80 Eighth Avenue, Suite 200, New York, New York 10011-5126 (212) 337-0200 www.ldrc.com

MLRC MEDIALAWLETTER

Reporting Developments Through April 18, 2003

IN THIS ISSUE

(Continued on page 2)

Supreme Court: State May Constitutionally Ban Cross Burning

By Seth D. Berlin and Audrey Critchley

On April 7, 2003, the U.S. Supreme Court held that a state may, consistent with the First Amendment, criminalize burning a cross with the intent to intimidate. *Virginia v. Black*, No. 01-1107, 2003 WL 1791218. Although six of the justices reached that conclusion, albeit for varying reasons, the Court was deeply divided – filing five separate opinions – on the significance of a provision in the statute that treats the burning of a cross as prima facie evidence of intent to intimidate. As a result of the splintered ruling, the Court vacated one man's conviction under the statute, and remanded for further proceedings two other convictions.

The Prosecutions Under the Va. Cross Burning Statute

Virginia's cross burning statute provides that "[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place." Va. Code Ann. § 18.2-423. It further provides that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id*.

The constitutional challenge arose from three separate convictions under the statute. One defendant, Barry Black, led a Ku Klux Klan rally during which Klan members spoke about "what they were" and "what they believed in" and which culminated in the burning of a 25- to 30-foot cross. The rally took place on private property, with the owner's consent, in an open field several hundred yards from a state highway. The other two defendants, Richard Elliott and Jonathan O'Mara, burned a cross on the yard of Elliott's neighbor, apparently in response to the neighbor's complaints about Elliott's use of his backyard as a firing range.

The Court of Appeals of Virginia affirmed the convictions of all three defendants. The Supreme Court of Virginia consolidated the cases and reversed the convictions, finding the statute unconstitutional on its face.

Cross Burning With the Intent to Intimidate May Constitutionally Be Punished

The U.S. Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. Writing for the Court, Justice O'Connor concluded that "a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate." Slip op. at 1. However, the Court found, "the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form." *Id*.

After describing at length the origins of cross burning, Justice O'Connor explained that it could be used either as a "tool of intimidation and a threat of impending violence," or as a symbol of Ku Klux Klan ideology and unity. *Id*. at 8. Thus,

> "while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful."

"A State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate."

Id. at 12. In a point also emphasized by Justice Stevens in a brief concurring opinion, the Court found that burning a cross, where "intended to create a pervasive fear in victims that they are a target of violence," constitutes a "true threat" falling outside the First Amendment's protection. *Id.* at 14; *see also id*. at 1 (Stevens, J., concurring).

Relationship to R.A.V. v. City of St. Paul

In reaching that conclusion, the Court distinguished its earlier holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), picking up its discussion of the circumstances in which the government may, without running afoul of the First Amendment, proscribe only a subset of one of the categories of unprotected speech. In *R.A.V.*, the Court had invalidated a similar statute, which banned "certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would 'arouse anger, alarm or resent-

(Continued on page 4)

Supreme Court on Cross Burning

(Continued from page 3)

ment in others *on the basis of race, color, creed, religion or gender*.'" Slip op. at 15 (quoting *R.A.V.*, 505 U.S. at 380) (emphasis added). That statute failed to pass constitutional muster because it engaged in content-based discrimination against "those speakers who express views on disfavored subjects." 505 U.S. at 391.

By contrast, the Virginia cross burning statute "does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics'"; rather, to the extent that it bans cross burning, a particular form of true threat, "'the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.'" Slip op. at 16-17 (quoting *R.A.V.*, 505 U.S. at 388, 391).

Applying this principle, the Court concluded that

> "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence." Slip op. at 17.

Cross Burning Has Some Protection

The Court recognized, however, that cross burning may also constitute symbolic expression uniting the members of a group around its ideology. Under those circumstances, it cannot be punished consistent with the First Amendment. As a result, Justice O'Connor concluded that the prima facie evidence provision of the cross burning statute – interpreted by Virginia's Model Jury Instructions to mean that "[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent," *id*. at 18 – is unconstitutional on its face because it "strips away the very reason why a State may ban cross burning with the intent to intimidate," *id*. at 19.

According to Justice O'Connor, these provisions would permit a jury to convict in every case where a defendant exercises his right not to put on a defense, and make it more likely that a defendant will be convicted even if he puts on a defense and even where he was engaged in constitutionally protected speech. Because the statute, as interpreted by the jury instruction, "permits the Commonwealth to arrest, prosecute and convict a person based solely on the fact of cross burning itself," it blurs the line between protected and unprotected conduct by ignoring "all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." *Id*. at 19, 21. As a result,

> "the provision chills constitutionally protected political speech because of the possibility that a State will prosecute – and potentially convict – somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect."

Id. at 20.

Applying this analysis, Justice O'Connor found Black's conviction problematic because it was based on the Model Jury Instruction's construction of the "prima facie evidence" provision and because he led a rally, rather than burning a cross directed at any particular person. The other two convictions, which had not been based on the "prima facie evidence" provision, were remanded to the Virginia Supreme Court for further consideration in light of the Court's ruling.

Justices Souter, Kennedy and Ginsburg: Banning Cross Burning is Unconstitutional

Justice Souter, joined by Justices Kennedy and Ginsburg would have found that the statute's prohibition on cross burning was unconstitutional and that it could not be saved by any exception under *R.A.V.*, particularly because cross burning is a symbol long associated with a specific message and viewpoint. According to Justice Souter, the cross burning statute's "tendency to suppress a message disqualifies it from any rescue by exception from *R.A.V.*'s general rule" barring content-based proscriptions on expression. Slip op. at 3 (Souter, J., concurring in judgment in part and dissenting in part).

> "The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment." *Id.* at 4.

In addition, Justice Souter found the prima facie evidence

(Continued on page 5)

Supreme Court on Cross Burning

(Continued from page 4)

provision problematic because it leads to a "high probability that . . . 'official suppression of ideas is afoot." *Id.* at 5 (quoting *R.A.V.*, 505 U.S. at 390). In Justice Souter's view – a point with which Justice O'Connor agreed – the "primary effect" of the provision

> "is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning."

Id. at 6; *see also* Slip op. at 21 (O'Connor, J.). Such a result is inconsistent with the First Amendment because it "tend[s] to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression." Slip op. at 7. As a result, Justice Souter would have affirmed the Supreme Court of Virginia's judgment vacating all three convictions.

Justice Scalia wrote separately because he disagreed, on fairly technical grounds, with the Court's interpretation of the prima facie evidence provision, addressing the Court's role in interpreting state statutes facing constitutional challenges.

Justice Thomas Dissents: Cross Burning is Conduct, Not Speech

Justice Thomas filed a particularly strongly-worded dissent, arguing that, in light of the strong historical connection between cross burning and violence, the cross burning statute bans only threatening *conduct* and therefore does not implicate First Amendment protections at all. Slip op. at 8 (Thomas, J., dissenting). Characterizing the Ku Klux Klan as a "terrorist organization," Justice Thomas noted that "cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence." *Id*. at 2, 5.

Moreover, "the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks," but rather, "is now widely viewed as a signal of impending terror and lawlessness." *Id*. Indeed, according to Justice Thomas, because Virginia's cross burning statute was enacted in 1950 at a time when Virginia otherwise enforced *de jure* segregation, the Legislature's purpose was to criminalize conduct that terrorized citizens, not to restrict any racist message conveyed by the conduct. *Id*. at 6-8. As a result, the statute "prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point." *Id*. at 8.

Justice Thomas also would not have found the prima facie evidence provision constitutionally infirm because (a) it creates only an inference of intent, and does not compel conviction and, (b) as a result, the fact that a person might be arrested and prosecuted under the statute before ultimately being exonerated does not trigger overbreadth concerns.

For Virginia: William H. Hurd, Richmond, VA; Jerry W. Kilgore, Attorney General, William H. Hurd, State Solicitor, Maureen Riley Matsen, William E. Thro, Alison P. Landry, Christy A. McCormick, Assistant Attorneys General, Richmond, Virginia.

Amicus Curiae: Michael R. Dreeben, Washington, DC, for United States supporting the petitioner.

For Respondents: Rodney A. Smolla, Norfolk, VA; Rebecca K. Glenberg, Richmond, Virginia, James O. Broccoletti, Zoby & Broccoletti, P.C., Norfolk, Virginia; David P. Baugh, Sara G. Davis, Law Offices of David P. Baugh, Richmond, Virginia; Kevin E. Martingayle, Stallings & Richardson, P.C., Virginia Beach, Virginia, for Respondent

Seth D. Berlin and Audrey Critchley are with Levine Sullivan & Koch, LLP in Washington, D.C.

UPDATE: Certiorari Filed in Young v. New Haven Advocate

Plaintiffs in *Young v. New Haven Advocate* filed a petition for certiorari with the Supreme Court.(02-1394). In *Young*, the Fourth Circuit held last December that personal jurisdiction cannot be exercised over an out-of-state publication for the sole reason that the publication operated a website accessible within the plaintiff's home state. *315 F. 3d 256 (4th Cir, 2002)* Only if the publication had a "manifest intent" to target an audience in the plaintiff's home state could jurisdiction be properly applied. (*For further discussion, see LDRC MediaLawLetter December 2002 at 5) Young* was the first circuit court opinion on this issue and stands in sharp contrast to the Australia High Court's ruling in *Dow Jones & Co. v. Gutnick* [2002] HCA 56.

Third Circuit Again Strikes Down COPA As Unconstitutional

By Carl A. Solano, Jennifer DuFault James, and Chad Cooper

On March 6, 2003, the Court of Appeals for the Third Circuit held for the second time that the Child Online Protection Act (COPA) is unconstitutional. *American Civil Liberties Union v. Ashcroft*, No. 99-1324, 2003 U.S. App. LEXIS 4152 (3d Cir. Mar. 6, 2003) (*Ashcroft II*), 322 F.3d 240. The court, in an opinion by Senior Judge Garth, joined by Judges Nygaard and McKee, held that the statute is overbroad and not the least restrictive means of furthering any compelling governmental interest in protecting minors from harmful material on the Internet.

COPA Intended to Fix CDA

COPA was Congress' second attempt to regulate pornography on the Internet. The first, known as the Communications Decency Act (CDA), was struck down by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997) (*Reno I*). That statute prohibited any person from posting material on the Internet that was "indecent" or "patently offensive as measured by contemporary community standards." *See Reno I*, 521 U.S. at 859-60. The Supreme Court held that the use of the term "indecent" was vague and that the scope of the CDA was too broad to withstand First Amendment scrutiny. The Court also expressed concern that

> "the 'community standards' criterion as applied to the Internet meant that any communication available to a nationwide audience would be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78.

In an effort to cure the ills that doomed the CDA, Congress limited the applicability of COPA. Under COPA, a person would be liable if he or she

> "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1).

The statute therefore would apply only to those persons who sought to make a profit from publishing material on the World Wide Web. To define "material that is harmful to minors," Congress devised a three-part test that was based on the Supreme Court's decisions in *Ginsberg v. New York*, 390 U.S. 629 (1968), and *Miller v. California*, 413 U.S. 15 (1973):

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act of sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). The statute created affirmative defenses available to those who attempted to restrict minors' access to material that fell within the reach of the statute. *See* 47 U.S.C. § 231(c)(1 & 2).

From Injunction to Remand

The day after President Clinton signed COPA into law, the ACLU and numerous plaintiffs who publish material on the Web filed suit in the United States District Court for the Eastern District of Pennsylvania. The district court granted plaintiffs' motion for a preliminary injunction against the enforcement of COPA, *ACLU v. Reno*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999) (*Reno II*), and the Third Circuit affirmed, *ACLU v. Reno,* 217 F.3d 162 (3d Cir. 2000) (*Reno III*).

The Third Circuit held that because it was impossible to limit the Internet geographically, COPA's reliance on "community standards" in its definition of "material that is harmful to minors" meant that those in the most tolerant communities would be subjected to the decency standards of the least tolerant communities. *See Reno III*, 217 F.3d at 179-81.

The Supreme Court vacated the Third Circuit's decision, however, holding that

(Continued on page 7)

Third Circuit Again Strikes Down COPA

(Continued from page 6)

> "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."

Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (*Ashcroft I*) (emphasis in original). The Supreme Court remanded the case to the Third Circuit for further proceedings.

Affirms Injunction Again

The Third Circuit's March 6, 2003, decision in *Ashcroft II* was the court's action on that remand. On different grounds, the Third Circuit again affirmed the preliminary injunction. Applying an abuse of discretion standard, the court held that the district court did not "err in ruling that the plaintiffs had a probability of prevailing on the merits of their claim inasmuch as COPA cannot survive strict scrutiny." *Ashcroft II*, 2003 U.S. App. LEXIS 4152, at *30. As an alternative ground for affirming the district court, the court also found COPA overbroad and vague. *Id.* at *85.

The court analyzed three aspects of COPA — its definition of what material is harmful to minors, its purported limitation to commercial web sites, and its provision of affirmative defenses. The court held each of these was deficient.

The court observed that the district court had required that COPA survive the "strict scrutiny" test because it is a content-based restriction on protected speech (non-obscene protected expression), *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *18, and it applied that same test itself without further discussion of its applicability. Of course, strict scrutiny requires that the government use the least restrictive, narrowly tailored means to achieve a compelling governmental interest. *Id.* at *30-*31.

The court noted that there was no argument between the parties that protecting minors from harmful material online is a compelling interest, *id.* at *31, and it agreed with the district court that the statute did not provide the least restrictive means of furthering that interest. In reaching that conclusion, the court analyzed three aspects of COPA — its definition of what material is harmful to minors, its purported limitation to commercial web sites, and its provision of affirmative defenses. The court held each of these was deficient.

Fails on Least Restrictive Means

The court held the provision defining "material harmful to minors" was not narrowly tailored to achieve that objective because non-obscene speech otherwise protected as to adults would fall within the ambit of COPA. The inability to geographically control material published on the Web meant protected speech would be burdened as a result of being forced to apply the standards of the most puritanical community. *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *33.

The language of COPA required "that each individual communication, picture, image, exhibit, etc. be deemed 'a whole' by itself in determining whether it appeals to appeals to the prurient interests of minors, because that is the unmistakable manner in which the statute is drawn." *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *34. COPA thus contravened Supreme Court precedents requiring that an entire body of work be examined under the First Amendment. COPA made individual expressions potentially criminal even if the work taken in context would not violate the statute, a result that was not narrowly tailored. *Id.* at *34-*37.

The statute also left publishers at a loss to determine which "minors" should be considered when placing material on the Web. COPA defined a "minor" as someone under seventeen, 47 U.S.C. § 231(e)(7), thus making the term apply equally "to an infant, a five-year-old, or person just shy of age seventeen," even though the effect of the relevant material (its "serious value," appeal to a prurient interest, or patent offensiveness) would vary with the age of the recipient. *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *37-*39. In view of the statute's language, the court refused to accept the government's argument that the statute pertained only to "normal, older adolescents," though it added in passing that even that definition would not be narrowly tailored to satisfy strict scrutiny. *Id.* at *39-*40.

Limits to "Commercial Purpose" Can't Save It

Congress' attempt to limit liability to those making communications for "commercial purposes" also failed to pass constitutional muster. COPA's convoluted definitions of "commercial purposes" required that the defendant be

(Continued on page 8)

Third Circuit Again Strikes Down COPA

(Continued from page 7)

"engaged in the business" of sending the prohibited material and, contrary to the government's argument, was broad enough to reach more publishers than just "commercial pornographers." *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *42-*48.

Posting any material deemed "harmful to minors" subjected the poster to punishment even if the publisher did not make a profit from such material itself or did not post the material as the principal part of its business. *Id.* at *44-*48. COPA even could apply to publishers providing free content in the hope of receiving advertising revenue. *Id.* at *44.

The court held that the affirmative defenses in Section 231(c)(1) of the statute did not save COPA. Relying on the findings of the trial court, the Court of Appeals held that the affirmative defenses could deter users from accessing plaintiffs' sites and that the reduced traffic could harm plaintiffs economically. *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *49-*51. The court agreed that many adults would simply be unwilling to provide identifying information, especially if they sought controversial or sensitive information. *Id.* at *52.

The Third Circuit was also concerned that the affirmative defenses applied only after prosecution had begun because, "the speaker must himself prove . . . that his conduct falls within the affirmative defense." *Id.* at *54 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

Filter Software As Effective

The court rejected the government's argument that COPA provided the least restrictive means to effect the compelling interest in protecting minors, recognizing the trial court's findings that blocking and filtering software was at least as effective as COPA in protecting minors and was less restrictive because the burden was not placed on web publishers. *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *58-*69.

The court rejected the Government's argument that the burden of protecting minors should be on web publishers and not on parents. Relying on the Supreme Court's holding in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), the Third Circuit was not troubled by requiring the customer to take the initiative and rejected the argument that parents would fail to act. It was less restrictive on constitutionally protected speech to give "parents some measure of control over their children's access to speech that parents consider inappropriate." *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *64.

Fails on Overbreadth

The Third Circuit also held that COPA was overbroad "in that it places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech." *Ashcroft II,* 2003 U.S. App. LEXIS 4152, at *73. COPA reached a wide array of speech deserving of constitutional protection. The fact that COPA demanded material be evaluated outside of its context resulted in significant over inclusiveness. *Id.* at *74.

In this connection, the court discussed a number of examples of protected speech highlighted by a group of *amici curiae* led by the American Society of Journalists and Authors. Each of the examples would be appropriate for adults but endangered by COPA. *Id.* at *74-*78. For example, a photograph by Paul Outerbridge that is displayed on the J. Paul Getty Museum Web site features what the site calls a "disturbing image of a naked woman piercing her own breast and abdomen with the sharp tips of meat packer's gloves." *Id.* at *76 n.35. The court noted that in isolation the photograph arguably fell within COPA's "harmful to minors" definition, but that, taken in the context of a Web page discussing the artist and displaying his other art work, the photograph failed to meet the "harmful to minors" standard. *Id.*

The court also pointed to information published by *amicus* Safer Sex Institute on sexual health and education, including graphic drawings that showed how to use a condom. Although three of the drawings "exhibit . . . the genitals" and when viewed alone, could fit within the definition of "harmful to minors," the court concluded that the site was protected speech as to adults, and perhaps even as to older minors. *Id.* at *77 & n.36.

The Third Circuit thus has once again held COPA unconstitutional, and this time it did so on multiple grounds that are far broader than those in its first decision in *Reno III.* The court's reasoning is persuasive, but another appeal to the Supreme Court is likely and the final word on COPA therefore is expected be at least another year away.

For ACLU: Douglas A. Griffin, Catherine E. Palmer, Michele M. Pyle, Katherine M. Bolger, Christopher R. Harris, Latham & Watkins, New York, NY, Ann E. Beeson (Argued), Christopher A. Hansen, American Civil Liberties

(Continued on page 9)

Third Circuit Again Strikes Down COPA

(Continued from page 8)

Union Foundation, New York, NY, John C. Salyer, American Civil Liberties Union of New Jersey Foundation, Newark, NJ.

For Ashcroft: Robert D. McCallum, Jr., Assistant Attorney General, Patrick L. Meehan, United States Attorney, Barbara L. Herwig, Jacob M. Lewis (Argued), Charles W. Scarborough, Attorneys, Appellate Staff Civil Division, Department of Justice, Washington, D.C.

Carl Solano, Jennifer DuFault James, and Chad Cooper were among the lawyers at Schnader Harrison Segal & Lewis LLP who filed the amicus *brief on behalf of the American Society of Journalists and Authors, Safer Sex Institute, and eight other* amici.

Prior Restraint Silences Anti-Tax Books and Seminars
Nevada District Court Issues Broad TRO in IRS Civil Complaint

On February 11, 2003, IRS agents executed a warrant seizing records from Freedom Books, Irwin Schiff's anti-tax publishing and seminar business. Schiff thinks income taxes are illegal. His book, *The Federal Mafia*, claims to "prove that the 'Federal income tax' is the greatest hoax and organized program of extortion ever conceived by man." Schiff has filed tax returns showing zero income for the past 13 years, and his book claims to help readers do the same. As part of an IRS civil complaint filed in the District of Nevada, U.S. District Judge Lloyd George issued a broad temporary restraining order preventing Schiff, his company and colleagues from, among other things, advocating his zero income tax plan through books, seminars, advertising, or through tax preparation. See *U.S. v. Schiff, et. al.*, No. CV-S-03-0281-LDG-RJJ, (D. Nev. March 19, 2003) (order granting temporary restraining order). On April 11, Judge George extended the temporary restraining order and gave attorneys for both sides till May 1 to provide additional information to the court. Schiff has not been criminally charged.

The Court, in the original temporary restraining order, found that the government had a high likelihood of success on the merits of their claims against Schiff under 28 U.S.C. §§ 6694, 6695, 6700, 6701 for willfully understating tax liabilities, promoting abusive tax shelters and aiding and abetting understatement of tax liability. The Court, in balancing the equities of the temporary restraining order, found that the public will suffer irreparable harm because Schiff will continue to violate tax laws, and that Schiff and his businesses will suffer little, if any harm, if the restraining order is granted.

The temporary restraining order prohibits defendants from further violating tax codes, but the order also prohibits the defendants from:

(i) "advocating the false and frivolous position through the sale or distribution of the book, 'The Federal Mafia: How the Government Illegally Imposed and Unlawfully Collects Income Taxes,' and through other book, videotapes, audiotapes, seminars, packages, and consultations"

(ii) "making any false commercial speech about federal income taxes, in person or through any media, including radio, television, print, billboards or signs, (including the sign outside Freedom Books store at 444 East Sahara)"

(iii) "holding any seminars in which they or anyone else at their direction promote, sell, or advocate the 'zero income' tax plan"

(iv) "preparing or assisting in the preparation of any federal income tax returns for any person"

(v) "representing others before the IRS, giving tax advice or providing tax services for compensation."

The Court also ordered that copies of the temporary restraining order be placed on the home pages of www.ischiff.com and www.paynoincometax.com maintained by defendants, and copies to be given to each of their current and former customers since January 1, 1999, at defendant's own expense. *Id.*

According to reports in the *Las Vegas Review Journal*, Schiff, 75, has been making a living selling books and giving seminars touting his anti-tax views and practices. He has also been battling the IRS for some time. He was convicted in 1985 for failing to pay taxes and concealing income and served 20 months in prison. He was convicted in 1980 for failing to file tax returns from 1974-1980 and served six months in prison. The government is still pursuing a lawsuit for tax liabilities from 1979-1985. *See* e.g. Carri Gee Thevenot, Search Warrant: *Anti-tax activist's files taken*, Las Vegas Review-Journal, Feb. 21, 2003.

Collateral Bar: N.Y. Court Says Advertisement Was Protected Speech; But Artist in Criminal Contempt for Violating Injunction

A New York appeals court has ruled that an artist's advertising flyer that contained a caricature and a photograph of a local judge is protected artistic expression, but that the artist acted in contempt for violating a sweeping injunction. *Altbach v. Kulon,754 N.Y.S.2d 709 (N.Y. A.D. 3, Feb. 6, 2003)*.

Judge Objects to His Portrait With Horns

The case stems from an oil painting by Franciszek C. Kulon of Jeffrey S. Altbach, a town justice and private attorney in Liberty, N.Y., that depicted Altbach as a devil with horns and a tail. In 2000 Kulon used this image, along with a reproduction of Altbach's photograph, in advertising flyers to promote his new gallery. *(See MLRC MediaLawLetter, May 2002, at 20.)*

Altbach sued Kulon for defamation and successfully enjoined Kulon from "displaying, distributing, disseminating, copying, printing, recreating, and/or reproducing any photographs, designs or creations depicting (Altbach) in any manner."

In early 2001, Kulon was granted summary judgment dismissing the defamation claim. Altbach immediately cross-moved to add a privacy claim under New York's Civil Rights Law §§ 50 and 51, which makes it a misdemeanor to use a person's name, portrait or picture for advertising or other commercial purposes without the person's written consent. Judge Kane of the New York Supreme Court (Sullivan County) permitted the amendment and left the injunction in place.

Contemptuous Sale

The next year, Kulon tried to sell his Altbach painting on eBay and Altbach moved to have Kulon held in civil contempt. When a photograph of Kulon and the offending painting showed up in a local newspaper, the court *sua sponte* ordered Kulon to show cause why he should not be held in criminal contempt.

Kulon then moved to have the privacy claim thrown out and the injunction lifted. He also claimed that he hadn't understood the injunction and should not be held in civil nor criminal contempt. Judge Kane rejected Kulon's motion as an impermissible second application for summary judgment, but found that the painting – but not the photo of Altbach – was protected artistic expression. The court modified the injunction to permit Kulon to "disseminate any painting, parody or caricature of [Altbach] for any purpose." The court also imposed a fine of $3,850 for the civil contempt and $500 for the criminal contempt.

Part and Parcel of Parody

In its Feb. 6 decision the Appellate Division, Third Department, in an opinion by Judge Rose, found that the court did not go far enough in determining what material is protected artistic expression. Noting similarities between the photo and the painting, the appellate court found the photo was "part and parcel" of the parody. The photograph was "ancillary to a protected artistic expression" (the painting) and used to demonstrate the "worth" of the painting through comparison. *(citing Groden v. Random House, 61 F. 3d 1045, 1049 [quoting Booth v. Curtis Pul. Co., 223 N.Y.S. 2d 737])* The court also noted that Kulon's flyers "identified [Altbach] as the subject of the caricature and cannot reasonably be read to assert that [Altbach] endorsed or recommended either the painting or defendant's gallery."

The court held that the Supreme Court properly found Kulon guilty of criminal contempt. Noting that the "terms and restrictions of the injunction were effectively communicated to, and recognized by [Kulon]," there was "no dispute that [Kulon's] conduct in publicizing the painting violated the original injunction." The lower court therefore properly found Kulon in criminal contempt.

The appellate court reached a different conclusion regarding the imposition of civil contempt. Finding that Altbach had no protected privacy right at issue, the appellate court however threw out the civil contempt fine. Under Judiciary Law 753(A), civil contempt may only be imposed if the offending conduct prejudiced the rights of the other party. Here, Altbach's rights were not prejudiced because, as discussed above, he had no protected privacy right. Therefore, the fine imposed by the Supreme Court was reversed.

Stephen Bergstein of Thornton, Bergstein & Ullrich in Chester, NY, represented Kulon. Gerald Orseck of Liberty, N.Y., represented Altbach.

Second Circuit: Internet Posting Subject to Single Publication Rule

By George Freeman

On April 2, 2003, the U.S. Court of Appeals for the Second Circuit affirmed a grant of summary judgment in favor of The New York Times in a libel case based on an Op-Ed piece in The Times. In the first federal appellate court decision to rule on the subject, the court also determined that Internet postings are subject to the single publication rule for statute of limitations purposes. *Van Buskirk v. The New York Times Co.,* 2003 WL 1733739.

The case arose from an Op-Ed piece written by Maj. John Plaster which sharply criticized the controversial CNN program on Operation Tailwind which charged that the U.S. military conducted a raid in Laos in 1970 in which defectors were killed and nerve gas was used. CNN later retracted its story, in part because of the furor started by critiques such as Maj. Plaster's. The primary source for the CNN program was Lt. Robert Van Buskirk, who then sued both The Times and Maj. Plaster claiming defamation.

One of Van Buskirk's claims in the lawsuit was based on an Internet posting of a letter Maj. Plaster wrote making essentially the same charges as in The Times Op-Ed piece. However, his letter was first posted over a year before the filing of the Complaint and more than a year and a half before the filing of an Amended Complaint which first made mention of Maj. Plaster's letter.

Judge Mukasey found that the one year statute of limitations and New York's single publication rule applies to publication on the Internet.

In the trial court, Chief Judge Michael Mukasey of the Southern District of New York granted The Times motion to dismiss. Judge Mukasey found that the one year statute of limitations and New York's single publication rule – under which the limitations period begins to run when a newspaper or other publication is initially distributed, and does not begin to run anew when the same material is subsequently or continually redistributed – applies to publication on the Internet.

The Second Circuit affirmed. Noting that the issue remained unsettled when oral argument was heard, the court's ruling stated that subsequently the New York State Court of Appeals had held that the single publication rule applied to Internet publishing in *Firth v. New York* last summer. Following the state's highest court, and determining that the policies behind the single publication rule supported its application to Internet publishing, the Second Circuit therefore dismissed the libel claim based on the Internet posting.

With respect to Van Buskirk's central claim, that he was defamed by the Plaster Op-Ed piece, the court agreed with Judge Mukasey's opinion below that the article lacked a defamatory meaning. The court agreed with the district court that the article did not suggest that Van Buskirk had committed a war crime; indeed, it cited with approval the lower court's conclusion that the article suggested the opposite – that Van Buskirk could not have committed a war crime since the article's thesis was that the reports were untrue and that CNN had gotten it wrong.

At oral argument Judge Ralph Winter aggressively pressed the notion that the Op-Ed piece also suggested that Van Buskirk had misled CNN, and that such an allegation did have a defamatory meaning. However, not withstanding his viewpoint at oral argument, the court's unanimous opinion concluded that, as The Times argued, the article simply could not be read to suggest that he misled CNN and, moreover, that the Complaint never alleged that. Although the Second Circuit discussed whether the lower court should have allowed Plaintiff to amend his complaint to allege this new-found theory (one based on a footnote in Judge Mukasey's opinion below), it concluded that since the article did not allege that Van Buskirk misled CNN, any further amendment would be futile.

The Times was represented by George Freeman of its Legal Department. Plaintiff was represented by Elihu Berman of Clearwater, FL.

Op-Ed on Criminal Libel

An opinion article by MLRC staff attorneys David Heller and Eric Robinson arguing that Kansas' criminal defamation statute is archaic and should be repealed was published in *The Kansas City Star* on April 15 and in *The Manhattan Mercury* on April 17. A link to the article is available at MLRC's web site, www.medialaw.org.

Truth is Defense in Identifying Suspects

West Virginia's highest court has upheld a grant of summary judgment to a state police officer who indicated to reporters that four men, then public officials, were possible suspects in a suspected cover-up of a deadly hit and run automobile accident. *Chafin v. Gibson*, 2003 WL 716250.

The case stemmed from a December 1991 hit and run accident that left one person dead. While the driver of the car was never located, an investigation by state police led to a theory that local law enforcement personnel may have tried to conceal the driver's identity.

Almost four years after the accident, Sergeant W.R. Gibson of the West Virginia Department of Public Safety told reporters that "anyone at the scene" of the accident was a "possible suspect" in an alleged cover-up. Gibson did not name any of the plaintiffs, but a reporter soon learned and reported, that the plaintiffs, who included a former police chief of Delbarton, a former Delbarton police officer, the then-sheriff of Mingo County and the then-mayor of Delbarton, were present at the incident.

In dismissing the defamation action against Gibson, the Circuit Court of Mingo County found that truth was an absolute defense to plaintiffs' defamation action, that the plaintiffs were indeed suspects and that Gibson did not need an objective basis for proffering his theory that they were potential suspects.

In a plenary review of the lower court decision, the Supreme Court of Appeals of West Virginia did not directly address the plaintiff's "objective proof" claim. The high court, however, determined that the plaintiffs were properly considered public figures for the purposes of their defamation claim. Applying the *New York Times v. Sullivan* test, the court found that plaintiffs, who were not identified by name by Gibson, nor able to offer any evidence of personal animus on Gibson's part, failed to offer sufficient evidence of actual malice.

The Court found that truth was an absolute defense to plaintiffs' defamation action, that the plaintiffs were indeed suspects

Plaintiffs Gerald L. Chafin, Elmer Ray Spence, Earl Spence and James Earl Spence were represented by Michael C. Allen of Allen & Allen in Charleston, W.V.

Ancil G. Ramey and Michelle E. Piziak of Steptoe & Johnson in Charleston, W.V. represented Gibson.

Paper Had Facts to Doubt Editorial, Appeals Court Holds

A two-to-one majority of the South Carolina Court of Appeals has reversed a directed verdict for *The Augusta* [Georgia] *Chronicle* finding that the paper had "obvious reason to doubt" the accuracy of a 1997 editorial accusing a candidate for the South Carolina House of Representatives of falsely claiming that he had served in the National Guard. *Anderson v. The Augusta Chronicle*, 2003 S.C. App. LEXIS 14 (S.C. Ct. App. Feb. 3, 2003) (No. 3597), *available at* http://www.judicial.state.sc.us/opinions/advsheets/no52003.pdf#page=50. The court denied the newspaper's motion for rehearing, and the *Chronicle* has petitioned the South Carolina Supreme Court for *certorari*.

Initial Reporting Error on Candidate

During his unsuccessful 1996 candidacy for the South Carolina House of Representatives, insurance adjuster Tom Anderson spent ten weeks in North Carolina processing insurance claims resulting from two hurricanes. An article in *The Augusta Chronicle* by reporter Chad Bray on April 6, 1997 reported that Anderson was planning to run again in the 1997 special election and that Anderson had received 32 percent of the vote in the prior election "even though he was out of the area with the National Guard during the final weeks of the election." Bray repeated that Anderson had been on National Guard duty in another *Chronicle* article on June 3. Anderson did not object to either article.

In September, state Republican party executive director Trey Walker, after determining that Anderson had not served in the National Guard, publicly called for him to withdraw from the race for falsifying his service. In reporting on the controversy, the *Chronicle* repeated the National Guard information, as well as Anderson's statement that the reporter of the original April article must have confused the Guard with the National Flood Insurance Group, under the whose auspices he had gone to North Carolina.

On Sept. 26, a *Chronicle* reporter asked Anderson to fax her proof of his involvement in the National Flood Insurance Group program for a candidate profile, which he did. The fax included a letter from the National Flood Insurance Program accepting Anderson into the program, and a resume detailing his involvement in the program.

"Let the Liar Run"

On Oct. 1, the *Chronicle* ran an editorial titled, "Let the liar run," which stated that

> "[i]f Anderson is the best [candidate that] Democrats can come up with, they still have every right to run him. There's nothing in the election rules that says a political party can't nominate for public office a candidate who, in effect, lies on his resume."

The editorial, which was written by editorial page editor Phil Kent, concluded by comparing Anderson's situation to allegations of improper fundraising by presidential candidate Al Gore.

> "We are confident that an informed electorate won't vote into office a proven prevaricator," the editorial stated. "After all, he doesn't even have the long robes of one of Al Gore's Buddhist monks to hide behind!"

The state GOP mailed copies of the editorial to voters in the district where Anderson was running.

In response to Anderson's complaints, on Oct. 29 the *Chronicle* ran a "clarification" stating that "Anderson said" that the National Guard information was incorrect, and on Nov. 2 published a letter to the editor from Anderson disputing the National Guard information. The newspaper also published other letters from readers supporting Anderson's veracity.

Anderson lost the election on Nov. 3, receiving 33 percent of the vote. He then sued the newspaper, GOP head Walker for libel, and the state Republican Party.

Court Directs Verdict

In a deposition, reporter Bray testified that Anderson had told him that he had gone to North Carolina to serve with the National Guard. Bray, who had left the *Chronicle*, added that his notes had been destroyed when he left the paper.

A few days before the trial began on Oct. 11, 1999, Anderson's claims against Walker and the state Republican Party were dismissed.

Anderson's presentation at trial consisted of his own testimony and that of a potential employer. Anderson testified that he did not notice the error in the April and June articles, and thought that his denial in reaction to Walker's statement

(Continued on page 14)

Paper Had Facts to Doubt Editorial, Appeals Court Holds

(Continued from page 13)

was enough to put the matter to rest. The owner of a Columbia, S.C. insurance claims adjusting firm testified that the editorial led the company to drop plans to have Anderson oversee expansion of the firm's business into Georgia.

Among the evidence presented by Anderson at trial was an article about his trip that another newspaper – the *Aiken Standard* – published on Sept. 27, 1997, four days before the editorial was published in the *Chronicle*. The article stated that "Aiken County House candidate Tom Anderson has had to break off his campaign for House District 84 to help process insurance claims resulting from Hurricane Fran's destruction in North Carolina."

At the conclusion of Anderson's case, the defense moved for a directed verdict, which Circuit Judge Costa Pleicones granted in a bench ruling on Oct. 12. Pleicones held that Anderson had not presented adequate evidence that the editorial writer had acted with actual malice.

According to the *Chronicle*'s story on the ruling, Pleicones apologized to Anderson about the ruling. "I've got to go with what my view of the law is, and I hope to God I'm right," the paper reported the judge as saying. "I do not believe Mr. Anderson is a liar."

After announcing his verdict, the paper reported, Judge Pleicones shook Anderson's hand and said, "I'm sorry this happened to you. I'm sorry I had to rule against you."

Reversed and Rendered

Anderson appealed to the South Carolina Court of Appeals, which reversed and remanded for a new trial in the Feb. 3 ruling.

The two-judge majority opinion, written by Judge M. Duane Schuler for herself and Judge C. Tolbert Goolsby. Jr., wrote that the information in Anderson's denials in response to the GOP claims and the information he provided to the *Chronicle* for the candidate profile should have given the author of the Oct. 1 editorial "obvious reasons to doubt" reporter Bray's version of his conversation with Anderson. Slip op. at 70, *quoting St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968).

> A jury could reasonably infer from [the evidence that Anderson faxed to the *Chronicle* reporter] that Anderson had in fact said National Flood, or that even a cursory investigation of his denial would have revealed the likelihood of a misunderstanding.

Slip op. at 72.

Besides the material faxed by Anderson, the court held that Anderson could have presented further evidence of his activities in North Carolina had the *Chronicle* asked. The court also said that the information was not "hot news," noting that more than six months passed between the *Chronicle*'s publication of the initial articles and the editorial, and that the Oct. 29 clarification, which the court described as "lackluster" and "neither a correction nor a retraction of the allegedly false statements." Slip op. at 74.

> Taken as true, we think Anderson's testimony, combined with the irrefutable documentary evidence in the record, is sufficient to permit a jury to decide whether *The Chonicle* published the statements in "Let the liar run" with actual malice.

Slip op. at 74.

Based on this reasoning, the appellate court reversed the directed verdict and remanded.

Dissent

Chief Judge Kaye G. Hearn dissented, saying that "Anderson failed to present clear and convincing evidence that *The Chronicle* acted with actual malice." Slip op. at 77. She cited Anderson's failure to request a retraction or correction of the original articles stating that he served in the National Guard, and the fact that the *Chronicle* reported on Anderson's objections when he did voice them. Knowledge of the objection, Hearn wrote in her dissent, does not mean that the Chronicle was aware that the reports of Anderson's National Guard service were untrue.

The *Chronicle*'s petition for rehearing was denied, with Chief Judge Hearn dissenting.

The paper has now asked the South Carolina Supreme Court to review the case, arguing that the plaintiff had presented no evidence regarding the state of mind of the editorial writer, including whether he acted with actual malice. The newspaper's cert. petition also argues that the appellate court incorrectly relied on the writer's alleged negligence and failure to investigate to find evidence of actual malice.

The *Chronicle* is represented by James M. Holly of the Aiken, S.C. office of Hull Towill Norman Barrett & Salley, PC, and David E. Hudson of the firm's Augusta, Ga. office. Anderson is represented by solo practitioner John W. Harte of Aiken, S.C.

Supreme Court of Alabama Gives Sports Talk Radio A Win

Decision of First Impression on Defamatory Inference

The Supreme Court of Alabama recently decided a case raising significant issues of first impression in that state, and joined other jurisdictions in holding that (1) a defendant must intend or endorse a defamatory inference before a publication will be found actionable, and (2) other causes of action based on the same publication that gives rise to the defamation claim are subject to the entire panoply of restrictions imposed on claims for defamation, including that the plaintiff plead and prove the requisite degree of fault. *Finebaum v. Coulter*, 2003 WL 257385.

Paul Finebaum, a sports journalist and host of a radio talk show on WERC in Alabama, is known for his criticism of college athletic recruiting practices. After a caller to his program complained about the cozy relationships some sports journalists seem to have with coaches and recruiters, Finebaum commented on the lack of professional objectivity that such relationships engender. As one example, Finebaum offered his assessment of a broadcast by Matt Coulter, another sports talk radio host, which he had recently heard:

> Oh, they're vultures. . . . Reg, you would be amazed at how many football coaches suck up to these guys. [Y]ou'd be amazed at how close some of them are in proximity to where we're talking right now and the reason they do is simple – so these people will go on their shows and talk about what great coaches they are, what great – I heard a program this morning that was easily the most embarrassing 30 or 40 minutes of radio I have ever heard in my entire life. . . . It was by, Matt Coulter, and I can't remember the other clown, and it, I mean, these two guys slobbered over each other, I mean, I really thought they were going to start performing oral sex on one another, it was so sickening.

Coulter sued Finebaum and WERC, alleging defamation, outrage, and invasion of privacy, all based on the contention that Finebaum's listeners would have understood his commentary to be an allegation that Coulter is homosexual.

Defendants moved for summary judgment, arguing, among other things, that (i) the statement when considered in context was incapable of a defamatory meaning; (ii) the statement constituted non-actionable opinion or rhetorical hyperbole; (iii) plaintiff was incapable of meeting his burden of proving by clear and convincing evidence that the defen-

(Continued on page 16)

Libel Proof Doctrine Adopted in Kansas

Charles Lamb, a convicted murderer and kidnapper serving three consecutive life sentences, was held libel-proof from statements published by Tony Rizzo, a reporter for the *Kansas City Star*. *See Lamb v. Rizzo*, 2003 WL 245393 (D. Kan.)(Jan. 31, 2003). Kansas had not adopted the libel proof doctrine, however, Judge Marten of the U.S. District Court, District of Kansas, applying Kansas substantive law, believed the Kansas Supreme Court would do so in Lamb's situation.

The Court detailed the circumstances of Lamb's convictions from a Kansas Supreme Court opinion. The evidence and Lamb's own admissions were overwhelming. Lamb kidnapped two different young women on separate occasions. One was found murdered nearby; another was raped and held for ransom. While being pursued in connection with the later kidnapping, Lamb crashed into a police barricade. During his incarceration, he twice escaped from jail and once escaped from a state hospital, leading police on dangerous chases.

The Court dismissed Lamb's action finding that his "public reputation had been so demolished by his own actions" as detailed by the Kansas Supreme Court and his own admissions.

The Court cited adoptions of the libel-proof doctrine in other jurisdictions, particularly citing, *Ray v. Time, Inc.*, 425 F.Supp. 618 (W.D. Tenn. 1976). That court found that James Earl Ray, convicted for murdering Martin Luther King, Jr., could not maintain an action for libel against a publisher who alleged he was a drug addict. The Court concluded that the "libel-proof doctrine must be applied with caution, because few plaintiffs will have a reputation which is so awful that they are not entitled to obtain redress," however, the Court was convinced in Lamb's circumstance.

Supreme Court of Alabama Reverses

(Continued from page 15)

dants intended the defamatory implication he alleged was conveyed by the statement; and (iv) that the so-called "*Falwell* principle" required dismissal of his tag-along causes of action.

The trial judge, who declined to listen to a recording of the challenged broadcast, rejected the defendants' motion on the ground that an unspecified issue of material fact existed. The trial judge nevertheless granted the defendants' request for certification for interlocutory appeal pursuant to Alabama Rule of Civil Procedure 5.

High Court Grants Summary Judgment

The Supreme Court of Alabama initially rejected the petition for interlocutory appeal on a 5-4 vote. Upon defendants' application for reconsideration, however, the Court reversed itself and unanimously granted interlocutory review. On February 7, 2003, the Court unanimously reversed the trial judge's ruling, holding that Finebaum and WERC are entitled to summary judgment on Coulter's claims.

The court held that,

> "[w]hen a public official or public figure alleges a defamatory meaning, a defamatory implication, or a defamatory innuendo," he must prove, not only "'that the statement is susceptible of a defamatory meaning which the defendants knew to be false or which the defendants published with reckless disregard for its potential falsity, but also that the defendants intended to imply or were reckless toward the implications.'"

Op. at 8 (quoting *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318-19 (7th Cir. 1988)).

The court found, first, that Finebaum's commentary was not susceptible of the alleged defamatory meaning. When considered

> "[i]n the context of Finebaum's December 15, 1998 sports talk radio program, Finebaum's statement — 'It was Matt Coulter, and I can't remember the other clown, it, I mean, these two guys really slobbered over each other, I mean, I really thought they were going to start performing oral sex on one another, it was so sickening' — was not a statement that can 'reasonably [be] interpreted as stating actual facts about [Coulter].'"

Id. at 17 (alterations in original) (citation omitted). To the contrary,

> "Finebaum's statement is only rhetorical hyperbole, which the United States Supreme Court has held protected by the First Amendment." *Id*.

Defendants had argued that Coulter, an acknowledged public figure, was required to show by clear and convincing evidence that the allegedly defamatory statement was published with actual malice, a burden he could not meet unless he also could prove that Finebaum *intended* that it be understood "to contain the defamatory innuendos the plaintiff attributes to it." *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986). The undisputed evidence established that Finebaum had no such intention.

The Supreme Court of Alabama agreed, holding both that

> "Coulter did not present clear and convincing evidence that Finebaum made the statement with actual malice" and that Coulter failed to "present clear and convincing evidence that Finebaum intended to imply that Coulter is a homosexual." *Id*.

In addition, after quoting extensively from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), Alabama's Supreme Court joined numerous others in holding that the same requirements that apply to a plaintiff's defamation claim apply to tag-along claims arising from the same publication – in Coulter's case, claims of outrage and invasion of privacy. As a result, it ruled that defendants are entitled to summary judgment on all of Coulter's causes of action.

Lead appellate counsel for Finebaum and WERC are Lee Levine, Jay Ward Brown and Audrey Critchley of Levine Sullivan & Koch, L.L.P. in Washington, D.C. and Warren B. Lightfoot and Ivan Cooper of Lightfoot, Franklin & White L.L.C. in Birmingham. In the trial court, defendants were represented by L. Graves Stiff, III and Elise Froshin of Starnes & Atchison in Birmingham. Plaintiff is represented by Jack E. Swinford and Robert J. Hayes of Hayes, Swinford & Stanford, P.C. in Birmingham.

Ramseys Granted Summary Judgment in Defamation Action by Purported Suspect in JonBenét Murder

By Tom Kelley and Adam Lindquist Scoville

Judge Julie E. Carnes of the United States District Court for the Northern District of Georgia on March 31, 2003 granted summary judgment to the parents of JonBenét Ramsey, John Bennet Ramsey and Patricia Paugh Ramsey, on defamation claims brought by Robert Christian Wolf, arising out of the Ramseys' claims that Wolf was a suspect in JonBenét's killing. *Wolf v. Ramsey*, No. 1:00-CV-1187-JEC (N.D.Ga. Mar. 31, 2003), 2003 WL 1821525.

The result was hardly startling, but the rationale explicated in the 93-page opinion caught even those familiar with the case off guard: the court concluded that the Ramseys were entitled to summary judgment because Wolf had not produced evidence sufficient to allow a reasonable jury to decide, by clear and convincing evidence, that *Mrs. Ramsey* had killed JonBenét.

Wolf's case strategy was to argue that the Ramseys could not have considered Wolf a suspect because they knew that Mrs. Ramsey had herself killed JonBenét.

The court immersed itself in this six-year-old whodunit controversy to address Wolf's assertion that Mrs. Ramsey's killing of her daughter foreclosed a good faith belief that Wolf was a suspect. Inevitably, there is a staged quality to the decision that matches the special character of the entire Ramsey investigation, referred to by some of those involved as the "case with legs."

Wolf Becomes a Suspect

The opinion recites that in the early morning hours of December 26, 1996, JonBenét Ramsey was subdued with a blow to the head and/or a stun gun, tied with a "sophisticated" bondage device and garotte, beaten, sexually assaulted, and murdered in her own home. Although a purported ransom note was left in the home, JonBenét's body was found in a basement room. The lengthy ransom note (referred to by investigators and pundits as "the *War and Peace* of ransom notes") stated that its author was a member of a "small foreign faction," During the murder investigation, the police considered whether Mrs. Ramsey had killed JonBenét, and whether an intruder had performed the crime. Wolf was one of several men investigated as possibly having been such an intruder.

In early 2000, the Ramseys published a book entitled *The Death of Innocence: The Untold Story of JonBenét's Murder and How Its Exploitation Compromised the Pursuit of Truth*. In it, the Ramseys recount Wolf's ex-girlfriend's statement to police that Wolf had been out all of Christmas night, but that she woke up at around 5:30 a.m. to discover Wolf taking a shower, having left dirty clothes on the floor. The book also reports accounts that Wolf had become "quite agitated" by the coverage of JonBenét's death, and noted that Wolf owned a sweatshirt with the same initials used as a signature on the ransom note ("S.B.T.C."—used on the sweatshirt for Santa Barbara Tennis Club). The Ramseys concluded, "Whatever the police's intentions, Wolf went on our suspect list. He represented too many unanswered questions."

The Ramseys also appeared in a *Today* show interview with Katie Couric about the book. In the interview, Couric asked, "You also mention Chris Wolf . . . Why do you mention him?" John Ramsey replied, "Because he'd been widely mentioned in the news. And we wanted to clarify the facts that we knew." Ramsey then continued, "I can tell you when—when we first started looking at—at one particular lead early on—my reaction was, 'This is it. This is the killer.'" Although Ramsey claimed that he made the latter statement referring to another suspect, NBC superimposed Wolf's photograph on the screen as he spoke.

Court Wades Into Murder Theories

The court determined, without much analysis, that "the inference one draws from the [statements] is the defendants' belief, not that plaintiff actually killed their daughter, but that there is reason to suspect that he might have." Even if factual, this assertion was difficult to prove false, since it was public knowledge that the police had investigated Wolf

(Continued on page 18)

Ramseys Granted Summary Judgment

(Continued from page 17)

in earnest. Wolf's case strategy was to argue that the Ramseys could not have considered Wolf a suspect because they knew that Mrs. Ramsey had herself killed JonBenét. Because Wolf conceded that he was a limited purpose public figure, the court concluded that Wolf must ultimately prove Mrs. Ramsey's guilt by clear and convincing evidence.

Wading through the facts of the murder case as presented by the parties, the court concluded that several circumstances were inconsistent with Wolf's theory: that Mrs. Ramsey became angry with JonBenét in the middle of the night, perhaps over the child having wet her bed, accidentally hit JonBenét's head on a hard surface in the bathroom and, thinking JonBenét dead, took her to the basement in order to fabricate an elaborate intrusion/kidnapping/torture scenario. For example, the court found that JonBenét had been subdued with a stun gun and tied up in her bedroom. The court also pointed to evidence that JonBenét did not actually die of the head wound and was alive until asphyxiated by garrote in the basement. Judge Carnes reasoned that this was inconsistent with Wolf's theory that that the Ramseys had covered up an accidental death.

The Handwriting Experts

Wolf relied primarily on the expert reports of two handwriting analysts who concluded that Mrs. Ramsey had written the ransom note, and the court agreed that if there were clear and convincing evidence that Mrs. Ramsey had written the note, a jury could find that she had killed JonBenét. The court, however, granted the Ramseys' *Daubert* motion with regard to one expert.

The court allowed the second expert's testimony about similarities between the ransom note and Mrs. Ramsey's handwriting, but excluded his testimony to the extent he claimed to be certain that Mrs. Ramsey had written the note. This, in turn, led the court to hold that the expert's testimony was not "persuasive evidence that Mrs. Ramsey actually wrote the note." Judge Carnes also concluded that even if the expert were allowed to testify to his certainty that Mrs. Ramsey wrote the note, handwriting analysis is an inexact science and only rarely constitutes clear and convincing evidence. In view of the opinions of six other experts who determined that Mrs. Ramsey "probably did not" write the note, the court held that the plaintiff had failed his burden, and therefore granted the Ramseys summary judgment on the libel claim arising from their book passage.

Ramseys Not Liable for NBC Edits

Having disposed of the libel claim, the court briefly considered the slander claim premised on the *Today* show interview. The court held that the statement, "[W]hen we first started looking at—at one particular lead early on—my reaction was, 'This is it. This is the killer,'" was not libelous because Wolf could not show that Mr. Ramsey was referring to him. The court found it undisputed that the Ramseys had no control over NBC's editing decision to superimpose Wolf's photograph while the statement was being made.

Somewhat more curious is the alternative holding that "even had defendant intended to refer to plaintiff, the statements are still not malicious for the reasons discussed *supra*, with regard to the libel claim." It is not clear why liability for the statement, "This is the killer," would require proof of the Ramseys' guilt, rather than mere recklessness in accusing Wolf of the killing.

The Post-Decision Sound Bites

Comments by the principals after the decision also had a staged quality. Boulder D.A. Mary Keenan told the Boulder *Daily Camera* that she agreed "with the court's conclusion that 'the weight of the evidence is more consistent with a theory that an intruder murdered JonBenét than with a theory that Mrs. Ramsey did so,'" and said her office was following new leads that focused on the intruder theory.

Lin Wood, the Ramseys' attorney, said of the decision and Keenan's endorsement, "this is the day the Ramseys have been waiting for for 6½ years," calling the investigation prior to Keenan's involvement "one of the greatest injustices in the history of this country." But Keenan tempered her embrace of Judge Carnes' opinion by adding that the decision was based only upon the evidence before

(Continued on page 19)

Ramseys Granted Summary Judgment

(Continued from page 18)

the court, which was by no means all the evidence, that "we're not excluding the Ramseys," and that "it doesn't change what we're doing in any way."

Those who have followed the Ramsey investigation and the numerous legal sideshows that have erupted in its wake appreciate that the case has always been full of irony. After all, the case has produced collateral criminal charges and civil suits in the double digits, but no prosecution for the crime itself. JonBenét's killing became the second highly publicized murder investigation of the 1990s (a nose behind O.J. only because that case resulted in two trials) in which all but a fine fraction of the published information originated from leaks. Now, Darney Hoffman, who has made a career, nay, a compulsion, of proving Patsy Ramsey guilty of the murder, arguably achieved just the opposite result in his capacity as lawyer for Wolf. Of course, Hoffman did not have cooperation from investigating law enforcement authorities.

On the other hand, Alex Hunter, the Boulder District Attorney who handled the case through the discharge of the Boulder grand jury that investigated it, has frequently supported the Ramseys and cooperated with them. D.A. Mary Keenan, who assumed responsibility for the investigation from the Boulder Police last December, clearly shares Hunter's sympathy for the Ramseys. She recently re-hired Lou Smit, the philosopher-investigator for the D.A.'s office who championed the "intruder theory" and sought to vindicate the Ramseys (played by Kris Kristofferson in the TV adaptation of Larry Schiller's "Perfect Murder/Perfect Town").

The Boulder Police, who always targeted the Ramseys and were suspicious of the D.A.'s solicitude toward them, now seem perfectly willing to relinquish the file to Keenan, if for no better reason than to protect the investigation from discovery in litigation that, rumors have it, the Ramseys are about to file against the Boulder Police Department.

The court's decision is available on-line on the Public Access to Court Electronic Records (PACER) system at http://pacer.gand.uscourts.gov.

For Wolf: Darnay Hoffman, Law Offices of Darnay Hoffman (New York, NY); Evan M. Altman, Office of Evan M. Altman (Atlanta).

For Ramsey: James Clifton Rawls, Eric Schroeder, S. Derek Bauer of Powell Goldstein Frazer & Murphy; L. Lin Wood, Jr., Office of L. Lin Wood, (Atlanta).

Tom Kelley is a partner and head of the Media Practice Group in Faegre & Benson's Denver office. Adam Lindquist Scoville is an associate in the firm's Denver office.

Georgia Limited Purpose Public Figure Test

The Court of Appeals of Georgia had occasion, and took it, to reaffirm the limited purpose public figure test established in *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 251 Ga. App. 808 (2001). Chief Judge Smith upheld a trial court motion for summary judgment in favor of defendant, David Peaster, City Manager of Montezuma, Ga., accused of defaming plaintiff Craig Sparks. *See Sparks v. Peaster*, 2003 WL 1090242 (Ga. App.) (March 13, 2003).

Sparks is a local political watchdog, regularly appears at City Council meetings, and speaks out on issues from children's recreation to street and land maintenance in Montezuma. Sparks brought an action for defamation and tortuous interference of employment stemming from Peaster's statements that Sparks was a cocaine user and a problem-maker.

According to the limited purpose public figure test in *Jewell*, the Court of Appeals isolated the public controversy, examined Sparks' involvement in the public controversy, and determined whether alleged statements were germane to Sparks' participation in the controversy. The Court of Appeals found:

(1) that the controversy was the administration of City of Montezuma government,
(2) Sparks purposefully tried to influence the outcome by such things as speaking out at meetings and distributing flyers; and
(3) information about Sparks' character and stability is relevant to the public trust in Sparks' statements.

Sparks then failed to prove actual malice motivated Peaster's statements. The record contained evidence of Sparks' confrontational behavior at City Council meetings, and evidence that the police gave Peaster reports of Sparks' drug use. *Id.*

NDNY Chief Judge Holds Coverage Of Municipal Golf Department Audit Not Defamatory

Privileged Under Fair Reports Statute

By Kara L. Daniels and Charles D. Tobin

A federal district court in New York, holding that the newspaper's coverage of an official audit did not defame the former manager of a municipal golf course, has dismissed a libel claim against Gannett's *Press & Sun-Bulletin* newspaper in Binghamton. *Karedes v. Village of Endicott*, ___ F. Supp. 2d ___, No. 3:01-CV-1395 (FJS/GLS), 2003 WL 1785781 (N.D.N.Y. Mar. 31, 2003). The plaintiff, John Karedes, a former contractor hired to manage the golf course, brought the lawsuit based on three articles reporting on a government-commissioned audit of golf course operations. In a 31-page decision, Northern District of New York Chief Judge Frederick J. Scullin, Jr. held that the passages Karedes challenged did not defame him, were substantially true, and/or were protected as fair and true reports of a government record and proceeding.

Background

Karedes managed the En-Joie Golf Club, owned and operated for profit by the Village of Endicott in upstate New York. Among other things, as golf course manager Karedes was responsible for preparing and submitting to the village's treasurer for payment all bills and payroll. Throughout his tenure, Karedes reported directly to the mayor and the elected trustees of the village.

Each year, the golf club hosts the B.C. Open, a PGA Tour event that a private entity, Broome County Community Charities, Inc. ("BCCC"), operates. In September 1995, village trustees approved renovations to the golf course as requested by the PGA Tour. The BCCC agreed to pay nearly all costs of the renovation. The village also authorized another set of renovations to be paid at its expense. During the renovations, the village's treasurer wrote checks to pay invoices from third-party contractors and suppliers – invoices reviewed and passed along for payment by Karedes.

While renovations were performed, golf course expenditures exceeded golf course revenues by more than $2 million. In February 2000, under a new mayor's direction, an advisory committee issued an initial report entitled "John Karedes' Budget Information," finding that in 1997-1999, the golf department spent more than $1 million over budget. The mayor forcefully criticized Karedes and argued for a full-scale, private audit. The trustees agreed.

Auditors Fault Municipal Golf Course Financial Records And Management

At a February 12, 2001 trustees meeting, which the *Press & Sun-Bulletin* attended, independent auditors released the government-commissioned audit. The audit identified many problems with the village's management of golf-course resources. The auditors found that the village had paid vendors on certain invoices that had been billed to or addressed to another entity. The auditors also found that Karedes exceeded the scope of his contract by approving substantially all expenditures during the audit period. At the trustees' meeting, a representative of the auditing firm, when asked to rate the golf course's business procedures, said: "*Well, for the Village as a whole*, in terms of the golf department . . . I would say that I have never ever in 30 years of doing work both in private and in the governmental environment seen record keeping as poor as this." (emphasis supplied).

Newspaper Coverage of Audit's Findings

The *Press & Sun-Bulletin,* on February 13, February 25, and March 8, 2001, reported on the audit and the trustees meeting. The newspaper reported on February 13 that the audit was "sharply critical" of the club's bookkeeping, and quoted the auditors' representative as stating during the meeting: "Never, ever in 30 years (as an accountant) have I seen record-keeping *as poor as En-Joie*." (emphasis supplied). The article also reported the representative told trustees "no one person is to blame for the bookkeeping nightmare."

(Continued on page 21)

Coverage Of Municipal Golf Dept. Audit Not Defamatory

(Continued from page 20)

The February 25 article principally concerned the auditors' findings that the golf department's financial operation lacked internal controls, and the village had paid invoices addressed to the BCCC. The article reported that the audit "detailed wide spread financial problems at En-Joie and inside Endicott's government." The article also reported that, although trustees had promised renovations "would not cost taxpayers a dime," auditors estimated that the village "shouldered" substantial costs, "even though many of the bills were addressed to [another]." This article also reported that the village records showed Karedes had signed more than a dozen vouchers addressed to another, resulting in more than $150,000 in payments. The article reported: "Village officials had countless chances to step in and stop the bills from being paid. But a stack of cashed checks and signed invoices shows that they didn't." The article further reported that Karedes believed all invoices he authorized were proper and that the contractors most likely addressed the invoices to BCCC by mistake.

The March 8 article examined the validity of the auditors' methods and reported that Karedes had criticized the document, asking why auditors did not visit the golf course to view its daily operation. The article also reported that after reviewing the golf course's financial records, the auditors' representative had said "they were in such disarray that he refrained from issuing a professional opinion as to whether or not the financial statements offered a clear picture of the club's true financial condition."

Plaintiff Loses Management Contract, Sues Newspaper

The trustees terminated Karedes's management contract in early March 2001. Upset over his termination, Karedes sued the *Press & Sun Bulletin*, among others; the suit against the newspaper sounded in libel and was based on the three newspaper articles. Karedes attached a copy of the audit to his lawsuit. The newspaper moved to dismiss Karedes's claim against it, arguing, among other things, that the articles were absolutely privileged under New York Civil Rights Law ("CRL") § 74, because each of the articles constituted a substantially accurate report of the audit and the trustees meeting, both official proceedings under the law.

Court Holds Plaintiff To Public Figure Standard

In reaching its decision in the *Press & Sun Bulletin's* favor, the court noted that plaintiff's counsel conceded that Karedes is a public figure and that the underlying controversy involved a matter of public concern. Consequently, in order to survive the motion to dismiss, Karedes had to show that the complained-of statements were (1) of and concerning him; (2) likely to be understood as defamatory by the ordinary person; (3) false; and (4) published with actual malice, i.e., with knowledge of their falsity or with reckless disregard of the truth. *Karedes v. Village of Endicott, et al*., 2003 WL 1785781 at *8. The court, considering each articles as a whole, determined that none was actionable.

February 13 Article—No One Is To Blame

The court disagreed with Karedes's allegation that the February 13 article – which reported that the auditors' representative told trustees at the meeting that he had never seen records "as poor as En-Joie's," rather than reporting that the representative had couched his comment as a reflection on "the Village as a whole" – falsely suggested that Karedes mismanaged the golf club's financial records. Instead, the court held that no ordinary person would find the article defamatory.

In reaching this conclusion, the court emphasized that the article reported that the auditors had found "no one person is to blame for the bookkeeping nightmare" at the golf club. The court also emphasized that the only specific reference to Karedes in this article simply said he would not comment until he had a chance to read the final audit report.

February 25 Article—True Statements Are Not Defamatory

The court next concluded that Karedes "grossly misstate [d]" the content of the February 25 article. *Id.* at *11. Karedes alleged the *Press & Sun-Bulletin* falsely reported the audit found he had "arranged" to have the village pay bills that should have been paid by the BCCC. Instead, the article only reported that Karedes signed certain vouchers that were not made out to the village, causing the municipality to pay substantial amounts for bills "addressed" to another

(Continued on page 22)

Coverage Of Municipal Golf Dept. Audit Not Defamatory

(Continued from page 21)

party. Karedes did not deny that he signed these vouchers or that the vouchers were addressed to entities other than the village. Thus, the court observed, "In fact, what [this article] says is true: Plaintiff signed vouchers which were addressed to third-party entities and passed these vouchers along to the Village for payment." *Id.* Consequently, the court held, the February 25 article also was not actionable.

March 8 Article—"Disarray" Not Defamatory

Karedes's claim against the March 8 article revolved around the newspaper's use of the word "disarray" to paraphrase the characterization of the golf department records by the auditors' representative. The court noted that the audit did not specifically use the word "disarray", but found that the *Press & Sun-Bulletin*'s descriptive term was not "inherently false." *Id*. at *10. In reaching its conclusion, the court relied on the auditors' express findings that the "Village did not maintain certain customary accounting records and supporting documents . . . nor was the system of internal control adequate to provide safeguards of assets and assure proper recording of transactions." *Id.*

The court also stressed that the article did not blame Karedes for the disarray. Indeed, the court noted that, other than stating that Karedes questioned why the auditors never visited the golf club, the article did not relate to Karedes at all. *Id*. Consequently, the court held that the March 8 article was not defamatory.

Articles Absolutely Privileged Under Fair Reports Statute

Alternatively, the court ruled that even if any of the articles contained false or defamatory statements, they were absolutely privileged under CRL § 74. *Id*. at *12-*17. Under that provision, a plaintiff cannot maintain a civil action based on the publication of a fair and true report of any official proceeding. The court noted that the term "official proceeding" has been broadly construed to encompass any "action taken by a person officially empowered to do so." *Id*. at *12 (citations omitted). The court also noted that the phrase "fair and true report" has been construed liberally such that a libel defendant need not reproduce the proceeding verbatim in order to avail itself of the privilege. Rather, the libel defendant need only show that the report was "substantially accurate," i.e., despite minor inaccuracies, the report does not produce a different effect on a reader than would a report containing the precise truth. *Id*. at 13.

Applying these standards to each article, the court determined that the *Press & Sun-Bulletin* had accurately reported on the contents of the government-commissioned audit and the February 12 trustees meeting about the auditors' findings, both of which fell within the broad scope of the statutory protection for "official proceedings." The court considered point-by-point, and dismissed, each distinction plaintiff drew between the words used by the auditors and the language in the newspaper's reports. The court concluded that the articles were absolutely privileged under New York law and could not form the basis of a libel action.

For John Gallagher: High, Swartz, Roberts & Seidel, LLP, (Norristown, PA).

For Binghamton Press Company: Charles D. Tobin and Kara L. Daniels of Holland & Knight LLP (Washington, D.C.); Stuart M. Pearis of Pearis, Resseguie, Kline & Barber, LLP (Binghamton, NY).

Charles D. Tobin and Kara L. Daniels, with the Washington, D.C. office of Holland & Knight LLP, represent the Press & Sun-Bulletin in this lawsuit, along with local counsel Stuart M. Pearis, Pearis, Resseguie, Kline & Barber, LLP, Binghamton, N.Y. Karedes's counsel are John A. Gallagher, High, Swartz, Roberts & Seidel, LLP, Norristown, PA, and Theo J. Totolis, Endicott, N.Y.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

Media Law Resource Center, Inc.
80 Eighth Avenue, Ste. 200
New York, NY 10011

Ph: 212.337.0200
Fx: 212.337.9893
ldrc@ldrc.com

Old Public Figures Never Die, Nor Do They Fade Away

A Multi-factor Approach to Public Figure Analysis

By Joseph Finnerty

March 25, 2003, Buffalo, New York.

The New York Supreme Court (Erie County, Justice John P. Lane) issued a media-favorable Decision and Order granting a motion by *The Buffalo News* to determine a defamation plaintiff to be a limited purpose public figure. *White v. Berkshire Hathaway, Inc., et al.*, Erie County Index No. I1995-3771. In its decision, the Supreme Court engages in a full discussion of multiple elements, producing an opinion that should prove to be more serviceable to New York media defendants on the public figure issue than much of the existing state case law, which has tended to stress a single-element analysis in reported decisions. In addition, the opinion is also quite helpful on the effect on public-figure status of a temporal lapse of publicity.

The chief practical value of the decision is not so much in its bottom-line result -- the holding that Mr. White is a limited purpose public figure seems to us clearly to be the right one; rather, its value for New York practitioners is in its articulation of the rationale informing the result.

In *White*, the plaintiff is a real estate developer who during the late 1970s into the early 1980s had been the subject of and a participant in dozens of news reports concerning his business practices and real estate ventures in Buffalo. His projects included a nursing home and some of the earlier articles discussed its development. The ini-

(Continued on page 24)

Old Public Figures Never Die, Nor Do They Fade Away

(Continued from page 23)

tial period of publicity was followed by an approximately twelve-year span in which plaintiff received virtually no media coverage.

In 1994 however, following an investigation by the United States Department of Housing and Urban Development ("HUD"), *The Buffalo News* published a lengthy article and editorial concerning the HUD proceedings and plaintiff's alleged involvement in improprieties at the nursing home. The plaintiff brought an action for defamation. After initial discovery, *The Buffalo News* asked the court to declare Mr. White to be a public figure.

New York Public Figure Caselaw

In 1976, following the U.S. Supreme Court's decision in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997 (1974), New York's Court of Appeals decided *James v. Gannett*, 40 N.Y.2d 415, 386 N.Y.S.2d 871, stating

> "[t]he essential element underlying the category of public figures is that the publicized person *has taken an affirmative step to attract public attention*." 40 N.Y.2d at 422, 386 N.Y.S.2d at 876 (emphasis added).

Since *Gertz* and *James*, national public figure caselaw evolved to include in the analysis a number of factors above and beyond this "affirmative thrust" element. However, in New York, post-*James* decisions on the issue have tended simply to repeat the language of *James*, emphasizing this single element to the virtual exclusion of other factors.

The Buffalo News argued that the *James* single-factor "thrust" test merely reflected public figure jurisprudence in its infancy and is improperly narrow. The plaintiff argued that the *James* single-element analysis is controlling and limiting.

Plaintiff also tried narrowly to circumscribe the "controversy" to encompass only the 1990s HUD investigation of the nursing home. Because this HUD/nursing home matter had received no media attention prior to the *The Buffalo News*' article and editorial, plaintiff argued that it was not a "public" controversy at all. *The News* argued that the public controversy at issue was plaintiff's business practices in general (which had been widely reported in the past) *including* his involvement in the nursing home and that plaintiff was a public figure for this purpose in the earlier period and remained so for these 1994 reports.

Multi-Step Analysis Wins Out

The Supreme Court agreed with the newspaper, holding that a limited purpose public figure determination is a multi-step inquiry, involving analysis of:

(a) "whether there was a particular public controversy that gave rise to the alleged defamation;"
(b) "what was the nature and extent of the plaintiff's participation in that controversy;" and
(c) "whether the alleged defamation was related to that controversy." The Court broadly defined the public controversy to include not only plaintiff's involvement in the nursing home in particular, but also his development efforts in general, noting that it was the plaintiff's own business practices that had led to investigations and public interest.

As to the issue of the lapse between the publication of the earlier articles and the publications at issue, the Court found that

> "[i]t matters not that many of the articles temporally preceded the complained of writings for a public figure, once established, remains a public figure for later comment on that controversy or subject matter."

Looking at "the totality of his past conduct and business practices," the Court held that defendants had "aptly demonstrated" that the plaintiff is a limited purpose public figure.

Plaintiff's Counsel: Sullivan Oliverio & Gioia (Richard T. Sullivan).

Joseph Finnerty is with Stenger and Finnerty in Buffalo, New York, and represented The Buffalo News in this matter.

The Fair Index Rule: Newsday Defeats Libel Claim by Nassau County GOP Chairman Joseph Mondello

By Saul Shapiro and Kathleen L. Jennings

On June 15, 2001, the headline on the cover of Newsday read:

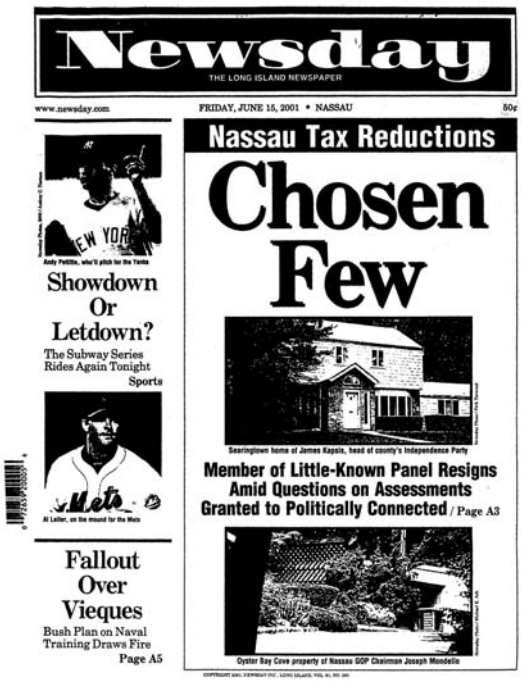
Nassau Tax Reductions
Chosen Few

This headline was accompanied by a sub-headline that stated:

Member of Little-Known Panel Resigns Amid Questions on Assessments Granted to Politically Connected

Below the sub-headline appeared pictures of two properties. One depicted the home of the head of Long Island's Independence Party, and the other was identified by its caption as the "Oyster Bay Cove Property of Nassau GOP Chairman Joseph Mondello."

The article accompanying the headline, which began on page three of the newspaper, reported that the vice chairwoman of Nassau County's Independence Party had resigned from her part-time position as a member of the Nassau Assessment Review Commission after "officials questioned her personal reduction of assessments for a number of homeowners, including . . . Joseph Mondello, chairman of Nassau's Republican Party." In the fifteenth paragraph of the article, the paper reported that "officials sa[id] the proper process was followed when Anderson reduced the assessed valuation" of Mondello's property.


Newsday
THE LONG ISLAND NEWSPAPER
www.newsday.com FRIDAY, JUNE 15, 2001 • NASSAU 50¢
Nassau Tax Reductions
Chosen Few
Showdown Or Letdown?
The Subway Series Rides Again Tonight
Sports
Fallout Over Vieques
Bush Plan on Naval Training Draws Fire
Page A5
Member of Little-Known Panel Resigns Amid Questions on Assessments Granted to Politically Connected / Page A3
Oyster Bay Cove property of Nassau GOP Chairman Joseph Mondello

Implication From Headline

Shortly after this article was published, Mondello sued Newsday for libel and trespass. With respect to his libel claim, Mondello acknowledged that the Newsday article itself was truthful, but alleged that the *headline* of the article falsely created the impression that he was an "active participant in an unethical, if not criminal, conspiracy" with respect to Anderson's tax reassessments.

Mondello's trespass claim alleged that a Newsday photographer had stepped onto his property without his consent for the purpose of taking the photograph that appeared with the challenged Newsday article.

First, Find A Judge Without Appearance of Bias

Mondello originally filed suit in Nassau County, where for decades he and his Nassau Republican Party have played a substantial role in the selection of judges, including Supreme Court justices. The first three judges assigned to the case – all of whom were Republicans – recused themselves *sua sponte*. After the fourth judge (also a Republican) was assigned, Newsday moved to transfer the action to a different county. Newsday specifically argued that the case should not be transferred to Suffolk County, where Mondello also wields significant power in Republican politics and judicial elections. Mondello opposed the motion, arguing in the alternative that any transfer should be to Suffolk County.

The Court granted Newsday's motion to transfer venue to avoid an appearance of impropriety. However, despite Newsday's concerns about Suffolk County, that is precisely where the case was transferred. Not surprisingly, the first five judges assigned to the case in Suffolk County (again, all Republicans) recused themselves *sua sponte*. The sixth judge did not recuse himself. Over fifteen years ago, that judge had run in and lost an election to the judiciary as a Democrat, without a cross-endorsement from Mondello's Republican party. In a subsequent election soon thereafter, the judge was elected to the judiciary as a candidate for the

(Continued on page 26)

The Fair Index Rule: Newsday Defeats Libel Claim

(Continued from page 25)

Independent Party. Mondello moved to recuse the judge on the ground that he would appear biased against Mondello based on this "prior history" between Mondello and the judge.

Over Newsday's objection, Mondello's recusal motion was granted. The seventh judge assigned to the case in Suffolk County, the Hon. John J.J. Jones, Jr., is also a Democrat. Judge Jones, however, had been elected to the judiciary with a cross-endorsement by Mondello's Republican Party, after running a number of times as a Democrat without such cross-endorsements. Newsday therefore moved to recuse him or, in the alternative, to transfer the venue of the case to a county where the issue of the appearance of judicial impropriety would not be so prominent. At the same time, Newsday renewed a motion to dismiss it had originally filed in Nassau County. On March 13, 2001, Judge Jones denied Newsday's motion to transfer, but granted its motion to dismiss the complaint in its entirety.

Newsday's Motion to Dismiss

Newsday's motion to dismiss Mondello's libel claim was based on three principal grounds:

(1) that the headline was a fair index of an admittedly truthful article and that any ambiguity in the headline was explained by the article;
(2) that the headline was not actionable because it could not reasonably be construed as defamatory by implication because Mondello could not show that Newsday endorsed the allegedly defamatory meeting; and
(3) that even under traditional libel law, a fair reading of the headline would not ascribe a defamatory meaning to what was published.

In his opposition to Newsday's motion, Mondello relied very heavily on the Second Department's decision in *Schermerhorn v. Rosenberg*, 426 N.Y.S.2d 274 (2d Dep't 1980). In *Schermerhorn*, the court upheld a jury verdict of libel where the challenged headline was not only false and defamatory but also expressly contradicted statements in the text of the accompanying article. Citing *Schermerhorn*, Mondello argued that the Newsday headline and the article should not be read together in the Second Department, but must be read separately. *Newsday* countered that *Schermerhorn* dealt with the very narrow circumstances pursuant to which a headline could be independently actionable under the fair index rule: *i.e.*, where an unambiguously defamatory headline is expressly contradicted by true facts recorded in the accompanying article. Otherwise, Newsday argued, *Schermerhorn* did not disturb well-established law that a challenged headline and article should be read together, and Newsday's headline was an unambiguously fair index of an admittedly accurate article.

Court Reaffirms Fair Index Principles

Judge Jones agreed with Newsday's reading of *Schermerhorn*. In his March 13, 2003 decision dismissing Mondello's complaint, Judge Jones held that the headline was a fair index of the Newsday article. The Court read *Schermerhorn* to hold that in determining whether the headline of a concededly truthful article is actionable, the court must consider, first, whether the headline is a fair index of the article with which it appears and, second, if it is not a fair index, whether the headline itself is actionable based on general principles of libel law. The court further held, as Newsday had argued, that in determining whether the headline was a fair index of the article, both the headline and the article had to be considered together.

Reading the Newsday headline and article together, the court held that the headline and article accurately reported that an official on the Nassau Assessment Review Commission had resigned and had been questioned about the reassessments that she gave to certain politically connected individuals, Mr. Mondello among them. The court found that neither the headline nor the Newsday article itself implicated Mr. Mondello in the official's misconduct. Further, Judge Jones reaffirmed the rule that even had the headline itself been ambiguous regarding Mondello's involvement in the reassessment problems, the accurate text of the article would have dispelled any such possible misleading implication or impression created by the headline.

Finally, the Court dismissed Mondello's trespass action on the ground that he could not as a matter of law recover in trespass for what was clearly a reputational injury involving no alleged damage to his property.

For Mondello: Jim Ryan.

Saul B. Shapiro and Kathleen L. Jennings, attorneys at Patterson, Belknap, Webb & Tyler LLP, and Stephanie S. Abrutyn, Counsel/East Coast Media for the Tribune Company, represented Newsday, Inc. in this matter.

Tenth Circuit Affirms Summary Judgment for Defendants in "John Doe #2" Case

By Robert D. Nelon

In a not-for-publication Order and Judgment, the Tenth Circuit recently affirmed summary judgment for the defendants KFOR-TV, its news director, and its reporters in a defamation, false light invasion of privacy, and intentional infliction of emotional distress case that had been brought in the United States District Court for the Western District of Oklahoma. *Hussain v. Palmer Communications, Inc., et al.*, 2003 WL 1558286 (10th Cir., March 26, 2003). The Court of Appeals, among its rulings in the case, upheld a refusal of the trial court to permit additional discovery prior to granting summary judgment on dispositive issues of substantial truth and lack of actionable injury.

The Bombing, the Pick-Up Truck, and the Iraqi Suspect

Almost immediately after the bombing of the A. P. Murrah federal building in Oklahoma City on April 19, 1995, federal authorities issued an all points bulletin to be on the look-out for a late-model brown Chevrolet pickup truck with tinted windows and a smoke-colored bug deflector. According to the bulletin, two men of Middle-Eastern appearance were believed to be in the truck. Within a couple of days of the bombing, authorities issued arrest warrants for and sketches of two men believed to be involved in the bombing; one of them, described as of dark-complexion, medium build, and having a tattoo on his left arm, was identified simply as "John Doe #2."

(Continued on page 28)

Officer Wins $15,000 For Mistake

Newspaper Does Not Plan To Appeal

The *Scranton Tribune* in Pennsylvania was ordered to pay $15,000 in mid-April after a jury ruled that an error in the paper defamed a state Fish and Boat Commission officer. *Cammerino v. Scranton Times, L.P.*, No _____ (Pa. C.P., Lackawanna County jury verdict April 9, 2003). The newspaper's lawyer says that there will not be an appeal.

The error was published in a Feb. 16, 2001 story about a federal lawsuit that David Rickert of Honesdale, Pa. had brought against Jeffrey Cammerino and other officers, for falsely arresting him and thus violating his civil rights. *See Rickert v. Cammerino*, Civil No. 01-287 (M.D. Pa. filed Jan. 20, 2001). That case is scheduled to go to trial in the federal district court in Scranton in August.

In the tenth paragraph of the *Tribune* article, which described the arrest, Cammerino's name was published instead of Rickert's, making it appear that Cammerino was the one who had been arrested. The roles of Cammerino and Rickert were correctly stated in the remainder of the 12-paragraph article.

During the three-day trial before Judge Terrence Nealon of the Lackawanna County Court of Common Pleas, Cammerino testified that many people thought that he had been arrested, and that the misstatement in the article caused him anguish and distress. His lawsuit alleged that the error had been intentional.

The newspaper admitted that the name switch was an error, but that it was unintentional.

The story was corrected when it ran in the *Tribune*'s affiliated afternoon paper, *The Scranton Times*. Cammerino did not demand a correction to the original *Tribune* story, and none was printed.

Despite his position with the state, Nealon held that Cammerino was a private figure, and refused to instruct the jury to apply the actual malice standard. Cammerino's state position is part-time and unpaid.

The *Tribune* was represented by J. Timothy Hinton of Haggerty, McDonnell and O'Brien in Scranton.

Tenth Circuit Affirms Summary Judgment for Defendants in "John Doe #2" Case

(Continued from page 27)

Reporters for KFOR-TV, the NBC affiliate in Oklahoma City, like others from virtually all local and national media, were involved immediately after the bombing in investigating who the perpetrators might be, especially with respect to the identity of the elusive John Doe #2. The investigation by KFOR's reporters led them to two confidential sources who worked for a man of Palestinian descent. The sources said that about six months before the bombing, their employer had hired several Iraqis, who seemed to be engaged in suspicious behavior in the days before the bombing. One of the men, who was of medium build, had a tattoo on his left arm. Both sources said they had seen a brown Chevrolet pickup truck with tinted windows and a smoke-colored bug deflector at their employer's place of business prior to the bombing but had not seen it since.

Further investigation led to more information suggesting that the tattooed Iraqi man might be John Doe #2. The FBI declined to say whether he was a suspect but admitted they had the man under surveillance and did not discourage KFOR's investigation into possible links between the man and the bombing. During June 1995, KFOR aired a series of five reports that demonstrated a possible connection of the Iraqi man to Timothy McVeigh, who by then was in custody, and the bombing. None of the reports used the man's name, and in all of the reports his face was digitized to disguise his identity. In all of the reports, KFOR disclaimed that it was reporting as fact that the man was John Doe #2, but instead the broadcasts raised the question whether the man might be involved based on the information gathered by the reporters.

Suspect Goes Public

After some of KFOR's reports aired, the man, Hussain al-Hussaini, voluntarily sought out other media, revealing himself as the subject of KFOR's reports and giving interviews to competing television stations and newspapers. The other media publicly identified al-Hussaini for the first time as the man discussed in KFOR's reports. They reported his denial of any involvement in the bombing.

In September 1995, al-Hussaini filed suit in Oklahoma state court against Palmer Communications, the owner of KFOR, its news director, Melissa Klinzing, and its reporters, Brad Edwards and Jayna Davis, for defamation, false light invasion of privacy, and intentional infliction of emotional distress. Nineteen months later—two days before the second anniversary of the bombing in 1997—al-Hussaini dismissed his state court suit without prejudice in the face of the defendants' motion for summary judgment. He re-filed the suit in federal court in September 1997. The plaintiff did little discovery and was repeatedly tardy in meeting court-imposed deadlines. When the defendants filed a summary judgment motion in December 1998, al-Hussaini's only response was a request for a continuance under Fed.R.Civ.P. 56(f) in order to do more discovery.

Summary Judgment Rounds 1 & 2

In November 1999, the district court denied the plaintiff's request for Rule 56(f) relief and granted the defendants' motion for summary judgment on the defamation claim. While the defendants' summary judgment motion was pending, the district court reinstated the plaintiff's false light and intentional infliction claims, which had been dismissed on statute of limitations grounds, after the Oklahoma Supreme Court reversed the appellate decision on which the federal court had relied to sustain a motion to dismiss those two claims. The defendants were given leave to file a second summary judgment motion directed to the reinstated claims, which the district court granted in September 2000.

The district court granted summary judgment on the defamation claim on several grounds. The court concluded that KFOR's reports were either substantially true with respect to statements of fact or were protected expressions of opinion. The court also concluded that the plaintiff could not demonstrate that the defendants had been negligent in their reporting.

The second order granting summary judgment tracked the first in denying the plaintiff's Rule 56(f) request. With respect to the false light claim, the district court concluded that because the reports were substantially true or merely expressions of opinion, they could not place the plaintiff in

(Continued on page 29)

Tenth Circuit Affirms Summary Judgment for Defendants in "John Doe #2" Case

(Continued from page 28)

a false light and the defendants could not have recklessly disregarded the truth of any factual statements. Moreover, because they were reports about an unidentified man, they could not be highly offensive as a matter of law. With respect to the intentional infliction claim, the court concluded that the defendants' truthful (or otherwise non-actionable) reports could not constitute extreme or outrageous conduct necessary for liability for the tort of outrage.

Denial of Further discovery Affirmed

The Tenth Circuit affirmed. The court first addressed the issue whether the district court abused its discretion in denying the plaintiff's request under Rule 56(f) for additional time to do discovery. It concluded there was no abuse of discretion. Finding "ample support in the record for the district court's ultimate decision to deny the plaintiff's Rule 56(f) request," the court concluded that the plaintiff's lack of discovery resulted primarily from "the plaintiff's contributions to the delays in scheduling his own deposition," which the district court ordered be taken before certain other discovery was done.

The circuit court observed that Rule 56 does not require that discovery be complete before summary judgment can be entered. In this case the plaintiff "did not show his inability to oppose the summary judgment without the discovery sought," because the additional discovery identified by the plaintiff related primarily to the issue of fault and did not address the issues of substantial truth and lack of actionable injury.

No Evidence of Harm to Plaintiff

Having rejected the plaintiff's contention that the district court "tied his hands" on discovery, the circuit court acknowledged that the plaintiff presented no evidence to challenge KFOR's "fully supported" arguments

(Continued on page 30)

Tenth Circuit Affirms Summary Judgment for Defendants in "John Doe #2" Case

(Continued from page 29)

that the reports were substantially true as to those statements "about which he complained and which could be construed as assertions of fact," were made without negligence, and resulted in no harm to the plaintiff's reputation.

Following *Zeran v. Diamond Broadcasting, Inc*., 203 F.3d 714 (10th Cir. 2000), the court held that although al-Hussaini may have suffered an injury, "he did not suffer injury to his reputation, as he could point to no one who thought he was John Doe #2 as referred to in KFOR's news reports. In the instant case, as in *Zeran*, the plaintiff's defamation case fails because the plaintiff has not shown that any person thinks less of him as a result of the broadcasts."

The appellate court likewise affirmed summary judgment on the false light and intentional infliction claims. It agreed with the district court's conclusion that the defendants did not recklessly disregard the truth: "In this regard, the plaintiff has failed to offer any proof that the defendants either knew the information they broadcast was false or acted recklessly." This was particularly so, the court said, "in view of the fact that the district court accurately determined that KFOR's news reports were not substantially false nor highly offensive, as they were news reports about an unidentifiable person." The court twice reiterated the requirement that actual malice, not negligence, be established to sustain a false light claim under Oklahoma law.

Other Claims and Other Concerns

With respect to intentional infliction, the court discussed the elements of the tort under Oklahoma law, which includes the requirement that the defendants' conduct be "beyond all bounds of decency" and that the plaintiff's emotional distress be so severe "that no reasonable person could be expected to endure it." The court held that there was "nothing in the record which indicates that the defendants behaved in such an extreme or outrageous manner towards Hussain as to impose liability for intentional infliction of emotional distress."

The defendants' summary judgment success in the district court tended to mask some of the potential difficulties in the case. The plaintiff's failure to cooperate in having his deposition taken within the time limits of the court's scheduling order left him without an opportunity to depose any of KFOR's employees. KFOR's investigation relied on more than two dozen confidential sources whose identities the defendants refused to disclose in response to the plaintiff's initial discovery requests. The plaintiff never filed a motion to compel, and the issue of confidential sources, which would have been significant in depositions of the reporters, never surfaced.

The defense was complicated by external events as well. During the interim between the dismissal of the state court suit and its re-filing in federal court, the television station was sold by Palmer Communications to The New York Times Co. Shortly thereafter, one of the primary reporters on the John Doe #2 reports, Jayna Davis, left the station and took virtually all of the John Doe #2 files with her, claiming that they were her work product. The New York Times ultimately filed suit against Davis to recover the files. After al-Hussaini refiled his suit, Palmer retained separate counsel to defend Davis in the defamation suit. Davis, meanwhile, threatened to move to disqualify KFOR's litigation counsel (who had vetted the reports before their broadcast) and to list them as witnesses in her defense because of their prebroadcast review of the reports. The end of the time for discovery and KFOR's submission of a summary judgment motion avoided these and other problematic issues.

Hussain al-Hussaini was represented by Gary L. Richardson of Richardson Stoops & Keating, Tulsa, and Victor R. Grider, Oklahoma City.

Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City, represented defendants Palmer Communications, Inc., Melissa Klinzing, Jayna Davis, and Brad Edwards. After separate counsel were retained, Davis was represented by A. Daniel Woska, Stephen Martin, and W. Dan Nelson of Woska & Hasbrook, Oklahoma City.

Maryland Appeals Court Affirms Dismissal of Defamation and Related Tort Claims Against Baltimore's WJZ-TV Channel 13

Seven of Eight Claims Dismissed in Lawsuit Over Burial Investigation

By Ashley I. Kissinger and Chad Bowman

The Maryland Court of Special Appeals has affirmed the dismissal of defamation and related claims brought against Viacom station WJZ-TV Channel 13 in Baltimore ("WJZ") that arose out of two televised reports concerning allegations of an improper burial. Dismissing plaintiffs' defamation claims on statute of limitations grounds, for lack of defamatory meaning, and because the reports were not "of and concerning" most of the plaintiffs, the Circuit Court for Baltimore City also dismissed related claims for false light invasion of privacy, violation of the Maryland Declaration of Rights, negligence, tortious interference with business relations, tortious interference with prospective advantage, and intentional infliction of emotional distress because they "take root in the facts pertaining to the defamation claims."

On February 20, the Court of Special Appeals adopted the lower court's decision as its own. *See March Funeral Homes West, Inc., et al. v. WJZ-TV Channel 13, et al.*, No. 02424 (Md. Ct. Spec. App. Feb. 20, 2003).

Rejecting the argument that the October 11 and October 13 broadcasts constituted a "two-part series," the court held that "each broadcast is a separate publication and it is to each broadcast the Court must look to decide if it contains defamatory content."

The Investigation and Two News Reports

The reports arose out of complaints made by Baltimore citizen Enid Costley concerning the funeral and burial of her husband. Plaintiff March Funeral Homes conducted the funeral services and arranged for the burial of Mr. Costley, a Vietnam veteran, at Garrison Forest Veterans' Cemetery. Mrs. Costley complained to March Funeral Homes about both the funeral and the burial. She and family members were upset that material was hanging out of, and a horrible odor emanated from, the casket during the funeral services. They were also concerned that the casket lid appeared to be ajar at the conclusion of the funeral services, and that the cemetery workers dropped the casket into the vault liner at the burial site, causing what sounded like the lid flying open and slamming shut. Cemetery workers had prevented Mrs. Costley and her son from approaching the vault, instead sealing it and proceeding with the burial.

WJZ investigated Mrs. Costley's allegations on October 11, 1999, including interviewing family members who were present at the funeral and burial and speaking with representatives of March Funeral Homes. That evening, WJZ's newscast described Mrs. Costley's allegations and her request that her husband's grave be exhumed. The report further explained that the Funeral Home said it would "immediately investigate," that "the cemetery will interview the men who worked on the burial site," and that the funeral home would replace the casket if it was defective.

Two days later, the cemetery exhumed the body in the presence of Mrs. Costley, several of her family members, a WJZ reporter and cameraman, and plaintiff Erich March, the funeral home's general manager. The casket proved to be tightly sealed, and WJZ broadcast the exhumation and its outcome that evening.

March Funeral Homes filed the initial complaint on Oct. 13, 2000, exactly one year after the second WJZ broadcast. The complaint was then amended twice, each time adding new causes of action and new plaintiffs, all related corporate entities and March family members. Initially, the plaintiffs complained that WJZ defamed them by falsely describing both the funeral and burial provided to Mr. Costley. When Viacom proffered dozens of affidavits of Mr. Costley's friends, family and coworkers describing the horrific odor during the funeral services and their concerns regarding the appearance of the casket, the plaintiffs recast their allegations to focus only on the burial. At the heart of all of the plaintiffs' claims is their contention that, in both reports, WJZ failed adequately to distinguish the funeral home from the cemetery, and therefore falsely implied that it was fu-

(Continued on page 32)

Maryland Court Affirms Dismissal

(Continued from page 31)

neral home employees – rather than cemetery workers – that dropped Mr. Costley's casket into the vault.

The Defamation Claims

The court dismissed the lion's share of plaintiffs' defamation claims as barred by the statute of limitations. Rejecting the argument that the October 11 and October 13 broadcasts constituted a "two-part series," the court held that "each broadcast is a separate publication and it is to each broadcast the Court must look to decide if it contains defamatory content." On that basis, the court held all defamation claims based on the first October 11 broadcast to be time-barred. The court also held that all claims filed by the new plaintiffs added in the amended complaints were barred as new causes of action, citing *Grand Pierre v. Montgomery County*, 97 Md. App. 170 (Md. Ct. Spec. App. 1993).

In the alternative, the court held, many of the plaintiffs' defamation claims failed because the news reports were "of and concerning" only March Funeral Homes and Erich March, the only two plaintiffs mentioned in the broadcast, and therefore "an action for defamation could not possibly stand for any Plaintiff other than March West or Erich March."

Because not all of the defamation claims premised on the second broadcast were subject to dismissal on these grounds, the court next considered whether that broadcast conveyed a defamatory meaning about March Funeral Homes. Specifically, the court considered whether "a reasonable viewer of the second broadcast would understand that March Funeral Home West was responsible for the burial, and dropped Mr. Costley's casket into the vault," as plaintiffs alleged.

After undertaking a painstaking analysis of the language used and images displayed in the broadcast, viewing them in the context of the broadcast as a whole, the court determined that "a reasonable viewer would [not] attribute the meaning of the report proposed by plaintiff." Concluding that "there was no untruthful aspect to the report," the court held that WJZ

> "used reasonable care to distinguish the burial and funeral responsibilities, that no reasonable juror could discern an intent to utter defamatory information, [and] that the cloud of such harmful information as may have been broadcast about Plaintiff March West, *i.e.* that the casket may not have been firmly sealed, was dissipated by the broadcast itself."

In short, the news reports were, according to the court, "a story constructed around questions, not conclusions."

The Tag-Along Claims

Noting that the remaining tort causes of action "take root in the facts pertaining to the defamation claims," as demonstrated by the plaintiffs' own pleadings, the court found that they were "inextricably linked factually with a successful defamation claim." Because it had found that the second broadcast was not capable of conveying a defamatory meaning, the court summarily dismissed all of the tort claims related to that broadcast.

The news reports were, according to the court, "a story constructed around questions, not conclusions."

The court then conducted the same inquiry with respect to the first broadcast to determine whether any tort claims based on it could survive Viacom's motion. It again carefully analyzed the statements and images of the broadcast as a whole, and in context, and determined that, like the second broadcast, no reasonable viewer could come away from the broadcast believing that funeral home employees dropped Mr. Costley's casket. WJZ "clearly distinguishe[d] between the defective casket and the dropping of the casket," the court explained, and "presented a factual report, and concerned March West only to the extent that Enid Costley believed that March may have provided an unsealed casket." For that reason, the court dismissed all of the tag-along tort claims premised on the first broadcast, as well.

On April 8, plaintiffs filed a Petition for Writ of Certiorari to the Maryland Court of Appeals, and briefing on the petition is expected to conclude at the end of April.

Viacom Inc. is represented in this matter by Susanna M. Lowy of Viacom Inc. and Lee Levine, Ashley I. Kissinger and Audrey L. Critchley of Levine Sullivan & Koch, L.L.P. The plaintiffs are represented by Roy L. Mason and Pamela J. Diedrich of Mason, Ketterman & Cawood, P.A., in Annapolis, Md., and by Walter N. Malloy, Jr., of Baltimore.

Two Denials of Summary Judgment Affirmed in Texas

By Scott Fuqua

The Corpus Christi Court of Appeals recently held that summary judgment in a defamation case was not proper when a newscast and two newspaper articles failed to report that the defamation plaintiff had been dismissed as a defendant in a medical malpractice case. The opinions in *Entravision Communications Corp. v. Belalcazar*, 2003 Tex. App. LEXIS 1725 (Tex. App.—Corpus Christi Feb. 27, 2003), 99 S.W.3d 393 and *Scripps Texas Newspapers, L.P. v. Belalcazar*, 2003 Tex. App. LEXIS 1728 (Tex. App.—Corpus Christi Feb. 27, 2003), 2003 WL 536620, arose from the same set of facts.

In late 1997, Ruby Ernst filed a medical malpractice claim against Dr. Alberto Belalcazar and the Doctor's Regional Medical Hospital. Nearly two years later, Ernst voluntarily dismissed Belalcazar from the lawsuit.

In early 2000, the lawsuit against the hospital went to trial. Entravision's local station and Scripps (*The Corpus Christi Caller-Times*) both covered the trial. Entravision ran three newscasts on the story. In the first, Belalcazar's office was shown, with his name "prominently displayed" in front of it, while the reporter stated that "a legal document says Dr. Alberto Belalcazar . . . left an 18 inch piece of gauze" in Ernst's abdomen after an appendectomy.

Scripps published three articles about the lawsuit, incorrectly identifying Belalcazar as a defendant in the first two. The third story acknowledged the error, and ran simultaneously with a correction stating that Belalcazar was not, in fact, a defendant in the lawsuit.

The court held that it could not conclude the stories inaccurately describing Belalcazar as a defendant were no more damaging than the literal truth would have been.

Entravision's Motions Denied

Entravision moved for summary judgment on both traditional and no-evidence grounds. Both motions were denied by the trial court, and the court of appeals affirmed. On Entravision's traditional summary judgment motion, the court held that it could not conclude that the broadcast was not more damaging to Belalcazar than the literal truth would have been, relying in part on the false omission or juxtaposition language in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000).

Because Entravision had not demonstrated the substantial truth of its broadcast, the court held that the defense of a fair report privilege was inapplicable as a matter of law.

On Entravision's no-evidence motion — which asserts

(Continued on page 34)

Two Denials of Summary Judgment Affirmed in Texas

(Continued from page 33)

that there is no evidence of one or more essential elements of claims upon which the adverse party holds the burden — the court held that Belalcazar's summary judgment evidence, which included a videotape of the objectionable broadcast, was sufficient to raise a fact issue regarding whether Entravision knew or should have known of the broadcast's falsity.

The court noted that the evidence established Belalcazar was not a party to the lawsuit when the broadcast aired, the broadcast did not mention Belalcazar's dismissal from the lawsuit, and "Belalcazar's office, with his name prominently displayed, was shown." The court also noted that, although the reporter claimed that a "legal document" showed Belalcazar's involvement in the medical procedure, the document was never identified.

Scripps's Summary Judgment Motion

Scripps also moved for summary judgment on traditional and no-evidence grounds. Here, too, the court of appeals affirmed the denial of both motions. Scripps's traditional summary judgment motion raised the defenses of substantial truth and privilege and presented evidence attempting to negate the negligence element of Belalcazar's claim.

On the issue of substantial truth, the court noted that Belalcazar presented evidence, through the testimony of his employees, that after the first two articles were published Belalcazar began having difficulty getting patients. Based on this evidence, the court held that it could not conclude the stories inaccurately describing Belalcazar as a defendant were no more damaging than the literal truth would have been. The court could also not conclude that the articles as a whole were not false and defamatory. As with Entravision's claim of fair report privilege, the court rejected Scripps's privilege defense because Scripps had not demonstrated the substantial truth of its publications.

Expert Testimony Considered

The court held that a question of fact existed on the issue of Scripps's negligence. In reaching this conclusion, the court considered expert evidence presented by both parties. Scripps presented the expert testimony of Ralph Langer, formerly editor of *The Dallas Morning News* and currently a member of the journalism department at Southern Methodist University, indicating that the reporter's actions were within the standard of care for reporters operating under the same or similar conditions. This testimony was based on six factors: (1) the information was time sensitive because the trial was ongoing; (2) the court's file was available for review for only a limited time; (3) the size of the file precluded exhaustive review; (4) during her review of the file, the reporter was justified in focusing on key items such as the spelling of names and amount of damages; (5) the attorneys in the case would not comment to the reporter; and (6) the reporter spent much of her time observing witnesses and watching the trial.

Belalcazar's competing expert, Joseph Goulden, testified that the reporter's lack of training, instruction, supervision, or guidance amounted to a deviation from the standards of journalistic practice and care. This conclusion was based on the reporter's testimony that she had only been in court once before, that she wanted to cover courts because she had never done so before, and that the reporter's training was limited.

The court also considered Belalcazar's evidence (1) that the reporter's supervisor had asked the reporter whether Belalcazar was still a party to the lawsuit and (2) as to the extent to which the article had damaged his reputation. Based on all of this evidence, the court affirmed the denial of summary judgment.

The court also affirmed the denial of summary judgment on the issue of actual malice, raised in the context of Belalcazar's claim for punitive damages. The court held that summary judgment for Scripps was inappropriate due to testimony from the reporter's supervisor indicating that the supervisor had felt some concern regarding Belalcazar's involvement in the medical malpractice lawsuit.

In support of its no-evidence summary judgment motion, Scripps argued that Belalcazar failed to present any evidence showing that the gist of the stories was false or any evidence of fault. Relying on the evidence highlighted above, the court held that no-evidence summary judgment in Scripps' favor would be improper.

Entravision Communications was represented by Barker, Leon, Fancher & Matthys. Scripps was represented by The Rangel Law Firm.

Scott Fuqua is an associate in the Dallas office of Vinson & Elkins L.L.P.

FROM THE EMPLOYMENT LAW COMMITTEE

Intra-Corporate Communications About Employees: Absolute v. Qualified Privilege

New Mexico Appellate Court Comes Down on the Qualified Side

By Sandy Bohrer

If you say something defamatory to a co-worker or subordinate about another employee, have you "published" that statement? The answer depends on what state you are in when you say it. In the most recent pronouncement, the Court of Appeals of New Mexico said yes, but the communication is subject to the standard qualified privilege for business communications. *Hagebak v. Stone,* 61 P.3d 201, 2002 WL 31954012 (N.M. Ct.App. December 9, 2002).

Criticisms: At Grievance Hearing

Hagebak, a psychologist, was terminated by his employer, a corporation. At a corporate grievance hearing requested by Hagebak, who was seeking reinstatement, Stone, the company's "fiscal officer," described Hagebak's patient load, productivity, and billing, and the fiscal impact of Hagebak's performance on the company. The testimony was largely critical. The corporation's board of directors denied Hagebak's request for reinstatement after the grievance hearing.

Hagebak sued the corporation and Stone. With regard to Stone, he claimed she made false statements about him at the hearing, including the ones described above, that were defamatory, making it appear he was, among other things, incompetent. He said these false statements hurt his chances for reinstatement and damaged his professional reputation generally.

If No "Publication," No Libel

The trial court adopted the rule recognized in a number of jurisdictions that states that communications among the employees, officers, or agents of a corporation are not "published," because they do not extend beyond the corporation. A number of courts have recognized this rule, among them *Starr v. Pearle Vision, Inc.,* 54 F.3d 1548 (10th Cir. 1995)(applying Oklahoma law),*Noel v. Andrus,* 810 F.2d 1388 (5th Cir. 1987) (applying Louisiana law); *Halsell v. Kimberly-Clark Corp.,* 683 F.2d 285 (8th Cir. 1982) (applying Wisconsin law); *Agee v. Huggins,* 888 F.Supp. 1573 (N.D.Ga. 1995) (applying Georgia law); *Keddie v. Pennsylvania State Univ.,* 412 F.Supp 1264 (M.D. Pa. 1976) (applying Pennsylvania law);*Williams v. A.L. Williams & Assocs., Inc.,* 555 So.2d 121 (Ala. 1989); *Lovelace v. Long John Silver's, Inc.,* 841 S.W.2d 682 (W.D.Mo.Ct. App. 1992). The rule means, in effect, that if no one outside the corporation hears it, in effect the statement was never made. The main rationale behind this rule comes from agency theory. That theory provides that a corporation can act only through its agents or employees, and employees, at least those acting within the course and scope of their employment, are not third parties "vis-B-vis the corporation."

The courts adopting the qualified privilege have found it both adequately protects the corporation from unwarranted defamation liability and affords at least some protection to "vulnerable employee reputations."

As the New Mexico Court of Appeals noted, this "exception" to the general rule about publication has some support in public policy. For a corporation to make an informed decision, it requires internal communications in a free and open manner. Any chill imposed on that freedom and openness, such as the threat of being sued, may impede the corporation's ability to function. Put dif-

(Continued on page 36)

Update on E-Mail Monitoring

Eric Robinson's article "Update on Employer E-mail Monitoring: The Ninth Circuit Joins the Mainstream," was published in the Winter/Spring 2003 issue of the ABA's *Labor Lawyer*. A link to the article is available at MLRC's web site, www.medialaw.org.

Intra-Corporate Communications About Employees: Absolute v. Qualified Privilege

(Continued from page 35)

ferently, what other way does a corporation have of informing itself about the activities and performance of its employees?

Qualified Privilege Preferred

This exception to the publication rule amounts to an absolute privilege, and a number of jurisdictions reject this exception in favor of a qualified privilege that precludes lawsuits, even if the defamatory statements at issue are false, if the statements are made in good faith *See, e.g., Jones v. Britt Airways, Inc.,* 622 F.Supp. 389 (N.D. Ill 1985); (applying Illinois law); *Kelly v. Gen. Tel. Co.,* 136 Cal.App.3d 278, 186 Cal.Rptr 184 (1982); *Luttrell v. United Tel. Sys., Inc.,* 9 Kan.App.2d 620, 683 P.2d 1292 (1984).

Some of those courts have noted that the real issue is not publication or not, but absolute privilege or qualified privilege. The courts adopting the qualified privilege have found it both adequately protects the corporation from unwarranted defamation liability and affords at least some protection to "vulnerable employee reputations."

The New Mexico Court of Appeals recognized the fact that damage to one's reputation within a corporate community might be just as great or even greater than the damage caused by publication outside one's workplace. 61 P.3d at 206. See, also, Ruth A. Kennedy, *Insulating Sexual Harassment Grievance Procedures From The Chilling Effect of Defamation Litigation,* 69 Wash. L. Rev. 235, 241 (1994).

The New Mexico court referred to what it considers the "huge cost" in providing an absolute privilege, stating it permits knowing, malicious falsehoods to be made, with a devastating effect on a person's reputation and career, all without recourse by the victim. On the other hand, the court also recognized the problem that a qualified privilege presents, which is litigation – sometimes expensive litigation - over "good faith," and the inevitable jury trial in some cases.

Nevertheless, the court adopted the qualified privilege approach, relying in large part, ultimately, on the Restatement of Torts and a propensity in New Mexico to do so, at least in an area of new development in tort law. The Restatement says that

> "the fact that the defamatory matter is communicated to an agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation. The publication may be privileged, however."

Restatement (Second) of Torts §577 cmt. e (1977). The statement is also a publication by the corporation, in addition to the agent, as both the Court of Appeals and the Restatement note. *Id.* cmt. i.

The Court of Appeals decision includes citations to many of the decisions in both regards, as well as citations to articles and other publications on the issue, and thus serves as a good resource guide. However, an even better resource guide is the MLRC 50-State Survey of Employment Libel and Privacy Law, which states the law in every state on this issue.

Sandy Bohrer is with Holland & Knight, LLP, Miami, Florida, and is Chair of the MLRC Employment Law Committee.

SAVE THE DATE!

New York City

MLRC ANNUAL DINNER 2003

WEDNESDAY, NOVEMBER 12

DCS ANNUAL BREAKFAST MEETING 2003

FRIDAY, NOVEMBER 14

Michael Douglas and Catherine Zeta-Jones Win Privacy Trial in London Over Unauthorized Wedding Photos

Following a highly publicized month-long bench trial, a London High Court judge ruled in favor of celebrity couple Michael Douglas and Catherine Zeta-Jones, and Northern & Shell PLC, publisher of the magazine *OK!*, on their claims against *Hello!* magazine over its unauthorized publication of photographs from the couple's wedding. *Douglas v. Hello! Ltd.*, [2003] EWHC 786 (High Court April 11, 2003). A copy of the judgment is available online through www.courtservice.gov.uk.

In late 2000, the couple sold an exclusive right to publish wedding photographs to OK! magazine for £1 million. In a detailed 80 page decision, High Court Justice Lindsay ruled that the publication of unauthorized wedding photographs in rival magazine *Hello!* amounted to a "breach of commercial confidence" for which he will likely award substantial damages after a hearing at a later date. Publication also constituted a breach of the Data Protection Act as to Douglas and Zeta-Jones – entitling them to at least nominal damages for the unauthorized processing of personal information in the form of photographs. Justice Lindsay rejected Douglas and Zeta-Jones' breach of privacy claim, noting that explicit recognition of a privacy tort is "better left to Parliament" – but he warned that if Parliament does not step in "the courts will be obliged to."

Privacy in All But Name

As a practical matter, though, this decision recognizes a right of privacy in all but name. At its broadest this right makes actionable the publication of truthful information that creates embarrassing or simply unwanted publicity. Indeed, Justice Lindsay explained that Douglas and Zeta-Jones' wedding was essentially a valuable "trade secret" which they were entitled to control both for commercial and personal interests.

While the court held that this commercial and personal right had to be balanced against the right of free expression, the balance tipped decidedly in favor of the Hollywood couple. The court reasoned that the publication was not in the "public interest," despite the intense interest in the wedding. In addition, *Hello!* knew, or should have known, that the photographs were obtained by a trespasser. While not unlawful or even outrageous such, surreptitious newsgathering could not be justified under the circumstances.

Wedding Photo Rights Sold for £1 Million

OK! magazine is published in England; *Hello!*, in Spain with UK and other foreign versions. The magazines are competitors and both specialize in publishing photographs of celebrities together with generally flattering profiles. Prior to their wedding both magazines negotiated with a representative of Douglas and Zeta-Jones for the exclusive right to publish authorized wedding photographs. At trial, the actors explained that this arrangement was designed to protect the wedding "from the inevitable media intrusion" while still accommodating the public's interest in photographs of the event. Douglas and Zeta-Jones ultimately accepted an offer from *OK!* of £1 million for the right to publish an exclusive set of photographs to be selected by the couple. As part of the contract, the couple agreed to provide security to bar any unauthorized photography at the wedding.

After losing out in the negotiations, *Hello!* made it known that it was in the market for unauthorized photographs from the wedding. Testimony in the case showed that such an approach was common among the magazines and that *OK!* had published unauthorized photographs from celebrity events where *Hello!* had obtained exclusive rights.

Wedding at the Plaza Hotel Was a Private Event

Douglas and Zeta-Jones were married on November 18, 2000 at the Plaza Hotel in New York City with several hundred guests in attendance. The wedding was described by the tabloid press as the "event of the year." Nearly 400 people attended, including "many names that anyone would recognize as famous or celebrated." It was also, of course, to be photographed by OK! magazine. Nevertheless, Justice Lindsay concluded the wedding was "private." He was loathe to conclude otherwise simply based on the

(Continued on page 38)

Michael Douglas and Catherine Zeta-Jones Win Privacy Trial in London Over Unauthorized Wedding Photos

(Continued from page 37)

large number of guests "especially where the means of the parties were so ample" and "the couple was popular enough to have many friends."

And Justice Lindsay accepted as reasonable the couple's claim that the media coverage by OK! actually preserved and reinforced the private nature of the event, since the exclusive was designed to eliminate unauthorized media intrusions. At trial, Catherine Zeta-Jones notably remarked that the £1 million they accepted "was not that much" for them and Justice Lindsay agreed describing the payment to the couple as a mere "blandishment." *Id.* at ¶ 66-69. Justice Lindsay also recognized that the agreement with OK! furthered the couple's interest in "the certainty of fair coverage," a point which he did not analyze but which simply appears to be added to the couple's basket of protected privacy interests. *Id.* at ¶ 52.

Photographer "Infiltrates" the Wedding

Rupert Thorpe, a California-based photographer, dressed in a tuxedo and pretending to be an invited guest managed to infiltrate the gauntlet of security and take photographs. *Hello!* purchased these photographs for approximately $188,000. A good deal of the decision concerns the arrangements and dealings between *Hello!* and intermediaries involved in obtaining the photographs. The court found that while Hello! did not directly commission the photographs in advance – perhaps to avoid legal exposure – it knew that photographers would resort to deception to obtain pictures.

Two days after the wedding, Douglas and Zeta-Jones learned that unauthorized wedding photographs were being offered for sale. This discovery led to some dramatic testimony at trial. Catherine Zeta-Jones testified that "our peace and happiness evaporated. I felt violated and that something precious had been stolen from me." *Id*. at ¶ 82. Michael Douglas was "devastated and shocked by the news.... It was a truly gut wrenching and very disturbing experience which left both of us deeply upset. *Id.* at ¶ 83.

On cross-examination, Mr. Douglas conceded that their distress was minor in comparison to the loss of a limb. But Justice Lindsay had "no doubt but that Mr. Douglas and Miss Zeta-Jones both suffered real distress .... which led Miss Zeta-Jones to tears" wondering if one of their guests had betrayed them. *Id*. at ¶ 84.

That same day the couple's lawyers obtained an ex parte injunction barring *Hello!* from publishing the issue containing the wedding photographs. The injunction was dissolved three days later by the Court of Appeal. *Douglas v. Hello! Ltd.* (Dec. 21, 2000); see also LDRC LIBELLETTER Jan. 2001 at 23. While expressing sympathy to the couple's claims, the Court of Appeal concluded that an injunction at that stage was inappropriate. Interestingly, Justice Lindsay found that the injunction was lifted based on false testimony from the defendants who had lied about their involvement in procuring the pictures.

As an interesting side note, the offending photographer Rupert Thorpe was ultimately identified because he was captured in one of the photographs taken by OK! at the wedding. He was seen holding a camera in his hand at waist level. He was not named as a defendant in the case. Another American, Philip Ramey, a California photographer and photo agent who brokered the transaction, was named but apparently did not appear to defend himself.

Hello! and OK! Both Do Wedding Features

After the injunction was lifted OK! moved up its publication schedule so that it would not be scooped by Hello! Both magazines published issues featuring wedding photographs on the same day in late November 2000. The court found that the photographs published in Hello! were of poor quality and some were out of focus. At trial, Zeta-Jones described a photograph of her father as "very offensive." A photograph of her eating wedding cake was "very offensive" since "it looks like all I did was eat." Adding to her distress, this last photograph was republished in the *Sun* tabloid with the humorous headline "Catherine Eater Jones."

The text accompanying the photographs was, according to the Court, "snide" and "hurtful." For instance, in contrast to the usually flattering tone of such pieces, the text accompanying a photograph of Zeta-Jones dancing erroneously stated, "The vivacious bride took to the dance floor but not, at any time, with her groom." Justice Lindsay, however,

(Continued on page 39)

Michael Douglas and Catherine Zeta-Jones Win Privacy Trial in London Over Unauthorized Wedding Photos

(Continued from page 38)

found insufficient evidence to conclude that Hello! published such comments in retaliation for the couple giving the exclusive to rival OK!

Breach of Commercial Confidence

Justice Lindsay held that Douglas and Zeta-Jones had a "hybrid" right of confidentiality which was partly personal and partly commercial. Under this right the publication does not have to be "highly offensive or offensive at all" but simply likely to "offend the Douglases" under the circumstances. Id. at ¶ 192.

> The claimants had here a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by Miss Zeta-Jones and Mr Douglas for the benefit of them and [OK!].... Of course, the general appearance of both Mr Douglas and Miss Zeta-Jones was no secret; what they looked like was well known to the public. But that does not deny the quality of commercial confidentiality to what they looked like on the exceptional occasion of their wedding.... The event was private in character and the elaborate steps to exclude the uninvited, to include only the invited, to preclude unauthorised photography, to control the authorised photography and to have had the Claimants' intentions in that regard made clear all conduce to that conclusion. Such images as were, so to speak, radiated by the event were imparted to those present, including Mr Thorpe and his camera, in circumstances importing an obligation of confidence. Everyone there knew that was so. .... As for the Hello! Defendants, their consciences were, in my view, tainted; they were not acting in good faith nor by way of fair dealing.... The Hello! Defendants had indicated to paparazzi in advance that they would pay well for photographs and they knew the reputation of the paparazzi for being able to intrude.

Id. at ¶ ¶ 196-198.

(Continued on page 40)

Michael Douglas and Catherine Zeta-Jones Win Privacy Trial in London Over Unauthorized Wedding Photos

(Continued from page 39)

Justice Lindsay found it obvious that Douglas, Zeta-Jones and OK! were damaged by Hello's publication. In addition to the emotional distress, the couple had to re-arrange their schedules to approve photographs for publication ahead of schedule. And the publication in OK! may have dampened interest in syndication rights for the authorized wedding photographs. OK! similarly had to speed up its publication schedule, it may have lost sales and it "lost also the kudos of being and being seen to be the only one of the two leading rivals to be able to offer authorised coverage of the 'showbiz wedding of the year.'" Id. at ¶ 200.

Balance With Free Expression

Justice Lindsay's decision in favor of the couple's breach of commercial confidence claim was not the end of the matter. The claim still had to be balanced against Article 10's right to free expression. This proved to be an easy hurdle. Justice Lindsay found that there was no "public interest" to publish the photographs as that term is used in the Press Complaints Commission Code. The Code is a set of best practice standards framed by the UK newspapers and magazines. Section 3 on Privacy provides:

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent

ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

Section 11 on Misrepresentation provides in relevant part that:

i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge..... iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

Both Sections are subject to a "Public Interest" exception. In addition to several specific public interest exceptions, such as "detecting or exposing crime or a serious misdemeanor" and "protecting public health and safety" the Code contains a catch all that "there is a public interest in freedom of expression itself. The Commission will therefore have regard to the extent to which material has, or is about to, become available to the public." The full text of the Code is available at www.pcc.org/uk.

Justice Lindsay held that the prohibition on long lens photography applied with equal force to secret "short lens" photography at a private event – and no "public interest" exception was claimed or applied. Although described as voluntary and non-legal, the best practices of the Code may well be adopted as legal requirements as UK courts struggle with privacy law questions. Under this decision, a newspaper or magazine that violates the Code may effectively lose any general claim of protection under Article 10.

The trial was divided on liability and damages with damage to be determined at a later date. Justice Lindsay hinted that damages may be in excess of £1 million by noting that the couple could have commanded far more than that for the sale of the photographs. But the conduct of Hello! was not so outrageous to justify exemplary or aggravated damages.

Conclusion

From an American media law perspective the decision is a tangle of concepts. At its core the decision recognizes a disturbingly broad right to control publicity. The judgment itself is enormously sympathetic in tone to Douglas and Zeta-Jones. It is tempting to describe Justice Lindsay as star-struck, perhaps a tribute to the presence and dramatic flair of Michael Douglass and Catherine Zeta-Jones, at least compared to the more unseemly publishers, editors, and photographers of the celebrity press.

The plaintiffs were represented by barristers Michael Tugendhat QC and David Sherborne of 5 Raymond Buildings and solicitors firm Theodore Goddard. Defendant Hello! magazine was represented by barrister James Price QC of 5 Raymond Buildings and solicitors firm Charles Russell.

Silverstein v. Penguin Putnam, Inc: A Creative Compilation?

By Elizabeth A. McNamara

In a decided shot in the arm for protection of compilations, on April 4, 2003, Judge Keenan of the Southern District of New York granted summary judgment for the plaintiff, Stuart Silverstein, on his copyright and Lanham Act claims arising out of Penguin's publication of *Dorothy Parker: Complete Poems* and enjoined further distribution of the work. Mr. Silverstein, an attorney, had compiled some 122 previously uncollected Dorothy Parker poems and published a 1996 collection *Not Much Fun: The Lost Poems of Dorothy Parker.* Mr. Silverstein contended that *Complete Poems,* which simply photocopied and republished 121 of the poems from *Not Much Fun,* infringed his copyright in his collection and improperly failed to credit him. The Court agreed. *Silverstein v. Penguin Putnam,* 2003 WL 1797848.

Ever since *Feist v. Rural Tel. Serv. Co.,* 499 U.S. 340 (1991), sent the "sweat-of-the- brow" doctrine back to the gym, copyright protection for compilations has been generally considered to be exceedingly thin. Indeed, on the heels of *Feist*, and after West Publishing also failed to obtain protection for its arrangement of attorney information and annotations in connection with publishing judicial opinions, it was recognized that only a truly creative and original selection of facts or public domain materials warranted copyright protection. *Matthew Bender & Co., Inc. v. West Pub. Co.,* 158 F3d 674 (2d Cir. 1998). Enter Mr. Silverstein and a case that is most certainly "Not Much Fun" for Penguin Putnam.

Collecting the Uncollected Poems

During her life time, Dorothy Parker published most of her poems in a series of collected works. In doing so, however, she omitted more than one hundred poems that had been previously published in various periodicals, such as *Vanity Fair* and *The New Yorker.* Mr. Silverstein set out to compile these "uncollected" Parker poems and, once collected, submitted his compilation to Penguin Putnam. However, he turned down Penguin's $2,000 offer to publish the poems as part of a larger collection of Parker poems and instead ultimately published his 1996 collection with Scribner as *Not Much Fun.* There is no dispute that the poems in *Not Much Fun* are in the public domain.

In arrangement with the owner of the Dorothy Parker copyrights, in 1999, Penguin then published the first complete edition of Dorothy Parker's poems, *Complete Poems.* Penguin's edition contained, in a section of the work called "Poems Uncollected by Parker," all but one of the poems previously published by Silverstein in *Not Much Fun*.

Even though a "Note on the Text" informed readers that *Complete Poems* "faithfully reproduced" Parker's poems from their original publications, the evidence showed that the author and editor of the work simply photocopied the poems from *Not Much Fun* and cut and pasted the photocopies in the "uncollected" section of her work. However, she did not reproduce the poems in the same order as Silverstein had done. Penguin's work includes the poems in chronological order according to their original publication dates. In contrast, Silverstein's work sequenced the poems differently, with 30 poems out of chronological order. Finally, the evidence showed that the editor/author of the *Complete Poems,* consciously decided to not give any credit to Silverstein, noting in a letter to her editor that "…I don't think we want to direct people to the competition…"

Compiler Argues His Creativity

Based on these facts, Silverstein argued that *Complete Poems* usurped his creative labors by publishing virtually his entire compilation. To imbue such labors with sufficient creativity, Silverstein relied on the subjectivity and creativity involved in selecting the 122 poems from a "vastly larger amount of items" attributed to Parker.

In particular, Silverstein pointed to his rejection of certain works as not authentic Parker and the fact that his work included a series of free verses, called the "Hate Verses," that he concluded were not poems, but were otherwise generally recognized as Parker poems.

He argued that these creative conclusions — which were not shared by one of the leading Dorothy Parker scholars — underscored his independent and creative analysis of her works. He also sought protection for editing changes to the poems and the creative order of his selection and arrangement of the poems.

Penguin Sees Only Labor, No Art

Penguin argued that Silverstein was seeking protection for his labors, nothing more or less. The alleged skill, exper-

(Continued on page 42)

A Creative Compilation?

(Continued from page 41)

tise and judgment that went into selecting specific poems to include in the work — notably, labeled "all" of the uncollected Parker poems — is simply not copyrightable. Nor was Silverstein's judgment concerning whether a "poem is a poem" subject to copyright. If Silverstein's creative judgment in including certain Parker free verses in his book of poems rose to the level of copyrightability, then any hypothetical scholar who locates and publishes new works by an author or rejects other works would automatically be accorded a copyright interest.

Penguin thus invoked Nimmer's industrious Shakespearean scholar who locates a "lost" play in the stacks of the British Museum and with his considerable skill, judgment and knowledge identifies the work as a "true" Shakespeare play. Nimmer concluded that it was clear that the scholar would not have a copyright interest in his discovery. According copyright protection to Silverstein's creative judgment in concluding that certain free versus were not "poems," however, would be the same as ceding a copyright interest to Nimmer's theoretical Shakespeare scholar. This result is particularly unfounded, Penguin argued, because Silverstein did not even disclose to his readers, in a book described as "*The Lost Poems of Dorothy Parker,"* that he had in fact concluded that the Free Verses were not poems.

Court Sides With Compiler

In a decision plainly driven by the Court's disquiet with certain difficult facts — the editor's photocopying of Silverstein's collection and her failure to credit Silverstein with the conscious desire to not "direct people to the competition" — Judge Keenan came down solidly on the plaintiff's side. In so doing, the Court may have crafted significant new protection for compilations. The Court recognized that a compilation of facts or public domain materials will only be afforded copyright protection if the *manner* in which the collected facts have been selected, coordinated and arranged demonstrates a "minimal level of creativity." The Court concluded, however, that Silverstein's compilation showed "substantial" creativity and judgment in the (1) selection of and characterization of materials as poems, and (2) the coordination and arrangement of the work.

On the selection of the poems, the Court found that Silverstein exercised judgment — relying on his "own taste" and "informed decision-making" — in deciding which items to include in his work, specifically determining which works were in fact "poems" and were written by Parker. The subjectivity of the determination is underscored by the fact that Penguin's editor conceded that answering the question "what is a poem" is a "scholarly subjective answer."

And the Court rejected the argument that because *Not Much Fun* purported to be "all" the uncollected poems, no subjective choices or contemplation was required. Because the collection did not include all of the works of Dorothy Parker — but was limited to the "lost" poems — Judge Keenan analogized the selection to a "best of" collection, albeit with a more minimum amount of originality. Under this theory, however, virtually any selection of poetry would be sufficient to meet the copyrightability threshold, as would the publication of a Shakespeare compilation that included a "new" Shakespeare play.

Beyond Mechanical Grouping

The Court next determined that Silverstein's selection and arrangement of the Parker "uncollected" poems warranted copyright protection since the arrangement went beyond a mere mechanical grouping. Silverstein did not simply publish the poems in chronological or alphabetical order. Yet, inexplicably, the Court did not address the fact that Penguin published the "uncollected" poems in strictly chronological order and did *not* adopt Silverstein's "creative" arrangement. Instead, without explanation, the Court simply concluded that the arrangement of the poems in Penguin's work is "so strikingly similar" to Silverstein's that it "precludes an inference of independent creation."

With the admitted "cutting and pasting" of virtually all of the poems in *Not Much Fun*, once the Court concluded that Silverstein's compilation reflected sufficient creativity to warrant copyright protection, it had no trouble determining that *Complete Poems* constituted actionable infringement. It enjoined further distribution of the book and scheduled a hearing to discuss a recall and plaintiff's request for costs and attorneys' fees. In the meantime, Penguin has appealed the decision to the Second Circuit.

For Silverstein: Monica Petraglia McCabe and Christine Jaskiewicz of Piper Marbury Rudnick & Wolfe LLP (New York, New York).

For Penguin Putnam: Richard Dannay and Thomas Kjellberg of Cowan Liebowitz & Latman, P.C., New York, New York.

Elizabeth A. McNamara, Davis Wright Tremaine LLP.

Legal Fees Awarded to CNN, ABC and CBS as Prevailing Defendants in Fair Use Suit

By Robert Balin, Gregory Welch, Nathan Siegel and Naomi Waltman

Deciding whether to pay a licensing fee for the use of film clips in a news report, documentary or other fact-based television program has in the past often presented users (and their in-house counsel) with a difficult cost-benefit dilemma. Under copyright law, the use of short movie clips to illustrate editorial points in a new non-fiction work often lies at the core of the fair use doctrine, indicating that no license for use should be necessary. Yet, in the real world (with real world budgetary constraints), the risk of provoking a copyright infringement suit may well persuade the user to nonetheless pay a small licensing fee (or settle for a few thousand dollars) simply to avoid the substantial legal costs of defending even non-meritorious infringement litigation.[1]

In the November 2001 *LibelLetter*, we reported on a quartet of decisions from the Southern and Eastern Districts of New York in which four different judges uniformly held that non-consensual uses of short move clips in various news and documentary programs constituted fair use.[2] We noted then that these decisions (by their collective force) might serve to deter the use of non-meritorious litigation threats to extract small fair use licensing payments. Now, one judge has added real teeth to that promise of deterrence.

In an opinion issued on March 31, 2003, Judge Barbara Jones of the Southern District of New York ruled that CNN, ABC and CBS — as the prevailing defendants in fair use litigation — are entitled to recover their reasonable attorneys' fees and costs from the plaintiff under the Copyright Act's fee shifting provision, 17 U.S.C. § 505. *Video-Cinema Films, Inc. v. CNN, et al.*, 2003 WL 1701904 (S.D.N.Y. March 31, 2003). While fee awards to prevailing copyright *defendants* are not commonplace, Judge Jones concluded that the plaintiff's assertions of infringement were "objectively unreasonable" and that "fees are appropriate in this case to deter future copyright owners from using the threat of litigation to chill other fair uses." *Video-Cinema*, 2003 WL 1701904 at *5. By placing prospective plaintiffs on notice that they bear a risk of footing the defendant's legal bills, the *Video-Cinema* decision may well stem the flow of non-meritorious infringement claims and (in Judge Jones' words) encourage more fair users "to defend that fair use doctrine." *Id.*

Judge Jones concluded that the plaintiff's assertions of infringement were "objectively unreasonable" and that "fees are appropriate in this case to deter future copyright owners from using the threat of litigation to chill other fair uses."

The Video-Cinema Suit

The *Video-Cinema* litigation arose from news reports on the death of actor Robert Mitchum in July 1997. As is common when actors die, the news obituaries on CNN, ABC and CBS each reported the highlights of Mitchum's lengthy screen career, with accompanying clips (ranging from six to twenty two seconds) from several of Mitchum's films. Among the excerpts used were brief clips from the 1945 war film "*The Story Of G. I. Joe,*" for which Mitchum received his one and only Oscar nomination — a fact reported by each news network as the *G. I. Joe* clip was shown. Also typical of newsroom practice for day of death obituaries, all the film clips used in the Mitchum reports came from video store rentals, video purchases or archival footage and no licensing fees were paid by the networks.

At the time of the Mitchum news obituaries in July 1997, plaintiff Video-Cinema Films did not own *G. I. Joe*, but had been negotiating to buy it from the University of Southern California. Nonetheless, upon learning that Mitchum had died, Video-Cinema's president spent 10 hours simultaneously watching two TV sets, flipping through broadcasts on seven different stations to find news obituaries that used *G. I. Joe* clips.

Then, in September 1997, Video-Cinema submitted a

(Continued on page 44)

Legal Fees Awarded to CNN, ABC and CBS

(Continued from page 43)

revised contract proposal to U.S.C. in which it inserted a new provision granting Video-Cinema retroactive rights in *G. I. Joe* that would pre-date the July 1997 Mitchum obituaries. On the day Video-Cinema's president received the fully executed U.S.C. contract (with retroactive ownership rights), he immediately began sending letters to 12 different national and local news organizations demanding a "fee" from each of $5,000 ($10,000 in the case of the networks) for its use of *G. I. Joe* clips in its Mitchum obituaries. Each news organization — including ABC, CBS, NBC, FOX and CNN — responded that its unlicensed clip use was permitted by the fair use doctrine. Video-Cinema thereafter sued ABC, CBS and CNN in the Southern District of New York for copyright infringement.

In September 2001, after extensive (and costly) discovery and motion practice, Judge Jones granted summary judgment to the news defendants on fair use grounds. Finding that the defendants had used only brief excerpts from *G.I. Joe* for the statutorily-favored purpose of news reporting, that the use was "transformative," (*i.e.*, for an "entirely new purpose") and that Video-Cinema could claim no legitimate clip licensing market for news obituary uses, Judge Jones concluded that "the public would be hindered by denying Defendants' fair use defense." *Video-Cinema*, 2001 WL 1518264 at *9.

The Fee Decision

Shortly after the grant of summary judgment, CNN, ABC and CBS jointly moved for recovery of their attorneys' fees and costs pursuant to Section 505 of the Copyright Act, which provides that the court, in its discretion, "may . . . award reasonable attorney's fees to the prevailing party as part of the costs." 17 U.S.C. § 505.

While there are no set criteria for the exercise of this discretion, the Supreme Court has indicated that some of the factors a court may consider in deciding whether to award fees are

> "frivolousness, motivation, objective unreasonableness (in both the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence."

Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994). Ultimately, as Judge Jones pointed out in her fee decision, "all of these factors are subservient to the broader question of whether an award of fees furthers the policies of the Copyright Act." *Video-Cinema*, 2003 WL 1701904 at *1. Additionally, while prevailing copyright defendants do not routinely seek fees, the Supreme Court held in *Fogerty* that discretionary fee awards to defendants are entirely permissible since:

> a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of the copyright.

Fogerty, 510 U.S. at 527.

Objective Unreasonableness

In her fee decision, Judge Jones found that Video-Cinema had made numerous "objectively unreasonable" arguments in opposing the news defendants' fair use summary judgment motion. In one particularly egregious example, the plaintiff had asserted that, as a threshold requirement, any use of copyrighted materials must be "essential" or an "actual necessity" to qualify as a fair use. As Judge Jones noted in her fee decision, there is no such requirement and, in fact, "the portions of the opinions upon which Plaintiff relied to support this proposition did not even address the fair use doctrine." *Video-Cinema*, 2003 WL 1701904 at *3.

Judge Jones also found plaintiff's arguments on the four statutory fair use factors to be "equally deficient." *Id.* For example, on the second factor (nature of the copyrighted work), *G.I. Joe* was clearly a published work since it had been widely shown in movie theaters upon its 1945 release and had since then aired many times on television. *See Arica Institute v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (second factor supports fair use finding where the copyrighted work has already been published). Nonetheless, in opposing summary judgment, Video-Cinema argued that under the technical labels of the 1909 Copyright Act, *G.I. Joe* had only a "limited" publication, as opposed to a "general" publication — a

(Continued on page 45)

Legal Fees Awarded to CNN, ABC and CBS

(Continued from page 44)

distinction relevant only to whether a pre-1976 work is divested of its copyright. In finding this "limited" publication argument "unreasonable," Judge Jones noted that "the fair use doctrine is concerned only with whether the work is published at all, and the distinction between general and limited publication is irrelevant." *Id.* at **4 (*citing Harper & Row Pub., Inc. v. Nation Enterprises, Inc.*, 471 U.S. 539, 555 (1985)).

Similarly, on the third fair use factor (amount and substantiality of the portion used), Judge Jones found that it was "wholly unreasonable" for Video-Cinema to claim that the news defendants had used a "substantial" portion of *G.I. Joe* in their obituaries when, in fact, the clips used were only 6 to 22 seconds long, or less than 1% of the 108-minute film — an amount Judge Jones found to be *de minimis*. *Video-Cinema*, 2003 WL 1701904 at *3. The Court further ruled that, on a qualitative basis, it was also objectively unreasonable for plaintiff to argue that the brief clips shown by defendants — in which, for example, Mitchum's character orders a soldier to dig latrines — constituted the "heart" of the film, especially since they did not distill the movie's plot. *Id.*

Last, on the fourth fair use factor (effect upon the potential market), Judge Jones found it unreasonable for Video-Cinema to have claimed that there "ever existed" a "market for licensing film clips for obituaries." *Id.* at *4. In fact, as noted by Judge Jones, the evidence showed that, during his 38 years in the film licensing business, plaintiff's president had received only three small payments for the use of clips in obituaries "and these were settlement payments in order to avoid litigation." *Id.*

Improper Motivation

Having found that Video-Cinema advanced objectively unreasonable factual and legal arguments "throughout the litigation" (*id.* at *2), the Court further concluded that the plaintiff had an improper motive in bringing suit. In so holding, Judge Jones noted that, before Video-Cinema even owned *G.I. Joe*, its president and sole shareholder (Larry Stern) had spent 10 hours channel-surfing through televised Mitchum obituaries "to find as many potential targets of litigation as possible," then secured for plaintiff not only the copyright in the film but the right to pursue retroactive infringement claims, and then immediately began issuing demand letters to numerous news organizations — including some that had never even used *G.I. Joe* clips in their Mitchum obituaries. *Id.* at *4. Characterizing this behavior as an "elaborate scheme to place [Video-Cinema] in a position to sue the Defendants," Judge Jones ruled that:

> Plaintiff's conduct was nothing more than on obvious effort to use the Copyright Act to secure payment from Defendants for their fair use of the film footage. As such, plaintiff's motivation was improper and weighs in favor of an award of attorneys' fees for Defendants.

Id. at *5.

Deterrence

Last, and perhaps most important to future fair use defendants, Judge Jones found that an award of fees against the plaintiff would further the policies of the Copyright Act. Using language that will surely find its way into other fair use fee petitions, Judge Jones reasoned that:

> fees are appropriate in this case to deter future copyright owners from using the threat of litigation to chill other fair uses. To hold otherwise would diminish any incentive for defendants to incur the often hefty costs of litigation to defend the fair use doctrine. As the Supreme Court in *Fogerty* explained, "copyright law ultimately serves the purpose of enriching the general public through access to creative works . . ."

Id. at *5 (citation omitted).

Having ruled that CNN, ABC and CBS are entitled to an award of reasonable attorneys' fees and costs, Judge Jones has directed the news defendants to submit petitions calculating their fees by May 9. Stay tuned for further news.

Robert Balin and Gregory Welch, who practice at Davis Wright Tremaine LLP, represent CNN in the Video-Cinema case. ABC is represented by in-house counsel Nathan

Big Dog Parodies Smack Down WWE Claims

On March 10, a Federal District Court Judge, David Stewart Cercone granted summary judgment for Defendant in a case alleging that T-shirts parodying various WWE wrestlers constituted copyright and trademark infringement and violated various provisions of the Lanham Act. *World Wrestling Federation Entertainment v. Big Dog Holdings, Inc.*, Civil No. 01-394 (W.D. Pa. summary judgment granted March 10, 2003).

The case involved shirts depicting caricatures of World Wresting Entertainment[1] personalities "The Rock," "Stone Cold Steve Austin," and the "Undertaker" in which the characters were portrayed as dog-like in appearance. The shirts were sold under the "Big Dogs" brand through the company's clothing stores, catalogue, and web site.

The t-shirt designs included caricatures of the WWE personalities along with caricatures of other characters from popular culture. All eight t-shirt designs at issue in the case included the statement "BIG DOG SPORTSWEAR. THIS IS A PARODY."

Judge Cercone agreed with Big Dog, holding that the t-shirt designs were parodies that fell under the "fair use" exception of the Copyright Act.

WWE alleged that the use of the characters and their identifying symbols, dress and phrases (for Stone Cold Steve Austin, for example, these include his costume of black wresting trunks, black wrestling boots, no shirt, and a open black leather vest with a skull depicted on the left side and the name "Austin" on the right) constituted infringement. Big Dog responded that the t-shirt designs were parodies that mocked the personas of the WWE characters and the "larger-than-life" nature of WWE's performances.

Judge Cercone of the Western District of Pennsylvania agreed with Big Dog, holding that the t-shirt designs were parodies that fell under the "fair use" exception of the Copyright Act. Cercone also held that while the Big Dog illustrations included elements that mimiced WWE logos, there was no likelihood of confusion because of the different context – the wrestlers portrayed as dogs – in which they were placed.

After applying the ten factors to be considered when determining whether there is a likelihood of confusion between marks outlined by the Third Circuit in *Interpace Corp. v. Lapp*, 721 F.2d 460, 462 (3rd Cir. 1983), Cercone held that while there were similarities between Big Dog's t-shirt designs and WWE's trademarks and logos, there was no likelihood of confusion between them. He also held that, given WWE's vast media exposure, the t-shirts were not capable of diluting WWE's trademarks, and they were not capable of tarnishing the trademarks because the shorts were no more offensive than WWE's own t-shirts and phrases.

Finally, the court cited the California Supreme Court's decision in *Comedy III Productions, Inc. v. Saderup*, 21 P.3d 797 (Cal. 2001), *see LDRC LibelLetter*, May 2001, at 3, in finding that Big Dog's use of the images of the WWE wrestlers included "significant artistic and imaginative expression ... that outweighs the state law interest in protecting WWE's rights of publicity."

Based on these findings, Judge Cercone granted summary judgment to the defendants.

"Denying Big Dog the opportunity to poke fun at WWE characters and symbols that have become such a major component in today's entertainment media, would constitute a serious curtailment of a protected form of expression."

Defendant Big Dog Holdings was represented by Mark R. Hamilton of Zimmer Kunz of Pittsburgh and Jackie Criswell and David Butman of Tressler, Soderstrom, Maloney & Priess in Chicago. The plaintiff, WWE, was represented by Jerry McDevitt, Curtis B. Krasik, and Jill D. Helbling of Kirkpatrick & Lockhart in Pittsburgh.

[1] World Wrestling Entertainment was formerly known as the World Wresting Federation.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

Media Law Resource Center, Inc.
80 Eighth Avenue, Ste. 200
New York, NY 10011

Ph: 212.337.0200
Fx: 212.337.9893
ldrc@ldrc.com

Bust Enhancing Remedy Ads Don't Implicate Public Issue

Court of Appeal of California Denies Herbal Drug Maker's Anti-SLAPP Motion Against Consumer Group

Trimedica International, Inc.'s Grobust may or may not be the "revolutionary breakthrough that provides a 100% natural alternative" to a "fuller, more beautiful bust." The Consumer Justice Center (CJC) certainly doubts Trimedica literature that substantiates "breast enlargement of one half inch in 45 days," according to a "doctor" endorsing Grobust. The CJC filed suit alleging the false and misleading statements were in violation of California's consumer remedies and unfair competition laws.[1] Trimedica's first line of defense was an anti-SLAPP motion, denied by the Court of Appeal of California. The Court found that Trimedica's commercial speech about a specific product was not in the public interest within California's anti-SLAPP statute. *See Consumer Justice Center v. Trimedica International, Inc.* 2003 WL 1564246, Cal.App. 4 Dist. (2003), 132 Cal.Rptr.2d 191. (Judge Moore).

If a court were to "examine the nature of speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute."

Anti-SLAPP Law

California's broad anti-SLAPP statute gives defendants a special motion to strike suits arising from any act in furtherance of a right of petition or free speech in connection with a public issue, unless the court finds the plaintiff has a probability of prevailing on the claim. Such acts in connection with a public issue include written or oral statements: (1) made before legislative, executive, judicial or any other official proceedings; (2) made in connection with an issue under review or consideration by a legislative, executive, judicial or any other official body or proceeding; (3) made in place open to the public or a public forum in connection with an issue of public interest; and (4) any other conduct in furtherance of the exercise of right to petition or free speech in connection with a public issue or issue of public interest. *See* Cal. Civ. Proc. Code § 425.16 (West 2003).

Statements Not Issue Within Public Interest

The court found that Trimedica's statements were not within the public interest, but rather "commercial speech about the specific properties and efficacy of a particular product, Grobust." Trimedica tried to argue that herbal dietary supplements and other forms of complementary medicine are the subject of public interest. The court rejected this reasoning — if a court were to "examine the nature of speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute." *Consumer Justice Center v. Trimedica International, Inc., 2003 WL 1564246, Cal.App. 4 Dist. (2003).*

The Court also rejected Trimedica's comparison to *DuPont Merck Pharmaceutical Co. v. Superior Court* 78 Ca.App.4th 562 (2000). Statements made by DuPont about Coumadin, a drug that treats blood clots, were considered issues of public interest. The DuPont complaint alleged false statements were made before regulatory bodies, the medical profession and to the public. More than 1.8 million Americans purchased Coumadin for the prevention and treatment of blood clots that could lead to stroke or pulmonary embolism. DuPont's statements qualified as a matter of public interest because of the serious condition and the number of people affected. The same could not be said of Grobust. *Id.*

CJC Likely to Win on Merits

Trimedica's anti-SLAPP motion was alternatively denied because the CJC established a probability of prevailing on the consumer protection and unfair competition claims. CJC submitted the declaration of a professor at the University of California, San Diego with a Ph.d. in biochemistry. The professor found that Grobust's studies were not adequately defined, peer-reviewed in any scien-

(Continued on page 48)

Bust Enhancing Remedy Ads Don't Implicate Public Issue

(Continued from page 47)

tific literature, nor part of a double-blind, placebo-controlled or independent study. She found that Grobust's "doctor" did not have a doctorate or scientific training, but rather received an honorary Doctor of Science degree from an unaccredited institution. Furthermore, she could find no valid research on the individual ingredients of Grobust that supported claims of increased breast size, nor any research on the safety or long-term effects on humans of those ingredients. *Id.*

Mark Boling, Law Offices of Mark Boling, represented the plaintiffs.

Carlos F. Negrete, Law Office of Carlos F. Negrete, represented the defendants.

[1] The CJC is suing under the same unfair competition law, Cal. Bus. & Prof. Code § 17200, et. seq. (West 2003) as plaintiffs in *Nike Inc. v. Kasky*, 27 Cal.4th 939 (2002), *cert. granted*, 123 S.Ct. 817 (Jan. 10, 2003) (No. 02-575).

Publishing False Interest Rates Treated as Fraud Claim

Must Be Pleaded With Specificity Says Washington Federal District Court

By Andrew M. Mar

A Washington federal district court granted *The Seattle Times*' motion to dismiss claims against the newspaper and two Seattle-area mortgage lenders/brokers for publishing advertisements and news articles with allegedly false and misleading interest rates. *Fidelity Mortgage Corp. v. Seattle Times Co.*, Civ. No. C02-2516C (Mar. 13, 2003), 2003 WL 1562477.

The Seattle Times publishes news articles and advertisements containing information about 30-year fixed, 15-year fixed and adjustable mortgages, including note rate percentage, annual percentage rate, loan fee discount percentage, and so forth. The plaintiff, Fidelity Mortgage Corp., sought an injunction and alleged the newspaper's advertising and news articles were "false, deceptive and/or misleading" in violation of the Federal Truth in Lending Act, Washington Mortgage Broker Practices Act, and the Washington Consumer Protection Act. Fidelity Mortgage Corp., a Seattle-area mortgage lender, alleged the false and deceptive interest rates harmed both Fidelity Mortgage Corp. and "those similarly situated."

In response to the newspaper's motion to dismiss, Fidelity Mortgage claimed it did not specifically plead fraud and should not be held to heightened pleading standards. The court disagreed, finding because Fidelity Mortgage's claims were rooted in allegedly false publication, the complaint was "grounded in fraud" and "sound in fraud" and thus subject to the heightened pleading requirements of Fed. R. Civ. Pro. 9(b). The complaint was required to specify the allegedly false statements, give particulars as to the respect in which the statements were allegedly fraudulent, state when and where the statements were made, and identify who was responsible for the false statements. *See In re Glenfed, Inc. Sec. Litigation*, 42 F.3d 1541, 1547 n.7 (9th Cir. 1994).

The court found Fidelity Mortgage's complaint identified the false statements (certain newspaper articles and advertisements), when and where the statements were published (in *The Seattle Times* newspaper) and who was responsible for the statements (at least in part *The Seattle Times*). The plaintiff failed to "give particulars as to the respect in which plaintiff contends the statements are fraudulent," however. *Fidelity Mortgage Corp.* at 4.

> "In other words, the Complaint fails to set forth *why* the information published by the Seattle Times Co. is false or misleading."

In so ruling, the court also struck a declaration from a Fidelity Mortgage executive as evidence outside the pleadings.

The court dismissed the complaint, but with leave to amend.

For Fidelity Mortgage: Gregory P. Cavagnaro of Cavagnaro/Foster (Seattle).

Bruce E. H. Johnson and Andrew M. Mar of Davis Wright Tremaine LLP's Seattle office represent defendant Seattle Times Co. in this matter.

Judicial Watch v. DOJ: "Presidential Communications Privilege" Applies to Clinton Pardon Materials

D.D.C. Denies Access; Holds DOJ Properly Withheld Information

The District Court of the District of Columbia held on March 28 that records relating to pardons issued by former President Clinton were properly withheld under FOIA's "presidential communications privilege", and unwarranted invasion of privacy privilege. In *Judicial Watch v. DOJ, 2003 WL 1737601*, Judge Kessler granted the Department of Justice's (DOJ) motion for summary judgment holding that the department properly denied Plaintiff access to certain documents under FOIA.

Background

Judicial Watch filed a FOIA request with DOJ in February 2001 requesting all documents that "refer or relate...in any way" to pardon applications President Clinton both considered or granted on January 21, 2001. Judicial Watch initiated its suit in March 2001 after DOJ informed it that the request could not be completed within the statutory guidelines. In June 2001, DOJ completed its search and released 597 full documents to Judicial Watch. However, 4341 pages were withheld under FOIA Exemption 5 (presidential communications privilege), and 524 pages were withheld under Exemption 6 (unwarranted invasion of privacy).

"Presidential Communications Privilege" Applies

Judge Kessler first held that DOJ's application of the "presidential communications privilege" was proper. The privilege, Exemption 5 of FOIA, applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency." *5 U.S.C. § 552 (b)(5)*.

The court recognized the historical importance of the privilege and that it is "fundamental to the operation of Government". *(Citing United States v. Nixon, 418 U.S. 683, 708 (1973)*. The privilege also provides "greater

(Continued on page 50)

South Dakota Court Upholds Governor's Secret Pardons

By David Tomlin

A South Dakota judge has upheld the right of the state's governor to hear and grant requests by convicted criminals for executive pardons entirely in secret. *John Doe, Jane Doe, John Doe #2, and Others Similarly Situated v. Chris Nelson*, Civ. 03-417.

Circuit Court Judge Glen A. Severson of the Second Judicial Circuit based his decision on a 1972 state constitutional amendment that provides simply that the governor may grant pardons.

The case arose when the Sioux Falls Argus Leader asked the secretary of state to release the names of several persons pardoned by former Gov. Bill Janklow between 1995 and 2002.

Statutory law in South Dakota permits sealing of pardons granted by the governor following application and hearing procedures specified in the law. But the governor granted some pardons without any such open preliminaries. The newspaper argued that these pardon records could not be sealed, and when asked for an opinion, the state's attorney general agreed.

Several of the pardoned individuals immediately filed application anonymously for a court order against the release of their pardon records.

The Argus Leader, The Associated Press, and several other South Dakota news organizations filed an amicus brief in which they argued among other things that the public has a right under both common law and the U.S. Constitution to an open process for requesting and considering pardons, even if the pardon records themselves can be sealed.

Judge Severson rejected those arguments. The 1972 amendment clearly gives the governor sole authority over the pardon process, he wrote. Limiting it by statute or in any other way would violate the separation of powers doctrine. In granting pardons, the governor can choose not to follow the statutory process of open applications and hearings conducted by the state Board of Pardons and Paroles.

"Presidential Communications Privilege"

(Continued from page 49)

protection against disclosure" than other privileges, and that once the privilege is invoked, a presumption against disclosure is raised. *(Quoting In re Sealed Case, 121 F. 3d 729, 746 (D.C. Cir. 1997))* When the privilege is invoked, the court stated, courts should defer to the executive branch because of the President's need to communicate with advisors freely. *(Citing Nixon v. Administrator of General Services, 433 US 425, 448-49 (1977)).*

Former President Can Invoke It

The court rejected Judicial Watch's argument that the privilege could not be asserted on behalf of a former president. The D.C. Court of Appeals directly rejected this argument earlier in *Dellums v. Powell*, in which it held that the privilege, "does not disappear merely because the president who made or received the communication dies, resigns, or has completed his term." *(Quoting Dellums v. Powell, 561 F. 3d 242, 248 (D.C.Cir.1977))*

The privilege also provides "greater protection against disclosure" than other privileges, and that once the privilege is invoked, a presumption against disclosure is raised.

Judge Kessler recognized that the arguments favoring non-disclosure carry less weight when the privilege is invoked for a former president. However, the court gave "great deference" to the fact that the Bush administration asserted the privilege on behalf of President Clinton in order to protect the "institution of the Presidency".

Judicial Watch also contended that the privilege was not applicable in this situation because the documents at issue did not directly involve either President Clinton or other members of his White House staff. The concern that the privilege would encompass an excessively broad segment of the executive branch was not relevant in this situation as the documents at issue were created by President Clinton's advisors for the purpose of advising the President. As stated in *In re Sealed Case*, the documents, "were generated in the course of advising the President in the exercise of...a quintessential and nondelegable Presidential power." *(Quoting In re Sealed Case at 752-753)* Finally, the court held that there was no indication that DOJ had asserted the privilege so as to deny access to documents and information not related to the pardon process.

Denial of Access Under "Unwarranted Invasion of Privacy" Exemption Proper

The court also held that DOJ properly refused to release certain documents under FOIA Exemption 6. This Exemption applies when a disclosure would constitute an invasion of privacy of those individuals mentioned in the documents at issue. Judicial Watch argued that this Exemption does not apply because the FOIA request was not made with the intent to gain information on those individuals seeking pardons, but the process by which President Clinton made his decisions. Judge Kessler rejected this argument holding that notwithstanding Judicial Watch's intent, the documents contained "non-public, personal information regarding the applicants" which would be revealed.

Judicial Watch also claimed that the pardon applicants were convicted felons whom did not enjoy the same level of privacy interest as other Americans. Again, the court rejected Judicial Watch's claim by citing Supreme Court precedent which held that,

> "requests for the type of information withheld by DOJ in this case can reasonably be interpreted as unwarranted invasions of personal privacy subject to privacy protection under FOIA, even if the information concerns possible felons."

(citing United States Dep't. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989)

Finally, the court also dismissed Plaintiff's argument that a balancing of the public's interest for disclosure against the privacy interests against falls in favor of access. As the presidential communications privilege had already been held to apply, the court could not find any reason how disclosure of these documents would enhance the public's knowledge and understanding of "non-privileged activities of the government."

For Judicial Watch: Larry Klayman and Paul Orfanedes (DC)

For DOJ: Anne Weismann of DOJ, Civil Division, Federal Programs (DC)

UPDATE: The Continuing Fight For Enron Documents

Judge Harmon Orders Enron to Produce Detailed Privilege Log to Media

By Pete Kennedy

Federal Judge Melinda Harmon of the Southern District of Texas (Houston) is presiding over the massive consolidated securities fraud litigation arising out of the collapse of Enron. To date, general discovery in the litigation has been stayed pending the Court's ruling on various motions to dismiss, but with an important exception. Early in the case, Judge Harmon ordered the creation of a Document Depository and ordered Enron to produce into that depository those documents that Enron had previously assembled and provided to the various government agencies and legislative committees that were investigating Enron. *See* MLRC MediaLawLetter February 2003 at 33 ("The Fight For Enron Documents").

Fight Over Confidentiality Order

Along with the wrangling over the form of the Document Depository came a dispute over whether a confidentiality order should restrict disclosure of the documents contained in the depository, and if so, how broad an order should be entered. Enron claimed that segregating confidential from non-confidential documents would be too great a burden, and it sought a "blanket" order that would presume all documents in the depository were confidential unless the plaintiffs could convince the Court otherwise. To their credit, the plaintiffs refused to agree to an order that would have lowered a dark veil of secrecy over much of the Enron securities litigation.

Dow Jones, joined by Gannett, The New York Times, The Washington Post, ABC news, The Houston Chronicle and The Reporter's Committee for Freedom of the Press, intervened to challenge Enron's request for a blanket confidentiality order. Although Enron and other parties challenged the intervention, in December 2002 Judge Harmon found that the media's interest was different enough from that of the plaintiffs to provide independent standing to be heard on issues concerning confidentiality of documents and proceedings in the litigation.

Judge Harmon also rejected Enron's request for a blanket protective order, and required Enron to identify specific categories of information and documents it claimed were confidential, and to support those claims with specific evidence. Enron filed a motion in January 2003 in an effort to do so, identifying four categories of documents it wished to protect: (1) personnel files; (2) documents related to Enron's outstanding claims against other parties; (3) documents concerning assets Enron hopes to sell off; and (4) "competitively sensitive and/or privileged information related to contracts and trading relationships." Although this

(Continued on page 52)

Proceeding Closures Ordered: Fourth Circuit Closes Arguments in Moussaoui Case

Moussaoui Cannot Argue on Own Behalf

In a March 24 order, the Fourth Circuit closed oral arguments in the Zacarias Moussaoui case. Set for May 6, the hearing will evaluate Judge Leonie Brinkema's decision to grant Moussaoui's attorneys access to Ramzi Binalshibh, another September 11 suspect. The order is the only one recalled in which the court has closed arguments to the public. The Fourth Circuit claimed that it had the authority to close the hearing under a federal statute relating to the use of classified information in a criminal trial. Media organizations are planning to request the Fourth Circuit to reconsider the order and permit access to the hearing. The government claims that granting Moussaoui access at this juncture would frustrate their interrogation of him and overall fight against terrorism.

On April 9, the Fourth Circuit issued another order which forbid Mossaoui from presenting his arguments himself before the court. Moussaoui's court appointed attorney, Edward MacMahon, said that the decision is not surprising as Moussaoui is not cleared for classified information, and that criminal defendants are rarely permitted to argue their own side in front of appellate courts.

However, on April 15 the Fourth Circuit cancelled arguments and remanded the case back to the district court.

Enron Judge Orders Production of Privilege Log to Media

(Continued from page 51)

appeared to narrow Enron's proposed confidentiality order, as a practical matter the categories were so broadly defined that they permitted Enron to designate documents as secret almost at will.

Judge Harmon heard Enron's motion on March 28, 2003, in a courtroom packed with no less than 75 lawyers. Enron's counsel reported that Enron had deposited about 19,000,000 pages of documents into the Document Depository. About 1% of the documents remain to be deposited, primarily documents which were seized by the FBI.

Of those 19,000,000 pages, Enron's counsel claimed it had initially identified some 44,000 as being potentially within the categories of documents it wishes to keep confidential. Half of those documents had been reviewed individually, he said, and about 4,000 were likely to be claimed as confidential. If the same proportion holds, Enron appears to have reduced its claim of confidentiality from 19,000,000 pages to approximately 8,000 – a reduction of about 99.95%.

Judge Harmon's order requiring a "rolling production" of a privilege log to the media represents a nearly unprecedented level of court-ordered access to the internal workings of the discovery process in civil litigation.

Judge Harmon remained skeptical, however, and refused to enter Enron's protective order because the four categories were too broad and ill-defined. Instead, she gave Enron 60 days (until May 26) to complete its review of documents for confidentiality and to file another motion with evidence supporting the confidentiality claim as to each purportedly confidential document. She also granted the media intervenors' request on two highly significant points.

Enron Must Maintain Rolling Log

First, Judge Harmon ordered that Enron create a privilege log that specifically identified the documents which it sought to keep confidential, and ordered Enron to produce that log to the media intervenors as well as to the parties to the litigation. Enron must produce that log on a "rolling" basis; that is, Enron should be producing the log as it is created, not at the end of the 60-day period.

Second, Judge Harmon granted the media intervenors standing equal to that of the parties to the litigation to object to the designation of any of the documents as confidential. Her order continues to place the burden on Enron to prove a valid basis for keeping any of its documents secret and overcome a presumption of openness.

Judge Harmon's order requiring a "rolling production" of a privilege log to the media represents a nearly unprecedented level of court-ordered access to the internal workings of the discovery process in civil litigation. And once Enron identifies those documents it seeks to designate confidential, the great mass of other documents in the Document Depository will be subject to public disclosure by the parties and their counsel, without fear of sanctions by the court. Hopefully these are the first steps in a process that will lead to much greater access to the great mass of documents Enron has provided to the various federal government agencies investigating it and its various officers and employees. Perhaps Judge Harmon's sensible approach will encourage other judges to view blanket protective orders with skepticism and to carefully scrutinize efforts by parties in significant civil litigation to conduct litigation behind closed doors.

Pete Kennedy is a partner with George & Donaldson, Austin, Texas, who is representing the media along with David Donaldson.

Media Entities Help Persuade the New York Stock Exchange to Drop Proposed Rule Mandating Certain Disclosures in Press Reports

By Thomas Golden

A number of media entities recently weighed in on a proposed New York Stock Exchange rule that could have had the effect of mandating certain disclosures in print news reports, and they succeeded in getting the Exchange to drop the problematic features of that proposal.

Proposal on Analysts' "Public Appearances"

Under Section 501 of the Sarbanes-Oxley Act of 2002, the SEC (or, with the SEC's authorization and at its direction, a national securities exchange) is required to adopt rules "reasonably designed to address conflicts of interest that can arise when securities analysts recommend equity securities in research reports and public appearances." Consistent with that, last year the New York Stock Exchange submitted to the Securities and Exchange Commission proposed new rules governing research analysts' communications with the public. *See* NASD and NYSE Rulemaking: Proposed Rule Changes Relating to Exchange Rules 344, 345A, 351 and 472 and the National Association of Securities Dealers, Inc., Securities Exchange Act of 1934 Release No. 34-39110 (December 31, 2002).

Among other things, the proposed rule would have defined "public appearances" to include interviews with the print media. It also would have required research analysts who give such interviews to disclose various items of information that the Exchange deemed to be generally relevant to analysts' potential conflicts of interest, including whether they or their employer had financial interests in the companies being discussed.

While the proposed rule did not explicitly state what would happen if the media outlet omitted the mandated disclosures in its own reports, a June 26, 2002 joint memorandum issued by the Exchange with the NASD suggested that the Exchange would expect the analyst to refrain from future contact with that outlet.

A number of news organizations, including Bloomberg News, The Associated Press, Dow Jones & Company, Forbes Inc., Gannett Company, The McGraw-Hill Companies, Inc., The New York Times Company, Reuters, Time Inc., Tribune Company, and The Washington Post Company filed with the SEC comment letters objecting to the proposed rule. They argued that the proposed rule, while in many respects consistent with good journalism, nonetheless could constitute a dangerous encroachment on editorial discretion, and an impermissible governmental regulation of the content of news reports.

In that regard, the comments cited *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in which the Supreme Court stated:

> A newspaper is more than a passive receptacle or conduit for news, comments and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues… — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258. Commentators noted that the rule, while not directly applicable to the media, nonetheless constituted an indirect — and therefore still impermissible — governmental restriction on speech, because its effect would be to punish non-complying media entities by restricting their access to sources. *See Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 12 (1986) ("[u]nder *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden."). The comments requested that the proposed rule eliminate any requirement that analysts decline subsequent interviews with media entities that do not publish the disclosures in question.

Proposed Rule Withdrawn

The Exchange apparently took the concerns to heart. Earlier this month, it withdrew its proposal to penalize analysts if the publications to whom they give interviews failed to report the conflict-of-interest disclosures. As New York Stock Exchange Chairman Richard Grasso was quoted as saying, while the Exchange would still require analysts to make the mandated disclosures to the print media, "what the media do with [the disclosures] is entirely up to them." The Exchange is expected shortly to file a revised proposal with the SEC.

Thomas Golden is a member of Willkie Farr & Gallagher, which regularly represents Bloomberg News.

Gag Order in San Francisco Police Trial Rejected

By Thomas Burke

A prosecution's request for a gag order and a defense motion to keep the grand jury transcripts sealed were rejected in separate hearings held by San Francisco Superior Court Judge Kay Tsenin, who is handling pre-trial motions in a highly publicized criminal case involving the highest ranking officials with the San Francisco Police Department. Superior Court of the State of California for the City and County of San Francisco, Department No. 22, *People v. Alex Fagan, Jr., David Lee; Matthew Tonsing; David Robinson; Greg Suhr; John Syme; Ed Cota; and Greg Corrales*, SCN No. 188728; MCN 2096549 (Fagan Jr); MCN 2096548 (Lee); MCN 2096547 (Tonsing); MCN 2096552 (Robinson); MCN 2096550 (Suhr); MCN 2096553 (Syme)
MCN 2096551 (Cota); MCN 2096554 (Corrales).

DA: Gag Me In Cop Assault Case

The case involves three off-duty officers who are charged with assaulting two men on Union Street one early morning in November. The off-duty officers had just left a celebration for the Assistant Chief, Alex Fagan, Sr. and one of the three officers facing assault charges is Alex Fagan, Jr., the Assistant Chief's son. Five senior officers in the department were also accused of conspiring to hamper the investigation of the alleged assault.

The department and local politicians received national press scrutiny after the grand jury returned felony conspiracy indictments against Chief of Police Earl Sanders and Alex Fagan, Sr. and other senior members of the department. The indictments of Sanders and Fagan, Sr. were later dismissed by San Francisco District Attorney Terrence Hallinan. Sanders is currently on medical leave; Fagan, Sr. is now running the department in Sanders' absence.

On March 14, Judge Tsenin began a hearing on the District Attorney's request for a gag order by distributing a tentative order that would have effectively silenced all counsel and witnesses. District Attorney Hallinan literally pleaded "gag me" in his argument to the Court insisting that media reports were threatening the integrity of the judicial process as well as the rights of the defendants to receive a fair trial.

Defense attorney Stuart Hanlon, arguing on behalf of his client and the other defendants took exception to the District Attorney's professed concern for this client's fair trial rights. Hanlon offered the Court numerous examples of published public comments by Hanlon since November. In particular, Hanlon was critical of published comments made by the District Attorney comparing the alleged police cover-up of the incident to Watergate.

Court Opens Grand Jury Transcript

A Media Coalition and the San Francisco Chronicle also objected to the court's tentative gag order. Counsel emphasized that a gag order would be counter-productive and interfere with the media's ability to inform the public about these important proceedings. Judge Tsenin announced that she had been persuaded and would not issue a gag order.

On March 19, Judge Tsenin rejected a request by counsel for defendant Fagan, Jr. and other defendants to keep under seal, the 1,300 page grand jury transcript. This time, the District Attorney objected to the request to seal.

By statute in California, shortly after grand jury indictments are returned, transcripts are to be publicly available absent express findings by the trial court that justify continued sealing. Observing that "it's leaking out everywhere," Judge Tsenin noted that portions of the then-sealed grand jury transcript had already been published. Judge Tsenin rejected the defendants' the request to seal but agreed to redact telephone numbers from the grand jury transcript and approximately three pages worth of testimony that she labeled "inflammatory" and "extremely prejudicial."

At a hearing on April 4, Judge Tsenin dismissed all conspiracy charges against the defendant officers prompting yet another round of media attention.

The assault charges against the three off-duty officers remain and may be tried this summer. At the request of defense counsel and apparently without a hearing and without making findings of fact, Judge Tsenin initially sealed the blood-alcohol test results for the defendants. The media objected to this sealing. Nevertheless, the sealing has not prevented press coverage. On April 2, relying on "confidential sources," the San Francisco Bay Guardian reported that the off-duty officers' blood-alcohol contents were well above legal limits at the time of the alleged incident. And on April 15, the judge ruled that the test results should be public, but will remain under seal pending appeal.

Thomas R. Burke, Davis Wright Tremaine LLP, San Francisco, and his partner, Duffy Carolan, were involved on behalf of the Media Coalition. Roger Myers represented the San Francisco Chronicle in these proceedings.

NJ Judge Allows Release of Confidential Youth Records for "Good Cause"

By Bruce S. Rosen and David E. McCraw

A New Jersey magistrate judge has ruled that a protective order in a federal class action should be modified to allow release of thousands of pages of confidential state documents about abused and neglected children. *Charlie and Nadine H. v. Whitman*, Civ. Action No. 99-3678 (D.N.J. March 2003), 213 F.R.D. 240.

The documents are, like most juvenile protective records, highly confidential, and the state fought to limit their release under a strict protective order that was put into place during the discovery phase of the class action, in which children in foster care are suing the state. Nevertheless, U.S. Magistrate Judge John J. Hughes, citing "great public interest, impacting on the health and safety concerns" of wards of the beleaguered Division of Youth and Family Services ("DYFS"), extended Third Circuit law to rule that the newspapers had established "good cause" and allowed their release with redactions of identities.

This is the first time that the ruling had been cited to extend public access to highly confidential child protection agency records.

The motion to modify the protective order was brought by *The New York Times*, which was later joined by the *Newark Star Ledger*. The class action is being litigated by on behalf of foster children placed by DYFS brought by the New York-based advocacy group Children's' Rights, Inc. The documents are expected to detail the cases of foster children who died, were critically injured, or were abused while under DYFS supervision.

The agency has been operating under a "state of emergency" since January 2003, shortly after Faheem Williams, a 7 year old Newark boy under DYFS care, was found dead in a plastic storage bin and his two brothers were found beaten and starving.

Hughes ruled in *Charlie and Nadine H. v. Whitman*, Civ. Action No. 99-3678, which will be published.

> "Furthermore, it is important that government entities be held accountable for their actions not only to prevent further tragedies like the case of Faheem Williams, but to answer to its citizenry, whose taxpaying dollars support DYFS."

The Third Circuit's 1994 decision in *Pansy v. Borough of Stroudsberg*, 23 F.3d 772, which not only allows easy media intervention to obtain sealed documents but shifts the burden to the party seeking continued confidentiality, makes public interest a key factor favoring a finding of "good cause" for modification. This is the first time that the ruling had been cited to extend public access to highly confidential child protection agency records.

In opposing the release, the state asserted that federal courts were required to abstain and defer to the state courts or to apply state confidentiality statutes. The state also speculated that disclosure of the documents

(Continued on page 56)

Amendments to Mississippi Open Meetings Act

By Christopher R. Shaw

Public bodies that violate Mississippi's Open Meetings Act could now face penalties for intentionally closing meetings that are supposed to be open under the Act. Governor Ronnie Musgrove signed House Bill 454 which fines a public board $100 for "willfully and knowingly" violating Mississippi's Open Meetings Act, codified at Section 25-41-1, *et seq*. of the Mississippi Code of 1972. The new law amends Section 25-41-15 of the Code which provides no such penalties. In addition to the $100 fine, the amendment allows a court to award "all reasonable expenses incurred by the person or persons in bringing suit to enforce the chapter." A Senate proposal would have limited legal expenses to $1,000.

Christopher Shaw is an Associate at Phelps Dunbar LLP in Jackson, Mississippi.

NJ Judge Allows Release of Confidential Youth Records for "Good Cause"

(Continued from page 55)

would discourage persons from referring cases to the agency. But Judge Hughes did not buy the state's arguments.

> "Defendants need do more than assert non-binding state confidentiality statutes to support their contention that release of state case records may compromise the privacy interests," he ruled.

Nonetheless, Hughes did attempt to accommodate privacy concerns by ordering that certain information be withheld. He directed that the parties were to redact all identifying information except the names of deceased children, which are public under federal law, and the names of state employees. He also declined to allow the release of records pertaining to investigations where abuse or neglect allegations were not fully substantiated, although he said he would allow further argument on that point if the intervenors could more fully demonstrate the public interest in those cases.

The mechanics of the release was the subject of much discussion with the court and among the attorneys. In the end, Hughes ruled that the state would redact the documents at the expense of the intervenors even though the actual release of the materials would come from the plaintiffs. Because of the number of documents involved, there was a further question as to how the key documents were to be selected for release without violating the protective order. Ultimately, reporters for the intervenors provided Children's Rights with information on the kinds of cases that were of interest, and Children's Rights then identified the files for release. Both The Times and The Ledger declined the judge's initial proposal that their lawyers be given attorneys' eyes-only access to do the selection

The state did not appeal and the redaction process is under way. The class action itself is still active and nearing the close of discovery. The first batch of redacted documents were released by Children's Rights on April 14.

David E. McCraw of The Times and DCS Member Bruce S. Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh represented Intervenor The New York Times, P.A. of Chatham N.J. while Donald Robinson of Robinson & Livelli of Newark represented Intervenor The Star Ledger. Defendant The State of New Jersey was represented b Deputy Attorney General Stephanie A. Brand and Charles M. Hart of Wolf, Block, Schorr, Solis-Cohen, L.L.P of Philadelphia. Plaintiff Children's Rights was represented by Eric Thompson, Marcia Robinson Lowry and Susan Lambiase as well as Patrick J. Whalen and Michele Nance of Lowenstein Sandler of Roseland, N.J. (also a DCS member)

Where You Stand is Decisive — People v. Kopp: New York's Statutory Courtroom Camera Ban Does Not Apply to Still Photography

By Joseph Finnerty

Introduction

Almost three years ago, a commentator in the LDRC *LibelLetter* (*see* June 2000 at 39) observed that judicial impatience with the New York Legislature's failure to repeal or modify its 1950s-era ban on cameras in courtrooms, N.Y. Civil Rights Law §52 ("§52"), had resulted in "...a kind of judicial version of the civil rights movement."

§52 contains a blanket ban on "...televising, broadcasting or taking of motion pictures..." in courts and other adjudicative forums within the state.

Beginning with the Nassau County Supreme Court's decision in *People v. Boss*, 182 Misc.2d 238, 707 N.Y.S.2d 308 (2000), individual judges began to address the statute and, by declaring it unconstitutional, to express in their decisions the dissatisfactions rife within the state of citizens clamoring for less fettered access to their courts in this age of instantaneous information.

The Legislature has remained intransigent and, thus far, appellate courts presented with the issue have avoided it, *see Santiago v. Bristol*, 273 A.D.2d 813, 709 N.Y.S.2d 724 (4th Dep't 2000), *Barron v. Colabella*, 296 A.D.2d 585, 745 N.Y.S.2d 829, *and* 2002 N.Y. App. Div. LEXIS 7757, 745 N.Y.S.2d 728 (2nd Dep't 2002), on grounds that, although articulated as procedural, have had the substantive effect of maintaining a status quo that has proliferated inconsistency of access across the state.

The number of trial courts that have declared §52 unconstitutional or limited its reach have multiplied exponentially, *see* partial Census, *infra*. But others, *see*, *e.g.*, *People v. Grady*, (Albany County Court, June 7, 2001) (unpublished) and *People v. Alvarez-Hernandez*, 2002 N.Y.Misc. LEXIS 1623 (Westchester County Court (2002)), have declined to cross that line.

County-Wide Schizophrenia

Now, with the recent combined decision of Erie County Court Justice Michael L. D'Amico (sitting as both County Court Judge in *People v. Kopp*, Indictment No. 98-25555-S01, and Acting Supreme Court Justice in the companion case of *The Buffalo News, et al. v. The State of New York, et al.*, Index No. I2002-13043, ____ Misc.2d ____, ____ N.Y.S.2d _____, 2003 N.Y. Misc. LEXIS 211, 2003 W.L. 1700100) ("*Kopp*"), the inconsistency has attained its illogical (or, on a county-wide basis, perhaps schizophrenic) extreme: in the opinion, the judge granted *The Buffalo News*' request to construe §52 as being inapplicable on its face to bar still photographic coverage but dismissed *The News*' and two television news stations' declaratory judgment actions to declare §52 unconstitutional; but within the same county two years ago, a different judge on declaratory judgment determined §52 to be unconstitutional, *see People v. Jones*, Indictment No. 98-2415-002 (unpublished, April 30, 2001) (DiTullio J.) ("*Jones*").

So, within a single county, still photo coverage seems to be acceptable across the board because it is not encompassed within §52 (*Kopp*) or because the law is unconstitutional (*Jones*), but as far as television cameras are concerned: they are out (*Kopp*)--or in (*Jones*)--and §52 may be constitutional (*Kopp*)--or not (*Jones*)--

(Continued on page 58)

Where You Stand is Decisive — People v. Kopp

(Continued from page 57)

depending on where you stand in the same building, Erie County Hall.

Confused? If so, read *Kopp* and the rest of this note, not for clarity, but for an illustration of the confusion that results when leadership lapses.

The Ruling

New York jurisprudence regarding the Legislature's ban on courtroom camera coverage moved one incremental step forward in favor of print media with the Supreme Court/County Court decision in *Kopp*. Judge D'Amico ruled that §52 does not apply to still photography. However, the decision was a step backward for electronic media, as the Judge ruled that the statute's ban on video cameras is not unconstitutional.

Two different Erie County and Supreme Court judges now have ruled in diametrically opposed ways on the issue of the constitutionality of §52.

Procedural Complexities

Traditionally, media outlets have used intervention as the vehicle for addressing access and rights-related concerns before the courts. However, in *Santiago v. Bristol*, *supra*, the appellate court held that a stand-alone intervention motion was an insufficient vehicle through which to seek camera access to New York courtrooms. Intervention, the court determined, can be used only if there is an underlying right that the intervenor seeks to enforce. Because it concluded that the press has no previously determined right to camera access to court proceedings, intervention does not lie and, instead, the press "...should have commenced a declaratory judgment action in Supreme Court challenging the constitutionality of the statute and rule barring such coverage [citation omitted]." 273 A.D.2d at 814, 709 N.Y.S.2d at 725.

Sought Access to Anti-Abortion Sniper Trial

As a result, *The Buffalo News*, later joined by two local television stations, WGRZ-TV (Gannett, NBC Dateline) and LIN Television Corporation (CBS), started a declaratory judgment action coupled with an intervention motion in order to comply procedurally with the Fourth Department's 2000 decision in *Santiago*.

Actually, *The News* asserted both an intervention motion in the context of the pending criminal action (on the theory that, if §52 were inapplicable to still photography, then the more arcane procedural requirement of *Santiago* should not apply, *see People v. Zwack*, 188 Misc.2d 761, 729 N.Y.S.2d 846 (Co. Ct. Rensselaer Co. 2001)) and a concurrent, separate declaratory judgment action (to satisfy *Santiago* in the event the Court determined §52 to be applicable). It expressly asked the court to decide its still photography access application in the context of *both* the intervention motion and its declaratory judgment action. It moved for summary judgment on all issues within the declaratory judgment action.

The News sought a ruling that §52 is inapplicable to still photography or that, if the court were to determine it applied to still photography, a declaration that it is unconstitutional under both the state and federal constitutions. *The News* on behalf of Robert Kirkham, one of its cameramen, also asserted a state and federal equal protection argument that, if the statute barred still photography, it was an impermissible discrimination inasmuch as sketch artists routinely are permitted to record and publish still images of in-court activity.

The context of the challenge was *The News*' desire to photograph the murder trial, then scheduled for early March, of anti-abortion activist James C. Kopp ("Kopp") for the 1998 sniper shooting of abortion provider Dr. Barnett A. Slepian in his home just outside of Buffalo.

The New York Attorney General appeared on behalf of the state defendants in the declaratory judgment proceeding, opposed the summary judgment motion and moved to dismiss all of the petitioners' complaints for constitutional relief. She expressly declined to oppose *The News*' statutory construction claim that §52 does not apply to still photography.

(Continued on page 59)

Where You Stand is Decisive — People v. Kopp

(Continued from page 58)

Rules Bar Doesn't Apply to Stills

Judge D'Amico ruled in *The News*' favor on the still photography statutory construction issue. He wrote: "The Court concludes that still photography is not covered by CRL § 52." However, he made the ruling only within the context of the intervenor motion. This appears to be proper procedurally, *see People v. Zwack, supra.* He dismissed the declaratory judgment actions in their entirety.

In media-helpful language, he rejected defendant's objection to still photo coverage (interestingly, defendant did not object to video cameras):

> The defendant makes many of the usual arguments against allowing cameras in general when opposing the use of still photography. Most notably he argues that a cameraman moving about the courtroom would be disruptive and . . . may influence the jury by the mere fact that his shutter clicks at certain junctures thereby emphasizing a particular witness or specific testimony. Those arguments are frequently made by opponents of cameras in general when they point out that TV stations may show only brief excerpts of the day's trial testimony on the nightly news. It is naive to presume that jurors, not sequestered during a trial, would firstly, be unable to discern for themselves what testimony is important and, secondly, be aware of news coverage in general of a high-profile criminal case on which they serve as jurors. Just as these arguments have been unsuccessful in limiting or preventing camera use in those jurisdictions which have opted to allow cameras, they are unsuccessful here . . . .

Thus, while *The News* "won" its case (and later covered Kopp's trial with still cameras), the electronic media failed to obtain relief appropriate to their video needs. They subsequently applied for and received Judge D'Amico's approval to participate in still photo coverage of the trial.

Aftermath

The effect of *Kopp* is twofold. First, taken together with *Jones* there now exist within Erie County both Supreme Court-level and County Court-level decisions (made on both intervention applications and within the context of a declaratory judgment action) determining (both on constitutional grounds and as a matter of statutory construction — the latter with the apparent consent and concurrence of the State Attorney General) that §52 is inapplicable to ban still photographers from the state courts on a blanket basis. Presumably, news organizations, at least within the county, now may apply informally to photograph state trial court proceedings. Thus still photography appears to be permissible, at least county-wide, on a judge-by-judge basis.

Second, by virtue of the *Kopp* decision Erie County has achieved the dubious distinction of exemplifying within its borders the state of confusion and lack of predictability regarding camera access that has plagued the courts statewide since the 1997 sunset of the ten-year experiment with cameras in the courtroom during which §52 was suspended.

Two different Erie County and Supreme Court judges now have ruled in diametrically opposed ways on the issue of the constitutionality of §52.

In Judge DiTullio's courtroom §52 is unconstitutional and video cameras, as well as stills, are welcome on a case-by-case application basis. *People v. Jones, supra.* In her decision, Judge DiTullio specifically held that the media's presumptive First Amendment right of access to trial court proceedings includes the right to broadcast those proceedings and a concomitant right of the public to view them.

In Judge D'Amico's court, there is no constitutional right to camera access and, indeed, electronic video coverage is banned by virtue of §52. However, there is also no statutory proscription of still photo coverage, which now presumably may be obtained, at least in *this* judge's courtroom, by a simple application. Electronic camera operators, however, need not apply: they are statutorily and constitutionally banned and there is no room for judicial discretion to permit them, no matter how compelling the case.

(Continued on page 60)

Where You Stand is Decisive — People v. Kopp

(Continued from page 59)

Judge D'Amico's court and Judge DiTullio's are in the same southeast corner of the second floor of Erie County Hall. If you are a member of the media, then, depending on whether you are toting a video camera or a still camera, your courtroom access--and your constitutional rights--depend on which way you turn when you get to the end of the hallway.

Next Steps

Absent further proceedings on Judge D'Amico's Order in the Fourth Department, it would appear that the next — and perhaps decisive--phase of the cameras-in-the-courts battle will shift to the First Department. Court TV has moved for summary judgment within its declaratory judgment action there, and the matter is scheduled for submission toward the end of May and oral argument thereafter. *Courtroom Television Network LLC v. The State of New York, et al.*, Index No. 116954/01 (Sup. Ct., N.Y. Co.) (Kornreich, J.).

Census of Pro-Media Decisions

To assist media practitioners within New York in future camera-access applications, we have compiled a census of trial court rulings that have permitted camera coverage. The list is probably incomplete, inasmuch as many such decisions remain unpublished. Indeed, many of the decisions on this list fall within this category and were identified anecdotally and confirmed, either telephonically or in writing, whenever possible with the courts of issuance.

In addition to *Kopp*, we have located at least sixteen cases:

Boss, *supra* (holding §52 unconstitutional under both the First Amendment and Article 1, §8 of the New York State Constitution, allowing audio-visual coverage of proceedings);

- *People v. Zwack*, 188 Misc.2d 761, 729 N.Y.S.2d 846 (Rensselaer Co. Ct. 2001) (holding §52 does not apply to still photography);
- *Coleman v. O'Shea*, 184 Misc.2d 238, 707 N.Y.S.2d 308 (Sup.Ct. Albany Co.2000) (declaring §52 unconstitutional and granting application to televise);
- *People v. Barron*, ___ N.Y.S.2d ___ (Sup.Ct. Kings Co. 2002), *dismissed sub nom*, *Barron v. Colabella*, *supra*, (declaring §52 unconstitutional and granting applications to photograph, televise and broadcast);
- *People v. Seiriz* (Onondaga Co. Ct. 2000) (granting audio-visual coverage of sentencing over objections of District Attorney and defendant);
- *People v. Jones* (Erie Co. Ct. 2001) (declaring §52 unconstitutional and granting application to televise over the objection of defendant);
- *People v. Schroedel* (Sullivan Co. Ct., March 5, 2001), ("*Schroedel I*") (granting newspaper application to photograph over objections of defendant);
- *People v. Schroedel* (Sullivan Co. Ct., March 5, 2001), ("*Schroedel II*") (declaring §52 unconstitutional and granting application to video criminal trial over objections of defendant);
- *People v. Seeber* (Saratoga Co. Ct. 2001);
- *People v. Hampshire* (Saratoga Co. Ct. 2001);
- *People v. Koester* (Madison Co. Ct. 2001);
- *People v. Strawbridge* (Albany Co. Ct. 2000);
- *People v. Baker* (Tioga Co. Ct. 2000); *People v. Sabendra* (Otsego Co. Ct. 2000);
- *People v. Hall* (Warren Co. Ct. 2000);
- *People v. Santiago*, (Monroe Co. Ct. 2000), *rev'd on procedural grounds*, *Santiago v. Bristol*, *supra*, *appeal dismissed* 95 N.Y.2d 847, 735 N.E.2d 1286 (2000), *appeal denied* 95 N.Y.2d 848, 735 N.E.2d 1286 (2000).

Counsel who appeared in *Kopp* are: for *The Buffalo News*, Stenger & Finnerty (Joseph M. Finnerty, of counsel); for WGRZ-TV/Gannett/NBC Dateline, Nixon Peabody, LLP (Mark A. Molloy, of counsel); for LIN Television Corporation (CBS), Hodgson Russ (Paul I. Perlman, of counsel); for the State of New York defendants, Assistant Attorney General Barbra Kavanaugh; and for the United States, as *amicus curiae* opposing camera coverage, Assistant United States Attorney Kathleen Mehltretter.

Joseph Finnerty, Stenger and Finnerty (Buffalo, New York) received assistance with this article from Lynn Montante and Karim Abdulla, associates with the firm.

FOIA: Balancing Act

For nearly 40 years, the Freedom of Information Act (FOIA) has given the public access to government files. Enacted under the philosophy that transparency is critical to political legitimacy, FOIA established a presumption of openness of and accessibility to government records by placing the burden on the government to prove a need for secrecy.

September 11 has clearly tipped the scales away from public access. The terrorist attacks have prompted a complete rethinking of how to balance openness and national security, and in some cases, resulted in the scaling back of document access.

Here's a look at some developments on the FOIA front:

- There has been inconsistent agency response to a Justice Department memo that lowered the standard for refusing FOIA requests, according to a survey released March 14th by the National Security Archive, a watchdog group at the George Washington University that monitors public access to government information under FOIA.

  In a October 2001 memo to all federal agencies, Attorney General John Ashcroft said FOIA requests could be denied on "a sound legal basis," a more lenient showing than the "foreseeable harm" standard set by the Clinton Administration in 1993.

  In a survey of 35 federal agencies, 25 of which account for 97 percent of all federal FOIA processing, the Archive found that 15 percent (including the Departments of the Air Force, Army and Navy and the Nuclear Regulatory Commission) had adopted significant changes after receiving the Ashcroft memo. In general, the changes indicate a move away from a presumption of disclosure to special consideration for institutional and personal privacy interests, especially of military personnel. Most other agencies, however, indicated little or no change in the way they handle FOIA requests.

  In conducting its survey, the Archive also said it discovered "a federal FOIA system in extreme disarray." The group said Internet contact information was often inaccurate and response time was generally poor with just 11 agencies answering within the 20-day limit provided by statute.

  The survey is available at www.nsarchive.org.

- The National Security Agency reportedly wants permission to routinely withhold "operational files" from release to the public. The Federation of American Scientists' *Secrecy News* reported March 20 that while NSA generally does not release this information, not having to process FOIA requests would allow the agency to spend more time on "key mission areas" such as national security.

- A group of senators led by Sen. Patrick Leahy (D-Vt.) is seeking to curb provisions of the Homeland Security Act that criminalize public disclosure of "critical infrastructure" information submitted to the government by the private sector.

  The bill, S. 609, removes provisions that would subject whistleblowers to fines or jail time if their disclosures concerned the critical infrastructure, a category that includes power plants, dams, bridges, ports and chemical plants. The legislation also narrows the category of "protected information" to records that specifically deal with the vulnerability of and threats to national critical infrastructure, and covers only materials submitted to the Department of Homeland Security. Leahy has criticized HSA as providing vague, overbroad protection to information not directly related to infrastructure vulnerabilities.

  Leahy has also attacked the law as providing the private sector with unnecessary liability protection; it prohibits information that has been voluntarily submitted to the government from being used directly in civil suits by government or private parties. Leahy's bill does not provide civil immunity to companies that voluntarily submit information.

  The bill, which was introduced on March 12, is being co-sponsored by Carl Levin (D-Mich.), James Jeffords (I-Vt.), Joseph Lieberman (D-Conn.), Bob Graham (D-Fla.) and Robert Byrd (D-W.Va.).

- A federal judge has refused to order the release of documents relating to former President Clinton's last day pardons, saying the information falls under FOIA exemptions.

(Continued on page 62)

FOIA: Balancing Act

(Continued from page 61)

The case stems from a February 2001 FOIA request by Judicial Watch, a Washington, D.C.-based watchdog group, for all documents that "refer or relate … in any way" to the 177 pardons and commutations granted on January 21, 2001.

In response to the request, the Justice Department located 17 boxes of potentially responsive documents. It released nearly 600 pages to Judicial Watch and identified another 433 for release. However, it withheld 4,341 pages, citing presidential communications privilege, and 524 pages as an unwarranted invasion of privacy.

In a March 28 decision, U.S. District Judge Gladys Kessler granted the Justice Department's motion for summary judgment, saying the presidential communications privilege was critical to preserving the president's ability to receive full and candid advice on sensitive issues. She also upheld the privacy claim, saying it was justified "even if the information concerns possible felons."

Judicial Watch says it plans to appeal.

ATTENTION MLRC MEMBERS

YOU SHOULD HAVE RECEIVED YOUR 2003 DCS DIRECTORY

Contact us if you did not receive the directory or you would like to order more copies.

EMAIL KELLY CHEW AT KCHEW@LDRC.COM WITH CORRECTIONS

Seminoff v. Mecham: Administrative Office of the U.S. Courts Not "Agency" Under FOIA and APA

Reports are Not Judicial Records

On April 16, Judge Garaufis of the Eastern District Court of New York held that the Administrative Office of U.S. Courts was not an "agency" under FOIA and the Administrative Procedure Act. The Administrative Office therefore did not have to provide access to records of registry funds, monies deposited with the court, to a legal research firm. In granting Defendants' motion to dismiss, the court also held that there was no common law right of access to the reports at issue because the documents were not "judicial" records. The case stems from a legal research firm's request for access to records maintained by the Administrative Office and Court Clerk. *Wayne Seminoff Company v. Mecham (02-CV-2445)*.

Registry Funds and CRIS

The court first explained that registry funds are monies, which involve a "pending or adjudicated case", which are deposited with a U.S. court. The court can either deposit registry funds into a U.S. Treasury registry or into an interest bearing investment (pursuant to a court order). The District Court for the Eastern District Court of New York participates in the Court Registry Investment System (CRIS), a system in which registry funds from several courts are collected together and placed in interest bearing investments.

Mr. Heinemann is clerk of the Eastern District and custodial agent responsible for the maintenance of the court's registry funds. To assist him with this charge, he receives CRIS Liquidity Reports (CRIS Reports) which state the funds held by the court, which cases each fund is associated with, and the remaining balance of the funds.

Plaintiff, a "legal research firm", is in the business of locating registry funds involving older cases in which the party who deposited the funds has not withdrawn them. Once funds have been located and the owner contacted, Seminoff coordinates the return of the funds to the owner. Seminoff claimed that CRIS Reports are in some circumstances the only manner it can locate the funds a certain court holds.

Having had his requests for access ignored by Chuck Heinemann, Seminoff filed this complaint with the Eastern District against Heinemann and Leonidas Ralph Mecham, the Director of the Administrative Office (AO) of the United States Courts.

Seminoff claims its right to access the CRIS Reports is based on the Freedom of Information Act (FOIA) 5 U.S.C. §552, and the common law right to inspect judicial documents. Defendants moved to dismiss claiming the court lacked subject matter jurisdiction over Seminoff's FOIA claim, and that Seminoff's common law claim was not a claim for which relief could be granted.

Defining What Comes Under FOIA

The court dismissed Seminoff's FOIA claim holding that because U.S. courts do not fall under FOIA, which applies to "agencies," the court lacked subject matter jurisdiction. The court held that the Administration Procedure Act 5 U.S.C. §551(1)(B) specifically excludes "courts of the United States" from "agency" as used in FOIA.

As the claim was brought against an administrative office and not a court itself, Judge Garaufis had to determine whether the FOIA exclusion was applicable to the entire judicial branch. Even though Seminoff agreed that as clerk of the court, Heinemann would fall under the "courts of the United States" exclusion, Mecham would not as he worked for a purely administrative office.

While whether the Administrative Office of the U.S. Courts was an "agency" under FOIA was an issue of first impression for the Eastern District, Judge Garaufis explained that precedent from other jurisdictions overwhelmingly supported the conclusion that the entire judiciary is excluded from FOIA. The court took particular notice of, and adopted the analysis used by the Second Circuit in *First Fidelity Mortgage Investors v. The Administrative Office of the United States Courts, 690 F. 2d 35 (2d Cir. 1982)*.

(Continued on page 64)

Seminoff v. Mecham

(Continued from page 63)

In *First Fidelity*, the Second Circuit held that the Judicial Conference was not an "agency" under APA. The Second Circuit based its conclusion on three factors. First, the APA's legislative history was clear in stating that "the entire judicial branch of the Government" was excluded from the APA. (*Quoting First Fidelity at 38*). Second, the "task" performed by the Judicial Conference was one "which otherwise might be left to the courts." *(Quoting First Fidelity at 39)*. Finally, in an earlier case*, Liberation News Service v. Eastland, 426 F. 3d 1379 (2d Cir. 1970)*, the Second Circuit ruled that the statutory definition of "agency" in the APA only applied to the executive branch.

Entire Judiciary Excluded

Applying the Second Circuit's analysis in *First Fidelity*, Judge Garaufis held that the entire judicial branch is excluded from "agency." Finding that the Administrative Office was "undisputedly" part of the judicial branch, the court held that the APA's legislative history supported the conclusion that the AO did not fall under the definition of "agency." Next, the court found that the function performed by the AO, while administrative in nature, was one "which otherwise might be left to the courts." (*Quoting First Fidelity at 39)*. Third, "agency" only referred to the executive branch and the AO was part of the judicial branch. *See also*, *Novel v. United States, 109 F. Supp. 2d 22 (D.D.C. 2000)* (the entire judicial branch was excluded from "agency," as defined by §551 of the APA).

Judge Garaufis held that the entire judicial branch is excluded from "agency."

Seminoff also claimed that under 28 U.S.C. §601, the Director of the AO, Mecham, was to be considered an "officer" under title 5 of the U.S.C. and therefore must follow all of title 5's provisions, including FOIA. The court rejected this argument explaining that FOIA only applies to "agencies", not "officers" and therefore §601 does not make "the Director of the AO subject to *every* provision in Title 5."

No Common Law Right of Access

The court next granted Defendants' motion to dismiss Seminoff's claim that it had a common law right of access to the CRIS Reports for failure to state a claim. Judge Garaufis explained that in determining whether a common law right of access to a judicial document exists, the court must first determine whether the document in question is in fact "judicial". If the document is "judicial", the court should balance the relevant interests regarding disclosure. The court held that the CRIS Reports were not judicial records.

In analyzing whether the CRIS Reports were judicial records, the court adopted the analysis used by the Second Circuit in *United States v. Amodeo, 44 F. 3d 141 (2d Cir. 1995),* and *United States v. Graham, 257 F. 3d 143 (2d Cir. 2001)*. In *Amodeo*, the Second Circuit held that a record is "judicial" when it is "relevant to the performance of the judicial function and useful in the judicial process". *(Quoting Amodeo at 145-46)*. The Second Circuit apparently modified this test in *Graham* when the court placed emphasis on whether the documents in question were used to determine "the defendants' substantive rights." *(Quoting Graham at 153.)*

According to Judge Garaufis, the description of the CRIS Reports by Plaintiff, "demonstrates that these documents are not used to determine a party's substantive rights", in this case whether registry funds should be returned to a party. The Reports are not used to assist a court in determining whether a party "is entitled to return of funds". Their only purpose is "to assist the court in *accounting* for a party's funds," once the substantive determination has been made by the court.

For Seminoff: Richard Alan Klass of Richard Alan Klass, Esq. (Brooklyn, NY).

For Mecham & Heinemann: Kathleen Anne Mahoney (Assistant U.S. Attorney).

War in Iraq, Battles in Court

Journalists on the Battlefield Put Their Lives on the Line

Embeds, Unilaterals Bring War Home

While the press on the embed program seems generally positive, the embedding program was not without its critics. In mid-March, a group of 12 Republican lawmakers, including House Armed Services Committee Chairman Duncan Hunter (R-Cal.), wrote a letter to Defense Secretary Donald Rumsfeld asking him to justify the embedding policy.

Not unexpectedly, journalists not traveling with the military — so called "uni-laterals" — had a harder time in the field.

Some uni-laterals managed to attach themselves to military units on an informal basis, but two — Phillip Smucker of the *Christian Science Monitor* and Geraldo Rivera of the Fox News Channel — were removed from Iraq after the military claimed they violated the embedding ground rules by revealing troop locations. Two Israeli journalists and two from Portugal were detained by American troops and then taken to Kuwait; the military said that the reporters had posed a "security threat." Another reporter, BBC reporter Johnny Dymond, was expelled from Turkey on April 2 by that nation's government, after reporting on conditions along the Turkey-Iraq border.

Non-embedded reporters in Baghdad, found themselves being targeted when American troops fired on the Palestine Meridien Hotel on April 8. Military officials said that the troops had been fired on from the hotel; reporters said that the claim was untrue. American forces also bombed buildings containing bureaus of the Arab news channel Al Jazeera and all told, as of April 16, 15 American and foreign reporters died while covering the conflict. Three were missing, and at least 16 suffered injuries. At least 30 journalists were detained at some point during the war by either Iraqi or coalition forces (see box).

In one incident, the media fired back: on April 13, an armed escort returned fire when a CNN crew was fired upon outside the town of Tikrit.

One valuable compilation of articles and commentary on the war reporting, and many other issues of current controversy in journalism is the Poynter Institute's daily column by Jim Romanesko, found at www.poynter.org. It is billed

(Continued on page 66)

JOURNALISTS AND ASSISTANTS DEAD, MISSING OR INJURED IN IRAQ WAR
This list is based on reports from various media, and is current as of April 15, 2003.

DEAD (15; 12 in combat): Tariq Ayoub (Al-Jazeera, *Jordan Times*); David Bloom (NBC)*; Veronica Cabrera (America TV, Argentina)*; Jose Couso (Telecinco, Spain); Kaveh Golestan (freelance, BBC); Michael Kelly (*Atlantic Monthly*/*Washington Post*); Christian Liebig (*Focus* magazine, Germany); Terry Lloyd (ITN); Paul Moran (freelance/Australian Broadcasting Corp.); Kamaran Abdurazaq Muhamed (BBC); Julio Anguita Parrado (*El Mundo*, Spain); Mario Podesta (America TV, Argentina)*; Taras Protsyuk (Reuters); Gaby Rado (ITN)*; unidentified translator for Malaysian reporters. * non-combat

MISSING (3): Frederic Nerac (ITN); Hussein Othman (ITN).

INJURED (16): Zuhair Al Iraqi (Al-Jazeera); Kemal Batur (SkyTurk, Turkey); Eric Campbell (Australian Broadcasting Corp); Rui de O (SIC television, Portugal); Daniel Demoustier (freelance, ITN); Maria Fleet (CNN); Mesut Gengec (Show TV, Turkey): Tom Giles (BBC); Stuart Hughes (BBC); Faleh Kheiber (Reuters); Samia Nakhoul (Reuters); Paul Pasquale (Reuters television); John Simpson (BBC); Paul Watson (*Los Angeles Times*); unnamed Abu Dhabi TV staffer; unnamed CNN driver.

DETAINED (30; all now released): Franco Battistini (*Corriere della Sera*, Italy); Lorenzo Bianchi (*Il Resto del Carlino*, Italy); Molly Bingham (freelance); Boaz Bismuth (*Yediot Ahronot*, Israel); Luis Castro (Radio Televisao Portuguesa, Portugal); Vittorio dell'Uva *(Il Mattino*, Italy); John Feder (*The Australian*); Marcin Firlej (TVN 24, Poland); Toni Fontana (*Unita*, Italy); Luciano Gulli (*Il Giornale*, Italy); Stewart Innes (*The Australian*); Jacek Kaczmarek (Polish public radio); Leonardo Maisano (*Sole 24 Ore*, Italy); Matthew McAllister (*Newsday*); Richard Mitchellson (CNN); Ezio Pasero *(Il Messaggero*, Italy); Moises Saman (*Newsday*); Dan Scemama (Channel One TV, Israel); Victor Silva (Radio Televisao Portuguesa, Portugal); Kevin Sites (CNN); Bill Skinner (CNN); Johann Spaner (freelance/*Jylands-Posten*, Denmark); "Tofik" (CNN); Peter Wilson (*The Australian*); three unidentified French television reporters; three unidentified Malaysian reporters.

War in Iraq, Battles in Court

(Continued from page 65)

as "[y]our daily fix of media industry news, commentary, and memos." You can sign up to have it delivered to your e-mail daily.

Fourth Circuit Closes, Then Cancels, Moussaoui Argument; Records Released

Never mind. The Fourth Circuit reversed itself on April 15 and refused to hear an appeal in the Zacarias Moussaoui case and ordered the trial judge to forge an agreement between Moussaoui and the federal government. The reversal means a highly anticipated battle over media access will not be fought. Previously, and on the heels of a closed argument before the Eleventh Circuit, *see MLRC MediaLawLetter*, March 2002, at 46, the Fourth Circuit, in a March 24 order closed oral arguments in the appeal which were set for May 6. *See U.S. v. Moussaoui*, No. 03-4162 (4th Cir. order issued March 24, 2003). On April 9, the court expanded the closure order to also exclude the defendant himself.

The appeal involved a decision by trial Judge Leonie Brinkema of the Eastern District of Virginia granting Moussaoui's attorneys access to Ramzi Binalshibh, another Sept. 11 suspect. The government claims that granting Moussaoui access at this juncture would frustrate their interrogation of him and the overall fight against terrorism.

In closing the now cancelled arguments, the Fourth Circuit claimed that it had the authority to close the hearing under a federal statute relating to the use of classified information in a criminal trial. Various media organizations – including ABC, Inc., the Associated Press, CNN, CBS Broadcasting Inc, Hearst Corp., NBC, *The New York Times*, the Reporters Committee for Freedom of the Press, the Minneapolis *Star Tribune*, the Tribune Company, and the *Washington Post* – asked the appeals court to reconsider the order and permit access to the hearing. *See In re: U.S. v. Moussaoui*, No. 03-4261 (4th Cir. filed March 14, 2003). The media organizations are represented by Jay Ward Brown of Levine, Sullivan & Koch in Washington, D.C.

The Fourth Circuit had also issued an order, on April 9, which forbid Moussaoui from presenting his arguments himself before the court. Moussaoui's court appointed attorney, Edward MacMahon, said that the decision is not surprising since Moussaoui is not cleared for classified information, and since criminal defendants are rarely permitted to argue their own side in front of appellate courts.

While the closed Fourth Circuit argument was pending, Brinkema issued a routine order in the criminal case, which included comments that "the court is disturbed by the extent to which the United States' intelligence officials have classified the pleadings, orders and memorandum opinions in this case." She added that she "agrees with the defendant's skepticism of the government's ability to prosecute this case in open court in light of the shroud of secrecy under which it seeks to proceed." *U.S. v. Moussaoui*, Crim. No. 01-455-A (E.D.Va. order issued April 4, 2003). The order is online at http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68467/0.pdf.

Two weeks later, Brinkema released several documents in the case that had been sealed. She released the documents after the government, in response to a motion by the media for access the documents, agreed that many of documents could be released in whole or redacted form. Brinkema withheld documents that the government argued could be released only after consultation with an unidentified foreign government, and documents that the govenrmen said should not be disclosed because they "disclose confidential, sensitive details regarding the foreign relations of the United States."

Brinkema's order is available online at http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/68573/0.pdf.

Supreme Court Declines Review of Secret Court's Decision

The U.S. Supreme Court has denied a motion by a coalition of civil rights and Arab-American groups seeking to file a *certiorari* petition seeking review of the first decision ever by a court established in 1978 to hear appeals regarding government requests for surveillance as part of intelligence investigations. *ACLU v. U.S.*, No. 20M69 (March 24, 2003) (denying motion to intervene).

The coalition wanted the Court to review a decision by the Foreign Intelligence Surveillance Court of Review,

(Continued on page 67)

War in Iraq, Battles in Court

(Continued from page 66)

holding that a new policy allowing use of evidence gathered in intelligence investigations in non-intelligence cases, such as criminal prosecutions, was permissible under the Foreign Intelligence Surveillance Act of 1978 (FISA). *In re: Sealed Case No. 02-001*, 2002 WL 31546991 (F.I.S. Ct. Rev. Nov. 18, 2002), *available at* www.cadc.uscourts.gov/common/newsroom/02-001.pdf; *see also LDRC MediaLawLetter*, Nov. 2002, at 43.

The coalition consisted of the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the American-Arab Anti-Discrimination Committee and the Arab Community Center for Economic and Social Services. They were represented by Ann Beeson, Jameel Jaffer and Steven Shapiro of the ACLU, and Joshua L. Dratel, John D. Cline and Tom Goldstein of NACDL.

Access Bills in Congress

A number of bills have been introduced in the Congress on issues related to public access to government information and the war on terrorism. (And see, "FOIA: A Balancing Act," p. 51).

- The Military Tribunals Act of 2003 (H.R. 1290), introduced by Rep. Adam Schiff (D-Cal.), would require that military tribunals in which non-U.S. residents accused in the Sept. 11 terrorist attacks are tried "be accessible to the public consistent with any demonstrable necessity to secure the safety of observers, witnesses, tribunal judges, counsel, or other persons." See H.R. 1290, 108th Cong. (2003). The bill would also require that the federal government certify "identifiable harm" when requesting that evidence be kept secret.

- Some of the public access provisions have been introduced as amendments to a bill that would allow the Justice Department to seek wiretaps under the Foreign Intelligence Surveillance Act (FISA) for terrorists acting alone, not just those acting as part of an international terrorist group. *See* S.113, 108th Cong. (2003); for a summary of the FISA Act provisions, *see LDRC LibelLetter*, Dec. 2001, at 49. An amendment being proposed by Sen. Orrin Hatch (R-Utah) would remove the Dec. 31, 2005 sunset provision from the USA Patriot Act, while Sen. Russell Feingold (D-Wisc.) is pushing a measure to increase government reporting of its use of FISA powers.

- Sen. Ron Wyden, D-Ore., has introduced legislation that would require public disclosure in the awarding of contracts for Iraq reconstruction that do not undergo traditional competitive bidding processes.

  The "Sunshine in Iraq Reconstruction Contracting Act," S. 876, would require government agencies that enter into contracts, without submitting competitive bids, to disclose the amount of the contract, how the agency selected the contractor(s) who were awarded the contract and the reasons for not awarding the contract through an open competition.

  The main postwar contracts are being handled by the U.S. Agency for International Development. The *Washington Post* reports that the agency is using an exemption in its acquisition regulations that allows it to bypass the normal competitive bidding process when foreign-aid programs would otherwise be impaired. The same process was used to award contracts in Afghanistan and Bosnia.

  The bill, which was introduced on April 10, is co-sponsored by Sen. Susan Collins, R-Maine, and Sen. Hillary Rodham Clinton, D-N.Y.

Department of Homeland Security Issues Proposed Rules

The Department of Homeland Security (DHS) issued proposed rules mandated by the Homeland Security Act regarding the secrecy of critical infrastructure information. Under the Act, information submitted by businesses regarding critical infrastructure will be kept confidential, and the unauthorized disclosure of any confidential information by a DHS employee was made a crime. While the Act only applied to DHS, the rules proposed by DHS would require other federal agencies to submit any critical infrastructure information they receive from non-government sources to DHS. Under the proposed rules, the decision as to whether the information submitted was "critical infrastructure information" under the Act would be made by the business.

ETHICS CORNER

By Robert C. Bernius

In January, former *Cincinnati Enquirer* editor Lawrence Beaupre dropped the civil case in which he claimed that the *Enquirer's* attorneys had represented him personally, and had committed malpractice in that representation. Defendants vigorously denied Beaupre's claims. Extensive discovery showed that the claims had no factual basis and, at the end, Beaupre voluntarily dismissed his action. The defendant lawyers paid Beaupre nothing, and rejected his request for a release. Thus ended another chapter in Cincinnati's long-running Chiquita — *Enquirer* affair. Characterized in an earlier Media Law Letter as a "case to watch," the Beaupre litigation may offer lessons suitable to *Ethics Corner*.

The Facts

On May 3, 1998, the *Enquirer* published a package of news articles critical of the business practices of Chiquita Brands International. The articles resulted from a year-long *Enquirer* investigation, supervised by editor Beaupre. During the project, *Enquirer* reporter Michael Gallagher had advised Beaupre that a high-ranking Chiquita official was giving Gallagher tapes of Chiquita voice mail messages. Beaupre eventually decided to incorporate excerpts from those tapes into the published Chiquita stories.

Chiquita forcefully protested the stories immediately after they were published. The *Enquirer* then learned that Gallagher had himself stolen the voice mail messages from Chiquita's computers. As a result, to avert a civil lawsuit the *Enquirer's* lawyers began round the clock negotiations with Chiquita representatives on Wednesday, June 24.

After an all night negotiating session, the *Enquirer's* lawyers sought Beaupre's reaction to the potential terms of a settlement, explaining that they represented the newspaper; that they did not represent Beaupre personally; and that if Beaupre wanted a personal lawyer the company would provide him with one, at company expense. Beaupre acknowledged the admonition, refused the offer of separate representation, and approved the settlement terms.

With Beaupre's concurrence, the parties reached a settlement in principle, and sealed it with a handshake late that afternoon (Thursday). The following day (Friday), a written agreement was drafted; early on Saturday, a revised draft circulated among all parties. At midday, after Beaupre had an opportunity to review the draft, *Enquirer* lawyers explained its terms to him and answered his questions. During that conversation, the lawyers reminded him – for the second time – that they represented only the company; that they did not represent him personally; and that if he wanted a personal lawyer the company would provide one to him. Again, Beaupre explicitly declined separate representation and agreed with the settlement terms.

What ethics rules govern the relationship between a company's attorney and its employee? How does a court determine when the company lawyer becomes a lawyer for the employee?

Later on Saturday afternoon, newspaper lawyers once more spoke with Beaupre to explain some slight modifications to the written terms of the agreement. For the third time, they reminded him that they represented the company, and not him personally. Still again, Beaupre said he understood who the lawyers represented, and approved the minor changes to the agreement.

Finally, late on Saturday evening, Beaupre was reminded that if he wanted a personal lawyer, the company would get him one. Beaupre refused the offer and signed the final agreement (and re-signed it a month later, with minor typos corrected) without protest, question, or criticism.

The settlement completely protected Beaupre from civil liability. Chiquita did not sue him, nor did any of the individuals whose voice mail messages were stolen. Before he signed the settlement agreement, Beaupre was told four separate times, in the presence of five different lawyers, that no *Enquirer* lawyer represented him personally. Nevertheless, two years later Beaupre filed his complaint in D.C. Superior Court, claiming that the *En-*

(Continued on page 69)

ETHICS CORNER

(Continued from page 68)

quirer's lawyers were his personal lawyers, and that they committed malpractice by permitting him to enter into the settlement.

Meantime, as the civil settlement discussions were taking place, an Ohio state special prosecutor convened a grand jury to investigate the theft of Chiquita's voice mail messages. The U.S. Attorney's office opened a parallel investigation. Both agencies viewed the *Enquirer* and its employees as witnesses and victims (as distinct from targets of the investigation).

Nonetheless, the newspaper retained a Cincinnati criminal defense attorney separately to represent Beaupre and its other employees. The *Enquirer's* outside lawyers continued to represent only the newspaper in connection with those investigations.

In lieu of a grand jury appearance, the special prosecutor agreed in early July to interview Beaupre with both his and the company's attorneys present. In connection with that interview, *Enquirer* counsel — for the fifth time — reminded Beaupre that they represented the company, and did not represent him personally. Beaupre yet again acknowledged that he understood the distinction.

Before he signed the settlement agreement, Beaupre was told four separate times, in the presence of five different lawyers, that no Enquirer lawyer represented him personally.

On September 4, 1998, reacting to a new Ninth Circuit holding, the special prosecutor changed course and declared Beaupre and two other Enquirer employees targets of the investigation. Three separate attorneys were immediately retained for each, again at the newspaper's expense.

Two months later, the criminal investigation resolved entirely favorably from Beaupre's perspective. He was not charged or indicted, nor has he ever been arrested or fingerprinted, let alone convicted. He paid no fines or other costs, and has never been required to pay any of his legal fees. In his deposition, he admitted that he "believed at that time … that the lawyers, indeed, were -- were working to protect me from an indictment. And, actually, I believe to this day that at that time they were working to protect me … from an indictment."

Nevertheless, his lawsuit claimed that the *Enquirer's* lawyers were his personal lawyers, and that they committed malpractice in connection with the criminal investigation. His malpractice allegation was difficult to comprehend. At his deposition, Beaupre essentially described it as a failure of the defendant lawyers to allow him to be indicted: "if I had been indicted and gone to trial and my role in the case had been fully explored at trial, I think I would have [come] out of this better …" Notwithstanding that unique claim, Beaupre also acknowledged that at the time of the criminal investigation he had told the lawyers that he "in no way, shape or form wanted to endure a criminal trial and appreciated the efforts that the paper was making on his behalf."

The Law

What ethics rules govern the relationship between a company's attorney and its employee? How does a court determine when the company lawyer becomes a lawyer for the employee? And how does a company lawyer avoid frivolous claims like Beaupre's?

The Ethics Rules

Corporations, as legal constructs, have neither flesh nor blood, and do not speak or listen. It is a tautology, therefore, that lawyers representing an organizational client necessarily deal with real people who, under ethics rules, are known as "constituents" of the organization. The organization, however, remains the client: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." District of Columbia Rules of Professional Conduct ("D.C. Rules") 1.13(a).

The rules recognize that constituents who act on behalf of an organizational client do not thereby become clients of the corporate counsel. D.C. Bar Legal Ethics Comm. Op. No. 269 (January 15, 1997) ("the lawyer does not

(Continued on page 70)

ETHICS CORNER

(Continued from page 69)

have, by reason of the lawyer's representation of the corporation, attorney-client responsibilities to the corporate constituents with whom he may be dealing").

The rules also specify the circumstances under which a lawyer has an obligation to clarify the nature of the attorney's relationship to the constituent. The attorney must "explain the identity of the client when it is apparent that the organization's interests may be adverse" to the employee. D.C. Rule 1.13(b). As amplified in a comment to the rule, the determination of adversity is subjectively to be made by the lawyer:

> [T]he lawyer should advise any constituent, whose interest *the lawyer finds adverse* to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person *may wish to* obtain independent representation.…

D.C. Rule 1.13 cmt. 8 (emphasis added).

There was, of course, no adversity of interest between Beaupre and the *Enquirer* at any relevant time. Indeed, after Beaupre was named a grand jury target, the Cincinnati criminal defense attorney retained to represent solely Beaupre took pains to confirm in writing that there was "no apparent conflict" between his client and the newspaper, and described Beaupre's interests and those of the *Enquirer* as "completely and totally the same."

Thus, though the repeated explanations and clarifications given to Beaupre by *Enquirer* counsel were proper, they exceeded the requirements of the ethics rules.

The Judicial Test

When interrogated under oath at his deposition, Beaupre admitted that *Enquirer* counsel had explained their role to him. What if the case were different? What if no specific disclaimers had been made, or what if Beaupre denied that admonitions had been given to him by the newspaper's lawyers? What standards does a court use to determine if and when a corporate constituent becomes a personal client of the company's lawyer?

The cases describe a presumption that the company's attorney represents only the corporate entity, and not the individual employee. *See Egan v. McNamara*, 467 A.2d 733 (D.C. 1983); Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law Governing Lawyers*, §17.13 at 17-45 ("high-ranking 'constituents' typically are not clients of the entity's lawyer, and are not represented by *any* lawyer unless they have made separate arrangements for representation").

Such a presumption is both logical and necessary, lest every employee with whom corporate counsel communicates be empowered to make an unwarranted claim similar to Beaupre's.

> ***The "default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption."***

The Third Circuit, in *In re Bevill, Bresler, & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3rd Cir. 1986), approved a multi-part test to determine when an employee may validly assert the attorney-client privilege with respect to communications with the company's lawyer. That test, although typically applied in the context of grand jury subpoenas, is useful to determine when the presumption of non-representation is overcome. Its elements are:

- First, employees seeking to establish an attorney-client relationship with corporate counsel must show that they approached counsel for the purpose of seeking legal advice.
- Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities.
- Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise.
- Fourth, they must prove that their conversations with counsel were confidential.
- And, fifth, they must show that the substance of their

(Continued on page 71)

ETHICS CORNER

(Continued from page 70)

> conversations with counsel did not concern matters within the company or the general affairs of the company.

Thus, the "default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption." *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001). The employee's burden in doing so is substantial. *See, e.g., United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210, 215 (2d Cir. 1997) (employee must "make it clear to corporate counsel that he seeks legal advice on personal matters"); *Innes v. Howell Corp.*, 76 F.3d 702, 712 (6th Cir. 1996) ("an attorney for a corporation does not automatically represent the corporation's constituents in their individual capacities . . . There must be clear consent"); *Quintel Corp. v. Citibank*, 589 F.Supp 1235, 1241-42 (S.D.N.Y. 1984) ("affirmative assumption of duty by the attorney" necessary to create attorney-client relationship in corporate counsel context); *In re Grand Jury Proceedings, Detroit, Michigan, August 1977,* 434 F.Supp 648, 650 (E.D. Mich. 1977) (employee must "make clear when he is consulting the company lawyer that that he personally is consulting the lawyer"); *Polovy v. Duncan*, 269 A.D.2d 111, 112 (N.Y. App. Div. 2000) ("[u]nless the parties have expressly agreed otherwise . . . a lawyer for a corporation represents the corporation, not its employees.") On the facts of his claim, Beaupre could meet none of these elements.

The Lesson

What, therefore, is the lesson of the Beaupre litigation? There was no ethical violation; nor was there anything that remotely resembled legal malpractice. Nevertheless, Beaupre filed his now-defunct lawsuit. How does one avoid such a claim?

One deterrent is a disclaimer of individual representation, made — if time and circumstances permit — in writing and countersigned by the employee. Sometimes, perhaps even most times, the circumstances are such that an attorney simply cannot present such a memorandum. And, without an ironclad document, the possibility of a Beaupre-type allegation will, unfortunately, always be present, however remote.

So, perhaps the real lesson of the *Beaupre* case is, in the words of Clare Boothe Luce, that no good deed goes unpunished. Sometimes lawyers can do good legal work, represent a client conscientiously, be scrupulous and forthcoming beyond the requirements of the ethics rules, and still get blind-sided by a meritless malpractice claim. Then, one can stand on principle, and fight such a claim to the end.

Robert C. Bernius (Chair of MLRC's Ethics Committee) and Henry J. DePippo of Nixon Peabody LLP in Washington D.C. represented the Enquirer and were named as defendants in the Beaupre litigation.

Colombian Journalist Granted Political Asylum

By Ryan M. Pierce and Mark Pryor

A Colombian journalist and former speechwriter to high-level Colombian politicians won political asylum in Dallas recently, following an assassination attempt on his and his son's life in their home city of Cali.

As a result of its four-decade-old civil war, which pits right-wing paramilitary groups against leftist guerrilla groups, Colombia has long been recognized as one of the world's most dangerous places for journalists. Each side in this civil war has demonstrated a persistent willingness to silence journalists who favor (or are merely perceived to favor) the opposing side. A recent survey showed that a startling 78% of journalists in Colombia feared being killed because of what they reported. Tracey Eaton, *Experts Say Danger for Correspondents Rising*, DALLAS MORNING NEWS, Feb. 2, 2003. Because of the numbing precision with which journalists are targeted in Colombia, journalists regularly practice self-censorship and investigative reporting on the Colombian conflict is exceedingly rare.

Despite the obvious risks involved, our client courageously began investigating and writing a book about Colombia's violent paramilitary group, the AUC, a group that in recent years has been responsible for most of Colombia's murders. After the AUC discovered that the client had been talking with suspected guerrilla collaborators, he began receiving threats from the AUC, warning him against conducting any more interviews and indicating that his investigation had caused the AUC also to target his young son. In December 2001, several armed men attempted to smash into the client's house as he hid with his son. Luckily, the men were chased away by armed neighbors, but a telephone call several days later from a notorious AUC leader warned the client that "next time" there would be no escape. The client and his son then fled to Texas and applied for political asylum.

They were denied asylum at their first hearing, and a second hearing was scheduled for early 2003. To satisfy the burden that the client had a well-founded fear of future persecution and that the persecution would be on account of his political beliefs, the evidence included affidavits from his colleagues attesting to his staunch and well-known opposition to the AUC's rampant human-rights violations and from one colleague whom the AUC had tortured and interrogated about the client. (The colleague was released with the chilling message that the AUC would be waiting for the client in Colombia.)

To satisfy the difficult burden of showing that the AUC would persecute the client on account of his political beliefs, we further argued that investigative "[j]ournalism is work that overtly manifests a political opinion," which, in turn, causes those engaged in conflict commonly to impute adverse political opinions to journalists. *Hussain v. INS*, No. 98-70454, 2000 U.S. App. LEXIS 25987, at *6 (9th Cir. Feb. 8, 2000). Persuaded that the client was entitled to political asylum, the INS lawyer astonishingly conceded the case after direct examination. The immigration judge immediately granted the client and his son asylum.

We further argued that investigative "[j]ournalism is work that overtly manifests a political opinion," which, in turn, causes those engaged in conflict commonly to impute adverse political opinions to journalists.

Not giving up on his desire to expose the suffering caused by the ever-intensifying civil war, the client still plans to publish a book about the AUC and will include in it his experience with the American legal system (which fortunately has given him the opportunity to speak freely without any fears of swift retribution, a luxury that he has never before experienced in his long career).

Ryan M. Pierce and Mark Pryor are associates in the Dallas office of Vinson & Elkins L.L.P. The case was referred to them by the Human Rights Initiative of North Texas (www.hrionline.org). The client's name has not been used for his protection.

William S. Dixon (1943-2003)

William S. Dixon, for many years New Mexico's leading spokesman for free speech, died on March 27 after an intense battle with cancer. He was 59.

New York-born, New Jersey-bred, and Princeton-polished – with flaming red hair and (it seemed to some) political sensibilities to match – Bill came to New Mexico like a bat out of Yale in 1968, and began what would become a 35-year career with the law firm of Rodey, Dickason, Sloan, Akin & Robb. He quickly developed into a versatile and formidable advocate with wide-ranging interests and talents. But his first love was always the First Amendment, a subject he taught to generations of local law students and litigated with gusto.

Defending defamation claims with all the constitutional and common-law tools at his disposal, Bill enjoyed a remarkable run of appellate successes just five years after his arrival in New Mexico. During that time he persuaded the state's courts to recognize absolute privileges for statements made during labor-grievance arbitration proceedings, *see Neece v. Kantu*, 507 P.2d 447 (N.M. Ct. App. 1973), for letters written by attorneys on behalf of their clients in connection with pending litigation, *see Romero v. Prince*, 513 P.2d 717 (N.M. Ct. App. 1973), and for communications designed to precipitate professional peer review, *see Franklin v. Blank*, 525 P.2d 945 (N.M. Ct. App. 1974); and, for good measure, he vanquished the argument that publication of a little girl's picture invaded her privacy by affronting "traditional Navajo beliefs," *see Bitsie v. Walston*, 515 P.2d 659 (N.M. Ct. App. 1973).

Among more recent significant contributions to New Mexico law on libel and related torts, *Andrews v. Stallings*, 892 P.2d 611 (N.M. Ct. App. 1995) (holding that newspaper articles about public officials involved in matters of public concern cannot give rise to defamation by implication, and refusing to let prima facie tort make end run around libel's doctrinal constraints); *Schuler v. McGraw-Hill Cos.*, 989 F. Supp. 1377 (D.N.M. 1997) (sex change for which plaintiff courted publicity does not become private fact twenty years later), *aff'd mem.*, 145 F.3d 1346 (10th Cir. 1998); *Printron, Inc. v. McGraw-Hill, Inc.*, 35 F. Supp. 2d 1325 (D.N.M. 1998) (libel statute of limitation runs from time of magazine's first general distribution, not cover date).

But Bill did not merely play superb defense. He fought passionately for access to newsworthy documents and proceedings. *See, e.g., Does v. Roman Catholic Church of Archdiocese of Santa Fe, Inc.*, 924 P.2d 273 (N.M. Ct. App. 1996) (newspaper has standing to challenge protective order that impinges on litigant's First Amendment right to disseminate discovery materials). And he contended no less vigorously for a different kind of First Amendment access — to the ballot. *See, e.g.*, *Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980). He brought and won civil rights claims on behalf of council-meeting gadflies and fringe-party leafleteers.

And because speech does not live by litigation alone, he helped draft — and successfully lobbied for the promulgation of — a New Mexico rule of professional conduct that affords attorneys extraordinary latitude to talk to the press about pending cases. *See* Rule 16-306 NMRA 2003.

At a memorial ceremony salted with mariachi music and attended by hundreds, colleagues and clients and friends repeatedly recounted his brilliance, his infectious joy, his personal commitment to free speech in the form of profanity, and a laugh that reverberated throughout the Rodey Law Firm dozens of times every day. He will be deeply missed.

Kip Purcell is a director with Rodey, Dickason, Sloan, Akin & Robb, P.A., in Albuquerque, New Mexico, where he was privileged to work with Bill Dixon on media-law matters for a number of years before Bill's death.

SAVE THE DATE!

MLRC LONDON CONFERENCE

SEPTEMBER 22-23, 2003
STATIONERS HALL
AVE MARIA LANE, LONDON EC4

DEVELOPMENTS IN UK & EUROPEAN LIBEL, PRIVACY & NEWSGATHERING LAWS

You Should Have Received Conference Program & Registration Information By E-Mail.

Contact Us if You Did Not Receive the Materials.

for more information contact
Dave Heller at dheller@ldrc.com

MLRC ANNUAL DINNER 2003

WEDNESDAY, NOVEMBER 12

DCS ANNUAL
BREAKFAST MEETING 2003

FRIDAY, NOVEMBER 14