating to disclaim knowledge or acquaintanceship when admitting them would involve one in dispute and interminable discourse. How much kinder and more diplomatic to praise a dreadful performance by a friend or a client's child. (In such situations, Noel Coward perfected the *mot juste* without resort to pre-variation: "My dear, you will never know what you did on that stage tonight!")

But these are what one would call "white lies" and most of us (possibly excepting Sissela Bok) would find them harmless in the

quite literal sense of that word: they cause no harm, and help to lubricate the engines of social intercourse. It is when we confront the prospect of deliberate and premeditated fraud and deception — concealing the truth or stating something to be so when you know it is not so in order to induce action or forbearance by the auditor in reliance upon the lie — that the stakes are raised, and civil and criminal penalties may be exacted by a polity that values truth and depends upon its assertion as a fundament of societal harmony.

The role of lawyers in the truth game is inevitably a complex one, and the importunate demands of clients for help that might implicate lying places the lawyer in a position where no professional wants to be or should be. And yet, when fraud and deceit are perceived to be the only means available to achieving a greater social good, the temptations (and the client pressure) become the greater as the ability to rationalize wrongdoing becomes easier. Even Sophocles reasoned that while "to tell lies is not honorable ... when the

truth entails tremendous ruin, to speak dishonorably is pardonable." (Sophocles, of course, did not have to deal with attorney discipline boards.)

Investigative reporting has always relied to a significant extent on fraud and deception. The only way a reporter can find out in a credible way whether the supermarket is operating in unsanitary conditions or selling spoiled fish may well be to prepare false background documents and seek employment in the back room, allegedly as a bona fide employee whose sole purpose is fidelity to the interests of her employer, the supermarket. The only way a reporter can obtain hard evidence that

certain landlords are discriminating in rentals against certain protected classes, such as minority groups, is to pretend to have a bona fide desire to rent, perhaps to pre-

pare and show false documentation as to her past, and to lie about various aspects of her life and plans when addressing the landlord. The same scenario, inspiring similar deception, is involved in attempts to unmask negligent or dangerous physicians, home improvement contractors, small loan companies and the whole panoply of society's detritus.

Those engaged in such a pattern and practice of deceit may be civilly, and perhaps criminally, liable to those who suffer a loss as a result of that deceit or, upon their complaint, to the State which has enacted penal laws on behalf of society generally to discourage such conduct. Most editors and reporters may well calculate that the risk they run is small and the story they get is worth it. After all, they reason, how likely is it that a quack physician, an adulterating shopkeeper or an illegally discriminating landlord is going to pursue civil remedies or persuade law enforcement personnel to pursue criminal sanctions against them?

Media lawyers, on the other hand, have a far greater exposure to sanctions for engaging in fraud

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### *The role of lawyers in the truth game is inevitably a complex one . . .*

## Helping Reporters to Lie

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and deception — or aiding clients to do so — than do their clients. The media lawyer who is asked, for instance, to help devise a script, a series of appropriate false assertions and false responses to likely questions, and false documentation to support reporter deceit and to create a paper trail when the target inquires further, must calibrate his response to the client not just in light of potential civil or criminal sanctions (such as aider and abetter liability). He must also take into consideration his exposure under applicable legal ethics rules — the Rules of Professional Conduct (in most states) or the Code of Professional Responsibility in a few others (but including major venues like New York).

And this is all the more so because *anyone* — not just the victim of the deception — can lodge a complaint against a lawyer for violating the Rules or Code. The purpose of these precepts is prophylactic: to protect the public from exposure to bad lawyers by removing them from the rolls of attorneys entitled to practice. Thus, no *harm* need be shown to have occurred to complainant or *anyone else from the lawyer's misconduct*. A lawyer who engages in fraud, *deceit and dishonesty*, even if he is a bungling incompetent at misconduct, fooling and harming no one, can be disciplined professionally for doing what he did. He poses a danger to future potential victims.

### *ABA Model Rule*

The duty of lawyers to deal solely in the truth is a thread that runs throughout the Rules. Its clearest iteration is in American Bar Association Model Rule of Professional Conduct 8.4 (a) - (d):

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

When a partner or associate of a lawyer guilty of a violation of Rule 8.4 knows of it, she may well be required to report it to disciplinary authorities under Rule 8.3(a), or else find herself exposed to disciplinary action for failure to do so:

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

It is no defense to a disciplinary complaint that the media lawyer was merely acting as a lawyer for his client, giving advice on how most efficaciously to achieve the laudable result of exposing wrongdoers. Model Rule 1.2(d) and (e) prevent a lawyer from hiding behind his client:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client

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## Helping Reporters to Lie

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regarding the relevant limitations on the lawyer's conduct.

The duty of confidentiality enjoined upon lawyers by Model Rule 1.6 as to "information relating to representation of a client" — an ethical rule having its evidentiary counterpart in the attorney-client privilege — is likewise no sanctuary for the lawyer charged with professional misconduct involving fraud. If the discussions between the reporter and the lawyer were for the purpose of devising a fraudulent script for the reporter, the crime-fraud exception to the attorney-client privilege permits compulsion to disclose the contents of that conversation. (And Model Rule 1.6 (b)(2) would allow the lawyer to disclose communications with his client in defense against a disciplinary charge.)

"Fraud" is a defined term in the Model Rules, denoting "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." Scripting — or helping a reporter to script — assertions designed to deceive landlords, doctors and supermarketers would clearly appear to fit within that definition.

But reporters are not the only ones who deceive for, what are to them, laudable purposes. So, too, do organizations dedicated to promoting the rights of minorities, women, the disabled, the dispossessed. They, too, often have lawyers; and those lawyers, too, read the relevant law and based on its provisions help devise scripts and answers and documentation for "testers" to use to expose non-compliant third parties.

While some court decisions have touched upon deceptive testers in terms of their standing to sue and the admissibility of the testimony they gained by use of deception, no cases have yet dealt with the ethics of lawyers' involvement in assisting in crafting the

means of deception. That lacuna inevitably has made lawyers understandably nervous and perhaps reticent in this area. And it has from time to time inspired efforts to revise the Model Rules to make lawyers' conduct ethically proper if the misrepresentations are solely as to the identity and purpose of the investigator or tester and are only made for fact-gathering purposes. These efforts, all of which at least *sub silentio* are premised on the socially desirable results anticipated from the investigation (an ends justifying means analysis elsewhere universally condemned), have so far come to naught; and in any event are not proposed for lawyer/reporter situations.

The conclusion of this examination is thus cautionary. In working with their client editors and reporters, media lawyers should be sensitive to their own professional ethical obligations concerning the avoidance of fraud and deception. The result of that duty may be to require media lawyers, despite client importuning, to forbear involvement in devising scripts and documentation furthering reporters' deception and fraud. The lawyer is certainly free to discuss with the reporters and editors what the law requires of those the publication plans to investigate and what kind and quantum of evidence likely would show a violation of the law. But proceeding beyond that discussion to complicity in fabricating fraudulent and deceptive assertions and documentation is a path fraught with disciplinary peril, and one which the observant lawyer would do well to avoid.

*Ralph Gregory Elliot is a member of Tyler Cooper & Alcorn, Hartford, Connecticut. He also served on the ABA Standing Committee on Ethics and Professional Responsibility from 1989-1995 and currently serves on the ABA Standing Committee on Professional Discipline and as its liaison member to the Ethics Committee.*

## New Trial Ordered for MMAR Suit Against Dow Jones Misconduct by Plaintiff Cited

The federal district court judge in Texas who presided over the largest award in libel history in the first trial of *MMAR v. Dow Jones & Co.* and then-*Wall Street Journal* reporter, Laura Jereski, has determined by clear and convincing evidence that the plaintiff withheld from defendant in discovery critical tapes of MMAR telephone conversations that prevented Dow Jones from fully and fairly presenting its case. Granting defendants' Amended Rule 60(b) motion, the court ordered a new trial subject to remand by the Fifth Circuit. *MMAR Group, Inc. v. Dow Jones & Co., Inc.* (S. D. Tex. Apr. 6, 1999)

Rule 60(b), which can be brought even after a notice of appeal has been filed, provides that the court may relieve a party from a final judgment because of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

MMAR, a Houston brokerage firm, sued Dow Jones alleging that a *Wall Street Journal* story on October 21, 1993 about its handling of various client portfolios caused the firm to go out of business. The *Journal* has contended all along that the story was accurate and that it simply covered the causes of MMAR's problems, it did not create them. A jury in March, 1997 found five statements in the lengthy article to be both false and defamatory (nineteen were sued upon initially) and awarded MMAR \$22.7 million in compensatory damages and \$200 million in punitive damages. The sheer enormity of the award resulted in extensive news coverage and concern expressed by the press on the matter.

In post-trial rulings, the court let stand the compensatory damages and \$20,000 in punitive damages awarded against the reporter-Jereski, but dismissed the punitive damages against Dow Jones as unsupported by the evidence. Dow Jones took an appeal to the Fifth Circuit.

### *An Unexpected Witness*

In early 1998, a former senior employee of MMAR

— senior enough that like other "valued employees," according to the court's opinion, he had been given by MMAR a percentage interest in any recovery in the lawsuit against Dow Jones — contacted an attorney for Dow Jones. The former employee, William Fincher, had been assigned by MMAR back in 1992-93 to review tapes made on MMAR's internal telephone taping system. He had done so and had made copies of specific conversations from the tapes that he thought were relevant to the litigation with Dow Jones. He reported to Dow Jones in these post-trial meetings that he had been asked to erase certain tapes from the master system (which he said he declined to do) and knew that there were a number of important, and to MMAR, damaging tapes that had not been produced to Dow Jones.

In July 1998, after meeting with counsel for Dow Jones and before his deposition in the matter could be taken, Mr. Fincher and others died when a small plane he was piloting crashed in Belize. According to the court, however, the post-trial discovery taken in connection with the Rule 60(b) motion produced a number of audiotapes of conversations and "considerable other information not previously disclosed." Slip op. at 7.

### *Blaming the Victim*

In what could be characterized as a remarkably restrained opinion, the court rejected MMAR's defense that the defendants simply did not ask for the material hard enough. The gist seems to be: we represented to the court and defense counsel that we gave Dow Jones everything and Dow Jones didn't call us liars and demand in repeated motions that the court order us again to produce everything despite our various objections to discovery, representations and denials.

MMAR apparently never disputed the authenticity of most of the tapes filed with the court in support of the 60(b) motion, although they did argue that defendants did not prove that MMAR knew of the existence of these tapes prior to the trial, an argument the court rejected.

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## New Trial Ordered for MMAR Suit

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While MMAR's defenses may be somewhat more sophisticated than that, the court concluded that MMAR deliberately failed to produce tapes that its senior officers knew existed — indeed, at least two of which were made directly by one of those officers with a *sneaky pen* — that the tapes contained conversations that were not only relevant to litigation, but offered substantial support on the most damaging allegation in the *Wall Street Journal* story: that MMAR hid losses in the portfolio of derivatives held by its largest customer by mismarking certain securities.

An example: a conversation between MMAR's Chief Compliance Officer/Chief Financial Officer and the head of its trading desk. They are speculating on why the NASD wanted to interview the trading desk chief. "What did we do?" the CCO/CFO asked, "except for mispricing?" The head of the trading desk responded that that was "pretty major." And this is only one of the tapes withheld during discovery in the case.

Further, MMAR had sought to destroy, and evidence did show the destruction of, tape recordings that were detrimental to its position. Finally, the court noted in a footnote that it would not unduly burden its opinion "by reciting all of the other evidence of MMAR's misconduct and misrepresentations or all of the ways in which Defendants were severely prejudiced in their ability fully and fairly to present their defense." Slip op. at fn 6.

### *And now...*

Both parties were quoted as saying that they were optimistic about their chances at a new trial. While LDRC is not generally in the bet-placing business, if plaintiff's counsel is working on a contingency fee basis, we would suggest they not count on much out of this one. We would think that MMAR officials may have more to worry about than simply the fact that their libel case, which some would argue (Dow Jones among them, to be sure) was never very strong, now appears to be untenable.

## CERT. DENIED: U.S. Supreme Court Lets Stand Ruling That Reporter Is a Public Figure

The United States Supreme Court has denied certiorari in the Texas case where a television reporter was held to be a public figure by virtue of his coverage of the raid on the Branch Davidian compound in 1993. *McLemore v. WFAA-TV Inc.*, 978 S.W.2d 568 (Tex. 1998), *cert. denied*, 67 U.S.L.W. 3610 (Apr. 6, 1999) (No. 998-1286). *See also LDRC LibelLetter*, October 1998 at 8.

John McLemore, a local television reporter, was on the scene when the shooting started at the 1993 ATF raid on the Branch Davidian compound. He claimed that he was libeled when federal agents blamed unnamed "local reporters" for compromising raid security (there were allegations that reporters had either intentionally or inadvertently alerted the cult to the raid in advance). WFAA repeated these allegations in a newscast that identified John McLemore.

McLemore sued WFAA and several other news organizations and individuals in 1994. WFAA's motion for summary judgment (on actual malice grounds) was denied by the trial court and affirmed by the intermediate appellate court, but was reversed by the Texas Supreme Court. That court held that McLemore was a vortex public figure and that the record negated actual malice as a matter of law. The decision is notable in that the court adopted a test that does not require voluntary action on the plaintiff's part to achieve public figure status.

By the time the case reached the Texas Supreme Court, WFAA was the only remaining defendant. The other defendants had been dropped or dismissed from the case.

The justices denied the petition for certiorari without comment.

## United States District Court Affirms Application of First Amendment to Ratings Issued by Standard & Poor's

By Geoffrey L. Thomas and Eve M. Coddon

In a decision affirming that the First Amendment provides significant protections to speech concerning matters of public concern, the United States District Court for the Central District of California granted partial summary judgment in favor of The McGraw-Hill Companies, Inc., d/b/a Standard & Poor's Ratings Services ("Standard & Poor's") in a lawsuit arising out of the December 1994 bankruptcy of Orange County. *County of Orange v. The McGraw-Hill Companies, Inc. d/b/a Standard & Poor's Ratings Services*, No. SA CV 96-0765 (C.D. Cal. Mar. 18, 1999).

### *Ratings Allegedly Too High*

The lawsuit against Standard & Poor's, a rating agency and publisher, was filed by Orange County in June 1996. Orange County requested that Standard & Poor's in 1993 and 1994 provide bond ratings to the County. In its suit, Orange County contends that Standard & Poor's ratings of County bonds in 1993 and 1994 were purportedly "too high," and were therefore allegedly false and inaccurate. The County contends that without those ratings it either would not have issued, or would not have been able to market, its debt securities, thereby avoiding the heavy losses it ultimately incurred. Orange County seeks damages from Standard & Poor's for alleged breach of contract and "professional malpractice."

On March 18, 1999, the United States District Court issued an Order Granting In Part and Denying In Part Standard & Poor's Motion for Summary Judgment ("the Order"). In the Order, the Court confirmed that Standard & Poor's ratings of County debt issues are expression on matters of public concern and are

therefore fully protected by the First Amendment.

In the Order, the Court held that the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), applies to Standard & Poor's published ratings of Orange County debt offerings. The Court acknowledged the applicability of the First Amendment protections drawn from libel to all of Orange County's claims involving false, albeit non-defamatory speech, regardless of the label given the claims by the plaintiff. Thus, the Court stated that "[a]lthough these issues traditionally arise in libel or defamation actions, the actual malice standard applies to other causes of action when the plaintiff seeks compensatory damages arising from allegedly false statements." Slip op. at 3 (citing *Hustler Magazine v. Falwell*, 485 U.S. 45 (1988) (intentional infliction of emotional distress); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986) (intentional interference with prospective economic advantage); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (product disparagement); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (invasion of privacy)).

### *Breach of Contract*

In analyzing the specific claims asserted against Standard & Poor's, the Court ruled that the "actual malice" standard applies to Orange County's claim for breach of contract. In a prior ruling, the Court left open the possibility that Standard & Poor's could have contracted away its First Amendment protections. In this motion, Orange County contended that Standard & Poor's had done just that.

The Court stated, however, that "[c]ourts are reluctant . . . to find a promise to limit First Amendment protection if it is not clearly part of

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## Standard & Poor's

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the contract.” Slip op. at 4 (quoting *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167, 1178 (N.D. Miss. 1992)). The Court recognized that a waiver of a constitutional right must be express and is not to be implied. Slip op. at 5 (citing *Gete v. Immigration and Naturalization Service*, 121 F. 3d 1285, 1293 (9th Cir. 1997)). Finding that the contracts between Orange County and Standard & Poor's, in which Orange County requested Standard & Poor's public ratings, did not contain an express waiver of constitutional rights, the Court held that the “actual malice” standard applied to the breach of contract claim.

Absent an express waiver, the Court rejected as well Orange County's argument that its breach of contract claim, like that in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), was governed not by First Amendment principles, but by laws of general applicability. The Court noted that the “key” to the holding in *Cohen* “was that the newspapers had expressly promised the plaintiff they would not reveal his name, thus undertaking a separate duty to plaintiff. Here, there has been no express promise made to the County separate from the contract for a rating.” Slip op. at 5.

### *Professional Malpractice*

The Court also reaffirmed its previous determination that because “the First Amendment protects S&P's preparation and publication of its ratings,” if what was ultimately at issue was the content of the ratings, the “actual malice” standard would apply to Orange County's tort claim for “professional malpractice.” See *LDRC LibelLetter*, April 1998 at 18. While Orange County had claimed that its contract with Standard & Poor's was for services beyond the preparation and publication of the ratings, it has abandoned that position. Thus, the Court further reaffirmed its earlier ruling on Standard & Poor's motion to

dismiss, namely, that “[b]ecause the County alleges harm arising from S&P's expressive activity, the Court finds the tort cause of action does not arise from non-publishing activity, and the County must therefore satisfy the heightened pleading standards of the First Amendment.” Slip op. at 6 citing prior order on Motion to Dismiss, dated June 2, 1997.

### *The Summary Judgment Standard*

Finally, applying the summary judgment standard of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), the Court granted summary judgment in favor of Standard & Poor's with respect to the 1993 ratings of Orange County debt. The Court specifically found that a reasonable jury could not conclude that Standard & Poor's acted with “actual malice” in issuing ratings in 1993. This favorable ruling will substantially reduce the amount of potential damages which the County can seek to recover against Standard & Poor's. The County claims the reduction to be approximately \$1 billion. The Court denied summary judgment as to the 1994 ratings, finding Orange County had raised a triable issue of fact regarding “actual malice.”

*Geoffrey L. Thomas and Eve M. Coddon are with Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA, and represented The McGraw-Hill Companies, Inc. in this matter.*

LDRC would like to thank intern  
Lara Schneider,  
Cardozo Law School,  
Class of 2000, for her  
contributions to this month's  
*LibelLetter*.



## D.C. Court Dismisses Defamation Claims, Applies Fair Report Privilege and Finds Headline Viewed in Context to Be Non-Actionable

By Jay Ward Brown

The United States District Court for the District of Columbia has dismissed defamation, injurious falsehood and false light claims arising out of a news report about a lawsuit. *Q International Courier, Inc. v. Seagraves*, No. 95-1554 (D.D.C. Feb. 26, 1999). The court held that the fair and accurate report privilege shields most of the allegedly defamatory statements, that the headline, when read in the context of the entire article, is non-actionable, and that another statement constitutes protected opinion pursuant to the four-part test established in *Ollman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984).

### *Did It Charge Illegality?*

The United States filed a civil complaint against Quick *International Courier* and others, alleging that they had improperly evaded U.S. postage by shipping their clients' bulk mailings to Barbados, where they were mailed back to U.S. addresses at substantially reduced postal rates. *Business Mailers Review* ("BMR"), which reports on postal regulations and the direct mail industry, obtained a copy of the complaint and published a story that quoted some allegations and summarized others.

Quick's attorney dispatched a letter to BMR objecting to the article. In response, BMR published a second story. BMR quoted the lawyer's denial that Quick's conduct was improper or that it had attempted to evade U.S.

law. However, BMR added the news that Quick's clients "apparently . . . don't believe Quick has a strong case," because "they settled with the U.S. Attorney," paying \$23,000 and \$37,700, respectively.

Quick and related parties sued, claiming that both articles defamed them by falsely implying that they had committed illegal acts. Judge Ricardo Urbina, however, granted BMR's motion to dismiss.

### *Privilege Covers Complaint*

After first observing that "[s]ummary judgment is particularly appropriate in the First Amendment context, where speedy resolution of litigation may be necessary to prevent the chilling of public speech," Judge Urbina straightforwardly applied the fair and accurate report

***Parting company with at least one recent decision and following what he labeled the majority rule, Judge Urbina held that, where headlines are at issue, they "are to be construed in conjunction with their accompanying articles."***

privilege. Noting that the District of Columbia is among the minority of jurisdictions that extend the privilege to reports concerning any formal pleading regardless of whether it has been the subject of judicial action, he compared BMR's articles to the government's complaint and concluded that the published quotations were accurate and that the summaries of other allegations fairly reported the gist of the complaint.

The plaintiffs also argued that the first headline — "Two Firms Nailed for Postage Fraud" — constituted an independent defamatory statement. Relying on a 1960 opinion by the D.C. Circuit,

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## D.C. Court Dismisses Defamation Claims

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Judge Urbina observed that “[n]ewspaper headlines, if defamatory *and* if they do not fairly and accurately reflect the gist of the text, are not privileged, even though the story if read in its entirety would not be misleading.” This test requires the court to examine the meaning of the headline in its full context, he continued. Parting company with at least one recent decision and following what he labeled the majority rule, Judge Urbina held that, where headlines are at issue, they “are to be construed in conjunction with their accompanying articles.”

Although plaintiffs contended that the word “nailed” in the headline would be understood by readers falsely to mean that they had been arrested, Judge Urbina concluded that the headline “accurately reflects the gist of the article.” When read in conjunction with the text, “it is clear that the term ‘nailed’ means ‘caught’ rather than ‘arrested.’” Because the article was privileged as a fair and accurate report, so, too, was the headline privileged as an accurate depiction of the article.

### *Ollman Applied*

After also ruling that plaintiffs had failed to present evidence of actual malice, Judge Urbina turned to the question of whether the statement in the second story that Quick’s clients “[a]pparently . . . don’t believe [it] has a strong case” was one of fact or opinion. While acknowledging that the United States Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), held that the First Amendment does not carve out an absolute privilege for assertions of opinion, Judge Urbina noted that the Supreme Court had not defined either category of speech. Consequently, “the *Milkovich* holding does not discount the four factor test established in *Ollman* for distinguishing between utterances of fact and opinion,” he ruled.

Having thus successfully resuscitated *Ollman*

from what some have argued was the kiss of death delivered by *Milkovich*, Judge Urbina examined the four *Ollman* factors — the specific language used, the statement’s verifiability, the surrounding language, and the broad context — and concluded that the statement at issue was opinion. *BMR* had introduced its statement regarding the customers’ “beliefs” with the word “apparently” and had set forth the supporting facts, giving readers an opportunity to draw their own conclusions, Judge Urbina noted. Furthermore, plaintiffs failed to provide any evidence of what those “beliefs” were, thereby suggesting that the statement was not verifiable. Because plaintiffs offered no evidence that the statement of opinion implied a provably false fact or relied upon stated facts that were provably false, he held that the statement was non-actionable.

Finally, because all of the allegedly defamatory statements were non-actionable and plaintiffs’ claims for injurious falsehood and false light were based on the same statements, Judge Urbina also dismissed the tag-along claims.

Whether plaintiffs will appeal was unclear as of press time.

*Mr. Brown is associated with the Washington, D.C. firm of Levine Sullivan & Koch, L.L.P.*

### 1999 NAA/NAB/LDRC LIBEL CONFERENCE

The 1999 NAA/NAB/LDRC LIBEL CONFERENCE is scheduled for September 22-24 in Arlington, Virginia at the Hyatt Regency Crystal City. While registration materials will be mailed by NAA next month, we thought you might be interested in the current proposed schedule and have enclosed it with the newsletter. If there are issues that you think should be addressed by any of the sessions, please let LDRC or Conference co-chairs Peter Canfield or Dan Waggoner know of them. See you all there!

## New York Appellate Court Reinstates Libel Claim Finding Celebrity Divorce Is Not of Public Concern

For the second time in a year, New York's Appellate Division, First Department, has held that reports concerning the contentious divorce of a celebrity and her business manager/husband are not matters of public concern. *Huggins v. Moore and The Daily News*, (N.Y. App. Div. Apr. 8, 1999). And as in the prior decision, the First Department applies — indeed, misapplies, — public figure criteria in deciding whether to apply New York's gross irresponsibility fault standard.

### *A Secret Divorce?*

At center lies the bitter divorce battle between singer Melba Moore and her former husband and manager, music producer, Charles Huggins. Huggins obtained an uncontested divorce in Pennsylvania from Moore in 1990 which Moore challenged and subsequently had declared invalid by a New York court in 1993. Following the New York judgment, Moore commenced a Federal action for fraud against Huggins' divorce attorney alleging that the attorney and Huggins acted in concert to obtain the purportedly fraudulent Pennsylvania divorce.

Despite a confidentiality agreement which was incorporated into the New York divorce judgment, Moore later spoke to a number of media outlets. Broadly summed, Moore related that Huggins obtained the Pennsylvania divorce secretly through fraud and forgery and that his actions left her nearly destitute. Huggins countered by filing a flurry of lawsuits alleging claims of libel and tortious interference with contract against NBC, The Maury Povich Show, The Jane Whitney Show, and the *Daily News*. Each of the lawsuits was dismissed on pre-trial motion.

In his suit against the *Daily News*, Huggins alleged that he was defamed by three articles written by gossip columnist Linda Stasi. New York Supreme Court Judge Elliot Wilk granted the newspaper's motion for summary judgment on the basis that each of the 18 statements complained of were protected expressions of opinion.

### *"Gossip" Not Necessarily Opinion*

On appeal, the court reversed the trial court's decision with respect to six statements, stating that "even the most flexible application of context does not insulate certain starkly

factual statements, not drawn directly from court documents or otherwise protected under traditional libel standards." Included among the six statements were charges that Huggins forged Moore's name on divorce and tax papers, that he had embezzled money from her, that Moore was forced to get "another order of protection" against Huggins after the divorce, that Moore was left near-destitute after Huggins took away the management company they started together, and that Huggins had an employee, who had power of attorney for Moore, sign over all of Moore's holdings in the management company.

Rejecting the *Daily News'* argument that the gossip context served to minimize the reputational damage to Huggins, the court held, "the *Daily News'* and Stasi's obligations to evaluate [Moore's] credibility as a presumably biased source of *damaging factual statements* about [Huggins] and the availability of simple means at their disposal to verify core statements made by Moore, albeit in a judicial setting, will be trial issues."

### *Krauss Revisited*

More alarming than the appellate court's treatment of opinion, is the manner in which it went on to analyze the issues relating to public figure status and public concern. The decision in *Huggins* bears unsettling similarities to the First Department's decision in *Krauss v. Globe International*, 674 N.Y.S.2d 662, 26 Media L. Rep. 2118 (N.Y. App. Div. June 23, 1998), *motion for leave to appeal denied*.

In *Krauss*, the court reversed summary judgment for the defendant on the basis that the plaintiff, the ex-husband of television celebrity Joan Lunden, was not a public figure. According to the court, despite the fact that Krauss often appeared with Lunden in conjunction with their projects and was subject to substantial press coverage, "there is no basis to find that he ever sought, or achieved, a meaningful level of public attention for himself." *Id.* at 2120. Relying on *Time Inc. v. Firestone*, 424 U.S. 448 (1976), the court also held that a divorce "that is no more than 'a private matter of public concern merely to gossips' [citation omitted] is not a public controversy requiring a limited-purpose public figure analysis." *Id.*

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## Libel Claim Reinstated

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The *Krauss* court also refused to apply New York's gross irresponsibility standard which would normally apply where the subject matter of a story was "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition." See *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 1 Media L. Rep. 1693 (1975). The court relied on its findings relating to *Krauss*' public figure status — that there was no public controversy — to find that the article was not within the "sphere of legitimate public concern." Thus, the court concluded, *Krauss* would need only prove negligence in order to prevail on his claim. In its motion for leave to appeal, defendants argued that application of public figure criteria or analysis to the *Chapadeau* standard is contrary to the broad reading given to *Chapadeau*'s "legitimate public concern." Following the First Department's decision denying leave to appeal, *Krauss* was settled.

### *Huggins Not a Public Figure*

In *Huggins*, the court found that *Huggins*, a producer in the musical entertainment business, was also not a public figure. Relying on *Krauss*, the court stated, "any degree of public interest in [the] plaintiff arose because of his marriage to a celebrity and not from the attributes with which the article was saddling him." The court continued to state that "despite his personal business arrangements and successes, and even considering that the business was to promote celebrities, [*Huggins*] had not sought publicity for himself personally."

The court also rejected the contention that *Huggins* was a limited-purpose public figure finding that there was no public controversy. The *Daily News* had argued that the dispute between *Moore* and *Huggins* represented the controversy surrounding economic spousal abuse. In fact, one of the three articles that gave rise to the suit dealt solely with a speech given by *Moore* on the "black-on-black crime of economic spousal abuse."

Again relying on *Krauss*, the court stated that because divorce is "essentially a private, and not a public matter, the media defendants were required to provide a 'viable rationale that would transform the subject matter of their article from mere gossip to public controversy.'" According to the court,

the *Daily News* failed to do so.

### *Public Controversy vs. Public Concern*

The court in *Huggins* also applied the rationale of *Krauss* in deciding that the article failed to address a matter arguably within the public sphere. In doing so, the court reinforced its earlier misreading of the public controversy/public concern distinction. Rather than addressing the more general question of whether the article was "arguably within the sphere of legitimate public concern," the court elevated the public concern requirement to the more demanding showing of public controversy which is applied in the limited-purpose public figure context.

While recognizing that in *Time Inc. v. Firestone*, 424 U.S. 448 (1976), the U.S. Supreme Court held that "[d]issolution of marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*," the First Department fails to comprehend in both *Krauss* and *Huggins* that the "public controversy" referred to in *Gertz* and the "public concern" of *Chapadeau* are not the same thing.

The court writes, "[t]he Supreme Court has frowned on the elevation of reportage of divorces to that of public concern, even if prominent people are involved and even if that factor may be of interest to the general public."

Compounding the error, the First Department, in both instances, dubiously props up its reasoning by quoting Justice Brennan — "divorce . . . is no more than 'a private matter of public concern merely to gossips.'" *Krauss v. Globe International*, 26 Media L. Rep. at 2120 (quoting *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 964, n.9 (Brennan, J., dissenting)). The quote is taken from a footnote in Brennan's 1985 dissent to a denial of certiorari in *Milkovich* on the public figure issue. Interestingly, Brennan dissented because he would have held *Milkovich*, a high school teacher and coach, to be a public figure.

In addition, in the footnote Brennan was attempting to explain the difference between the public controversy presented in *Firestone* and the one presented in *Milkovich* for limited-purpose public figure purposes and for the more general proposition of whether a matter is of public concern. In fact, Brennan dissented from *Firestone* as well, reasoning that any reporting on the judicial process should be protected by the actual malice standard.

Regardless, the First Department relies on the quote to

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## Libel Claim Reinstated

(Continued from page 12)

support its conclusion:

The particular issues being communicated in the present case arise from the fact of a divorce, and do not address matters of public importance. There is some gloss in one of the columns, possibly tailored to provide some constitutional cover to what really is gossip, about what may be legitimate social problems. Defendants' appellate brief tries to make the most of connecting the statements to "economic spousal abuse," but the connection is specious as a defense to defamation. The divorce and the business arrangements between the

parties still remain essentially private affairs.

## Conclusion

*Krauss* and *Huggins* should give pause to any practitioner who finds himself within the increasingly unfriendly confines of New York's First Department. In all, seven of the thirteen judges in the First Department were involved in the unanimous decisions handed down in the cases. In a state that counts among its public figures a belly dancer who billed herself as a "stripper for God" (*James v. Gannett Co.*, 40 N.Y.2d 415 (1976)), the First Department's reluctance to hold two plaintiffs as media-savvy as *Krauss* and *Huggins* to be public figures is disturbing.

## California Appeal Court Dismisses Political Consultant's Suit Over Domestic Abuse Charges

In a decision that stands in marked contrast to the recent decisions handed down by New York's Appellate Division, First Department (*see above*), the California Court of Appeal has dismissed a libel suit brought against *Mother Jones* magazine by political consultant Donald Sipple. *Sipple v. Foundation for National Progress*, No. B120358 (Cal. Ct. App. Apr. 7, 1999).

Like *Krauss* and *Huggins*, the allegations at center in *Sipple* were premised upon domestic relations. Specifically, Sipple claimed he was defamed by a *Mother Jones* article that reported on the custody dispute between Sipple and his first wife and the allegations of physical and verbal abuse levied against Sipple during the proceeding by both his first and second wives.

Unlike the New York cases, however, the California Court of Appeal had no trouble affirming dismissal of the suit on the grounds that the article was either protected under the California anti-SLAPP statute because it addressed a "public issue," or, alternatively, that Sipple as a public figure could not show that the article was published with actual malice.

As to "public issue," the court was guided by the recent California Supreme Court decision in *Briggs v. ECHO*, 99 Daily Journal D.A.R. 687 (Cal. Jan. 21, 1999), *see LDRC LibelLetter*, February 1999 at 9. In *Briggs*, the California Supreme Court "drawing on statutory analysis, legislative intent, and public policy considerations . . . agreed . . . that in crafting the statute, the Legislature equated a 'public issue' with the authorized official proceeding to which it connects."

*Sipple*, slip op. at 13. Accordingly, the statements made in connection with the custody proceeding were automatically deemed to concern a public issue under California law.

The court also rejected Sipple's contention that statements in the article that were not made as part of the custody proceeding should not be protected under the statute because they do not pertain to an issue of public interest. Stating that "[d]omestic violence is an extremely important public issue in our society," the court noted that Sipple had "devised media strategy based on gender-based advertising against domestic violence" in his consulting work. Slip op. at 14-15. Accordingly, the court concluded "the details of [Sipple's] career and [his] ability to capitalize on domestic violence issues in his advertising campaigns for politicians known around the world, while allegedly committing violence against his former wives, are public issues." Slip op. at 17.

As to status, Sipple contended that because he is a "behind the scenes" player who is told what campaign themes to develop, and because the press is not interested in him but rather "his observations concerning the relative political impact of particular issues," "it would be the height of unfairness to conclude that he is a public figure." Slip op. at 26. The California Court of Appeal rejected the argument stating, "[t]he fact that the media seeks his observations on the political climate, political issues, and national figures, and that he has sought out media attention as exemplified by the press conference he called after he left the Dole campaign does not lend credibility to his claim of anonymity." Slip op. at 26.

## Ninth Circuit Rules California Anti-SLAPP Law Applies to State Claims in Federal Court

By Mark Goldowitz

In a very important decision furthering First Amendment rights, the Ninth Circuit Court of Appeals last month ruled that California's anti-SLAPP (Strategic Lawsuit Against Public Participation) law, Cal. Code of Civil Procedure § 425.16, applies to state claims in federal court. *United States ex rel. Newsham v. Lockheed Missiles and Space Company*, \_\_ F.4th \_\_, 99 DJDAR 2753, 99 CDOS 2132 (9th Cir., 1999).

This is the first published opinion to address the issue of the applicability of state anti-SLAPP laws in federal

mandates recovery of attorneys fees for prevailing defendants. See *LDRC LibelLetter*, February 1999 at 9-11.

The *Lockheed* case involved a *qui tam* action filed in 1988 under the False Claim Act, 31 U.S.C. §§ 3729-3733. The *qui tam* plaintiffs (also known as "relators") were Margaret Newsham and Martin Bloem. They alleged that defendant Lockheed had submitted millions of dollars of false claims for excessive nonproductive or personal activities on government projects. In 1991, Lockheed filed four state law counterclaims — breach of duties

### States with Anti-SLAPP Laws

Colorado	Massachusetts	New York	Washington
Delaware	Minnesota	Oklahoma	
Georgia	Nebraska	Rhode Island	
Maine	Nevada	Tennessee	

### States With Proposed Anti-SLAPP Laws

Florida - Introduced 1998 session	New Hampshire
Indiana - State Senate passes bill	New Jersey
Kansas - Sponsor pulls bill	Pennsylvania - Bill passed by State House
Maryland - Third try for bill	Texas - Third try for bill
Michigan	Utah

*Access to text of statutes available on California Anti-SLAPP Project website: [www.casp.net](http://www.casp.net)*

court. The reasoning of this decision would apply to any state's anti-SLAPP law. Thirteen states currently have anti-SLAPP laws on the books, and there are efforts in another ten states to secure such protections.

In California, citizens who are sued as a result of their exercise of the constitutional rights of petition or speech can invoke the protections of California's anti-SLAPP law. This law allows defendants to bring a special motion to strike the complaint as a SLAPP at the beginning of the lawsuit. The law facilitates speedy disposition of meritless lawsuits arising from First Amendment activity and

imposed by fiduciary obligations, contract, statute, and the implied covenant of good faith. The counterclaims were originally dismissed by the district court in 1991, but were reinstated by the Court of Appeals in 1994. 99 DJDAR 2753-2754.

### *Anti-SLAPP Conflicts with FRCP*

In August 1995, the district court granted the relators' motion to dismiss Lockheed's counterclaims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a

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## Anti-SLAPP Law Applies to State Claims in Federal Court

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claim, and denied their companion special motion to strike the counterclaims and for attorneys' fees under the California anti-SLAPP statute. The district court found that the California anti-SLAPP directly conflicted with the following Federal Rules of Civil Procedure: Rule 8 (requiring specificity of pleadings), Rule 12(f) (motions to strike), Rule 12(b)(6) (motions to dismiss for failure to state a claim), and Rule 56 (motions for summary judgment). The relators appealed the denial of their special motion to strike. *Id.* at 2754.

On appeal, the Ninth Circuit reversed the district court's denial of the special motion to strike, in an opinion written by District Judge Robert J. Bryan, sitting by designation, in which Judges Betty Fletcher and Wallace Tashima concurred. *Id.* at 2753.

The Ninth Circuit noted that only two aspects of the California anti-SLAPP statute were at issue, the special motion to strike, pursuant to C.C.C.P. § 425.16(b), and the availability of fees and costs, pursuant to C.C.C.P. § 425.16(c). The court concluded that these provisions and Rules 8, 12, and 56 "can exist side by side. . . each controlling its own intended sphere of coverage without conflict" (citing *Walker v. Armco Steel*, 446 U.S. 740, 752 (1980)). 99 DJDAR at 2756.

### Ninth Circuit Disagrees

The Court agreed with Lockheed that the anti-SLAPP statute and the Federal Rules did serve some "similar purposes, namely the expeditious weeding out of meritless claims before trial." However, the Court found that this "commonality of purpose" did not constitute a "direct collision" — that there was "no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims." In addition, the anti-SLAPP statute was "crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'" *Id.* at 2757.

### Important State Interests Furthered

The Court then noted that Lockheed had not identified any federal interests that would be undermined by the application of the anti-SLAPP provisions. On the other hand, it recognized "the important substantive state interests furthered by the anti-SLAPP statute," even though the law was in form a procedural one (citing *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 2220 (1996)). 99 DJDAR at 2757.

### Erie Rule Favors Application of Anti-SLAPP Statute

Finally, the Court noted that "the twin purposes of the *Erie* rule — 'discouragement of forum shopping and avoidance of inequitable administration of the law' — favor application of California's Anti-SLAPP statute in federal cases." If the anti-SLAPP provisions did not apply in federal court, "a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum." Conversely, it would also disadvantage defendants in federal proceedings. *Id.*

***[T]he anti-SLAPP statute was "crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"***

The Ninth Circuit remanded to the district court with directions that it rule on the relators' special motion to strike and motion for fees under the California anti-SLAPP law. *Id.*

The Court's opinion does not directly address the question of whether California's anti-SLAPP law may also apply to federal claims brought in federal court, which raises some different legal issues. But its reasoning can be used to support such a position. A brief arguing that the anti-SLAPP law does apply to federal claims in federal court can be found on the website of the California Anti-SLAPP Project at [www.casp.net](http://www.casp.net). This website also contains a copy of the Lockheed opinion and the text of the state anti-SLAPP laws which are currently on the books, as well as those which are proposed.

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## No Free Lunch and No Libel by Implication

By Bob Latham

For the third time in three years the Houston [1st District] Court of Appeals in Texas has rejected the concept of "libel by implication." In *Dolcefino v. Lehaie*, the court was called upon to review a series of reports that Wayne Dolcefino, an investigative reporter for KTRK Television in Houston, had prepared regarding city building inspectors accepting free lunches from restaurants whose building permits they approve. Lehaie, one of the building inspectors referenced in the broadcasts, had argued that the broadcasts implied that he was "accepting meals in exchange for giving favorable inspections" — an allegation that appeared nowhere in the broadcasts. The Houston court reinforced its earlier analysis of the Texas Supreme Court's decision in *Randall's Foods Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) as rejecting a cause of action for libel by implication.

The *Lehaie* opinion is also useful in its treatment of Lehaie's arguments as to what statements in the broadcast were "of and concerning" him. Lehaie was videotaped having lunch at a particular restaurant, without paying, and he argued that any broadcast that used that video footage of him was by definition "of and concerning" him. The court rejected this argument and said that the footage of Lehaie was shown only in certain of the broadcasts and then only in the context of building inspectors' accepting free lunches — which was undeniably true. Lehaie could not assert a cause of action on other statements in the broadcasts simply because he appeared in videotape in one isolated portion of the broadcasts.

Finally, the court reinforced that the Texas statute providing for the interlocutory appeal of

the denial of a summary judgment motion brought by a media defendant in a libel case was constitutional. Lehaie had argued that the statute unfairly "discriminates against individuals in order to protect the media."

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## Master Restorer Held to be Involuntary Public Figure Appellate Court Reverses and Dismisses *Goldreyer v. Dow Jones & Company*

In an opinion spanning little more than two pages, New York's Appellate Division, First Department reversed and dismissed Daniel Goldreyer's suit against the *Wall Street Journal*, holding the master art restorer to be an involuntary public figure. *Goldreyer v. Dow Jones & Company, Inc.*, 1999 WL 145293 (N.Y. App. Div. Mar. 18, 1999). See also *LDRC LibelLetter*, September 1998 at 13.

### *"Who's Afraid of Red, Yellow and Blue"*

*Goldreyer* revolved around the restoration of "Who's Afraid of Red, Yellow and Blue III," an expressionist painting by the American artist Barnett Newman. The painting was slashed by a vandal while it was hanging in the Stedelijk Museum in Amsterdam. Daniel Goldreyer, who had worked with Mr. Newman for more than 25 years, seemed a natural choice to restore the painting, valued at more than \$3.1 million. Goldreyer's restoration of the painting was subjected to harsh criticism, both for allegedly ruining the painting and for having the audacity to charge \$270,000 for his work.

In December 1991, the *Wall Street Journal* published a story on the controversy surrounding the restoration of the painting. The article was entitled, "For That Price, Why Not Have the Whole Museum Repainted?" The article suggested that Goldreyer had used the inappropriate type of paint in the restoration and also reported claims that the restoration bordered on criminal fraud. The following week *Time* magazine's international edition also published a story on the controversy entitled "Was a Masterpiece Murdered?"

Goldreyer filed suit against Dow Jones and *Time* magazine, alleging damage to his reputation as a master in the field of art restoration.

### *Triable Issue of Fact - Was Wall Street Journal Grossly Irresponsible?*

Trial court judge Edward J. Greenfield determined that Goldreyer was not a public figure under a vortex

public figure analysis. The court then went on to apply the *Chapadeau* "gross irresponsibility" standard, the standard applied in New York to private figures when the matter at issue is arguably of legitimate public concern. On this basis, the court determined that a triable issue of fact existed as to whether the *Wall Street Journal* "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." N.Y.L.J. July 28, 1998 at 22 (N.Y. Sup. Ct. July 28, 1998). Summary judgment was denied. Justice Greenfield determined that the reporter's signal failing was to treat the story lightly.

### *Appellate Division Disagrees: Goldreyer was Involuntary Public Figure*

New York's Appellate Division, First Department disagreed. Citing *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, cert. denied, 449 U.S. 898 and *Dameron v. Washington Mag.*, 779 F.2d 736, cert. denied, 476 U.S. 1141, the appellate court concluded that Goldreyer was an involuntary public figure. The court also noted that the "record clearly reveals the absence of evidence suggesting awareness by the Dow Jones defendants that any statements in the article were false or that the article was published with reckless disregard for the truth." Slip op. at 7.

The court found persuasive the fact that Goldreyer did not respond to the reporter's telephone message and that a forensic laboratory report analyzing the restoration was written in Dutch. The reporter was therefore denied access to "two additional sources of information."

Justice Greenfield's earlier order denying *Time's* motion to dismiss was also reversed by the First Department in 1996.

## UPDATE: *Schafer v. Time, Inc.* Mediation Leads to Settlement

Court-ordered mediation has resulted in the settlement of *Schafer v. Time Inc.*, a 6-year-old libel suit between *Time* magazine and private-figure plaintiff, Michael Schafer. *Time* magazine ran a photograph of Schafer in 1992, mistakenly identifying him as a terrorist connected to the 1988 bombing of Pan Am Flight 103. *Time* obtained the photograph from an affidavit filed by Pan Am in connection with a civil case brought by the families of the Flight 103 victims. Although *Time* later printed a correction, Schafer filed a multi-million dollar libel suit.

In 1996, a jury found in favor of *Time* but the case was reversed and remanded for retrial by the U.S. Court of Appeals for the Eleventh Circuit. The appellate court held that the jury instructions on the definition of "common law malice" were confusing and most likely resulted in a "legally misguided verdict." *Schafer v. Time Inc.*, 142 F.3d 1361, 26 Media L. Rep. 1897 (11th Cir. 1998). See also LDRC LibelLetter, June 1998 at 7.

The terms of the settlement are confidential. The mediation was ordered by District Court Judge Willis B. Hunt, Jr. and conducted by Atlanta lawyer Joe C. Freeman, Jr.

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## Ex-Reporter Wins \$115,000 From Newspaper

In a battle over background documents between an ex-reporter and her former newspaper, the reporter won out as a Colorado jury awarded her \$115,000 in damages on her claims of libel, false light and outrageous conduct.

The battle began after the reporter, Allison Krupski, resigned from the *Daily Camera*, a Boulder newspaper, on December 11, 1997. Before leaving, Krupski, the *Camera's* lead reporter on the JonBenet Ramsey case, cleaned out her desk, taking documents including a copy of the autopsy report, police reports and the newspaper's files on then-Police Chief Tom Koby. Less than a week later, the paper filed a \$45,000 lawsuit against Krupski alleging theft and replevin. The paper ran an article the next day reporting on the filing of the suit and noting that a judge had entered an order restraining Krupski from using, selling or destroying any of the documents the *Camera* sought. Krupski responded with claims of libel, false light and outrageous conduct.

On March 15, 1999 a trial on all claims began. The paper's claim of theft was thrown out mid-trial and the judge reserved judgment on the replevin claim until after the trial. The court also held that Krupski was not a public figure and that the paper was not entitled to a jury instruction on the issue of fair report privilege. According to the court, the paper's status as a party to the suit caused it to automatically lose the protections of the fair report privilege. The jury subsequently returned a verdict for Krupski, awarding \$40,000 in damages for libel, \$30,000 for false light and outrageous conduct, and \$45,000 in punitive damages.

Post-trial motions are pending.

Laurin D. Quiat of Baker & Hostetler LLP in Denver, CO, is representing the *Daily Camera*.

## English Court Holds British Internet Service Provider Liable for Defamatory Posting

By David Hooper

In the first UK court decision in a defamation case against an Internet service provider, Mr. Justice Morland in the English High Court held on March 26, 1999 that Demon Internet Limited, Britain's largest ISP, is liable for the contents of a defamatory forged news group message when it failed to remove it after a complaint was made. *Laurence Godfrey v. Demon Internet Limited*, 1998-G-No. 30 (High Court Mar. 26, 1998). The decision specifically rejects recent American cases and holds, in contrast to those decisions, that an ISP may be treated as a publisher for purposes of libel actions over third-party created content.

The facts of the Godfrey case bear some resemblance to the recent New York case of *Lunney v. Prodigy Services Co.*, 27 Media L. Rep. 1373 (N.Y. App. Div. Dec. 28, 1998) which also involved a defamation claim against an ISP for a forged message — but *Godfrey* comes out the opposite way with the ISP liable for the third party message. On January 13, 1997, an unknown person made a posting in the United States on a news group pretending to be the plaintiff Laurence Godfrey. The posting used terms that the judge described as “squalid, obscene and defamatory.” On January 17, Godfrey sent a fax to the managing director of Demon complaining about the posting. The message appears to have been ignored and the offending posting remained displayed until January 27 when it was, in accordance with normal policy, automatically removed.

Godfrey, a lecturer in computer science, is the *bête noir* of libel litigation on the Internet. In April 1995, he accepted “significant” damages from Dr. Phillip Hallam Baker of the European Swiss Nuclear Physics Laboratory for remarks made about him on a Usenet news group. He has recovered \$6,190 from the Melbourne PC Users and has sued Cornell University and one of its researchers, Michael Dolenga, the University of Minnesota and one of its students, Kratchel Quanchairut, Minneapolis ISP StarNet, Toronto Star Online and New Zealand TeleCom. He has recently signed a judgment in default for £15,000

against the Cornell researcher Michael Dolenga who is now based in Canada. Judging by Dolenga's reported remarks “I am not recognizing the British court's jurisdiction and to hell with it” a challenge to the enforcement of this judgment along the lines of the *Bachchan* and *Telnikoff* cases seems likely.

The key points of interest in the decision are the analyses of whether Demon “published” the libellous message and whether the innocent dissemination defense contained in Section 1 of the British Defamation Act 1996, which specifically covers ISPs, rescued Demon. As followers of the English libel scene may have guessed, the answers to these two questions are yes and no. Demon sought to argue that under common law it had not published the defamatory material or alternatively that it was “an innocent disseminator,” *i.e.*, that it was not the (primary) publisher and had exercised the appropriate degree of care.

### *Under English Common Law, Demon Is a Publisher*

The judge ruled that Demon whenever it transmits, or whenever there is transmitted from the storage of its news service a defamatory posting, publishes that posting to any subscriber who accesses the news group containing that posting. The same common law principles were applied as in the case of *Byrne v. Deane* (1937) 1 KB 318 where a golf club was held to be liable for continuing to display (after warning) a defamatory notice on the club noticeboard where Mr. Byrne was accused of caddish behavior in tipping off the local constabulary about an illegal gaming machine at the club. The judge in *Byrne* said “The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?”

The judge here rejected the argument that Demon was merely the owner of an electronic device through which postings were transmitted. He said that Demon had chosen to store these postings within its computers which

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## English Court

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could be accessed to news groups and it could obliterate these postings and indeed did so about a fortnight after receipt. In other words, the judge did not accept the American view as expressed in cases such as *Lunney* that Internet service providers are analogous to telephone companies in the sense of simply providing the equipment on which the defamatory message was passed. His decision is close to *Stratton Oakmont Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 25, 1995), as opposed to *Cubby Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 19 Media L. Rep. 1525 (S.D.N.Y. 1991), in that the degree of control was "the" factor. The failure of *Demon* to respond to Godfrey's complaint meant that under common law it fell foul of the other requirements of taking reasonable care and lack of knowledge about the publication of a libellous statement.

### *No Innocent Dissemination Defense*

The Defamation Act 1996 §1(1)(a)-(c) provides a defense to people such as Internet service providers, as well as printers and distributors, if they are not the (primary) publisher of the statement complained of and they took reasonable care in relation to its publication and did not know or have reason to believe that what they did caused or contributed to the publication of a defamatory statement. A person is not to be considered a publisher if, *inter alia*, 1) he is only involved in processing or selling the electronic medium on which the statement is recorded; 2) only provided the system or service by which the statement is retrieved or made available in electronic form; or 3) is merely the provider of access to a communications system on which the statement is transmitted by a person over whom they have no effective control. Defamation Act 1996 §1(3)(c), (e).

On this basis, *Demon* was not a publisher within the meaning of §1(1)(a), but the additional requirements under subsection (b) of reasonable care in respect of the publication and subsection (c) no knowledge or reason to believe that what was done caused or contributed to the

defamatory publication created, the judge held, insuperable difficulties for *Demon*. The judge did, however, indicate that damages were likely to be very small.

### *U.S. Decisions Rejected*

The American authorities were given fairly short shrift by the judge who pointed out that he referred to them in deference to the researchers of Counsel but only shortly because he found them of only marginal assistance because of the different approach to defamation "across the Atlantic." The judge observed that the impact of the First Amendment has resulted in a substantial divergence of approach between American and English defamation law. He decided the case on the basis of English common law and an analysis of Section 1 Defamation Act 1996 — there are no legislative enactments in the United Kingdom comparable to Section 230 of the Communications Decency Act or Section 509 of the Telecommunications Act which protect ISPs from lawsuits over third-party content.

### *Impact of the Decision*

Unless Mr Justice Morland's decision is reversed on appeal, English cyberspace is likely to become another venue for forum-shoppers. In addition, although the judge indicated that damages were likely to be small, the decision may lead to censorship of the Internet in Britain since ISPs might now automatically delete any complained of message or site rather than risk a libel action. Though some ISPs were already removing some postings after complaint, now ISPs will have to set up systems to deal with complaints and will need to be aware of the fierce libel laws in England when complaints are made. There are presently no plans to introduce legislation similar to the Communications Decency Act. ISPs will need to satisfy English courts that they have exercised the reasonable care required by the Defamation Act.

*David Hooper is a partner with the law firm of Biddle in London.*

## Web Page and Internet Postings Alone Not Enough For Jurisdiction In Libel Case

By Charles J. Glasser, Jr.

The U.S. District Court for the Eastern District of Pennsylvania held in a mid-April decision that an allegedly libelous web page and Internet postings by an Oregon resident were not, by themselves, enough for the Pennsylvania court to exercise personal jurisdiction. *Barrett v. Catacombs Press, et al.*, Civ. No. 99-736 (E.D. Pa. April 12, 1999). This case represents one of the first Internet libel cases in which the jurisdictional facts centered completely on Internet speech — since the defendant did not have any commercial or other contacts to Pennsylvania.

### *Conflicting Healthcare Web Sites*

The plaintiff in the case, Stephen Barrett, is a Pennsylvania physician who maintains an award winning web page called "Quackwatch" which provides information about health frauds and scientific misinformation. The defendants in the case are: an author of books investigating medical science; the publisher of those books; and most germane to this case, Darlene Sherrell, an Oregon resident who also maintains a web page and is a frequent contributor to Internet discussion groups concerning the alleged health risks of fluoridated water. At the heart of this case were comments made by Sherrell which she posted to her web page and to USENET discussions groups available on the Internet.

Among other things, Sherrell stated that her web page "exposes Quackwatch and . . . Barrett . . . in their attempt to eliminate competition in the health care field, discredit chiropractors, and pander to anti-consumer special interests." She also stated that "Barrett's Quackwatch group pretend to be consumer advocates" and referred to Barrett as a "bogus consumer watchdog." Slip op. at 10. Her web page also republished passages

from a book published by Catacombs Press critical of Barrett which formed the basis of his complaint against the book's author and publisher.

### *No General Jurisdiction Under "Active/Passive" Analysis*

In granting Sherrell's motion to dismiss for lack of personal jurisdiction under FRCP 12(b)(2), the court observed that Sherrell had no "systematic and continuous" contacts with Pennsylvania to warrant general jurisdiction under *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 197 (1980). Sherrell did not transact business with Pennsylvania residents and had only "passed through" the state more than 10 years ago. Most significantly, the court found that under the "passive/active" analysis used by courts deciding Internet jurisdictional issues in contract and trademark areas, the mere availability of a "passive" web site did not rise to "systematic and continuous" activity.

The "passive/active analysis" is a method of determining whether to exercise personal jurisdiction based on the nature and quality of contacts made with the forum state through the web page. See *"Interactivity as a Measure of Personal Jurisdiction," ABA Tort and Insurance Practice Section Newsletter, Spring, 1997*, at 1. An "active" page is one that requires user passwords, charges a fee for access, or generates sales and distributes goods through the web page and thus is likely to subject the author to general jurisdiction. *Zippo v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997); *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C. 1997); *Gary Scott Int'l v. Baroudi*, 981 F. Supp. 714 (W.D. Mass. 1997).

Conversely, a "passive" page merely makes information available, and is not sent into the jurisdiction in tandem with contracts to sell goods, and does not require a significant degree of

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## Web Jurisdiction

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communication in and out of the forum state. See, e.g., *Smith v. Hobby Lobby*, 968 F. Supp. 1356 (W.D. Ark. 1997).

The web page was Sherrell's only "contact" with Pennsylvania, and unlike other recent Internet cases, the defendant did not have other avenues of business there. See *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (defendant's travel to forum to promote web site was systematic and continuous); *Edias Software L.L.C. v. Basis Int'l, Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) (longstanding contractual relationship between parties in addition to web page supported exercise of jurisdiction).

### *Discussion Group Postings and E-mails Insufficient to Exercise Jurisdiction*

As to Sherrell's postings of messages to discussion groups, the court acknowledged that these "technically differ from the maintenance of a 'passive' Web page because messages are actively disseminated to those who participate in such groups." Slip op. at 7. For jurisdictional purposes, though, the court found that these postings were "akin" to a passive web site. These postings were non-commercial and, like a web site, are available to anyone nationwide who accesses them. According to the court, "the fact that such information is accessible worldwide does not mean that the Defendant had the intent of targeting Pennsylvania residents with such information." *Id.* at 7. The exchange of three e-mail messages between the parties, described by the court as "minimal correspondence," likewise failed to amount to purposeful activity within Pennsylvania. *Id.* at 9.

### *Calder "Effects" Test Read Narrowly*

After finding that Sherrell was not subject to general jurisdiction, the court determined that the allegedly defamatory statements were also insufficient to warrant "specific" jurisdiction.

Specific jurisdiction under *Calder v. Jones*, 465 U.S. 783 (1984), requires that a defendant's tortious conduct was intentional, the effects were felt by the plaintiff in the forum state, and that the tortious conduct was expressly aimed at that forum. While noting that other courts have found that tortious acts committed over the Internet have triggered specific jurisdiction, the court distinguished those cases, which involved trademark infringement and extortion, from a pure libel claim.

The plaintiff's claim that the brunt of the defamatory statements was felt in Pennsylvania, was "without any evidentiary support." Moreover, the alleged "defamatory statements concern the Plaintiff's non-Pennsylvania activities and impugn his professionalism as a nationally-recognized health advocate." *Id.* at 10. While granting that it was foreseeable that the defendant's speech might have a harmful effect in Pennsylvania, the Court held that "unless Pennsylvania is deliberately or knowingly targeted by the tortfeasor, the fact that the harm is felt in Pennsylvania from conduct occurring outside Pennsylvania is never sufficient to satisfy due process." *Id.*

### *Pro-First Amendment View of the Internet*

The decision concludes with a fairly strong statement of the First Amendment concerns with exercising jurisdiction in such circumstances, noting that "we cannot help but think that the exercise of personal jurisdiction over non-commercial on-line speech that does not purposefully target any forum would result in hindering the wide range of discussion permissible on listserves, USENET discussion groups and Web sites that are informational in nature." *Id.* at 11.

The decision is available on-line at [www.paed.uscourts.government/opinions/99D0282P.htm](http://www.paed.uscourts.government/opinions/99D0282P.htm).

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## Alleged Chiquita Source Moves to Enforce Shield Law: Contends Sources Can Claim Protection

*The Court ruled on April 19, denying all of Mr. Ventura's motions discussed below. Because details of the decision were unavailable at print time, we will report them in next month's LibelLetter.*

In a most unusual argument — in what can fairly be characterized as a most unusual scenario altogether — the man identified as a confidential source for *The Cincinnati Enquirer* investigative reporters for their controversial stories on Chiquita Brands International, Inc., has sought to bar prosecutors from using any evidence obtained from the reporters that identifies him as a source. George G. Ventura, a former lawyer for Chiquita and the identified source, was indicted by Ohio on ten felony counts involving his alleged participation in the interception of stored voice-mail and computer systems of Chiquita by the *Enquirer* reporters. Ventura has filed a motion in limine to exclude identification testimony from the two reporters, Michael Gallagher and Cameron McWhirter.

### *Reporters Agree to Testify*

Gallagher, fired last June by the *Enquirer*, pled guilty last September to two felony charges involving his interception and accessing of voice-mail communications from the internal Chiquita system and is awaiting sentencing. It has been reported that in his plea agreement, he agreed to turn over all of his notes and sources for the Chiquita stories and to testify at Ventura's trial in exchange for receiving probation and not a prison term. Gallagher is also being sued by Chiquita in a civil action in federal court in Cincinnati.

McWhirter, who allegedly learned of the Chiquita access codes, but never actually accessed the Chiquita systems himself, was, according to Ventura, granted immunity for his conduct in exchange for his testimony and assistance in the prosecution against Mr. Ventura.

McWhirter currently works for *The Detroit News*. He has said that he has not and will not reveal any confidential sources.

Ventura, in a motion currently pending before Hamilton County, Court of Common Pleas Judge Ann Marie Tracey, has asked for an order prohibiting the prosecution from using any evidence "that stems from or will be presented through state witnesses, Michael Gallagher and Cameron McWhirter, that identifies George Ventura as a source of information concerning Chiquita or

***This case underscores the need for news sources, and not merely news reporters, to have the means to protect their confidentiality of the relationship.***

allowing access to any information possessed, owned or controlled by Chiquita." His motion is based upon "the laws, privileges, and public policy of the state of Ohio which are intended to protect the identify of individuals who are

connected with newspapers and the gathering or procuring of news and who qualify as 'news sources.'"

### *Shield Law/Policy Govern*

In an argument that is a bit of a cross-eyed stretch of the statutory language, Ventura contends that the language of the Ohio shield law for newspaper reporters, R.C. 2739.12, by its terms applies to him. The statute provides that "[n]o person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news" (emphasis as supplied by Ventura in his motion) shall be required to disclose the source of any information procured or obtained by such person in the course of his employment in any legal proceeding (described in broad terms). Ventura contends that as a source, he was "connected with" the gathering of information for the purpose of producing a news story.

But Ventura further argues that the clear public policy

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## Chiquita Source Moves to Enforce Shield Law

*(Continued from page 23)*

of the state of Ohio is to protect the ability of reporters to obtain information by protecting the identify of confidential sources. Any disclosure of the identify of confidential source(s) runs afoul of that policy and would jeopardize serious investigative reporting in the future.

Certainly the public's need to preserve the free flow of information will be ill served if McWhirter and Gallagher are permitted to testify on behalf of the prosecution, regardless of whether by subpoena or threat of prosecution, that Mr. Ventura was their source, notwithstanding their express, emphatic and repeated assurance to him of confidentiality. This case underscores the need for news sources, and not merely news reporters, to have the means to protect their confidentiality of the relationship.

Finally, Ventura argues that the judiciary has the power to recognize and apply a common law privilege such as that sought by Ventura. He cites *Cohen v. Cowles Media* for the proposition that courts have recognized the legally binding nature of promises of confidentiality to sources and that creation of a privilege is consistent with the application of contract principles vindicating the integrity of the agreements between reporters and sources. These principles become more important, Ventura says, when society at large, and not merely the parties, have an interest in maintaining their provisions.

Ventura concludes:

Ultimately, this case exemplifies the point that assurances of confidentiality made to a news source are illusory if self-serving, unscrupulous, or even well-meaning reporters, perhaps in this instance Mr. Gallagher, are intimidated by threats of prosecution into serving as arms of the state, and go back on these assurances.

Ventura cites no decisions in which a source has been allowed to assert a reporter's privilege protection. While we at LDRC have not found one either, we would welcome LDRC members letting us know if you are aware of similar arguments or decisions relevant to the issue.

## *Moving to Bar Contents of Taped Conversations*

Ventura has also filed a motion seeking to suppress the introduction of content of conversations he had with the two reporters taken from tape recordings of those conversations made by the reporters without his consent. Apparently, Gallagher and McWhirter, unbeknownst to Ventura, were taping at least some of the conversations that they had with him. The prosecution has indicated that it plans to introduce those tapes into evidence in Ventura's criminal trial. While not conceding that he is the individual on the tapes. Ventura argues that the conversations were illegally taped and must be suppressed.

Ventura states that the Ohio wiretap statute, which for these purposes is basically the same as the federal wiretap laws, allows one party to consent to taping, but not if the communication is intercepted for the purpose of committing a criminal offense or tortious act or for the purpose of committing any other injurious act. He contends that the fact that the reporters were charged with criminal conduct arising out of the use of the information that is contained on the tapes (e.g., access codes for the Chiquita voice-mail system) makes the taping itself unlawful.

He contends that the reporters' conduct was tortious as well, citing to the lawsuit brought by Chiquita against Gallagher for defamation, trespass, conversion, and other intentional misconduct. Moreover, the breach by the reporters of their promise of confidentiality to him constitutes promissory fraud, Ventura states. Ventura's conclusion — which is strongly contested by the prosecution — is that the wrong the reporters did or are doing with the information on the tapes is the kind of illegal, tortious, or injurious action that renders the original taping unlawful.

The Government has countered that the reporters had no illegal, tortious, or injurious purpose in mind when they taped the conversations. The acts cited by Ventura as criminal or tortious, are subsequent acts unrelated to the interceptions. Moreover, the case law applies the criminal, tortious, injurious exception to otherwise lawful taping only to instances where the consenting party's purpose in taping the calls is to injure the non-consenting party.

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## Chiquita Source Moves to Enforce Shield Law

(Continued from page 24)

Ventura also argues that illegally intercepted communications are not admissible into evidence. The State disagrees, arguing that evidence of Ventura's participation with Gallagher and McWhirter in unlawful activity can be introduced at least, where as in this case, the government was not involved in the taping. The policy of the provision, and the case law interpreting the statute, supports the notion that a wrongdoer cannot suppress evidence of wrongdoing made by a confederate.

Ventura counters that as a source, he is not a *co-conspirator* with the reporters and he refutes the government's argument that there is a "clean hands" exception to the wiretap rules that allows the government to use that which it did not itself unlawfully tape. Ventura argues that those who illegal intercept telephone conversations should not be allowed to benefit from their ill-gotten gains and, in a footnote, reprises his public policy arguments in favor of protecting confidential sources.

### Selective Prosecution Argued

Ventura has also moved to dismiss the indictment on the basis of selective prosecution. He requests discovery of those involved with the decision to prosecute him but not McWhirter; *Enquirer* editors and attorneys who were involved and aware of the project and who, according to Gallagher's testimony, instructed Gallagher to destroy papers and tapes evidencing his interception and copying of Chiquita voice mails (and who, Ventura argues, may thereby be characterized as aiders and abettors or responsible for obstruction of justice or both); and the other source inside Chiquita that Gallagher allegedly identified. Ventura further argues that Gallagher himself, who was not indicted but instead allowed to plead to two low-grade felonies, got off very lightly compared to what is being thrown at Ventura, who is facing a ten felony count indictment with a possible twelve and a half years imprisonment and fines of \$37,500.

Ventura suggests that his prosecution may be at the behest of Chiquita, while the *Enquirer* participants were spared prosecution in exchange for other consideration: the \$10 million paid to Chiquita, the withdrawal of the story about Chiquita, and the "purging of the editorial staff" at the *Enquirer*.

## UPDATE:

### AT&T Wireless Adopts Policies of AT&T Long Distance On Subpoenas for Customer Records

We reported last month that AT&T Wireless Service maintained a policy of complying with any subpoenas for customer service records without any notice to the customer that its/his/her records were sought or provided. In a letter to The McGraw-Hill Companies, Inc, dated March 31, 1999, AT&T Wireless responded to a request from McGraw-Hill and reversed its prior policies and practices. AT&T Wireless adopted the more consumer-sensitive policies of its parent corporation, AT&T, which on behalf of its long distance services has long taken the position that it will notify customers of any request or subpoena for their records unless barred from doing so by applicable law.

AT&T Wireless wrote:

"In essence, AT&T's policy -- except where otherwise required by law -- will be to use reasonable means to provide customers written notification before providing customer-specific proprietary information in response to a subpoena or other legal process. AT&T will not provide notification, however, where government officials inform AT&T that such notification could jeopardize ongoing criminal investigations. Where applicable law, regulations or court orders require AT&T to treat subpoena notification in a different manner, AT&T will comply with applicable legal requirements.

Please understand that this policy, which calls for reasonable steps to notify customers as outlined, is not a contractual undertaking. AT&T will not charge it[sic] customers for the expenses related to notification."

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**UPDATE: AT&T Wireless***(Continued from page 25)*

AT&T indicated that the policy change would not be implemented until approximately mid-May because of necessary system and personnel changes and training, but that McGraw-Hill could indicate in the interim which numbers it wished to have protected in this fashion.

McGraw-Hill discovered the discrepancy in the policies when it learned that the cellular telephone records of one of its reporters had been sought (indeed, the subpoena had not been validly served on AT&T Wireless, but merely faxed to the company) and turned over to the defense counsel in a Colorado murder case. Counsel for the murder defendant sought these records, as well as through subpoena to the reporter, her notes and testimony, in order to determine more about the reporter's contacts with the local police and her interview with the murder defendant.

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## Michigan Judge Signs Newsroom Search Warrants Newspapers and Television Stations Ordered to Turn Over Riot Photos and Footage

In the aftermath of a riot that broke out on the campus of Michigan State University after a loss to Duke University in the NCAA basketball tournament, a Michigan judge signed newsroom search warrants and ordered three newspapers and eight television stations to turn over unpublished photos and footage of the riot so that prosecutors can identify the individuals involved. The media petitioners' motion to quash the subpoenae was denied on April 13 by East Lansing District Judge David Jordan. The judge agreed, however, after being advised by media counsel that newsroom search warrants were prohibited by federal law, to stay execution of the warrants.

One of the subpoenaed news organizations, WSYM in Lansing, complied with the subpoena and turned over unaired tapes of the riots. WSYM News Director Caryn Brooks stated that, "[i]n this instance — this unique instance — we felt that our corporate responsibility to the community and to help the police outweighs our journalistic privilege." See David Poulson, *Police Forcing Media to Give Up MSU Riot Photos*, *The Ann Arbor News*, April 6, 1999.

When Michigan State lost in the NCAA tournament on March 27, a crowd of approximately 5,000 rioted on the campus, setting cars on fire, breaking windows and generally causing mayhem. While Michigan police have arrested 27 individuals, the police are seeking others who may have been involved in the violence. On April 13, Judge Jordan ordered the newspapers and television stations — including the *Detroit Free Press*, *The Lansing State Journal* and *The State News* and WJBK, WKBD and WXYZ in Detroit, WJRT in Flint, WILX in Onandaga, WLNS in Lansing, WWMT in Kalamazoo and WZZM in Grand Rapids — to turn over unpublished photographs and footage. Several rolls of film were also seized from an area department store on March 29 and 31. Employees of the department store notified detectives when eight rolls of riot footage, five of which belonged to an Associated Press freelance photographer, were spotted.

All of the news organizations are in the process of appealing the ruling to the Circuit Court, Michigan's court of general jurisdiction, and will consider further appeals if necessary. A hearing on the appeal is scheduled for Thursday, April 22.

## "Shielding" the Identities of Advertorial Contributors

By Kelli L. Sager and Rochelle L. Wilcox

Just how far does the journalist's shield law extend? May a newspaper use the shield law to protect the anonymity of contributors of paid advertorials? If not, may it assert some other constitutional protection, such as the right to speak anonymously, to protect those identities? These questions were addressed by the California Court of Appeal recently in *Rancho Publications v. Superior Court*, 68 Cal. App. 4th 1538, 81 Cal. Rptr. 2d 274 (1999).

*Rancho Publications*, doing business as the *Downey Eagle* (the "Eagle") published advertorials from a group identified as "Save Our Hospital," challenging a community hospital's new affiliation with a for-profit managed care provider. The hospital subsequently filed a defamation suit against individuals that it claimed were responsible for similar public comments.

Although the *Eagle's* publications were not at issue in the defamation case, the hospital subpoenaed the *Eagle*, seeking the identities of the authors of the advertorials it published. The *Eagle* refused to comply, arguing that it was protected from divulging this information by California's shield law, codified both in the California Constitution at article I, section 1, and in the Evidence Code, at section 1070. It also contended that the contributors had a constitutionally protected right to speak anonymously, and it asserted that right on their behalf.

The trial court disagreed with the *Eagle's* claims and ordered production of the requested materials. When the *Eagle* refused, the trial court issued a contempt order, and the California Court of Appeal granted the *Eagle's* alternative writ.

### *The Application of the Shield Law to the Eagle's Claims*

The Court first addressed the *Eagle's* claim that the shield law, by its plain language, extends to paid advertorials and, indeed, all paid advertisements. California's shield law protects newspapers and other

entities from being held in contempt for refusing to disclose the source of information obtained for publication "or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Cal. Const. art. I, A7 2. The *Eagle* contended that under the California Supreme Court's cases interpreting the shield law, the *Eagle* was absolutely protected from divulging this information because it was not a party to the civil proceeding in which the information was sought. See, e.g., *New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 461, 273 Cal. Rptr. 98, 796 P.2d 811 (1990).

The California Court of Appeal declined to adopt the broad application of the privilege urged by the *Eagle*. The Court found that an essential prerequisite to application of the shield law is "that the unpublished information be prepared in the process of gathering 'information for communication to the public,'" and asserted that "[a]t a minimum, the phrase 'information for communication to the public' requires that the person or entity invoking the shield law be engaged in legitimate journalistic purposes, or have exercised judgmental discretion in such activities." *Rancho Publications v. Superior Court*, 81 Cal. Rptr.2d 274, 274 (1999).

Because the record presented to the trial court below did not include sufficient facts to determine if this prerequisite had been met, the Court declined to apply the privilege. *Id.* The Court did not, however, rule out the possibility that an advertorial could fall within the protections provided by the shield law. By way of example, the Court pointed to cases protecting letters to the editor and enunciating the possibility of protection for advertisements, where the newspaper can demonstrate that it exercised editorial judgment in accepting the advertisement. *Id.* at 279. Thus, with the proper evidentiary showing, an advertorial — or even an advertisement — could find protection in the

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## "Shielding" Identities

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shield law.

### *The Constitutional Protections Afforded Anonymous Speech*

The Court of Appeal did agree with the *Eagle's* claim that the anonymity of the contributors was constitutionally protected. Relying on *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *Talley v. California*, 362 U.S. 60 (1960), the Court found that there is a well-established constitutional protection for those who choose to speak anonymously, and that the important public benefit served by this type of speech requires that it be protected despite the potential dangers of its misuse. *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 274, 279.

Moreover, although both *McIntyre* and *Talley* involved laws banning certain forms of anonymous speech, this constitutional protection also applies to prevent compelled disclosure in litigation. *Id.* Indeed, as the Court of Appeal noted, the California Supreme Court has found that "the threats to liberty 'may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential.'" *Id.* (quoting *Britt v. Superior Court*, 20 Cal. 3d 844, 852-55, 143 Cal. Rptr. 695, 574 P.2d 766 (1978)).

The Court then looked to *Mitchell v. Superior Court*, 37 Cal. 3d 368, 208 Cal. Rptr. 152, 690 P.2d 625 (1984) — a case applying the federal constitutional journalist's privilege — for the guidelines in applying this qualified protection. Relying on *Mitchell* and other cases providing qualified immunity to those whose privacy interests are challenged, the *Rancho Publications* court held that Courts [must] carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights. Mere relevance is not sufficient; indeed, such private information is presumptively protected. The need for discovery is

balanced against the magnitude of the privacy invasion, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material. *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d 274, 281 (citations omitted).

Moreover, in striking this balance, the court must consider "a variety of interrelated factors, including the importance of confidentiality, whether a journalists (sic) are parties, whether plaintiffs have made a prima facie case of falsity, and whether the information sought 'goes to the "heart" of their suit ... or is only peripheral to that matter.'" *Id.* (citing *Mitchell v. Superior Court*, 37 Cal. 3d at 280).

The Court in *Rancho Publications* then found that the litigants had failed to establish a need for the information sufficient to overcome the qualified privilege. The advertorials warranted a high measure of protection because they "involved core political speech." *Rancho Publications v. Superior Court*, 81 Cal. Rptr. 2d 274, 282. Moreover, the hospital never claimed that the advertorials themselves were defamatory, but instead sought the names of their authors because the commentary was similar to the allegedly defamatory flyers over which the hospital was suing. The hospital hoped to use the information to impeach one of the named defendants in the lawsuit, all of whom had denied writing the advertorials. The Court of Appeal found this tenuous connection insufficient to overcome the contributor's rights of privacy, asserting that "impeaching a witness on a peripheral issue . . . is not a compelling reason to pierce the anonymity of constitutionally protected speech." *Id.* Because the hospital failed to provide a compelling reason for disclosure, the Court issued a writ reversing the trial court and quashing the subpoena directed to the *Eagle*.

*Kelli Sager is a partner and Rochelle Wilcox is an associate with Davis Wright Tremaine LLP in Los Angeles, CA, and represented the Downey Eagle in this matter.*

## California District Court Quashes Microsoft Subpoena to CNET News.com Reporter

By Kent Raygor and Amy Johnson

In a cautious victory for the qualified privilege, a magistrate judge in the Northern District of California granted the motion of CNET News.com journalist Dan Goodin for a protective order and to quash a subpoena issued by Microsoft Corporation that requested documents cited by Goodin in an article exposing Microsoft's hardball competitive tactics. *Sun Microsystems, Inc. v. Microsoft Corp.*, No. C 97-20884 (N.D. Cal. Mar. 22, 1999).

Although the decision will not be reported, it is the most recent victory in a series of battles between the media and the computer giant along the First Amendment front and represents a fortification of media rights against a disturbing trend of recent attacks by Microsoft and other large corporations against reporters, authors and professors.

But the case leaves unanswered a larger question: what impact does a court's protective order have on the reporter's privilege? Microsoft asserted that the documents it wanted were Microsoft e-mail messages produced pursuant to a protective order in the company's ongoing breach of contract and copyright dispute with competitor Sun Microsystems and that the reporter's privilege should yield to the parties' and the court's right to enforce the protective order. The court answered only the threshold question of what is required before a party may resort to the media for answers when it *believes* a court order has been violated. It did not answer the ultimate question Microsoft attempted to pose: whether a party may use the media to track down sources of *known* violations of court orders, or whether that burden should lie solely with the involved parties and courts.

### Background

Goodin was interrupted at breakfast last October when a process server knocked at his door, serving him a subpoena *duces tecum* requesting the

inspection and copying of all documents he used to write two articles posted on CNET News.com in late September 1998 detailing Microsoft's steady undermining of Sun Microsystems' Java, a competing technology that many commentators have suggested has the potential to threaten Microsoft's dominance in the lucrative operating systems market and the accompanying leverage the company maintains in related markets like software.

Through its spokespersons in news articles covering Goodin's subpoena, Microsoft asserted a conversion-type theory: the company just wanted its documents back (a strange argument given its subpoena's request to merely inspect and copy the documents). However, Microsoft's counsel later acknowledged in its papers and in discussions with Goodin's counsel that it sought the documents because it believed they might reveal who had allegedly violated the protective order governing Microsoft's case with Sun.

Goodin sought his own protective order and asked the court to quash the subpoena, asserting that he had promised confidentiality to his source and that such source-seeking conduct was directly prohibited by the qualified First Amendment privilege.

### The Arguments

Citing *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), Goodin argued Microsoft had not even attempted to make the showing required to defeat the privilege — that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. (*Shoen* involved a request for the notes of a non-party author that contained evidence useful to the case.) The purpose of these factors, common to many circuits, is to prevent fishing expeditions in the First Amendment context; parties who request

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## Microsoft Subpoena

*(Continued from page 29)*

information from reporters must prove there is truly a need for the information and no other way to get it.

Goodin argued further that Microsoft's subpoena was based on the unproven assumption that there had been a violation of the protective order. First, if the documents had been broadly distributed, the source might not have been subject to this court's protective order. The documents might have been produced in any number of Microsoft legal proceedings, the largest of which was the antitrust case brought by the Department of Justice ("DOJ") and up to twenty states.

Further, if the leak had come from Microsoft itself, it would not violate the protective order; under the order's terms, parties were allowed to use their own documents as they pleased. Goodin argued that before Microsoft turned to him, it should have deposed all parties with access to the documents — and their attorneys and their respective staff and office personnel, as well as court personnel — to determine there was no other route to the information.

Finally, Microsoft had not even proven that the documents themselves were covered by the order. A special master had been appointed in the Sun/Microsoft case to classify the documents and was still making determinations.

Microsoft, in turn, argued that statements in Goodin's articles referring to "evidence not yet public" and "evidence in Sun's possession" proved that the information came from someone subject to the protective order in the Sun case. To protect the secrecy of its documents and to maintain the protections of the order, Microsoft had a duty to track down the leak. Further, the court had a duty to enforce its own orders by locating violators. Microsoft also said that the leak had not come from within the company and relied on a letter from Sun's counsel suggesting the same for Sun; no declarations from company personnel were provided in support of these statements.

The company cited *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), in which a journalist covering the widely publicized Manson family murder trial reported information he received in violation of a gag order and was ordered to reveal his source. That court ruled that a reporter's right to protect his confidential source must yield to the court's interest in enforcing its orders to ensure that a criminal defendant receives a fair trial.

At the December hearing on Goodin's motion before Magistrate Judge Patricia V. Trumbull, the parties and the court agreed that the issue of the interaction of the privilege with a court order in a civil case was an issue of first impression in the Ninth Circuit.

### *The Court's First Order*

Judge Trumbull ruled in January that Microsoft had not met the showing required to pierce the First Amendment privilege. But she required further briefing and evidence, emphasizing that "[a] protective order is of little value in protecting legitimate privacy interests if the court is unable to enforce its terms."

The court asked Microsoft to prove its unstated assumptions by submitting briefs and declarations addressing (1) whether the documents disclosed to Goodin were protected by state confidentiality statutes, whether they had been reviewed by the special master, and the outcome of that review; and (2) whether Microsoft had turned over any documents to the DOJ, or whether the documents had been made public in any way.

Microsoft's response indicated that some, but not all, of the documents had been reviewed by the special master; that the documents were subject to varying levels of protection; and that all but one had been turned over to the DOJ and the states.

### *The Court's Second Order*

The court's second order was brief; it granted Goodin's motion, noting that because the

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## Microsoft Subpoena

*(Continued from page 30)*

documents at issue were distributed to many people at Microsoft and the DOJ, the court could not conclude that Goodin's source had "most likely" been someone who was bound by the protective order, and under those circumstances would not require a reporter to turn over documents that might reveal a confidential source.

As of press time, Microsoft had not challenged the judge's decision.

### *Conclusions and Unanswered Questions*

This outcome should be encouraging. The order reinforces the idea that media subpoenas should not be used as fishing expeditions, even when a court order may have been violated. Microsoft, suspecting a leak, tried to shift the burden to the reporter to prove that there was no violation or, alternatively, to reveal the identity of the violator. The court implicitly found that the media have no part in such processes of elimination. A party must first prove that the allegedly leaked information "most likely" came from someone bound by the protective order before it gets to the larger issue of whether the reporter should reveal the identity of a violator.

Because Microsoft failed in its initial showing, the court never had to address the potentially more disturbing issue of whether the parties or the courts may use a reporter to track down leaks, or whether those entities themselves should bear that burden. As companies increasingly use protective orders to protect their trade secrets and confidential business information in civil litigation, however, reporters nationwide who come into possession of information covered by those orders will likely encounter this issue.

*Kent Raygor, Robert Shore and Amy Johnson of Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, represented Dan Goodin in this case.*

## NORIEGA REVISITED:

*Ex Parte State Record Co., 504 S.E. 2d 592 (S.C. 1998), cert. denied, 67 U.S.L.W. 3611 (U.S. Apr. 6, 1999)*

### *Is the prior restraint threat higher now?*

By Stuart F. Pierson

B.J. Quattlebaum was indicted for armed robbery, assault with intent to kill and murder. Following his arrest, the police secretly videotaped the first conference with his counsel, telling no one for over a year. Shortly before his trial, with the State seeking the death penalty, Quattlebaum learned the tape had been leaked to a local television station. He immediately sought a temporary restraining order, which the trial court promptly issued, prohibiting any dissemination or characterization of the tape.

Then, with notice to the State's main newspaper, the court held a hearing, and then issued an injunction, to terminate when the jury was empaneled, prohibiting all trial participants and media from disseminating the contents of the tape. The injunction permitted, however, revelation of the fact of the recording and the identity of the participants. In issuing the injunction, the court made no specific findings concerning the likelihood that measures short of a prior restraint would mitigate the risk to a fair trial, gave no specific characterization to the substance of the tape, and gave no specific consideration to the possibility that the tape had been disseminated beyond the media.

The media complied with the injunction. Quattlebaum was tried, convicted and sentenced to death. The State's main newspaper then took an appeal, challenging the prior restraint.

In addressing issues identical to those in *United States v. Noriega (Cable News Network)*, a majority of the South Carolina Supreme Court found a different, yet apparently still flawed path to

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## NORIEGA REVISITED

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approving the trial court's orders. Acknowledging the controlling authority of *Nebraska Press Ass'n v. Stuart*, 427 U.S.539 (1976), the court had little difficulty holding that the first and third elements of the Supreme Court's test were satisfied: They had no doubt that the public dissemination of the tape presented the potential of impairing Quattlebaum's right to a fair trial, and they were certain that the injunction would be effective to remove that risk.

On the second element, however, they hit a familiar snag. They refused to accept that the Supreme Court meant what it said: "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity." It could not have meant that the inquiry should merely be whether alternatives to a prior restraint are "likely to mitigate" the threat to a fair trial; "it could always be argued that other measures would, to some degree, 'mitigate' the effects of pretrial publicity."

The Supreme Court, the South Carolina tribunal concluded, must have meant that the restraint was necessary to "ensure" a fair trial; otherwise, it would be virtually impossible to issue a valid prior restraint. They reached this conclusion without a full consideration of the facts of *Nebraska Press* and while recognizing that four of the Justices had appeared to favor an absolute bar.

The majority also noted the litigation course and opinions in *Noriega*, agreeing with commentators that the principal decisions of the Florida district court and the Eleventh Circuit erred in justifying the prior restraint on the refusal of CNN to turn over the tapes. The South Carolina majority failed — or refused — however, to take the logical next step: *i.e.*, to assume that the threatening tape included the same incriminating confession and admissions that were presented in *Nebraska Press*.

Indeed, like the courts in *Noriega*, the majority merely presumed that the tape's content was so prejudicial that the trial court was forced to make a

choice between the First and Sixth Amendments. As many have observed, when the content of the allegedly threatening material is not revealed, the inquiry should begin with an assumption that it contains directly incriminating statements of the accused, and the court should then consider whether there is a stronger case for a prior restraint than presented in *Nebraska Press*.

While also missing that fundamental point, the dissenting judge exposed the second flaw in the majority's opinion: As the Supreme Court's prior restraint precedents are predicated on a presumption against prior restraints, even in the context of pretrial proceedings in criminal cases, there is no direct conflict between the First and Sixth Amendments, because a court is called upon to balance only the risk of impairing the defendant's fair trial right against the certainty of the most intolerable infringement of First Amendment freedoms. In such a calculus, while it may be true as a practical matter that no prior restraint may pass muster under *Nebraska Press*, that is the law as it now stands. With that observation, the dissent then joined the majority in inviting the Supreme Court to revisit its opinion in *Nebraska Press*.

On April 5, 1999, the Supreme Court denied certiorari.

Even with its apparent flaws, this decision may have more force than the Eleventh Circuit's decision in *Noriega*: It is more carefully reasoned, it invites the Supreme Court to say that it is wrong in its revision of the *Nebraska Press* test, and it is a second, direct affirmation of a prior restraint that appeared to fail that test.

*Stuart F. Pierson is a partner at Troutman Sanders in Washington, DC. He was co-lead counsel for CNN in U.S. v. Noriega.*



## Gag Orders Construed Narrowly

By John Borger

Two Minnesota trial court orders prohibiting attorneys in murder prosecutions from talking with the news media about "any aspect" of the cases shrank under challenge from the *Star Tribune* in March.

Although the courts technically left the orders in place, the orders were "construed" to reach no further than general provisions of the Minnesota Rules of Professional Conduct, thereby eliminating the objectionable features of the original orders. *State v. Henderson*, No. C8-99-373, (Minn.Ct.App. Mar. 17, 1999).

### *Gang Murder/Anonymous Jury*

The first order came in the prosecution of Keith Henderson for the apparently gang-related murder of a police informant. Juwan Gatlin's body had been found in an alley, shot nine times. As trial began in February 1999, Hennepin County District Court Judge Thor Anderson empanelled an anonymous jury over the defendant's objections. Anonymous juries are permitted in Minnesota but are rare and controversial. Defense attorney Richard Trachy told the court that he intended to appear on a radio talk show to discuss anonymous juries. Judge Anderson on February 24 directed that "until further order of the court" all attorneys on the case, police officers, and defendant's investigators must "not talk with the media about any aspect of the case."

The effect was immediate, with trial attorneys refusing to talk to reporters even about scheduling issues and the spelling of witness names. On March 1, the *Star Tribune* asked Judge Anderson to reconsider, noting that a similarly broad order prohibiting all comments had been overturned as a First Amendment violation in *United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (arising from the World Trade Center bombing.) The *Star Tribune* acknowledged that the United States Supreme Court had approved some restrictions on public comments by trial counsel in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991),

but argued that those restrictions did not extend to any and all statements.

The *Gentile* standards were similar to Rule 3.6 of the Minnesota Rules of Professional Responsibility, which requires attorneys to "not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing a pending criminal jury trial." The newspaper argued that Rule 3.6 provided enough restrictions on attorney comment to protect a fair trial, and that if the court believed additional protection was necessary it should provide appropriate cautionary instructions to the already-selected jury or sequester the jury.

At oral argument on March 1, Judge Anderson appeared reluctant to simply rely upon the Rule 3.6 standards, commenting: "I'm not very impressed with changing the order to say they can't say anything that materially affects the case because that's a subjective, unenforceable, ununderstandable standard." However, he explained his order in these terms: "I think it's one thing, for instance, if the prosecutor or the defense counsel would tell your reporter 'court is scheduled to start at 9:00 tomorrow morning.' Now, that would technically, I think, violate my order but would not violate what I had in mind. However, I think a comment by one of the parties, 'We have a witness tomorrow that is really going to be powerful,' I think that would violate it the way it's written."

Judge Anderson denied the motion for reconsideration on March 3, observing that the original order had been issued

in response to a situation which developed at the hearing involved. The defendant moved for a change of venue and continuance because of the pretrial publicity occurring that very day [news coverage of the order allowing an anonymous jury]. Defense counsel then announced that he intended to appear on a radio talk show to educate its

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## Gag Orders

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listeners as to the defense position on ongoing events. So the attorney for the party allegedly burned by the publicity was enroute to the fire with a can of gasoline."

He refused to vacate or modify his gag order.

The *Star Tribune* challenged that refusal on March 4 by asking the Minnesota Court of Appeals to issue a writ of prohibition against the gag order. The Court of Appeals waited for responses from the trial attorneys and the trial judge, none of whom actually submitted a response.

While that petition was pending, trial began against Kawaskii Antonio Blanche and Montay Antwone Bernard, accused of participating in a gang shooting that took the life of 11-year-old bystander Byron Phillips. Jury selection was almost complete when, on March 10, the *Star Tribune* published a background article that began: "Months before he allegedly shot an 11-year-old Minneapolis boy to death while aiming at a rival gang member, Kawaskii Blanche vowed that he would murder someone, court records say." The only statement in the article that was attributed to or obtained from any trial counsel was that "Bernard's attorney plans to argue that his client isn't a gang member and was at home when the stray bullet hit the boy in the chest."

Hennepin County District Judge Richard Scherer expressed his displeasure with the article that day, but denied defense motions for dismissal, stating that the 12 jurors already selected were intelligent and committed to deciding the case based solely on the evidence presented in the courtroom. The judge had told each juror as they were selected to avoid any contact with the media, and he stated that "I have faith that they have and will continue to follow that admonition." Nevertheless, on March 11, he told counsel: "I am issuing a gag order to the parties and attorneys. They are not to be talking to the press."

The *Star Tribune* filed a motion to vacate that order on March 12, but could not be heard until March 17. Testimony began on March 15, and trial counsel declined to answer any questions at all from reporters,

citing the gag order, although one smiled as he backed away from television cameras and commented that "it's been a good first day."

On March 16, the Court of Appeals denied the *Star Tribune's* petition for a writ of prohibition, pointing to *Gentile* for the principle that Rule 3.6 was "a permissible restraint on [trial] participants' speech. It held that the newspaper had not shown that "the order as properly construed is so broad as to constitute an unconstitutional restriction on speech."

In order to reach that conclusion, however, the Court of Appeals also stated: "The district court's comments on the record, and its written order explaining its February 24, 1999 order, indicate that the order should not be construed as restricting the speech of participants beyond the limitation provided in Minn. R. Prof. Conduct 3.6." It specifically ordered that the trial court's order "is construed as restraining only that speech by the participants identified in the order that meets the standard provided in Minn. R. Prof. Conduct 3.6."

The next day, at the hearing in Blanche/Bernard, Judge Scherer announced that he, too, would leave his order in place but construe it as restraining only speech meeting the standard of Rule 3.6.

Attorneys in the two cases promptly began answering reporters' routine questions without fear of sanction by the court. Both trials ended in convictions. Henderson and Blanche were convicted of separate murders. Bernard was acquitted of murder but found guilty of conspiring to commit murder and of committing a crime to benefit a gang. *The Star Tribune's* accounts of the guilty verdicts included the immediate reactions of trial counsel. The prosecutor expressed pleasure with the verdicts, while defense attorneys outlined possible grounds for appeal.

Despite the formal denial of its petition for a writ of prohibition, the newspaper had achieved its larger objective and re-established access to important sources of information.

*John Borger chairs the Minneapolis media law practice for Faegre & Benson LLP. He represented the Star Tribune in the challenges to these two gag orders.*

## Sunshine in the Courtroom? Federal Court Camera Legislation Introduced

A bill that would allow all federal court judges — from the district court level to the United States Supreme Court — to open their courtrooms to cameras was introduced in Congress on March 25, 1999. The Sunshine in the Courtroom Act, introduced in the Senate by Sens. Charles Grassley, R-Iowa, and Charles Schumer, D-N.Y., and by Reps. Steve Chabot, R-Ohio, and William Delahunt, D-Mass., in the House, would allow, but not require, the photographing, electronic recording, broadcasting and televising of appellate and district court proceedings.

The decision to open the courtroom to cameras rests with the presiding judge. In proceedings with multiple judges, the senior active judge would generally decide. In en banc sittings of any U.S. Court of Appeals, however, the presiding judge would be the circuit's chief judge. The presiding judge in the U.S. Supreme Court will be the Chief Justice whenever the Chief Justice participates.

The bill also provides that witnesses must be informed of their right to have their faces and/or voices disguised. The provision, however, would not apply to parties to the action. By its terms, the act has a lifespan of three years.

The House passed a comparable bill last April but the Senate did not consider it.

## Publicity Rights in California May Be Changing

By Stephen G. Contopoulos and Bradley H. Ellis

The California Supreme Court has granted review in a case that reflects its Hollywood origins: the son of Bela Lugosi representing the plaintiff (of which he is executive vice president and counsel) against the creator of a charcoal sketch of the Three Stooges which the artist reproduced and sold on prints and T-shirts. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 68 Cal. App. 4th 744 (1998), review granted, 1999 Daily Journal D.A.R. 2551 (Mar. 17, 1999) ("Comedy III"). The current draft of this script ends with the son of Dracula the victor. The California Supreme Court may be poised to rewrite the ending, perhaps bringing the artist's work back to life, but the California Legislature is also vying to have the final cut.

California protects the publicity rights of celebrities, dead or alive. While the rights of celebrities to protect their name, voice, signature, photograph or likeness has its roots in the common law, *Comedy III* turns on the proper interpretation of California Civil Code Section 990, enacted in 1984. Section 990 provides that "[a]ny person who uses a deceased personality's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling; or soliciting purchases of, products, merchandise, goods, or services, without prior consent" shall be liable for actual damages, profits, punitive damages and attorneys' fees and costs. Civ. Code § 990(a). Consent is obtained from the successor-in-interest to the celebrity's rights (or the successor's licensee) who has registered his or her claim with the Secretary of State and paid the \$10 fee. Approximately 700 people are currently registered.

The statute provides specific exemptions for use "in connection with any news, public affairs, or sports broadcast or account, or any political campaign"

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## Publicity Rights

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(§990(j)); to "the owners of any medium used for advertising without knowledge of the unauthorized use" (§990(l)); and for use in a

"(1) [a] play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4),"

"(2) [m]aterial that is of political or newsworthy value,"

"(3) [s]ingle and original works of fine art,"

"(4) or [a]n advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3)" (§990(n)).

### *T-Shirts and Prints*

Without consent or license, Saderup sold prints and T-shirts bearing likenesses of the Three Stooges, which were reproductions of his original charcoal sketch of the comedy team. The products were "representational and unadorned, except by Saderup's signature." *Comedy III* at 747. The trial court, on stipulated facts and exhibits, found that Saderup had violated section 990, and entered judgment in favor of the plaintiff in the amount of \$75,000, which represented all of Saderup's profits, plus attorneys' fees of \$150,000. In addition, the trial court issued a broad injunction against Saderup's use of the image of the Three Stooges on all goods, products and merchandise and any other medium by which Saderup's art work could be sold.

On appeal, Saderup offered four grounds for reversal of the damages award, the first three of which the Court of Appeal quickly rejected. (The injunction did not survive the appeal because it was over broad.) First, Saderup argued that the "product" under Section 990 must be something other than the likeness, and all he sold was the likeness. The Court was not convinced that T-shirts

and prints were not products subject to the statute.

Second, Saderup maintained that section 990 reached only advertising uses. The Court had little trouble reading the statute, however, concluding that it prohibited both use on products and use for purposes of advertising or selling products. Third, Saderup argued that the Stooges remained "newsworthy," and therefore, the exception at subdivision (n)(2) applied. Again, the Court had little trouble concluding that the exemption meant what it said and applied to the use in "material that is of political or newsworthy value," and not the use of a newsworthy personality's name or likeness.

### *First Amendment Rejected*

Saderup's fourth defense — that his use constituted a form of speech protected by the First Amendment — garnered the Court's most detailed analysis. Saderup claimed that if section 990 prohibited his T-shirts and prints, a form of free expression, then it was a presumptively unconstitutional content-based restriction.

The Court, however, could find no message in the T-shirts or prints, and thus held that the First Amendment offered Saderup no defense. The reprints of Saderup's charcoal sketch were, as Saderup had conceded, "no more or less than the Three Stooges' likenesses." *Id.* at 753.

The Court, citing several cases from California and other jurisdictions, observed that it was not the first to draw a distinction between using a celebrity's image to convey an informational or other type of message and merely selling a representation of the image. See e.g., *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995), and *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S. 2d 501 (1968) (images of football star Joe Montana and comedian Pat Paulsen on posters were sufficiently tied to newsworthy events or matters of public interest to be protected uses). *Compare Factors etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978) (the sale of posters of Elvis Presley bearing the words "In Memoriam"

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## Publicity Rights

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and the years of his birth and death was not protected because it amounted to nothing more than the sale of the singer's likeness).

Undeterred, Saderup argued that his reproductions "must command full First Amendment protection, as art." *Id.* To support this argument, Saderup relied on *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), in which the court held unconstitutional a municipal law requiring permits for street vending of goods as it applied to a group of painters, sculptors and photographers. There, the Second Circuit opined that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." The California court remained unpersuaded that Saderup's T-shirts and prints were entitled to First Amendment protection.

The Court did not believe that the fact that

reproductions came from a single original demonstrated by itself that they were "expressive of any message, idea, emotion — or anything, other than the likenesses of the Three Stooges." *Id.* at 754. Second, the Court believed that a finding that the T-shirts and prints must be considered "art" for constitutional purposes merely because they reproduced Saderup's sketch, would eviscerate the property right of celebrities. *Id.* The Court summarized its conclusion as follows: "Simply put, although the First Amendment protects speech that is sold (citations omitted), reproductions of an image, made to be sold for profit, do not per se constitute speech." *Id.*

The Court analogized section 990 to the nation's copyright, patent, trademark and trade name laws, which do "not seek to regulate protected speech, but rather to secure and protect a declared interest in property." *Id.* at 755. The Court, referring to the list of exemptions found at subdivision (n), went on to note that in its view section 990 provided "plentiful allowance" for certain uses of a deceased celebrity's name or likeness. *Id.*

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## Dead Celebrity Bill is Very Much Alive in California

By Tom Newton

Legislation that would repeal certain statutory exemptions from the law prohibiting the unconsented use of the name or likeness of deceased celebrities sailed out of California's Senate Judiciary Committee recently on a vote of 8-0.

SB 209 by Senator John Burton would repeal exemptions that permit the unconsented use of a deceased celebrity's name, voice, signature or likeness in plays, books, magazines, newspapers, works of fine art and material that has political or newsworthy value and replace these exemptions with a single sentence that exempts uses "protected by the constitutional guarantees of freedom of speech or freedom of the press." The bill also extends the law's protection from 50 years following the celebrity's death to 70 years.

The bill does not change existing law which exempts

unconsented uses in any "news, public affairs, or sports broadcast or account, or any political campaign. . . ." The bill also leaves untouched current law that protects publishers who publish advertisements in violation of the law unless it is established they had knowledge of the unauthorized use.

The bill is supported by Robyn Astaire (spouse of Fred) and the Screen Actor's Guild and is principally opposed by the motion picture industry. At the hearing Burton pledged to continue working with opposition to address the concerns. CNPA is working with Burton's staff to amend the bill to ensure it does not inadvertently overturn California case law that has protected newspapers' ability to publish photographs of celebrities and to subsequently use those published photographs in promotions for the newspaper.

*Tom Newton is with the California Newspaper Publishers Association Legislative/Legal Department.*

## Publicity Rights

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But what if the art is "expressive of a message, idea or emotion" that would "summon First Amendment protection?" *Id.* Would the sale of reproductions of such art be beyond section 990's reach? What if Saderup had meant to convey a message, idea or emotion through his sketch of the Three Stooges? Would the Court have ruled differently? The Court's opinion suggests that it would have. Arguably, however, subdivision (n)(3), which permits use in "single and original works of fine art" would, by negative implication, still not protect the sale of reproductions of such art despite the fact that it conveyed a message. If so, is the statute unconstitutional?

### *California Senate Bill 209*

The California Legislature along with the California Supreme Court will likely have a say in answering those questions. On April 5, in response to the Ninth Circuit's application of subdivision (n) to exempt from liability the use of film clips of Fred Astaire in an instructional dance video, *Astaire v. Best Film & Video Corp.*, 136 F.3d 1208 (1997), the California Senate, on a 30 to 1 vote, passed and sent to the Assembly S.B. 209 which would amend section 990 by, among other things, eliminating the enumerated exemptions of subdivision (n). They would be replaced by the following provision: "This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press."

Proponents of the amendment (the acting community) believe that in *Astaire* the Ninth Circuit followed form over substance, and opened the possibility that, for example, the sale of magazines and books comprised of nothing other than images of celebrities would be exempt from liability even though the use of those same images on T-shirts

would be prohibited. Opponents of the proposed changes to section 990 (largely networks and studios) argue that the list of exemptions provides a measure of certainty and that eliminating them would invite litigation, thereby stifling creative expression.

The Senate passed S.B. 209 after its author said he was still negotiating with film studios to find compromise language. What will emerge from the Legislature remains in doubt, then, despite the overwhelming support for the amendments in the Senate. So, too, do the intentions of the Supreme Court remain unclear. Will they put a stake through the heart of the plaintiff's claim? Will Mr. Saderup's image of the Three Stooges rise from the dead? As they say in Hollywood, stay tuned.

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## Foul Weather Not Fair Game Court Finds No Duty Arises Out of Weather Forecasts

Relying upon the well established principle that media owe no duty to the general public, the U.S. District Court for the Southern District of Florida has ruled on a motion to dismiss that the Weather Channel is not liable for the alleged weather-related death of a Florida fisherman. The family of Charles Cobb sued the station for \$10 million after adverse weather conditions caused him to be thrown from his fishing boat and drown in June 1997. The family claimed Cobb watched the Weather Channel before his departure and received no warning of potentially dangerous weather. *Brandt v. The Weather Channel, Inc.*, No. 98-10060-Civ-Paine, 1999 U.S. Dist. LEXIS 3998 (S.D. Fla. Mar. 18, 1999).

The court found the Cobb family's wrongful death claim an unreasonable expansion of tort law, refusing to "impose on a television broadcaster of weather forecasts a general duty to viewers who watch a forecast and take action in reliance on that forecast." 1999 U.S. Dist. LEXIS 3998, at \*5.

In its decision, the *Brandt* court quoted from *Brown v. United States*, 790 F.2d 199, 204 (1st Cir. 1986), which held that a weather forecast is a "classic example of a prediction of indeterminate reliability and a place peculiarly open to debatable decisions." Inherent in the nature of a prediction is the possibility of error. To impose such a duty would result in enormous potential liability for broadcasters and "chill the well established first amendment rights of the broadcasters." 1999 U.S. Dist. LEXIS 3998, at \*6. The court declined to create such a duty.

The court also rejected the Cobb family's assertion that the Weather Channel breached its contractual obligation by withholding weather information from viewers, finding no enforceable contract, express or implied, between Cobb and the Weather Channel.

## Maryland High Court to Rule on Public Access to Governor's Calendars and Phone Bills

By Patrick J. Carome and Jonathan J. Frankel

The Maryland Court of Appeals, the state's highest court, recently heard argument in a case that will determine whether the Governor's telephone bills and appointment calendars must be made available for public inspection under the state's Public Information Act. *Office of the Governor v. The Washington Post Co.*, No. 117 (Md. 1998).

In late 1996, in connection with its ongoing coverage of Maryland politics, *The Washington Post* formally requested copies of Governor Parris N. Glendening's appointment calendars under the Act, together with two years' worth of his and his staff's telephone records. The Office of the Governor denied the requests on the ground that both types of records were covered by executive privilege, since disclosure of the records, in its view, would threaten the Governor's ability to conduct policy deliberations. The Office also claimed that the calendar records were not "public records" covered by the Act and subject to disclosure.

### *Categorical Privilege Sought*

The parties continued negotiations, and *The Washington Post* ultimately offered to narrow its request to six months of the Governor's calendars and six months' worth of records for telephones belonging to the Governor and certain named staffers. In late 1997, when even these accommodations proved unsuccessful, *The Washington Post* filed suit in the Circuit Court for Anne Arundel County, as provided for in the Act.

The Governor's Office moved for summary judgment, arguing that it was entitled to a *categorical* executive privilege for these records that excused the Office from having to prove that the disclosure of any particular record would result in some specific harm to the Governor's deliberations. *The Washington Post* cross-moved for summary judgment on the ground that executive privilege — in particular, the privilege for the "deliberative processes" of an executive official — did not extend to documents like calendars and telephone bills that contained no deliberative content within their four corners.

While the Circuit Court expressed sympathy for the

(Continued on page 40)

## Maryland High Court to Rule on Public Access

(Continued from page 39)

Office's policy argument that disclosing the Governor's telephone contacts and meetings might make his work more difficult, it rejected the idea that the Office was entitled to a categorical executive privilege that excused it from having to provide specific evidence of harm.

The court directed the Office to provide a memorandum identifying the particular telephone and calendar records whose release would harm the Governor's ability to deliberate, and it promised to redact those records.

After some procedural skirmishing, the Office produced its redaction memorandum; however, the memorandum attempted to make a particularized claim of executive privilege only for a handful of the records at issue — fewer than two percent — and then only in extremely general terms. (By contrast, the Office proposed redacting about sixty percent of the records on bases *other* than executive privilege, such as nonstatutory claims that disclosure would reveal personal material, or arguments that the Office was obligated to release call detail only for those calls that it could prove to have been made by the Governor and the named officials themselves.)

### *Failure to Meet Burden of Concrete Injury*

On October 23, 1998, the Circuit Court ruled that the Office had once again failed to meet its burden of demonstrating that the disclosure of any particular calendar or telephone record would cause concrete injury to the deliberations of the Governor and his aides. The court also held that the Office failed to prove any of its other statutory and nonstatutory bases for redaction. It therefore ordered the Office to disclose the requested records within ninety-six hours.

The Office immediately filed a notice of appeal and asked the Court of Special Appeals, the intermediate appellate court, for a stay, at which point the Circuit Court stayed its own order. On November 18, before briefing in the intermediate court, the Court of Appeals granted certiorari *sua sponte* and set the case for expedited briefing in the high court.

### *Reconstructing the Decision Making Process?*

Briefing in the Court of Appeals largely focused on the question of executive privilege. The Office of the Governor again claimed a categorical privilege for these materials,

rooted in the traditional protection for executive officials' deliberative processes, together with a putative state gubernatorial privilege analogous to the federal one for presidential communications. It maintained that releasing these records would chill citizens from contacting the Office with their concerns and make it impossible for the Governor to secure counsel from advisors inside or outside the government or conduct confidential negotiations. The Office argued that allowing a requestor to survey an official's telephone bills and appointment calendars would enable it to reconstruct the official's decision making process, since a diligent requestor could combine the contact information found in the records with its own knowledge about what issues were before the government at the time of the contact.

### *The Public Information Act*

*The Washington Post* replied that the Office was taking the very goal of the Public Information Act — enabling the public to learn something about the activities of government officials — and holding it up as the primary evil to be avoided. *The Washington Post* argued that an entry on a telephone bill or appointment calendar discloses only the *fact* of a communication, not its content. It argued further that Maryland and federal cases uniformly limit executive privilege claims to documents that actually reveal the substantive content of advisory opinions, policy recommendations, and other internal executive deliberations; the privilege does not permit officials to shield the very fact that a communication ever took place, nor does it allow them to shield communications with parties outside the executive.

As a practical matter, *The Washington Post* argued, disclosing executive contacts would not intolerably chill the public's communications with the Governor's Office, any more than the adoption of rules requiring the disclosure of legislative contacts had ended lobbying at the legislature; moreover, it was especially inappropriate to assume such harms in this case, where the Governor's Office itself had been unable to tie the release of any particular record to the harms it claimed.

The Court of Appeals heard arguments on March 7, 1999. Questioning by the seven judges was very active. A decision is expected by the end of the Court's term this summer.

*Patrick J. Carome and Jonathan J. Frankel, attorneys with Wilmer, Cutler & Pickering in Washington, D.C., represented The Washington Post Company.*



## State "Stalking" Statute Creates No Civil Action for Damages

### Georgia Court Rules Violation of Criminal Statute Provides No Private Remedy

By Joseph R. Bankoff

The Georgia Court of Appeals has ruled that the Georgia criminal statute which prohibits "stalking" does not create a private cause of action in tort in favor of the victim. In *Troncalli v. Jones*, \_\_\_ S.E.2d \_\_\_, 1999 WL 134688 (Ga. App. Mar. 15, 1999), the Georgia Court of Appeals reversed a general verdict by a jury awarding \$290,891 in compensatory and punitive damages and remanded for retrial on the claims of invasion of privacy, intentional infliction of emotional distress, and assault and battery.

The evidence showed that defendant had followed plaintiff in a high speed car chase after a "touching" incident at a business cocktail party. That encounter ended when plaintiff approached two police cars stopped in a parking lot. The officers asked defendant to leave when he arrived less than a minute later. The following evening defendant encountered plaintiff at a business meeting where he again touched her and said that she had better be careful, because someone might be watching her. Defendant came to plaintiff's home several days later and banged loudly on the door while the plaintiff was away, but her teenage daughter was at home. The evidence showed that following these incidents, plaintiff developed shingles, experienced nausea and vomiting, became depressed, and sought counseling.

Plaintiff filed a complaint seeking damages under five claims: (1) stalking; (2) intentional infliction of emotion distress; (3) negligent infliction of emotion distress; (4) invasion of privacy; and (5) assault and battery. The case was tried to jury which returned a "general verdict" in favor of plaintiff for \$45,000 in compensatory

damages and \$245,891 in punitive damages.

The Georgia Court of Appeals reversed, finding that stalking is not a tort. The court, however, rejected defendant's directed verdict attack on plaintiff's claims for invasion of privacy and intentional infliction of emotional distress. The court held that the evidence could support a finding that defendant intruded on plaintiff's seclusion or solitude, or into her private affairs and defendant's conduct was outrageous and extreme, rather than merely rude or insulting. The court concluded, however, that a new trial is required because it is not possible to determine whether the jury's general verdict was entered on a proper basis.

In rejecting plaintiff's claim for damages based on violation of the criminal "stalking" statute (O.C.G.A. § 16-5-90), the court followed well established precedent in Georgia. "It is well-settled that '[t]he violation of a penal statute does not automatically give rise to a civil cause of action on the part of one who is injured thereby,'" citing *Cechman v. Travis*, 202 Ga. App.255, 256(1), 414 S.E.2d 282 (1991). The record showed that plaintiff had relied heavily on stalking in the opening statement and it formed a separate charge to the jury.

Commenting on the claim for invasion of privacy, the court observed that the claim here was based on the "intrusion into solitude and private affairs" branch of the tort. Because there was a clear "touching," the court was able to distinguish and avoid those cases which have drawn a line between physical and non-physical intrusions. The court also observed that other states have also addressed stalking claims under their invasion of privacy tort and noted the problems in carefully crafting the parameters of this potentially volatile tort. See 1999 WL 134688, at \*3 n.2.

*Joseph R. Bankoff is a partner at King & Spalding in Atlanta, Georgia.*

## New York Tax on Shopping Guides Does Not Violate First Amendment

The New York Court of Appeals upheld a tax law exempting printing bills from sales taxes if the advertising space in shopping guides does not exceed 90 percent. *Stahlbrodt v. Commissioner of Taxation and Finance*, 92 N.Y.2d 646, 1998 N.Y. Slip. Op. 11282 (Dec. 17, 1998).

Peter Stahlbrodt is the publisher and distributor of *The Shopping Bag*, a weekly advertising paper for which he claimed a tax exemption under Section 1115(I) of the Tax Law. The Tax Law provides an exemption on printing services for such "papers" if the advertising in the weekly does not exceed 90 percent. "The 90 percent rule," as it is known, was instituted to ensure that "at least ten percent of the publication would be devoted to news of general or community interest, or community notices, thus restricting the exemption to those advertising papers that serve at least in part the same informational social purposes served by general newspapers and news periodicals." Slip op. at 2.

After an audit by the State Division of Taxation and Finance, Stahlbrodt was denied the exemption and the denial was upheld by the Tax Appeals Tribunal because the advertising in the weekly exceeded 90 percent of the paper. Stahlbrodt then sought a declaratory judgment challenging Section 1115(I) as facially unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Stahlbrodt alleged that the tax law amounted to "content-based discrimination against certain forms of expression, singles out a small subset of newspapers for differential tax treatment, and denies a class of shopping papers equal protection of the laws." Slip op. at 1.

The New York trial court rejected each of Stahlbrodt's claims and dismissed the complaint. The Appellate Division affirmed. On his appeal to the New York Court of Appeals, Stahlbrodt limited his claim to one ground: that "in making entitlement to

the shopping paper sales tax exemption turn on whether advertising comprises not more than 90 percent of the printed area, the provision discriminates among shopping papers based on their conduct and thus violates the First Amendment." Slip op. at 1. The Court of Appeals disagreed.

The court held that the tax law was one of general applicability, "levied against virtually all final sales of products and services. Neither the print media in general, nor shopping papers in particular, are singled out for special treatment." Slip op. at 3.

The court also relied on United States Supreme Court precedent, including *National Endowment for the Arts v. Finley*, 524 U.S. \_\_\_, 118 S. Ct. \_\_\_, 141 L. Ed. 2d 500 (1998), for the proposition that there is a "crucial constitutional distinction . . . between direct, content-based discriminatory regulation or penalization of expression, on the one hand, and subsidization of some expressions to encourage activities deemed socially desirable while remaining neutral as to other expressions." Slip op. at 3. Ruling that Section 1115 (I) is constitutional, the court indicated that the proper disposition of the declaratory action was an "adverse declaration to the plaintiffs, rather than a dismissal of the complaint." Slip op. at 4 (citations omitted). The Appellate Division's order was therefore modified, declaring Section 1115 (I) constitutional and granting costs to the defendant.

## California's Tax on Pay-Per-View Violates First and Fourteenth Amendments

Taxing the gross receipts of pay-per-view telecasts of boxing, martial arts, and wrestling violates the First and Fourteenth Amendments. So said the United States District Court for the Eastern District of California in a 42 U.S.C. § 1983 action seeking declaratory and injunctive relief, challenging California's Boxing Act tax. *United States Satellite Broadcasting Co. v. Lynch*, No. S-98-1838 (E.D. Cal. Mar. 12, 1999).

### *The Boxing Act*

The California statute, also known as The Boxing Act, imposes a five percent tax on the gross receipts of such events. In June, 1997, the United States Satellite Broadcasting Company sold pay-per-view telecasts of the Evander Holyfield/Mike Tyson fight. The telecasts were sold to subscribers in California. The defendants, members of the State Athletic Commission, demanded payment of the tax. The plaintiffs refused to pay the tax. Plaintiffs then asked whether there was a way that the tax could be paid and a refund given later. The State Athletic Commission never responded to this request.

### *Speech Taxed Solely on Content*

After denying defendant's motion to dismiss for lack of jurisdiction, the court went on to hold that the statute was unconstitutional as a content-based regulation of speech because, while the state imposed the tax on boxing and other combative events, the state did not tax telecasts that presented different subject matter. "On its face, the Boxing Act taxes some telecasts, and not others, based on the content of those telecasts. Television broadcasts constitute speech. The Boxing Act thus taxes some speech based solely on its content." Slip op. at 4 (citations omitted).

Under a strict scrutiny analysis, the court found that California's "selective application of the proffered rationales to boxing telecasts and boxing telecasts alone constitutes exactly the kind of judgment about content which the First Amendment does not allow California

to make." Slip op. at 6. The court rejected the defendants argument that because the Free Speech Clause does not protect boxing, it also does not protect the telecast of boxing activities.

### *Revenue Justification Rejected*

Nor was the court persuaded that a content-based tax on speech was justified by California's general interest in raising revenue. The court questioned the state's contention that the tax defrayed the cost of operating the State Athletic Commission, an organization the state contended helped keep boxing "clean," at least in part because the state presented no evidence on how much it actually cost the Commission to "keep boxing clean." Slip op. at 5.

Defendants quite simply present no evidence whatsoever that the amount of the Boxing Act tax bears any relationship to anything. Defendants present no evidence on the amount of revenues created, on the current "costs" of the State Athletic Commission (in 1965 the budget of the Commission amounted to around \$20,000) as related to boxing telecasts, or on the cost to the state, if any, of plaintiff's speech. Clearly, the Commission does not directly spend all of the revenues raised by the Boxing Act tax, because it deposits those revenues in the state general fund.

Slip op. at 5.

The state also argued that because live boxing events and sales of broadcast rights were taxed, the tax on pay-per-view equalized the tax burden placed on the media entities. The court rejected this argument also, pointing out that the state failed to show why equalizing the tax burden was necessary. If equalizing the tax burden was important, the court said, a tax scheme based on something other than content would accomplish the same result.

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## UPDATES

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### Settlement Reached in *Globe v. National Enquirer*

On March 17, the *Globe* and the *National Enquirer* reached a settlement in a case that some considered an unprecedented test of press freedom, with one tabloid suing another for copyright infringement. While the financial details of the settlement are not available, the settlement marks the end of a saga that began in March 1997, when the *Globe* came under criticism by some who alleged it played a role in orchestrating and videotaping an intimate encounter between former flight attendant Suzen Johnson and *Monday Night Football's* Frank Gifford. See *LDRC LibelLetter*, February 1999 at 25.

On December 30, 1999, the *Globe* filed an action in the United States District Court for the Central District of California for a temporary restraining order to block distribution of the *Enquirer's* interview with Ms. Johnson. The *Enquirer* article claimed that the *Globe* had paid Johnson \$250,000 to set Gifford up. In the same interview, she also talked about the prostitution investigation that followed publication and her regrets.

*Globe* alleged breach of contract against Ms. Johnson (based on an alleged exclusivity agreement) and tortious interference against the *Enquirer*, but the prayer for injunctive relief rested on a copyright claim. The copyright claim was based on *Globe's* exclusivity contract with Ms. Johnson. *Globe* claimed that it had acquired the copyright in the first-person autobiographical account of Johnson's affair with Gifford and that the story about to be run by the *Enquirer* would necessarily infringe on the *Globe's* copyright.

The *Enquirer* responded that its story hardly resembled, let alone infringed on, copyrighted material in the 1997 *Globe* article, and with respect to the as yet unpublished information from Ms.

Johnson that was the gravamen of *Globe's* application, *Globe* had failed to register those materials and so it could not institute an infringement action pursuant to 17 U.S.C. § 411(a). Second, the *Enquirer* claimed that it lacked access to the unpublished material. As for the trade secrets claim, the *Enquirer* observed that the amount of the payment had already been published in the December 31 *Los Angeles Times*.

Finding that the *Globe* had not demonstrated a likelihood of success on the merits of the copyright claim, and expressing skepticism about whether *Globe's* real complaint lay against the *Enquirer* as opposed to Ms. Johnson, *Globe's* motion to block publication of the story in the January 8, 1999 issue of the *Enquirer* was denied by the United States District Court in Los Angeles. The *Enquirer* was broadly disseminated within hours of the court's ruling.

One week later, *Globe* sought a preliminary injunction, on a new and far more sweeping theory. The *Globe* asked the district court to enjoin the *Enquirer* from publishing any additional first-person accounts from Johnson relating to the Gifford affair. That injunction was rejected on January 25, 1999.

The California case was dismissed by *Globe* and was refiled in the United States District Court for the Southern District of Florida, as the Florida venue was a more convenient forum. The focus of the Florida action was the allegation that the *Enquirer* had tortiously interfered with the *Globe's* contractual rights. During discovery in the Florida litigation, the *Enquirer* reached a settlement with the *Globe*. In the settlement, the *Enquirer* acknowledged the *Globe's* contract with Johnson and represented that it would not interfere with that contract.

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## UPDATES

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### Statutory Damages Awarded in Wiretap Claims

Last month LDRC reported that Dan Peavy, a former Dallas Independent School District trustee, and his wife appealed the dismissal of their federal and state wiretap claims (as well as state law claims for invasion of privacy, intentional infliction of emotional distress, and conspiracy) against WFAA-TV and one of its reporters based on the station's use of information obtained from intercepted telephone conversations. *Oliver v. WFAA-TV, Inc.*, No. 3-96-CV-2945-R (N.D. Tex. Feb. 20, 1999). See also *LDRC LibelLetter*, October 1998 at 31, *LDRC LibelLetter*, March 1999 at 47. Neighbors of the Peavys, Charles and Wilma Herman, recorded off a police band radio conversations made on a cordless phone.

In a related case against the Hermans, brought by callers to the Peavys, for damages under the federal wiretap statute for interception of their telephone calls, U.S. Magistrate Judge Jeff Kaplan of the United States District Court for the Northern District of Texas, Dallas Division, awarded statutory damages of \$10,000 each to seven plaintiffs and \$20,000 to an eighth plaintiff (\$10,000 for the interception and an additional \$10,000 because evidence showed that as to this plaintiff there was also disclosure). *Goodspeed, et al v. Harman*, No. 3-97-CV-2681-BD.

The *Harman* opinion is notable for Judge Kaplan's analysis of the issue of intent under the wiretap statute. Judge Kaplan evoked a standard that looks a lot like strict liability — the court has already determined that Harman acted consciously, as opposed to accidentally, to bring about the consequences of his actions. Therefore, he "intentionally" violated the statute (citing *Peavy et al. v. Harman et al.*, No. 3-96-CV-1506-R). Judge Kaplan also granted the plaintiffs' motion to suppress playing of the tapes at the bench trial, thereby rejecting the Harmans' proposed defense that the

tapings were made out of fear for their own safety.

Finally, on the issue of damages, the court held that it had discretion whether or not to award damages, but that once it chose to award damages, it had no discretion to set the statutory damages in an amount lower than the \$10,000 set out in 18 U.S.C. § 2520(a).

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### Louisiana Supreme Court Declines to Review Wiretap Ruling Against Newspaper

#### *Newspaper May Be Liable For Publishing Tape*

On April 1, the Louisiana Supreme Court declined to review an appellate court's ruling that two newspapers may be held liable for publishing the contents of a taped telephone call between public officials which they obtained at a press conference. *Keller v. Aymond*, No. 99-C-0199 (La. Apr. 1, 1999), *Johnson v. Aymond*, No. 99-C-0219 (La. Apr. 1, 1999). The decision stands in contrast to an opinion issued by the United States District Court for the Northern District of Texas dismissing federal and state wiretap claims brought by Dan Peavy against WFAA-TV and its reporter. *Oliver v. WFAA-TV, Inc.*, No. 3-96-CV-3436-L (N.D. Tex. Feb. 20, 1999). In that case, a neighbor who had intercepted Dallas Independent School District trustee Dan Peavy's telephone calls and eventually contacted WFAA-TV reporter Robert Riggs with a tip on a potential news report about Peavy.

The *Alexandria Daily Town Talk* and the *Avoyelles Journal* published excerpts of telephone conversations between the plaintiffs, Michael Johnson, a state district judge, and McKinley "Pop" Keller, a police juror (the Louisiana equivalent of county commissioner). The press conference had been called by a local attorney, Carol Aymond, who had run against Johnson

*(Continued on page 46)*

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## UPDATES

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### Louisiana Supreme Court

*(Continued from page 45)*

unsuccessfully in a judicial election. Aymond claimed that tapes of the telephone conversations appeared anonymously in his vehicle one day. Aymond played the tapes and distributed copies of the transcripts at the press conference. See *LDRC LibelLetter*, January 1999 at 19 for a complete discussion of these cases.

In *Keller*, the district court granted summary judgment in favor of the defendant but the Court of Appeal reversed. Similarly, in *Johnson*, *The Alexandria Daily Town Talk's* exception of no cause of action (equivalent to a motion to dismiss) was granted by the district court and reversed by the Court of Appeal.

The *Keller* court held that a newspaper can be held civilly liable for publishing the contents of a conversation taped in violation of the Electronic Surveillance Act even if the elements of criminal willfulness were lacking. All plaintiff had to do was prove publication in order to prevail. It was not unconstitutional to hold the newspaper liable, the court said, reasoning that since the Electronic Surveillance Act prohibits access to private telephone conversations between individuals; as the press has no right of access greater than that of the public, the press could not avoid the prohibitions "under the guise of constitutional protection." *Keller v. Aymond*, No. 98-844, 1998 WL 901774 (La. App. 3d Cir., 12/29/98).

The Louisiana Supreme Court, by a 4-3 vote, denied the newspapers' applications for writs to review the appellate court decision without a written opinion.

### Steal This Radio (and Any Equipment You Can Get Your Hands On)

A federal judge in New York rejected a broad constitutional challenge by a "micro-power" radio station known as "Steal This Radio" to the FCC's radio licensing scheme. The radio station, which filed suit after being ordered to shut down, claimed that the FCC's regulations were vague and violated broadcasters' First Amendment rights. *Free Speech v. Reno*, No. 98 Civ. 2680 (S.D.N.Y. Mar. 12, 1999).

Steal This Radio had been operating as a microbroadcaster for three years without a license from the FCC, claiming to reach 100,000 people within a mile of their location in lower Manhattan. Microbroadcasters are stations that transmit at less than 100 watts. The FCC is not currently licensing low power stations.

The decision by Judge Mukasey dismissed the suit and also preliminarily enjoined the station from making any further broadcasts. The decision held that the standards for issuing licenses do not provide the FCC with "unbridled discretion" and noted further that denials of license applications are immediately appealable to the D.C. Court of Appeals. The broadcaster had never applied for a license, arguing that such an application would have been futile.

In another case involving a microbroadcaster, the Eighth Circuit recently ruled that a district court hearing an in rem forfeiture action against the equipment of a microbroadcaster also had jurisdiction to hear the broadcaster's constitutional challenges to the FCC's broadcasting regulations. *United States v. Any and All Radio Station Transmission Equipment*, No. 97-3972 (8th Cir. Feb. 26, 1999) (reversing and remanding).

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## Ninth Circuit Upholds First Amendment in Prohibition of Publication Gifts to Prisoners

The Ninth Circuit has upheld a Washington District Court decision that a Washington prison's policy of prohibiting all gift publications to its inmates was not "reasonably related to any valid penological objective" and therefore, violated the First Amendment. *Crofton v. Roe et al.*, 1999 U.S. App. LEXIS 5223 (9th Cir. Mar. 26, 1999). The Ninth Circuit affirmed the district court's injunction barring enforcement of the policy.

Relying on the Supreme Court opinion of *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), the Court looked to four factors to determine if the policy reasonably related to a penological goal: (1) a rational relationship between the regulation and the legitimate state end; (2) whether inmates have other means to exercise their asserted rights; (3) how accommodating the prisoners' rights would be to prison personnel, other inmates, and the allocation of prison resources; and (4) whether the prison can serve its own interests, and still meet the rights of the inmates, through alternative means.

The state asserted that the policy furthered a number of interests including preventing contraband from entering the prison, ensuring the effectiveness and efficiency of the prison mailroom employees to monitor and handle the packages, preventing a fire hazard as well as space constraints, and finally avoiding inmate "strong-arming" — one inmate threatening physical harm to another inmate's family members if demands for publications instead of cash payments were not met.

The Ninth Circuit rejected the state's arguments finding that the state did not offer any evidence that these problems existed with regard to gift publications. While the state emphasized that the policy related to all gifts, and not just publications, the Court found this unpersuasive in light of the First Amendment. "The issue is not whether an overall restriction on other gift items is legitimate. The Supreme Court's decisions instruct that the issue is whether there is a penological justification for the restriction on First Amendment rights." *Crofton v. Roe et al.* at \*8.

The Court concluded that the state had not come

forward with any rationale for its policy, nor demonstrated any particular risk in allowing prisoners to receive gift publications. The state had shown no rational relationship between the means chosen and the legitimate penological ends and therefore, had violated the prisoners' First Amendment rights.

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