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# MEDIALAWLETTER

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## NY Times Attorney Adam Liptak Joins The Times News Staff

Adam Liptak, Senior Counsel in The New York Times Law Department, member of the LDRC Board of Directors, and Chair of the LDRC *LibelLetter* (now *MediaLawLetter*) Committee, has joined the news side staff of *The New York Times* as its national legal reporter. Adam had been with The Times legal staff for 10 years, and with Cahill Gordon & Reindel for 4 years before that.

But Adam was also a copyperson at The Times in his pre-law days, and has been writing articles and book reviews for the paper and other publications for many years now. We have all come to expect to see Adam's byline on articles much as we have on briefs. He is, as anyone who works with him knows, an excellent writer and editor.

While we will miss Adam enormously at LDRC, and everywhere in the media bar, we will all benefit from his skills and abilities on The New York Times news side. He started his new post on April 8. Best to Adam – we will be cheering you on to all success in your new role.

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*Editor's Note: Along with so many of you in the LDRC membership, I was stunned by the sudden and abrupt deaths of two of our colleagues in the First Amendment, media defense bar – two superb lawyers and two truly wonderful men. Goodness, how we will miss these men of valor whose lives we should continue to honor by remembering all that they brought to the cause of free speech and free press. --Sandy Baron*

## Richard L. Klein (1954-2002)

Rick Klein, a partner at Willkie Farr & Gallagher responsible for media law litigation for Bloomberg L.P. died on February 28, 2002 after suffering a massive heart attack at work. Sandy asked if I could jot down a few words about him for the LibelLetter, and I thought that I'd share the perspective of an associate who worked for him.

Rick's boundless — and persuasive — charm is what enticed me to come work for Willkie. He could flash that electric smile and make you feel honored to work 20 straight weekend hours on a access motion to intervene. Rick was everything a partner should be to a young associate: a rabbi, a teacher, a stern taskmaster and an outstanding editor. A graduate of Columbia Law School ('79), and a former clerk to Judge Haight in the Southern District, Rick could inspire as well, having a deep respect for the law in general, and for First Amendment jurisprudence in particular. Although he started out his career as a generalist litigator, he applied himself to learning the principles and policies that shape media law.

As many LDRC members may not know, in the last few years of his life Rick conducted a heroic battle against Multiple Myeloma, a rare form of bone cancer. He went through intense chemotherapy, stem cell transplants, and other procedures with a determination to come back to the firm, to live life fully and practice law at its highest level. Within 2 months of his therapy, Rick was back in the office, giving hell to anyone who sought to serve subpoenas on Bloomberg reporters, duking it out with erstwhile plaintiffs' counsel, and holding all our feet to the fire. Those of us lucky enough to have shared any time with Rick - socially or professionally - can count ourselves as lucky indeed.

*Charles Glasser*
*Media Law and Newsroom Counsel,*
*Bloomberg L.P., New York*

## Samuel E. Klein (1946-2002)

"Samuel E. Klein was a journalist's best friend." So read an obituary for our lost friend, colleague and mentor, who died suddenly and too soon, at 55.

It is a great loss. Those of us who were privileged to work with him — and there are many of us — know that he was a lawyer of tremendous skill, determination and heart. It is telling that, upon learning of his death, sadness and praise were expressed not only by his grief-stricken clients and colleagues, but by long-time adversaries who fought him in grueling and notorious libel battles. One such opponent, Richard A. Sprague, called Sam "one of the finest, finest people" he knew; the other, James E. Beasley, said he was "the finest First Amendment lawyer in the United States."

He established his reputation as a formidable defender of the First Amendment and was intensely committed to all of his clients at many newspapers, magazines and television and radio networks and stations. His passion for their causes was unequaled.

He helped found Pennsylvania's First Amendment Coalition and was the first author and later editor of "The Media Survival Kit," a well-worn guidebook for reporters. He was a preparer of the LDRC'S outline for the LDRC 50-STATE SURVEY: MEDIA LIBEL LAW. Somehow, he found time in his endless work days to teach communications law, serve a variety of charities, and help manage our law firm.

But these accomplishments do not really describe the man we will remember. Sam was warm and kind-hearted, charismatic, a family man, funny and direct, and a mentor always generous with his time and his prodigious knowledge.

Journalists may feel that they've lost a best friend. We do, too.

*Gayle Sproul, Amy Ginensky and Vernon Francis*
*Dechert*
*Philadelphia, PA*

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# *UPDATE*: Second Circuit Decides *Morris v. Business Concepts* Petition for Rehearing: Confirms that Magazine's Notice Does Not Protect Free-Lancer's Copyright Claim

**By Bruce E. H. Johnson**

In a case that may have special significance for several *Tasini*-related class actions pending in federal court in New York, the Second Circuit on March 18 reaffirmed its original holding in *Morris v. Business Concepts, Inc.* – that the author of an unregistered magazine article cannot use the publisher's collective work registration to satisfy the registration requirement of Section 411(a) for bringing an infringement lawsuit.

## *Background*

The *Morris* case grew out of a claim by journalist Lois Morris who wrote articles for the "Mood News" column in *Allure*, a monthly magazine published by Condé Nast. Condé Nast obtained collective work registrations for each issue of its magazine but Morris, who retained ownership of the copyright in her articles, never obtained any registrations of her own.

Between 1994 and 1998, another company, Business Concepts, Inc. (BCI), copied 24 of the "Mood News" articles written by Morris, and published them in its newsletter, entitled *Psychology and Health Update*. In January 1999, Morris sued BCI for copyright infringement and for violations of Section 43(a) of the Lanham Act.

BCI moved for summary judgment, which was granted by Judge Casey of the United States District Court for the Southern District of New York. The court dismissed the *Morris* lawsuit for lack of subject matter jurisdiction because the Copyright Act, 17 U.S.C. § 411(a), requires registration as a condition precedent for commencing an infringement action.

On July 26, 2001, a panel of the Second Circuit (Judges Oakes, Kearse, and Cabranes) affirmed this decision. In doing so, the court rejected the plaintiff's effort to rely on BCI's collective work registration to satisfy her own registration requirement.

## *The Rehearing*

Morris sought rehearing, which was granted in part and denied in part by the panel. The decision stated: "In the earlier opinion, the panel concluded that there could be only a single copyright in each of the appellant's works and that therefore the appellant's licensee was not a copyright owner. Because this portion of the opinion is not necessary to support the ultimate holding in the case, and because our reasoning in it might affect future cases, we narrow our ruling by eliminating this portion. Otherwise, the petition for rehearing is denied."

Judge Oakes reaffirmed the panel's holding that Condé Nast's copyright registrations for its collective works were not sufficient to cover the rights of the owners of copyright in each of the individual articles. "The distinction between those constituent parts of a collective work in which the author of the collective work owns all rights and those constituent parts in which the author does not own all rights is critical in determining whether a copyright registration in a collective work also registers a copyright claim in a particular constituent work." Recognizing that its interpretation of the Copyright Act was entitled to significant weight, the court noted that the Copyright Office's position was "that if all rights in a constituent work have not been transferred to the claimant, a collective work registration will not apply to the constituent work."

## *Rehearing En Banc Denied*

On April 5, 2002, the Second Circuit denied plaintiff's petition for rehearing en banc and the court's mandate issued shortly thereafter. Assuming that no petition for certiorari is filed and granted, the *Morris* case is now over.

The immediate impact of *Morris* will likely be felt in the consolidated class actions that were filed in the Southern District of New York last year by several writers and writers' organizations (including the National Writers Union and the Authors Guild, Inc.) against various database owners (LEXIS-NEXIS, Dow Jones, West Group, and others) in the wake of the United States Supreme Court's decision in *Tasini v. New York Times*. Although a motion for class certification has not yet been presented in those cases, Morris is likely to affect the viability of claims by class members who failed to obtain copyright registrations for their individual works.

*Bruce Johnson is a partner at Davis Wright Tremaine, LLP in Seattle*

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# Pennsylvania Superior Court Rejects Any Form Of Neutral Reportage Privilege

**By Samuel E. Klein* and Michael E. Baughman**

On March 18, 2002, the Pennsylvania Superior Court, Pennsylvania's intermediate appellate court, held that the press may not accurately republish statements a public official made about other public officials after a public meeting if the press doubts the truth of those statements. With the stroke of a pen — and just a few paragraphs of analysis — the Superior Court in an opinion written by Judge Joyce, and joined by Judge Olszewski and Montemuro, rejected any form of the neutral reportage privilege.

The panel specifically refused to follow opinions from at least four federal courts (including the Second Circuit (*Edwards v. National Audobon Society*, 556 F.2d 113 (2d Cir. 1977) and Eighth Circuit (*Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1990)). The Court in *Norton v. Glenn*, 2002 WL 413903 (Pa. Super. Mar. 18, 2002), even dismissed an extensive constitutional analysis from its *own court* as "obiter dictum" without offering a single reason why its colleagues got it wrong. It returned for a new trial claims based upon reports of statements of an elected representative — statements which the plaintiffs' own witnesses at trial in this case admitted bore directly on the defamer's fitness for office and which his constituents used to vote him from office.

***The superior court ignored these alternative grounds and went right to the constitutional question: "whether the Commonwealth of Pennsylvania should adopt the neutral reportage privilege . . . ." With almost no analysis, the court said no.***

### *An Elected Official Disrupts the Public Meeting*

The case arose out of a dispute between public officials in Parkesburg, Pennsylvania. In late 1994 and early 1995, William T. Glenn, Sr., a member of Parkesburg's Borough Council, became dissatisfied with the manner in which the Borough's government was being run. Instead of presenting his grievances in a professional manner, however, Glenn disrupted meeting by calling his fellow council members names such as "draft dodgers," "liars," and "criminals." Several Borough Council meetings had to be adjourned early because of Mr. Glenn's disruptions.

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## Pennsylvania Superior Court Rejects Any Form Of Neutral Reportage Privilege

(Continued from page 5)

Borough Council President James B. Norton, III, called a special meeting of Council for April 19, 1995, to address Mr. Glenn's unruly behavior. During the meeting, President Norton read a short statement making clear that further disruption of Borough business would not be tolerated. Before Mr. Glenn had a chance to respond, the meeting was abruptly adjourned.

Mr. Glenn brought with him to the meeting a written statement, which he provided to a reporter for the *Daily Local News*. The statement indicated Mr. Glenn's belief that Norton and Parkesburg's Mayor, Alan M. Wolfe, were homosexuals conspiring to remove him from office. It read, in part,

> Mr. Norton has been making homosexual proposals to me for some time. I detest queers and child molesters. Since he and his friend, the mayor, are in positions that give them the opportunity to have access to children, I now feel that it my duty to report what has been happening.

Mr. Norton was a high school teacher.

In an April 20, 1995 article entitled "Slurs, Insults Drag Town Into Controversy," the *Daily Local News* reported Mr. Glenn's charges, along with Mr. Norton's statement that "If Mr. Glenn has made comments as bizarre as that, then I feel very sad for him, and I hope he can get the help he needs," and Mr. Wolfe's comment that "As he has done in the past, he is creating stories."

The article went on to provide Glenn's basis for the charges, obtained by the reporter during an interview with Glenn after the Borough Council meeting had ended. Among other things, Glenn described how he had caught the Mayor and Mr. Norton "in the act" in 1983, and also observed them holding hands while walking around the Borough.

***The superior court reasoned that (1) Edwards relied primarily on Pape in formulating the neutral reportage privilege; (2) Pape does not adopt the neutral reportage; and (3) therefore Edwards erred in adopting a neutral reportage privilege.***

### *Media Reports Official's Charges to the Voters*

The plaintiffs' own witnesses testified that the information contained in the article bore negatively and directly on Glenn's fitness to hold elective office and, without the article, they would not have known of the outrageous conduct of their elected representative. One of the plaintiffs' witnesses testified:

Q: Did you know that Mr. Glenn was going around council meetings making these kinds of comments?

A: No. *I didn't know any of this until I read the article*

Q: Do you believe that that kind of conduct described in this article bore on his fitness to continue to hold public office?

A: *Yes. Yes, I did. I was glad to see he was not re-elected after that.*

Shortly after the April 20, 1995, article appeared, Glenn stood for reelection in a primary. He was defeated, receiving less than 10 percent of the vote. Norton and Wolfe were later re-elected to their positions.

### *The Jury Finds Media Issued A Neutral Report*

Based on a 1988 Superior Court opinion, *DiSalle v. PG Publ'g Co.*, 544 A.2d 1345 (Pa. Super. 1998), the trial court instructed the jury that the media defendants were protected by the privilege of neutral reportage if they accurately reported Glenn's statements, and did not espouse or concur in the charges. The jury found that Glenn had, in fact, made the statements contained in the article, that the media had accurately republished the statements, and that the media had not abused the neutral reportage privilege by espousing or concurring in the charges. Thus, the jury returned a verdict in favor of the media defendants. The jury found Glenn liable and awarded $10,000 in compensatory damages and $7,500 in punitive damages as to each plaintiff. Glenn did not appeal.

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## Pennsylvania Superior Court Rejects Any Form Of Neutral Reportage Privilege

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### *Superior Court Rejects Decisions from Across the Country*

The superior court reversed. In addition to the neutral reportage privilege, the media defendants raised several grounds for affirmance, including the fair report privilege and lack of subject matter jurisdiction because the case was moot since all the damages allegedly caused by the article had already been recovered as against defendant Glenn. The superior court ignored these alternative grounds and went right to the constitutional question: "whether the Commonwealth of Pennsylvania should adopt the neutral reportage privilege . . . ." With almost no analysis, the court said no.

First, the court addressed the Second Circuit's seminal decision in *Edwards v. National Audobon Society*, 556 F.2d 113 (2d Cir. 1977), which first recognized a privilege of neutral reportage. *Edwards* adopted a neutral reportage privilege on the theory that "[i]t is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves." *Edwards*, 556 F.2d at 115. *Edwards* was based on the core constitutional principles which have guided the Supreme Court's First Amendment jurisprudence since at least *New York Times v. Sullivan* -- that the central meaning of the First Amendment is to provide protection to speech necessary to assist citizens in a self governing society to make decisions on how to exercise their franchise.

**_Perhaps most bewildering, the superior court rejected with almost no comment whatsoever its own court's earlier analysis of the neutral reportage privilege in DiSalle._**

The superior court ignored this fundamental constitutional principle. Instead, it offered an illogical rationale as to why *Edwards* got it wrong. Instead of focusing on the reasoning of *Edwards*, the superior court noted that *Edwards* had cited, among other authorities, *Time, Inc. v. Pape*, 401 U.S. 279 (1971), as support for adopting a neutral reportage privilege. The superior court reasoned that (1) *Edwards* relied primarily on *Pape* in formulating the neutral reportage privilege; (2) *Pape* does not adopt the neutral reportage; and (3) therefore *Edwards* erred in adopting a neutral reportage privilege.

This reasoning, however, is based on a faulty premise — neither the Second Circuit nor the media defendants ever contended that *Pape* adopted a neutral reportage privilege. Indeed, the Supreme Court suggested in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), that the question is an open one. The fact that the Supreme Court has not addressed neutral reportage certainly does not mean that the privilege is foreclosed. *See id.* at 694 (Blackmun, J., concurring) ("petitioner has eschewed any reliance on the 'neutral reportage' defense. . . . This strategic decision appears to have been unwise in light of the facts of this case."). Indeed, although the Superior Court did not grapple with the authority cited by the defendants in their briefing, the privilege has generally been well received in both the courts and the academy.

### *Court Rejects Own Prior Decision*

Perhaps most bewildering, the superior court rejected with almost no comment whatsoever its *own court's* earlier analysis of the neutral reportage privilege in *DiSalle*. In *DiSalle*, a panel of the superior court recognized a "neutral reportage privilege" that permits the press to inform the public when one public official makes a serious accusation against another public official.

In a scholarly constitutional analysis constituting 10 pages of the Atlantic Reporter, the *DiSalle* Court found that the privilege is based on bedrock constitutional principles — the press must be protected in accurately conveying the information that a public official made a particular charge because the statements, whether or not true, give the public a valuable insight into the character and fitness for office of the elected representative *who made the statement*. The privilege thus protects the fun-

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## Pennsylvania Superior Court Rejects Any Form Of Neutral Reportage Privilege

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damental right of citizens to obtain information necessary to make intelligent decisions about how to govern themselves in a free society.

If the party making the false charge is a public official, it is essential for the public to be informed of the calumny of those upon whom it has bestowed its trust, and thereby to better supervise their conduct. Similarly, if a public figure, embroiled in a controversy, levels false accusations against others involved in the same contest, the public's ability to weigh the merits of the vying positions is greatly enhanced by the publication of the charges. *DiSalle*, 544 A.2d at 1363.

Calling this analysis "dicta" the superior court in *Norton* just ignored *DiSalle*, without offering a single reason why the *DiSalle* Court got it wrong. The *only* affirmative reason given by the superior court for refusing to adopt the privilege was because "this privilege does not appear in the United States Constitution, the Pennsylvania Constitution, or any statutory law." That is certainly a unique form of constitutional analysis. The First Amendment to the United States Constitution reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." If anything, this unequivocal language, made applicable to the states by the Fourteenth Amendment, would seem to prohibit *any* defamation action. To hold that no privilege of neutral reportage is available because it does not specifically appear in the text of the Constitution would take strict construction to a level never before embraced by the courts or even the "strictest" strict constructionists. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 22 (1971) ("We are . . . forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or its history.").

### *Norton is the Paradigm Case for Applying the Neutral Reportage Privilege*

There is perhaps no better case for adoption of the neutral reportage privilege than *Norton*. At trial, the jury found that the media defendants *accurately* reported Glenn's remarks and that they did not concur or espouse in the remarks. The plaintiffs' own witnesses testified that the information that Glenn was making these charges was important in evaluating his fitness for office. And what did the voters of Parkesburg do with this information? They voted the defamer out of office. Thus, the Superior Court has deprived the citizens of Pennsylvania with the most valuable type of information protected by the First Amendment — accurate information that reflects on the fitness for office of elected representatives.

The Superior Court's unequivocal conclusion that there is absolutely no neutral reportage privilege appears to be unprecedented in a case involving public officials and speech that demonstrably reflects on the public official's fitness for elected office. As Professor Anderson has opined,

> If the President of the United States baselessly accused the Vice President of plotting to assassinate him . . . most courts surely would hold that the media could safely report the President's accusation even if they seriously doubted its truth.

David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 504 (1991). Not in Pennsylvania. What a shame for a well-functioning participatory democracy in our Commonwealth.

A petition for reargument en banc was filed with the Superior Court on April 1, 2002. The Petition is available from the LDRC.

Plaintiff Norton is represented by Geoffrey R. Johnson, of Sprague & Sprague in Philadelphia. Plaintiff Wolfe is Represented by William T. Wilson, of Legg & Wilson, in West Chester, Pennsylvania.

**Sam Klein, a partner in Dechert's Media Practice Group, tried this case for the Media Defendants and co-authored this article. A week after the Superior Court's decision, on March 25, 2002, Sam passed away suddenly. Sam spent his career fighting to ensure the public's right to obtain information about their government and government officials. The First Amendment, and his colleagues at Dechert, have lost a great friend.*

*Michael E. Baughman is an associate in Dechert's Media Practice Group.*

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# District Court Dismisses Libel Claim Against Website Operator for Lack of Personal Jurisdiction

***Plaintiff's Residence in Jurisdiction Insufficient***

**By Edward D. Rogers**

Adding to the growing body of case law on Internet jurisdiction, a federal judge in Philadelphia has held that a website operator cannot be sued in Pennsylvania for publishing allegedly defamatory news articles solely because the articles contained references to the Pennsylvania activities of a Pennsylvania resident. See *English Sports Betting, Inc. and Atiyeh v. Tostigan, et al.*, No. Civ. A. 01-2202, 2002 WL 461592 (E.D. Pa. March 15, 2002). In so ruling, Judge Jay C. Waldman of the United States District Court for the Eastern District of Pennsylvania emphasized the website operator's lack of contacts with the forum and specifically rejected plaintiffs' efforts to predicate jurisdiction on the so-called "effects test" based on the contentions that the articles caused harm in Pennsylvania and that, in publishing them, the website operator purposely targeted a Pennsylvania resident.

***Plaintiffs attempted to base jurisdiction exclusively on the "effects test," contending that, by publishing the articles, Theprescription.com "purposefully targeted a Pennsylvania resident with defamatory comments."***

## *Article on Offshore Gambling*

The action arose out of allegedly defamatory articles published on two websites about a business figure in the offshore gambling industry named Dennis Atiyeh, who owns a Jamaican-based and Jamaican-incorporated gambling enterprise known as English Sports Betting. Atiyeh claimed that he and English Sports Betting were defamed in an article written by defendant Christopher "Sting" Tostigan reporting on Atiyeh's allegedly criminal activities. Atiyeh and English Sports Betting brought this suit against Tostigan and the operators of two websites — www.playersodds.com and www.theprescription.com — that posted the articles on their sites.

Theprescription.com moved to dismiss for lack of personal jurisdiction, contending that it lacked the necessary minimum contacts with Pennsylvania because Theprescription.com did not conduct business, sell advertising, or own property in Pennsylvania. Theprescription.com also argued that specific jurisdiction could not be premised on the "effects tests" established in *Calder v. Jones*, 465 U.S. 783 (1998), that has been used as an alternative jurisdictional analysis in Internet defamation cases, because the website's intended audience and thus the focus of any reputational harm was not in Pennsylvania.

In response, plaintiffs attempted to base jurisdiction exclusively on the "effects test," contending that, by publishing the articles, Theprescription.com "purposefully targeted a Pennsylvania resident with defamatory comments." Plaintiffs largely based this argument on references in the articles that discuss plaintiff Atiyeh's past brushes with the law in Pennsylvania.

## *Residence Not Focus*

Granting Theprescription.com's motion and dismissing the action, Judge Waldman accepted Theprescription.com's arguments that Pennsylvania was not the focus of the website or its audience. Thus, the court ruled that "the recipient audience is not linked by geography but by a common interest in off-shore sports gambling." 2002 WL 461592, at *3.

Further, the court continued, "[t]he brunt of any harm suffered by the plaintiff corporation would be in Jamaica." Moreover, the court explained, "[e]ven assuming that the brunt of any harm suffered by the individual plaintiff would be in Pennsylvania, there is no showing that the defendant expressly aimed the tortious conduct at the forum." *Id.* In this regard, the court explained, "[t]here is a difference between tortious conduct targeted at a forum resident and tortious conduct expressly aimed at the forum. Were the former sufficient, a Pennsylvania resident could hale into court in Pennsylvania anyone

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**District Court Dismisses Libel Claim Against Website Operator for Lack of Personal Jurisdiction**

*(Continued from page 9)*

who injured him by an intentional tortious act committed anywhere." *Id.*

In addition, the court held that Pennsylvania was not the "focal point of the tortious conduct" because the articles were "targeted at the international off-shore gambling community." *Id.* This fact was significant, reasoned the court, because "[i]t is not sufficient that the brunt of the harm falls within plaintiff's home forum, even when this was reasonably foreseeable [as] '[t]here is an important distinction between intentional activity which foreseeably causes injury in the forum, and intentional acts specifically targeted at the forum.'" *Id.* (quoting *Narco Avionics, Inc. v. Sportsman's Market, Inc.*, 792 F. Supp. 398, 408 (E.D. Pa. 1992).

The decision is potentially significant for website operators and other Internet businesses because it underscores that jurisdiction in a defamation action may not be based simply on plaintiff's residence, even when the allegedly defamatory statements refer to plaintiff's conduct within the forum.

Consistent with the "purposeful availment" ordinarily required for specific jurisdiction, the court focused on the conduct of the website operator itself, *i.e.*, whether it intended to reach a Pennsylvania audience or was otherwise aimed at the forum, as opposed to whether the content of the article related to the forum. Because the vast majority of websites are aimed at a national or, as in this case, an international audience, the court's approach provides an important measure of protection for website operators that are sued in remote locations, and particularly in the home-state courts of the plaintiff.

Joseph Blum and Peter Baker of Frey Petrakis Deeb & Blum in Philadelphia represented the plaintiffs.

*Edward D. Rogers of Ballard Spahr Andrews &Ingersoll, LLP represented Theprescription.com in this matter.*

# Court Dismisses Action Against Author and Source

### *Separate orders grant motions to dismiss for lack of personal jurisdiction*

In separate orders, the Charleston County Court of Common Pleas dismissed the libel, false light and conspiracy claims against an author and one of his sources. *See Moosally, et. al. v. W.W. Norton & Co., et. al.*, Case No. 01-CP-10-604 (S.C. Ct. Common Pleas April 3, 2002). The case was brought by Fred Moosally, Joseph Miceli, John Morse and Robert D. Finney and based on the publication of *A Glimpse of Hell*, a book about the April 19, 1989 explosion onboard the battleship IOWA.

The case was filed in South Carolina, despite the fact that none of the plaintiffs and neither Charles S. Thompson II, the author, or Daniel P. Meyer, one of Thompson's 209 sources, are residents of South Carolina. Thompson is a resident of Virginia and Meyer is a resident of Maryland. The court cited *Southern Plastics Company v. Commerce Bank*, 423 S.E.2d (S.C. 1992), a South Carolina Supreme Court decision that requires a two-step analysis in determining whether personal jurisdiction is appropriate.

The first prong of the test requires a court to determine whether South Carolina's Long Arm Statute applies. The court held that it did not apply in this case because the causes of action did not arise from "any of the acts enumerated in the Statute." The court cited *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996), as support for its conclusion.

*McFarlane* is a 1996 case in which the D.C. Circuit said, in pertinent part, that "*writing* an article for a publication that is circulated throughout the nation, including the District, hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct, *within* the District."

The South Carolina court also held that finding personal jurisdiction would violate due process requirements.

John J. Kerr, of Buist Moore Smythe & McGee in Charleston, S.C., represented the defendants. Judge A. Victor Rawl presided.

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# Fifth Circuit Affirms Summary Judgment for CBS and 48 Hours In Texas Libel and Invasion of Privacy Case

**By Mike Raiff and Dan Petalas**

The Fifth Circuit has affirmed summary judgment for CBS, its reporters, and its producers in a case involving a 48 HOURS report on the "Roby 43" – the 43 West Texans who won a $46 million lottery jackpot. The ex-wife of one of the Roby 43 and her daughter sued CBS, anchor Dan Rather, correspondent Bill Lagattuta, executive producer Susan Zirinsky, and producer Chuck Stevenson for libel and invasion of privacy. The district court dismissed all claims brought by both plaintiffs, and the Fifth Circuit recently affirmed. *Green v. CBS, Inc.*, 2002 WL 423452, No. 01-10151 (5th Cir. Apr. 3, 2002).

The Fifth Circuit's opinion favorably discusses several issues of significance to media defendants, including the interplay between the substantial truth doctrine and accurate reports of competing allegations by third-parties, and the irrelevance to a libel claim of allegedly damaging implications drawn from an accurate account of third-party allegations.

***[W]hen the challenged statement is a third-party allegation, media defendants merely need to show that the allegations were in fact made and accurately reported.***

### *The Forty-Three Roby Millionaires and the 48 HOURS Broadcast*

In 1996, 43 people from the small west Texas farm town of Roby won $46 million in a Texas lottery. Over the next year, 48 HOURS chronicled the dramatic changes in Roby, exploring the age-old question: "Does money buy happiness?"

For one winner – Lance Green – the events that unfolded during that year answered this question with a clear "No." His life changed dramatically, as the cotton-gin hand found himself in the spotlight, went through a divorce, campaigned unsuccessfully for mayor, and faced criminal charges of sexual abuse. Already separated from his wife (plaintiff Mitzi Green), Lance was within days of finalizing his divorce when he won the lottery. Then, in the words of Mitzi's divorce lawyer, "all bets were off": Mitzi demanded part of the lottery winnings in connection with the divorce settlement. During the divorce proceedings, Lance accused Mitzi of denying him access to his step-daughter in order to get him to give her money to pay expenses. Mitzi denied the charges, and ultimately they reached a financial settlement that awarded Mitzi some of the lottery proceeds.

Lance launched himself into local politics, ran for mayor of Roby, and lost by only two votes. Around the time of the election, Lance's life took perhaps the sharpest turn. Lance was accused of sexually abusing his stepdaughter and was indicted. The sexual abuse charges and the indictment of the lottery winner/mayoral candidate became big news in Roby. Lance denied the abuse charges and defended himself by counter-charging that his ex-wife made up the allegations to get more money from him, perhaps through a later civil lawsuit.

Approximately 13 months after the lottery win, the 48 HOURS broadcast aired, reporting on the changes in the lives of a number of residents in Roby over the course of the intervening year. As for Lance, the broadcast reported on his divorce dispute, the charges and countercharges, the election, the indictment, and Lance's defense to the indictment. The broadcast also included portions of an on-camera interview with Lance in which he showed 48 HOURS some of his personal pictures of the step-daughter he was accused of sexually abusing.

### *The Lawsuit and Summary Judgment*

Later in 1998, Lance's ex-wife, Mitzi Green, and her daughter sued for libel and invasion of privacy. For their libel claims, plaintiffs challenged the broadcast and claimed that the media defendants falsely accused Mitzi of lying, being a "gold digger," and extorting money from Lance Green. For their privacy claims, the plaintiffs primarily challenged the inclusion of the step-daughter's name and pictures in the 48 HOURS broadcast.

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**Fifth Circuit Affirms Summary Judgment for CBS and 48 Hours In Texas Libel and Invasion of Privacy Case**

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The media defendants filed a motion for summary judgment arguing, among other things, that the broadcast was a classic case of reporting on allegations, charges, denials, and countercharges. As explained in the motion, the media defendants reported on Lance and Mitzi's cross-allegations without adopting those allegations as their own. The media defendants also argued that Mitzi could not establish her libel claim by drawing unreasonable inferences from a broadcast that was substantially true, both in its parts and considered as a whole.

As for the privacy claim, the media defendants submitted evidence showing that the sexual abuse allegations and the step-daughter's identity as the alleged victim were in no way private facts. To the contrary, the fact that Lance's step-daughter was the alleged victim of sexual abuse was big news in Roby and was contained in public court records, including records filed by Mitzi herself. Thus, the media defendants argued, among other things, that plaintiffs could not establish an essential element of their private facts claim – that defendants disclosed "private facts" about the plaintiffs.

The district court granted the media defendants' motion for summary judgment on both counts, holding that the challenged excerpts taken individually and as a whole were substantially true, disposing of plaintiffs' untenable "libel by implication" theory, and finding that the broadcast disclosed no "private" fact.

### *The Fifth Circuit's Opinion*

The day after the district court entered judgment, the Texas Supreme Court released *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), holding that "a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Id.* at 115. On appeal to the Fifth Circuit, the Green plaintiffs relied heavily on *Turner* in urging reversal.

On April 3, 2002, the Fifth Circuit affirmed the district court's grant of summary judgment on both the libel and invasion of privacy claims. In addressing the libel claim (*e.g.*, the broadcast's inclusion of allegations Lance and his criminal defense attorney made against Mitzi), the court concluded that the media defendants did not need to demonstrate that the allegations were substantially true. Rather, when the challenged statement is a third-party allegation, media defendants merely need to show that the allegations were in fact made and accurately reported. The Fifth Circuit then agreed with the district court that the media defendants had met their burden of showing that they had simply published an accurate account of competing charges between Lance and his ex-wife.

***[W]hen the challenged statement is a third-party allegation, media defendants merely need to show that the allegations were in fact made and accurately reported.***

### *No Juxtaposition or Omission of Material Fact*

The Fifth Circuit also rejected plaintiffs' argument under *Turner* that the broadcast omitted certain facts favorable to her that would have undermined Lance's allegations and bolstered her own allegations against Lance. The court concluded that plaintiffs had failed to identify any juxtaposition or omission of material facts that created an overall false impression. To the contrary,

> [t]he 'gist' of the 'Lotto Town' story with regard to Lance Green was that his wife requested additional money as part of their divorce settlement after he won the lotto, and that she accused him of sexually abusing her daughter . . . , charges which he denied. Given that CBS accurately reported facts, albeit not all of the facts, whether or not the story painted

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### Fifth Circuit Affirms Summary Judgment for CBS and 48 Hours In Texas Libel and Invasion of Privacy Case

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Mitzi Green in an attractive light is irrelevant.

Regarding the privacy claim, the court concluded that the step-daughter's name and likeness were not in themselves "private" facts. Rather, only her connection to the alleged sexual abuse could possibly form the subject of plaintiffs' private facts claim. The court then agreed with the district court that the step-daughter's identity as the alleged victim was not private in this case, because the record showed that the sexual abuse allegations and the step-daughter's identity as the alleged victim were well known in the community, discussed in open court, and presented in court documents. Thus, plaintiffs failed to raise a genuine issue as to the private nature of that connection, and summary resolution of the invasion of privacy claim was therefore appropriate.

*Mike Raiff is a partner at Vinson & Elkins L.L.P. in Dallas, Texas, and Dan Petalas is an associate in the firm's Washington, D.C. office. They represented all of the defendants in the Green case, together with Susanna Lowy and Anthony Bongiorno of CBS Inc. and Tom Leatherbury, who argued the case, and Stacey Doré of Vinson & Elkins L.L.P.*

## UPDATE: Sprague Concedes Status as Limited-Purpose Public Figure

Prominent Philadelphia attorney Richard A. Sprague conceded that he should be considered a limited-purpose public figure for his lawsuit against the American Bar Association and the *ABA Journal*. Sprague had been contesting the point, and the ABA had engaged in discovery and briefing on the issue.

The concession by Sprague comes almost five months after Judge William H. Yohn, Jr., denied the ABA's motion for judgment on the pleadings, finding that the challenged language — the characterization of Sprague as a "lawyer-cum-fixer" was sufficiently ambiguous in context to preclude granting the motion that argued the publication was not defamatory. *See Sprague v. American Bar Association, et. al.*, 2001 U.S. Dist. LEXIS 18707 (E.D. Pa. Nov. 14, 2001). See *also LDRC LibelLetter*, December 2001 at 29.

The article that gave rise to Sprague's defamation claim was an October 2000 article entitled "Cops in the Cross Fire." The article detailed the fatal shooting of a young black man by Christopher DiPasquale, a white Philadelphia police officer. The case carried serious racial and political implications, given the fact that the victim was black and the police officer was white.

Adding to the complexity of the situation, the leaders of Philadelphia's black community used a private criminal-

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**Sprague Concedes Status as Limited-Purpose Public Figure**

*(Continued from page 13)*

complaint procedure to obtain a court order forcing Philadelphia District Attorney Lynne Abraham to bring murder charges against DiPasquale. Describing the tension surrounding the case, the article said "Some of the biggest names in the city's legal community have lined up to battle over the validity and the constitutionality of this use of the private criminal complaint.

Sprague sued over the following passage:

> The political stakes were raised in May when the DA accepted outside help in the case from her former boss, Richard Sprague, perhaps the most powerful lawyer-cum-fixer in the state. The appearance of the storied Dick Sprague set off alarms in the black precincts. Within a week they brought in their own big guns.

In November, the Eastern District of Pennsylvania concluded that the passage was ambiguous because it "contained no additional modifiers" and there was "no direct reference in the article to Sprague's political skills." The court held that "fixer" could have a defamatory meaning to a reader, and thus denied the ABA's motion for judgment on the pleadings.

The ABA followed that decision by arguing that Sprague should be considered either a public official, a general-purpose public figure, or a limited-purpose public figure. In their brief, the ABA argued that "Mr. Sprague's conscious decision to accept high-profile engagements and to lead a public life has turned him into a public figure in the Philadelphia area, as well as the local and national legal communities." The ABA also argued that Sprague "no longer needs high-profile clients or cases to attract media attention. Mr. Sprague, himself, is news. The very fact that he becomes involved in an existing legal matter has been the subject of news reports."

Sprague's concession of limited-purpose public figure status may have been a preemptive move to avoid being labeled a general-purpose public figure, which could have ramifications in future cases.

Joyce S. Meyers, David H. Marion, and Jeanette Melendez Bead of Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia, represented the ABA. James E. Beasley, of The Beasley Firm in Philadelphia, represented Sprague.

# Suit Stemming From Ramsey Murder Dismissed

## *Case By Housekeeper Against Parents Dismissed*

Another in the slew of the libel cases stemming from the death of six-year-old JonBenet Ramsey has been dismissed.

A suit against John and Patsy Ramsey based on statements in their book on their daughter's 1996 murder was dismissed in early April. *Hoffmann-Pugh vs. Ramsey*, No. 01-CV-630, 2002 WL 522713 (N.D. Ga. motion to dismiss granted April 5, 2002).

Linda Hoffman-Pugh, who was the Ramsey's housekeeper at the time of the murder, claimed that passages of the book, *The Death of Innocence*, describing her behavior before the killing implied that she was a suspect. The lawsuit, filed in March 2001, sought $50 million.

District Court Judge Thomas W. Thrash, Jr. rejected the argument, holding that the statement from the book which formed the basis of the suit "is not defamatory as it would be understood by the average reader."

The Ramseys are also defendants in another lawsuit stemming from their book, brought by Boulder resident Chris Wolf. *See Wolf v. Ramsey*, No. 00-CV-1187 (N.D. Ga. filed May 11, 2000) (*see also LDRC LibelLetter*, March 2001, at 15).

And four libel cases filed by the Ramseys are still pending. The defendants in these cases are ex-Bolder, Colo. police detective Steve Thomas (for his book on the murder); the *New York Post*; the publisher of the book *A Little Girl's Dream? A JonBenet Ramsey Story*; and Court TV. *See Ramsey vs. Thomas*, No. 00-CV-801 (N.D. Ga. filed March 20, 2001); *Ramsey v. NYP Holdings, Inc.*, No. 00-Civ-3478 (S.D.N.Y. filed May 8, 2000); *Ramsey v. Windsor House Publishing Group*, No. ______ (Tex. Dist. Ct., Travis County filed May 11,2000); and *Ramsey v. AOL Time Warner*, No. 01-CV-1561 (N.D. Ga. filed June 15, 2001).

Previously, settlements were reached in suits brought by the Ramseys against *Time* magazine (*see LDRC LibelLetter*, July 2001, at 24); the *Globe* newspaper (*see LDRC LibelLetter*, March 2001, at 4); and *Star* magazine (*see LDRC LibelLetter*, April 2000, at 8).

The Ramseys are represented by L. Lin Wood in Atlanta. Hoffman-Pugh was represented by New York attorney Darnay Hoffman and Evan Altman of Atlanta.

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## UPDATE: *Cleveland Plain Dealer* and AirTran Settle Defamation Suit

### *In January, District Court Implied That the Story's Headline Alone Could Defeat Summary Judgment*

*The Cleveland Plain Dealer* has settled the defamation suit brought against it by AirTran Airlines. The settlement prohibits any comment by the parties or their counsel beyond the statement that: "AirTran Airlines and *The Plain Dealer* have resolved the lawsuit brought by the airline relating to a January 11, 1998 article published by the Cleveland, Ohio newspaper. Neither party admitted to any liability as part of the settlement."

*The Plain Dealer* had been unable to obtain summary judgment in the case.

The article that gave rise to the lawsuit was a January 1998 report on a late 1997 FAA inspection of AirTran, formerly known as ValuJet. *See LDRC LibelLetter*, October 1999 at 23. Headlined "New name, Old problems for ValuJet: FAA finds faults at AirTran," the article reported that an FAA inspection team had preliminarily found that AirTran/ValuJet, which had been grounded after a 1996 Everglades crash that killed 110 passengers and crew, was not in compliance with a number of FAA safety requirements.

***[T]he court questioned the headlines' accuracy and implied that those perceived inaccuracies, standing alone, might be sufficient to defeat summary judgment in the case.***

More than a month after publication, a different Atlanta-based FAA team responsible for day-to-day oversight of AirTran reviewed that initial inspection, discounted some of its findings and concluded, as did the FAA final report issued thereafter, that there were no systemic safety violations.

AirTran filed suit four months later in the Northern District of Georgia. It was represented by L. Lin Wood.

After unsuccessfully contesting personal jurisdiction, *The Plain Dealer* sought dismissal prior to discovery on the grounds of the fair report privilege, citing, based on a comparison of the article and the initial FAA draft report, the demonstrable accuracy of the article's reporting. Questioning the authenticity of the draft report submitted in support of the motion as well as the applicability of the fair report privilege to draft government reports, the trial court denied the motion. *See AirTran Airlines v. The Cleveland Plain Dealer*, 66 F.Supp.2d 1355 (N.D. Ga. 1999) (Charles Moye, Jr., Senior Judge). *See also LDRC LibelLetter*, October 1999 at 23.

Following discovery, *The Plain Dealer* moved for summary judgment on a complete record on the ground that the plaintiff could neither prove falsity nor actual malice. On October 4, 2001, that motion was perfunctorily denied by a special master initially assigned to supervise discovery. On October 19, *The Plain Dealer* filed a motion objecting to the special master's report rejecting summary judgment.

*The Plain Dealer* requested that the District Court reconsider the denial, arguing that the special master evidently misinterpreted AirTran's burden of proof as a public figure plaintiff, misapplied the standard of proof to the facts of the case, and failed to consider the First Amendment issues "inherent in any analysis of the requirement that a plaintiff establish actual malice and falsity at the summary judgment stage."

When the District Court heard oral arguments regarding *The Plain Dealer*'s objection to the special master's motion, the court, consistent with its earlier order, was unsympathetic. Citing the headlines' reference to the "FAA" rather than an FAA team and the headlines' omission of the notion that the finding was preliminary, the court questioned the headlines' accuracy and implied that those perceived inaccuracies, standing alone, might be sufficient to defeat summary judgment in the case.

Post hearing, *The Plain Dealer* filed a supplemental brief arguing that it was "well established in Georgia that a publication must be construed in its entirety when determining whether it is defamatory," meaning the headline and the text of the article "must be read together in assessing defamation." Citing a 1958 Georgia Supreme Court decision, *The Plain Dealer* argued that rule applies "even when the headline is alleged to be de-

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## *UPDATE*: Contempt Proceedings For Internet Posters

A California appeals court has issued a stay of a lower court's contempt proceedings against two former employees found to have violated the terms of a permanent injunction barring them from posting messages regarding plaintiff biotech company, its affiliated company and their executives. Defendants were ordered in December to pay $775,000 in damages to plaintiffs for postings to various Internet message boards about the company and its executives. *Varian Medical Systems v. Delfino*, No. H024214 (Cal. Ct. App., 6th Dist. order April 16, 2002) (staying No. CV 780187 (Cal. Super. Ct. order March 26, 2002)). (For background on the case, *see LDRC LibelLetter*, Jan. 2001, at 13.)

The stay was issued as Santa Clara County Superior Judge Jack Kumar was overseeing discovery, prior to a contempt hearing scheduled for July 11. Kumar began the contempt proceeding after finding that plaintiffs Varian Medical Systems, Inc., an affiliated company, and executives of both firms had presented sufficient evidence that Michelangelo Delfino and Mary Day had violated the order.

An attorney for Varian told the San Francisco *Recorder* that Delfino and Day could be sentenced to up to five days in jail for each violation of the injunction.

In addition to the more than 13,000 postings which led to the suit, Delfino and Day continued to post comments on their own web site and other web sites throughout the 38-day trial. Varian contends that they posted at least 30 additional messages after the trial ended.

In June 1999, when the case was temporarily pending before the federal court in San Jose, Cal., District Court Judge Ronald M. Whyte issued an preliminary injunction barring Delfino and Day from posting messages regarding Varian and its employees. In November, the defendants were held in contempt and ordered to pay the defendants' $20,000 investigatory costs after the plaintiffs presented evidence that the defendants had posted particular messages from a computer at Kinko's. The preliminary injunction was reversed by the Ninth Circuit Court of Appeals in an unpublished opinion. See *Felch v. Day*, 238 F.3d 428 (table), 2000 U.S. App. LEXIS 23925 (decision) (Sept. 11, 2000).

Varian was represented at trial and in the suspended contempt proceeding by Lynne Hermle, Matthew Poppe and Robert Linton of Orrick, Herrington & Sutcliffe LLP in Palo Alto and in-house counsel Mary Rotunno and Joseph Phair. Day was represented by Palo Alto attorney Randall Widmann, while Delfino was represented by Glynn P. Falcon, Jr. also of Palo Alto.

In their appeal of the injunction, Delfino and Day are represented by Jon Eisenberg of Horvitz & Levy in Oakland, Cal. The company's appellate counsel is Gerlad Marer of Palo Alto.

### *Cleveland Plain Dealer* and AirTran Settle Defamation Suit

*(Continued from page 15)*

famatory." Citing a more recent case, *Blomberg v. Cox Enterprises*, 491 S.E.2d 430 (Ga. App. 1997), *The Plain Dealer* argued that Georgia courts have recognized that headlines are "merely a shorthand method for conveying a story's point in a limited amount of space," and "must be read together with the text of the article in order to fully understand the gist of the story."

On February 26, Judge Charles Moye Jr. denied *The Plain Dealer*'s motion for summary judgment. On March 22, the stipulation dismissing the case was entered by the court.

Peter Canfield, Sean Smith and Marcia Stadeker of Dow, Lohnes & Albertson in Atlanta, represented *The Plain Dealer*. L. Lin Wood, Brandon Hornsby and Mahaley Paulk of L. Lin Wood, P.C. in Atlanta, represented AirTran.

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# "Murderer" and "Racist" Protected From Libel Claim

## *Pre-Discovery Dismissal Also on Actual Malice*

**By Robert Balin and Peter Karanjia**

In a recent free speech victory for the NAACP, on March 22 a New Jersey Superior Court judge granted pre-discovery dismissal of a policeman's libel suit against the President of the New Jersey chapter of the NAACP. *Mildon v. Rutherford*, Superior Court of New Jersey, Essex County, Dkt. No. ESX-L-4238-01 (March 22, 2002). In *Mildon*, Judge Edith Payne ruled from the bench that public statements harshly criticizing the plaintiff's shooting of an unarmed black man as "murder" by a "racist" police officer were constitutionally protected expressions of opinion and protest, not assertions of verifiable fact.

In a rare grant of pre-discovery dismissal on actual malice grounds, Judge Payne further held that the plaintiff-police officer had no hope of proving by clear and convincing evidence that the one and only fact statement in suit had been made with actual malice and that, as such, permitting discovery on actual malice grounds would serve no useful purpose. Finding that the officer's libel claims had as their apparent objective the stifling of public debate about the police shooting, Judge Payne broadly opined that such public official SLAPP suits "should be discouraged at the outset" through prompt pre-discovery dismissal.

### *The Shooting*

The *Mildon* case arose from a highly controversial incident in which an Irvington, New Jersey policeman, William Mildon, shot and killed an unarmed African-American motorist, Bilal Colbert, during a routine traffic stop. At the time of the killing, Colbert was driving his girlfriend's two daughters (age 8 and 10) to school and was parked in front of a grocery store. As widely reported in the press, when Colbert refused to obey Officer Mildon's order to get out of his car and began to drive away, Officer Mildon swung open the driver-side door and shot Colbert in the neck at point blank range. At the time of the shooting, the two young girls were in or near the back seat of the car.

The incident immediately received intense media coverage and it was reported that, four years earlier, Officer Mildon had shot and killed another African-American motorist, Keion Williams, under eerily similar circumstances (although a grand jury had declined to issue an indictment in connection with that incident). Against the backdrop of racial profiling by New Jersey law enforcement agencies and other recent police killings of African-American men, the Colbert shooting triggered a firestorm of public protest and criticism of Officer Mildon's actions — with many in the community condemning the shooting as wholly unjustified.

### *NAACP Highly Critical of Cop*

In a televised press conference two days after the Colbert shooting, Reverend Rutherford — as the NAACP's chief spokesman in New Jersey —vehemently denounced the killing and complained of "systematic racism . . . in police departments" whereby African-American men "are shot down in the street like dogs by racist, insensitive and misguided police officers like Officer Mildon and who have no regard for human life." The Reverend further criticized Officer Mildon as "deranged" and an "executioner," and characterized Officer Mildon's shootings of Colbert and Williams as "murder." Reverend Rutherford also stated at his press conference that, according to unnamed witnesses to whom he had spoken, Officer Mildon had on prior occasions harassed Mr. Colbert by making gun gestures with his hand as if he was shooting Colbert.

Two days after the press conference, Officer Mildon filed suit for slander, libel, intentional infliction of emotional distress and false light invasion of privacy. Reverend Rutherford thereafter filed a pre-answer motion to dismiss and/or for summary judgment. Shortly before oral argument, it was reported that an Essex County grand jury had declined to indict Officer Mildon in connection with the Colbert shooting.

### *The Bench Ruling*

In her bench ruling granting dismissal, Judge Payne held that, but for the hand gesture statement, all the statements in suit were clearly expressions of opinion and "precisely the types of comments that must be protected by the First Amendment[.]" In holding that Reverend Ruther-

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## NAACP Libel Win

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ford's characterization of the Colbert shooting as "murder" and "racist" constituted opinion, the court looked to

> the context in which [the statements] were presented [i.e., as part of a hyperbolic and rhetorical speech] . . . by whom there were presented [a prominent civil rights advocate] and the manner in which they were presented [at a press conference to denounce a police killing].

Noting in particular the feelings of racial polarization in the city of Irvington, the widespread publicity received by the Colbert shooting and the extensive public comment regarding it as an unjustified death, the court observed that

> one would expect that a person who is a leader of [the] black community such as the Reverend Rutherford . . . would be a vocal spokesperson for his community" and he "has a right to . . . distill[] and express [] the outrage that was felt in the black community at what [was] . . . perceived to be a very unjustified killing.

### *Pure Opinion*

In reaching this conclusion, Judge Payne joined a number of other courts from around the country which have held that rhetorical use of terms like "murder", "murderer" and "executioner" as part of impassioned criticism of controversial shootings and deaths constitutes non-actionable opinion under First Amendment principles. *See e.g., Goetz v. Kunstler*, 164 Misc.2d 557, 563, 625 N.Y.S.2d 447, 452 (Sup. Ct. N.Y. Co. 1995); *Thuma v. Hearst Corp.*, 340 F.Supp. 867, 871 (D. Md. 1972); *Pellegrini v. Ferrer*, 27 Med. L. Rptr. 1127, 1128 (Sup. Ct. Bronx Co. 1998); *Kevorkian v. American Medical Association*, 237 Mich. App. 1, 12-13, 602 N. W.2d 233, 239 (Mich. App. 1999), *cert. denied*, 121 S.Ct. 1655 (2001).

Without addressing the issue in detail, Judge Payne also held that Reverend Rutherford's statements were "pure" opinion under New Jersey common law's fair comment privilege. Following the Restatement (Second) of Torts § 566, courts in New Jersey define "pure" opinion, which is absolutely privileged, as occurring either where the speaker states the facts on which he bases his opinion, or where "the maker of the comment does not spell out the alleged facts on which the opinion is based but both parties to the communication know the facts or assume their existence." *Kotlikoff v. The Community News,* 89 N.J. 62, 68-69, 444 A.2d 1086 (1982). Here, Judge Payne agreed with Reverend Rutherford's argument that because the underlying facts about the Colbert shooting had been widely reported in the press, his characterization of the shooting as "murder" by a racist and deranged officer constituted expressions of "pure" opinion and were, accordingly, immune from suit.

### *Pre-Discovery Dismissal on Actual Malice*

Having disposed of all but one of the statements in the suit on opinion grounds, Judge Payne also granted dismissal as to Reverend Rutherford's one fact statement – that, according to witnesses, Officer Mildon had previously harassed Mr. Colbert with hand/gun gestures. In a rare example of pre-discovery summary judgment on grounds of no actual malice, Judge Payne found that there was "no possibility that the plaintiff could prevail on the claim that actual malice existed" and that discovery was therefore unnecessary. In reaching this conclusion, the court relied on two uncontested certifications in which witnesses confirmed that they had told Reverend Rutherford about the hand/gun gestures, and a certification from the Reverend stating that he honestly believed the information to be true. Issuing a strong warning to potential SLAPP litigants, Judge Payne observed that:

> If there were to be discovery in this case, the plaintiff would have fulfilled an objective . . . of interfering with the free exchange of ideas in filing a suit of this sort. That is something that the New Jersey courts have commented on in the past and have expressed vehemently their position that suits of this nature should be discouraged at the outset and not two or three years down the road . . . . That clearly is an impediment . . . on free speech that is not tolerated.

Finally, the Court also dismissed Officer Mildon's tag-along claims for false light and intentional infliction of emotional distress on the ground that they were merely restatements of his defective defamation claims.

*Robert Balin is a partner, and Peter Karanjia is an associate, at Davis Wright Tremaine LLP in New York.*

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## "Skank," "Chicken Butt," Not Defamatory on Talk Radio Show, California Court Rules

**By Susan Seager**

A California Court of Appeal granted a special motion to strike a slander lawsuit against radio talk show hosts who called a reality show contestant a "local loser," "chicken butt" and "big skank," ruling that those phrases were "too vague" to be proven true or false and "classic rhetorical hyperbole" not reasonably interpreted as stating actual facts. *Seelig v. Infinity Broadcasting Corp.*, — Cal. Rptr. 2 —, 2002 WL 554459 (April 16, 2002) (quotations omitted).

Describing the word "skank" as a "derogatory slang term of recent vintage that has no generally recognized meaning," the Court held that it was merely a "subjective expression of disapproval, devoid of any factual content." *Id.* at * 7 (quotations and brackets omitted). The plaintiff, who was ridiculed in part because of her appearance on "Who Wants to Marry a Multimillionaire," failed to offer the trial court an "acceptable dictionary definition for the term skank." The Court said that its research discovered "no reported decision in California or elsewhere that has held the term skank constitutes actionable defamation." *Id.*

The Court held that the lawsuit came within the scope of California's anti-SLAPP statute, which permits the pre-discovery dismissal of meritless lawsuits that target protected First Amendment activity, because the "offending comments" were made "in connection" with a general debate about the "Multimillionaire" television show and "what its advent signified about the condition of American society," which qualified as "an issue of public interest." *Id.* at *5.

*(Continued on page 20)*

*To Be Published in July*

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## "Skank," "Chicken Butt," Not Defamatory on Talk Radio Show, California Court Rules

*(Continued from page 19)*

### *Reality Television Meets Talk Radio*

The case was brought by Jennifer Seelig, who voluntarily appeared as one of 50 finalists on the "Multimillionaire" show. After "Multimillionaire" was taped, but before it was broadcast, the hosts of "The Sarah and Vinnie Morning Show," invited Ms. Seelig to appear on their talk radio program. She refused, saying she did not want to be ridiculed on their show. On the morning of February 15, 2000, the hosts and producer of the talk radio show launched into 3 ½ minutes of unscripted dialogue about Ms. Seelig and the "Multimillionaire" show. Ms. Seelig was not named, but described as "a local loser" and "chicken butt," and the "ex-wife of someone who works at our sister station down the hall. And uh yeh, he just says what a big skank she is."

Ms. Seelig filed a complaint for damages for five causes of action: slander per se, slander by radio broadcast, invasion of privacy (false light), negligent hiring and supervision, and intentional infliction of emotional distress. She named Infinity Broadcasting Corp., which owns KLLC-FM, one of the talk radio hosts, the producer and director. She alleged that the insults falsely "attributed a want of chastity, poor moral character, and a lack of maternal fitness to plaintiff."

### *Commentary About Reality Television Is "Issue of Public Interest"*

The First District Court of Appeal reversed. Writing for the three-member panel, Judge Mark Simons held that Infinity defendants met their threshold burden of showing that they were sued for engaging in conduct protected by California's anti-SLAPP statute. Citing the widespread public debate about the "Millionaire" show and its impact "on American society," the Court held that "the challenged commentary was made 'in connection with an issue of public interest[.]" *Id.* at * 1, *5. The Court cited Code of Civil Procedure Section 425.16 (e)(3), which protects "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," and 425.16(e)(4), which protects "any other conduct in furtherance of the exercise of the constitutional right . . . of free speech in connection with a public issue or an issue of public interest." *Id.* at * 1, *5.

The Court found that Ms. Seelig could not show a probability of prevailing on her slander claims because the "insults" were "too vague to be capable of being proved true or false." *Id.* at * 7. Relying on *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999), the Court explained: "The chicken butt remark was plainly a derogatory figure of speech intended to convey Vinnie's subjective belief, stated in a nonserious manner, that plaintiff was afraid to appear on defendant's radio program for fear of being ridiculed; the term could not have been meant for listeners to take literally because its literal interpretation is nonsensical when applied to a human being." *Id.* at * 6.

Examining the "context" of the radio show, the Court held that its "nonserious" nature, which included "light banter . . . frequently punctuated by laughter," signaled to the listener that the hosts were not making "factual pronouncements." *Id.* at * 7. Although the language may be "sophomoric and in bad taste," the comments are "just the type of name calling of the sticks and stones will break my bones variety" that are not actionable as a matter of law. *Id.* at * 6 (quotations omitted).

The court remanded the case back to the trial court, and ordered it to strike all of plaintiff's causes of action because they all "arise from and depend on her claims of defamation." *Id.* at *8. The Court awarded the Infinity defendants their reasonable fees and costs on appeal. Defendants also are entitled to their fees and costs for successfully bringing the special motion to strike.

*The defendants were represented by Frederick F. Mumm, Thomas R. Burke and Susan Seager of Davis Wright Tremaine LLP in Los Angeles and San Francisco. The plaintiff was represented by Christopher B. Dolan and Mark L. Weber of The Dolan Law Firm of San Francisco.*

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# California Supreme Court Rules Against Secretly Taping Conversations

## *Decision resolves conflict in lower courts*

**By Duffy Carolan**

In a decision that may significantly impact investigative journalism in California, the state Supreme Court in March held that a conversation can be a "confidential communication" under the state penal code even if everyone knows the conversation might be repeated to someone else later. Thus, under the ruling in *Flanagan v. Flanagan*, 2002 WL 392917 (March 14, 2002), it might be a crime for reporters to secretly tape record an interview for later corroboration or simply to make sure they are getting the quotes right.

The court in *Flanagan* was confronted with a conflict in the courts of appeal as to the meaning of "confidential communication" under California's Penal Code § 632. That section makes it a crime for anyone to intentionally record or electronically eavesdrop upon the "confidential communications" of others without the consent of all the parties to the communication. Cal. Penal Code § 632 (a).

***What is called the Frio rule held that the mere fact that a party does not reasonably expect a communication to be recorded or overheard renders it "confidential."***

### *A Split in Courts of Appeal*

Courts that applied what is called the *Frio* rule held that the mere fact that a party does not reasonably expect a communication to be recorded or overheard renders it "confidential." *See Frio v. Superior Court*, 203 Cal. App. 3d 1480 (1988); *Coulter v. Bank of America*, 28 Cal. App. 4th 923 (1994). Under these cases, even if a party knows a conversation will be repeated to others by someone in the conversation, anyone who records the conversation has committed a crime—as long as it was reasonable to expect that the conversation would not be overheard by a non-participant or recorded by anyone.

The other line of authority applied the *O'Laskey* rule and held that a communication is confidential if a party has an objectively reasonable expectation that the content of the conversation would be "confined to the parties" and not later divulged to others. See *O'Laskey v Sortino*, 224 Cal. App. 3d 241 (1990); *Deteresa v. American Broadcasting Companies, Inc.,* 121 F.3d 460 (9th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

Under the *O'Laskey* rule, journalists were allowed to use hidden microphones or recording devises in gathering the news without the express consent of all the parties as long as what was said and the circumstances surrounding the conversation would lead a reasonable person to conclude that the content of the communication may later be disclosed to others.

For example, in *Deteresa*, a flight attendant on the plane that O.J. Simpson took from Los Angeles to Chicago the night Nicole Simpson and Ronald Goldman were murdered sued ABC for, among other things, allegedly violating § 632. ABC interviewed Deteresa at the door to her condominium about appearing on a television program. The interview was secretly recorded and a cameraman videotaped it from an adjacent street. During the interview, Deteresa voluntarily disclosed that contrary to reported accounts Simpson did not keep his hand in a bag during the flight. When Deteresa later refused to appear on television, ABC played portions of the videotape, but not the audio. Predicting what the California Supreme Court would do, the Ninth Circuit applied the *O'Laskey* rule and concluded that the recorded conversation was not confidential under § 632 because "no one in Deteresa's shoes could reasonably expect that a reporter would not divulge her account" *Deteresa*, 121 F.3d at 465.

### *The California Supreme Court Steps In*

This conflict among the state courts of appeal about what "confidential" means reached the supreme court in *Flanagan* in the context of a dispute between the wife of a wealthy mortuary owner and his son from a prior marriage. The wife sued the stepson and her manicurist alleging that they had violated § 632 by recording telephone conversations in which she supposedly talked to

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**California Supreme Court Rules Against Secretly Taping Conversations**

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the manicurist about hiring someone to kill her husband. The stepson counter sued under § 632, accusing his stepmother of secretly recording conversations the son had with his father. Some of the son's calls, however, were as innocuous as calling the father to notify the gatekeeper that he was coming to visit.

Because the jury rejected the stepmother's claims in their entirety, the question for the supreme court was whether the son should have been allowed to claim a Section 632 violation when he knew his father might repeat the content of their conversations. After discussing both the *Frio* and *O'Laskey* lines of cases, the court turned to the statutory language of § 632 itself.

Quoting from the statute, the court noted that subsection (c ), which defined confidential communications, had two clauses:

- The first clause states that "'confidential communications' includes any communication carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined to the parties thereto."
- The second clause specifically "excludes a communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

In adopting the *Frio* test, the court reasoned that the *O'Laskey* conclusion that a conversation is confidential only if a party has an objectively reasonable expectation that its content will not be disseminated to others did not conform to the inclusive language of the first clause of subsection (c ). In other words, under the *O'Laskey* test, according to the court, confidential communications would not only *include* but would be *limited* to conversations whose content is to be kept secret.

***In adopting the Frio test, the court reasoned that the O'Laskey conclusion that a conversation is confidential only if a party has an objectively reasonable expectation that its content will not be disseminated to others did not conform to the inclusive language of the first clause of subsection (c ).***

### *Applying the Decision to Reporters*

Setting aside the fact that the Court's interpretation of the statute transforms the exception to confidential communication into the rule and makes superfluous the express definition of confidential communication in the process, the decision is a step backwards for undercover, investigative journalism. Although the case did not involve reporters or the press' First Amendment rights to gather the news, the court's broad reading of the statute exposes a journalist to potential criminal liability for recording a conversation, unless the journalist gets the consent of all parties to the communication or unless under the circumstances the person being interviewed may reasonably expect that the communication may be overheard or recorded.

While the ruling poses a challenge for journalism, undercover taping may still be defensible in some circumstances. *Flanagan* leaves intact the exceptions of § 632(c) for communications made in public gatherings or government proceedings open to the public, even if the reporter is using a hidden microphone. § 632(c) also leaves open the exception for circumstances in which the parties might expect to be "overheard." If the recording occurs in a locale where others are present, the people involved would reasonably expect that they may be "overheard." The "overheard" exception potentially covers many situations in which a reporter might surreptitiously tape. For example, if a reporter were standing in line recording at a supermarket while customers asked the butcher about the freshness of the meat, a reasonable person would expect that his or her reply might be overheard.

The supreme court could not have been unaware of the effects of its ruling on journalists; several news organizations filed an *amicus* brief in *Flanagan* to warn of the implications for freedom of the press. That brief reviewed the importance of investigative journalism throughout history, beginning with Upton Sinclair's ex-

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**California Supreme Court Rules Against Secretly Taping Conversations**

(Continued from page 22)

pose of unsanitary Chicago meatpacking plants in his 1906 novel, *The Jungle*. In response to the book, President Theodore Roosevelt ordered an investigation that led to the enactment of the Meat Inspection Act of 1906.

More recently, the a*mici* noted, journalists used concealed cameras and recording devices "to uncover unsanitary food handling practices at a large supermarket chain (*Food Lion, Inc. v. American Broadcasting Company*, 194 F.3d 505 (4th Cir. 1999)); to capture the sales pitches of purveyors of fraudulent "800" telephone number businesses (*Wilkins v. National Broadcasting Company, Inc.,* 71 Cal. App. 4th 1066 (1999)); to report on unnecessary procedures prescribed by eye clinics (*Desnick v. American Broadcasting Companies*, 44 F.3d 1345 (7th Cir. 1995)); and to report on an animal trainer regularly abusing animals (*People For The Ethical Treatment Of Animals v. Bobby Berosini, Ltd.,* 110 Nev. 78, 867 P.2d at 1121 (Nev. 1994))."

By broadly defining confidential communications under § 632 in the manner that it has, the court has severely restricted the press' ability to gather the news. The situation could be rectified if the Legislature amended the statute to clarify that confidential communications include only those where it is reasonable to expect the content will not be divulged to others regardless of whether it is reasonable to believe it is not being recorded or overheard. Without such legislative action, investigative journalists who use hidden microphones to expose wrongdoing, or even criminal conduct, may find themselves facing criminal charges instead of praise for doing a public service.

*Duffy Carolan is a partner in Davis Wright Tremaine LLP, San Francisco. Davis Wright Tremaine represented Amici Curiae in Flanagan.*

*Christine Whalen contributed to this article. She is an associate who specializes in media law at Davis Wright Tremaine in San Francisco.*

# FCC Fines Station For Playing Tape of Answering Machine

In a case that should serve as a reminder that the Federal Communications Commission still has rules that govern the taping and broadcast of telephone conversations by licensees – and that the Commission still plans to enforce those rules – the FCC has fined a rock music station, WWDC FM, $6,000 for airing the answering message from a telephone answering machine without the speaker's permission. *In the Matter of AMFM Radio Licenses, LLC,* No. 02-622, 2002 WL 416267 (FCC March 15, 2002).

Under 47 C.F.R. § 73.1206, the FCC prohibits the broadcast of a telephone conversation by a broadcast licensee, either live or having been taped by the broadcaster, absent the prior consent of the individual whose voice would be broadcast. Exceptions include individuals who knowingly call into on-air talk radio programs, where the individual speaking can be presumed to know that they are going to be put on the air.

In pertinent part, 47 C.F.R. § 73.1206 says that

> Before recording a telephone conversation for broadcast or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any

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# Tennessee Supreme Court Recognizes Intrusion Privacy Claim

In a case in which it did not need to reach the issue, the Tennessee Supreme Court expressly adopted the claim of unreasonable intrusion upon seclusion as defined in the Restatement (Second) of Torts, § 652B. *Givens v. Mullikin* (March 25, 2002). This was a non-media case, and the court ultimately concludes that the plaintiff has not pled an invasion of privacy claim.

But after noting that it had not recognized expressly any cause of action for privacy – other than the recent recognition of false light invasion of privacy in *West v. Media General Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) – the court makes it clear that intrusion is now a viable claim under Tennessee law.

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### FCC Fines Station

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party to the call of the licensee's intention to broadcast the conversation, except where such party is aware or may be presumed to be aware from the circumstances of the conversation that it is being or likely will be broadcast.

In this case, a radio jockey taped and then broadcast the complainant's answering message from her machine, played it on air, encouraging listeners to call her to complain about a position she had taken on a local matter. She complained to the FCC, and, apparently has won a fine against the station.

The radio station argued that the message was "generic in content" and that the matter was thus distinguishable from a previous FCC ruling in which the FCC "found apparent liability for the broadcast of a conversation between the complainant in that case and another person, which was taken from the complainant's answering machine." *Citicasters Co.*, 15 FCC Rcd 13805.

The FCC acknowledged in its opinion in *Citicasters* that the broadcaster's conduct was different from the typical § 73.1206 case, but concluded that the conduct still violated the language and purpose of the rule. According to the FCC, the purpose of the rule is to protect parties to telephone conversations.

In the *AMFM* decision, the FCC said *Citicasters* makes it clear that the "right to answer the telephone without having one's voice transmitted to the public exists irrespective of whether the voice broadcast or recorded for later broadcast is live or is lifted from an answering maching."

## Correction: The Wrong Party Girls

A headline in last month's *MediaLawLetter* incorrectly identified the defendant in a lawsuit which resulted in a default judgment. (The default judgment has since been vacated, as reported on this page.) As correctly stated in the article beneath the erroneous headline, the default judgment was entered against AccroMedia Group, the producer of the "Wild Party Girls" video. AccroMedia is in no way associated with MRA Holdings, Inc. which produces and distributes the "Girls Gone Wild" video series, which the headline incorrectly stated was at issue in the suit.

# "Wild Party Girls" Default Vacated

***Plaintiff Mis-identified, Failed to Notify Defendant***

A $5 million default judgment against the producer of a video that was advertised with pictures of a Texas college student baring her breasts, reported in last month's newletter (*see MediaLawLetter*, March 2002, at 32; also see correction on p. 24 of this issue), has been vacated. *Kulhanek v. Acro Media Group, Inc.*, No. 01-0505 (Tex. Dist. Ct., 22nd Dist. default verdict vacated March 28, 2002).

The lawsuit was brought by Amber Kulhanek, a student at Southwest Texas State University who bared her breasts at a bar in Matamoras, Mexico in 2000. A still picture of her appeared in the member's section of a web site promoting "Wild Party Girls" videos, and a censored video version was used in an advertisement for the videotape that was broadcast by E!. Kulhanek sued both the producer of the videos and E!.

The producer, Florida-based AccroMedia Group, Inc., was originally identified in the suit as "Acro Media Group," and, according to the plaintiff, was served through the Texas Secretary of State. When the company did not appear to answer the suit, Judge Charles R. Ramsay of the the Hays County District Court issued a default judgment against the absent defendant, awarding $2.5 million for Kulhanek's privacy claim, $2.5 million for her emotional distress claim, and $10,000 in attorney's fees.

After AccroMedia then appeared to challenge the default judgment. Kulhanek filed a motion for a "default judgment *nunc pro tunc*," seeking to correct the name of the defendant, and to have the court issue a new default judgment for a reduced amount: $1 million in damages, plus $100,000 in attorney fees. The court rejected this motion, and vacated the default award.

Kulhanek is represented by David Sergi, a solo practitioner in San Marcos, Texas. AccroMedia is represented by Sean E. Breen of Herman, Howry & Breen, L. L.P., in Austin, while Dale Jefferson of Martin, Disiere, Jefferson & Wisdom, L.L.P. in Austin and Houston is representing E!.

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# Naomi Campbell Wins Privacy Case Against *Mirror* Newspaper

In a surprising decision, the judge who presided over the bench trial of model Naomi Campbell's breach of confidence and data protection claims against the *Mirror* newspaper, ruled in her favor, awarding her the modest sum of £3,500 for both claims, but entitling her to recovery of legal fees estimated at £200,000, and arguably throwing British privacy law into further confusion. *Campbell v. Mirror Group Newspapers*, [2002] EWHC 499 (QB) (March 27, 2002) (Morland J.) (available online at www.courtservice.co.uk.).

### *Article Revealed Campbell's Drug Addiction*

At issue in the case was a *Mirror* article published on February 1, 2000 entitled "Naomi: I am Drug Addict," which revealed that the model – contrary to her public denials – was addicted to drugs and was regularly attending meetings of Narcotics Anonymous ("NA"). The article was accompanied by a photograph of Campbell leaving an NA meeting in London. *See also LDRC LibelLetter* February 2002 at 27. Subsequent articles and editorials in the *Mirror* that criticized Campbell for bringing the lawsuit were found to have caused aggravated damages amounting to £1,000 of the total award.

***"[I]t does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalist. They are entitled to some space of privacy."***

### *Disclosure of Details of Treatment is Actionable*

Justice Morland presided over a one week bench trial in February 2002 during which he referred to Campbell as "a most unreliable witness," seemingly signaling that he viewed her claims skeptically. But to the surprise of many, he ruled in her favor this month. The decision holds quite oddly that while "the *Mirror* was entitled to reveal, and to reveal in strong terms, that Miss Naomi Campbell was a drug addict" and "was receiving therapy" she still had a "residual area of privacy" to make actionable the disclosure of details regarding her NA meetings. *Campbell v. Mirror* at ¶ 10, 68-70.

Justice Morland found these "details" to be an "obvious" privacy interest, although the "details" revealed are hardly the sort of medical or personal information that ordinarily would be considered private under U.S. law. In addition to publishing a photo of Campbell leaving an NA meeting, the *Mirror* reported that "the 30-year-old has been a regular at [NA] counseling sessions for three months, often attending twice a day"; that she attended a lunchtime meeting and later that same day attended a women's only NA session. It described how she was dressed for the meetings – "in jeans and a baseball hat." And concluded that "despite her £14 million fortune Naomi is treated as just another addict trying to put her life back together." *Id.* at ¶ 10.

### *Privacy Interest Is "Obvious"*

The legal distinction between merely reporting that Campbell was receiving therapy and these additional details is not analyzed beyond Justice Morland's apparent gut reaction that these facts are "obviously" private, citing Lord Justice Woolf's guideline from the Court of Appeal decision last month in *A. v. B. & C.*, [2002] EWCA Civ 337 (Mar. 11, 2002) (LCJ Woolf, LJ Laws, LJ Dyson); *see also LDRC MediaLawLetter* March 2002 at 42. In that case, involving a professional soccer player's efforts to restrain publication of articles revealing his extramarital affairs, Lord Woolf noted that "usually the answer to the question whether there exists a private interest worthy of protection will be obvious. In those cases in which the answer is not obvious, an answer will often be unnecessary." *A. v. B. & C.* at ¶11 (vii). While this guideline could reasonably be interpreted as requiring an objective consensus as to what is or is not private, Justice Morland apparently found it sufficient to rely on his own instincts in this area – an approach that leads to the sort of ad hoc decision making Lord Woolf's decision seemed designed to reign in.

### *Breach of Confidence*

Having found a privacy interest, Justice Morland concluded that Campbell proved her breach of confidence claim on the ground that the source for the *Mirror's* article must have been one of her employees or a fellow NA attendee obliged to keep the information private. The court specifically rejected the testimony of the *Mirror's* editor Piers Morgan that the newspaper stumbled onto the story by accident when a photographer noticed Campbell leaving an NA meeting. Justice Morland also found that Campbell was damaged by the *Mirror's* disclosure, at least so far as it might

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**Naomi Campbell Wins Privacy Case Against *Mirror***

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"adversely effect her participation in NA." Campbell at ¶ 40.3.

As to whether Campbell's pervasive fame narrowed her right of privacy, Justice Morland accepted that Campbell is an international celebrity who has frequently discussed her personal life with reporters and who acknowledged problems with "behavioral unpredictability," and a notoriety for "tantrums," but Morland goes on to hold that "it does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalist. They are entitled to some space of privacy." Id. at ¶ 66.

Morland quotes at length from Lord Woolf's press-friendly pronouncements in *A v. B & C*, including the admonishment that "courts should not act as censors or arbiters of taste" and concludes that his decision passes muster under this test. Id. at ¶ 49. But overall his fine line drawing between reporting that Campbell was receiving therapy (protected) and attending NA (actionable) appears to be exactly the sort of judicial editing condemned by Lord Woolf. For example, Justice Morland comments in the nature of an editor that "it was not necessary to publish the therapy details complained of. . . .All that needed to be published in pursuit of the defendant's legitimate interests were the facts of drug addiction and therapy – fullstop." *Id.* at ¶112.

***Also troubling, despite the relatively small damage award, is the court's application of the Data Protection Act against a newspaper – the first time the Act has been construed in a claim against the press.***

### *Data Protection Violation*

Also troubling, despite the relatively small damage award, is the court's application of the Data Protection Act against a newspaper – the first time the Act has been construed in a claim against the press. The decision holds that the *Mirror* is a "data controller" and its "obtaining, preparation and publication" of the facts about Campbell amounted to data "processing" – a sweeping conclusion that subjects every aspect of newsgathering and publishing to Data Protection law. *Id.* at ¶ 80. Analyzing the law in a technical and narrow way and showing no special regard for the press, Justice Morland held that the press can be liable for damages under the Act for news reports that disclose sensitive personal data – in this case the "details" of Campbell's NA therapy meetings.

### *Press Exemption Applies Only Prior to Publication*

Justice Morland further ruled that Section 32 of the Act which exempts data processing when "the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material did not apply." Justice Morland interpreted the words "with a view to the publication" to mean only prepublication processing *Id.* at ¶ 95 The press exemption, he reasoned, "is aimed at limiting a disproportionate restraint on freedom of expression by publication such as granting of injunctions to stop publication.... [It] was not intended to whittle down Article 8" and bar claims for post-publication damages. *Id.*

Moreover, Justice Morland also held that two catch-all exemptions in the Act either do not apply to the press at all or not under the facts of the case. A "public interest" exemption (Schedule 2 Condition 5 (d)) was held not to apply because "the commercial publications of newspapers is not the exercise of a function of a public nature." Id. at ¶ 110. A "legitimate interests" exemption (Schedule 2 Condition 6) did not apply – assuming it could apply to the media – where the information was obtained by intruding into the data subject's privacy. Id. at ¶ 112.

Justice Morland rejected the *Mirror's* sensible argument that the Data Protection Act violated Article 10 of the European Convention "because instead of starting from the preeminent premise of freedom of expression, one starts with a whole series of restrictions which then in order to justify not being in breach of the Act, one has to demonstrate one comes within exceptional cases." The Data Protection Act 1998 is available at: www.legislation.hmso.gov.uk/acts/acts1998/19980029.htm

The newspaper will appeal the decision.

*The Mirror was represented by Barristers Desmond Brown Q.C., Mark Warby and Anna Coppola and the Mirror's legal department. Naomi Campbell was represented by barristers Andrew Caldecott Q.C. and Antony White Q.C. and the solicitors firm Schilling & Lom and Partners.*

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# The Status of English Privacy Law After *A v. B and C* and *Campbell*

**By Martin Cruddace and Amber Melville-Brown**

As many are aware the UK Parliament has, through the Human Rights Act 1998, incorporated the European Convention on Human Rights into UK Law. Those with publishing or broadcasting interests in the UK have waited with baited breath to see how the courts will interpret the potential conflict between Article 8 (an individual's right to privacy) and Article 10 (the right of freedom of expression – subject to certain restrictions which are set out in the Article) of the Convention.

Many commentators came to the conclusion that a right to privacy was inevitable and, indeed, many practitioners proceeded on that assumption. Recently, there have been two significant cases in which these points have been argued but not settled The first is the Court of Appeal's March 2002 Judgment in *A v. B and C* [2002] EWCA Civ 337 (Mar. 11, 2002) (LCJ Woolf, LJ Laws, LJ Dyson); the second, this month's bench trial decision in *Naomi Campbell -v- MGN Limited*) (*The Daily Mirror*) (Morland J.).

While the Court of Appeal decision was a significant boost for the press the *Campbell* decision involved an unexpected but none the less significant development in the interpretation of the Data Protection Act 1998, highlighting a new area of potential media liability regarding the "processing" of "sensitive personal data."

## *Court of Appeal Weighs In on Emerging Right of Privacy*

The facts of *A v B and C* can be easily summarized as follows: The plaintiff "A" is a married professional footballer with two children. Not too cryptically, he is described as having a "responsible" position in the club. He liked to take out fellow members of his team to bars (including lap-dancing clubs) "with the object of improving team spirit" (of course). There he met and had an adulterous affair with D (not a party to the proceedings). He then met another woman (C) and began a relationship with her. Both relationships ended and the *Sunday People* (B) decided to run two articles which, not surprisingly, were concerned with "salacious description of sexual activity."

The plaintiff obtained from the trial court a pre-publication injunction arguing that a right of privacy attached to the facts of his extra-marital affairs under a theory of breach of confidence and the emerging right of privacy under Article 8. The Court of Appeal reversed the injunction, finding that the law of confidentiality was sufficient to protect privacy interest, that no new tort of privacy need be recognized and that under the facts of the case the law of confidentiality did not apply. Moreover the Court of Appeal issued guidelines for future cases which address the balance between free expression and privacy, including the role of the press and coverage of public figures.

***The definition of what constitutes a public figure is now far wider than any editor could have either guessed or hoped for.***

## *Key Aspects of the Decision*

The most important aspects of the Judgment of the Court of Appeal appear to us to be as follows:

1. The definition of what constitutes a public figure is now far wider than any editor could have either guessed or hoped for. Indeed it is probably wider than even the Press Complaints Commission would understand it to be. Lord Justice Woolf quoted, with apparent approval, paragraph 7 of the Council of Europe's resolution 1165 of 1998, in which public figures are defined as "all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain." It is also worth quoting him when he says: "The public figure may be a role model whose conduct will well be emulated by others. He may set the fashion." So look out, actors, singers, sports starts and other "personalities."
2. A newspaper will be allowed to comment on or disclose conduct of a public figure which in the case of a private individual would not be appropriate.
3. The definition of what is in the public interest has been considerably widened (indeed it now goes fur-

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## The Status of English Privacy Law After *A v. B and C* and *Campbell*

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ther than the Press Complaints Commission's own definition). In many cases (such as this one) Lord Justice Woolf says that: "It would be overstating the position to say there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information." In an astonishingly press friendly observation, he also says that courts should take into account that if newspapers do not publish information in which the public are interested, fewer newspapers will be sold, which will not be in the public interest.

4. The more public figures voluntarily put their private lives into the public domain, the "less ground [they have] to object to the intrusion".
5. There is no need to analyze the path of a new tort of privacy because the tort of confidence is now wide enough to cover all those parts of an individual's private life that need protecting.
6. Adulterous relationships (such as the ones engaged in by A) constitute conduct that is on the outer limits of what needs protection.

### *Private Lives of Public Figures More Open to Press Scrutiny*

The Court of Appeal Judgment radically affects the application of the law in respect of the private lives of individuals and also greatly widens the definition of what constitutes a public figure.

The decision may be most helpful in protecting serious news and investigative reports about public figures. However, we do not think that tabloid newspapers have as much cause for celebration as some appear to suggest. Tabloid newspapers rarely have similar "kiss and tell" stories which rely on individuals who have had a sexual relationship with married "public figures." Frequently these type of stories can be simply a jilted girlfriend or boyfriend. Depending on the length and character of the relationship, the Court of Appeal Judgment makes clear that the facts surrounding the relationship may be covered by the law of confidentiality and thus newspapers will still be under threat of an injunction or an action for damages.

Further, Lord Woolf makes the obvious point that conduct being carried out in private does not necessarily characterize it as conduct that is capable of protection. The logical extension of this reasoning is that conduct being carried out in public does not mean it can, ipso facto, be plastered across pages 1, 4 and 5 – the reasoning followed in part by Justice Morland in the *Naomi Campbell* case.

***Thus while there is no new tort of privacy, confidence has been extended so far as to conclude that there is a law of privacy in everything but name.***

We wait to see whether or not this extension of what constitutes a public figure, is adopted by the courts in libel actions when they consider the defense of fair comment on a matter of public interest. Clearly one would expect that the more likely the person on whom the comment is made is a public figure the more likely the defense will be available and successful.

### *Campbell Case*

Justice Morland who recently decided the *Naomi Campbell* case agreed with Lord Justice Woolf's that there is no need to introduce a new law of privacy. The reason given was that it is possible to extend the law of confidence to protect all the private activity that ought to be protected. Justice Morland called the type of activity that needs protection, activity which has the necessary "badge of confidence." In this case it was accepted that Naomi Campbell did not complain of the revelation that she took drugs or that she was receiving treatment for the taking of those drugs. However, she did complain, and the Justice Morland said that she was right to complain, about the disclosure of the details of that treatment. Following Lord Woolf's guidelines, he found it "obvious"

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## The Status of English Privacy Law After *A v. B and C* and *Campbell*

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that the details of Campbell's NA therapy bore a badge of confidence. Thus while there is no new tort of privacy, confidence has been extended so far as to conclude that there is a law of privacy in everything but name.

### *Celebrities Retain Some "Space for Privacy"*

The task of determining the contours of the right of privacy under the rubric of confidence law will fall initially to the High Court Justices. The *Campbell* case is therefore clear authority for the proposition that even though various aspects of a celebrity's private are in the public domain (either through choice or otherwise and either for financial reward or otherwise), he or she will still have, in Justice Morland's words, "some space for privacy." Clearly the extent celebrities seek out publicity will be a factor that will be taken into consideration by the court, but a newspaper cannot simply rely on that argument to defend against an application for an injunction or a claim for damages in relation to details of the private life of a celebrity.

**_In this case, it was successfully argued that details concerning the claimant's treatment at Narcotics Anonymous would constitute sensitive personal data._**

### *Data Protection Act 1998*

Justice Morland also ruled that the *Mirror* violated the Data Protection Act 1998. This particular part of the claim of Ms Campbell was not the focus of analysis after the judgment. It is not exactly a sexy topic. However, it is of extreme importance to those who have publishing interests in the United Kingdom and cannot be ignored. Indeed, the most significant part of the judgment may be the Data Protection Act ruling. The result suggests that the Data Protection Act is a new and powerful tool in the celebrity claimant's armory to be used in the battle with the press.

The Data Protection Act 1998 was introduced to give effect to an EC Directive on data protection. The directive is intended to strike a balance between the fundamental rights of freedom of expression and respect for private and family life (Article 8). Given the increasing importance and value of data information in today's world, the Act was intended to provide a framework for the processing of personal data. It provides a number of obligations which must be satisfied where personal data is dealt with in any one of a number of ways.

### *First Case to Apply Act to the Press*

The decision in *Campbell* is truly a landmark decision in that it is the first case in which an individual has succeeded in claiming compensation from a newspaper for the distress caused by the unlawful processing of data. Perhaps when compared with the layman's view of a glamorous and exciting libel trial, an action under the DPA may not have the same audience pulling power (although in the case of *Campbell* the public gallery of the court of the Royal Courts of Justice in London was full to capacity). Rather than the thrust and parry of a George Carman-like cross-examination, an action under the DPA requires a thorough and detailed analysis of numerous factors, rather like putting together a very complex, three-dimensional jigsaw. A step by step process is required carefully to build the picture by reference detailed sections within the DPA and cross references to the Human Rights Act.

Under the Act, any information processed in a computer system or in any other systematically organized form, such as a filing system, which enables a living individual to be identified is classed as personal data. "Processing" includes obtaining, holding, adapting or disclosing data and basically extends to any operation which a journalist is likely to carry out in relation to any written information or digital image, from obtaining it to publishing it. The Act requires that all such processing is carried out in compliance with "the data protection principles." These principles require the data to be processed fairly and lawfully and only permit processing if one of a series of complex conditions is met.

In addition, certain data is classed as "sensitive personal

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## The Status of English Privacy Law After *A v. B and C* and *Campbell*

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data" and may only be processed if one of a further set of complex conditions is met. "Sensitive personal data" covers information relating to matters such as health, race, religion, trade union membership and sex life. In this case, it was successfully argued that details concerning the claimant's treatment at Narcotics Anonymous would constitute sensitive personal data. If processing by journalists is not carried out in accordance with the data protection principles an individual who suffers distress has a right to compensation.

### *Mirror Article Revealed Sensitive Personal Data*

Justice Morland decided that the article and the photograph contained "sensitive and personal data" about Ms Campbell. Quite simply, it conveyed information about her health. In its defense, the *Mirror* argued that its processing was undertaken with a view towards publication of journalistic material and therefore specifically exempt under Section 32 of the Act covering processing for journalistic, literary and artistic purposes. However, by reference to the Directive, and to the Report of a Working Party established under the Directive, and fortified by textbook writers' views, the Judge held that this exemption applied only to pre-publication processing. It was there to prevent complaints about unlawful data processing leading to prior restraint of publication. It did not extend to protect a newspaper from a claim for compensation for unlawful processing which amounted to publication of the data.

The newspaper was also foreclosed from relying on a "public interest" exemption under the Act. Justice Morland held that the data had not been obtained fairly as the photograph had been taken surreptitiously and the other information obtained from a disloyal confidante. Since the obtaining of that information involved a breach of confidence it had also been obtained unlawfully.

### *Data Protection and Press Liability*

The upholding of the Data Protection Act claim is of huge significance and potential liability for the press. It opens the way for claims by individuals who find private information has been published about for example, their health or their sex lives without their consent even if the publication has not involved a breach of confidence. As with many such cases it will be difficult for the newspapers to show that the information was obtained fairly, so the processing will have been unlawful and compensation for distress will be available.

In the future plaintiffs may choose to sue only under the Data Protection Act, rather than also for breach of confidence. There is only a limited public interest exemption and no public domain defense for data processed in breach of the Act, and much of the intrusive questioning to which the newspaper subjected Ms Campbell might in future cases be disallowed by the court.

Some British commentators have dismissed the ruling, suggesting particularly and perhaps short-sightedly that it does not give rise to a right of privacy in the UK. In fact, one only has to look at the words of the judgment to see that the Act has protected the plaintiff's privacy: "The therapy details complained of were an unwarranted intrusion into the claimant's right of privacy."

### *Conclusion*

With the ever-increasing public thirst for celebrity scoops, goes hand in hand the need in some circumstances to protect those parties' privacy. And through a combination of breach of confidence, data protection legislation and the principles guaranteed by the European Convention, that protection *is* now available meaning troubled times ahead for publishers.

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# Detroit Federal District Court Opens Immigration Proceedings

**By Len Niehoff**

On April 3, Judge Nancy Edmunds of the Federal District Court for the Eastern District of Michigan issued an Order and Opinion holding that the First Amendment creates a presumptive right of public access to immigration proceedings closed in the wake of the events of September 11.

On September 21, 2001, the Chief Immigration Judge of the United States, Michael Creppy, issued a memorandum to all United States immigration judges and court administrators outlining "additional security measures" to be immediately applied in certain cases designated by United States Attorney General John Ashcroft. These additional security measures required immigration judges to

> hold . . . hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclos[e] any information about the case to anyone outside the Immigration Court." The Creppy directive specifically instructed that "[t]he courtroom must be closed for these cases – no visitors, no family, and no press.

On December 14, 2001, the Immigration and Naturalization Service arrested Rabih Haddad, a Muslim religious and community leader and resident of Ann Arbor, Michigan, for overstaying his immigration visa. Haddad had helped found the Global Relief Foundation, and on that same day the government froze the assets of the Foundation on the basis that it may have provided aid to terrorist organizations. Haddad was taken into custody and placed in solitary confinement.

Subsequent to his detention, three hearings were conducted as part of his immigration proceedings. Hundreds of Haddad's supporters, and numerous reporters representing local and national media, went to the Immigration Court and attempted to observe the proceedings. Pursuant to the Creppy directive, the Detroit Immigration Judge, Elizabeth Hacker, completely closed all of these hearings. This was done even though no secret, sensitive, or confidential information was apparently disclosed at any of these hearings.

Three lawsuits were filed seeking transcripts of the prior proceedings and access to any future proceedings: one brought by *The Detroit News*, *The Metro Times*, and Congressman John Conyers; another brought by the *Detroit Free Press* and the *Ann Arbor News*; and a third brought by Haddad himself. The cases were consolidated before Judge Edmunds. These plaintiffs brought motions seeking injunctive and declaratory relief. The defendants, U.S. Attorney General John Ashcroft, Judge Creppy, and Judge Hacker, filed a Motion to Dismiss on the basis that the court lacked jurisdiction. A hearing on plaintiffs' and defendants' motions was conducted at the end of March.

On April 3, Judge Edmunds denied the motion of the defendants, and granted the plaintiffs' request for a preliminary injunction. Judge Edmunds applied the standards established by the United States Supreme Court in the *Gannett/ Richmond Newspapers/Globe Newspaper/Press-Enterprise* line of cases. As Judge Edmunds recognized, pursuant to

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## 6th Circuit on Access to Immigration Proceedings

As Len Neihoff notes in the article on this page, the Sixth Circuit on April 18 lifted the stay it had imposed on the district court's which had enjoined the government from conducting closed immigration proceedings relating to Rabih Haddad and required the government to produce transcripts of previously held proceedings and documents related to his case. This is not a final determination of the merits of the matter before the Sixth Circuit, but the court was obviously unimpressed with the government's showing on the merits of its claim for closed proceedings.

Importantly, the Sixth Circuit stated in its April 18 order that in its view, "the justifications for access to criminal and civil proceedings, see *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 10-13 (1986); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984), have comparable force when applied to the removal hearings at issue in this case."

The court also indicated that it simply did not buy the argument that the harm here was of a different magnitude than "the harm frequently presented in significant criminal investigations." The government was still free, as it would be in any criminal case, to seek matter-by-matter protective orders.

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## Federal District Court Opens Immigration Proceedings

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those cases courts consider two factors in determining openness: First, whether there has been a tradition of accessibility to such proceedings, and, second, whether public access plays a significant positive role in the functioning of the particular process in question.

With respect to the first factor, Judge Edmunds found that "the statutory and regulatory history of immigration law demonstrates a tradition of public and press accessibility to removal proceedings." With respect to the second factor, she ruled that "it is important for the public, particularly individuals who feel they are being targeted by the government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the government is adhering to immigration procedures and respecting individuals' rights." She noted that "openness is necessary for the public to maintain confidence in the value and soundness of the government's actions, as secrecy only breeds suspicion as to why the government is proceeding against Haddad and aliens like him."

***Judge Edmunds noted that "openness is necessary for the public to maintain confidence in the value and soundness of the government's actions, as secrecy only breeds suspicion as to why the government is proceeding against Haddad and aliens like him."***

Having concluded that the First Amendment created a presumptive right of access to these proceedings, Judge Edmunds went on to consider whether the government had articulated a compelling interest that would justify closure, and had demonstrated that closure was a narrowly tailored way to achieve that compelling interest. In addressing this, Judge Edmunds carefully analyzed the interest claimed by the government. In essence, the government argued that disclosing *any* information with respect to these proceedings – even the identity of the detainee – would compromise national security.

Judge Edmunds found two fatal flaws with this argument. First, with respect to the specific case before her, Haddad's identity (as well as other details such as the date and place of his arrest) had been public from the outset. Second, neither the Creppy directive, nor anything else, prohibited the detainees in special interest cases (or their counsel or families) from revealing information about the proceedings to the press and public. In sum, Judge Edmunds found that it was impossible to justify the Creppy directive by reference to interests it could not possibly achieve.

Judge Edmunds accordingly issued an Order compelling defendants to produce transcripts of prior proceedings (and evidence offered at those proceedings), and enjoining defendants from closing proceedings pursuant to the Creppy directive. The government filed a motion asking her to reconsider her decision, which she denied, and to stay her decision, which she also denied.

The government sought an emergency stay from the Sixth Circuit Court of Appeals. On April 10, the Sixth Circuit issued a very narrow Order, staying the portion of Judge Edmunds' decision that required the government to produce transcripts of prior proceedings (and any attendant evidence) as of 4:00 that same day. The court also set an expedited briefing schedule, which anticipates the filing of all pleadings by May 7, 2002.

On April 18, the Sixth Circuit dissolved the narrow stay it had imposed, and in the course of doing so expressly recognized a First Amendment right of access to immigration proceedings. On the day this article is being written, arrangements are being made to secure access to the transcripts of the prior proceedings.

The next hearing in Haddad's case is scheduled for April 24. If the government does not adjourn that hearing pending the Sixth Circuit's final decision on the merits, that proceeding will go forward on that day in open court.

Herschel P. Fink and Brian D. Wassom of Honigman, Miller in Detroit represent the Detroit Free Press; The Ann Arbor News is represented by Jonathan D. Rowe of Soble & Rowe in Ann Arbor; and Michael J. Steinberg of the American Civil Liberties Union in Detroit and Steven Shapiro of the ACLU's New York headquarters represent the Metro News.

*Len Niehoff is a shareholder with the Butzel Long law firm in Ann Arbor, Michigan, which represents The Detroit News in this matter.*

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# Judicial Conference Revisits Remote Access Policy

***Changes Allow Criminal Case Access In High Profile Cases, Begin Two-Year Trial to All Criminal Case Documents In Selected Courts***

Six months after adopting guidelines for remote availability of federal court records which severely limited Internet access to documents from criminal cases, the Judicial Conference of the United States has stepped back somewhat from the restrictions.

On March 13, the Conference created a pilot program to allow certain courts to provide web access to all criminal case records, and decided to allow all federal district and appeals courts to provide such access in highly-publicized cases. (For a press release on the new policy, *see* www.uscourts.gov/Press_Releases/302jc.pdf.) In September, the Conference had adopted policies allowing web access to documents from civil cases (with "personal data identifiers," such as Social Security numbers, redacted), but barring such access to criminal case files. *See LDRC LibelLetter*, Sept. 2001, at 32.

The changes came in the face of a large volume of media and public requests for documents in the criminal prosecution of Zacarias Moussaoui, who is accused of being a conspirator in the terrorist attacks of Sept. 11. [A request to televise the trial was denied. *See LDRC LibelLetter*, Jan. 2000, at 3.] The Conference had already approved a temporary exception to the access guidelines for the Moussaoui case.

The new policy for highly-publicized cases permits in Internet access in cases where demand for copies of documents places an unnecessary burden on the clerk's office. Both parties and the judge in the case must consent to such access.

The pilot program for criminal case file access was created pursuant to a provision in the original guidelines under which the policy on criminal access will be re-evaluated by September 2003. Under the program, a number of federal courts across the country will be selected to offer access to criminal case documents on a trial basis.

The Judicial Conference policies apply to district courts and the Courts of Appeal; the U.S. Supreme Court determines its own access rules. The access guidelines do not affect availability of docket information through the federal courts' PACER service, although case documents are to be made available through the service. Several federal courts already offer access to civil case documents through PACER, which charges a per page fee.

# Two Courts Come to Different Conclusions on 911 Tapes

In the last month, two courts have ruled on requests to release 911 tapes. One court, in Arizona, placed great weight on the family's privacy interests, while the other court, in New Jersey, came down on the side of openness.

### *Belo v. Mesa Police Department (Arizona)*

In Arizona, the state court of appeals held that a family's privacy interests were sufficient to deny access to audiotapes of a 911 call, and that the transcript of a 911 call was an adequate alternative to the actual tapes. The decision reversed the trial court's decision requiring the release of the tapes to television station KTVK. *See A.H. Belo Corp. v. Mesa Police Dept.*, 42 P.3d 615 (Ariz. Ct. App. March 26, 2002).

KTVK was seeking the 911 tapes of a call placed by a babysitter, Nancy Walsh, on February 9, 2000. Walsh called 911 and said the sixteen-month-old boy, Dominic, that she was taking care of had fallen out of his crib. During the call, Walsh frantically described the boy's condition, pleaded for help and screamed that the boy might die. In the background, the boy's cries could be heard. Walsh was later indicted on four counts of child abuse and attempted child abuse and pleaded guilty to two of the counts.

The television station requested the tapes and transcripts, but the Mesa Police Department refused to provide the tapes. The trial court ordered the police department to release the tapes, holding that the state legislature had not determined whether minimizing the emotional impact on a family was an interest sufficient to overcome the presump-

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## Two Courts Come to Different Conclusions on 911 Tapes

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tion favoring the disclosure of public records. On appeal, however, Judge Fidel held that the family's privacy concerns did outweigh the presumption favoring disclosure of the tapes.

### *Family Privacy v. Public Records*

There is a presumption in favor of disclosure under Arizona's Public Records Act, A.R.S. § 39-121. According to the court, the government, in order to prevent the release of public records, "must demonstrate that the policy in favor of public disclosure and access is outweighed by considerations of 'confidentiality, privacy, or the best interests of the state.'"

The police department, in seeking to prevent disclosure, argued that the family's privacy rights outweighed the policy in favor of disclosure. To make this argument, the police department noted that the mother of the baby testified that broadcasting the tape "would interfere with her family's healing process and 'remind [her] of that painful day.'" The police department also noted a letter written by the mother, in which she expresses her concern that the tape would "torment" her son.

**_The court concluded that it could not imagine "a more fundamental concern or one more directly associated with 'the intimate aspects of identity' and family autonomy than the desire to withhold from public display the recorded suffering of one's child."_**

Even though the trial court held that the question of whether privacy interests could overcome the presumption of disclosure was an unanswered question, the court cited an Arizona Supreme Court case that held just the opposite. According to the court, *Carlson v. Pima Co.*, 687 P.2d 1242 (Ariz. 1984), stands for the proposition that privacy interests can overcome the presumption of access.

The court went on to accept the police department's arguments against disclosure. The court concluded that it could not imagine "a more fundamental concern or one more directly associated with 'the intimate aspects of identity' and family autonomy than the desire to withhold from public display the recorded suffering of one's child." Consequently, the court held that the government had sustained its burden by demonstrating a privacy interest that outweighed the policy in favor of public disclosure.

### *Other Factors*

According to the court, there were other factors that, once the government put forward a justification for non-disclosure, helped tilt the scales in favor of non-disclosure – the purpose that would be served by access and the availability of alternative sources of the public information.

First, the court noted that the transcript – and an alternative to the tape – would adequately serve the purpose of Arizona's Public Records Act, which the court identified as informing citizens of what their government is up to. But when considering the purposes of releasing the tape, the court became suspicious of the television station.

> "Tellingly, however, KTVK-TV does not contend that the tape would assist our citizens 'to be informed about what their government is up to' in any manner that the transcript does not achieve."

The broadcast of the tape, the court concluded, would "excite some voyeuristic element," but was not necessary to inform the citizens on governmental operations in a way not adequately preserved in the transcript.

KTVK argued that it was not obligated under the Public Records Act to demonstrate a legitimate purpose in requesting the records. The court agreed in part. It said:

> We agree that unless the government puts forward an interest that justifies withholding access to a public record, a person or entity seeking ac-

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## Two Courts Come to Different Conclusions on 911 Tapes

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> cess to the record need not demonstrate what purpose such access would serve. We agree as well that, unless the government puts forward an interest that justifies withholding access to a public record, it does not matter that the information contained within the record is available by alternative means.

Once the court, however, accepted the government's arguments for non-disclosure, more importance was attached to the availability of the transcript and the court's arch view of KTVK's purposes in broadcasting the tapes.

### *The Dissent*

Judge Timmer dissented from the court's opinion. Most importantly, Judge Timmer argued that under the majority's view "Mesa and other cities can shield every 911 tape from inspection if its release would be emotionally upsetting to someone involved in the call." Judge Timmer also said that "such a sweeping exemption would contravene the strong policy favoring open disclosure and access to public records."

***Judge Timmer argued that under the majority's view "Mesa and other cities can shield every 911 tape from inspection if its release would be emotionally upsetting to someone involved in the call."***

Also of importance to Judge Timmer was the fact that the tapes did not reveal "any graphic details concerning the crime" and the police department did not direct the court to "any private or confidential information on the tape that, if revealed, would subject Dominic or his family to retaliation, humiliation, public ridicule, or other substantial and irreparable harm."

### *Asbury Park Press v. Lakewood Township Police Department (New Jersey)*

When confronted with a similar request for 911 tapes, the Ocean County (N.J.) Superior Court balanced similar competing interests and came to the opposite conclusion, ordering the release of the tapes. *See Asbury Park Press v. Lakewood Township Police Dept.*, Case No. OCN-L-2777-01-PW (N.J. Super. Ct. April 11, 2002).

In this case, the *Asbury Park Press* had requested the 911 tapes and the transcripts from a call placed by Thomas Jacobs on July 6, 2001. Jacobs was involved in a low-speed chase with undercover Lakewood police officers. During the chase, he called 911 and said he was being followed by "kids in a van" and that he feared for his safety. Jacobs was ultimately stopped and forcibly removed from his vehicle. Jacobs claimed that the police threw him to the ground, kicked and punched him. Three Lakewood police officers were subsequently indicted.

In holding that the tapes and transcripts should be released, Judge Serpentelli relied on New Jersey's Right to Know Law, N.J.S.A. 47:1A-1 *et. seq.*, and the principles of the common law. However, Judge Serpentelli denied the *Asbury Park Press*'s request for the accompanying police reports.

### *Release of the Tapes*

According to the court, the New Jersey Right to Know Law requires the disclosure of all public records unless they are specifically exempted. Since the court held that the tapes were public records for the purposes of the statute, the police department argued that they were exempted from release.

First, the police department argued that the tapes were exempted under an executive order that excluded "fingerprint cards, plates and photographs and similar criminal investigation records" from the definition of a public record. The court rejected this argument, saying that the tapes were not produced for investigatory purposes in the same sense as the other documents specifically listed.

Next, the police department argued that the tapes

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**Two Courts Come to Different Conclusions on 911 Tapes**

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were excluded under a provision of the Right to Know Law that excludes from the definition of a public record those documents that "pertain to an investigation in progress" and whose release would be "inimical to the public interest." That argument, too, was rejected by the court. Here, though, the court considered any negative impact that releasing the tapes may have. Unlike the Arizona Court of Appeals, the New Jersey Superior Court did not concern itself with the caller's right to privacy.

The court's releasing of the tapes was slowed somewhat by the New Jersey Attorney General's assertion that the press was entitled to only the transcripts. Citing a 1995 case in which the New Jersey Supreme Court held that an amendment to the Right to Know Law prevented the release of computer tapes. *See Higg-A-Rella, Inc. v. County of Essex*, 660 A.2d 1153 (N.J. 1995).

Unable to determine whether *Higg-A-Rella* prevented the release of 911 tapes, the court turned to the common law, where the court concluded that "there is little doubt that the tapes should be disclosed under the common law right to know." The court considered many factors under the common law, and concluded that none of them weighed against disclosure of the tapes. For instance, the court noted that id did not believe that citizens calling 911 expect that their identities will be protected. Also, the court said there was a need for release because there was a "public need unrelated to any disciplinary or investigatory process regarding alleged police officer misconduct."

### *Preventing Release of Police Reports*

The New Jersey Superior Court, however, did not release the police reports of the incident. Foremost, the court held that the police reports were not public records under the definition used in the Right to Know Law.

Then turning to the common law, the court held that the plaintiff's right to see the records was outweighed by the fact that the reports were part of an on-going investigation. The court concluded that the plaintiff could wait until the completion of the trial to access the police records pursuant to the common law. The court cited the "importance our courts have placed on confidentiality while investigations are ongoing and criminal matters are pending" as reason for delaying the release of the police records.

In *Belo v. Mesa Police Department*, Daniel C. Barr and John L. Blanchard, of Brown & Bain in Phoenix, represented the Belo Corp. Catherine M. Shovlin, the Mesa Deputy City Attorney, represented the police department.

In *Asbury Park Press v. Lakewood Township Police Department*, John C. Connell, of Archer & Greiner in Haddonfield, N.J., represented the *Asbury Park Press*.

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# L.A. Church Fails to Stop Publication of E-Mails

## *Sister Judith Ann Murphy v. KFI et al.*

**By Kelli Sager**

It was shortly past 10:00 p.m. on Thursday, April 4.

Karlene Goller, counsel for the Los Angeles Times, got an emergency call from a night editor at The Times, who had just been notified that attorneys for the Archdiocese of Los Angeles and Cardinal Roger Mahoney intended to go to court seeking an emergency temporary restraining order to stop The Times and a local radio station from publishing emails sent by Cardinal Mahoney to others in the Church hierarchy. We all assumed that the notice was for the next morning. But within minutes, Karlene confirmed that the hearing actually was going to take place at *10:30 p.m. that night*.

### *Church Suit Confirms Authenticity*

The emails apparently had been given to on-air personalities at Los Angeles radio station KFI, and had been the subject of its programming for much of the afternoon. KFI had given emails to The Times, which was in the process of verifying their authenticity when the Church's attorneys – by running into Court in an attempt to stop the publication of what they characterized as "stolen" emails – eliminated any remaining doubts about whether the emails were authentic. Indeed, the Church's attorneys confirmed at the outset that their motivation for the sudden hearing was that the emails were "real."

### *Church Contact Opens Night Court*

The behind-the-scenes maneuvering that lead to the late-night hearing was as intriguing as the content of the emails themselves. Although the Church's attorneys had talked to the Court's presiding judge earlier in the day, and had been given the names of the two judges who are assigned to hear emergency writs, they chose instead to contact a retired judge who was well-connected to the Catholic Church, who made his own telephone calls to assist the Church in setting up the extraordinary late-night hearing. A bailiff, court reporter, and clerk were summoned, and were joined by Judge David Yaffe in the empty court building. A security guard in the lobby opened the locked doors to the attorneys, who converged on the courthouse dressed in various stages of casual or business-casual attire.

At the hearing, which lasted more than an hour, Judge Yaffe dismissed The Times' objections to the lack of notice, noting that there appeared to be "exigent circumstances" that warranted the short amount of notice to The Times. (KFI later said that it never received notice of the TRO hearing, and no one appeared on behalf of KFI.)

### *In Support of a TRO: No Case Law*

In response to Judge Yaffee's inquiry about the merits of the Church's TRO request, its counsel claimed that emails had been stolen by someone who had "hacked" into the computer system.

Two arguments were offered to justify a restraining order. First, they argued that because the emails included communications between Cardinal Mahoney and the Church's attorneys, the need to protect the attorney-client privilege outweighed the First Amendment rights of the media companies. Second, the Church's counsel relied on California Penal Code § 502(c)(2), which provides remedies (including injunctive relief) for owners of computer systems that are accessed without permission. Counsel for the Archdiocese acknowledged, however, that he had no case authority to support issuance of such an extraordinary order, commenting ruefully at one point that he "wished he had" some cases to cite to the Court.

### *U.S. And California Law Oppose Injunction*

In response, The Times' counsel pointed to the myriad of United States Supreme Court and lower court cases that have found prior restraints to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Even in cases where national

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## L.A. Church Fails to Stop Publication of E-Mails

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security interests were invoked, the Supreme Court rejected issuance of a prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

The California Supreme Court has been even more definitive in outlining the state's protection of speech and press rights under the California Constitution:

The wording of [Article I, section 2(a)] is terse and vigorous, and its meaning so plain that construction is not needed. *The right of the citizen to freely . . . publish his sentiments is unlimited[.]* . . . He shall have no censor over him . . ., but he shall be held accountable to the law for . . . what he publishes.

*Daily v. Superior Court*, 112 Cal. 94, 97 (1896) (emphasis added).

Applying these principles, the Court of Appeal for the Second Appellate District recently held that a restraining order could not be issued to prevent disclosure of information about a plastic surgeon's patients, notwithstanding claims that the information was protected by privacy concerns and by the physician-patient privilege. In *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232 (2000), the appellate court was unequivocal, noting that

"respondent can point to no case where any court in the nation has held that a threatened violation of the physician-patient privilege, or any other privilege, justifies a prior restraint of speech." Id. at 1243.

Indeed, less than a year before, The Times had used these authorities in fending off an unsuccessful attempt by the American Humane Association to restrain publication of material that AHA claimed was protected by the attorney-client privilege. *Los Angeles Times Communications v. American Humane Association,* 92 Cal. App. 4th 1095 (2001).

### *Cal Penal Law Runs Into Bartnicki*

The Church's reliance on the California Penal Code similarly was unavailing, The Times' counsel argued, because even if the statute could be interpreted as allowing a prior restraint on publication – which The Times disputed – such an interpretation would be unconstitutional. There was no allegation that The Times had obtained the emails unlawfully, and the content clearly involved a matter of public interest; thus, under recent authority from the United States Supreme Court, application of the Penal Code to prevent or punish the "use" of the emails would violate the First Amendment. *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001).

Shortly before midnight, Judge Yaffee ended the hearing, finding that the Church's request would be an unconstitutional prior restraint. As we left the courthouse, Times editor Jim Newton called ahead to "stop the presses," so that a story about the extraordinary events of that evening could be inserted into the editions that had not yet been printed. Instead of preventing an article about the emails, the Archdiocese effectively had facilitated its publication, by demonstrating their authenticity and by providing even more fodder for a discussion about the use – and abuse – of the Church's immense power.

*Kelli Sager, Alonzo Wickers, Jean-Paul Jassy, and Susan Seager of Davis Wright Tremaine, Los Angeles, represented The Los Angeles Times in this matter.*

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# Farm Bill Will Cut Off Access to Info on Who is on the Farm Conservation Dole

**By Kevin Goldberg**

One section of the Senate version of the Agriculture, Conservation, and Rural Enhancement Act of 2001 (S. 1731) is causing concern to those interested in access to environmental records. The bill, which is supported by Senate leadership, contains a provision which exempts from public access specific data related to conservation programs funded by taxpayer money.

S. 1731 was introduced by Sen. Tom Harkin (D-IA) on November 27, 2001. It was reported out of the Committee on Agriculture, Nutrition and Forestry on that same day. Despite the wishes of Senate Majority Leader Thomas Daschle (D-SD) to have the bill approved by the Senate prior to the end of the first session of Congress, it was only approved in the Senate on February 13, 2002, after being incorporated as an amendment to the House version, HR 2646.

All press organizations should be concerned with Section 204(g) of the bill. This section would exempt from FOIA all information developed by the United States Department of Agriculture regarding natural resources programs administered by the Natural Resources Conservation Service or the Farm Service Agency. This includes a number of key documents relevant to local communities, including all farm conservation plans. The most important aspect of these documents is their itemization of the amount of federal cost-share dollars provided to farmers to implement the plan - as this legislation is expected to provide nearly $44 billion (more than $ 4 billion per year) to farmers over a 10-year period.

***This section would exempt from FOIA all information developed by the United States Department of Agriculture regarding natural resources programs administered by the Natural Resources Conservation Service or the Farm Service Agency.***

Programs administered by the National Resources Conservation Service affect over two dozen resource programs. An example of specific information which would be rendered in accessible is the National Resources Inventory. This survey of environmental indicators is conducted every five years by the National Resources Conservation Service. It takes data from 800,000 statistically selected locations around the country to measure issues such as:

- Land cover
- Land use
- Soil erosion
- Prime farmland soils
- Wetlands
- Habitat diversity
- Conservation practices

If the Farm Bill passes into law with § 204(g) intact, information concerning these issues would be inaccessible for any useful purpose (access to this information currently exists). The bill contemplates that information would only be available when aggregated to a degree that would effectively prevent the public from determining the existence of specific problems, such as those involving pollution of local groundwater, or what is being done to remedy such a problem.

The information which would be exempted from FOIA is of prime public concern to any rural or suburban community as it contains information about practices which threaten the landscape and the quality of life in that community, along with potential dangers arising from pollution to the local water supply. Of course, this information is only useful if provided in a format which allows the requestor to identify some specific impact. Therefore, the access provided by this bill to aggregated data is akin to no access at all. Any measure of accountability for pollution problems in a local community would be impossible to trace.

It would also prevent oversight of abuse in the government's farm subsidy programs. If this information were not publicly available, it could not be collected by interested groups such as the Environmental Working Group, who then posted the various recipients on its website. This posting allowed the

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## Farm Bill Will Cut Off Access to Info on Who is on the Farm Conservation Dole

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public to learn that the federal government was distributing farm subsidies to such family farmers as Ted Turner, Chase Manhattan's David Rockefeller, and NBA star, Scottie Pippen. And that Enron CEO Ken Lay collected $12,000 in farm subsidies.

The further danger is that this bill appears to continue a trend in Congress to mandate information provided to and/or kept by a government agency which affects the safety of the local community will be inaccessible to the public. Two examples are instructive:

- The Chemical Safety Information and Site Security Act of 1999 exempts from access records of vital importance to local communities where hazardous-chemical facilities are located. The 1990 Clean Air Act required every chemical facility in the nation to file with the Environmental Protection Agency information known as a risk management plan. The EPA announced plans to post this information on the Internet. A bill was eventually passed which prevented access to this information through FOIA; the risk management plans themselves would have alerted citizens to the worst case scenario in terms of damage to local communities in the event of an accident at a chemical plant.
- Legislation introduced during this session in the House of Representatives by Reps. Davis (R-VA) and Moran (D-VA) (H. 2435) and in the Senate by Sens. Bennett (R-UT) and Kyl (R-AZ) (S.1456) would allow private companies to share information with the government regarding possible security problems affecting the nation's critical infrastructures. However, it would also prevent the public from finding out that these problems - mainly involving cybersecurity breakdowns - even pose a danger to water, telecommunications, highway, financial or other infrastructures.

Opponents of this provision are cautiously optimistic that they are succeeding in their quest to have access to the names of subsidy recipients. However, the information contained in applications for subsidy funds, including what the individual farmer seeks to do with the subsidy money, is still unlikely to be made public – which still has implications for local communities concerned about their environment.

A Conference Committee is currently meeting regarding the bill, with the access issue very much unresolved. Conferees include:

| Senate | House |
|---|---|
| Tom Daschle (D-SD) | Terry Everett (R-AL) |
| Tom Harkin (D-IA) | Saxby Chambliss (R-GA) |
| Kent Conrad (D-ND) | Jerry Moran (R-KS) |
| Patrick Leahy (D-VT) | Robert Goodlatte (R-VA) |
| Richard Lugar (D-IN) | Charles Stenholm (D-TX) |
| Jesse Helms (R-NC) | Gary Condit (D-CA) |
| Thad Cochran (R-MS) | Collin Peterson (D-MN) |
| John Boehner (R-OH) | Cal Dooley (D-CA) |
| | Richard Pombo (R-CA) |
| | Tim Holden (D-PA) |
| | Eva Clayton (D-NC) |
| | Frank Lucas (R-OK) |

*Kevin Goldberg is with Cohn & Marks LLP, outside counsel for ASNE in Washington, D.C.*

***Any developments you think other LDRC members should know about?***

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# Seattle Federal Judge Rejects Seattle Times Subpoena

## *Reporter's Sharing Information With Plaintiffs Didn't Waive Privilege*

**By Jeffrey Fisher**

On April 2, 2002, the U.S. District Court for the Western District of Washington refused to require *The Seattle Times* to turn over documents to the The Fred Hutchinson Cancer Research Center (commonly known as "the Hutch"), ruling that a reporter for *The Times* had not waived his journalistic privilege by sharing information with plaintiffs involved in a lawsuit against the Hutch. The documents sought were correspondence between *The Times* reporter and the plaintiffs.

The Hutch moved to compel production in *Wright v. The Fred Hutchinson Cancer Research Center*, No. C01-5217L, an ongoing lawsuit that grew out of an award-winning investigative series by *The Times* into the Hutch's informed-consent and conflict-of-interest practices in two of its clinical research trials. In the course of *The Times'* investigation, reporter Duff Wilson shared information and various theories with family members of patients who eventually died in the trials. Wilson also promised to keep the family members informed of future developments in his investigation and regarding any governmental action concerning the Hutch _ a promise that Wilson kept by keeping in touch with family members by email after *The Times* published the principal series.

When the Hutch obtained copies of such e-mails from the plaintiffs in the current lawsuit, it asserted that Wilson had "stepped outside the role of 'newsgatherer'" and had become an "adviser to the plaintiffs." The Hutch further contended that *The Times* had waived the First Amendment journalistic privilege and requested that it turn over all correspondence between its reporters and the plaintiffs.

The court was unmoved. It noted that the Hutch has "not accused Mr. Wilson of any illegal activities, asserted that he was being paid by plaintiffs, or shown that he was otherwise motivated to investigate [the Hutch] for non-journalistic purposes." That being so, the court held that Wilson's activities "fall squarely within the Ninth Circuit test for identifying individuals who benefit from the journalist's privilege."

In the court's view, nothing about Wilson's information-sharing practices altered this conclusion.

> [I]t is not at all surprising that an investigative reporter who wants information might introduce himself to a potential source by explaining the topic and the scope of his research and sharing his theories. In the context of this investigation, Mr. Wilson needed to establish some credibility with plaintiffs if he hoped to obtain authorization to review their decedents' medical records: a full disclosure of the information within his possession and an agreement to share any information he later discovered could reasonably assist in these endeavors and are in no way inimical to his purpose of newsgathering for public dissemination.

The court concluded its opinion by holding that the Hutch had not made a showing sufficient to overcome the journalistic privilege in avoiding compelled disclosure of documents. Indeed, the court noted that the Hutch's subpoena and motion were "coercive insofar as they could be expected to have appreciable adverse impacts on *The Times* and its reporters" in their ongoing

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## UPDATE: Supreme Court Denies Leggett's Petition for Certiorari

The United States Supreme Court denied the petition for certiorari filed by Vanessa Leggett, the freelance writer from Houston who spent 168 days in jail for refusing to comply with a subpoena for her notes. The Court denied the petition without comment. *See Leggett v. United States*, 01-983, 70 U.S.L.W. 3642.

Leggett went to jail on July 20, 2001 because she refused to turn over her notes to a grand jury. In August, the 5th Circuit Court of Appeals let stand the lower court decision that held there was no applicable reporter's privilege that would protect Leggett's research.

Leggett was released from jail on January 4 when the grand jury investigation came to an end.

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# Website Lands Retired Journalism Professor in Jail for Contempt

A retired professor of journalism was held in contempt and placed in jail on February 27 for violating a judge's anti-harassment order by refusing to remove from his website the names and addresses of the administrators of a Seattle senior citizens' residence community.

The feud between Paul Trummel and his former residence community began when Trummel began distributing a newsletter to the residents of the Council House community. In his newsletter, Trummel wrote about his complaints with the Council House administration. Council House is a residence community that was built with funds provided by the U.S. Department of Housing and Urban Development. When the administrators tried to prevent Trummel's distribution of his newsletter, Trummel sought an injunction against the administrators.

Washington Superior Court Judge James Doerty denied Trummel's request and invited Council House to seek an injunction against Trummel. On April 19, 2001, Judge Doerty issued a restraining order that prohibited Trummel from "harassing" the administrators of the senior citizens' residence in which Trummel had resided. The restraining order also evicted Trummel from the residence by prohibiting him from entering the building or contacting anyone at Council House.

Trummel then took his publication to the Internet. After the initial restraining order, the administrators at Council House claimed that Trummel was harassing them by posting their names, phone numbers and addresses on his website.

Judge Doerty agreed with the administrators and ordered Trummel to take down any personal information relating to anyone connected with Council House. According to Trummel's lawyer, Robert Siegel, all of the information that Trummel was ordered to remove from his website was available in public documents. Trummel complied with the order and edited many of the items on the website. Trummel, however, posted the unedited version of his website on a shadow website based in Holland.

In February, Judge Doerty said Trummel violated the order by refusing to remove that information from the shadow website. When Trummel refused remove content from the Holland-based website, he was found in contempt.

Trummel will remain in jail until the information is taken off the Holland-based website. According to Siegel, however, Trummel has refused to take down the offending information because he doesn't think he has an obligation to edit his website.

Trummel has appealed the original restraining order and the contempt order. Both of those appeals are pending.

The edited website can be found at http://www.contracabal.net. The unedited version of the website can be found at http://www.contralcabal.org.

*Trummel is represented by Robert Siegal of Merkle Siegel & Friedrichsen, P.C. in Seattle.*

## Seattle Federal Judge Rejects Seattle Times Subpoena

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coverage of the Hutch, and it invited *The Times* to submit a statement of reasonable attorney's fees because the Hutch's motion "imposed a burden on *[The Times]* with very little legal justification."

*The Times was represented by Bruce E.H. Johnson and Jeffrey L. Fisher of Davis Wright Tremaine LLP, in Seattle, Washington. The Hutch was represented by William J. Leedom, Michael Madden and David B. Robbins of Bennett Bigelow & Leedom, P.S., in Seattle, Washington; and Joseph M. Hassett, Barbara F. Mishkin, George H. Mernick III, and Jonathan S. Franklin of Hogan & Hartson LLP, in Washington, D.C. The plaintiffs in the underlying lawsuit are represented by David E. Breskin and Daniel F. Johnson of Short Cressman & Burgess PLLC, in Seattle, Washington; Thomas R. Dreiling of Seattle, Washington; and Alan C. Milstein of Sherman, Silverstein, Kohl, Rose & Podolsky in Pennsauken, New Jersey.*

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# Colorado Supreme Court Rules That State Constitution Protects Bookstore's Customer Records

**By Steven D. Zansberg**

On April 8, Colorado's Supreme Court ruled that law enforcement could not execute a particular search warrant against a bookstore seeking to determine which books a criminal suspect had purchased. *Tattered Cover, Inc. v. City of Thornton*, __ P.3d __, 2002 WL 519039 (Colo. 2002); <www.courts.states.co.us/supct/opinion/01SA205.doc> The court held that law enforcement had not demonstrated that its need for the information was sufficiently compelling to outweigh the harm that would be caused to the reader's constitutional interests if the search warrant were executed. Grounding its ruling on the free speech provision of Colorado's Constitution, the court held that before a private bookstore can be compelled to disclose a customer's book-purchasing record(s), the bookstore must be afforded an adversarial hearing before a magistrate, who must balance law enforcement's needs for the bookstore records against the harm caused to constitutional interests by execution of the search warrant.

## *Facts and Trial Court Litigation*

While investigating a suspected methamphetamine lab in a trailer home, police found a mailing envelope, from Denver's The Tattered Cover bookstore, addressed to one of the four known inhabitants of the trailer. The label on the envelope contained the suspect's name and address, as well as an invoice number and order number, but no indication of which books had been purchased. Subsequently, police officers searched the trailer home, pursuant to a search warrant, and discovered a small methamphetamine lab and a small quantity of meth in the master bedroom. Also in the bedroom were several of Suspect A's personal belongings, including clothing, papers and his personal address book. Officers also found and confiscated two books, entitled *Advanced Techniques of Clandestine Psychedelic Amphetamine Manufacture* by Uncle Fester, and *The Construction and Operation of Clandestine Drug Laboratories* by Jack B. Nimble. Fingerprints were taken from the books and from the glassware of the meth lab; no other items in the room, including firearms, were dusted for prints. No usable prints were obtained from the two books (and there were no prints found inside either book), and the police had not attempted to match any of the methamphetamine glassware prints.

The police believed they needed to determine whether the Tattered Cover envelope addressed to Suspect A contained the two books recovered from the master bedroom to establish that Suspect A was involved in setting up and running the meth lab, that he had access to the master bedroom, and that he had the *mens rea* necessary to be charged with having "intentionally or knowingly" operated a meth lab. After the bookstore refused to comply with an "administrative subpoena" for Suspect A's purchase records, the police obtained a search warrant for those records from a Denver County Court judge. When they attempted to execute the warrant, the owner of the Tattered Cover bookstore, Joyce Meskis, contacted her attorney, who negotiated an agreement to postpone execution of the warrant until after a ruling from a state district court judge.

After a full evidentiary hearing, the Chief Judge of the Denver District Court, Stephen Phillips, applying a four-part test he derived from the *In re Grand Jury Subpoena to Kramer Books & Afterwards, Inc.*, 26 Media L. Rep. 1599 (D.D.C. 1998) decision, ruled that the warrant's demand for production of Suspect A's purchases for a thirty-day period was overbroad and could not be enforced. However, he ordered the bookstore to produce the sales records that identified the books connected with the mailing envelope retrieved from Suspect A's trash. The Tattered Cover appealed that ruling and the Colorado State Supreme Court agreed to hear the direct appeal (in lieu of Colorado's Court of Appeals).

## *The Supreme Court's Decision*

Writing for five other Justices (the seventh and most recently-appointed Justice recused himself after oral argument), Justice Michael Bender authored a lucid and thorough, 51-page opinion, reversing the District Court's

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## Colorado Supreme Court Rules That State Constitution Protects Bookstore's Customer Records

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ruling. As the court stated,

> Bookstores are places where a citizen can explore ideas, receive information, and discover myriad perspectives on every topic imaginable. When a person buys a book at a bookstore, he engages in activity protected by the First Amendment, because he is exercising his right to read and receive ideas and information. Any governmental action that interferes with the willingness of customers to purchase books, or booksellers to sell books, thus implicates First Amendment concerns.

Moreover, the court held that the right to purchase books with anonymity, "without government intrusion or observation, is critical to the protection of the First Amendment rights of book-buyers and booksellers, precisely because of the chilling effects of such disclosures. . . . In sum, the First Amendment embraces the individual's right to purchase and read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read."

### *Protections Based on Colorado Constitution*

The opinion acknowledges that in *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), U.S. Supreme Court rejected the argument that the First Amendment required police to obtain a subpoena *duces tecum* instead of using a search warrant to obtain photographs in the newsroom (to help identify demonstrators who had assaulted police breaking up a demonstration). Finding that "the protections afforded to fundamental expressive rights by federal law . . . [are] inadequate," the Colorado Supreme Court grounds its holding on the Colorado Constitution, which affords greater protection than the First Amendment provides.

Expressly overturning *Zurcher* on state constitutional grounds, the Court holds that "an innocent, third-party bookstore must be afforded an opportunity for a hearing prior to the execution of any search warrant that seeks to obtain its customers' book-purchasing records." At such a pre-enforcement adversarial hearing, "law enforcement must demonstrate a sufficiently compelling need for the specific customer purchase records sought." In addition, "officials must exhaust . . . alternatives before resorting to techniques that implicate fundamental expressive rights of bookstores and their customers." If the judge determines that the government's need for particular information is narrowly tailored (not overly broad) to a compelling interest in a particular investigation, "the ultimate question is whether the law enforcement need for the customer purchase record is sufficiently compelling to outweigh the harms caused by execution of the search warrant."

***Finding that "the protections afforded to fundamental expressive rights by federal law . . . [are] inadequate," the Colorado Supreme Court grounds its holding on the Colorado Constitution, which affords greater protection than the First Amendment provides.***

### *Test Not Satisfied in the Case Before the Court*

Applying its newly minted test to the facts of the immediate case, the court holds that law enforcement did not establish that Suspect A's book-purchase records were necessary to make the case against him for operating the meth lab discovered in the bedroom of the trailer home. First, the fact that several items of Suspect A's personal possessions were found in the bedroom itself, along with the two "how-to" books, made the book purchase records unnecessary for purposes of establishing Suspect A's proximity to the lab or that whoever set up and ran the lab did so "intentionally or knowingly" (as opposed to "mistakenly").

Furthermore, the police had not exhausted the myriad alternative means available to connect Suspect A to the meth lab; they had not run the fingerprints taken from the lab glassware and did not interview several witnesses who could have established Suspect A's involvement in the operation of the meth lab.

Finally, even if the purchase records were to prove that Suspect A was the person who had purchased the two "how

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**Colorado Supreme Court Rules That State Constitution Protects Bookstore's Customer Records**

to" books confiscated from the bedroom, there are several "innocent" reasons why someone would have purchased such books; therefore, it is not compelling evidence necessary to establish Suspect A's involvement in the crime. In sum, the Court concluded that "the City has failed to demonstrate that its need for this evidence is sufficiently compelling to outweigh the harmful effects of the search warrant."

### *Conflict with the USA PATRIOT Act*

Because the Court's holding is explicitly grounded on the Colorado Constitution, it does not protect bookstores from the provisions of the recently enacted federal law, the "USA PATRIOT Act," which authorizes the F.B.I. to obtain from a secret tribunal an *ex parte* order requiring the production of any tangible things, (including books, records, papers, documents), in furtherance of "an investigation to protect against international terrorism or clandestine intelligence activities . . . provided that such investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution." (Moreover, any person who is served with such an *ex parte* order, for instance an "innocent, third-party bookstore owner," is prohibited by the federal law from disclosing to any other person that the F.B.I. has sought or obtained tangible things by means of the *ex parte* order.)

Thus, it appears that even in Colorado, the F.B.I., proceeding under the USA PATRIOT Act, (or any federal agency proceeding under existing federal law), can circumvent the holding of the *Tattered Cover* case simply by obtaining a search warrant from a federal judge upon an ordinary showing of probable cause. Presented with such a federal search warrant, a bookstore owner (or librarian) would be forced to comply, unless, as Joyce Meskis was able to do in the *Tattered Cover* case, she could obtain an agreement from law enforcement to have the issue litigated before a federal judge, and to challenge the execution of the warrant under the First Amendment.

*Steven Zansberg is a partner in the Denver office of Faegre & Benson, LLP, and, along with Thomas Kelley of that office, served as local counsel to the American Booksellers Association and numerous other organizations that filed amici briefs in support of the Tattered Cover.*

# State High Court Jurists Generally Support Media On First Amendment, Study Finds

## *Little Support, However, On Confidential Sources and Cameras in Court*

A survey of retired state supreme court judges found that they are generally supportive of most First Amendment concerns of the media – except for withholding confidential sources and allowing cameras in courts – and felt that courts had an important role to play in protecting the media's right. But they give middling reviews to media coverage of the courts, and fault the coverage for lack of thoroughness. *State Supreme Court Justices' Views on Free Expression*, 22 Newspaper Research J. 28 (2001).

The survey was conducted by Professor F. Dennis Hale of the Journalism Department at Bowling Green State University in Ohio in 1997. Hale identified 120 judges of the highest courts in 47 states who had retired between 1991 and 1996; 50 of the judges, from 33 states, responded.

Hale focused on retired judges because of the concern that judicial ethics would bar sitting judges from responding to the survey. The judges in the survey had been retired an average of two years, and had an average age of 72. Only one of the judges (two percent) was a woman.

Hale's questionnaire consisted of 55 questions exploring the respondents' judicial and legal backgrounds, their opinions on news coverage of the state supreme court, and various free speech issues.

The coverage and issue questions each offered five choices, with statements allowing the judges to indicate their opinion on a range of zero through four (in social science, such ranges are known as Likert scales). For the media law issues, the scale ran from "strongly disagree" (which was rated as zero on the scale) to "strongly agree" (rated as a four); in the coverage questions, the ranges ran from strongly disliking media coverage (zero) to strongly praising it (four). For each type of question, the middle value (two) indicated neutrality.

Placing values on the scale allows for the computation of averages, and for analysis to determine whether a particular variable correlates with another.

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## State High Court Jurists Study

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### *Judges' Views on Media Law Issues*

Of the media law issues studied, the respondents showed their strongest support for the concept of open courts (with an average of 3.73), followed by access to government in general (3.56). There was also strong support for freedom of erotic speech within the home (3.20) and speech of public high school journalists (3.08). Of the nine issues studied, support was lowest for the right of journalists to withhold the identity of confidential sources (2.04) and for allowing cameras in courtrooms (1.63).

The retired judges were also asked whether the state supreme court was an appropriate entity to provide each of the rights. The results on this point for each of the First Amendment concerns were generally consistent with the results regarding the rights themselves.

### *Table*

| First Amendment Issue | Support (avg) | Support Supreme Court Role (avg) |
|---|---|---|
| Open Courts | 3.73 | 3.79 |
| Access to Government | 3.56 | 3.08 |
| Erotic Speech at Home | 3.20 | 3.16 |
| H.S. Student Journalism | 3.08 | 3.04 |
| Pamphlet in Mall | 2.62 | 3.83 |
| Protect Media Against Libel Claims | 2.49 | 2.71 |
| Protect Media Against Privacy Claims | 2.34 | 2.72 |
| Protect Media from Having to Reveal Confidential Sources | 2.04 | 2.56 |
| Allow Cameras in Courts | 1.63 | 2.0 |

But the study also found that the judges' opinions on each issue were more often based on each particular issue, instead of a consistent ideology. When Hale compared individual respondents' views on pairs of issues, he found that they were consistent – in terms of leaning toward press freedom, or away from it – in only one-quarter of the correlations.

Hale found that there was a relationship between political outlook and the jurists' views on certain of the media law issues surveyed. Judges' self-identified political philosophies generally correlated with their opinions on five of the nine media issues: the more "liberal" a judge identified himself, the more supportive he was of erotic speech, high school journalism, pamphleteering, libel protection, and courtroom cameras. There was no correlation on four of the issues (government access, open courts, protection from privacy claims and protection of confidential sources).

There was also little relationship between First Amendment views and judges' opinions of news coverage of their courts, their pre-judicial legal experience, or the socio-economic characteristics of the judges' states.

### *Judges' Views of Media Coverage*

Hale also asked for the retired judges' views on media coverage of the courts. The judges were slightly positive regarding of the coverage they received as a judge, the fairness and accuracy of media coverage of court arguments and decisions and of judicial campaigns, but gave the media low marks for thoroughness of their coverage of the judicial system, especially compared with news coverage of other branches of government.

Finally, the judges in Hale's survey said that state supreme court judges generally are only somewhat concerned about future treatment by the media when deciding a media law case.

Professor Hale's study was honored as the top faculty paper in the law division by the Southeast Colloquium of the Association for Education in Journalism and Mass Communication.

The study has been published in a number of other articles, including: *Cameras in Courtrooms: State Supreme Court Justices' Attitudes*, Visual Communications Quarterly, Winter 1998, at 4.

*Dimensions of State Justices' Attitudes Concerning Freedom of Expression*, in *Proceedings of the Southeast Colloquium* 114 (Association for Education in Journalism and Mass Communication, History, Law, Magazine and Newspaper Divisions, March 1998).

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*Editor's note: If you and your media clients are not familiar with the document retention procedures for the federal courts, you should read this article. There may be some surprises in it for you about the degree to which the courts destroy court records as a matter of course.*

# Court Rules That Seal on Confidential Depositions in Historic Copyright Case To Expire in Five Years

## *"I Have a Dream" Speech Testimony To Be Made Public*

**By Landis C. Best**

In a recent decision involving the status of sealed documents in a closed copyright action brought by the Estate of Martin Luther King, Jr., against CBS concerning the "I Have a Dream" speech, Senior Judge William C. O'Kelley of the Northern District of Georgia ruled that the Estate satisfied its burden to maintain the confidentiality of two depositions that had been filed in the case, but that the seal would expire in five years time. *See Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.,* 184 F. Supp.2d 1353 (N. D. Ga. Feb. 15, 2002). In the course of reaching its decision, the court *sua sponte* embarked upon a scholarly discussion of the procedures and regulations that govern the federal courts' document retention practices with respect to court files, a subject that appears to have received scant attention. The subject is all the more important where (i) the case involves matters of historical importance; and (ii) a litigant, like the Estate in this matter, contests the unsealing of certain documents after the case has been resolved.

> ***[T]he court sua sponte embarked upon a scholarly discussion of the procedures and regulations that govern the federal courts' document retention practices with respect to court files, a subject that appears to have received scant attention.***

The court explained the purposes of its opinion as follows:

> By exploring this otherwise hidden component of the judicial process, the court hopes to provide guidance to litigants, records administrators, and judges, alleviate the court's document management burdens, and unclog precious storage resources.

184 F. Supp. 2d at 1360. The court also recommended further investigation into the federal judiciary's document management and disposition procedures generally. *Id.*

### *The Materials In Question*

The underlying copyright dispute between the Estate and CBS had been amicably resolved when the court issued its show cause order with respect to the documents that had been filed under seal in conjunction with the parties' motions for summary judgment. CBS ultimately informed the court that it would not oppose the unsealing of any document filed with the court that was previously designated Confidential. The Estate also dropped its claim of confidentiality to many of the documents that had been filed under seal. However, the Estate continued to press for the seal with respect to the deposition transcripts of Dexter Scott King and Phillip Jones, chairman of the organization charged with licensing the intellectual property of the Estate. According to the Estate, the depositions contained confidential trade secret information pertaining to a publishing deal between the Estate and Time Warner, Inc.

### *The Record Storage and Disposition Procedures for Court Files*

After recounting the procedural history and background of the case, the court discussed its records storage and disposition procedures. According to both the local rules of the court and the records disposition procedures promulgated by the Administrative Office of the United States Courts, the CBS-King files were originally classified as "temporary" and transferred to the East Point, Georgia, Federal Records Center (the "FRC"). *Id.* at 1356. The designation was made pursuant to a schedule governing United States District Courts, which provides

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## Seal on Confidential Depositions to Expire

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that: "all civil case files dated 1970 or later that (1) did not terminate during or after a trial; and (2) do not have historical value, shall be 'dispos[ed] [of] 20 years after transfer to a FRC.'" *Id.* (citing authority). According to this standard, the CBS-King files would be destroyed in May of 2021. *Id.*

The court explained that the district court records officer is charged with determining whether closed civil cases should be classified as "temporary" or "permanent," a classification that has serious consequences. Temporary files are destroyed in 20 years, whereas permanent files are retained forever and archived by the National Archives and Records Administration ("NARA"). *Id.* at 1361. NARA, in consultation with court officials, makes the initial determination as to whether a case has historical value deserving of permanent retention. *Id.* at 1360. In making this determination, NARA may consider the views of "judges, clerks of court, probation officers, lawyers, historians, or others." *Id.* at n.4.

**_At this meeting, the court performed a public service by classifying the CBS-King files as historical records, thereby ensuring their preservation rather than destruction in 20 years._**

Because some of the CBS-King documents to be transferred to the FRC contained sealed documents, the court records officer requested permission to unseal them prior to transfer as part of its periodic review of the district court archives and consistent with the records disposition manual. *Id.* at 1357. It was pursuant to that request that the court issued its show cause order to the parties. *Id.*

### *The Court's Reclassification of the Documents as Historical*

After hearings on the show cause order, the court held a meeting with the court records officer "[i]n an effort to clarify its understanding of the district court records disposition procedures." *Id.* at 1359. At this meeting, the court performed a public service by classifying the CBS-King files as historical records, thereby ensuring their preservation rather than destruction in 20 years. In reaching its decision, the court noted the

> novel copyright issues addressed in the underlying litigation . . . the widespread media attention it had received, and the overall importance of Dr. King and the 'I Have a Dream' speech in the grand scheme of American history." *Id.* at 1359. The court then consulted with officials from NARA after which the court officer reclassified the case files as "permanent." Such a designation means that the records at issue have "sufficient historical or other value to warrant permanent retention." *Id.* (citing authority).

Here, of course, there can be no question that the CBS-King court files are historically significant. The court papers refer to and discuss many of the underlying facts of Dr. King's delivery of the "I Have a Dream" speech at the March on Washington in August 1963, an event of monumental historical significance regarding the struggle for civil rights in America. Ironically, if there had been no issue regarding the sealed documents in this case, the court records may have escaped Judge O'Kelley's review and simply been sent to the FRC with the original "temporary" classification and subject to destruction in 2021. While one would like to believe that, at some point, someone would have corrected the "temporary" classification of the CBS-King court files, such classification should not be left to chance.

The court's laudatory reclassification of the court records, however, served to exacerbate the problem regarding the sealed depositions at issue. Permanent sealed case files cannot be transferred to NARA unless they include a date upon which the seal may be vacated. *Id.* at 1359. To solve this problem for future cases, the court made two suggestions: (1) litigants should be mindful of the administrative challenges facing courts in dealing with sealed documents and should seek such treatment judiciously; and (2) protective orders should contain in them a date at which the seal may be vacated. *Id.* at 1361.

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## Seal on Confidential Depositions to Expire

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### *Court's Analysis of the Estate's Efforts to Maintain the Seal*

Turning to the Estate's opposition to the show cause order, the court first noted a district court's authority to seal documents pursuant to Rule 26 of the Federal Rules of Civil Procedure. Once challenged, however, "any decision to enter a Rule 26(c) protective order must be construed in light of the presumption in favor of public access to the courts." *Id.* at 1362. A court must exercise its Rule 26(c) authority "only in a manner consistent with (1) the common law right to inspect and copy judicial records; and (2) the First Amendment right of access to court records and documents." *Id.* at 1365.

Under the common law standard, a litigant must satisfy the "good cause" standard of Rule 26(c). The court explained that this standard requires the court to "(1) determine whether valid grounds for the issuance of a protective order have been presented; and (2) balance the public's interest and access against the litigant's interest in confidentiality." *Id.* at 1366. Noting that the Eleventh Circuit "has presented a somewhat muddled First Amendment analysis," the court was constrained to hold under Circuit precedent that the same "good cause" standard of Rule 26(c) rather than the "compelling interest" standard satisfies First Amendment concerns. *Id.* at 1363.

**_One lesson to learn is that under the document preservation regulations, unless a civil case is tagged by someone as "historical," there is a good chance that the court files relating to that case will be destroyed 20 years after the case is closed._**

### *Short Term for Seal*

Turning to the circumstances at hand, the court held that the Estate satisfied Rule 269(c)'s "good cause" standard. The court found that the Estate presented a *prima facie* case for trade secret protection. The court noted that the Estate took steps in the litigation to protect the confidentiality of the Time Warner book contract information, including issuing appropriate objections during the deposition testimony in question. Although the court questioned the continued value of the information given that five years time had passed since the commencement of the litigation, the court credited the Estate for its persistence in continuously fighting the unsealing of the depositions. *Id.*

As to the public interest in the information, the court again stressed the historical significance of the CBS-King case generally and the court's decision to earmark the files for historical preservation, "making it available to future researchers, authors, educators, and scholars." *Id.* at 1367. The court found, however, the deposition testimony at issue "cannot be described as a matter of the utmost public concern." *Id.* It noted that the testimony was not critical to the resolution of the copyright dispute. *Id.* Thus, the court concluded that the Estate's interest in maintaining the seal trumped the public's right of access at present and granted the protective order. However, the court also ruled that the seal shall expire in five years. As the court stated: "it is unlikely that the financial matters discussed therein will be of any value or in any way prejudice the Estate's position in contractual negotiations in five years, when the information will be more than a decade old." The Estate has since filed a motion for modification of the court's order, permitting it to present information to the court at a later date to justify a continuation of the seal beyond February 2007, if necessary.

### *Conclusion*

Judge O'Kelley's opinion is worthy of praise and further study for many reasons. Without briefing by the parties, the court took it upon itself to address matters that should be of concern to all lawyers and to the public — namely the preservation of court files. In this very case, historical court documents played an important role. Both the Estate and CBS relied upon documents that had been filed in a 1963 copyright case involving the "I Have a Dream" speech. *King v. Mister Maestro, Inc.*, 224 F. Supp. (S.D.N.Y. 1963).

One lesson to learn is that under the document preservation regulations, unless a civil case is tagged by someone as "historical," there is a good chance that the court files relating to that case will be destroyed 20 years after the case is

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### Seal on Confidential Depositions to Expire

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closed, as civil cases rarely proceed to trial. Perhaps there should be a formal mechanism by which litigants, who are familiar with the issues in their case, are required to make a recommendation to the court regarding the preservation of court files in civil cases that settle or are otherwise disposed of prior to trial. This process could help ensure that due consideration is given to the preservation issue. Another lesson, of course, is that care should be given to sealing documents generally. While there are legitimate reasons for litigants to seek protective orders, litigants should also reevaluate the need for such protection when cases are resolved or after the passage of time.

*Landis C. Best is a partner at Cahill Gordon & Reindel in New York. Together with Floyd Abrams, she represented CBS in the Estate's copyright infringement action. The Estate was represented by Joseph M. Beck and Miles J. Alexander of Kilpatrick Stockton in Atlanta.*

## Cussing Canoeist's Conviction Overturned by Michigan Court of Appeals

### *Court holds that the 105-year-old statute is unconstitutionally vague*

A 105-year-old law that prohibited the use of "indecent, immoral, obscene, vulgar or insulting language" in front of women and children has been held to be unconstitutional by the Michigan Court of Appeals. *See People v. Boomer*, 2002 WL 481153 (Mich. Ct. App. March 29, 2002). In striking down the statute, the court overturned the conviction of Timothy Joseph Boomer, who was convicted in June 1999 for violating M.C.L. § 750.337 after he fell out of his canoe and into the Rifle River. *See LDRC LibelLetter*, June 1999 at 16.

In an opinion written by Judge William Murphy, and joined by Judges David Sawyer and Joel Hoekstra, the court said that "the fact that a statute may appear undesirable, unfair, unjust, or inhumane does not of itself render a statute unconstitutional and empower a court to override the Legislature." However, the court concluded that the statute was unconstitutionally vague.

Citing a 1994 case handed down by the Michigan Supreme Court, *People v. Lino*, 527 N.W.2d 434, the court noted that a penal statute "must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"

The court concluded that the statute was unconstitutionally vague because there was no "restrictive language" that would "limit or guide a prosecution for indecent, immoral, obscene, vulgar or insulting language." The court went on to say that allowing a prosecution for "insulting" language "could possibly subject a vast percentage of the populace to a misdemeanor conviction." Thus, the court concluded that the statute "fails to provide fair notice of what conduct is prohibited, and it encourages arbitrary and discriminatory enforcement."

On August 15, 1998, Boomer was on a canoe trip when he fell out of his canoe and into the river. He proceeded to express his displeasure with falling into the river with a three-minute outburst that included splashing water on a particular group of canoers and yelling at them. A sheriff's deputy and a family of four testified that they witnessed the tirade.

The prosecutor handling the case conceded that the statute violated equal protection, but the court accepted the prosecutor's argument that the court could sever the references to women without affecting the remainder of the statute. *See LDRC LibelLetter*, February 1999 at 18. Boomer was found guilty of violating the law, and was sentenced to four days of community service and a choice of three days in jail or a $75 fine. *See LDRC LibelLetter*, September 1999 at 6.

Though the court of appeals found the statute to be unconstitutional, the court did remind the legislature that the First Amendment does not protect obscene speech, and noted that the legislature could enact a "properly drawn statute to protect minors from such exposure."

The ACLU represented Boomer in the matter.

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# Publisher to Appeal Ruling That Mass Buy-Out of Newspaper by Off-Duty Sheriff's Deputies Was Not Unconstitutional

**By Audrey Billingsley**

On February 21, 2002, the United States District Court for the District of Maryland dismissed a civil rights action instituted by Ken Rossignol and Island Publishing Company, publishers of the then-weekly community newspaper *St. Mary's Today*, against the Board of County Commissioners of St. Mary's County, Maryland and the county's sheriff, state's attorney, and seven deputy sheriffs. *Rossignol et al. v. Voorhaar et al.*, Civil No. WMN 99-CV-3302 (Nickerson, J.). Addressing plaintiffs' claims brought under 42 U.S.C. § 1983 for violations of the First, Fourth and Fourteenth Amendments, the court held that the defendants did not act under color of state law in planning and carrying out a mass seizure of the November 1998 Election Day edition of *St. Mary's Today*.

***Anticipating that Mr. Rossignol would accuse them of theft, they obtained receipts from those stores that were open for business, and with respect to vending newsboxes, videotaped themselves dropping quarters into the boxes.***

## *The Newspaper Raid*

In the early morning hours of Election Day 1998, two teams of ostensibly off-duty law enforcement officers from the St. Mary's County, Maryland Sheriff's Office drove around the county to convenience stores and newsboxes and purchased virtually every copy available for sale to the public of that day's edition of *St. Mary's Today*. The newspaper bore the front-page headline "Fritz Guilty of Rape," and accurately reported that Richard Fritz, the Republican candidate for the office of State's Attorney in the 1998 election, had pleaded guilty in 1965 to the charge of carnal knowledge of a minor. A separate article criticized the handling by Sheriff Voorhaar, who also stood for reelection that day, of an employee's sexual harassment claim.

The defendants, offended by the newspaper's long history of news coverage criticizing the Sheriff's Office and county officials and anticipating more of the same on Election Day, conceived of the newspaper raid as a way to "protest" Rossignol's allegedly "unsavory journalism" and prevent him from "smear[ing] Richard Fritz, and [Richard Voorhaar] . . . in the newspaper on Election Day." To implement their plan, the defendants pooled their money – including a $500 contribution from Sheriff Voorhaar. – Although at least two of them openly carried their guns, the deputies had agreed to wear civilian clothing, as most of them did in the normal course of their employment, and to drive their own cars. Moreover, although they can be called to duty at any time, and several of them in fact were paged by the one on-duty defendant in the middle of the night and met with him to discuss an on-going investigation, six of the deputies formally had taken leave in advance of the election.

These six deputy sheriffs split into teams of three to remove *St. Mary's Today* from circulation as it was delivered to newsboxes and convenience stores throughout the county. Anticipating that Mr. Rossignol would accuse them of theft, they obtained receipts from those stores that were open for business, and with respect to vending newsboxes, videotaped themselves dropping quarters into the boxes. As one defendant told the camera in the middle of the night:

> You know what, Rossignol has never given us enough credit to have formally laid plans. He always calls us bumbling idiots. We're gonna see who's an idiot tonight. We have a plan, we're working our plan. We planned our work and we're working our plan, Rossignol.

Rossignol first learned of the raid at approximately 2:00 on the morning of November 3 when he was called out by one of his delivery drivers to repair a broken newsbox. When he set out to restock the papers, the defendants followed him around the county and purchased the resupply.

The defendants' videotape and the receipts they collected are a testament to the success of their plan: Of the

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**Publisher to Appeal Ruling That Mass Buy-Out of Newspaper by Off-Duty Sheriff's Deputies Was Not Unconstitutional**

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approximately 2,600 newspapers sold at retail stores and 1,100 sold from vending newsboxes in the county, the defendants managed to purchase at least 1,379 copies of the paper by the time the polls opened on Election Day. The newspapers were bundled together and taken to a barn on the Fritz family farm, where they remain to this day.

The Federal Bureau of Investigation and U.S. Attorney's Office devoted 22 months to an investigation of the newspaper raid. Ultimately, however, the government did not indict and the investigation was closed. In the meantime, Mr. Rossignol and Island Publishing Company filed a civil suit in federal court in Maryland.

### *The Litigation*

The complaint alleged, *inter alia*, that the defendants, acting under color of law, imposed an unlawful prior restraint on the press in violation of the First Amendment, and carried out unlawful and warrantless seizures of property in violation of the Fourth Amendment, and deprivation of property without due process of law in violation of the Fourteenth Amendment. Plaintiffs sought damages and declaratory and injunctive relief.

> ***According to the court, there was no evidence that the defendants invoked their authority as public officials in carrying out their plan.***

The parties filed cross-motions for summary judgment, and on February 21, 2002, the court denied the plaintiffs' motion and granted the defendants' motions, holding that plaintiffs could not state a claim for relief under 42 U.S.C. § 1983 because the defendants did not act "under color of state law." In that regard, the court acknowledged both the defendants' retaliatory motive and their intent to remove the newspaper from circulation. Nevertheless, it concluded that "[t]he fact that Defendants' conduct was related to or motivated by their state employment does not transform that conduct into state action." Mem. Op. at 16.

Instead, the court reasoned that, "[w]hen determining whether a defendant acted under color of state law, 'the nature of the act is controlling.'" Mem. Op. at 14. Thus,

> [w]hether or not the defendant officers were on duty, wearing a uniform, driving a patrol car, or exhibiting other indicia of state authority, may inform the inquiry but is not dispositive of the issue. Rather, the reviewing court must examine the nature and circumstances of the defendant's conduct to determine whether it is 'fairly attributable to the state.'" *Id.* (citations omitted).

In this case, the court determined, "the Purchasing Defendants are unquestionably state officials, and the inquiry is whether 'the actions complained of were committed while the defendants were purporting to act under the authority vested in them by the state, or were otherwise made possible because of the privileges of their employment.'" *Id.* (citations omitted). According to the court, there was no evidence that the defendants invoked their authority as public officials in carrying out their plan. Moreover, the court held, their motive for seizing the newspapers – *i.e.*, to retaliate against plaintiffs for their history of unflattering news coverage and to prevent the dissemination of such news on Election Day - was irrelevant to whether they were acting under color of state law.

Shortly after the court announced its decision, Fritz – who was elected to the office of State's Attorney in the 1998 election – issued a press release praising the ruling as one that "signifies the last gasp of a dying political machine that attempted to subvert democracy through the use and control of an unprincipled tabloid editor on the eve of an election." Plaintiffs filed notice of appeal to the Fourth Circuit on March 22, 2002. Their brief on appeal is due on May 23, 2002.

*Mr. Rossignol and Island Publishing Company are represented by Lee Levine, Seth Berlin, Ashley Kissinger, and Audrey Billingsley of Levine Sullivan & Koch, L.L.P. and by Alice Neff Lucan. Deputies Doolan, Long, Merican, Myers, Willenborg and Young are represented by Daniel Karp. Sheriff Voorhaar, Deputy Alioto and the Board of County Commissioners of St. Mary's County, Maryland are represented by John Breads. Mr. Fritz is represented by Kevin Karpinski.*

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# Suspended Public Access Show Wins Big Round With Cable Channel

***Court holds that public access channel is a state actor and possibly a public forum***

A United States District Court for the District of Massachusetts, in a decision by Judge Michael A. Ponsor, granted a preliminary injunction against a public access cable channel that had suspended the producers of a show called "Think Tank 2000." *See Demarest, et. al., v Athol/Orange Community Television, Inc., et. al.*, Case No. 01-30129-MAP (D. Mass. Feb. 28, 2002).

In April 2001, Athol/Orange Television ("AOTV") had suspended Patricia Demarest and Vicki Dunn, the show's producers, when they refused to agree to certain new policies promulgated by the channel. In July 2001, Demarest and Dunn filed suit, claiming the new policies were unconstitutional.

## *Original Suspension*

The suspension in April 2001 was not the first run-in that Demarest and Dunn had with the channel. In July 2000, AOTV refused to transmit one of their "Think Tank 2000" shows and suspended Demarest for 30 days because of violations of AOTV's policy prohibiting "knowingly falsifying forms."

The original dispute involved Demarest's criticisms of local officials, including that Duane Chiasson was using his position on Athol's Needs Assessment Committee to get special treatment. According to Demarest's broadcast, Chiasson was granted a permit to construct a home without filing the proper paperwork. Demarest also alleged that Chiasson misused the permit.

In the process of compiling her report, Demarest set up a camera on the sidewalk opposite Chiasson's home. When Chiasson came home, he approached Demarest and had a conversation with her which she videotaped. Demarest used the footage for the broadcast. Chiasson complained to AOTV that Demarest did not get his permission to use footage of him in her program and that she produced inaccurate reports. He demanded that something be done about it.

AOTV required its producers to obtain "all necessary" release forms from individuals and to certify that they have done so in AOTV's Air Time Request Form. There were certain exceptions, including one for those individuals taped in the course of electronic newsgathering.

Concluding that Demarest had not obtained a necessary release from Chiasson, AOTV suspended Demarest for allegedly filing a false Air Time Request Form.

## *New Policies Adopted by AOTV*

This dispute prompted AOTV to revise its policy manual. Demarest and Dunn objected to four of the policy changes and refused to agree to them, which led to the suspension giving rise to this case.

First, AOTV eliminated the electronic newsgathering exception to the release requirement, and modified the manual to make it a requirement to have a release form from everyone who appeared in AOTV broadcasts.

Second, AOTV's new policy manual prohibited the recording of any illegal act.

Third, AOTV began requiring producers to indemnify AOTV for legal fees.

Fourth, AOTV required producers to notify AOTV when a broadcast contained material that was "potentially offensive."

## *State Action?*

For the First Amendment to be implicated in AOTV's actions, the court would have to find that AOTV was a state actor. Even though AOTV is a municipally authorized and operated public, educational and government ("PEG") access channel under § 531 of the Cable Act, the court said the "state actor" issue was "more difficult than may appear on the surface." According to the court, "no federal decision cited by the parties, or located by this court, has positively found state action in a PEG case such as this one." The court found, however, that "several cases have treated a PEG channel as a state actor without explicitly addressing the issue."

Relying on a 1995 Supreme Court case, *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, the

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**Suspended Public Access Show Wins Big Round With Cable Channel**

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court concluded that AOTV was a state actor. According to the court, three factors made it "highly probable" that AOTV would be found to be a state actor for the purposes of the First and Fourteenth Amendment.

First, the court noted that AOTV was created by the Town of Athol through a license agreement with Time-Warner Cable. The court said that there could be "no doubt that AOTV was created by Athol, much like the Bank of the United States was created by the federal government." The court also concluded that the fact that much of AOTV's funding comes from Time-Warner was "no evidence of any lack of state action." The court said that Time-Warner's contribution was much like a tax or licensing fee.

Second, the court noted that Athol created AOTV "to further public objectives." The court said that AOTV serves the public much like a public park.

Finally, the court noted that Athol has "retained authority through its Board of Selectmen to appoint all – not just a majority – of the members of the "Access Group," which manages and operates AOTV.

Thus, according to the court, the requisite state action was present to implicate the First and Fourteenth Amendments.

### *Public Forum?*

The court also had to consider a second preliminary matter: whether AOTV was a public forum. The plaintiffs asserted that AOTV, in addition to being a state actor, was a public forum for the purposes of the First Amendment. On this issue, however, the court did not find a clear-cut answer.

In 1996, the Supreme Court handed down *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727. In that decision, Justices Kennedy and Ginsburg asserted that a public access channel was a public forum. That opinion, however, did not garner a majority of the court. The Breyer plurality, however, did not deny that public access channels had some of same characteristics of a public forum. The Breyer plurality concluded that restrictions on the use of public access channels were deserving of, at very least, "heightened" scrutiny.

Relying on the six justices that signed either the Breyer or Kennedy opinions, the court concluded that analyzing PEG restrictions with "heightened" scrutiny would be appropriate, and a public forum finding unnecessary.

### *Policy Revisions*

***[T]he court said it would be unreasonable to require a producer to obtain a written release from everyone taking part in a protest or demonstration. The court called this requirement a "suffocatingly impracticable burden."***

Turning to the policy revisions in question, the court concluded that three of the policy revisions were unconstitutional. The plaintiffs, however, did not persuade the court that the policy requiring producers to give AOTV advance warning of "potentially offensive" programming was unconstitutional on its face. Relying on *Denver Area Educational Telecommunications Consortium*, however, the court held that the release policy and the legal expense policy did not survive heightened scrutiny. Finally, the illegal acts policy was stricken because the court determined it was a content-based restriction and could not survive strict scrutiny.

In analyzing the release requirement, which required producers to have a written release from everyone who appeared in a program, the court held that it could not pass a heightened scrutiny because it was not sufficiently tailored. It was of import to the court that under the policy, even public officials could prevent coverage of themselves by simply refusing to sign a release. Moreover, the court said it would be unreasonable to require a producer to obtain a written release from everyone taking part in a protest or demonstration. The court called this requirement a

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## Suspended Public Access Show Wins Big Round With Cable Channel

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"suffocatingly impracticable burden."

In analyzing the legal expense provision, the court similarly found that the provision could not pass heightened scrutiny. The court considered it an "extra deterrent to [the] exercise of First Amendment rights," especially when AOTV would have recourse to attorney's fees and costs "when proper general authority renders such an award appropriate."

Turning to the illegal acts provision, the court shifted its test to strict scrutiny because it found the provision to be content based. The court said the provision "targets an entire subject-matter" and is "so broad as to dwarf any interest in [AOTV] equipment safety," the ostensible reason given for the provision.

By way of example, the court said AOTV's illegal acts provision would have forbidden the filming of John Lewis as he marched in Selma, Alabama on Bloody Sunday – images that were so stunning that Lewis himself said they "touched a nerve deeper than anything that had come before." The thought of a producer being prohibited from filming such an important and moving event helped convince the court that the illegal acts provision was blatantly unconstitutional.

Having found that it was likely that Demarest would prevail on these claims, the court said that "balance of harm" and the "public interest" factors, used in determining whether a preliminary injunction would be appropriate, weighed in favor of granting the injunction.

### *Allows "Potentially Offensive" Notice Requirement to Stand*

The only provision which the court did not enjoin was the "potentially offensive" provision. The court said that Demarest could not prove that the provision was unconstitutional, despite the fact that the court labeled it a content-based provision. The court said that the provision did not attempt to ban the regulated content in total, but instead sought to merely "identify programming which would justify a viewer warning and might be more appropriate for later viewing hours." The court said that AOTV's requiring a producer to notify it of "potentially offensive" programming was a "minimal burden on producers."

The court did say, however, that should AOTV apply the provision in an unconstitutional way, as the plaintiffs argued it would, the provision would be reviewed under strict scrutiny.

Harris Freeman, of Lesser, Newman, Souweine & Nasser in Northhampton, Mass., and William Newman, of the ACLU, represented Demarest and Dunn. Peter J. Epstein, of Boston, represented Athol/Orange Community Television, Inc.

## *UPDATE*: California Supreme Court to Review Mass E-Mail Injunction Case

***In December, appellate court issued injunction under the legal doctrine of trespass to chattels***

On March 27, the California Supreme Court agreed to hear the appeal of a former Intel Corp. employee who was prohibited from sending out mass e-mails to current Intel employees under the legal doctrine of trespass to chattels. *See Intel Corp. v. Hamidi*, 2001 Cal. App. LEXIS 3107, *review granted*, No. S103781 (Cal. March 27, 2002).

In December, the California Court of Appeals held that Intel was entitled to an injunction because Kourosh Kenneth Hamidi's six mass e-mails to as many as 29,000 employees was a trespass and caused a loss of productivity at Intel. The court of appeals held that Intel was entitled to the injunction despite no demonstration of sufficient harm to "trigger entitlement to nominal damages for past breaches of decorum by Hamidi." Instead, the court based its decision on the seldom-used legal doctrine of trespass to chattels, saying that Hamidi "was disrupting [Intel's] business by using it's property."

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## California Supreme Court to Review Mass E-Mail Injunction Case

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According to the Restatement, trespass to chattels "may be committed by intentionally ... (b) using or intermeddling with a chattel in the possession of another." Liability is established if the "intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest [is harmed]."

Hamidi's mass e-mails were sent out over a period of two years following his firing from Intel. In his e-mails he voiced his complaints about the employment conditions at the company. He later claimed that he was providing "an extremely important forum for employees within an international corporation to communicate via a web page on the Internet and via electronic mail, on common labor issues, that, due to geographical and other limitations would not otherwise be possible.

The ACLU, on behalf of Hamidi, argued that six e-mails over the course of two years did not place a tremendous burden on Intel's computer system nor seriously disrupt business. The court of appeals rejected arguments made by the ACLU, saying that the ACLU had discounted the disruption, given the fact that thousands of employees were involved. The court of appeals also rejected Hamidi's free speech arguments and arguments that unsolicited e-mails were analogous to unwanted first-class mail.

In dissent, Judge Kolkey was critical of the majority for, among other things, accepting Intel's trespass to chattels argument without demonstrating some sort of concrete harm was done by Hamidi's mass e-mails.

The California Supreme Court is awaiting briefs for the case. No date has been set for oral arguments.

Hamidi is represented by Karl Olson and Erica Craven, of Levy Ram, Olson & Rossi, in San Francisco, and William M. McSwain, Richard Berkman, and F. Gregory Lastowka, of Dechert, in Philadelphia. Intel is represented by Michael A. Jacobs, of Morrison & Foerster in San Francisco, and Abner R. Neff, of Los Angeles.

## *Eternally Vigilant: Free Speech in the Modern Era*

### edited by Lee C. Bollinger & Geoffrey R. Stone

Published by University of Chicago Press, this new text compiles essays by leading thinkers and academicians on the First Amendment. It begins from a premise the editors draw from Justice Oliver Wendell Homes statement in the 1919 opinion in *Abrams v. United States*, that the constitutional guarantee of freedom of speech is "an experiment, as all life is an experiment," requiring each day that we "wager our salvation upon some prophecy based upon imperfect knowledge."

The editors see a "deep tension in that statement," the reality that an "experiment implies a tentativenss of commitment and a need for ongoing review and adjustment," while at the same time what is at core in that experiment is something both fundamental to the society and yet vulnerable.

Looking first at historical philosophical underpinnings and at early 20th Century First Amendment opinions, the essays move on to try to address the application of these earlier theories and new theories to modern free speech and free press issues. It is a relatively dense tome. This editor's vote for most accessible amid the academic theory was the essay by Richard Posner, who posits an economic cost-benefit model, complete with *x*'s and *y*'s, for analyzing free speech restrictions. While readable, however, and while suggesting a veneer of mathematical objectivity, it is in the end no more objective in approach than any other theory of analysis in this area.

That said, if one wants to get a feel for such truly notable First Amendment academics as Vince Blasi, Ken Greenawalt, Robert Post, Frederick Schauer, Stanley Fish, Lillian BeVier, Owen Fiss and Cass Sunstein, they are all represented along with the editors in this text.

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# Supreme Court, 6-3, Voids "Virtual" Child Porn Law

**By Laurence Sutter**

The United States Supreme Court, resolving a split in the circuits (which had ruled 4-1 in favor of the legislation), has rejected as overbroad Congress's criminalizing material which appears to be, or is promoted as, child pornography. See *Ashcroft v. Free Speech Coalition et al.*

Justice Kennedy wrote the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Thomas concurred in the judgement, and wrote separately. Justice O'Connor also concurred in the judgment in part and dissented in part, with Justices Rehnquist and Scalia joining in the dissenting portion of the opinion. Chief Justice Rehnquist wrote a separate dissenting opinion in which Justice Scalia joined all but one part.

## *From Miller to Ferber to CPPA*

*Miller v. California*, 413 U.S. 15 (1973), set the current constitutional test separating protected from unprotected sexually explicit material — a blend of subjective and objective standards. The community's tolerance of the explicit acts depicted and the material's appeal to a "prurient" interest in sexual matters, as measured by community standards, on the one hand, are balanced against the countervailing factor of serious literary, artistic, political or scientific merit, on the other.

The issue then arose whether sexual performances by minors were subject to the *Miller* test. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court ruled that such sexual performances were a form of child abuse as to which content was irrelevant. Those whose muse commanded the depiction of under-age sexuality, the Court suggested, could use adults who looked like children, or some form of simulation.

But then in 1996 Congress criminalized precisely that. Congress was spurred by the ease by which images could be "morphed" on a computer, and by the suggestion that wily pornographers — or their lawyers — might create foolproof reasonable doubt by suggesting that any impugned images might merely be "morphs" of adults.

***Justice Kennedy's analysis of the statute began with the obvious: the CPPA criminalized that which was neither obscene under Miller nor child abuse under Ferber.***

The Child Pornography Protection Act ("CPPA," amending 18 U.S.C. § 2256(8)) augmented the definition of "child pornography" to include:

(i) any explicit visual depiction that "is, or *appears* to be, of a minor" (emphasis added);

(ii) the "morphing" of an image of an actual child to make it appear that the child is engaging in sexual activity; and

(iii) any sexually explicit material "advertised, promoted, presented, described or distributed in such a manner that it conveys the impression" that it depicts a minor engaging in sexually explicit conduct.

"Sexually explicit" includes a wide variety of actual or simulated explicit acts as well as "lewd exhibition of the genitals or pubic area." Respondents, photographers, artists and an adult industry coalition, did not challenge the second provision. The existing law which this amended already criminalized all forms of production and distribution, as well as mere possession (upheld in *Osborne v. Ohio*, 495 U.S. 103 (1990), on the basis that protecting the victims of child pornography was a compelling state interest).

## *Kennedy's Majority Opinion*

Justice Kennedy's analysis of the statute began with the obvious: the CPPA criminalized that which was neither obscene under *Miller* nor child abuse under *Ferber*: works of serious literary or artistic value, works which did not offend the community's tolerance of sexual matters, and even materials which were not "taken as a whole" but contained only an isolated passage of prohibited matter, would be caught. He rejected the argument that images "virtually indistinguishable" from those involving live children should suffice — which would, clearly, have involved distorting or overruling *Ferber*.

The Court identified four Government arguments to support the statute: First, "virtual" child pornography's effect on children might make it easier for pedophiles to seduce them. So may many things, and, reaching back to *Butler v. Michi-*

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*gan*, 352 U.S. 380 (1957), the Court reaffirmed that adults may not be reduced to reading only what is fit for children nor may material be banned because of its supposed tendency to induce immoral acts (the so-called "bad tendency doctrine"). Closely related is the argument that this material whets the depraved appetites of pedophiles. But such a justification amounts to thought control, the Court said: improper thoughts must ripen into improper action which alone can be criminalized.

Following the *Osborne* rationale, the Government also argued that elimination of "virtual" child pornography would eliminate the market for the real thing, which the Court found somewhat illogical but in any event unjustifiable absent an underlying crime.

Finally, the Government advanced its evidentiary rationale — child pornographers would be harder to convict if they could argue that the material was just "morphed" images of adults. "This analysis turns the First Amendment upside down," the opinion said. "The Government may not suppress lawful speech as the means to suppress unlawful speech." Nor did the existence of an affirmative defense (that the models used actually were over 18 and the producer could prove it) in the statute help the Government, since it applied only to producers and, of course, only to images where live models were used.

The Court more easily dismissed the third prohibition, against materials marketed so as to "convey the impression" that they are child pornography. The majority acknowledged (probably in response to the dissent) that "pandering" — "the commercial exploitation of erotic materials solely for their prurient appeal," *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) — may be allowed as evidence of obscenity in a close case. But under the CPPA everyone in the chain of distribution, including mere possessors who were not the "panderer" and who might even know the material was mislabeled, would be condemned. It, too, was found overbroad, and the Ninth Circuit's decision affirmed.

***In Free Speech Coalition, the Court reaffirms that absent the actual abuse of a living child, Miller and the First Amendment must be satisfied before sexually explicit material can be criminalized.***

### *Thomas Concurs*

Justice Thomas's concurrence was most concerned with the evidentiary rationale, but noting that it had never been successfully argued, left for the future the possibility of a narrowly drawn statute or a redrafted affirmative defense that might somewhat impinge on lawful materials in order the suppress the unlawful.

### *Rehnquist/Scalia Dissent*

Chief Justice Rehnquist and Justice Scalia, in dissent, argued that the statute could be saved from overbreadth by a narrowing construction limiting it to "hard-core," actual sexually explicit conduct indistinguishable from material already prohibited prior to the CPPA. They also would have read a scienter requirement into the possessory offense. The marketing provision would be narrowed to cover only actual "pandering."

### *O'Connor Concurs and Dissents*

Writing separately, Justice O'Connor agreed that the marketing provision was unconstitutional as well as the "appears to be" prohibition except in the case of what she termed "virtual-child pornography": "pornographic images of children created wholly on a computer, without using actual children." Joined by the Chief Justice and Justice Scalia in this portion of her opinion, Justice O'Connor argued that the statute could permissibly be narrowed to cover images "virtually indistinguishable" from real children but not involving youthful-looking adults.

### *The Import of Kennedy's Majority*

In *Free Speech Coalition*, the Court reaffirms that absent the actual abuse of a living child, *Miller* and the First Amendment must be satisfied before sexually explicit material can be criminalized.

Forty-five years ago, in *Roth v. United States*, 354 U.S. 476 (1957), Justice Brennan advised his readers that not all

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representations of sex — even explicit ones — were obscene. "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern[.]"

So, too, Justice Kennedy, in *Free Speech Coalition*, did not shrink from pointing out that "the Court [in *Ferber*] recognized some works in this category might have significant value." Including *Romeo and Juliet* (who's thirteen but has the presence of mind to marry Romeo before she sleeps with him), *American Beauty* and *Traffic*. Perhaps he had Justice Brennan's famous passage in mind when in *Free Speech Coalition*, in a passage also likely to be frequently quoted, he in turn reminded his readers of the abiding human interest in youth and its dalliances:

> Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.

Justice Kennedy also pointed out that 18, the age below which explicit depictions are prohibited by the statute, is well above the age many states permit their citizens to engage in sexual relations in or out of wedlock. Rejecting the justification that the material covered by the statute might lure children into the clutches of molesters, Justice Kennedy observed that so could video games and candy, "but we would not expect those to be prohibited because they can be misused."

That may sound arch, but Justice Kennedy wasn't kidding. The opinion resonates with the gravity of the issues at hand. It opens with a recitation of the First Amendment, the draconian penalties (up to 15 years for a first offense, up to 30 for a second) under the statute, and summarizes the Court's historical protection of disfavored, unpopular and offensive expression. He dismisses the Government's argument based on the material's effect on the minds of child pornographers in another noteworthy passage

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

In terms of jurisprudence the decision is perhaps most noteworthy for what it did not do, but what it didn't do was profound. First, it kept *Ferber* in its box: there would be no expansion of a *Miller*-less obscenity test without a living, abused child. Indeed, Justice Kennedy pointed out that the dissenting Circuit Judge below had acknowledged this to be the law but urged that it be changed. The decision also kept *Osborne* in its box: the Court dismissed its "destruction of the market" rationale by noting that *Osborne* involved images of real, not virtual, children.

***In terms of jurisprudence the decision is perhaps most noteworthy for what it did not do, but what it didn't do was profound.***

Second, *Free Speech Coalition* preserves American constitutional obscenity jurisprudence, which began with *Roth.* A reversal, approving the "bad tendency doctrine" applied to abusers and victims alike, would have replaced it with something quite akin to the doctrine of *R. v. Hicklin*, [1868] L. R. 3 Q.B. 360 ("to deprave and corrupt" the most vulnerable consumer.)

It's also noteworthy that the opinion was written by Justice Kennedy, the court's bellwether vote, and that Justices O'Connor and Thomas concurred for the most part. For the time being *Miller* and *Ferber* are still good. But the trend in an increasingly conservative political climate is to fashion ostensibly content-neutral rationales to curtail sexually explicit content and thus avoid the First Amendment and its quaint notions of individual intellectual freedom and insurmountable strict scrutiny level, and *Miller*, with its pesky balancing of social worth against popular sentiment. In addition to zoning and licensing schemes, the centuries-old accu-

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sation of corruption of the youth, both as spectators and participants, provides an attractive implement.

Many concerned with the welfare of children may be disappointed by *Free Speech Coalition*. But given its limitless rationale of condemning everything the legislature concludes could inspire a child molester it's hard to see what choice the Court had. The CPPA's paradigm case remains that of (let us say) an artist, in the solitude of his home or atelier, sketching from his imagination erotic pictures of youthful-looking subjects (in the Third Circuit they need not even be nude), and thereby finding himself guilty of several federal felonies, RICO, forfeiture and decades in the penitentiary if a jury finds that they "appear to be" (to whom?) under 18. One needn't be a First Amendment absolutist to suggest that this burns a very large house to roast a very small pig.

*Laurence Sutter is Senior Vice President, General Counsel and Secretary of General Media, Inc.*

# Fred Friendly-Style Seminar at Columbia University Student Press Convention

On March 21 LDRC produced a Fred Friendly-style seminar for the Columbia Scholastic Press Association's Annual Convention at Columbia University. The Columbia Student Press Association ("CSPA") has been promoting student journalism through competitions and workshops since 1924. The Convention is an annual event for high school journalism students and faculty advisers from all over the country – which made this an ideal platform to showcase and promote the LDRC Institute's First Amendment education program – Free Press in a Free Society.

Jay Brown, a partner with LDRC member firm Levine Sullivan & Koch, moderated a seminar with the theme "The Press, Law Enforcement & the Public's Right to Know." The hypothetical has print and television reporters following a hot story while law enforcement investigates crime, exploring how both sides do their respective jobs and the tensions that arise as they try to balance the public's right to information and public safety.

### *Hypothetical Explored Press and Public Safety Issues Post 9/11*

This event used a hypothetical that directly explored the press / law enforcement theme in the context of issues that have come up post 9/11. Here the crimes under investigation were a series of bomb blasts in New York City at ATM machines and empty police cars. Suspicion falls on a high school student with alleged white extremist views. This was done deliberately to leave room for debate on the public safety issue and not have the press trumped with the claim of national security – but still posing serious public safety issues.

The panel featured: Zachary Carter (a former US Attorney & federal judge and now head of the white collar crime and civil fraud practice group at LDRC member firm Dorsey & Whitney); Stephen Engelberg (the Investigative Editor for the *New York Times*); David Gelber (a CBS News Producer for 60 Minutes & 60 Minutes II); Len Levitt (*Newsday* Columnist); Sol Watson (General Counsel The New York Times Company); and Lou Young (a veteran reporter for WCBS-TV).

Prioritizing public safety concerns, Zachary Carter took a hard line on the press, but the press representatives put on a strong defense for how they would gather the news and the public's interest in receiving news. Questions from the students were intelligent and focused, including a some that touched on the murder of Daniel Pearl and the extent to which reporters will put themselves at risk for a story. Toward the end, Len Levitt summed up the unresolved complexities following 9/11 by discussing his inchoate sense of how those events have changed things for him as a reporter, as yet in no specifically identifiable way, other than in his "reporter's gut."

### *Teachers Invited to Follow Up and Contact LDRC*

Faculty advisers attending the Convention will receive follow up information on LDRC's education program and will be invited to contact us if they are interested in hosting a program in their school. We will then try and match interested teachers with local LDRC's moderator.

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# Courts Rule on Terror War Issues

There have been a number of court decisions in the past few weeks in cases on media issues that have emerged in the war on terrorism, with First Amendment concerns winning out in most of these cases. Meanwhile, the government issued regulations for military tribunals which include a presumption of openness, and reporters faced new challenges in covering conflict in another area of the Middle East.

## *Court Foresees Win on Access to Cuba Base*

In a little-noticed opinion issued on March 7, the U.S. District Court for the District of Columbia wrote that the Pentagon's method for providing transportation for journalists to Guantanamo Bay, Cuba – where suspected Taliban and al Queda prisoners are being held – may be unconstitutional. *Getty Images News Services Corp. v. Department of Defense*, 2002 WL 371955 (D.D.C., March 7, 2002).

While dismissing most of a lawsuit brought by Getty Photo Images to force the Pentagon to allow it to participate in media press pools in Afghanistan and elsewhere, District Judge John D. Bates wrote that

> Getty has raised a serious question on the merits relating to its request for equal access to Guantanamo Bay, particularly with regard to the absence of clear standards and procedures. The Court is persuaded that Getty is likely to succeed on the claim that, at some point in time, published criteria and a process for obtaining relevant information must be in place to govern media access to ongoing detention activities at Guantanamo Bay.

*Getty Images* at *11.

Getty Images News Services filed suit after it was excluded from the Department of Defense National Media Pool, and from the media pools sent late last year to Afghanistan. (In court, the Pentagon said that the Afghanistan pools were ad hoc, and were not an activation of the National Media Pool.) The agency was also excluded from initial flights to the American military base at Guantanamo Bay, Cuba.

In its initial complaint, filed Jan. 31, 2000, Getty sought a temporary restraining order and a preliminary injunction barring the Defense Department from not accommodating the photo agency along with other media outlets. Judge Bates denied the request for a temporary restraining order on Feb. 8.

By the time Bates made this decision, Pentagon officials had added Getty to the list of news organizations eligible for the press pool, lifted the press pool restrictions in Afghanistan, and allowed a Getty photographer aboard a plane to Guantanamo Bay, although defense officials did not form an official pool for coverage of the base When Bates held a preliminary injunction hearing on Feb. 21, the Defense Department argued that the case was now moot.

Judge Bates agreed in large part with this argument, as explained in a decision released March 7. He held that Getty lacked standing on its claims regarding the national and Afghanistan pool, due to the mootness of the claims. On the question of access to Guantanamo Bay, the court refused Getty's request that the Defense Department be ordered to form a pool for media coverage of the base, holding that an expedited schedule for the trial was sufficient and that the absence of a pool did not constitute irreparable harm to Getty because a Getty photographer had already been flown to the base without any pool having been established.

Bates added, however, that Getty would probably be able to show that the Pentagon's lack of written criteria for providing access to Guantanamo Bay was improper.

As described by the court, the Pentagon's method for providing transportation was based on four criteria.

> At the [preliminary injunction] hearing, DOD articulated four principles that guide the allocation of space on the media flights to Guantanamo Bay: (1) DOD seeks a mix of media types (e.g., television, print, radio, wire services) on the flights; (2) DOD gives some preference to media organizations that consistently reach large audiences; (3) DOD seeks to send international media organizations because the government has an interest in reaching a worldwide audience in matters concerning the war on terrorism; and (4)

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> DOD seeks to send regional news media because the detention activities at Guantanamo Bay are, in part, a regional news story. ... DOD conceded that neither the four criteria nor any other standards for allocating access to Guantanamo Bay are written or published. DOD also conceded that there are no formal procedures by which DOD gathers information relevant to the evaluation of a particular media organization under these criteria.

*Id.* at *2.

Nevertheless, Bates declined to issue a preliminary injunction, finding that "the balance of harms clearly weighs against granting a preliminary injunction at this time."

The following day, Bates stayed the proceedings at the request of both parties, in contemplation of settlement of the case.

Getty is represented by Joshua Jacob Kaufman of Venable, Baetjer, Howard & Civiletti, LLP of Washington, D.C. Henry A. Azar, Jr. of the Justice Department is representing the government.

### *Court Order On Disclosure of Detainees' Names Stayed*

On April 19, a New Jersey appeals court issued a stay of ruling by a state court judge holding that a county jail which is holding detainees for the Immigration and Naturalization Service must make the names of the detainees public. *ACLU v. County of Hudson*, No. HUD-L-463-02 (N.J. Super. Ct., Hudson County opinion April 12, 2002), available at www.judiciary.state.nj.us/ditalia/aclu.htm.

The Hudson County and Passaic County jails are among several local jails housing the detainees under contracts with the INS. The people being held are foreign nationals who were detained after Sept. 11 for immigration violations while the INS holds deportation proceedings. The INS has refused to disclose the names of the detainees, and the deportation proceedings are closed (*but see* decision regarding closure of these proceedings, *infra*).

In a March 26 oral decision and a April 12 written opinion, Superior Court Judge Arthur D'Italia ruled that the jails' records, including the names of the INS detainees, were public documents under New Jersey law.

In the initial, oral ruling, D'Italia issued an immediate stay of his decision, pending an appeal. But he reconsidered in his written opinion, and instead issued a stay for only 10 days.

On April 17, six days after D'Italia issued his written opinion, INS Comissioner James W. Ziglar issued an interim rule, effective immediately, to "clarif[y] that non-Federal providers shall not release information relating to ... detainees, and that requests for public disclosure of information relating to Service detainees, including Service detainees temporarily being held by non-Federal providers on behalf of the Service, will be directed to the Service." Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (April 22, 2002) (to be codified at 8 C. F.R. pts. 236 and 241).

The appeals court issued its stay on April 19, after the lawyers for both sides in the case held a conference call with Appellate Division Part C judges Howard Kestin and Edwin Alley. The court has scheduled argument in the case for May 20.

The ACLU is represented by Penny Venetis and Ronald Chen of the Rutgers University Constitutional Litigation Clinic, ACLU staff attorney Edward Barocas, and outside solo practitioner Howard Moskowitz of Jersey City. The counties are represented by First Assistant Hudson County Counsel Michael Dermody, Deputy Passaic County Counsel Matthew Malfa, and Assistant Passaic County Counsel Karen Brown. The INS, which intervened in the case, is represented by Thomas Calcagni, Michael Chagares and Carol Federighi.

The ACLU has filed a similar lawsuit in U.S. District Court for the District of Columbia regarding detainees nationwide. *Center for Nat'l Security Studies v. Department of Justice*, No. 01-CV-2500 (D.D.C. filed Dec. 5, 2001); *see LDRC LibelLetter*, Dec. 2001, at 51.

(Continued on page 63)

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## Courts Rule on Terror War Issues

(Continued from page 62)

### *Court Orders Open Hearings…*

Meanwhile, a federal judge in Michigan granted a preliminary injunction against continued closure of deportation hearings of a founder of an Islamic charity, and the 6th Circuit ordered that transcripts of past hearing be released. The closure was challenged in suits brought by a number of parties, including the *Ann Arbor News*, the *Detroit Free Press*, *The Detroit News* and *Metro Times*. *See Detroit Free Press, Inc. v. Ashcroft*, Nos. No. 02_CV_70339 and 02_CV-70340, 2002 WL 534475 (E. D. Mich. April 3, 2002). See page 31.

### *But Secret Evidence Allowed*

Ruling in the Global Relief Foundation's challenge of the government's seizure of its assets, U.S. District Judge Wayne Anderson held that the government could keep its evidence in support of the seizure secret. *Global Relief Fdtn., Inc. v. O'Neill*, No. 02-CV-0674 (N. D. Ill. order April 5, 2002). The 7th Circuit denied an emergency appeal of this ruling. No. 02-1874 (7th Cir. April 15, 2002) (denying mandamus).

### *Military Tribunals To Be Open, Mostly*

The final rules for military tribunals to prosecute terror suspects, made public in late March, provide that proceedings shall be open except to protect classified data or the personal safety of the participants.

The rules, which are contained in Department of Defense Military Commission Order No. 1, provide that "proceedings should be open to the maximum extent practicable," but the extent of openness is at the discretion of the presiding officer. Photography and video or audio broadcasting or recording are banned, expect as necessary for the tribunal to record its own proceedings.

Defendants would be entitled to a free military lawyer, and could have their own civilian counsel as well. But the rules provide that any civilian defense counsel, and the defendant himself, may be excluded from any closed proceedings. Such closures may be made by the presiding officer on the officer's own motion, or at the request of either of the parties.

The order is available online at www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

Also, in mid-April President Bush issued new rules for courts-martial which allow military judges to issue gag orders barring participants from discussing cases outside of court. *See* Exec. Order _____ (April 11, 2002) (adding R.C.M. 806(d)), *available at* www.whitehouse.gov/news/releases/2002/04/20020412_4.html.

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