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

MEDIALAWLETTER

Reporting Developments Through April 30, 2007

RETURN TO TABLE OF CONTENTS

Government's Motion to Limit Access to Classified Evidence in AIPAC Trial Not Authorized by CIPA and Unconstitutional, Judge Rules

By Jay Ward Brown

U.S. District Judge T.S. Ellis has issued a comprehensive memorandum opinion explaining his previously announced decision to reject a sweeping proposal by the government to offer in evidence, but deny public access to "a substantial amount of classified information" in the AIPAC criminal prosecution. *U.S. v. Rosen and Weissman*, No. 1:05cr225 (E.D.Va. Apr. 19, 2007), slip op. at 1.

Judge Ellis rejected the government's proposal both on the ground that it is not authorized by the Classified Information Procedures Act ("CIPA") and that, even if the statute purported to authorize such a procedure, it would be unconstitutional.

Judge Ellis has, however, observed that he might revisit the question if the government sought to curtail public access only to discrete, limited pieces of classified evidence.

Backgound – CIPA

The facts underlying this Espionage Act prosecution against Steven Rosen and Keith Weissman are well-known. Suffice to say here that the two lobbyists have been charged with receiving and then passing along to others classified "national defense information," or NDI, the transmission of which allegedly could have harmed the United States. *See, e.g., MediaLawLetter* March 2007 at 41, 49.

CIPA was enacted to end the practice of graymail, in which defendants in criminal matters involving classified information would threaten to make the secrets public at trial, in hopes of discouraging prosecution. CIPA established procedures for the courts to make pre-trial rulings on the admissibility of classified evidence, including whether use of non-classified summaries of or substitutions for the actual classified material would adequately protect the defendant's right to a fair trial.

In the AIPAC case, the government asked Judge Ellis to approve a scheme in which, rather than offering substitutions or summaries for various classified documents and audio recordings, the actual classified material would be admitted in evidence at trial, but only the trial participants would have access to it. The public would not.

Thus, for example, the government envisioned playing some 22 classified audiotapes of the defendants' telephone conversations in "open" court, but having the trial participants listen to the unredacted tapes via headphones. The public in the courtroom, in contrast, would hear only white noise whenever classified portions of the tapes were played, and jurors and other trial participants would be instructed that they could never disclose the contents of the classified portions.

Similarly, under the government's proposal, witnesses would refer to 48 documents, including 8 "public source documents" (presumably newspaper articles), during testimony without the classified portions of the documents themselves being made available to the public. Classified material in the documents would be referred to by code words, so that those in the "open" courtroom would not learn the actual substance of the classified evidence.

This, Judge Ellis observed, "would surely exclude the public from substantial and critical parts of the trial." Slip op. at 5. Indeed, "[w]hat the public does not see or hear [under the scheme] is the heart of the case, namely the classified material the government claims is the NDI that the defendants allegedly received and distributed without authorization," Judge Ellis concluded. Slip op. at 8.

Defendants, not surprisingly, had objected to this proposal on numerous grounds, including that it would violate their Sixth Amendment right to a public trial as well as the public's First Amendment right to attend the trial and have access to the evidence.

In addition, the defendants argued, it would deny them a fair trial since the procedures would suggest to the jurors that the court had already determined that the evidence in question is in fact sensitive "national defense information," which is an element of the offense on which the government has the burden of proof and a factual question that is reserved to the jury.

Judge Ellis's Ruling

In rejecting the government's "novel" proposal, Judge Ellis largely agreed with the defendants. The government had premised its scheme on CIPA, which expressly authorizes the closure of the pre-trial proceedings in which the government, defendant and the court review the classified material and any proposed non-classified substitutions or summaries. Reduced to its essence, the government's position was

(Continued on page 4)

RETURN TO TABLE OF CONTENTS

Motion to Limit Access to Classified Evidence in AIPAC Trial Not Authorized by CIPA and Unconstitutional, Judge Rules

(Continued from page 3)

that the redacted public versions of the documents and recordings qualified as "substitutions" authorized by CIPA.

As Judge Ellis noted, however, CIPA contains no suggestion that it was intended to authorize one set of evidence for presentation to the jury and a different set of evidence for review by the public. Slip op. at 10. "To the contrary," he ruled, "it seems clear that CIPA envisions that 'substitutions,' if not unfair to defendants, will be used at a public trial in identical form for both the jury and the public." *Id.* As Judge Ellis explained:

> While is it true, as reflected in CIPA's legislative history, that 'Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems,' there is no evidence that Congress expected this creativity to extend to adopting procedures that effectively close the trial to the public. Indeed, given the strong presumption in the law that trials will be open and that evidence will be fully aired in public, CIPA's silence about whether 'substitutions' and 'excisions' can be made available to the public and jury on different terms should be interpreted as *a prohibition* on doing so.

As Judge Ellis noted CIPA contains no suggestion that it was intended to authorize one set of evidence for presentation to the jury and a different set of evidence for review by the public.

Slip op. at 10-11 (footnotes omitted, emphasis added).

Furthermore, even assuming that the terms of CIPA could "be stretched to encompass the government's proposed procedure" in the first instance, Judge Ellis further held that it "would not pass must under CIPA's fairness requirements." Slip op. at 11.

In this case, because a central issue for the jury is whether the information disclosed by the defendants was in fact NDI, and the government's proposal would apply to all of the alleged NDI, defendants would *not* have "'substantially the same ability to make [their] defense as would disclosure of the specific classified information,'" Judge Ellis held. Slip op. at 11-12.

Put simply, the court concluded that the proposed procedure, under which neither counsel nor witnesses would be permitted to discuss fully or robustly the evidence in question, would seriously compromise the ability of defense counsel to present their arguments to the jury.

The government proposal "essentially robs defendants of the chance to make vivid and drive home to the jury their view that the alleged NDI is no such thing," Judge Ellis observed. Slip op. at 12.

Similarly, the proposal that witnesses be required to speak in code and without specific reference to the contents of crucial documents "would render virtually impossible an effective line of cross-examination vital to the defense," not to mention impermissibly hobble the defendants' ability to testify on their own behalf. Slip op. at 14-15.

Finally, the court noted, the government's proposed, complex system of codes "not only invites juror confusion, but virtually guarantees it," especially given the extraordinary volume of evidence at issue in this case. Slip op. at 15-17. By the same token, Judge Ellis emphasized in a footnote, he did not intend to foreclose the government from returning with a similar proposal applicable only to one or more particular pieces of evidence.

But even in that event, he added, the government would have to satisfy both the fairness standard of CIPA and the defendants' and public's rights to an open trial. Slip op. at 18 n.18.

Constitutionality

In this regard, Judge Ellis turned finally to whether the government's proposal would be constitutional, even assuming it were proper under CIPA. Concluding that the defendants' Sixth Amendment right to a public trial and the public's First Amendment right to attend an open trial are governed by the same standard, Judge Ellis applied the so-called *Press-Enterprise* test to the government's proposal. Slip op. at 21 (citing *Press-Enterprise c. v. Superior Court of California*, 464 U.S. 501 (1984)).

The court squarely held that the government could not meet its "'weighty' burden to establish that closure is permissible." Slip op. at 21. First, while acknowledging that the protection of classified information can be a compelling in-

(Continued on page 5)

Motion to Limit Access to Classified Evidence in AIPAC Trial Not Authorized by CIPA and Unconstitutional, Judge Rules

(Continued from page 4)

terest, Judge Ellis emphasized the government's obligation to "make a specific showing of harm to national security in specific cases to carry its burden in this regard.

The government's *ipse dixit* that information is damaging to national security is not sufficient to close the courtroom doors nor to obtain the functional equivalent, namely trial by code," Judge Ellis ruled. Slip op. at 22.

Rather, applicable precedent "require[s] a judicial inquiry into the legitimacy of the asserted national security interest, and specific findings, sealed if necessary, about the harm to national security that would ensue if the request to close the trial is not granted." *Id.*

The government's failure to even attempt a showing, through appropriate affidavits or otherwise, that protection of the evidence in question reflected a compelling government interest, coupled with the government's willingness to disclose the evidence to jurors and court personnel who do not have security clearances, led Judge Ellis to hold that the government had failed to carry its burden on even this threshold question. Slip op. at 23-27.

Judge Ellis also easily concluded that the government had failed entirely to demonstrate that its proposed scheme was narrowly tailored and that there were no other reasonable alternatives to the scheme. Slip op. at 27-28.

Judge Ellis separately has given the government until May 2 to decide how it will proceed. Options include proposing new substitutions under CIPA to replace the evidence intended to be introduced under the original scheme, seeking to appeal on an interlocutory basis Judge Ellis's order rejecting the scheme, or dropping the prosecution.

Jay Ward Brown, together with John B. O'Keefe and Ashley Kissinger of Levine Sullivan Koch & Schulz in Washington, D.C., represent a coalition of media organizations that have sought to intervene in the AIPAC proceedings to vindicate public access rights.

MLRC London Conference
September 17-18, 2007
International Developments in Libel, Privacy, Newsgathering and New Media Law

MLRC's London Conference 2007 on September 17-18, 2007 is a two-day event for media lawyers and press experts to discuss the latest developments in media law and practice.

Delegates from around the world will gather to participate in a series of facilitated discussions on developments in media libel law, privacy law, newsgathering laws and the challenges posed by the new digital media environment.

Among the highlights of the London Conference are a roundtable discussion with UK libel judges on the challenges of press litigation in the 21st century. Justice Henric Nicholas of the Supreme Court of New South Wales will comment on the Asian media law landscape from a Commonwealth law perspective. And Alan Rusbridger, editor of The Guardian, and Richard Sambrook, Director BBC Global News, will discuss the impact of the new digital media environment on journalism and the business of journalism.

The closing session of the conference is an Oxford-style debate on privacy law, with English and American lawyers facing off on the difficult question of the boundary between freedom of expression and privacy: What should be private? Who should decide what is private?

The conference also includes a delegates dinner on Sunday night September 16th and a breakfast meeting on September 19th for in-house media counsel.

The London Conference is a unique opportunity to meet colleagues from around the world. Space is limited, so we urge you to register early to ensure a place. We hope you will join us!

Contact londonconference@medialaw.org for more information.

The MLRC London Conference is presented with the support of:

Chubb Insurance, Covington & Burling LLP, Davis Wright Tremaine LLP, Finers Stephens Innocent LLP, Jackson Walker LLP, Media/Professional Insurance, Miller Korzenik & Sommers LLP, Prince Lobel Glovsky & Tye LLP and Reynolds Porter Chamberlain LLP

RETURN TO TABLE OF CONTENTS

California Court Rules Against Google in Sponsored Links Lawsuit

Finds Trademark "Use" In Keyword Prompted Ads

By Mark Sableman

A significant split has developed in the last few years on an important threshold issue relating to sale of trademarks as keywords to trigger advertisements on search engine results pages—specifically, whether this activity involves "use" of trademarks as required by the Lanham Act. In the latest decision, *Google, Inc. v. American Blind & Wallpaper Factory, Inc.*, No. 5:03-CV-5340, 2007 WL 1159950 (N.D. Cal. April 18, 2007) (Fogel, J.), the court concluded that the threshold requirement of "use" had been met, and thus keyword trademark use was potentially actionable under trademark infringement and dilution theories.

In connection with any claim for trademark infringement or dilution, the Lanham Act requires proof that the trademark in question was used in commerce. This is rarely an issue in traditional trademark cases, but the issue has become important in two different Internet contexts.

The Court adhered to its prior view that keyword-based advertisements tied to trademarks used as search terms satisfied the Lanham Act's "use in commerce" requirement.

Background

In the situation of background pop-up advertisements, which are prompted by the computer user's keystrokes, the companies that created pop-up software and installed it on computers claimed that any internal links between trademarks typed by the user, and the pop-up advertisements generated in response, which were not visible to the computer user, did not constitute cognizable trademark "use in commerce."

In three key decisions, courts agreed, and found that the links between the keystrokes and the pop-ups did not qualify as Lanham Act "use in commerce." *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 2005); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F.Supp.2d 734 (E.D.Mich. 2003); *U-Haul Int'l. Inc. v. WhenU.com, Inc.*, 279 F.Supp.2d 723 (E.D.Va. 2003).

Search engines such as Google then argued that these precedents protected their practices of selling advertisements and sponsored listings on search results pages, keyed to trademarks that were used as search terms. Several courts have accepted this argument. *Rescuecom Corp. v. Google Inc.*, 456 F.Supp.2d 393 (N.D.N.Y. 2006); *Merck & Co. v. Mediplan Health Consulting, Inc.*, 425 F.Supp. 2d 402 (S.D N.Y. 2006).

Several other decisions have gone the other way, finding that search engine use of trademarks as keywords constitute cognizable trademark "use in commerce." *GEICO v. Google*, 330 F.Supp. 2d 700, 703-04 (E.D.Va. 2004); *Google Inc. v. Am. Blind and Wallpaper Factory, Inc.*, 2005 WL 832396 at *6 (N.D. Ca1. 2005); *800-JR Cigar, Inc. v. Goto.com, Inc.*, 437 F.Supp.2d 273 (D.N.J. 2006); *Buying for the Home, LLC v. Humble Abode, LLC*, 459 F.Supp.2d 310 (D.N.J. 2006).

Because a significant amount of search engine advertising, such as advertising under the Google "AdWords" program, is conducted with advertisements keyed to trademarks used as search terms, the resolution of this issue is very significant for the search engine industry.

If infringement cases against search engines can be cut off because of the threshold lack of "trademark use," then trademark-keyword-based advertisements are safe. Without this threshold cutoff, all of these cases will hinge on whether there is a likelihood of consumer confusion, a fact-specific issue that requires full litigation.

Google v. American Blind

In the original 2005 decision in *Google v. American Blind and Wallpaper*, decided at the motion to dismiss stage, that court found trademark use, relying in part on the 2004 decision in *GEICO v. Google*, which in turn relied on the district court decision in *1-800-Contacts, Inc. v. WhenU.com Inc.*, which was later overturned by the Second Circuit.

Google took a second shot at the issue in a summary judgment motion filed in December 2006. Google undoubtedly felt it had a good chance to convince the court to change its position on this issue, based on the pop-up decisions, and the two 2006 decisions from New York finding no cognizable use in the keyword-prompted advertisement context.

However, in its decision, issued April 18, 2007, by Judge Jeremy Fogel, the Court adhered to its prior view that key-

(Continued on page 8)

RETURN TO TABLE OF CONTENTS

California Court Rules Against Google in Sponsored Links Lawsuit

(Continued from page 7)

word-based advertisements tied to trademarks used as search terms satisfied the Lanham Act's "use in commerce" requirement.

While acknowledging the intervening decisions that went the other way, and a developing split between district courts in the Second Circuit (finding no trademark use) and several in the Third Circuit (finding trademark use), the Court concluded that its decision had to be based on the sole relevant Ninth Circuit precedent, *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004) (discussed in the *MediaLawLetter* Jan. 2004 at 17).

Playboy v. Netscape involved banner advertisements generated in response to keyword searches, and chiefly addressed the correctness of the district court's summary judgment in favor of the defendant on a theory that the appeals court dismissed in a footnote as "absurd." (That theory was that the words "playboy" and "playmate" were only used in their dictionary senses, not as trademarks.)

Thus, much of the discussion of keyword-based ads in *Playboy v. Netscape* is arguably dicta, unnecessary to the court's reversal of the district court decision. But because it provides the only insight into the Ninth Circuit's views on keyword-based advertisements, the district court in *Google v. American Blind and Wallpaper* read the tea leaves of that decision carefully.

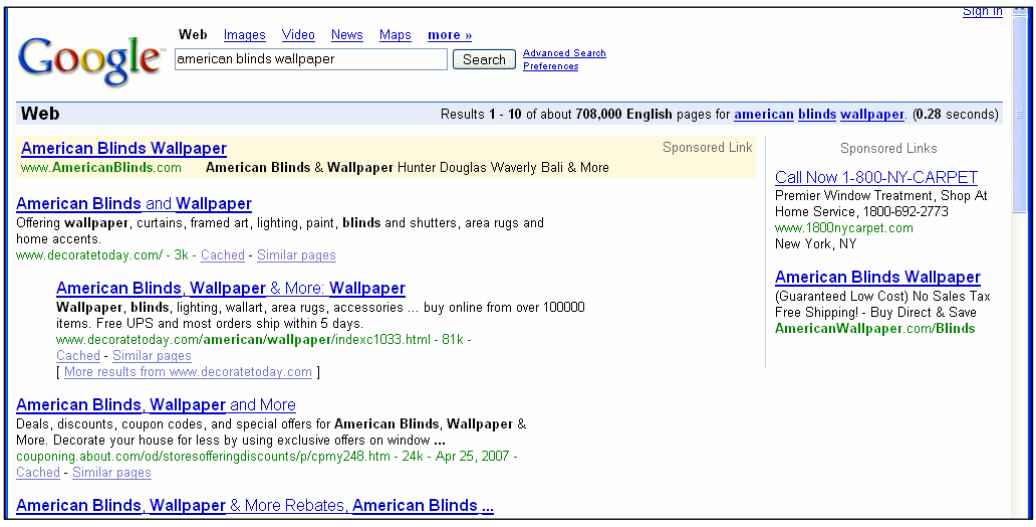
Specifically, the court noted that while the Ninth Circuit in *Playboy v. Netscape* never addressed the "use in commerce" element, it must have *assumed* that producing banner advertisements in response to searches using trademarks as keywords satisfied that element. Both the majority and concurring opinions, the court held, made an "implicit finding of trademark use in commerce."

Thus, the district court essentially made that implicit finding of *Playboy v. Netscape* explicit in the case at hand. While the court's decision also seems to suggest that it agrees with the cases that have explicitly ruled on the issue, its decision rests primarily on this implicit finding.

The court also went on to address the next issue raised by any trademark-keyword-based advertising case – whether there was actual infringement. On this issue as well the court followed the Ninth Circuit's guidance, by applying the traditional multi-factor trademark analysis (which, in the Ninth Circuit, is set forth in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)). Several of these factors weighed against Google, thus precluding summary judgment in its favor, including the trademark owner's survey showing 29% actual confusion, the close proximity of the trademark owner's goods and the goods advertised, evidence of a low degree of consumer care, and Google's intent to maximize its own profit.

On the trademark owner's federal dilution claim, the court granted Google's motion for summary judgment because of insufficient evidence that the trademarks in issue were famous.

With one other recent case concluding that use of trademarks as keywords to trigger advertisements constitutes actionable "use in commerce" (*J.G. Wentworth, S.S.C. v. Settlement Funding LLC*, 2007 WL 30115 (E.D. Pa. 2007)), this key issue remains unsettled, and will likely continue as a crucial hard-fought issue in similar cases.



Mark Sableman is a partner with Thompson Coburn in St. Louis, Missouri. Google is represented by Keker & Van Nest LLP, San Francisco, CA. American Blind and Wallpaper is represented by Howrey LLP and Kelley Drye & Warren LLP.

RETURN TO TABLE OF CONTENTS

Update: In First Phase of Libel Retrial State Prosecutor Ruled a Public Official

Case Will Now Be Tried Under Actual Malice Standard

By Robert A. Bertsche

The *Boston Phoenix*, its editors, and a former staff writer won a critically important court ruling this month in a case that had led to a $950,000 libel verdict against them, which was later thrown out on appeal and sent back for a retrial. *Mandel v. Boston Phoenix, et al.*, No. 03-10687 (D. Mass. April 26, 2007) (Stearns, J.).

Judge Stearns of the federal district court in Massachusetts ruled that Marc Mandel, an assistant state's attorney in Maryland, was a public official for libel law purposes at the time that the *Boston Phoenix* wrote about him in an article about fathers engaged in custody disputes that included disputed charges of child abuse.

The ruling means that Mandel cannot prevail at trial unless he shows, by clear and convincing proof, that the *Phoenix* (and its publisher, editors, and staff writer) published the article with subjective knowledge that the statements about him were false, or with reckless disregard as to whether those statements were false.

This ruling is, in effect, a complete reversal of the earlier conclusion, made by a different federal district court judge prior to a first trial, that Mandel was a private figure who must merely show that the defendants were negligent. *See* 322 F.Supp.2d 39 (D. Mass. 2004) (Harrington, J.).

Mandel's attorney said he will not appeal at this time (although he still may appeal after a final judgment is entered on the damages side of the case).

The ruling could prove dispositive to the outcome of Mandel's libel claim, which had led to a $950,000 jury award against the *Phoenix* and co-defendants after a trial that had proceeded on the premise that Mandel was a private figure. The First Circuit Court of Appeals subsequently reversed that conclusion, holding that plaintiff's status was determined on an incomplete record, and it ordered that a new trial be conducted. *See* 456 F.3d 198, 34 Media L. Rep. 2272 (1st Cir. 2006).

First Phase of Retrial

The district agreed to hold a bifurcated retrial with the first phase used to determine plaintiff's status. At the first phase of the retrial, the parties presented two days of testimony, followed by oral arguments as to whether indeed Mandel should be considered a private figure (with an expectation of privacy) or a public official whose qualifications and characteristics are relevant to the public's understanding of the workings of government.

Picking up on a central theme of the First Circuit's prior ruling in this case, Judge Stearns said that whether Mandel was a public official depended not on how Mandel carried out his job, but rather on the inherent functions of the position.

He noted that all of the witnesses at the two-day trial held last month had agreed that an assistant state's attorney like Mandel had, by virtue of the position, complete discretion as to whether to go forward with a prosecution; to determine which charges will be tried and which will be dismissed; and to recommend sentencing.

On the law, Judge Stearns relied heavily on the Massachusetts Supreme Judicial Court's ruling in *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282 (2002), which held that police officers are public officials because of their ability to impact citizens' daily life. Like a police officer, a prosecutor "even at the district court level" has the potential to cause great social harm if the position is abused. Judge Stearns said it would be an "anomaly" to hold that a police officer (with the power of arrest) is a public official, but that a prosecutor (with the power to "invalidate" an arrest by dismissing charges) is not.

The trial on the merits is scheduled to commence on October 9, 2007, the day after Columbus Day.

Robert A. Bertsche, a partner with Prince, Lobel, Glovsky & Tye, LLP in Boston, represents writer Kristen Lombardi and editor Susan Ryan-Vollmar. The Boston Phoenix is represented by Daniel J. Gleason, Nutter McLennan & Fish LLP in Boston who is lead counsel in the case. Plaintiff is represented by Stephen J. Cullen, Miles & Stockbridge, P.C., Towson, MD.

RETURN TO TABLE OF CONTENTS

Now Available

Basic Guide to Employment Defamation and Privacy Law

Prepared by the Media Law Resource Center Employment Law Committee, this pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

Each member firm has already received one printed copy of the pamphlet, with additional printed copies available for purchase from MLRC. The pamphlet is also available to MLRC members in electronic form on the MLRC web site at no cost.

MLRC members will find the pamphlet beneficial both for their own use and for distribution to their clients.

ORDER FORM

QUANTITY	TITLE	PRICE	TOTAL
	Basic Guide to Employment Defamation and Privacy Law	$ 3 each	
		Sales Tax (New York State orders only)	
		Total	

Name: _____

Firm/Organization: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____ E-mail: _____

Make check payable and send order to:
Media Law Resource Center
520 Eighth Ave., North Twr. 20th Fl.
New York, NY 10018

RETURN TO TABLE OF CONTENTS

Judge Reduces Illinois Supreme Court Chief Justice's Defamation Award

By Steven P. Mandell and Brendan J. Healey

Notwithstanding a trial judge's substantial reduction of the multi-million dollar defamation verdict in his favor, the Chief Justice of the Illinois Supreme Court still stands to gain millions of dollars from a trial in the court system he dominates. *Thomas v. Page*, No. 04 LK 013 (Ill. Cir. Ct. jury verdict Nov. 14, 2006) (O'Brien, J.). *See also* "Illinois Jury Awards Chief Justice $7 Million in Libel Suit Against Newspaper," *MediaLawLetter* Nov. 2006 at 7.

Calling $5 million in damages for reputational harm an award that "shocks this judicial conscience," the trial judge substantially reduced the jury's record-setting $7 million verdict in Chief Justice Bob Thomas's defamation lawsuit against a small, suburban newspaper.

The trial court reduced the reputational damages by $2 million on remittitur and reduced plaintiff's claimed economic damages to zero on a judgment notwithstanding the verdict. Even with the reduction, Chief Justice Thomas remained the beneficiary of a $4 million award.

Other Rulings of Note

In addition, several interesting rulings by the trial court still stand. Among the trial court's rulings that survived post-trial motions were the court's decisions:

- Allowing the defendants to show the jury the newspaper pages on which the opinion columns at issue appeared but forcing defendants to redact the word "Opinion" prominently emblazoned at the top of the page;
- Allowing "selective waiver" of the judicial deliberation privilege by the Justices of the Illinois Supreme Court; and
- Preventing defendants from presenting evidence regarding the difference between reporters and columnists—after plaintiff improperly introduced Society of Professional Journalist standards of conduct.

In addition, the trial court prevented defendants Bill Page, the author of the columns at issue, and the *Kane County Chronicle*, which published the columns at issue, from taking oral depositions of several Supreme Court Justices whom the Chief Justice called as trial witnesses. The court also prohibited defendants from presenting certain evidence of plaintiff's political machinations—in particular, his highly public and controversial flouting of his pro-life stance.

Remittitur

The jury awarded $5 million for reputational harm, $1 million for embarrassment, mental suffering and humiliation, and $1 million for future economic damages. Defendants sought to remit all three elements of damages.

Although the trial court remitted the $5 million in reputational damages, the surprising aspect of this decision was the court's decision to nonetheless award $3 million. Granted, asking the trial judge to reduce his boss's windfall award put the court in a difficult position. Even though he noted plaintiff's "paucity of evidence" of reputational harm, the trial court nonetheless upheld $3 million in reputational damages. Moreover, the trial court did so despite defendants' overwhelming and uncontradicted evidence (much of it the testimony of plaintiff's witnesses) that plaintiff suffered no reputational harm and, indeed, had flourished in the wake of the allegedly defamatory columns.

Ultimately, the trial court provided no explanation for upholding $3 million in reputational damages when "no witness presented at trial testified that Justice Thomas does not have a good reputation; no witness testified that he thought less of Justice Thomas as a result of the articles; and no witness testified that he was told by others that they thought less of Justice Thomas as a result of the articles."

Interestingly, a $1 million award for embarrassment, mental suffering, and humiliation for an individual who testified to suffering some anger and a general weariness from the publication of the columns did not shock the judicial conscience.

Judgment NOV

The trial court granted JNOV only as to plaintiff's claimed economic harm. Plaintiff claimed two types of future economic harm arising from the columns.

First, he said they would preclude him from becoming a federal judge at some point several years in the future. He also hypothesized that the columns would prevent him from becoming an equity partner at a major Chicago law firm when

(Continued on page 12)

RETURN TO TABLE OF CONTENTS

Judge Reduces Illinois Supreme Court Chief Justice's Defamation Award

(Continued from page 11)

his term on the Illinois Supreme Court ends in 2010. (Plaintiff also claimed the columns would prevent him from being retained as a Supreme Court Justice in 2010, but he dropped that argument during trial after defendants moved *in limine* to bar such damages based on an appellate court opinion issued during the trial.)

The trial court determined that the federal judge damages were simply too speculative. The process of becoming a federal judge involves numerous political and personal variables, and the court determined "one must pile inference upon inference" to tie the columns to a lost seat on the federal bench.

With regard to the equity partnership argument, the trial court noted that, critically, not one witness "testified that plaintiff *could* become an equity partner." In the absence of testimony that plaintiff could become an equity partner, the court was unwilling to award damages for loss of that opportunity.

The trial court agreed that, on a motion for judgment notwithstanding the verdict, it was required independently to do a *de novo* review of the entire record. Nonetheless, the trial court seemed to contradict itself in stating that it "cannot make its own findings of fact."

Most importantly in this regard, the trial court refused to grant JNOV on actual malice. Two points in the court's analysis stand out. First, the trial court characterized Mr. Page as admitting on cross examination that he was not concerned whether his sources were telling him the truth. In fact, Mr. Page testified repeatedly that he was not concerned because he had no reason to disbelieve his sources.

In addition, the trial court mentioned Mr. Page's "reporting of events in the Supreme Court before they actually happened." If reporting on events before they happen is evidence of actual malice, investigative reporters everywhere should take heed.

Motion for New Trial

Although defendants raised numerous grounds for a new trial, the trial court denied all of them. Without discussing the court's rulings on every basis on which defendants moved for a new trial, a few items bear mentioning.

First, the court advanced several reasons for its decision to delete the word "Opinion" from the pages on which the columns at issue appeared. Although it had not previously mentioned this justification, the trial court claimed the word "Opinion" was hearsay. In another newly enunciated reason for the deletion, the court determined that the word "Opinion" was, in itself, an opinion (the newspaper's characterization of that page) that should have been disclosed as such.

In addition, the court said it properly admitted the Society of Professional Journalists' Code of Ethics. The court also found that it correctly prohibited defendants from offering testimony regarding the difference between reporters and columnists, which defendants offered to show why certain SPJ provisions were inapplicable to a columnist who wrote twice-weekly columns. According to the court, it was "disingenuous" for Mr. Page to avail himself of the reporter's privilege and then claim to be a columnist.

The court's reasoning ignores the indisputable facts of the case and, if taken to its illogical limits, would strip all columnists in the state of Illinois of the protections of the reporter's privilege statute. The decision also flies in the face of the statutory language, which clearly encompasses reporters and columnists (and others involved in the news-gathering process) in providing that: "'Reporter' means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis . . . ."

Aftermath of the Post-Trial Motions

Shortly after the trial court ruled on the post-trial motions, plaintiff accepted the remittitur. Defendants intend to appeal.

Steve Mandell, Steve Rosenfeld, Steve Baron and Brendan Healey of Mandell Menkes LLC and Bruce Sanford, Lee Ellis and Bruce Brown of Baker & Hostetler represent the defendants. Joseph A. Power, Jr. and Todd A. Smith of Power Rogers & Smith, P.C. represent plaintiff.

RETURN TO TABLE OF CONTENTS

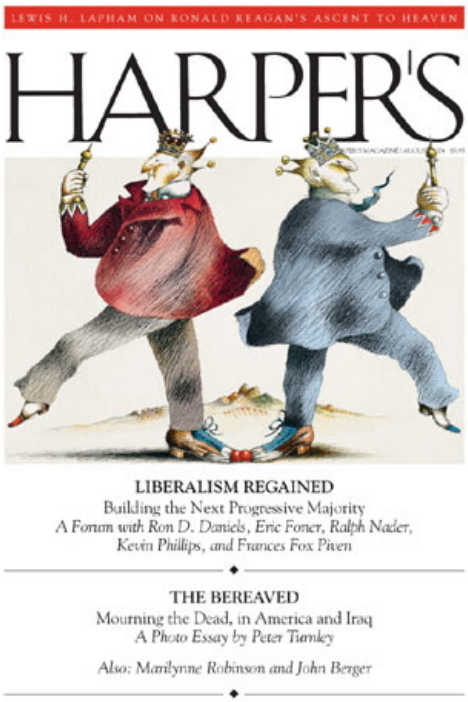
Tenth Circuit Affirms Summary Judgment For Harper's and Peter Turnley In Action Arising from Soldier's Photo

By S. Douglas Dodd

In a significant decision for photojournalists and publishers of their works, a summary judgment in favor of Harper's Magazine Foundation, publisher of *Harper's Magazine* and internationally known photojournalist Peter Turnley has been affirmed by the Tenth U.S. Circuit Court of Appeals. *Showler and Davidson v. Harper's Magazine Foundation and Peter Turnley*, No. 06-7001 (Tenth Circuit, March 23, 2007) (Kelly, Briscoe, Robinson, J.J.).

This Order and Judgment was an unpublished decision and under 10th Circuit Rules is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The biological father and the maternal grandfather of an Oklahoma Army National Guard soldier who was killed in Iraq, sued *Harper's* and Turnley in 2005 based on a Turnley photograph of the open casket of Army Sgt. Kyle Brinlee taken at his public funeral service and published, along with 19 other photographs, in the August 2004 edition of *Harper's*.



The Tenth Circuit panel affirmed in its entirety the summary judgment granted to *Harper's* and Turnley related to claims for common law invasion of privacy, statutory misappropriation, intentional infliction of emotional distress, fraud and misrepresentation, constructive fraud, unjust enrichment and negligent hiring, retention and supervision.

Background

Sgt. Kyle Brinlee was killed in action in Iraq on May 11, 2004. He was the first Oklahoma National Guard soldier to be killed in combat since the Korean Conflict in the early 1950s. His death in Iraq and events surrounding his funeral and burial in Pryor, Oklahoma were listed as the number one news story of 2004 by his home town newspaper *The Daily Times*.

Anticipating a very large crowd, Sgt. Brinlee's family held his funeral service in the community's largest indoor venue, the Pryor High School auditorium. They accommodated news coverage by designating an area in the back of the auditorium for the press. Turnley, along with other members of the press, including photographers from three newspapers, the *Associated Press* and a television pool videographer, attended the funeral and photographed events before, during and after the service.

The undisputed evidence showed that Turnley did not meet either of the Plaintiffs before or during the funeral service. He introduced himself to Plaintiff Showler after the graveside rites, expressed his condolences and offered to provide Showler copies of some of the photographs he took at the funeral services. Showler indicated he would like to have the photos and gave Turnley his address.

In August 2004, Showler saw a copy of the magazine and the photo essay, entitled "THE BEREAVED, Mourning the Dead in America and Iraq" when it appeared in *Harper's*. He claimed to suffer emotional distress as a result of seeing the open casket photograph.

Plaintiffs' claimed that Turnley's open casket photograph was outrageous, that it invaded the privacy of Sgt. Brinlee's family and misappropriated Sgt. Brinlee's image for advertising and commercial purposes. Plaintiffs also alleged that Turnley was instructed by and agreed with the funeral director not to take photographs of the open casket. Turnley denied there was any restriction as to what he could photograph and further denied any agreement to not photograph the open casket.

These allegations formed the basis of plaintiffs' claims for misrepresentation, fraud and constructive fraud. Plaintiffs also claimed that *Harper's* and Peter Turnley were unjustly enriched by publication of the open casket photograph

(Continued on page 14)

RETURN TO TABLE OF CONTENTS

Tenth Circuit Affirms Summary Judgment For Harper's and Peter Turnley In Action Arising from Soldier's Photo

(Continued from page 13)

and entry of the photo essay in news photography competitions.

Finally, Plaintiffs alleged that *Harper's* knew or should have known that Turnley had a propensity to obtain and publish controversial and objectionable photographs. Defendants Harpers and Turnley denied each and every one of plaintiffs' claims and in December 2005, were granted summary judgment by the United States District Court for the Eastern District of Oklahoma on all claims. *See* No. 05-178-S (E.D. Okla. Dec. 22, 2005) (Seay J.).

The plaintiffs appealed to the Tenth Circuit Court of Appeals in January 2006 and the Court heard oral arguments in November 2006. An amicus brief was filed on behalf of the Denver Post Corporation, the Magazine Publishers Of America, the Newspaper Association Of America, the New York Times Company, the Oklahoma Publishing Company, the Picture Archive Council of America, The Reporters Committee For Freedom of The Press and the Tribune Company.

The First Amendment

While the Tenth Circuit affirmed the trial court's grant of summary judgment which relied in part on the First Amendment, it declined to consider whether *Harper's* and Turnley's actions were themselves privileged under the First Amendment because none of plaintiffs' claims could survive summary judgment. However, the Court did take time to distinguish a Supreme Court decision which Plaintiffs argued should control.

Favish Distinguished

The Tenth Circuit found the Supreme Court's decision in *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) to be inapplicable to plaintiffs' invasion of privacy claims because *Favish* relies on a statutory privacy right under the Freedom Of Information Act, not a cause of action for invasion of privacy.

In fact, the Tenth Circuit noted, "the Supreme Court observed in *Favish* that 'the statutory privacy right protected by Exemption 7(C) [of FOIA] goes beyond the common law and the Constitution.'" *Order and Judgment* at 10 (citing *Favish* at 170).

And the Tenth Circuit noted that in *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, the Supreme Court stated that "the question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Reporters Committee*, 489 U.S. 749, 763 n. 13.

The Tenth Circuit found that "the photographs here are not death-scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respect. Coupled with the public nature of this funeral, the photographs are distinguishable from those at issue in *Favish*." *Order and Judgment* at p. 10.

"The photographs here are not death-scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral

Judgment On Non-First Amendment Grounds

Without relying on or articulating any constitutional protections, the Tenth Circuit found state law and factual support for defendants' entitlement to summary judgment on all claims. Of particular note to the news media is the Court's finding that "neither the photograph, nor the alleged breach of an agreement by Mr. Turnley constituted conduct that was so extreme and outrageous "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

The Court further found "it is undisputed that the photograph accurately reflects the image of Sgt. Brinlee's funeral and open casket, as seen by the 1200 people in attendance."

S. Douglas Dodd, Jon E. Brightmire, Michael Minnis and Raymond H. Tipton, III from the Tulsa and Oklahoma City offices of Doerner, Saunders, Daniel & Anderson, L.L.P. represented Harper's Magazine Foundation and Peter Turnley. Dodd and Minnis are members of the firm's First Amendment Practice Group. The Amicus Parties were represented by Thomas B. Kelley Steven D. Zansberg of Faegre & Benson LLP of Denver. The Plaintiffs were represented by Latham, Stall, Wagner, Steele and Lehman, P.C. of Tulsa.

RETURN TO TABLE OF CONTENTS

Verdict Affirmed Against New York Weekly for Political Column on Opinion Page

Newspaper Plans Appeal to Court of Appeals; Media Amicus Support Sought

By Henry R. Kaufman

On February 27, 2007, New York's Appellate Division, Second Department handed down a decision and order affirming a jury verdict for compensatory damages in favor of a public official libel plaintiff, Monroe Yale Mann, Town Attorney of Rye, New York, against Westmore News, Inc., a local independent weekly newspaper serving the Towns of Rye and Port Chester in Westchester County, New York and also affirming a finding of liability against the paper's political columnist and former publisher, Bernard Abel. *Mann v. Abel*, 2007 NY Slip Op 1694, 2007 N.Y. App. Div. LEXIS 2329 (2d Dept. 2007).

Appellate Division's Holding

The Second Department's unsigned, three-paragraph decision held the "jury's finding that the plaintiff was defamed, and that he was entitled to compensatory damages, could have been reached on a fair interpretation of the evidence." The Appellate Division offered no discussion of the record nor any reasoning supporting either this holding or its other, equally summary findings that "there was no basis to award punitive damages" and that "the amount of the compensatory damage award was excessive."

Based on these cursory, unexplained rulings, the Court issued a conditional order of remittitur, reducing the jury's compensatory damage award from $75,000 to $15,000, and affirming the award at that level on the condition that plaintiff stipulate to the reduction or, in the absence of plaintiff's stipulation, ordering a retrial of the compensatory damages issue.

Punitive damage awards of $15,000 each against the newspaper and its columnist were summarily thrown out and the court also ruled that the trial judge had erred in awarding prejudgment interest.

Earlier Proceedings

From the Second Department's abbreviated decision it would be impossible to discern that the newspaper's appeal challenged an unprecedented verdict based on constitutionally-protected opinions.

Broad, conclusory statements, such as that plaintiff's policies and actions as a school board member and Town Attorney were "destructive" – were placed on trial as if they could be proven "true" or "false." The jury was not instructed to distinguish fact from opinion and its general verdict did not identify which of several statements submitted were the basis for its findings of liability and damages.

This was not the first time the Appellate Division failed to address the issue of constitutional protection for opinion in the case. On an earlier appeal from denial of summary judgment, the Second Department issued a one-sentence order affirming the denial on technical grounds, also without ever addressing the opinion issue raised by trial counsel. *See Mann v. Abel*, 12 A.D.3d 646 (2d Dept. 2004).

On remand from that earlier appeal, plaintiff moved for summary judgment of liability against the newspaper and defendants cross-moved for summary judgment dismissing plaintiff's claims, again attempting to assert the constitutional defenses of opinion and absence of actual malice.

The trial court denied both motions. Once again it failed to address defendants' constitutional defenses, not even adverting to the issue of opinion other than to find that there remained "disputed issues of fact" on the issues of truth and actual malice.

Defendants' Two-Pronged Appeal

Both the judgment, and the order denying defendants' cross-motion for summary judgment, were challenged on appeal to the Appellate Division. As to summary judgment, defendants contended that denial of the motion was reversible error leading to an unwarranted trial. The trial court's failure to address the opinion issue in any way also led to a defective process in which clearly actionable statements of opinion were put on trial and submitted to the jury, along with arguable factual statements isolated out of context.

This procedure made it impossible to discern whether constitutionally-protected opinions formed an improper and reversible basis for all or some portion of the jury's verdict. Yet the Second Department's decision never addressed the summary judgment branch of the appeal, nor the issue of opinion.

(Continued on page 16)

Verdict Affirmed Against New York Weekly for Political Column on Opinion Page

(Continued from page 15)

Appellants' briefs also extensively examined the evidence related to actual malice, as required by *Sullivan* and *Bose*, to assist in the searching review of the entire record that is constitutionally required in a public official's libel action. Defendants demonstrated, based on that comprehensive examination the inadequate record, that plaintiff had failed to meet his burden, as a public official, of adducing proof – much less clear and convincing proof – of actual malice regarding any substantially false and defamatory factual statement.

Yet the Appellate Court's decision reflected absolutely no analysis of the issue of constitutional malice nor did it give any sign of meaningful appellate review – much less a *de novo* review – of the entire record on appeal.

Proceedings on Remand

On remand from the Appellate Division, plaintiff ultimately elected to stipulate to the reduced award rather than face the costs and uncertainties of a new trial on compensatory damages. As stipulated, the amended judgment was reduced by well over $100,000 and now stands at less than $20,000 – an amount that, but for the important constitutional issues involved, might not economically justify a further appeal.

Nonetheless, plaintiff's stipulation paves the way for a direct appeal by defendants, as a matter of principle, to the Court of Appeals. On the other hand, in stipulating to the reduced award, plaintiff is deemed to have consented to the resulting affirmance by the Appellate Division of the judgment at the reduced level, and is thus no longer considered an aggrieved party with the right to his own appeal.

Issues to be Raised in the Court of Appeals

Defendants will seek to pursue an appeal "as of right" under New York procedure, based on the two key substantive constitutional issues presented – opinion and actual malice. In addition, the Court of Appeals will be asked to address the gross procedural shortcomings that led to a constitutionally-suspect trial of opinions and that, for whatever reason, also led the Appellate Court to entirely ignore its clear obligation to accord a searching, independent review of the record to protect defendants' constitutional rights on appeal.

The Court will be urged to reject the Second Department's handling of defendants' appeal as if it were a run of the mill personal injury claim subject to summary disposition on a cursory review by means of an unexplained conditional remittitur that satisfied no party in result and that certainly did not satisfy the substantive and procedural constitutional requirements of *New York Times v. Sullivan* and its federal and state progeny.

Amicus Curiae Support at the Jurisdiction Stage

The Court of Appeals has a superb record of vigorously enforcing the constitutional standards presented on this appeal. It has previously held that New York's state constitution actually provides greater protection to statements of opinion than does the first amendment – *see Immuno A.G. v. J. Moor-Jankowski*, 77 N.Y.2d 235 (1991); it has fully embraced the requirement of *de novo* review of actual malice – *see Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466 (1993); and it has also recognized the importance of summary judgment, "where appropriate," in such cases.

For this reason, the central challenge is to assure that the Court will take jurisdiction to hear the appeal. Although the newspaper will argue it has an appeal "as of right," based on the meritorious constitutional issues presented, it is not unusual for the Court on its own motion to request the parties to brief the jurisdictional issue in terms of whether the appeal presents a "substantial" constitutional question. It is also possible that plaintiff will move to dismiss the appeal on this or some other ground.

If the Court of Appeals does find jurisdiction, and take the case for full argument, many New York media will doubtless have a strong interest in supporting an appeal presenting such significant issues for consideration in the state's highest court.

It would seem equally important that media groups lend their support, and express their concerns, at the jurisdictional stage, in order to assure that this important case is not shunted aside, either due to the obscurity of its previous treatment in the lower courts or because it involves an unheralded local newspaper and a judgment now of relatively modest size.

Henry R. Kaufman, Michael K. Cantwell and Beth A. Willensky represented the defendants on appeal. The plaintiff was represented on appeal by Mann and Mann, LLP. David Schulz of Levine Sullivan Koch & Schulz, LLP is representing the Associated Press as a potential lead amicus curiae.

RETURN TO TABLE OF CONTENTS

Pennsylvania Court Dismisses Libel Suit Against "DontDateHimGirl" Website

No Jurisdiction Over Florida Defendants

A Pennsylvania court this month dismissed a libel suit against the owners and operators of the popular website DontDateHimGirl.com for lack of personal jurisdiction. *Hollis v. Joseph,* No. GD06-012677 (Pa. Comm. Pleas April 5, 2007) (Wettick, J.).

DontDateHimGirl is a popular website that describes itself as an online community for women that provides information on dating and relationships. Its most popular and notable feature is a searchable database of mostly anonymous postings about men. The postings are "comment enabled" so that users can discuss the postings.

At issue in the case were anonymous postings about plaintiff, Todd Hollis, a Pittsburgh-based lawyer. The complained of postings state:

> todd hollis gave me herpes beware do not date him
>
> .... His crib is a dump. He wears dirty clothes all the time. He's an attorney but you would never think so cause he complains about paying child support for his kids. He got hook-ups in every zipcode in the USA. He's hot....DON'T LET HIM FOOL YOU GIRL!
>
> "I used to date this guy and heard he was gay, i'm quite sure he is bi. I remember his father George asking him if he was.")
>
> Do NOT DATE HIM. He gave me an STD and dated 2 people at a time.
>
> This jerk gave me herpes too, don't know why i ever even met him, he tried to pay me to have sex after we broke up, what a jerk, beware girlfriends, he is no chocolate but rather poo poo

Hollis filed suit in June 2006 against the website operators, two identified women who allegedly posted some of the profiles, and several Jane Doe defendants. Hollis also filed a complaint with the Pennsylvania Human Relations Commission claiming the site discriminates against men.

The website defendants brought a motion to dismiss for lack of personal jurisdiction and also arguing they are immune under Section 230 of the Communications Decency Act.

Jurisdictional Analysis

In dismissing for lack of jurisdiction, the court noted the following facts about the website. The server and operations of the site were all based in Florida. The site itself was "minimally interactive." Defendants did not specifically solicit Pennsylvania residents to post information, although they knew that Pennsylvania residents were posting to the site. The site has an online store that has sold $200 of merchandise to six Pennsylvania residents.

The site's primary source of revenue is advertisements, but none of the advertisers are Pennsylvania residents. The primary advertising revenue comes from Google's AdSense program which serves ads on website and pays website operators based on the number of "clicks" on the ad. There was no way to determine if any revenue from the AdSense program came from clicks on ads appearing next to the profiles of Pennsylvania residents.

Under these facts, there was no general or specific jurisdiction over the defendants. The website did not perform a significant amount of commercial business over the Internet to establish general jurisdiction. *Citing Efford v. Jockey Club*, 796 A.2d 370 (Pa. Super. 2002). And it had

(Continued on page 18)

RETURN TO TABLE OF CONTENTS

PA Ct. Dismisses Libel Suit Against "DontDateHimGirl" Website

(Continued from page 17)

no other contacts to justify being haled into Pennsylvania over the web postings.

Quoting from *Hy Cite Corp. v. BadBusinessBureau.Com*, 297 F. Supp.2d 1154, 1162 (W.D. Wis. 2004), the court conluded:

> Defendant's website is accessible to anyone connected to the internet anywhere in the world. Under plaintiff's argument, defendant could be haled into court in any state for any controversy, regardless whether defendant had any contact with a resident of that state. This result would be inconsistent with the Supreme Court's understanding of due process.

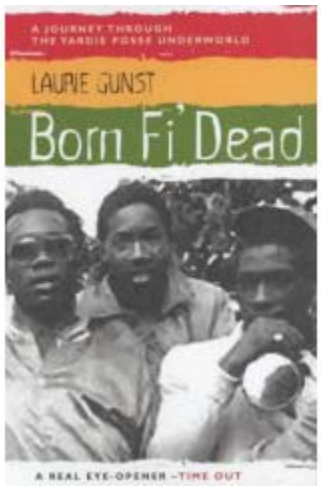
Plaintiff is represented by John R. Orie, Jr, Pittsburgh, PA. Defendant is represented by Robert L. Byer and Lida Rodriquez-Taseff, of Duane Morris LLP. The Electronic Frontier Foundation filed an amicus brief in support of the website's Sec. 230 defense.

Court Dismisses Declaratory Judgment Suit Over Jamaican Libel Action

Author Sought Declaration That Claim Was Unenforceable in the U.S.

A federal court in New York dismissed an action brought by a book author seeking a declaratory judgment that a Jamaican libel judgment is unenforceable in the United States. *Gunst v. Seaga*, No. 05 Civ. 2626, 2007 WL 1032265 (S.D.N.Y. March 30, 2007) (Batts, J.).

In a short opinion, the district court held that it did not have subject matter jurisdiction because the amount in controversy did not exceed $75,000 where the Jamaican judgment had not yet been made final.



Background

Plaintiff Laurie Gunst is a New York historian and author. In 1995, she published a book entitled *Born Fi Dead*, which discusses links between Jamaican politics and gang violence, in particular links between a violent criminal gang known as the "Posse" and Edward Seaga, the former Prime Minister of Jamaica and a current member of the Jamaican Parliament. The book was published in the U.S. and England.

In 1999, Gunst was interviewed from New York by a radio show called *The Breakfast Club* broadcast in Jamaica on HOT 102 FM. Among other things, Gunst repeated allegations from her book, including that the Posse received its early financial support from Mr. Seaga and members of his political party. She also discussed "speculation" that Seaga was involved in the murder of a Jamaican drug dealer to prevent his extradition to the U.S. and his possible cooperation with U.S. law enforcement.

In 1999, Seaga sued Gunst in Jamaica. Jamaica largely follows English libel law and thus the statements were presumed false and Gunst would have had the burden of proving truth. Gunst did not respond to the complaint because of the cost and disadvantages of litigating in Jamaica, and because she felt her life would be in danger if she were to return to Jamaica.

In January 2005, Seaga was granted an "Interlocutory Judgment in Default" with damages and costs to be assessed at a later date.

In March 2005, Gunst filed her complaint seeking a declaration that the judgment was unenforceable in the U.S. and that Seaga's defamation claim failed as a matter of law because he could no t prove fault.

District Court Decision

Dismissing the complaint, the court held that the amount in controversy did not exceed $75,000 where no final damage award had been entered against plaintiff in Jamaica. Moreover, the court cited plaintiff's position that any award would be unenforceable in the U.S. as further evidence that the value of the action could not exceed $75,000. The court dismissed without leave to replead.

Plaintiff is represented by Peter R. Ginsberg and Robert Solomon, New York, NY. Defendant is represented by David Patrick Rowe, Miami, FL.

RETURN TO TABLE OF CONTENTS

New York Times, WGBH Educational Foundation and Canadian Broadcasting Corporation Win Summary Judgment In Libel Case

By Daniel J. Kelly

A Texas state court judge has granted summary judgment to the media defendants in a libel suit brought by the owner of a medical clinic who claimed he and his business were defamed by a Pulitzer Prize-winning series on worker safety published by *The New York Times*. *Adams and Occu, Inc. d/b/a Occu-Safe vs. The New York Times Co., et. al.*, No. 03-2315-C (241st Jud. Dist., Smith Co., Texas April 16, 2007).

Judge Jerry Calhoon granted summary judgment to *The Times* and two of its reporters, as well as to PBS affiliate WGBH of Boston and the Canadian Broadcasting Corp., both of which collaborated with *The Times* on television documentaries about the deplorable occupational safety and environmental record of McWane, Inc., an Alabama company that operates foundries around the U.S. and in Canada. Both the articles and the TV programs ran in January 2003.

The action, alleging defamation and business disparagement, was filed in 2003 by Mike Adams and his company, Occu-Safe, which operated a medical clinic that treated injured workers under a contract with Tyler Pipe, a McWane plant in Tyler, Texas

Adams alleged that the articles and broadcasts libeled him and his clinic when they detailed how the clinic failed to diagnose the broken back of one worker, Marcos Lopez, and then failed to tell Lopez that his back was broken once the injury was discovered. Adams also claimed that he was defamed by statements that the clinic was under the control of McWane and cared more about cutting costs than providing medical care to workers.

The media defendants principally argued on summary judgment that the stories were true and that, in any event, under Texas law news organizations were free to print allegations from third parties involved in a public controversy, even if the underlying allegations were untrue.

Judge Calhoon held a three-hour hearing and then granted the motion from the bench. He did not issue a written opinion, and he reserved decision on a summary judgment filed by defendant Michelle Sankowsky, a former Tyler Pipe employee who was a primary source for the stories.

The media defendants principally argued that the stories were true and that, in any event, under Texas law news organizations were free to print allegations from third parties involved in a public controversy.

Background

In January 2003, *The New York Times* published a three-part series about McWane, one of the world's largest manufactures of cast iron sewer and water pipe. The series was the product of a nine-month newsgathering effort by journalists from *The Times*, including David Barstow and Lowell Bergman, WGBH, and the CBC into McWane and its practices.

In conjunction, with the reporting for the print series, WGBH/*Frontline* produced a companion television documentary, which aired on PBS stations. The print series won several awards, including the Pulitzer Prize for Public Service. The *Frontline* broadcast also won numerous awards, including the DuPont Silver Baton.

The publications reported on several controversies concerning McWane's business practices, particularly its safety, health, and environmental record at its plants in the United States and Canada. The publications detailed allegations about a corporate strategy, executed in one of the most inherently dangerous industries in America, that subordinated safety programs, environmental controls, and even some of the smallest workplace comforts to production, cost cutting and profit. Company managers called it the "McWane Way."

Following the series and documentary, the U.S. Department of Justice began a sweeping criminal inquiry that has resulted in a string of nearly sixty felony convictions against McWane and its managers.

Plaintiffs Mike Adams and Occu-Safe filed this libel lawsuit, challenging a portion of the McWane series and documentary describing the role of Occu-Safe, a small-start up medical firm hired by McWane to treat the hundreds of workers injured every year at Tyler Pipe. Workers had told the reporting team that they viewed Occu-

(Continued on page 20)

RETURN TO TABLE OF CONTENTS

The Times, WGBH Educational Foundation and CBC Win Summary Judgment In Libel Case

(Continued from page 19)

Safe and its owner, Mike Adams, as integral partners in the "McWane Way."

The portions of the publications in dispute reported on these and other allegations, including allegations by Michelle Sankowsky, the former occupational health and compensation manager at Tyler Pipe, and Marcos Lopez, a long-time employee of Tyler Pipe who broke his back in March 2002 and was treated by Occu-Safe.

Summary Judgment Motion

After lengthy discovery, the media defendants moved for summary judgment on three principal, independent grounds: (1) substantial truth, (2) no actual malice, and (3) statutory privilege.

In their motion, the media defendants argued that the publications are true and satisfied the substantial truth test in Texas. With respect to the reporting on the third-party allegations, the media defendants argued that the truth of the underlying allegations that Mr. Lopez and Ms. Sankowsky asserted against Occu-Safe is not relevant to the summary judgment motion and that the media defendants need only show that the allegations were made and accurately reported, not that the underlying allegations are true.

In response, plaintiffs argued that the media defendants may republish allegations by third parties, but only in connection with official proceedings and circumstances covered under Texas's statutory privileges. In reply and during oral argument, the media defendants argued that Texas courts recognize the media's rights to publish third-party allegations separate and apart from Texas's statutory privileges and that many Texas courts describe the third-party allegation rule in the context of the substantial truth doctrine and do not even mention or discuss the statutory privileges. *See, e.g., Green v. CBS Inc.*, 286 F.3d 281 (5th Cir. 2002).

The media defendants also contended that the plaintiffs' "libel-by-omission" claims failed to create a genuine issue of material fact as to the substantial truth of the publications. Under Texas law, a plaintiff must raise a fact issue that the publication is demonstrably, verifiably false, not that the plaintiff would have stated the facts differently or wish that the publication had emphasized plaintiff's own particular point of view. *See, e.g., Evans v. Dolcefino*, 986 S.W.2d 69, 78 (Tex. App.—Houston [1st Dist.] 1999, no writ).

The media defendants argued that none of the alleged omissions about Mr. Lopez's care was material or injected falsity in the publications.

Finally, the media defendants argued that under the substantial truth doctrine, the plaintiffs had to show that the gist of the challenged publications was more damaging to their reputation in the mind of the average reader or viewer than admittedly true statements. During discovery, plaintiffs admitted to a raft of serious deficiencies in Mr. Lopez's care. The media defendants argued that these additional admitted problems would have been even more damaging to plaintiffs' reputation than the statements in the challenged publications.

Limited Purpose Public Figure Status

In addition, the media defendants argued they were entitled to summary judgment because the plaintiffs are limited purpose public figures and they failed to show that the media defendants acted with actual malice.

Texas follows the standard three prong test in determining whether a libel plaintiff is a limited purpose public figure: (1) the pre-existing public controversy at issue was public in the sense that people were discussing it and that people, other than the immediate participants in the controversy, were likely to feel the impact of it; (2) the plaintiffs had more than a trivial or tangential role in the controversy; and (3) the alleged defamation was germane to their participation in the controversy. *See, e.g., WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568 (Tex. 1998).

(Continued on page 21)

The Times, WGBH Educational Foundation and CBC Win Summary Judgment In Libel Case

(Continued from page 20)

Plaintiffs all but conceded the first and third prongs of the test, but argued that they only had a trivial or tangential role in the controversies surrounding McWane Inc. In particular, they contended they did not voluntarily inject themselves into the controversies, that they did not seek out publicity, and that there was no prior publicity about them.

In reply, the media defendants argued that the fact the plaintiffs did not seek out (or want) publicity did not save them from becoming limited-purpose public figures. In fact, several Texas courts have held that a person can become a limited-purpose public figure by "voluntarily engaging in activities that necessarily involved the increased risk of exposure and injury to reputation." *McLemore*, 978 S.W.2d at 573.

The media defendants argued that plaintiffs' role as the designated company doctor and the self-professed, proud partner of Tyler Pipe satisfied the low threshold courts have adopted for finding that a plaintiff had more than a trivial or tangential role in the controversy.

The media defendants further argued that, as limited purpose public figures, the plaintiffs failed to carry their burden of showing they acted with actual malice. The plaintiffs' claim of actual malice mirrored their claim that the publications are false by omissions (i.e., that the media defendants should have included additional information in the publications).

In reply, the media defendants argued that plaintiffs did not demonstrate that they "selected the published material with actual malice, i.e., the awareness that the omission could create a substantially false impression." *Huckabee v. Time Warner Enter. Co.*, 19 S.W.3d 413, 426 (Tex. 2000).

Many courts in Texas have found that actual malice can be negated by extensive research, a belief that the challenged publications were true, and a lack of awareness by the defendants of any probable falsity of the publications. In support of their defense, the media defendants submitted lengthy and detailed affidavits from the reporters supporting their belief in the truth of the publications.

Fair Report Privilege

Finally, the media defendants argued they were entitled to summary judgment because the publications are privileged. Texas's statutory privileges protect media reports on (1) allegations that are fair, true, and impartial accounts of a judicial proceeding or (2) if the accounts are a "reasonable and fair comment on or criticism of [a] …matter of public concern published for general information." Tex. Civ. Prac. & Rem. Code § 73.002(b)(1) and (2).

Here, the media defendants argued the publications were privileged because they reported on, among other things, governmental investigations about worker safety issues, and lawsuits stemming from the care that injured workers, including Mr. Lopez, alleged they received from Occu-Safe.

Ruling

After considering the extensive written submissions of the parties and holding a lengthy oral argument, the trial court dismissed all of plaintiffs' libel claims from the bench. The court's order did not specify the grounds on which it granted the motion. The media defendants expect the plaintiffs to appeal this decision.

Dan Kelly is an associate with Vinson & Elkins L.L.P. David McCraw, Vice President and Assistant General Counsel of The New York Times represents The Times, David Barstow, and Lowell Bergman. Eric Brass, Corporate Counsel, represents WGBH and Daniel Henry, Senior Legal Counsel, represents the CBC. All of the media defendants are represented in the Texas lawsuit by Michael Raiff, Tom Leatherbury, Bill Sims, and Dan Kelly, attorneys at Vinson & Elkins L.L.P. in Dallas, Texas, and George Chandler of the Chandler Law Firm in Lufkin, Texas. Plaintiffs are represented by Joe Chumlea of Shackelford, Melton & McKinley, L.L.P. of Dallas, Texas; Gary Richardson of The Richardson Law Firm in Tulsa, Oklahoma; and Cindy Olson Bourland of Merica & Bourland in Austin, Texas.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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

Ph: 212.337.0200,
medialaw@medialaw.org

RETURN TO TABLE OF CONTENTS

MLRC Calendar

PLEASE VISIT www.medialaw.org FOR MORE INFORMATION

September 17-18, 2007

London, England
MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

Stationers Hall, London.

September 19, 2007

London, England
MLRC London Conference

International In-House Counsel Breakfast

Reynolds Porter Chamberlain
Tower Bridge House
St Katharine's Way
London

November 7, 2007

New York City
MLRC ANNUAL DINNER

November 9, 2007

New York City
Defense Counsel Section Breakfast

RETURN TO TABLE OF CONTENTS

Summary Judgment for Author Who Described Fall Out With Former Ally

No Evidence That Defendant Doubted Her Own Recollection

In an interesting decision, an Illinois federal district court last month granted summary judgment to a book author, notably finding that her description of a dispute with plaintiff was published without actual malice where there was no evidence to show that she doubted her own recollection of the dispute. *Madison v. Frazier*, 05–3283, 2007 WL 891327 (C.D. Ill. March 26, 2007) (Mills, J.).

Background

The defendant, Renatta Frazier, is a former Springfield police officer who was involved in a highly publicized discrimination case against the city. In 2001, while a rookie officer, Frazier was accused by police officials of improperly responding to a rape complaint. The city began proceedings to fire Frazier and she resigned from the force. Evidence later came out that the accusation was unfounded and a pretext to force Frazier off the force. This led to a discrimination lawsuit that was settled for approximately $850,000.

Frazier had originally sought out and obtained the help of plaintiff, Carl Madison, a local NAACP official, to champion her cause. But they had a falling out about how to handle the matter.

In 2005, Frazier self-published a book about her experiences entitled "The Enemy In Blue." Among other things, the book recounts her falling out with plaintiff, stating that he "was not working in my best interest" and that she severed ties with him. Frazier also wrote that she was dismayed to hear plaintiff claim that he had dropped her, concluding:

> "I couldn't believe what I was reading and hearing ... it didn't happen like that at all. ... Maybe he planned to run for some political office or was trying to obtain a politically connected employment opportunity. Whatever the reason, my respect for him diminished to nothing...."Real men don't lie." I thought, "real men don't sell out."

Plaintiff sued for libel and false light. He conceded public figure status.

District Court Ruling

The court found that statements speculating about plaintiff's motives were evaluative judgments and not statements of fact. While the defendant wondered about plaintiff's motives, she "did not state that [plaintiff] was in fact motivated by political concerns."

Similarly, the phrases "real men" and "sell out" have no precise meaning and were held not actionable here.

But the accusation that plaintiff was lying about the rift was capable of a defamatory meaning:

> "when Frazier called him a liar. Frazier impugned Madison's integrity by alleging he was dishonest about whether he severed ties with her or she severed ties with him. The comment asserts a statement of actual fact: Madison lied when he said that he severed ties with Frazier. Frazier's comment is per se defamatory."

But the claim failed for lack of evidence of actual malice. Defendant's statement was based on her own recollection of the event. And plaintiff provided no evidence to show that Frazier doubted her recollection that she severed ties with defendant before he and the NAACP withdrew its assistance.

Fictional Passages Not Actionable

Plaintiff also complained about a "fantasy section" in the book where Frazier imagined herself lying beaten and bleeding on the streets of Springfield. An imaginary black man shook his head at her and walked away. And her pleas for help were ignored by other black community, political and business leaders who "left [her] for dead."

Plaintiff alleged the book implied he was the imaginary man and/or one of the community leaders who ignored plaintiff. Granting summary judgment on these claims, the court noted that while plaintiff was indeed a real-life community leader, the events were presented as fiction and where therefore not actionable.

Because plaintiff's defamation claims failed his false light claim also failed. *See Seith v. Chicago Sun-Times, Inc.*, 861 N.E.2d 1117, 1130-1131 (Ill.App. 2007) (when a plaintiff's defamation per se claim fails, his false light claim fails too).

Donald M. Craven, Craven Law Office, Springfield, IL, represented the defendant. Plaintiff was represented by Stephen F. Hedinger, Hedinger Law Office, Springfield, IL, for Plaintiff.

RETURN TO TABLE OF CONTENTS

Tennessee Libel Case Tests Scope of Shield Law

By Robb Harvey

A libel case making its way through the appellate process in Tennessee raises significant reporter's privilege issues and could open old political wounds. *Jones v. Tony Hays, et al.*, No. W2005-00991-SC-R11-CV Hardin County (Tenn.) Circuit Court, application for permission to appeal to Tennessee Supreme Court denied (Tenn. Feb. 26, 2007.)

Background

The case arises from investigative reporting by two freelance journalists during the 2000 Presidential election which appeared on the website WorldNetDaily.com ("WND"). WND is a website that provides primarily conservative-oriented news and editorials.

The multi-part investigative news series concerned in part a Tennessee Bureau Investigation that was launched into allegations of drug activity in Hardin County, a rural county on the Tennessee River famous for the Battle of Shiloh. Some theorized that political pressure brought the investigation to a premature close.

The news articles mentioned Vice President Al Gore and others from his home state of Tennessee. One of those mentioned was Clark Jones, a businessman and car dealer in Hardin County, who had been an active participant in the Tennessee Democratic Party and fundraiser for Al Gore.

Jones sued freelance journalists Charles C. Thompson II and Tony Hays, WND, and several other entities. In his libel suit, Jones alleged that the articles were false in numerous respects.

In his libel suit, Jones alleged that the articles published by WND falsely stated that he intervened in the local drug probe, that they falsely implicated him in the 1980 arson of his own business, and falsely alleged that he was a suspected drug dealer.

Defendants asserted truth and absence of actual malice. The reporters declined to identify confidential sources, invoking the protection of the Tennessee Shield Law and federal and state constitutional and common law protection. WND moved to dismiss for lack of personal jurisdiction, but the trial court denied the motion.

Some of the defendants moved for partial summary judgment to declare the plaintiff to be a public figure, and the trial court granted their request. Thereafter, a couple of the defendants who had not published the allegedly defamatory statements were dismissed by summary judgment .

Disclosure of Sources

Several motions were filed regarding the freelance journalists' refusal to disclose the identity of a confidential source, including a motion by the plaintiff to strip the defendants of the right to argue truth in the case. The trial court issued rulings adverse to the journalists and WND, refusing to find that the Shield Law or federal or state constitutions or common law offered any protection. The trial court refused to allow the reporters to protect the identity of their confidential source, while declining the plaintiff's motion to divest the reporters of the defense of "truth."

The journalists then filed an appeal, relying on the interlocutory appeal provisions of the Tennessee Shield Law. *See* Tenn. Code. Ann. § 24-1-208 *et seq.*

The Shield Law adopted in Tennessee is broad, stipulating that a reporter "shall not be required by a court, grand jury, the general assembly, or any administrative body, to disclose…the source of any information procured for publication or broadcast." The statute permits an immediate appeal from an adverse ruling.

The Tennessee Shield Law, though, is one of the few in the United States that contains a "carve-out" – it provides for the protection of confidential sources unless a defamation lawsuit is filed and the defendant asserts truth as a defense. The scope of the "carve-out" has not been well defined.

On appeal, the issue should have been whether the freelance journalists had a statutory, constitutional and/or common law privilege, or would be precluded from arguing truth as a defense concerning a particular published statement about the plaintiff.

The journalists and WND also argued that the Tennessee Shield Law was unconstitutional because the "carve-out" provision conflicts with the First Amendment. The Tennessee Attorney General made an appearance to defend the constitutionality of the Shield Law.

(Continued on page 25)

RETURN TO TABLE OF CONTENTS

Tennessee Libel Case Tests Scope of Shield Law

(Continued from page 24)

Court of Appeals Decision

Last year the Court of Appeals failed to address the constitutional and common law arguments. The appellate court, in its 1 ½ page order, broadly stated that "no privilege exists for the non-disclosure of information or sources in a civil action involving defamation"; and, since the plaintiff did not move to divest any privilege, and no privilege exists (according to the court), then no appeal should have been taken.

In issuing its ruling, the Court of Appeals made some statements which may have an impact in this case and possibly in future Tennessee cases. The appeals court stated that the articles were "*prima facie* defamatory." That issue is contested, was not before the appeals court, and can be argued to conflict with Tennessee case law abolishing the doctrine of libel *per se*. The Tennessee Court of Appeals also stated that the freelance journalists were WND's agents, even thought that issue is contested and was not before the court on this appeal.

The freelance journalists and WND appealed to the Tennessee Supreme Court. They did so under the appellate provisions of the Tennessee Shield Law; however, the Tennessee Supreme Court treated it as a standard application for permission to appeal and, in February, declined to exercise its discretion to grant the application.

At this point, unless the remaining defendants apply for certiorari to the United States Supreme Court, the case will soon return to the Hardin County Circuit Court for trial. The ramification of the Court of Appeals' decision will continue to be fought for some time to come.

Robb Harvey is a partner in the Nashville office of Waller Lansden Dortch & Davis, LLP. He obtained summary judgment in favor of his client and has not participated in the appeal. Plaintiff is represented by Houston Gordon of Covington, Tenn., Lyle Reid and Irma Merrill of Memphis, Tenn. and Curt Hopper, Savannah, Tenn. WorldNetDaily.com is represented by Larry Parrish of Memphis, Tenn. Freelance journalists Thompson and Hays are represented by Sam Cole of Memphis, Tenn. and Gary Kreep, U.S. Justice Foundation, Escondido, California.

RETURN TO TABLE OF CONTENTS

Summary Judgment Affirmed in Photo Privacy Lawsuit

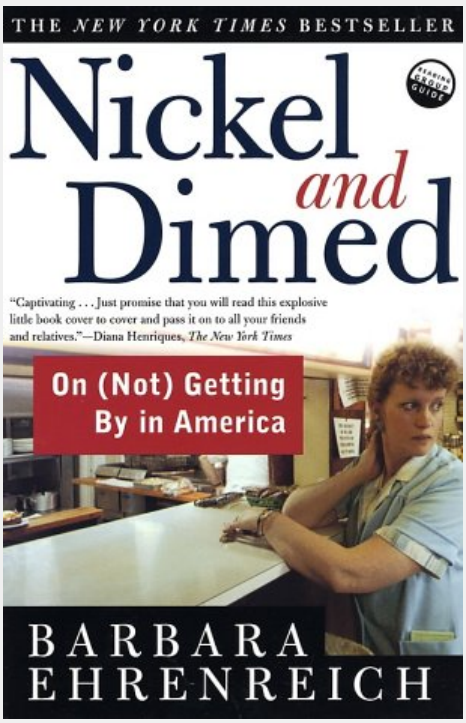
Plaintiff's Claim Untimely, Majority Declines to Address First Amendment Defense

A New York appellate court affirmed summary judgment for a well-known photographer and art gallery in an invasion of privacy claim brought by a man who was photographed in Times Square. *Nussenzweig v. DiCorcia*, 2007 N.Y. Slip Op. 02413, 2007 WL 819343 (N.Y.A.D. 1st Dept. March 20, 2007) (Tom, Friedman, Sullivan, Catterson, Malone, JJ.). The five judge panel unanimously agreed that the claim was barred on statute of limitation grounds because the lawsuit was brought more than one year after the photo was publicly displayed at an art exhibit. Three judges saw no need to address the constitutional defenses, but in a lengthy concurrence two judges agreed that the photos were protected by the First Amendment.

At issue was one of a series of candid photographs taken between 1991 and 2001 by Philip-Lorca DiCorcia on the streets of New York. The photographs were exhibited at a gallery in New York in 2001 and were also republished in a catalog of the show. One of the subjects was plaintiff Erno Nussenzweig, an Orthodox Hasidic Jew. Plaintiff filed suit in 2005 under Section 5 of New York's Civil Rights Law which prohibits the unconsented-to use of identity within the State of New York "for advertising purposes or for the purposes of trade." Plaintiff also claimed the photograph offended his religious beliefs and therefore constituted an interference with his right to the free exercise of religion.

Last year the trial court granted summary judgment for the defendants. *See* 34 Media L. Rep. 1495 (NY Sup. Ct. Feb. 8, 2006) (photograph was artistic and not commercial; no state action present to support a free exercise claim).

Plaintiff was represented by Jay Goldberg, New York. Defendants were represented by Lawrence C. Barth, Munger, Tolles & Olson LLP, Los Angeles.



Court Says Book Cover Photo is Commercial Speech

Motion for Reconsideration Pending

An Illinois federal court denied a motion to dismiss misappropriation and right of publicity claims over the use of plaintiff's photograph on a book cover, holding the use was commercial and not protected by the First Amendment. *Christianson v. Henry Holt LLC, Magnum Photos; Barbara Enrenreich*, No. 06-1156 (C.D. Ill. March 20, 2007) (McDade, J.).

A motion for reconsideration has been filed and the *MediaLawLetter* will publish a more detailed report after a ruling on that motion.

At issue is the cover photo on the best selling book *Nickel and Dimed: On (Not) Getting By in America* written by Barbara Ehrenreich. The book documents and discusses the problems of the working poor in America. The district court found that the "photo is both gripping and appears to emit all the ideas of hard work, worry and concern that Ehrenreich sought to capture in her book." Nevertheless, despite the clear relationship between the photograph and the content of the book, the court concluded that plaintiff's claim was not barred by the First Amendment because a book cover is "designed to catch the eye of a potential customer."

RETURN TO TABLE OF CONTENTS

New York's Highest Court Rules that Employer's Statements on U-5 Forms Are Absolutely Privileged

By David Jacobs

The New York Court of Appeals clarified New York Law and held that an employer's statements on a Uniform Termination Notice for Securities Industry Registration, commonly known as Form U-5, are absolutely privileged. *Rosenberg v. MetLife, Inc.*, 2007 WL 922920, 2007 N.Y. Slip Op. 02627 (N.Y. March 29, 2007) (Graffeo, J.).

The decision resolves a split among the New York Appellate Divisions on whether such statements are protected by a qualified privilege or an absolute privilege that applies without consideration of motive or bad faith and provides an employer with absolute immunity from a defamation suit. *See Spasiano v. 1717 Capital Mgmt.*, 1 A.D.3d 902 (4th Dept. 2003) (reviewing an arbitration award, the Court stated that New York law is far from clear that statements made on a Form U-5 are accorded "absolute immunity in every circumstance."); *but see Dunn v. Ladenburg Thalmann & Co.*, 259 A.D.2d 544 (2nd Dept. 1999) (holding that due to compelling public policy reasons statements uttered in the course of judicial or quasi-judicial proceedings are absolutely privileged); *Herzfeld & Stern v. Beck*, 175 A.D.2d 689 (1st Dept. 1991) (according any statements made on a Form U-5 an absolute privilege). The Third Department has not ruled on the matter.

The Rosenberg Case

Rosenberg claimed that statements made by MetLife on a Form U-5 that his employment was terminated because "an internal review disclosed Mr Rosenberg appeared to have violated company policies and procedures involving speculative insurance sales and possible accessory to money laundering violations" were defamatory and made with malicious intent.

Rosenberg originally filed a complaint in the United States District Court for the Southern District of New York, alleging libel, among other things, over MetLife's statements on the Form U-5. The district court held that under New York law, statements made on a Form U-5 are "absolutely privileged."

On appeal, Rosenberg argued that a qualified, not an absolute, privilege attached to statements made on a Form U-5. The United States Court of Appeals for the Second Circuit, noting that New York law was unsettled on whether absolute or qualified immunity applied to statements on a Form U-5, certified the question to New York State's highest court, the New York Court of Appeals.

The Court of Appeals held that an absolute privilege applies. The Court's decision was based on the Form U-5's compulsory nature, its role in the NASD's quasi-judicial process and the protection of public interests. In reaching its holding, the Court noted that when a compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are subject only to a qualified privileged.

The Court explained that the absolute privilege generally is reserved for communications made by individuals participating in a public function, such as legislative or judicial proceedings, to ensure that such persons' fear of a civil action do not have an adverse impact upon the discharge of their public function.

The Court reasoned that the public interests implicated by the filing of Forms U-5 are significant, since they play a significant role in the NASD's self-regulatory process. The form is designed to alert the NASD to potential misconduct, and to enable the NASD to investigate, sanction, and deter misconduct by its registered representatives. The NASD's actions ultimately benefit the general investing public, which faces the potential for substantial harm if exposed to unethical brokers. The Court emphasized that accurate and forthright responses on the Form U-5 are critical to achieving these objectives.

Although California follows the absolute privilege rule, other states do not. *See Fontani v. Wells Fargo Invs., LLC*, 129 Cal.App.4th 719, 28 Cal.Rptr. 833 (Cal.App. 1 Dist. 2005), *disapproved on other grounds*, *Kibler v. N. Inyo County Hosp. Dist.*, 39 Cal.4th 192, 46 Cal.Rptr.3d 41 (2006).

Courts applying Tennessee, Illinois, Oklahoma, North Carolina, Michigan and Florida law have granted Form U-5 statements qualified, rather than absolute, immunity. *See Dawson v. New York Life Ins. Co.*, 135 F.3d 1158 (7th Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132

(Continued on page 28)

New York's Highest Court Rules that Employer's Statements on U-5 Forms Are Absolutely Privileged

(Continued from page 27)

(6th Cir. 1996); *Andrews v. Prudential Sec.*, 1997 U.S. Dist. LEXIS 23694 (E.D. Mich. 1997), *affd.* 160 F.3d 304 (6th Cir. 1998); *Prudential Sec. v. Dalton*, 929 F.Supp. 1411 (N.D.Okla. 1996); *Haburjak v. Prudential Bache Sec.*, 759 F.Supp. 293 (W.D.N.C. 1991); *Eaton Vance Distrib. V. Ulrich*, 692 So.2d 915 (Fla.Dist.Ct.App. 1997), *lv. Denied* 705 So.2d 8 (Fla. 1997). *Andrews*, at 1997 U.S. Dist. LEXIS 23694, *12.

It is also important to note that New York employers may be subject to the qualified (and not the absolute) privilege in federal cases where other states' laws apply. Still other jurisdictions, such as New Jersey, have not yet decided this issue. Such states may, however, look to New York law on financial services industry matters and adopt the absolute privilege, as they have in the past with respect to other issues surrounding the financial industry.

However, all was not good news for defamation defendants in the last two weeks of March. A week before the *Rosenberg* decision, on March 21, 2007, an NASD arbitrator found Alliance Capital Management LP and related Alliance companies liable for $3 million for defaming the claimant, a former AllianceBernstein broker, after the employer made public statements about the broker.

Although arbitrators are afforded wide discretion, an arbitration award may be vacated if it is rendered in "manifest disregard of the law." In other words, arbitration decisions will generally be upheld, except if the arbitrator knew the law, yet refused to apply it, or if the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case.

On March 23, 2007, the Southern District of New York in *Merrill Lynch Pierce Fenner & Smith Inc. v. William B. Savino, et al.* 06 Civ. 868 (LAP) upheld a 2005 arbitration award of $14 million, $12.5 million of which was for lost wages and pain and suffering in connection with an alleged defamation of the brokers by Merrill Lynch on both U-5 statements (which now would be absolutely privileged under *Rosenberg*) and also in connection with *other public statements* made by Merrill Lynch.

The court in an exquisitely detailed analysis of why arbitration awards will not be reversed, reminded everyone that "a federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." Merrill Lynch argued that there should be a qualified privilege since the public interest in the issue of "market timing" weighed more heavily than the reputational interest of the brokers.

The Southern District found that while there may be public interest in the issue of market timing at the time the statements were made by Merrill Lynch, it was not a manifest disregard of any explicit law that the arbitrators could have found that the brokers' personal interests and their reputations outweighed any public interest or public welfare concerns that may have been served by Merrill Lynch's comments.

So while it was a good March for Wall Street in regard to U-5 statements, we are all once again reminded that a real future threat in defamation suits may not come from the courts, but through awards in arbitration.

David Jacobs is a partner with Epstein Becker & Green, P.C. in Los Angeles. The plaintiff in Rosenberg v. Metlife was represented by Maurice W. Heller of Heller, Horowitz & Feit, P.C. in New York. Metlife was represented by Steven Obus of Proskauer Rose LLP.

RETURN TO TABLE OF CONTENTS

Minnesota Supreme Court Applies Absolute Judicial-Proceedings Immunity to Claims for Breach of Confidence

By John Borger

The Minnesota Supreme Court has affirmed a decision in favor of a defendant sued for revealing confidences in the course of a judicial proceeding, but on narrower grounds than applied by the Minnesota Court of Appeals. *Mahoney & Hagberg v. Newgard*, No. A05-1523, 2007 WL 925694 (Minn. March 29, 2007) (*en banc*). The state supreme court decision holds that plaintiffs' claims were defeated by the absolute defamation privilege for statements made in judicial proceedings, because those claims sounded in defamation.

The Court of Appeals decision had applied the absolute privilege for judicial proceedings to all tort causes of action. *See* J. Borger, "Minnesota Court Applies Absolute Judicial-Proceedings Immunity to Claims for Breach of Confidence," *MediaLawLetter* April 2006 at 37.

Although the case itself did not involve media defendants, that earlier article suggested that the broad application of protection for statements made in judicial proceedings could support arguments by media lawyers that judicial proceedings privileges should protect a reporter who identifies a confidential source or reveals other information in connection with a judicial proceeding. The decision of the Minnesota Supreme Court renders this case less helpful for that argument.

Background

Legal assistant Tracy Newgard, through a temporary placement company (Professional Administration, LLC, or "PAL"), worked with the law firm of Mahoney & Hagberg, P.A. for three and a half years. She left when PAL did not pay her wages, and eventually obtained a judgment against PAL for almost $7,000, which remains unsatisfied.

Stephanie Boldt, one of PAL's principals, sued Mahoney & Hagberg for a share of a $9 million jury verdict, arguing that PAL had a contractual right to 25 percent of the law firm's revenues in exchange for providing office support services. Boldt's attorney asked Newgard to provide an affidavit regarding that suit, and told her that if she did not provide an affidavit she would be subpoenaed and deposed on the same information.

Newgard's affidavit described her duties at the law firm, her understanding of the fee-splitting arrangement between the law firm and PAL, and PAL's failure to pay her. It went on to detail conduct by one of the law firm's principals, Michael Mahoney, alleging that he created companies for a client who wanted to funnel money through them to avoid taxes, that he set Newgard up as the incorporator of the companies, that he became angry when she balked at calling the IRS to say that she was a company officer, and that Mahoney and other lawyers then called the IRS and identified themselves as company officers to obtain federal identification numbers.

After seeing this affidavit, the law firm sued Newgard for breach of confidences, invasion of privacy, and civil conspiracy. The district court denied her motion to dismiss, and she appealed based on "judicial immunity."

The Court of Appeals addressed the immunity issue as a legal question subject to de novo review, and reversed the district court, holding that: "Where a witness makes statements in an affidavit relevant to the issues in a judicial proceeding, the witness is not subject to tort liability for breach of confidences, invasion of privacy, or civil conspiracy, and is absolutely immune from suit for such claims under the doctrine of judicial immunity." *Mahoney & Hagberg v. Newgard*, 712 N.W.2d 215, 217 (Minn. Ct. App. 2006) (syllabus by the court).

Citing prior Minnesota decisions from 1966 and 1997, it stated: "Even if the claim is not for defamation, if it sounds in defamation, absolute immunity applies." *Id*. at 219. Although the court held that all of the plaintiffs' claims "broadly interpreted, arise only from [the witness'] allegedly defamatory statements contained in her affidavit," *id*. at 220, it did not base its decision on whether the non-defamation claims based on the witness' affidavit in fact "sound[ed] in defamation," and instead took a broader view of the judicial immunity doctrine itself.

It explained that: "The public policy reasons for applying judicial immunity to defamatory communications also apply with equal force to other torts that arise from a person's participation in the judicial process – it is in the public welfare to encourage participants to communicate freely in judicial proceedings." *Id*. at 220.

(Continued on page 30)

RETURN TO TABLE OF CONTENTS

Minnesota Supreme Court Applies Absolute Judicial-Proceedings Immunity to Claims for Breach of Confidence

(Continued from page 29)

The Supreme Court Decision

The Minnesota Supreme Court affirmed, but on less expansive grounds, applying the established rule that plaintiffs cannot avoid the strictures of defamation law by casting their claims under different legal theories.

The Supreme Court noted that "absolute privilege" in judicial proceedings was a distinct legal concept from "judicial immunity" and that the appropriate concept in this case was "absolute privilege."

The Court then stated the traditional formulation of absolute privilege: "Statements, even if defamatory, may be protected by an absolute privilege in a defamation lawsuit if the statement is (1) made by a judge, judicial officer, attorney, or witness; (2) made at a judicial or quasi-judicial proceeding; and (3) the statement at issue is relevant to the subject matter of the litigation." 2007 WL 925694, at * 2. .

Absolute privilege extends to statements published prior to the judicial proceeding, as long as they have some relation to the judicial proceeding. Courts "do not expect nonparty witnesses to understand which of their statements may be relevant to the litigation" and therefore extend the privilege to "all statements that have reference, relation, or connection to the case." *Id.* at * 4. The Court concluded that all of this witness's affidavit statements were relevant to the underlying litigation.

The Court restated its traditional rule that "absolute privilege ... bars claims sounding in defamation – that is claims where the injury stemmed from and grew out of the defamation." *Id.* at * 6.

Because the basis of all of the claims in the complaint was that the witness "made false statements when she knew that those statements would harm the firm," all of the claims were "in essence defamation claims" regardless of their label. Because the Court determined that all of the claims "sound[ed] in defamation," it stated that "we need not reach the question of whether absolute privilege applies to claims not sounding in defamation." *Id.*

Conclusion

Although the Supreme Court's affirmance reached the correct result, its decision is less helpful to media organizations facing breach-of-confidentiality suits by sources than the decision of the Court of Appeals had been. The claims in *Newgard* "sounded in defamation" because the complaint alleged that the statements in the affidavit were false.

Suits by sources more often will involve claims that journalists broke promises by revealing true information. Of course, the logic of the Court of Appeals decision has not been rejected by the Minnesota Supreme Court and remains persuasive, so it may yet influence other courts' analysis in media litigation.

Other legal bases of protection for court-compelled disclosures remain as well. *See* Borger, supra, *MediaLawLetter* April 2006 at 39-40.

John Borger is a partner with Faegre and Benson LLP in Minneapolis, MN. Plaintiffs were represented by Michael C. Mahoney, Mahoney & Foster, Ltd., Wayzata, MN. Defendant was represented by Michael J. Ford, Heidi N. Thoennes, Quinlivan & Hughes, P.A., St. Cloud, MN.

RETURN TO TABLE OF CONTENTS

Tenth Circuit Declines Invitation To Find Colorado's Criminal Libel Statute Unconstitutional

By Steven D. Zansberg

On April 16, 2007, the Tenth Circuit issued its long-awaited decision in the "Howling Pig" case, *Mink v. Suthers, et al.*, No. 04-1496, 2007 WL 1113951 (O'Brien, Ebel, Tymkovich, JJ.). And . . . *fifteen months* after the case was argued, the court affirmed the district court's finding that it lacked subject matter jurisdiction to hear a constitutional challenge to Colorado's criminal libel statute.

Background

The constitutional challenge arose after law enforcement authorities in Greeley, Colorado obtained a search warrant for, and seized computer files of, college student Thomas Mink, publisher of *The Howling Pig*, an on-line parody newspaper. *The Howling Pig* had hosted articles ridiculing University of Northern Colorado professor Junius Peake. The professor complained to the local district attorney's office, which authorized the execution of a warrant to search Mink's home and seize his computer and any other evidence of criminal libel.

The Colorado ACLU, on behalf of Thomas Mink, filed a § 1983 civil rights action in Colorado federal court, and obtained a temporary restraining order requiring return of Mink's computer. The TRO also prohibited the DA from filing the threatened charge. Subsequently, the district attorney for Weld County, Colorado issued a memorandum ("No File letter") stating that he would not press charges under the criminal libel statute based upon the first three editions of *The Howling Pig*.

District Court Dismissed Challenge

In 2004, U.S. District Court Judge Lewis Babcock dismissed Mink's claim challenging the constitutionality of Colorado's criminal libel statute, finding that Mink lacked standing because , in light of the district attorney's No File letter, Mink was unable to satisfy the "credible fear of prosecution" requirement. *See* 344 F.Supp. 2d 1231 (D. Colo. 2004).

Judge Babcock also dismissed Mink's § 1983 claim against the deputy district attorney who had authorized the search warrant, finding that she was entitled to absolute judicial immunity, and Mink's claim under the Privacy Protection Act against the assistant prosecutor, finding that she had not participated in the execution of the search warrant.

Mink appealed the district court's order dismissing all of his claims. The MLRC, along with several other media entities and media advocacy groups, filed *amici* briefs supporting Mink's position.

Tenth Circuit Offers Hope, Then Dashes It

At oral argument, the three-judge panel appeared skeptical that Colorado's criminal libel statute could sustain a constitutional challenge. *See MediaLawLetter*, Jan. 2006 at 23-24. Moreover, because neither the district attorney nor the Attorney General of Colorado had tendered an affidavit disclaiming their intention to subject Mink to future prosecution based on future publications, the panel was skeptical that the government had successfully mooted the case after Mink's lawsuit was filed.

Nevertheless, in its 36-page ruling, issued April 16th, the Tenth Circuit affirmed the district court's dismissal of Mink's constitutional challenge to Colorado's criminal libel statute on two alternative grounds: First, Mink lacked standing to bring the facial challenge to the statute, and second, even if he had such standing when the suit was originally filed, the case became moot by the district attorney's subsequent disavowal of an intention to prosecute Mink.

Standing, Then No Standing

Relying on previous Tenth Circuit decisions, the court stated that "assurances from prosecutors that they do not intend to bring charges are sufficient to defeat standing," even when those assurances come after the plaintiff's complaint is filed.

This holding is difficult to reconcile with the court's statements that "standing is determined at the time the action is brought" and that all allegations of the complaint are construed in the light most favorable to the plaintiff; afterall, Mink first filed his lawsuit after his computer had been seized subject to a search warrant and *before* any assurances from any prosecutor disclaiming prosecution.

(Continued on page 32)

Tenth Circuit Declines Invitation To Find Colorado's Criminal Libel Statute Unconstitutional

(Continued from page 31)

The Tenth Circuit gave little credence to Mink's original complaint, and noted that the district attorney had issued his "No File" decision prior to Mink's filing his *amended* complaint (replacing the John Doe defendant with an identified deputy district attorney): "we look to the amended complaint in assessing a plaintiff's claims, including the allegations in support of standing." (This should serve as a warning to future plaintiffs not to file an amended complaint until *after* the defendant's motion to dismiss for lack of standing has been denied.)

The court went further, and disregarded the district attorney's admission, in its Answer to the Amended Complaint, that when his lawsuit was filed, "Mink faced an imminent threat of prosecution." The Tenth Circuit described the defendant's admission as an "oversight . . . of no significance."

The Tenth Circuit stated that government officials should be "encouraged, not dissuaded, from assuring citizens that [they] will not pursue prosecutions based on statutes that cannot be constitutionally enforced." The court did not view as dispositive the fact that the D.A.'s "No File" letter was limited only to the first three editions of *The Howling Pig*; in fact, at no time has the district attorney or the Attorney General disavowed any intent to bring criminal libel charges against Mink on the basis of any future editions of *The Howling Pig*.

Government's Mootness Burden Lowered

The court then continued on to its analysis of mootness, and held that even if Mink had standing to challenge the criminal libel statute at the time he filed his complaint or amended complaint, the court once again credited the district attorney's "No File" decision even though it was not in the form of an affidavit and even though it did not purport to disavow prosecution of Mink based upon any *future* publications, which Mink pleaded, in his amended complaint, he intended to publish (including statements which "tend to blacken the memory of the dead" or "expose the natural defects of one who is alive").

Recognizing that the subject of Mink's first three editions – Professor Junius Peake – was a public figure, the court held that (consistent with Colorado Supreme Court precedent) Colorado's criminal libel statute cannot be applied to any statements concerning professor Peake.

The court then extrapolated from that conclusion to find that the same reasons "would carry over to further statements of the type Mink has subsequently made or intends to make. . . . We see no reason [the district attorney's] analysis would not apply to subsequent statements that are legally indistinguishable."

What the court does not explain is why the district attorney's "analysis" would apply to Mink's subsequent statements that are legally *distinguishable* – specifically, statements that do not disparage any public figure or public official. Nevertheless, the court concluded that following the district attorney's "No File" letter, Mink did not face a "credible threat of prosecution" and his case is therefore moot.

It is difficult to reconcile this ruling with the Tenth Circuit's prior case law, which held that a defendant seeking to demonstrate mootness by disavowing unlawful conduct faces a "heavy," "stringent," and "formidable" burden, and appeared to require an unequivocal disavowal by a prosecutor of *any* future prosecutions, of any kind, under a constitutionally overbroad statute.

One Claim is Resurrected Unless Barred by Qualified Immunity

The Tenth Circuit also affirmed the district court's finding that Mink's claim under the Privacy Protection Act could not proceed against the district attorney because Mink did not allege that the district attorney assisted in executing the search warrant on Mink's computer.

However, the Tenth Circuit reversed the district court's finding that the deputy district attorney was subject to absolute immunity for having approved the search warrant; advising police on "the existence of probable cause" is an investigative, not advocacy function, and is therefore not subject to absolute immunity.

Thus, the court remanded Mink's damages claim against the deputy district attorney for further proceedings to determine whether the deputy district attorney who approved the search warrant for Mink's computer is entitled to qualified immunity.

Steven Zansberg, a partner with Faegre & Benson in Denver, Colorado, wrote an amicus brief to the Tenth Circuit on behalf of the Associated Press, Bloomberg News, Dow Jones, and MLRC. ACLU volunteer lawyers Bruce Jones and Marcy Glenn of Holland & Hart in Denver represented the plaintiff. Assistant Attorney General William Allen represented the State of Colorado. David Brougham of Hall & Evans in Denver represented Assistant District Attorney Susan Knox.

RETURN TO TABLE OF CONTENTS

Tenth Circuit Affirms Summary Judgment Dismissing Publisher's § 1983 Claim

No State Action in Threatened Criminal Libel Prosecution

The Tenth Circuit recently affirmed summary judgment in favor of two Kansas public officials in a § 1983 action arising out of their threats to prosecute a local newspaper publisher, a columnist and a political candidate for criminal libel. *How v. Baxter Springs*, No. 06-3022 (10th Cir. Feb. 22, 2007) (Kelly, Ebel, Gorsuch, JJ.).

The Court affirmed a district court ruling that a city clerk who filed the criminal libel complaint was not acting under color of law for purposes of a § 1983 action and that the city attorney who vowed to pursue criminal charges was immune from suit because his actions did not constitute a recognizable chill on plaintiff's First Amendment rights.

Background

In March 2003, Baxter Springs City Clerk Donna Wixon went to the local city attorney, Richard Myers, to discuss filing a criminal libel complaint against Larry Hiatt, publisher of the weekly *Baxter Springs News*, newspaper columnist Ron Thomas, and city council candidate Charles How, Jr.

The trio were longstanding critics of Wixon and other local officials. The criminal libel charges were triggered by a column and political advertisement published in March 2003 in the midst of a city council campaign. The newspaper column and advertisement criticized Wixon over her official duties. The ad, for example, asked rhetorically "You Folks Want Two More Years Of This Hateful City Clerk?"

The publisher, columnist and candidate were all served with notices to appear in municipal court for violating a local ordinance prohibiting criminal defamation. The ordinance provides for up to one year in prison. The ordinance is identical to the state criminal libel statute K.S.A. 21-4004 which applies to statements "tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends."

The trio appeared and pled not guilty. The prosecutions were eventually dismissed without prejudice when the city attorney recused himself and a special prosecutor could not be found. But the city attorney publicly vowed in a press interview to pursue the charges, but never followed through on his threat.

Thomas and How then sued for civil rights claims under § 1983, and related state law claims. They also sought a declaration that the ordinance was unconstitutional. *See MLRC MediaLawLetter* June 2004 at 15.

District Court Decisions

In 2005, the district court granted defendants' motion to dismiss the constitutional challenge to the criminal libel statute, holding that the statute's actual malice requirement was sufficient to overcome constitutional arguments. *See How v. Baxter Springs*, No. 04-2256, 2005 WL 1119789 (D. Kan. May 10, 2005), *Thomas v. Baxter Springs*, No. 04-2257, 2005 WL 1119788 (D. Kan. May 10, 2005).

Plaintiffs had argued that being threatened with prosecution for engaging in core political speech was unconstitutional – notwithstanding the actual malice requirement – because the statute is vague and overbroad.

Following discovery, the district court granted summary judgment to defendants on the remaining § 1983 claims. *See* No. 04-2256, 2005 WL 3447702 (D. Kan. Dec. 15, 2005). The district court ruled that Wixon was not acting "under color of law" when she initiated the criminal libel charges against plaintiffs. And the City Attorney was entitled to qualified immunity because his public vow to pursue the charges was simply "hollow statements to a reporter, which is not the same as filing charges and prosecuting the case."

Charles How appealed the ruling to the Tenth Circuit.

Tenth Circuit Ruling

On appeal, plaintiff relied on the Fourth Circuit's decision in *Rossignol v. Voorhaar*, 316 F. 3d. 516 (4th Cir. 2003). In *Rossignol* a small newspaper publisher sued a local police chief and other state officials after the sheriff and other police officers engaged in the mass purchase of plaintiff's newspaper to prevent residents from reading a critical news story about the sheriff on election eve.

(Continued on page 34)

RETURN TO TABLE OF CONTENTS

Tenth Circuit Affirms Summary Judgment Dismissing Publisher's § 1983 Claim

(Continued from page 33)

The district court in *Rossignol* dismissed the complaint, finding that the officers had legally purchased the newspapers. On appeal, however, Judge Wilkinson got right to the heart of the problem, reasoning that targeting the newspaper for suppression and retaliation because of its viewpoint and the sheriff's effort to prevent this message from being disseminated was precisely the sort of conduct that violated the Constitution.

The Tenth Circuit briefly considered *Rossignol* in its decision, but affirmed the district court ruling finding that there was no state action. "Although the content of the publication may have some bearing on the question of whether a particular reaction to publication constitutes state action, we do not think that is the dispositive inquiry."

The Court concluded that the City Clerk was simply acting in her private capacity when she filed her criminal libel complaint, notwithstanding that she discussed filing charges with the City Attorney, used other state employees as witness for the complaint, and that the complained of statements involved her official duties.

The Court also affirmed that the City Attorney was entitled to qualified immunity. The Court took note that plaintiff had published two more political advertisements criticizing the City Clerk after he was charged. Thus, according to the Court, there was no evidence that the City Attorney's promise to pursue criminal charges would "chill a person of ordinary firmness from continuing to exercise his constitutional rights."

The Tenth Circuit's decisions in *How* and *Mink* are disappointing. The Court declined the opportunity to review the constitutionality of flawed state criminal libel laws. Moreover, the Court was surprisingly unmoved by the First Amendment considerations at stake when the state threatens to criminally punish speech on matters of public interest.

Plaintiff was represented by Sam L. Colville, Holman Hansen & Colville, PC, Kansas City, MO, and Kate Bohon McKinney and Thomas S. Busch, Holman Hansen & Colville PC, Overland Park, KS. Defendants were represented by James J. Rosenthal, Fisher, Patterson, Sayler & Smith, Topeka, KS, and Richard W. James, Edward L. Keeley, McDonald, Tinker, Skaer, Quinn & Herrington, PA, Wichita, KS.

RETURN TO TABLE OF CONTENTS

Tennessee District Court Grants Motion to Dismiss in Favor of Reporter, Newspaper

Plaintiff failed to state a claim for violations of HIPPA, § 1983

A Tennessee federal district court dismissed a pro se complaint against *The Citizen Tribune* and its reporter, Robert Moore, alleging a violation of rights under the Health Insurance Portability and Accountability Act of 1996 (HIPPA). *Reid v. Purkey*, No. 2:06-CV-40, 2007 WL 646370 (E.D. Tenn. Feb. 26, 2007) (Jordan, J.)

The plaintiff, Rev. Nigel M. Reid, Sr. alleged the newspaper violated HIPPA by reporting that Reid had spent time in a psychiatric or mental hospital.

The court held that HIPPA does not cover members of the media and does not provide a private right of action. In addition, Reid could not state a claim under § 1983 since the media does not qualify as a "state actor" under that statute.

"Defendants . . . are not 'covered entities' [under HIPPA] because they are members of the media – not a health plan, a health care clearinghouse, or health care provider."

The claims against *The Citizen Tribune* and Moore were just a piece of a sprawling complaint by which Reid attempted to gain relief after he was arrested for stalking and violating a temporary restraining order. According to the opinion, in 2005 Reid was convicted of stalking and was ordered to maintain a distance of one-third of a mile from the stalking victim and his place of business. Two days later, the victim reported that Reid was on the business premises, and when they arrived, the officers found him within 45 feet of the victim. The officers arrested Reid, who later plead guilty to stalking and violating a restraining order and served time in jail.

Reid then filed a complaint naming, among others, the sheriffs officers, prison officials, the district attorney and other attorneys presumably involved in the proceedings. Reid also sued *The Citizen Tribune* and Moore as part of his complaint. He alleged that Moore and the newspaper violated his rights under HIPPA because they published information that he was in a psychiatric or mental hospital without permission from Reid himself or from his doctor. Though the complaint was written somewhat unclearly, the court inferred that "the plaintiff is implying that the complained of statement was published in the *Citizen Tribune*." *Reid*, 2007 WL 646370, at *7.

Reid, the court found, had however failed to state a claim. HIPPA does not provide for a private right of action, and "defendants . . . are not 'covered entities' [under HIPPA] because they are members of the media – not a health plan, a health care clearinghouse, or health care provider." *Id.*

The court concluded by adding that to the extent Reid might have been attempting to assert a § 1983 claim, he would fail "because the plaintiff has made no allegations to satisfy the 'state actor' element of a valid § 1983 claim against defendant newspaper, its publisher, or its reporter." *Id*. (citing *Idema v. K. Wagner*, 120 F.Supp. 2d 361, 369 (S.D.N.Y. 2000), *aff'd*, 2002 WL 243119 (2d Cir. Feb. 15, 2002) (private newspaper not acting under color of state law by publishing newspaper articles.)).

RETURN TO TABLE OF CONTENTS

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

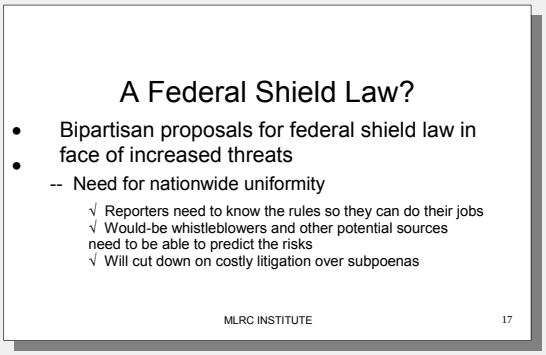
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

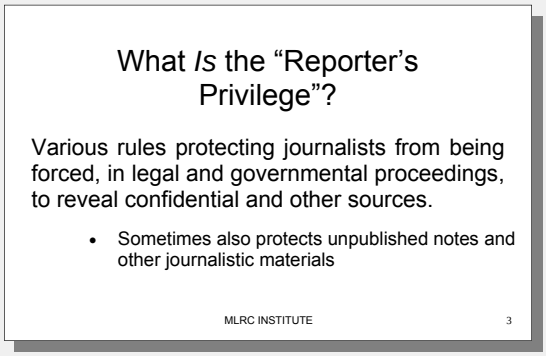
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org

Suggestion for background reading: Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.





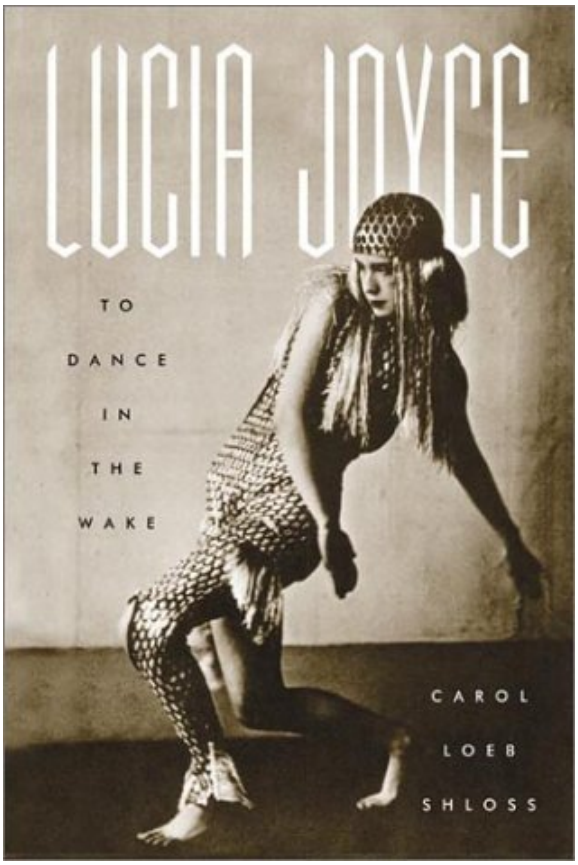
RETURN TO TABLE OF CONTENTS

Book Author Settles Suit with James Joyce Estate

Withdraws Declaratory Judgment Motion, Moves For Attorney Fees

In an important victory for authors and scholars, Carol Loeb Shloss, a Stanford professor and author of the book *Lucia Joyce: To Dance in the Wake*, settled a long-running copyright dispute with the James Joyce Estate. *See Shloss v. Sean Sweeney, in his capacity as trustee of the Estate of James Joyce, et al.*, No. CV 06-3718 (JW) (HRL) (N.D. Cal. Settlement date, March 16, 2007).

Shloss's book was published in 2003. Prior to publication she redacted portions of the book following complaints by the Joyce Estate. The current litigation involved her efforts to post the redacted material online as a supplement to the book. The material is now available at www.lucia-the-authors-cut.info.



Following the settlement agreement, this month Shloss filed a motion for attorneys' fees arguing that she fits the Copyright Act's definition of prevailing party, and that under the circumstances an award of fees would substantially further the policy of the Act.

Background

Represented by the "Fair Use Project" of Stanford University's Center for Internet & Society, Shloss filed a complaint for declaratory judgment and injunctive relief against the James Joyce Estate in June 2006, and added Stephen Joyce individually in January 2007. But her own interactions with the Estate began well before that filing. Shloss began research for a biography of James Joyce's daughter, Lucia Joyce in 1988. She traveled to several countries and worked with many libraries during that time.

Shloss's book, *Lucia Joyce: To Dance in the Wake*, chronicles Lucia's life, and the creative impact of Lucia's relationship with her father on his literary works. Lucia apparently suffered from mental illness and writings from her and about her life are rare and are staunchly protected by the Estate.

James Joyce's grandson, Stephen James Joyce, who now largely controls the Estate, was in particular very protective both of James Joyce's works and letters and of the entire family's privacy. Indeed, Shloss included in her complaint a series of examples in which the projects of other Joyce scholars were stymied by the Estate's refusal to grant permission to excerpt texts and letters.

Shloss also alleged that Stephen Joyce had destroyed Lucia's letters, which he had in his possession, and that he had removed papers concerning the family from the archives of the National Library of Ireland, apparently in the hopes of protecting the family's privacy. In its response papers, the Joyce Estate vehemently denied that any family papers had been destroyed or removed.

Shloss alleged that when the Joyce Estate learned of her work, it attempted to interfere with her research. For example, Shloss alleged that "intermediaries" of the Estate told the University of Buffalo library not to allow Shloss to see its collection of Joyce materials. Stephen Joyce also contacted Shloss's publisher Farrar, Straus & Giroux allegedly stating that publication of any Lucia Joyce-related material would be "at your risk and peril" and that the Estate would "put our money where our mouth is." Ultimately, to avoid the risk of litigation, Shloss was required to cut significant amounts of the Joyce materials from the book.

Motion for Declaratory Judgment

Shloss was unsatisfied with the publication because the redactions undermined the book's scholarly integrity and

(Continued on page 38)

RETURN TO TABLE OF CONTENTS

Book Author Settles Suit with James Joyce Estate

(Continued from page 37)

excluded evidence she spent years assembling. Indeed, Shloss noted in her complaint that some reviews of her book pointed to a lack of documentation.

Thus, Shloss sought to publish the back-up material by posting it to a website. This "electronic supplement" was to include excerpts from *Finnegans Wake*, Joyce's published and unpublished letters, and letters to Joyce and about his family. The supplement would also include excerpts from the 1922, first edition of *Ulysses*, which Shloss argued was in the public domain in the United States.

Shloss's counsel wrote to the Joyce Estate, described the supplement, and noted that it would be available only in the United States and was protected under the fair use doctrine of the U.S. Copyright Act. The Joyce Estate, which continued to claim it owned copyrights in the disputed material, objected. The motion for declaratory relief followed.

In her motion, Shloss asked the court for a judgment that the supplement did not infringe any copyrights held by the Joyce Estate, that the 1922 edition of *Ulysses* is in the public domain and that Shloss's scholarly use of Joyce materials in the supplement qualified for fair use protection.

Shloss also asked the court to determine that the Estate had engaged in "copyright misuse" so as to prohibit any enforcement of copyright against Shloss. Finally, Shloss asked for a judgment that the estate's "unclean hands prohibit enforcement of their copyrights against Shloss."

The Estate opposed the motion, arguing there was no actual controversy because it had not expressly stated it would bring an infringement action. Moreover, the Estate said it would covenant not to sue over the web supplement. But it moved to strike Shloss's claims of copyright misuse and unclean hands, as well as her assertion that *Ulysses* is in the public domain.

The Settlement

The parties ultimately came to a Settlement Agreement in March that vindicated Shloss's right to publish her supplement in the United States in electronic and printed form. As to electronic publication, the parties agreed to web publication "accessible only within the United States to computers with a U.S. Internet Protocol ("IP") address." This was in accord with Shloss's request to publish in the United States only, under U.S. fair use law.

The estate and Stephen Joyce, in turn, agreed not to sue Shloss for copyright infringement resulting from Shloss's publication, in either electronic or printed form, of the supplement. The Estate also agreed to provide documentary evidence to Shloss to substantiate its claim of a copyright interest in the Lucia Joyce materials.

The parties also agreed that the California federal district court would retain jurisdiction to for purposes of enforcing the agreement.

Attorneys' Fees Motion

Following the settlement, Shloss's lawyers this month filed a petition for attorneys' fees. Acknowledging that the lawsuit did not result in a decision on the merits, it nevertheless "established Shloss's right to publish material that Joyce and the Estate tried to suppress for years." The petition argues that Shloss is the prevailing party because she achieved much of the relief sought in a court enforceable agreement.

Moreover, the petition argues that an award of fees would further the policy of the Copyright Act because Shloss vindicated her and other scholars' right to make fair use of Joyce materials.

Carol Loeb Shloss was represented by Anthony Falzone, Lawrence Lessig, David S. Olson and Mark Lemley of Stanford; and Robert Spoo and Bernie Burk of Rice Nemerovski Canady Falk & Rubin in San Francisco. The Joyce Estate was represented by Maria K. Nelson and Anna E. Raimer of Jones Day, in Los Angeles, California.

Florida Supreme Court Stops Secret Dockets Known as Super Sealers

By Carol Jean LoCicero & Deanna K. Shullman

The Florida Supreme Court has amended its Rules of Judicial Administration to halt the process of concealing the existence of cases from the public by removing those cases from the public dockets, a practice called "super sealing." *In re: Amendments to Florida Rule of Judicial Admin. 2.420 – Sealing of Court Records at Dockets*, Case No. SC06-2136 (Fla. April 5, 2007).

In a *per curiam* opinion issued April 5, 2007, the state's high court called the practice "clearly offensive" to Florida's commitment to open government.

Background

The concealed dockets were exposed when *The Miami Herald* discovered more than a hundred dockets in one South Florida county were completely hidden from public view. Many of the secret dockets involved civil matters of judges, elected officials, celebrities, and other prominent citizens and were making their way through the court system without so much as a mention in the public dockets maintained by the clerks of courts.

Similar investigations by other media organizations around the state revealed that the problem was not isolated to one county. More secret dockets were discovered, including one civil matter uncovered by the *Sarasota Herald-Tribune* involving a candidate for the U.S. Congress. The civil dispute had been sealed in its entirety and removed from the public docket based upon a settlement stipulation between the parties.

To gain access, the newspaper that discovered the matter had to bear the burden of over-turning the closure order, though the proponent of closure—contrary to well-established Florida law—had never been required to justify removal of the case from public view in the first instance.

Florida Supreme Court Ruling

The Florida Supreme Court responded to the problem of hidden dockets by directing the courts and clerks to conduct an inventory of all sealed cases in their jurisdictions, to determine whether closure complied with the Rules of Judicial Administration, and to report the results of their investigation to the court.

In the meantime, the court also directed the Rules of Judicial Administration Committee ("RJAC") to consider and propose changes to the Rule of Judicial Administration governing closure of court files to address the super-sealer situation.

The court heard oral argument on the proposed rule changes on March 5, 2007, which included argument from a representative of the RJAC as well as various other groups, including the media. One month later, the Florida Supreme Court adopted several changes to the rules on an emergency and interim basis. The rule changes are limited to noncriminal proceedings in Florida state courts.

Significantly, the practice of super-sealing is forbidden in all cases. Under the revised rule, the removal of the case number, docket number, or other identifying number of a case is not allowed.

Historically in Florida and pursuant to the state's Constitution, court records are open to public view. Fla. Const. Art. I., § 24. Rule 2.420 (formerly Rule 2.051) confirms the courts' commitment to the constitutional right of access and provides a handful of exceptions to that right for a "narrow category of records" where public access is automatically restricted, such as in child dependency proceedings. *In re: Amendments to Florida Rule of Judicial Admin. 2.420 – Sealing of Court Records at Dockets*, Case No. SC06-2136 (Fla. April 5, 2007) at 2, 9.

Parties wishing to close other court records must demonstrate that one of the "carefully defined" interests outlined in Rule 2.420(c)(9) is present and must meet the test in *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988). *Id.* at 10.

The interim amendment to Rule 2.420 requires that requests to make court records confidential be made by written motion and that a public hearing take place in all cases in which the motion is contested. Motions must be presented in good faith and provide a sound factual and legal basis, regardless of whether they are contested. The court may sanction parties who file a sealing motion without such a basis.

In all cases, an order sealing all or part of a court file must state with specificity the grounds for closure and the

(Continued on page 40)

RETURN TO TABLE OF CONTENTS

Florida Supreme Court Stops Secret Dockets Known as Super Sealers

(Continued from page 39)

findings of the court that justify sealing pursuant to *Barron*. Motions to seal and the orders that result therefrom must be made public. Clerks must post the closure orders on their web sites and at their courthouse.

In all cases, a nonparty may file a motion to vacate a closure order, and such motions (if contested) must be heard at a public hearing. Per the interim rule, a properly entered closure order is accorded a presumption of correctness, and the proponent of access must bear the burden of demonstrating that continued closure is inappropriate under *Barron* in order to overturn a closure order.

Significantly, the practice of super-sealing is forbidden in all cases. Under the revised rule, the removal of the case number, docket number, or other identifying number of a case is not allowed.

The interim rule changes do not mark the end of the court's inquiry into this matter. The court has stated its intention to achieve a statewide, uniform system of procedures for access to court records.

To that end, the court referred the matter to the appropriate committees to study closure of court records in criminal matters and at the state appellate courts. The court also commended the media for bringing the practice of super-sealing cases to the courts' attention so that the judiciary could "identify and quickly correct unintended practices that tended to undermine the public trust and confidence in [Florida's] courts." *Id.* at 17.

Carol Jean LoCicero is a partner at Thomas & LoCicero PL in Tampa, Florida, and Deanna K. Shullman is an associate with the firm. They, along with partner James J. McGuire, filed a comment and presented oral argument on the proposed rule changes on behalf of Media General Operations, Inc., NYT Management Services, Inc., Sentinel Communications Company and Sun-Sentinel Company.

Massachusetts Supreme Judicial Court Rules Press Has No Right to Attend "Show Cause" Process

Process Was Historically Not Public

By Joseph D. Steinfield

Massachusetts criminal procedure includes a pre-complaint "show cause" process. The person against whom a complaint has been filed goes before the clerk-magistrate (who is often not a lawyer) to oppose the issuance of process. *See* Mass. Gen. Laws c. 218, § 35A.

Last month, the Massachusetts Supreme Judicial Court ruled that the press has no First Amendment right to attend such a hearing. *Eagle-Tribune Publ'g Co. v. Clerk-Magistrate*, 448 Mass. 647, 863 N.E.2d 517 (Mass. March 28, 2007) (Greaney, Spina, Cowin, & Cordy, JJ.).

The case grew out of an incident in which a woman under the drinking age was stabbed at a nightclub, and the police applied for criminal process against the club's owner. The *Eagle-Tribune* moved for access to the hearing, which the clerk-magistrate denied. A Single Justice of the SJC agreed, and the newspaper appealed to the full court.

The Court described the show cause process as one that is historically not public.

SJC Decision

In an opinion written by Justice Judith Cowin, herself a career prosecutor before becoming a judge, the Court affirmed on the basis that the qualified right of access does not apply to this particular proceeding.

In so ruling, the Court traverses the customary history and logic tests under *Press-Enterprise v. Superior Court*, 478 U.S. 1, 8-9 (1986) (*Press-Enterprise II)*, explicitly holding that these tests are conjunctive, *i.e.* access to the proceeding at issue must be supported not only by "a historic tradition of openness" but must also play a "significant positive role" in how the process functions.

The Court described the show cause process as one that is historically not public, distinguishing it from the preliminary criminal hearing to which there is a right of access under *Press-Enterprise II*. In the latter context, a defendant has already been charged with a crime, and the hearing determines whether enough evidence exists to bring the accused to trial. The Massachusetts equivalent of such a hearing is called a "probable cause" hearing.

In support of its ruling, the Court recounts the many distinctions between the two types of hearings, beginning with the fact that at the show cause stage a person has none of the mandatory procedural safeguards that arise after the probable cause stage, for example the right to appointed counsel, to present evidence and cross-examine witnesses, and to be held for trial only on the basis of admissible evidence.

By comparison, the show cause hearing is more like a grand jury proceeding which is historically held in private. That comparison only stretches so far, however. The Court is correct that "trial-like" procedures are not required by the statute, but Justice Cowin's opinion overlooks the fact that in actual practice these hearings often do involve the active presence of counsel, testimony, cross-examination, and the like.

As for the function or "logic" test (which the Court considered even while pointing out that it need not do so since the access seeker has failed to satisfy the history test), the role of the clerk-magistrate is to screen out baseless complaints, a purpose that public access would frustrate. In a sense, show cause hearings are like mediations in which a public officer can often effect a resolution of the matter.

For whatever solace it may provide to the press and public, the opinion instructs clerk-magistrates that transparency is a good thing and will often be appropriate where a particular matter is one of "special public significance" where the public's interest in access outweighs the individual's right of privacy.

In other words, while the show cause hearing is presumptively closed, it is different from the grand jury in the sense that the public official should engage in a balancing test. This looks a lot like common law access and may even preserve a right to argue, in a particular situation, that the refusal to grant access to such a hearing is an abuse of discretion.

Joseph D. Steinfield is a partner in the Boston law firm of Prince, Lobel, Glovsky & Tye LLP.

RETURN TO TABLE OF CONTENTS

Judge Denies Request for Immediate Access to Names of Jurors in Conrad Black Trial

By Eric S. Mattson

The federal judge presiding over the trial of press baron Conrad Black has denied a request by Chicago Tribune Company for immediate access to the names of jurors selected to serve on the jury, even though the names of prospective jurors had previously been read aloud in open court. *United States v. Black*, No. 05 CR 727, 2007 WL 1052527 (N.D. Ill. April 6, 2007).

Judge Amy J. St. Eve ruled that the *Tribune* did not have a First Amendment right of access to the names of the jurors, and that even if it did, that right would be outweighed by the defendants' right to a fair trial and the jurors' interest in privacy.

The *Tribune* filed a motion for reconsideration, which was denied on April 24, and has also asked the judge to indicate whether she intends to release the names of the jurors upon the return of a verdict. The latter request is pending.

Revealing the jurors' names "could unnecessarily interfere with the jurors' ability or willingness to perform their sworn duties."

Background

Black and three co-defendants are on trial in federal court in Chicago for allegedly defrauding Hollinger International of $60 million. The company, now known as the Sun-Times Media Group, owns the *Chicago Sun-Times* and once was a leading newspaper company with properties around the world. The trial has received an extraordinary level of publicity in Canada, where Black is from, and in Great Britain, where Black is a life peer in the House of Lords.

Jury selection began in mid-March and was conducted, for the most part, in open court, with the names of prospective jurors being read aloud. At the end of the process, however, Judge St. Eve accepted the parties' peremptory strikes at sidebar, out of the hearing of the reporters. As a result, reporters could determine the names of only some of the jurors who were selected.

The *Tribune* moved to intervene on March 16 and asked for immediate access to the names of the selected jurors. The defendants objected to the request, while the government took no position. The defendants pointed to the saturation media coverage of the trial and argued that, if their names were revealed, jurors might be susceptible to "external influences" or "juror harassment." One of the defendants acknowledged that "non-disclosure of the jurors' names infringes upon the press's First Amendment rights to free speech and public access to information."

On April 4, the *Tribune* requested a ruling on its motion pursuant to a local rule that allows parties to call a motion to the attention of the presiding judge. Judge St. Eve sua sponte struck that request, saying that it was "completely unreasonable" for the *Tribune* to expect a ruling so quickly. The next day, she issued her opinion.

Judge St. Eve granted the *Tribune's* request to intervene, but denied the substance of its motion. Citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), Judge St. Eve acknowledged that "unquestionably, the First Amendment guarantees the press and public the right to attend the voir dire proceeding." (Emphasis in original.)

She then drew a distinction between "the voir dire proceeding," which she considered to be open to the public, and the identities of the jurors selected through that proceeding, which Judge St. Eve found to be exempt from the presumption of access.

In finding that there is no First Amendment presumption of access to the names of sitting jurors, Judge St. Eve largely followed the analysis of the majority opinion in *Gannett Co. v. Delaware*, 571 A.2d 735 (Del. 1990), which held that neither historical tradition nor the proper functioning of the criminal justice system justified public access to the names of jurors.

In addition, Judge St. Eve found that even if there were a First Amendment right of access to jurors' names, that presumption was overcome because "to disclose the jurors' names in a high-profile trial such as this would create an unnecessary risk that, during the course of the trial, jurors will be subjected to improper and presumptively prejudicial contact." Due to privacy concerns, revealing the jurors' names "could unnecessarily interfere with the jurors' ability or willingness to perform their sworn duties," she added.

Hovering in the background of this case, and explicitly mentioned in Judge St. Eve's opinion, is the trial of former Illinois Gov. George Ryan. In that case, the *Tribune* successfully objected to defense and prosecution efforts to close jury selec-

(Continued on page 43)

Judge Denies Request for Immediate Access to Names of Jurors in Conrad Black Trial

(Continued from page 42)

tion. *United States v. Warner*, 396 F. Supp. 2d 924 (N.D. Ill. 2005).

Then, during jury deliberations after a months-long trial, the *Tribune* discovered that certain jurors had omitted information from their juror questionnaires. This prompted the court to conduct its own inquiry and led to the removal of two jurors; the reconstituted jury convicted the defendants. The problems with the jury are the primary issue in Gov. Ryan's appeal.

Eric S. Mattson, a partner with Sidley Austin in Chicago, represented the Tribune Company in this matter.

CO Court Declines to Release Discovery Materials from Columbine Shootings

Depositions Taken During Related Causes of Action to be Sealed for 20 Years

Earlier this month, a federal court in Colorado ordered that depositions and other materials taken in conjunction with civil cases arising out of the Columbine school shootings be transferred to the National Archives and Records Administration (NARA) and be kept sealed under a protective order for twenty years. *Rohrbough v. Harris*, No. 00-cv-00808-LTB-PAC (D. Colo. April 2, 2007) (Babcock, J.).

The court held that the materials, including school records and deposition testimony of the families of school shooters Dylan Klebold and Eric Harris, qualified as "federal records" under the Federal Records Act, 44 U.S. C. §§ 2101-2118, 2901-2910, 3101-3107, and 3301-3324. As such, the materials could not lawfully be destroyed, but "the balance of interests still strikes in favor of maintaining strict confidentiality."

Following the school shooting at Columbine High School in April 1999, victims brought civil suits against Klebold and Harris's parents, a drug manufacturer, Solvay Pharmaceuticals, Inc.—which manufactured a prescription medicine that Eric Harris was allegedly taking at the time of the shooting—and other defendants.

Discovery was conducted in conjunction with these cases, and the materials were sealed under a protective order and stored in a "repository," Room A540 of the Alfred A. Arraj United States Courthouse, in Denver, Colorado. When these and other related cases were resolved, an inventory was taken of the materials in the repository and the court considered options for the disposition of the documents.

A number of parties, including parents of students who were killed at Columbine, and interested non-parties, including the *Rocky Mountain News*, and the Colorado Attorney General, submitted briefs and pleadings regarding the disposition of the materials. The objections, the court noted in its order, were lodged at a hearing in January and focused on the destruction of the Harris and Klebold deposition materials.

District Court Decision

The court analyzed these deposition materials under the Federal Records Act (FRA) and noted "the extraordinary interest in these [Columbine civil] cases and the high degree of confidentiality that has been observed throughout their pendency[.] (Order at p. 7).

Judge Babcock held that "based on this review, the unique nature of these cases, and the broad interpretation given to the applicable terms of the FRA, I conclude that the materials relating to the depositions taken of the Harrises and Klebolds fall within the definition of records under the FRA." *Id.*

In addition, the other materials in the repository—school records and deposition testimony of doctors and other individuals—were similarly of "significant historical value"and should also be labeled "federal records" under the FRA. *Id.*

Based on this holding, the Judge ordered that the repository materials be physically transferred to the custody of NARA. The court, however, would have legal custody of the materials for twenty years and would thereby "reserve[ ] the right to determine access to them." (Order, p. 8).

The physical transfer of the materials was "critical" according to Judge Babcock, for the documents had historically been protected based on concerns including "public safety which could be jeopardized if copycat incidents result from the release of detailed information regarding the events of April 20, 1999; the privacy interests of the parties in these consolidated cases and non-parties who are referenced in the subject materials; and abiding by the expectations of the parties who acted in reliance on the protective orders throughout the course of litigation." (Order at 8-9).

The materials are to be permanently retained by NARA, and preserved even when legal custody has been transferred from the court after twenty years.

RETURN TO TABLE OF CONTENTS

Fox Prevails in Long-running Dispute over Access to Interview Outtakes for *America's Most Wanted*

By Thomas R. Burke and Rochelle L. Wilcox

A long-running dispute between STF Productions, Inc., a wholly-owned subsidiary of Fox Television Holdings, Inc., and a federal criminal defendant in the Northern District of California ended quietly earlier this year. *U.S. v. Lin*, No. 5:01-cr-20071-RMW-2 (N.D. Cal.)

After nearly four years, STF defeated defendant David Lin's attempt to obtain access to video outtakes from the television program *America's Most Wanted: America Fights Back* ("*America's Most Wanted*").

Background

This dispute began on March 25, 2003, when Lin, who was then charged with mailing a pipe bomb (inserted in a toy robotic dog) that killed its victim, issued a broad subpoena for STF, seeking access to a laundry list of information it held related to an episode aired regarding Lin's alleged co-conspirator Anthony Chang, who was a fugitive.

At the time the subpoena was issued, the prosecution was seeking the death penalty against Lin, and Lin argued that his exposure to capital punishment gave him greater leeway in gathering arguably relevant information. Lin asked for everything related to the episode, including the video outtakes of all interviews with government witnesses, any transcripts of the outtakes, script information, production notes, and even headshots of actors who auditioned to portray the parties.

After extensive motion practice and production of some non-privileged information, the dispute was narrowed to the video outtakes, which the Magistrate Judge ordered be disclosed. The court reasoned that "when the government voluntarily goes out and provides information to a third-party—here STF—Defendant is entitled to this information."

STF sought District Court review of the Magistrate Judge's Order. The District Court agreed with the Magistrate Judge, although on erroneous grounds. It initially concluded that "the information sought was provided without an expectation of confidentiality." In fact, however, part of the information was revealed to *America's Most Wanted* under a promise of confidentiality.

The court ordered disclosure of the outtakes, concluding that "the information is relevant to the development of facts and witness information necessary to the defense." However, the court stated in a footnote that if asked, it would review the outtakes *in camera* to evaluate whether disclosure was proper.

STF requested and received permission to submit the video outtakes and also created a transcript for the court's *in camera* review, to support its claim that some information was confidential and its ongoing argument that the materials were not relevant to the dispute. The court agreed to review the materials *in camera*, but only for the purpose of evaluating their possible confidentiality (not to evaluate their relevance).

Nineteen months later—and shortly before the criminal trial was set to commence—the District Court issued its order for production of the outtakes and transcripts. It ordered that it would release the outtakes and transcripts in its possession if STF did not obtain a stay from the Ninth Circuit Court of Appeals. It did not provide any explanation for its decision.

However, two events happened in the intervening nineteen months, which convinced STF that—as it always had argued—the outtakes and transcripts were not relevant and should not be disclosed.

First, the prosecution decided not to pursue the death penalty against Lin. Lin's exposure to capital punishment had been a key issue in the earlier decisions, and STF believed that this changed condition undermined the reasoning of these earlier decisions. In addition, during a pre-trial hearing not attended by counsel for STF, in a candid exchange between the District Court and counsel regarding production of the outtakes, the court advised defense counsel that it had reviewed the outtakes and believed they were "a big nothing," but that it intended to order disclosure nonetheless.

Ninth Circuit Ruling

In light of these significant facts, STF decided to appeal the District Court's order compelling disclosure. Although typically a third party must be held in contempt before it may appeal any order compelling disclosure, STF argued that the Ninth Circuit had jurisdiction because the District Court's order deprived it of the opportunity to be held in contempt.

(Continued on page 45)

RETURN TO TABLE OF CONTENTS

Fox Prevails in Long-running Dispute over Access to Interview Outtakes for *America's Most Wanted*

(Continued from page 44)

The District Court had possession of the video outtakes and intended to release them, without any further cooperation by STF, unless that order was stayed. STF successfully obtained a stay of the District Court's order, after a telephonic oral argument before the motions panel of the Ninth Circuit, and the parties then engaged in accelerated briefing (due to the quickly approaching trial date).

STF raised two substantive arguments in its brief: (1) Lin failed to establish the requirements of Federal Rule of Criminal Procedure 17(c), *i.e.*, relevancy, admissibility, and specificity; and (2) Lin failed to overcome STF's First Amendment journalist's privilege. STF argued that in light of the prosecution's decision not to pursue the death penalty, and given the District Court's candid admission that the outtakes were "a big nothing," defendant could not meet his heavy burden of establishing the relevance of the outtakes.

Oral argument was held in San Francisco on December 8, 2003, barely two months after the notice of appeal was filed. The Ninth Circuit found that it had jurisdiction, notwithstanding the fact that no contempt order was entered, citing *Perlman v. United States*, 247 U.S. 7, 13 (1918). The Court's decision was concise:

> A district court must grant a motion to quash a pretrial subpoena under Rule 17(c) unless the moving party can meet the requirements set forth in *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). The district court did not make specific Rule 17(c) findings with respect to Lin's need for the subpoenaed materials before trial. We therefore remand to the district court for specific findings under Rule 17(c). Because the absence of Rule 17(c) analysis warrants a remand, we do not reach the issue of STF's asserted journalist's privilege.

Remand

On remand, Lin acknowledged that he could not establish the elements of Rule 17(c) and withdrew his subpoena. The parties then stipulated to defer the issue until trial, and to have the trial court evaluate the relevance of the video outtakes after the government's witnesses testified, if the defense so requested. Ultimately, however, there was no need. One government employee interviewed did not testify at trial. The other witness, the government's bomb expert, testified for the prosecution, but the defense chose not to cross-examine her. Given this choice, the defense did not ask the district court to review the transcripts *in camera*. The federal jury acquitted Lin of all charges.

This case highlights the importance of presenting Rule 17(c) as a primary argument at all levels of review in a federal criminal case. Given recent decisions by federal prosecutors to abandon their own guidelines, and seek information from journalists without restraint, and particularly as those decisions are bolstered by federal courts questioning the applicability of a reporter's privilege in the federal system, Rule 17(c) remains a solid and reliable defense to pre-trial subpoenas in federal criminal cases.

This case highlights the importance of presenting Rule 17(c) as a primary argument at all levels of review in a federal criminal case.

Courts are more familiar with its requirements than with the reporter's privilege, and may be more willing to quash a subpoena not meeting this test than enter the sometimes uncertain waters of the reporter's privilege. Finally, Rule 17(c) is a test with teeth. Relevancy, admissibility and specificity are substantial burdens that many criminal defendants simply cannot meet.

Thomas Burke and Rochelle Wilcox, attorneys in the San Francisco office of Davis Wright Tremaine LLP, represented STF Productions, Inc. in this matter.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

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

Ph: 212.337.0200,
medialaw@medialaw.org

RETURN TO TABLE OF CONTENTS

Third Circuit Sides With Media By Upholding Access Rights And Providing Greater Speech Protections For Attorneys

By Robert C. Clothier

In a victory for access rights in a highly publicized criminal case, the Third Circuit, exercising its supervisory authority but declining to address constitutional arguments, amended a local rule to require that any prohibition on attorney speech be limited to statements that are "substantially likely"—and not just "reasonably" likely—to "materially prejudice ongoing criminal proceedings." *U.S. v. Wecht*, 2007 WL 1086308 (3d Cir. April 12, 2007) (Fuentes, Fisher, Bright, JJ.).

The Third Circuit also affirmed the trial court's holding that the press and public have a common law right of access to so-called *Brady/Giglio* materials that was not outweighed by countervailing interests supporting closure.

Trial Court Proceedings

The decision arose out of a federal criminal prosecution of "an acclaimed forensic pathologist" alleging that he "used his public office" as county coroner "for private financial gain."

The trial court's pre-trial order contained two provisions relevant on appeal. The first incorporated the Western District of Pennsylvania Local Rule 83.1 limiting what attorneys can say about ongoing criminal cases.

The rule specifically prohibits attorneys from releasing information "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." The second provision in the pretrial order required the government to turn over to the defense materials relevant to the impeachment of anticipated government witnesses—the so-called *Brady/Giglio* materials.

The government thereafter filed a sealed motion seeking an *ex parte* ruling on whether it must turn over certain personnel records of Bradley Orsini, the FBI agent responsible for the investigation leading to the defendant's indictment. Attached to the sealed motion were the *Brady/Giglio* materials at issue.

The trial court required the government to turn over the materials to the defendant, and the government moved for a protective order prohibiting public disclosure of the materials. Two newspapers (the *Pittsburgh Post-Gazette* and the *Pittsburgh Tribune-Review*) and two television stations (WPXI and WTAE) successfully moved to intervene, and the court thereafter granted intervenors' motion to unseal, holding that "even though the material is quite likely irrelevant and not admissible at trial, the government has not established a compelling interest or good cause justifying the continued sealing." The government appealed.

Meanwhile, after the defendants' attorney made several comments to the media, the court permitted briefing on whether Local Rule 83.1 "imposed unconstitutional restraints on speech." The court ruled that the rule did not violate the First Amendment, and the defendant and intervenors appealed.

Third Circuit's Ruling

Addressing the constitutionality of Local Rule 83.1, the Third Circuit first analyzed whether the media possessed standing. In *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838-39 (3d Cir. 1996), the Third Circuit held that "third parties have standing to challenge a gag order only when there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so." The government argued that defendant's attorneys "cannot be 'willing' speakers because they agreed to include the language of Local Rule 83.1 in the Pretrial Order."

The Third Circuit disagreed, finding that the "willing speaker" requirement was designed "not to tie the third party's interests with those of the speaker, but to ensure that there is an injury in fact that would be redressed by a favorable decision." The Court held that "the consent of the parties to an order limiting speech is irrelevant to third party standing analysis as long as the third party can demonstrate that an individual subject to the order would speak more freely if the order is lifted or modified."

Turning to the "substance" of the appeal, the Third Circuit noted that the media intervenors argued that Local Rule 83.1 is unconstitutional "because it prohibits comments that have a "'reasonable likelihood of prejudice,' a standard which the Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1068 (1991)] described as being 'less protective of lawyer speech' than the one it upheld." The government, however, had "no objection" to the more protective, "substantial likelihood" standard, but did not believe that the court "should declare a rule unconstitutional without good reason.

(Continued on page 47)

RETURN TO TABLE OF CONTENTS

Third Circuit Sides With Media By Upholding Access Rights And Providing Greater Speech Protections For Attorneys

(Continued from page 46)

In the end, the Third Circuit declined to rule on the constitutional issue and instead exercised its "supervisory authority over the application of local rule of practice and procedure." Relying on the Supreme Court's ruling in *Gentile*, the practice of 45 states (including Pennsylvania) and 43 federal district courts, and the Model Rules of Professional Conduct, the Third Circuit required that "district courts apply Local Rule 83.1 to prohibit only speech that it substantially likely to materially prejudice ongoing criminal proceedings."

Access to Brady/Giglio Materials

The Third Circuit then addressed the district court's ruling unsealing the Orsini records and held "(1) that the public has a common law right to the Orsini records, and (2) that the decision to unseal the records was appropriate pursuant to the trial court's general discretionary powers."

The Third Circuit required that "district courts apply Local Rule 83.1 to prohibit only speech that it substantially likely to materially prejudice ongoing criminal proceedings."

The Third Circuit began by noting that "it is well settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records." But that right is "not absolute" and instead creates a "strong presumption" of public access. The only issue on appeal was whether this common law right attached to the Orsini records, as the government had conceded that it had "failed to justify precluding the court from disclosing the information."

The government contended that the Orsini records were discovery materials lacking any right of access, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). That argument was weak on its face, because the Orsini materials were filed with the trial court along with the government's sealed motion for *in camera* review.

The government argued that this motion was akin to a discovery motion, which, under *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157 (3d Cir. 1993), is not subject to the common law right of access. The government asserted that the court "would crippled the *in camera* process for potential *Brady* materials if we hold that the common law right of access attaches to the Orsini records."

The Third Circuit disagreed, finding that "under the particular circumstances of this case, the public does have a common law right to access the Orsini records." The Third Circuit gave a number of reasons. First, the filing of the Orsini records along with a motion for *in camera* review "'clearly establishes' them as judicial records."

Second, disclosure would give the public "a more complete understanding of the judicial system" and "promote the public perception of fairness." Third, "the process by which the government investigates and prosecutes its citizens is an important matter of public concern" and "distinguishes *Brady* materials from civil discovery between private parties."

Fourth, "there is little question that the particular documents at issue are significant interest to the public" because they "concern the conduct of an FBI official who played a prominent role in a highly publicized investigation of a well-known defendant accused of abusing his public office."

Lastly, the records "were relevant to [the defendant's] suppression motion" alleging Orsini's "lack of veracity" and previous "'involve[ment] in improprieties.'" For all of these reasons, the Third Circuit concluded that the public had a common law right of access to the records.

The next question was whether the trial court properly exercised its "discretionary powers" by making the records public. The Third Circuit concluded the trial court "acted well within its authority" and "did not abuse its discretion." The Third Circuit ruled that the government had the burden of showing "good cause" for sealing the records, *i.e.*, that "disclosure will work a clearly defined and serious injury" to the government."

The Third Circuit also stated that "when there is an umbrella protective order, 'the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order.'"

Looking at the trial court's finding that the "integrity of this public proceeding" required disclosure of the documents, the Third Circuit wished that the trial court had "explained its reasoning more fully," but nonetheless con-

(Continued on page 48)

RETURN TO TABLE OF CONTENTS

Third Circuit Sides With Media By Upholding Access Rights And Providing Greater Speech Protections For Attorneys

(Continued from page 47)

cluded that the trial court had "sufficiently considered and weighed the interests at stake: "[A]bsent an abuse of discretion, it is not our role to second guess the [trial court's] weighing of the competing considerations."

The bulk of the Court's decision addressed the defendant's motion requesting that the trial judge recuse himself. The Third Circuit affirmed the trial judge's refusal to do so, finding that the defendant had "failed to demonstrate the 'deep-seated' or 'high degree' of 'favoritism or antagonism that would make fair judgment impossible.'"

It Ain't Over

This is likely not the end of the story, as the government intends to file a petition for rehearing and/or rehearing en banc. In its motion seeking an extension of time to file such a petition, the government contended that the Third Circuit's decision "could have a substantial impact upon the future administration of justice, and would undermine carefully crafted and judicially approved *Brady/Giglio* disclosure policies around the nation."

Robert C. Clothier is partner and chair of the Media, Defamation and Privacy Law Practice Group in the Philadelphia office of Fox Rothschild LLP. Counsel for the media intervenors are David Strassburger of Strassburger, McKenna, Gutnick & Potter, P.C. (Pittsburgh Tribune-Review & WTAE-TV), Walter DeForest of DeForest Koscelnik Yokitis & Kaplan (on behalf of WPXI), and David Bird of Reed Smith LLP (Pittsburgh Post-Gazette). Counsel for the defendant is Jerry S. McDevitt of Kirkpatrick & Lockhart.

RETURN TO TABLE OF CONTENTS

A "Final Adjudication" In The COPA Case

Statute Not Narrowly Tailor, Vague and Overbroad

By Michael A. Bamberger And Kenneth Dreifach

The challenge to the Child Online Protection Act ("COPA") (now known as *ACLU v. Gonzales*) has already been twice before the United States Supreme Court and twice before the Third Circuit since the law was enacted in 1998.

COPA, which criminalizes any communication of harmful to minors material to a minor for commercial purposes via the Web, was enacted after the Supreme Court struck down the Communications Decency Act (*Reno v. ACLU*, 521 U.S. 844 (1997)). COPA provides an affirmative defense to sites that verify the age of the Web site reader by use of a credit card or any other reasonable means.

However COPA has never actually been enforced; before its effective date, the ACLU obtained from the federal district court an injunction on its enforcement. In 2004, the Supreme Court affirmed the District Court's 1999 grant of a preliminary injunction, and remanded for a trial on the merits so that the factual record could be updated to reflect current technological developments and to determine whether Internet content filters or other possible alternatives are less restrictive and more effective in protecting minors from sexually explicit material than COPA.

After a 15-day trial, Senior Judge Lowell A. Reed, Jr. has now given the plaintiffs challenging COPA an overwhelming victory.

After a 15-day trial, Senior Judge Lowell A. Reed, Jr. of the Eastern District of Pennsylvania has now given the plaintiffs challenging COPA an overwhelming victory, on March 22, 2007, granting a permanent injunction against the enforcement of the Act. *ACLU v. Gonzales*, No. 98-5591.

Judge Reed concluded in an evidence-laden 84 page opinion that (1) at least some of the plaintiffs had standing; (2) COPA is not narrowly tailored to Congress' compelling interest; (3) the government failed to meet its burden of showing that COPA is the least restrictive, most effective alternative; and (4) COPA is unconstitutionally vague and overbroad.

Judge Reed found that COPA was not narrowly tailored in that it was both overinclusive and underinclusive -- overinclusive because it covers material which is inappropriate to younger minors as well as that which is inappropriate for older minors (commercial pornography), and underinclusive because so much of the Web's sexually explicit content comes from abroad, beyond the authority of COPA. (The Court found 32% of adult membership Web sites and 58% of free adult sites originate from outside the United States, and that the number of foreign sites are increasing while domestic sites are decreasing.)

The Court then went on to hold that the age verification affirmative defense does not narrowly tailor COPA – and indeed that age verification is "effectively unavailable" – given the absence of evidence that "age verification services … reliably establish or verify the age of Internet users." The Court noted that credit cards, for instance, were not an effective or feasible way to verify age; among other reasons, card association rules "prohibit Web site owners from using credit or debit cards to verify age," and minors often have access to credit or debit cards (with or without their parents' knowledge).

As to other "data verification" services, the Court found, based on extensive evidence and testimony, that "[a]ttempting to verify age with this information in a consumer-not-present transaction is … unreliable."

The Court also found that age verification burdens First Amendment rights by imposing fees and deterring users. Fees associated with age verification "must either be paid by the Web site or passed on to the users. As a result, Web sites … which desire to provide free distribution of their information, will be prevented from doing so." Requiring age verification would simply "deter most users from accessing [Web] pages, casing the traffic to Web sites … to fall precipitously."

As to the least restrictive alternative requirement, the Court found that filter software and the Government's promotion and support of filtering continues to be a less restrictive alternative to COPA.

Finally, and "merely supplementa[ly]" (whatever that means), the Court found a number of COPA's provisions

(Continued on page 50)

RETURN TO TABLE OF CONTENTS

A "Final Adjudication" In The COPA Case

(Continued from page 49)

unconstitutionally vague. In particular, the Court included in this category (i) whether "intentionally" (found in one part of the statute) is meant to create a different level of scienter from "knowingly and with knowledge of the character of the material" found in a different part of COPA, and if so what the differences are; (ii) the meaning of "communication for commercial purposes;" (iii) whether the "any person under 17 years of age" means, as the Government contended, only older minors; and (iv) what taken "as a whole" means in the context of an Internet Web site.

Judge Reed, perhaps with a note of wishfulness, titled his opinion "Final Adjudication." While the Government apparently has not filed a notice of appeal as of the date this is written (April 27, 2005), given the time and effort devoted to defending COPA to date, it is not unlikely that an appeal will be taken. The extensive findings of fact adverse to the Government's positions should, however, likely prove to be a significant impediment to any attempt to overturn Judge Reed's decision.

While COPA was an attempt to protect minors from sexually explicit material on the Web, the factual findings and conclusions of law spelled out by Judge Reed in the COPA opinion will also reverberate when the U.S. or (more likely) one or more of the states attempt to protect minors from other aspects of the Internet, such as violent content, or predators on social networking sites.

A number of state attorneys general have insisted that social networking sites implement age verification procedures and legislation to this effect (or similarly, requiring parental notification for minors) has been proposed in some states. State legislatures also continue to consider proposals to limit minors' access to violent material on the Internet. The extensive and specific findings of fact by Judge Reed which are keyed to specific evidence should give those proposing such restrictions significant pause.

Michael Bamberger and Kenneth Dreifach are partners in the New York office of Sonnenschein Nath & Rosenthal LLP. From 2000 through 2006 Dreifach was Chief of the New York Attorney General's Internet Bureau.

Reporters Privilege Case Update

Washington State Enacts Shield Law, State Updates

At press time, Washington Governor Chris Gregoire signed into law a state shield statute which provides absolute protection against the compelled disclosure of confidential sources in civil and criminal proceedings. The new law also provides substantial protection against disclosure of unpublished materials. To obtain disclosure of notes and outtakes from the news media, a party must show that the material sought is "critically necessary" to the claim, that he or she exhausted all reasonable alternatives – and that there is a public interest in disclosure.

House Bill 1366 was signed into law on April 27 and had received strong support in the state House and Senate. "News media" in the law is broadly defined as:

> "Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution;"

Among the drafters of the law was MLRC member Bruce Johnson of Davis Wright Tremaine LLP in Seattle. Next month's *MediaLawLetter* will contained a more detailed article on the enactment of the law.

Hatfill v. Ashcroft

In what may grow into a storm over privilege issues, the federal court hearing Stephen Hatfill's Privacy Act lawsuit against the government this month suggested that Hatfill compel testimony from reporters to proceed with his case.

Hatfill filed suit against the government in 2003 claiming it violated the federal Privacy Act by disclosing to the press his identity as a person of interest in the Anthrax murder investigation and releasing other information about his work for the government.

Earlier in the litigation Hatfill issued subpoenas to ABC, CBS, NBC, The Associated Press, *Baltimore Sun*, Gannett, the *Los Angeles Times*, *Newsweek* and *The Washington Post* seeking the identity of their government sources for information on Hatfill. The subpoenas were later withdrawn after several reporters identified the government agencies where their sources worked.

Last month D.C. Federal District Court Judge Reggie Walton who is presiding over the case (and who presided over the Scooter Libby trial) issued an order allowing Hatfill to renew his subpoenas to the press. *Hatfill v. Ashcroft*, No. Civ. 1793 (D.C. Cir. March 30, 2007). In his Order, Judge Walton noted that while:

> The court is mindful that conceivably, Privacy Act violations can be proven through circumstantial evidence. However, a wealth of case law suggests that in order to prove that a violation of the Privacy Act has occurred, the actual source of the information must be identified.

California

On April 3, Joshua Wolf was released from prison after he gave federal prosecutors a copy of a video he made of a 2005 San Francisco demonstration. Wolf had been in federal prison since August 1, 2006, for refusing too cooperate with a grand jury that was looking at damage and injuries that occurred at the demonstration. After mediation conducted by a federal magistrate between Wolf's lawyers and federal prosecutors, Wolf turned a copy of the tape over to prosecutors, and in return prosecutors agreed not to ask him to testify before the grand jury, or to identify any of the protestors. Prosecutors also required Wolf to state, in writing and under oath, whether he witnessed anyone vandalizing a police car or striking a police officer. After Wolf turned over the tape and signed the statement, the chief prosecutor in the case told the court that Wolf had cooperated with the subpoena and was no longer in contempt, but the prosecutor reserved the right to subpoena Wolf again.

Mississippi

On Friday April 13, a state judge quashed subpoenas for two journalists who were subpoenaed to testify in an upcoming criminal trial of Jackson, Mississippi Mayor Frank Mel-

(Continued on page 52)

Reporters Privilege Case Update

(Continued from page 51)

ton. The attorney for the Mayor had subpoenaed Chris Joyner a reporter for the *Clarion-Ledger* and Brian Johnson, Managing Editor of the *Jackson Free Press*, ordering them to appear at a pre-trial hearing. The *Jackson Free Press* filed a motion to dismiss the subpoenas because they were "repugnant to the U.S. Constitution as it threatens the freedom of the press by forcing Mr. Johnson to testify about matters he has reported on behalf of Jackson Free Press." The defense attorneys claimed the articles written for those publications were evidence of improper conduct of the part of the prosecutors. Judge Joe Webster dismissed the subpoenas, saying, according to the *Jackson Free Press*, "I'm not even sure why they were ever subpoenaed."

Tennessee

Two news organizations, the *Knoxville News Sentinel* and WBIR, are opposing subpoenas for "any and all" notes and recordings of their interviews with a judicial candidate in 2006. The subpoenas were issued by a lawyer whose client has filed a libel suit against the candidate, Judge William Swann. The judge oversaw the plaintiff's divorce case, and the plaintiff criticized the judge in advertisements used by his opponent. The plaintiff claims that in statements made to the media and in his own ads, in response to her criticisms, he libeled her. Knox Circuit County Judge Rosenbalm has delayed a scheduled hearing while both parties consider a compromise.

Texas

On April 4, a visiting state District judge dismissed subpoenas against two editors of the *Monitor*, a newspaper based in McAllen, Texas. The editors, Steven Fagan and Marcia Caltabiano-Ponce, had been called to testify about an editorial they wrote recommending that a state District judge to recuse himself from a case involving another state District judge. The District Attorney introduced the editorial as evidence, and subpoenaed the editors. The judge ruled the editorial was inadmissible and dismissed the subpoenas.

Update: Media Renews Motion to Unseal Files in U.S. v. Libby

On March 7, Dow Jones and the Associated Press renewed their motions with the D.C. Circuit Court of Appeals to unseal portions of the proceedings from the Plame Grand Jury investigation and litigation over the reporters' privilege issue.

The materials sought include the Special Counsel's *ex parte* arguments to the Court explaining why he needed testimony from several journalists, and the redacted portions of the opinion written by Judge Tatel.

In February 2007, the motion was denied by the Court of Appeals. On the renewed motion, Dow Jones and AP argue that because the Libby trial has ended and Special Counsel Fitzgerald has indicated the investigation is complete, the need for secrecy has "evaporated."

They argue that public access to the grand jury materials is needed "so the public can understand the Special Counsel's use of his investigatory authority and thereby serve as a check on the criminal justice system" and that disclosure is in the public interest.

The Special Counsel Patrick Fitzgerald argues that the grand jury secrecy is an important principle, and that there is no first Amendment right of access to grand jury proceedings.

Renewed Motion to Unseal available at: http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_MediaLawDaily/Attachments/FitzgeraldMotiontoUnseal.pdf

Dow Jones and Associated Press Reply brief available at: http://www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_MediaLawDaily/Attachments/FitzgeraldReply.pdf

RETURN TO TABLE OF CONTENTS

Ethics Corner: Provocative Journalism or Birdcage Lining?

The Special Significance Rule 1.2(b) Plays for Media Lawyers

By David A. Strassburger and Gretchen E. Moore

Introduction

During his Senate confirmation hearings, Chief Justice John G. Roberts, Jr., offered the following comment when asked whether it was appropriate to judge an attorney by the client she represents:

> It's a tradition of the American bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients.... [The] principle that you don't identify the lawyer with the particular views of the client, or the views that the lawyer advances on behalf of a client, is critical to the fair administration of justice.

2005 WL 2214702 (F.D.C.H., Sept. 13, 2005). These comments echo the views of the American Bar Association, which enacted Model Rule of Professional Conduct 1.2(b) in 1987. Rule 1.2(b) states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Model R. Prof. C. 1.2(b). The principle may also be found in the Model Code of Professional Responsibility, albeit by implication. Charles W. Wolfram, *Modern Legal Ethics* § 10.2.1 at 570 (1986).

Debate Over Professional Detachment

Rule 1.2(b) is less of a rule and, according to Wolfram, more of a "principle of professional detachment." *Id*. This principle is virtually unquestioned for many members of the Bar.

For example, the intake questionnaire used by most personal injury firms is unlikely to include questions about political affiliation, and there are very few such lawyers who would turn down a rear-ended plaintiff who has had two surgeries and missed 18 months of work merely because he never encountered a picket line he wouldn't join.

Similarly, most defense lawyers would not turn away a corporate client offering to pay a hefty retainer at regularly hourly rates simply because the client was accused of polluting or manufacturing a dangerous product.

There are exceptions. The Justice Department brought the issue of a lawyer's professional detachment to the forefront recently with its attack on lawyers representing detainees at Guantanamo Bay, and the minority view rejecting a lawyer's professional detachment has a long history.

Those who reject the premise of Rule 1.2(b) argue that representation of a client involves such an intimate relationship that a lawyer should not represent an "undesirable" client unless the lawyer agrees to be identified with the client.

The distinction between the two views has been characterized as procedural versus substantive. Andreas A. Borgeas, *Necessary Adherence to Model Rule 1.2(b): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation*, 13 Geo. J. Legal Ethics 761 (2000) ("*Borgeas*"). The lawyer who follows a substantive philosophy will choose to "approach the practice of law with certain social, religious, or ethical value systems that can inspire refusal to defend unpopular individuals and condemn tactics used to protect supposedly guilty, immoral, or unfavorable parties." *Id*. at 762. This school of thought has also been called the "moral activist" model. David Luban, *Lawyers and Justice: An Ethical Study*, p. 129-33, 148-49 (1988).

On the other hand, lawyers ascribing to the procedural approach envision a professional climate whereby "people can have equal access to competent representation so that the judicial system can fairly dispense justice." *Borgeas*, *supra*, at 762. Under this approach, which is reflected in Model Rule 1.2(b), the lawyer is merely an agent for the client, and does not implicitly associate with the client's conduct or viewpoint.

Case-Related v. Client-Related Detachment

Rule 1.2(b) sweeps broadly. It immunizes representation of a client in all matters, without regard to the facts giving rise to the engagement. Debate over the usefulness of professional detachment, sometimes called *moral insulation*, *see* Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 Law & Contemp. Probs. 31, 33 (Spring 1998), is usually case-specific.

Long before the Justice Department raised the issue, Ralph Nader famously attacked Lloyd Cutler's decision to settle a product-fixing suit against the Automobile Manufac-

(Continued on page 54)

ETHICS CORNER

(Continued from page 53)

turers' Association, instead of going to trial. *Borgeas, supra,*at 761-62.

Nader did not challenge Cutler's decision to represent the Association, only his handling of the case. Nader presumably would have had no quarrel with Cutler assisting the Association in purchasing a building to house its headquarters or defending the Association against employment claims.

Similarly, those who would pierce a criminal defense attorney's veil of moral insulation likely would not impugn domestic relations attorneys whose clients happen to have been convicted of a crime in the past.

The public's predisposition to moral judgments about lawyers who represent unpopular causes reflects the natural tendency towards our internal moral perspective:

> We have a strong tendency to view our own moral beliefs as true. We tend to view the moral beliefs of those with whom we disagree as mistaken. We experience a significant betrayal of self if we fail to act in accordance with our moral values.

Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism,* 90 Minn. L. Rev. 389, 404 (2005). But that natural tendency is usually case or issue-specific. The evangelical Christian who rejects the notion of professional detachment might frown upon the lawyer who represents a client pursuing a right to gay marriage, yet might not frown upon the same lawyer representing the gay client in a civil action against attackers who beat the client to near death because the client was gay.

The examples of attacks on lawyers for representing a client in all circumstances are less frequent and much harder to justify under the substantive approach. Perhaps the most notorious example arose nearly 60 years ago, when the American Bar Association participated in efforts to "rid America of Communist subversion." *Borgeas, supra,* at 764. At its annual convention, the ABA attacked the National Lawyers' Guild, among other organizations, stating that those groups and others who represented someone associated with the Communist Party were not worthy of membership in the bar. *Id., citing* Jerold S. Auerbach, *Unequal Justice* 233 (1976).

This type of pressure from an influential organization caused general apprehension in the legal community among those who maintained relationships viewed as "unpopular" due to their associates' personal, social, and political beliefs.

The "Unpopular" Media Client

The risk of criticism of media lawyers for the most part is not case-specific. Few would impugn the media lawyer for stating a case under the First Amendment, or arguing in favor of open meetings or open records in a particular context. To be sure, the moral activist approach is unlikely to subject to scorn the media lawyer providing intellectual property or transactional advice to her media client.

Rule 1.2(b) has special significance for media lawyers because the mission of the newspaper, magazine, broadcast company, or other media outlet is to be *conspicuous*, *provocative*, and in some situations, *controversial.* Our clients write editorials, offer opinions, and air investigative stories every day. Should Gonzales resign? Should the troops be withdrawn? Should Bush pardon Libby?

Our clients have probably chimed in on the most divisive issues facing the country, not to mention the local issues that can create a far more spirited debate (*e.g.* should the school board close your neighborhood school? Should your bus route be eliminated?).

In many neighborhoods, residents make judgments about their neighbors' political and social points of view by the color of the newspaper bags that land on their steps each morning. Many people have strong feelings about which newspaper, radio station, or evening news program they get their information from. Your news organization client may be the quintessential "unpopular client."

While every lawyer must always be guided by "personal conscience," *see* Model R. Prof. C. Preamble, Cmt. 7, Rule 1.2 (b) provides the media lawyer with the cover and grace of moral detachment. Sometimes the media lawyer agrees with the editorials, and sometimes she doesn't, but for purposes of professional responsibility the media lawyer is never identified with the media client.

Media lawyers will never be able to avoid completely the cocktail party conversation over the editorial in yesterday's newspaper, nor the jab: "I wouldn't line my birdcage with that rag." We can, however, take comfort and pride in representing clients who create debate over important public issues, without necessarily aligning ourselves with our client's side of the debate.

David A. Strassburger is a shareholder, and Gretchen E. Moore is an associate, in the Pittsburgh office of Strassburger McKenna Gutnick & Potter, P.C.

RETURN TO TABLE OF CONTENTS