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# LDRC LIBELLETTER

August 1998

## *In this Issue . . .*



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LDRC

*LIBEL DEFENSE RESOURCE CENTER*

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## Appellate Results and Certiorari Petitions Examined in LDRC's August BULLETIN

LDRC's recently published August 1998 BULLETIN examines appellate results in media libel and privacy cases from April 1984 to June 1998. Also included are case summaries of appellate decisions from the past two years. In addition, the BULLETIN contains LDRC's annual Supreme Court Report, reviewing the resolution of the 1997 Term's cases and petitions for certiorari to the U.S. Supreme Court in libel, privacy and other First Amendment cases of interest.

### *Appellate Results*

The appellate results were heartening to defendants. The LDRC 1998 REPORT ON APPELLATE RESULTS reports that in reviewing trial court verdicts for plaintiffs, appellate courts are likely to find in favor of the media on liability. Even when appellate courts affirm liability against the media, they are likely to find in favor of the media on damage issues, reversing or remanding or reducing most damage awards that plaintiffs have won at trial.

### *Liability*

In the most recent study period (July 1996-June 1998) when appealed, the courts reversed or remanded findings of liability against the defendants 50% of the time in reported cases where liability was at issue on appeal. Over LDRC's entire 15-year study period (April 1984 - June 1998), when

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appealed the courts have reversed or remanded 52.2% of the verdicts finding liability against the media in libel and privacy cases.

### *Damages*

In the most recent study period (July 1996 - June 1998), compensatory damage awards were reversed entirely or modified 70% of the time. No punitive awards were left standing. In the entire 15-year study period (April 1984 - June 1998), only 38.3% of plaintiffs' compensatory damage awards appealed survived the appellate process intact; and only 21% of plaintiffs' punitive damage awards were affirmed by appellate courts.

### *When Media Defendants Win at Trial*

Media defendants tend to hold on to their victories at the appellate court level against plaintiffs' appeals. Over the entire 15-year study period (April 1984 - June 1998), defendants' verdicts have been upheld on appeal 82% of the time. Over the last two years (July 1996-June 1998), the rate of success on appeal was down to 60%. The number of appeals is small, however, with only five appeals from defense verdicts. Out of these five appeals, one media defense verdict was reversed; and another, remanded.

### *Issues, Standards of Review, Plaintiffs' Status*

The LDRC 1998 REPORT ON APPELLATE RESULTS also looks at the many issues on which media appeals were based over the last two years ( July 1996 - June 1998), the rate at which plaintiffs and defendants prevailed on those issues, and the standards of review applied to the issues on appeal. The study reports on the win/loss statistics based upon the status of the plaintiff as a public or as a private figure, finding that the results are mixed over the last decade and a half.

The Report notes that the appellate process is moving slowly, and that a substantial number of cases remain pending at the appellate level.

### *Supreme Court Report: 1997 Term*

LDRC has reported on the Supreme Court and its handling of First Amendment press cases and petitions for certiorari since 1985. For the seventh consecutive Term, the U.S. Supreme Court did not grant certiorari in any libel or privacy case. The Court denied 13 petitions in these areas (7 media and 6 non-media). Only one of these petitions was from a media defendant appealing an adverse trial verdict, and the amount of damages at issue in this case was a relatively modest $50,000.

During the 1997 Term, the number of petitions in these areas was down: only 13 petitions (7 media and 6 non-media), compared to 28 (14 media and 14 non-media) in the 1996 Term. The 13 petitions ruled on was the lowest number reported in the 14 years that LDRC has been monitoring petitions to the U.S. Supreme Court.

### *Interesting Petitions Not Yet Decided*

Several petitions posing interesting media law issues were filed late in the Term and were not acted upon. CNN is seeking review of the Ninth Circuit's decision in *Berger v. Hanlon* that a CNN news crew that accompanied and videotaped federal agents executing a search warrant acted "jointly" with the government and therefore could be liable under the Fourth Amendment for conducting an illegal search. Also awaiting decision is a petition by Dow Jones and other media organizations on whether there is a First Amendment right of access to filings relating to the invocation of executive, protective and attorney client privileges in connection with the Lewinsky grand jury investigation.

Also examined are the two First Amendment cases decided by the Court, *National Endowment for the Arts v. Finley* and *Arkansas Educational Television Commission v. Forbes* and petitions filed in other First Amendment areas of interest.

LDRC's BULLETIN is published quarterly and is included with membership of $1,000 or more. Yearly subscriptions are available at $110 per year; single issues are $35 per copy. To subscribe contact LDRC at 212-889-2306.

# *Shulman v. Group W*: On Further Review . . . .

**By Lee Levine**

By Order dated July 29, 1998, the California Supreme Court revised the plurality opinion that controlled its recent decision in *Shulman v. Group W Productions, Inc.* Although the revisions do not affect the result first announced by the Court on June 1, they do have substantial ramifications for future applications of Section 632 of the California eavesdropping statute and the common law tort of intrusion upon seclusion.

## *June 1: Defining a Broad Eavesdropping Claim*

The Court's initial decision grappled with invasion of privacy claims sounding both in "publication of private facts" and "intrusion" asserted by two victims of an automobile accident on a public highway. The plaintiffs objected to the recording and subsequent broadcast of their voice and images, both at the accident scene and inside a rescue helicopter that carried them to the hospital. A divided California Supreme Court dismissed the "private facts" claims arising from the broadcast itself, but remanded the "intrusion" claims – based on the recording of one of the plaintiff's communications with the flight nurse at the accident scene and of her image inside the helicopter – for trial.

In its June 1 analysis of the intrusion claims, a plurality of the Court, in an opinion by Justice Werdegar, suggested that the recording of "confidential" communications between the plaintiff and the nurse may be actionable, both under the law of intrusion and Section 632 of the eavesdropping statute, if the plaintiff reasonably believed the conversation would not be overheard by third parties. Indeed, although the plaintiffs had not challenged the trial court's dismissal of their Section 632 claim on appeal, in footnote 15 of its initial opinion, the plurality wrote that "a conversation may be confidential, within the meaning of Section 632, even if the participants do not expect its contents to remain secret against secondhand repetition." Moreover, in footnote 16, the plurality observed that, despite the uncontested dismissal of their Section 632 claim, the plaintiffs' contention that conversations with the nurse had been recorded in violation of the statute is nevertheless "comprehended in the complaint's claim of intrusion and the substantive law relating to that claim."

## *On Rehearing: Footnote 15*

The defendants promptly filed a petition for rehearing limited to these two footnotes. In it, they argued that the statute's reference to "confidential" communications should be construed according to its plain meaning, as it had been in the Ninth Circuit's recent decision in *Deteresa v. American Broadcasting Cos.*, 121 F.3d 460, 463-64 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840 (1998). There, the Ninth Circuit, reviewing conflicting appellate decisions in California, held that a communication is "confidential" for purposes of Section 632 only when the participants reasonably believe it will not be repeated.

In its July 29 "Modification of Opinion," the plurality retreats from its contrary construction of Section 632. Indeed, it deletes the original footnote 15 entirely, replacing it with a frank recognition that the Court has not yet "had occasion to decide whether a communication may be deemed confidential under Penal Code section 632 . . . when a party reasonably expects and desires that the conversation itself will not be directly overheard by a nonparticipant" or otherwise recorded, "but does not reasonably expect that the contents of the communication will remain confidential to the parties." Justice Werdegar then cites both to *Deteresa* and to the conflicting California

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## *Shulman v. Group W*

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precedent on the issue and declares that the Court "need not resolve that issue here, because under either interpretation of section 632 . . . triable issues exist" concerning whether the plaintiff in *Shulman* "had a reasonable expectation of privacy in her communications to medical personnel." To emphasize the latter point, the text of the plurality opinion has also been modified to explain that whether the plaintiff "expected her conversations with" the nurse "to remain private and whether any such expectation was reasonable are, on the state of the record before us, questions for the jury."

### *And Footnote 16*

In addition, although the plurality did not delete or directly modify footnote 16 of its initial opinion, it added language to the opinion's text indicating that the plaintiff's intrusion claim "does not require her to prove a statutory violation, only to prove that she had an objectively reasonable expectation of privacy in her conversations." Defendants had argued in their rehearing petition that California's "new right/exclusive remedy" doctrine mandates that Section 632 provide the "exclusive remedy" for eavesdropping claims and that such conduct cannot therefore form the basis of a common law intrusion claim. While not rejecting defendants' contention, the plurality suggests that the various causes of action provided under California law may be different, "not[ing]" that "several existing legal protections for communications could support the conclusion that" the plaintiff "possessed a reasonable expectation of privacy in her conversations with" the flight nurse.

Finally, although not addressed in the rehearing petition, both the plurality and Justice Brown, who wrote a separate opinion dissenting from the Court's dismissal of the "private facts" claim, deleted language from their opinions referring to the plaintiffs as "limited involuntary public figures." Instead, both opinions have been modified to characterize them as "persons involuntarily involved in events of public interest." In one sense, this modification is extremely technical, substituting language familiar to the jurisprudence of the "private facts" tort for a phrase that has a decidedly different meaning and substantive ramifications in the defamation context. In another sense, however, the modification broadens the reach of the Court's initial "private facts" holding, extending it beyond any defined category of "involuntary public figures" to any person – whether a public or private figure – "involved in events of public interest."

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# OVER THE TRANSOM:
## *Boehner v. McDermott:* Is There Now Some Constitutional Protection?

**By Stuart F. Pierson**

On July 28, in a definitive ruling on the constitutionality of applying the federal wiretap statute to a lawfully acquired, unlawful recording, U.S. District Judge Thomas Hogan (D.C.), dismissed a civil action brought by U.S. Representative Boehner against Representative McDermott for disclosing to news media a recording of Boehner's mobile-phone participation in a conference call with Newt Gingrich and other members of the House of Representatives. *Boehner v. McDermott*, Civ. No. 98-594 (TFH)(D.D.C. 7/28/98).

On August 14, Congressman Boehner filed an appeal with the D.C. Circuit Court.

### *A Taped House Leadership Call*

In December 1996, Alice and John Martin intercepted and recorded a conference call among members of the House Republican leadership relating to the Gingrich ethics investigation. At the suggestion of other members of Congress, the Martins gave a copy of the tape with a description of its origin to McDermott, a Democrat who served on the House Ethics Committee. McDermott then transmitted the tape to *The New York Times* and other news media.

After reports of the content of the recorded conversation were then published, McDermott transmitted the tape to the Ethics Committee, but then resigned in the uproar over his sharing the material with the news media. The Martins were prosecuted and convicted for violating the federal wiretap statute (18 U.S.C. § 2511) and each paid $500. No other person or entity was prosecuted for disclosing the content of the recording. Boehner then sued McDermott under the federal and Florida wiretap statutes.

### *McDermott Moves To Dismiss*

Taking the allegations of the complaint as true, Judge Hogan concluded that even though McDermott violated the statute by disclosing the recording with knowledge that it had been unlawfully made, his sharing the tape with news media was protected by the First Amendment. While criticizing the failure of Congress to criminalize McDermott's *receipt* of the wrongful tape recording, Judge Hogan felt compelled to conclude that the receipt was not prohibited by the statute and, as a result, McDermott had received it lawfully.

Upon the further conclusions that the content of the tape was clearly a matter of public significance and that McDermott's disclosure of it to the news media was "truthful," Judge Hogan applied the strict-scrutiny standard of *Florida Star v. B.J.F*, 491 U.S. 524 (1989), holding that Boehner's interest in the privacy of the conversation, which he characterizes as "a salvo in the partisan battle between rival groups in the House of Representatives," did not meet the requirement of a state interest of the highest order. Slip op. at 14.

Indeed, he expressed skepticism that protecting the privacy of oral, wire or electronic communications could ever be found to reach a higher order of government interest than the protection of the privacy of rape victims; and, as a consequence, it appeared to him that the wiretap statutes could never survive First Amendment challenge in similar circumstances.

### *Notes Two Other Decisions*

In a footnote, Judge Hogan notes the two other relevant decisions – last year's decision by U.S. District Judge Jerry Buchmeyer (N.D. Tex.), holding that the wiretap statute cannot be constitutionally applied

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## OVER THE TRANSOM

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to publication of an unlawfully recorded telephone conversation that had been played at a public hearing of the local school board (*Peavy v. New Times, Inc.*, 976 F. Supp. 532 (N.D. Tex. 1997)), and the 1994 New York state court decision that rejected a constitutional challenge to application of the statute to publication of an unlawful recording received by news media over the transom (*Natoli v. Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994)). Though not feeling bound by either, he states his agreement with *Peavy*.

Although, unlike *Peavy* and *Florida Star*, this case involved private, not governmental distribution of the unlawfully obtained information, Judge Hogan found the difference constitutionally insignificant. In his view, only three factors are necessary to require application of the strict-scrutiny standard: (1) that the material was lawfully acquired by the defendant without involvement in the unlawful recording (even though he may have post-hoc knowledge of the unlawful interception); (2) that the defendant's disclosure of the material was truthful; and (3) that the content of the material was publicly significant. The First Amendment, thereupon, protects against legal sanction unless the state's interest is even stronger than maintaining the privacy of a rape victim or a minor in juvenile proceedings.

Unless the statute is amended, this is a strong precedent for journalists; for, just as McDermott could transmit the material to the news media, the news media could publish it under protection of the First Amendment with knowledge it had been unlawfully obtained.

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PRIVACY

## REPRESENTATIVE CONYERS INTRODUCES COMPANION "PERSONAL PRIVACY" BILL

On August 6, 1998 Representative John Conyers (Michigan) introduced H.R. 4425, a companion bill to the Feinstein-Hatch Personal Privacy Protection Act, providing protection from personal intrusion for commercial purposes. The Senate bill was introduced by Senators Feinstein and Hatch on May 21, 1998. The bills are similar in that both provide criminal sanctions for either "harassment" (in the Feinstein-Hatch bill) or "reckless endangerment" (in the Conyers bill) while in the pursuit of visual images, sound recordings or physical impressions for commercial purposes. "Reckless endangerment" is the House analogue to "harassment" in the Senate bill.

The Senate bill contains a provision prohibiting "trespass for commercial purposes and invasion of legitimate interest in privacy for commercial purposes." The House analogue is a "tortious invasion of privacy" provision defined as:

> (A) a capture of any type of visual image, sound recording, or other physical impression of a personal or familial activity through the use of a visual or auditory enhancement device, if
>
> > (i) the subject has a reasonable expectation of privacy with respect to that activity; and
> > (ii) the image, recording, or impression could not have beeen captured without a trespass if not produced by the use of the enhancement device; or
>
> (B) a trespass on private property in order to capture any type of visual image, sound recording, or other physical impression of any person.

While the Conyers bill is not as of yet on the fall agenda for the House of Representatives, hearings were held on May 21, 1998 on similar bills introduced by Representatives Bono and Gallegly. Hearings in the Senate will most likely begin once Congress returns from its August recess.

# Minnesota's New Torts For Invasion Of Privacy

## Rejects only False Light

**By Eric E. Jorstad**

*For the first time, the Minnesota Supreme Court has* recognized a claim for invasion of privacy. In a seminal ruling on July 30, 1998, the Court held that there is a right to privacy present in the common law of Minnesota, including three of the four privacy torts: intrusion upon seclusion, misappropriation of name or likeness, and publication of private facts. The Court rejected the tort for false light invasion of privacy. Although the Court characterized recognition of the invasion of privacy torts as "a question of first impression in Minnesota," the Court had rejected any such claim for decades. The new ruling opens the way for lawsuits by individuals who claim one of the three variants of this new tort.

The case is *Lake v. Wal-Mart Stores, Inc.*, ___ N.W.2d ___, 1998 WL 429904 (Minn. July 30, 1998). The plaintiffs, Elli Lake and Melissa Weber, vacationed in Mexico with Weber's sister. The sister took a photograph of Lake and Weber naked in the shower together. Wal-Mart's photo lab refused to print the picture because of its "nature." In the following months, acquaintances of Lake and Weber told them they had seen the picture and questioned their sexual orientation.

The trial court granted Wal-Mart's motion to dismiss for failure to state a claim upon which relief could be granted. The Minnesota Court of Appeals affirmed, stating it felt bound to affirm based on Minnesota Supreme Court precedent, e.g., *Richie v. Paramount Pictures*, 544 N.W.2d 21, 28 (Minn. 1996) (recounting Minnesota's "rejection" of the four invasion of privacy torts), but essentially challenged the Supreme Court to recognize the torts in this case.

After explaining its authority to interpret state common law, the Minnesota Supreme Court expressly found three of the four invasion of privacy torts to be present in Minnesota common law. The vote was 5 to 2. The Court adopted the framework of analysis for invasion of privacy claims in Restatement (Second) of Torts, §§ 652B (intrusion upon seclusion), 652C (misappropriation) and 652D (publication of private facts). *Lake v. Wal-Mart*, 1998 WL 429904 at *2. The Court stated,

> Today we join the majority of jurisdictions and recognize the tort of invasion of privacy. The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.
>
> Here Lake and Weber allege in their complaint that a photograph of their nude bodies has been publicized. One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection. Therefore, without consideration of the merits of Lake and Weber's claims, we recognize the torts of intrusion upon seclusion, appropriation, and publication of private facts.

1998 WL 429904 at *4.

The Court declined to recognize the tort of false light publicity because of First Amendment concerns. False light claims are similar to defamation claims, the Court stated, but to the extent false light may be more expansive than defamation it creates an unwarranted tension with First Amendment protections which have developed in the defamation context. *Id.* at *4. The Minnesota high court agreed with the reasoning of the Texas Supreme Court which rejected the tort, *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). Although aware that certain potential false light tort claims could not be brought as defamation claims, the Court found that "the risk of chilling speech is too great to justify protection for this small category of false publication not protected under defamation." *Lake v. Wal-Mart*, 1998 WL 429904 at *5.

For a review of Minnesota case law in this area prior to *Lake v. Wal-Mart*, see J. Borger, E. Jorstad & P. Hannah, Survey of Minnesota Privacy and Related Claims Against the Media, LDRC 50-State Survey 1998-99: Media Privacy and Related Law, at 794-816. Messrs. Borger, Jorstad and Mark Anfinson represented amicus curiae Minnesota Broadcasters Association and Minnesota Newspapers Association in *Lake v. Wal-Mart*.

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# Third Circuit Rules Journalist is Not A Journalist For Reporters' Privilege

The Federal Court of Appeals for the Third Circuit found itself in the unusual position of having to define whether an individual was a journalist for the purpose of the reporters' privilege. In *In re: Mark Madden: Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.*, No. 97-3267 (3d Cir. 7/21/98), the court held that a nonparty witness who prepared reports and commentaries on professional wrestling under contract with World Championship Wrestling ("WCW"), a party in the litigation, for the WCW 900-number hotline was not a journalist and was not entitled to invoke the reporters' privilege in order to protect his confidential sources from disclosure.

> ***"[w]e hold that individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public."***

Disputing both the Third Circuit's recitation of the facts regarding the witness' credentials and reporting practices, as well as its application of the law, counsel for the witness has filed for rehearing and/or rehearing *en banc*.

The underlying action is one alleging unfair trade practices, copyright infringement and other pendent state law claims. Mark Madden, the nonparty witness, was a full time sports reporter for a Pittsburgh daily newspaper at the time of his depositions (and still is a full time sportswriter and radio sports commentator). As a part time job, however, he is under contract with WCW to produce tape-recorded reports and commentaries for its 900-number.

During his deposition, Madden refused to identify his confidential sources for what is alleged to be various false and misleading statements recorded for the 900-number, although he did testify whether each source was affiliated with WCW or not.

While the underlying litigation is pending in the federal district court in Connecticut, Madden resides in Pennsylvania. The district court in the Western District of Pennsylvania denied Titan's motion to compel Madden to identify his sources concluding that Madden was a journalist, that he was covered by the privilege, and that Titan had failed to show that its need for the information outweighed the reporter's interest in protecting his sources *Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.*, 967 F. Supp. 142 (W.D. Penn. 1997).

The Third Circuit took jurisdiction of the appeal on the discovery issue, which otherwise would be a nonfinal order and not subject to appeal, finding that otherwise Titan would have no other avenue of effective appellate review.

Citing prior Third Circuit precedent, the panel recognized that a journalist is entitled to the privilege, but that the Third Circuit has never defined who qualifies as a "journalist" for these purposes. Indeed, the court found little precedent even outside of the Third Circuit to assist it in defining who is and who is not covered by the privilege. Working primarily from *von Bulow v. von Bulow*, 811 F.2d 136 (2nd Cir. 1987), adopted, the court noted, by the Ninth Circuit in *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir.), the panel concluded that "[t]he critical question in determining if a person falls within the class of persons protected by the journalist's privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." (Quoting *von Bulow*, 811 F.2d at 143) The District Court had applied this *von Bulow* test to find that Madden was a journalist.

The Third Circuit panel found that the test to be drawn first from *von Bulow* has as its primary purpose the protection of the activity of "investigative reporting." The dissemination intended may be through books, magazines, broadcasts, handbills, or other ve-

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## Journalist is Not A Journalist For Reporters' Privilege

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hicle of communication. The mode of dissemination is less important under the v*on Bulow* test, the panel stated, than the intent behind the newsgathering process.

From this test, however, the court jumped to the statement that "the privilege is only available to persons whose purposes are those traditionally inherent to the press: persons gathering news for publication," and arrives at its own test: "[w]e hold that individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public." Slip op at 9.

Madden, according to the panel, did not prove that he passed this test.

In a factual narrative that Madden has strongly disputed, the panel stated that he admitted to being an entertainer, not a reporter (contradicted somewhat by the court's acknowledgment and then contemptuous dismissal of Madden's claim to be "Pro wrestling's only real journalist" as "hyperbolic self-proclamation"); that his information comes solely from sources within WCW; that he is disseminating hype, not news; and concluding that Madden writes "little more than creative fiction about admittedly fictional wrestling characters." Slip op at 10. By concluding that Madden is a "creator[] of fictional work" with the primary purpose being to provide advertisement and entertainment, not to gather news or disseminate information, the court found he is not entitled to invoke the journalists' privilege.

On one hand, by reducing Madden to a dramatist, a fiction-writing flack, the court reduces the possibility that this opinion can serve as meaningful precedent against others who claim the privilege. On the other hand, one has to wonder why the panel reached so far -- and according to the material cited in the rehearing motion, ignored clear contrary statements and material in the record, as well as district court findings of fact to the contrary -- to deny journalist status to Madden.

Madden argues in his rehearing motion that the Third Circuit panel impermissibly looked at the content of his speech -- impermissibly discriminating against the sometimes humorous, sometimes entertaining commentaries on what is acknowledged to be a form of athletic theater -- and rejected it as the "investigative reporting" and "news" the panel's redefined test requires. Madden argues, among other things, that the court confuses the fictional quality of the sport on which Madden reports with the nonfictional reporting that Madden engages in on wrestling story lines, its business dealings, match results, and other factual matters. That he tries to do so in an entertaining fashion should not detract from his primary purpose as an information gatherer and provider.

Madden also argues that labeling him as an "entertainer" is decidedly disturbing at a time when the media is regularly criticized for engaging in entertainment, rather than more traditional news reporting and when information is increasingly delivered in a variety of very nontraditional media. The Third Circuit has modified v*on Bulow* to add a requirement of "serious" journalist intent, which carries the potential to create litigation for journalists whose work can be recast by others as "entertainment."

Mark Madden is represented by John Houston Pope and David Dunn of Davis Weber & Edwards, P.C.

LIBEL

# UPDATES

## Gannett Pays Award in Tennessee Libel Case

*The News-Examiner* in Gallatin, Tennessee, a Gannett newspaper, decided not to appeal an April 1998 libel judgment. A Gallatin jury awarded plaintiffs Garrett "Bubba" Dixon Jr. $500,000 in compensatory and $300,000 in punitive damages and Rufus Lassiter $150,000 in compensatory damages. The lawsuit, brought by then-student soccer player Dixon and his local high school soccer coach, Lassiter, was based on prank copy in a sports article that had the coach charging Dixon, in language that was admittedly vulgar and sexually explicit, with bestiality and unsanitary habits. The reporter expected his editor would delete the material, as he claimed had happened in the past, but the joke copy was overlooked and ultimately published. Despite efforts by the paper to recall unsold copies of the issue, its publication of a prominent apology in the next edition, its firing of the reporter and suspension of the editor, plaintiffs sued.

## NBC Files Post-Trial Brief in Maine *Dateline* Suit

NBC has filed a Motion for Judgment as a Matter of Law or for a New Trial or for Remittitur following the Maine jury trial in *Veilleux v. NBC* in which the plaintiffs were awarded damages totaling $525,000. *See LDRC LibelLetter*, July 1998 at p. 1. The plaintiffs were Raymond and Kathy Veilleux, owners of a Maine trucking company, and their employee, truck driver Peter Kennedy. Plaintiffs charged, among other things, that NBC News representatives misled them into agreeing to participate in a story which reported on the stresses of long-distance trucking, the violation of safety-based rules and driver fatigue.

## Jury Awards Plaintiff $345,000 in Brawley Defamation Trial

On July 29, jurors in the defamation trial against Al Sharpton, C. Vernon Mason and Alton Maddox awarded plaintiff Steven Pagones $345,000 in damages. The jurors had previously found that the three defendants defamed plaintiff on numerous occasions when they accused him of raping Tawana Brawley in 1987. Brawley's claim proved to be a hoax. *See LDRC LibelLetter*, Jan. 1998, at p. 11; July 1998, at p. 8.

The jury awarded $5,000 in compensatory damages against each defendant and punitive damages of $180,000 against Mason, $90,000 against Maddox, and $60,000 against Sharpton. The trial court will separately assess damages against Ms. Brawley who defaulted. Pagones had asked for $395 million in his complaint, but did not ask for a particular award during the damages hearing. Several jurors interviewed after the case said the award was consistent with Pagones' testimony that he brought the case to clear his name and not to financially destroy the defendants.

# UK Court Rules Qualified Privilege May Apply to False and Defamatory Newspaper Reports

In the latest round of a long running libel suit by former Irish Prime Minister Albert Reynolds against *The Sunday Times*, a British Court of Appeal on July 8th granted Reynolds a retrial, finding that he had not received a fair trial in 1996. *Reynolds v. Times Newspapers Ltd.*, (July 8, 1998). At the same time, though, the court significantly extended the scope of qualified privilege, recognizing that the defense can apply to media reports about the public conduct of public officials. A defense of qualified privilege could apply to a newspaper's publication of false and defamatory statements if the publication was made honestly and, in general terms, in the public interest.

## *A Historic Decision*

According to Katherine Rimell, partner at the law firm Theodore Goddard, who represented *The Sunday Times*, the decision is an important breakthrough, recognizing as it does, for the first time in English law, the right of the press to a defense of common law qualified privilege, on the basis of the media's duty to "inform the public and engage in matters of public interest," provided it satisfies the requirement in the particular case of discharging a "legal, moral or social duty to the general public, and the public has a genuine interest in the story."

In a historic ruling, the court held that in other jurisdictions in "differing ways and to somewhat differing extents" (the United States, Australia, New Zealand and the jurisprudence of the European Court of Human Rights) this imperative was recognized and it would be strange if the law of England - "the land of Milton, Paine and Mill -- were to deny this recognition." In the future, if the circumstances warrant it, the press will no longer be called upon to prove the truth of the challenged statements, and "will be afforded immunity from liability provided it acted without malice."

## *Accusation That Irish Prime Minister Lied*

Reynolds' libel suit is based on a 1994 *Sunday Times* article published after the collapse of a Reynolds-led Irish government. Drawing on statements made in the Irish Parliament and other sources, the article accused Reynolds of lying in Parliament and to members of his coalition. In 1996, after a 24-day trial, a jury returned a verdict for Reynolds, finding the article to be false and defamatory, but awarding no damages. The trial judge later increased damages to one penny.

## *Trial Summation Unfair to Plaintiff*

This outcome actually left Reynolds liable for an estimated £1 million of his own and *The Sunday Times'* legal fees, since he had a rejected a settlement offer of £5,000 "paid into court." Having rejected this offer and having received a damage award less than this amount, Reynolds was liable for defendants' legal fees subsequent to the settlement offer. Ordering a new trial, the court of appeal ruled that the trial judge's summation confused and misled the jury, particularly with regard to awarding damages to vindicate Reynolds' reputation. The now-retired trial judge, who presided over the case shortly after undergoing triple bypass heart surgery, was described in one newspaper report as not having "the concentration or powers of recall he once had."

## *Sunday Times Asked Court to Recognize Broad Privilege*

In its cross-appeal, *The Sunday Times* asked the court to hold that its article was protected by a broad privilege covering criticism of public officials focusing on their public conduct and fitness for office, a privilege which would essentially make honest mistakes in such reporting non-actionable. The court of

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## UK Court Rules Qualified Privilege

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appeal rejected this request, but in so doing the court gave explicit support to the position that such reports could be covered by qualified privilege under English common law -- in effect extending the scope of qualified privilege, as opposed to creating a new privilege.

Generally under English law, qualified privilege applies only in instances where statements are made under a social or moral duty to someone with an interest to receive the information and providing the maker of the statement is not malicious -- a privilege akin to the common interest privilege in American common law. Qualified privilege also contains what is called "the circumstantial test," explained by the court as whether "the nature, status and source of the material and the circumstances of the publication [was] such that the publication would in the public interest be protected in the absence of proof of express malice."

Status, as explained by the court, denoted:

> the degree to which information on a matter of public concern might, because of its character and known provenance, command respect. The higher the status of a report the more likely it was to meet the circumstantial test. . . . Conversely, unverified information from unidentified and unofficial sources might have little or no status . . . .

The privilege did not generally extend to news reports or investigative journalism on the theory that the press had no "moral duty" to make such reports to the public at large.

### *Privilege Issue Discussed at London Conference*

At LDRC's Forum on English Libel and Privacy Law in London, Andrew Nicol QC, a barrister at Doughty Street Chambers specializing in media law, explained that the British press had pushed for the establishment of a public interest privilege, arguing that newspapers have a general duty as public watch dogs to report on matters of public interest and their readers have a corresponding interest in receiving that information. If the press is careful and fair in its reporting, it should lose the privilege only if it has been malicious.

In 1984, the court of appeal in the case of *Blackshaw v. Lord* rejected such a privilege, though, as Nicol explained, attempts to establish such a privilege continued with the hope that courts down the road would edge a little closer to this position. He noted that the incorporation of the European Convention on Human Rights into UK law could provide additional momentum towards this privilege, and, in fact, the court in *Reynolds* cites to Article 10, the free expression provision, of the Convention.

### *Press Does Have Duty to Inform Public*

Referring to recent cases from Australia (*Lange v. Australian Broadcasting Corp.*), New Zealand (*Lange v. Atkinson*) and the European Court (*Lingens v. Austria*) that have recognized something of a public interest privilege for news reports, the court announced with regard to England that there too it is "the task of the news media to inform the public and engage in public discussion of matters of public interest. . . . Corresponding to the media's duty to inform [is] the public's interest to receive information." With respect to applying a qualified privilege to news reports, the court concluded that, "In modern conditions the duty test should be rather more readily held to be satisfied." That is, that the

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## UK Court Rules Qualified Privilege

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press does have a duty to report matters of public interest and, accordingly, the public also has a right to receive information on matters of interest to the community -- the first two steps in receiving a qualified privilege.

### *Court Will Look to Circumstances Before Applying Privilege*

*The Sunday Times'* article on Reynolds was clearly a subject of public interest so it met the duty and interest tests of qualified privilege. It did not, however, meet the circumstantial test -- "the nature, source and status of the defendants' information and all the circumstances of its publication." The court did not review the specific circumstances of the Reynolds article but it did cite examples of circumstances relevant to such an inquiry, such as the source of the story (was the source of the statement a government press release, a company report or was it a statement by a political opponent or disgruntled employee) and whether the subject of the article was given an opportunity to rebut.

The court's examples suggest that the "circumstantial test," encompasses elements of a fault standard, a significant advance away from strict liability.

### *Decision Boosts Investigative Reporting*

The court's decision finding that the press has a duty to report to the public, but still looking to the circumstances of publication before applying a qualified privilege, is ultimately a balancing test, but one with added weight on the press' side. As for the decision's impact on future cases, Katherine Rimell notes that while the defense would not apply to matters which are personal and private and in which there is no public interest in their disclosure, leaving articles about the private lives of celebrities outside the ambit of the defense, the ruling does provide a significant boost in the armory of newspapers conducting bona fide investigations into matters of public interest.

## HOUSTON APPELLATE COURT ON IMPLICATION AND TRUTH

### TEXAS MONTHLY WINS SUMMARY JUDGMENT ON INTERLOCUTORY APPEAL

**By Julie Ford**

*Texas Monthly* won its interlocutory appeal of a denial of summary judgment on July 23, 1998 when the Houston Court of Appeals, First District of Texas, found the article at issue was privileged and substantially true. The case, styled T*exas Monthly, Inc. v. Mediatex Communications Corporation and Gary Cartwright*, was based on allegedly libelous statements in a story about gas mogul Jack Stanley published in July 1995. Although still subject to a possible motion for rehearing and further appeal, the opinion issued by the Houston court should prove valuable to media defendants in Texas in the future, for the following reasons:

***Implied libel not actionable if implication arises from substantially true facts.***

One of the statements that plaintiff Jack Stanley found offensive was this: "[Billy Stanley] freely admits having operated a criminal enterprise from 1988 until 1992, the four years that he ran [Transamerican Natural Gas] office for his father [Jack Stanley]." Stanley argued that this statement was defamatory because, read in context, it implied that Jack Stanley was "the evil brains" behind his son's criminal enterprise. *Texas Monthly* proved that the admission was made by Billy Stanley, and argued that any implication arising from the true facts was not actionable. The Houston court agreed with *Texas Monthly*, stating, "the notion that a plaintiff can assert a cause of action for libel by implication, when the facts stated are substantially true, has been rejected by the supreme court," citing *Randall's Food Mkts., Inc. v. Johnson* (Tex. 1995).

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## HOUSTON APPELLATE COURT ON IMPLICATION AND TRUTH

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The *Randall's* case involved a slander claim against the plaintiff's supermarket employer. Since *Randall's*, libel plaintiffs in Texas have argued, as they did in this case, that this Texas Supreme Court decision does not apply to libel cases against the mass media. The Houston appellate court's rejection of this argument and its reliance on *Randall's* under these facts should be very beneficial to media defendants in Texas in the future.

***Statutory phrase "fair, true and impartial" equals "substantial truth."***

Many of the statements Jack Stanley complained about were descriptions of judicial proceedings. In Texas, the fair report privilege to repeat defamatory allegations made in judicial procedings is statutory. The statute provides that, to be protected as privileged, the report must be a "fair, true and impartial account." *Texas Monthly* argued that the test for whether an account was "fair, true and impartial" was simply the "substantial truth," or "gist" test. That is, if the effect of the statement on the mind of an ordinary reader would be no worse for plaintiff than a truthful statement would have been, the statement is "substantially true."

Plaintiffs argued that this test covered only the term "true" in the privilege statute, and that the statutory language also required the account to be "fair" and "impartial." The appellate court accepted *Texas Monthly's* position without comment, holding that, if the account was substantially true, it was privileged.

***In a privilege case, the question of "substantial truth" is an issue for the court, not the jury.***

A major point of contention in this summary judgment appeal involved the question of who would decide whether an account of a judicial proceeding was "substantially true?" At what point, if any, would this issue go to a jury ? Plaintiffs relied on a Fifth Circuit case which said that if reasonable minds could differ, the question went to the jury. *Texas Monthly* argued that the Fifth Circuit reading of Texas law was simply wrong, and that every Texas Supreme Court case deciding this issue of "privilege" indicated that the court was to decide whether the account was substantially true. (Under this line of cases, there may be issues of fact concerning what words were used or the statement's meaning. And there may be an issue of fact about what the real truth was. These fact issues would be determined by a jury. But the ultimate comparison of the account to the truth to determine whether the statement was a "substantially true" account, and therefore privileged, was an issue of law for the court. In a summary judgment context, the court must assume the nonmovant would win on any fact issues on either side of the equation.)

The Houston court, again without comment, agreed with *Texas Monthly* and decided the question of substantial truth. It compared each statement at issue with the uncontested summary judgment evidence and decided that none of the complained of discrepancies would make any difference in the mind of the ordinary reader.

***"Considerable latitude" should be afforded to media defendants.***

The Court also accepted defendants' position, based on the Texas Supreme Court's treatment of the substantial truth test in *Herald-Post Publ'g Co. v. Hill*, 891 S.W.2d 638, 639 (Tex. 1994), that "considerable latitude" should be given in the context of applying the substantial truth test in a fair report privilege case.

In terms of future summary judgment motions for both privilege cases and implied libel cases, this opinion could be a valuable contribution to the growing summary judgment caselaw in Texas following the enactment of the statutory right of the media to appeal denials of motions for summary judgment.

*Julie Ford is with the firm George, Donaldson & Ford, L.L.P. in Austin, TX.*

# JOHNNIE COCHRAN'S LIBEL SUIT AGAINST N.Y. POST DISMISSED

## *Tone, Tenor, Context Indicate Constitutionally Protected Opinion*
## Cal Court Upholds Jurisdiction Over Paper and Columnist

**By Charles J. Glasser, Jr.**

On August 4, 1998, Judge Kim M. Wardlaw of the United States District Court for the Central District of California dismissed a single-count libel claim brought by attorney Johnnie Cochran against the publisher of the *New York Post* and *Post* columnist Andrea Peyser which sought $10,000,000 for "damage to his reputation, shame, mortification and emotional distress." *Cochran v. NYP Holdings, Inc. and Andrea Peyser*, CV97-9086 KMW (August 3, 1998, C. D. Cal). The dismissal, in response to a Rule 12(b)(6) motion, was founded upon the Court's finding that the statement at issue in the case, unmistakeably Peyser's opinion, is "absolutely protected by the First Amendment." *Slip op.* at 3.

### *Cochran Enters New York Controversy*

The suit was brought by Cochran last December in reaction to Peyser's August 29, 1997 column about Cochran's involvement in the highly publicized New York civil rights case of Abner Louima, a Haitian immigrant allegedly beaten by New York City police officers. Louima had been represented by other attorneys who departed after Cochran entered the case. The column at issue raised questions about the Louima case's impact on race relations in New York, about the wisdom of Louima allowing Cochran on his legal team, and particularly, about the trial tactics used by Cochran in his defense of O. J. Simpson.

Cochran's suit was based upon a single statement in the column: "but history reveals that he [Cochran] will say or do just about anything to win, typically at the expense of the truth." Cochran claimed that this statement was false and defamatory by implying that he has a record of lying and of unethical conduct in his profession. The *Post* moved to dismiss on a lack of personal jurisdiction and plaintiff's failure to state a claim under the First Amendment. Alternatively, the *Post* sought a transfer of venue to the Southern District of New York.

### *Jurisdiction under Gordy*

As to personal jurisdiction, the Court found that it need not address the issue of general jurisdiction as the court had specific jurisdiction. The *Post* daily distribution at that time, through a local independent distributor, of 210 copies was sufficient, under *Gordy v. Daily News*, 95 F.3d 829 (9th Cir. 1996) for the Court to assert personal jurisdiction over the *Post*. Quoting *Gordy*, the Court noted that "the Ninth Circuit has found California jurisdiction on the basis of a mere 13 to 18 copies." *Slip op.* at 6.

Finding specific jurisdiction appropriate, the Court continued that "the most important factor" in the jurisdictional consideration is "the harmful effect of the defamatory statement, which occurs in the forum of an individual's domicile." Cochran's California domicile was challenged by the *Post*, based on Cochran's having moved to a Manhattan co-op and having taped his nightly "Cochran & Company" television show in New York. The Court instead noted that Cochran's California driver's license, payment of California taxes, auto registration and other California activities made the effect of any defamatory statement "felt most acutely in Los Angeles." *Id.* The Court also rejected arguments that under *Calder v. Jones*, 465 U.S. 783 (1984), the Court should also consider the "aim" of the article, which was New York, where the Louima case and Cochran's voluntary insertion into the controversy had taken place.

In addition, the Court asserted jurisdiction over Peyser as well as the publisher, who, the court recognized, had not contacted anyone nor traveled to California in connection with the column, because "the

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# JOHNNIE COCHRAN'S LIBEL SUIT AGAINST N.Y. POST DISMISSED

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reporter knew that the subject of the column lived in the forum . . . that [she] now finds herself in a Los Angeles court cannot be the result of 'random,' 'fortuitous' or 'attenuated contacts' or of the 'unilateral activity of another party or a third person.'" *Id., citing Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

## *Three-Step Analysis of Opinion*

The bulk of the *Post*'s motion to dismiss was based on the ground that Peyser's statement was constitutionally protected opinion, incapable of being proved true or false. Following *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995), Judge Wardlaw approached the defendants' argument with a three-part analysis, viewing: 1) "the statement in its broad context, including the general tenor, the subject of the statements, the setting, and the format of the work;" 2) "the extent of figurative or hyperbolic language and the reasonable expectations of the audience in that particular situation"; and 3) "whether the statement itself was sufficiently factual to be susceptible of being proved true of false." *Slip op.* at 11.

## *The Broad Context of Column Was the Simpson Criminal Trial*

At oral argument Cochran's counsel (in response to an inquiry from Judge Wardlaw) admitted that Cochran's "history" referred to by Peyser in the article solely related to Cochran's conduct at the Simpson criminal trial. The defendants' counsel readily agreed. This severely undercut Cochran's theory under *Milkovich* that Peyser's statement alluded to undisclosed defamatory facts not discussed in the article, because, as the Court explained, the public knowledge of the O.J. Simpson trial – unarguably the most talked-about trial in recent history – precluded an implication of undisclosed defamatory fact.

The defendants argued that the "broad context" or "setting" of Peyser's column was part of the public debate surrounding the Simpson criminal trial. The Court agreed, and taking judicial notice of the "overwhelming deluge of publicity" connected to the Simpson criminal trial, held that:

> [T]here exists a shared public knowledge of the [Simpson] trial proceedings, theories and underlying factual allegations. Because the factual referent is disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts.

*Slip op.* at 14, citing *Yagman v. Standing Committee on Discipline*, 55 F.3d 1430 (9th Cir. 1990).

## *Colorful Adjectives, Headlines, as Indicia of Opinion, Hyperbole*

The defendants argued that the not sued-upon phrases in the column made it clear to the reasonable reader that the column was a "lusty and imaginative expression" of Peyser's views of the Simpson criminal trial. Agreeing, the Court held that because the specific context was "a collection of opinions, colorfully expressed" the statement at issue was "simply more rhetorical hyperbole," and observed that Peyser's language, and the tone and tenor of the entire column was "loose, figurative and hyperbolic." *Slip op.* at 16. For example, Peyser said that Cochran had "cynically turned West Coast justice on its ear," that Cochran "dazzled a Los Angeles jury into buying his fantasy tale," and the headline read "NIGHTMARE TEAM TAKES OVER." The Court found that the factual impossibility of these statements was clearly the hallmark of opinion:

> Peyser does not . . . describe literal situations of Cochran "blinding" jurors nor causing them to "buy" his theory of defense; nor can the abstract concept of justice be "turned on its ear."

*Slip op.* at 16.

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## JOHNNIE COCHRAN'S LIBEL SUIT AGAINST N.Y. POST DISMISSED

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### *Trial Strategy Incapable of Objective Proof*

Also essential to Cochran's theory of recovery was the argument based upon *Unelko v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) that because the criminal trial jury acquitted Simpson, Cochran's police conspiracy theory was provably true and that he did not deceive the jury. The Court squarely rejected this argument. While under *Unelko*, the allegedly defamed product either did or did not work, the Court found that here the statement at issue was a comment upon a trial strategy, and "Cochran's trial strategy is not provably true or false because there is no core of objective evidence upon which this Court could verify the allegation." *Slip op.* at 18. Continuing, the Court noted that Cochran's trial theory:

> [M]ay never prove true or false, and, at most, can only be said to have persuaded the Simpson jury of a reasonable doubt. As the *Partington* court noted, "there is a wide variation in opinion concerning the appropriate trial strategy that should be pursued in a given circumstance."

*Slip op.* at 19, citing *Partington v. Bugliosi*, 56 F.3d 1147, 1158 (9th Cir. 1995).

As of the time of this writing, Cochran has not yet filed an appeal. When asked about an appeal, Cochran's attorney, Deborah Drooz, of Bronson, Bronson & McKinnon in Los Angeles, told Reuters that she was not certain whether Cochran would appeal, and that "maybe he [Cochran] just wanted to send a message to the tabloids that they can't play fast and loose with someone just because they are a celebrity."

*Charles J. Glasser, Jr. is an associate with Squadron, Ellenoff, Plesent & Sheinfeld L.L.P. in New York. He and Slade R. Metcalf represented defendants in this matter.*

**ACCESS**

## Grand Jury Transcripts Ordered Released

### Court Has Inherent Authority

### Merrill Lynch Seeks Review Order

**By Karen Frederiksen**

On July 27, 1998, Merrill Lynch & Co., Inc. and 28 of its present and former employees filed Petitions For Review with the California Supreme Court protesting a California Court of Appeal decision that a court has the discretionary authority to order disclosure of grand jury transcripts, even where the grand jury's investigation was terminated before it was able to deliberate. The unsealing order at issue was executed by Orange County Superior Court Judge David O. Carter at the request of a coalition of more than a dozen media organizations in connection with the aborted grand jury investigation into the devastating 1994 Orange County bankruptcy, the largest municipal failure in history. The focus of the last phase of that investigation was Merrill Lynch.

Merrill Lynch opposed the unsealing request on the theory that California essentially has an iron-clad common law secrecy rule surrounding grand jury transcripts, and that absent express statutory authority, grand jury transcripts must remain sealed. Judge Carter disagreed, and held that he – as the court supervising the Orange County grand jury – had the inherent authority to exercise his discretion and order the public release of the grand jury transcripts, at least where the grand jury's investigation had concluded and the public interest favored such disclosure.

Other state courts -- including those in Oregon, Florida, Delaware and New York -- similiarly have found that a court has the inherent, discretionary authority to release otherwise secret grand jury materials, at least where disclosure is in the public interest or furthers the "interests of justice." *See State v. Hartfield*, 624 P.2d 588, 589 (Or. 1981); *State v. Tillett*, 111 So. 2d 716, 722 (Fla. Ct. App. 1959); *Petition of Jessup*, 136 A.2d 207, 217 (Del. Sup. Ct. 1957); *Herschberg v. Board of Supervisors*, 167 N.E. 204, 251 N.Y. 156, 170 (N.Y. Ct. App. 1929).

Indeed, the Missouri Supreme Court has addressed the

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## Merrill Lynch

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same issue decided by the California Court of Appeal, and held that courts may "dispense with the observance of secrecy" with respect to grand jury transcripts, even where there is no express statutory authorization for such release. *See Mannon v. Frick*, 295 S.W. 3d 158, 365 Mo. 1203 (Mo. 1956).

In the Merrill Lynch matter, it was the unusual circumstances surrounding the termination of the grand jury's investigation into Orange County's bankruptcy - and Merrill Lynch's possible culpability in that calamity - that created the enormous controversy that led to the media's unsealing request. In June 1997, that investigation was abruptly aborted when the district attorney entered into a "prelitigation" settlement with Merrill Lynch whereby in exchange for dropping all criminal charges before any indictment was even considered with respect to the financial giant or its officers, Merrill paid the state $30 million. Reportedly, this was the largest settlement ever entered into by the Orange County District Attorney's office.

Another unusual aspect of the huge Merrill Lynch settlement was that the District Attorney's office directly received for its own coffers $3 million from the $30 million settlement. Furthermore, at the original press conference where the settlement was announced, the District Attorney stated that he supported making the grand jury transcripts public. However, since that time he - along with the California Attorney General's office - aggressively fought such disclosure. Of particular significance was that under California's Penal Code, if indictments had been returned prior to the settlement, the grand jury transcripts would automatically have been released to the public; at most, only a temporary delay in the release of the transcripts would have been possible.

The Court of Appeal's June 16 opinion, which was certified for publication, stated that the media's unsealing request presented the court with an issue of first impression in California. Noting that there was neither indictment nor exoneration because the district attorney called off the investigation - and that California's legislative grand jury scheme recognized the benefits of grand jury secrecy - the Court of Appeal nevertheless affirmed that the trial court had the discretionary authority to unseal the transcripts because, at least in California, a grand jury is a "judicial body" and "part of the court by which it is convened."

Thus, the superior court in which a grand jury is convened has the power to administer and supervise that body, and therefore order that materials related to its investigation be publicly disclosed. Adopting the holding of a Ninth Circuit case concerning federal grand jury secrecy rules, the California court noted that grand jury secrecy is "'not an end in itself'" and that when its "advantages are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted.'"

Then, turning to whether the trial judge had properly exercised his discretion in ordering that the Merrill Lynch grand jury transcripts be released, the Court of Appeal held that there was a "very strong public policy" in preserving the integrity of the grand jury system that could "only be served by disclosure." Moreover, "[t]he corrosive effect of a perception that the target of a grand jury investigation could buy its way out, or that a prosecutor might sometime in the future initiate such an investigation simply to coerce such a payment, could be catastrophic."

As of August 12, the California Supreme Court had not ruled on Merrill Lynch's request that it review the Court of Appeal's decision.

Kelli Sager and Karen Frederiksen of Davis Wright Tremaine's Los Angeles office represent the media entities seeking access to the transcripts, including Los Angeles Daily Journal, Los Beach Press Telegram, Bloomberg News, Associated Press, Freedom Communications, Inc. (dba the Orange County Register), Dow Jones & Co., Inc., Los Angeles Times, Society of Professional Journalists, California First Amendment Coalition, the Greater Los Angeles Chapter of the Society of Professional Journalists, and the Orange County Press Club.

*Karen Frederiksen is with the firm Davis Wright Tremaine LLP in Los Angeles, CA and, with Kelli Sager, represented the media in this matter.*

## NINTH CIRCUIT REVISITS EXECUTION ACCESS RULING, REMANDS FOR FURTHER PROCEEDINGS

**By Rex S. Heinke and Michelle H. Tremain**

On July 23, the Ninth Circuit modified its order in *California First Amendment Coalition v. Calderon*, 138 F.3d 1298 (9th Cir. 1998), regarding a California prison procedure that excludes witnesses from viewing some portions of executions by lethal injection. It remanded for further proceedings regarding the justifications for the procedure.

San Quentin Procedure No. 770 ("Procedure 770") provides that witnesses in the observation room are not to view the condemned until all intravenous tubing have been inserted and the execution team has left the execution chamber. The defendant Arthur Calderon, the warden of San Quentin, asserted that Procedure 770 was adopted out of concern for staff safety and institutional security. While lethal gas executions expose the prison staff for approximately one minute, it can take the staff up to twenty minutes to prepare the condemned for execution by lethal injection. Calderon argued that twenty minutes of exposure to witnesses would increase the likelihood of execution team members being identified, subjecting them to harassment and compromising their safety.

In its initial ruling in April, the Ninth Circuit held that the California procedure does not violate the First Amendment rights of either the press or the public. *Id.* at 1304. It therefore reversed the district court's preliminary injunction ordering the San Quentin warden to allow witnesses to see the condemned enter the death chamber and be attached to the intravenous tubing. *Id.* The Ninth Circuit relied principally on *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800 (1974) (upholding regulations limiting media selection of a particular inmate for interview) and *Houchins v. KQED*, 438 U.S. 1, 98 S. Ct. 2588 (1978) (upholding denial of media requests for special inspection of facilities and interviews of inmates), which applied rational basis-type tests to the prison regulations at issue. 138 F.3d at 1302-03. The court concluded that "Procedure 770 allows for some access and observation, while it minimizes the exposure of the members of the execution team to the media or other witnesses, out of a concern for staff safety and institutional security," and that there was not substantial evidence indicating an exaggerated response. *Id.* Therefore, "[w]hatever First Amendment protection exists for viewing executions, it is not violated by Procedure 770." 138 F.3d at 1304.

In the July 23rd decision, the Ninth Circuit added a single final sentence to its earlier ruling: "Accordingly, we reverse and remand this action to the district court with instructions to determine whether the Coalition has presented 'substantial evidence' that (the concealment procedure) represents an exaggerated response to Calderon's security and safety concerns." __ F.3d __, 1998 WL 409935, at * 7 (9th Cir. July 23, 1998).

*Mr. Heinke and Ms. Tremain are with Gibson, Dunn & Crutcher LLP in Los Angeles, California.*

## California Supreme Court Denies Review on Access to School Settlement

The California Supreme Court denied review of a pair of cases in which the *San Diego Union-Tribune* was granted the right to see the claims of students involved in a sexual assault upon another student. *Poway United School District v. Superior Court*, 62 Cal.App.4th 1498 (1998); *The Copley Press v. Superior Court*, 63 Cal.App.4th 967 (1998). In March 1997, a high school student was sexually assaulted with a broomstick by other students. In September 1997, the school district settled with the victim. The *San Diego Union-Tribune* sought the terms of the settlement, as well as the claims that were filed by other students, including the perpetrators. The Fourth District Court of Appeal held that the paper was entitled to see the other claims, albeit with the names and addresses of the minor perpetrators redacted, and was entitled to know the amount of money that the victim received from the school district. The attorneys for the school district argued that because of the nature of the claims, confidentiality was required. But the Supreme court disagreed, with only one judge voting to review the opinions.

# Media Win Right to Attend Bill Gates' Deposition in Antitrust Case

## Microsoft Files for Stay Pending Appeal

Citing a little known 1913 law, *The New York Times, The Seattle Times*, ZDNET, ZDTV, L.L.P, (publisher of *PC Magazine* and *PC Week*), Reuters America and Bloomberg News organizations obtained a district court order allowing them to attend depositions in the government's civil antitrust lawsuit against Microsoft, including the deposition of Microsoft's chairman and chief executive, Bill Gates. *U.S. v. Microsoft*, Civ. No. 98-1232 (D.D.C. Aug. 11, 1998) (Penfield Jackson, J.). On August 11th, the federal court hearing the antitrust suit granted the media organizations' emergency motion asking the court to enforce "The Publicity in Taking Evidence Act" (15 U.S.C. §30) (the "Act").

### *Law Provides for Public Access*

This obscure section of the Sherman Act provides, in relevant part:

> In the taking of depositions of witnesses for use in any suit in equity brought by the United States under sections 1 to 7 of [the Sherman Act], . . . the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable.

### *Court Cites Plain Language of Law*

The court found the plain language of the Act required that the media's motion be granted. The court stayed depositions in the case pending an agreement between the parties and the media-intervenors that provides for access but which also protects against the disclosure of trade secrets and other confidential information. According to a news report, among the issues to be worked out are how many spectators to allow in, how to allocate seats and whether cameras or sketch artists will be allowed. *See The Wall Street Journal*, Aug. 13, 1998 at B7.

### *Microsoft Seeking a Stay*

On August 12th, Microsoft filed a motion for a stay pending appeal in the district court which denied the motion. Thereafter, Microsoft asked the D.C. Circuit Court of Appeals to stay the order granting the media's motion. The D.C. Circuit is expected to act on August 17th.

### *The Media's Demand for Access*

After the media organizations learned that Gates was scheduled to be deposed on August 11th, they informed counsel for the government and Microsoft that they planned to attend Gates' deposition in accordance with the plain language of the Act. Microsoft's counsel responded that a protective order in the case precluded access, and, moreover, that the 1913 Act, particularly the term "deposition," as used therein, did not apply to discovery depositions under the Federal Rules of Civil Procedure.

The district court adopted the media's position that the Act means what it says, although it acknowledged potentially conflicting authority on this point -- no less than the procedure experts Wright & Miller, whose treatise observes that "it is not so clear that the statute was addressing circumstances like those in modern discovery." *See* 8 Wright et al., *Federal Practice and Procedure* §2041, at 539 (1994). The court also implicitly adopted the media's position that the parties' protective order cannot bar access to depositions, at least to the extent that it bars access to anything other than bona fide trade secrets and other confidential information.

Counsel for the media-intervenors noted that the Act has been uniformly construed to mean what it says, having been used (among other things) to open the depositions in the government's antitrust suit against IBM in the 1970's.

*The New York Times, The Seattle Times,* ZDNET, ZDTV, L.L.P., Reuters America and Bloomberg News were represented by Levine Pierson Sullivan & Koch, L.L.P, in Washington, D.C.

# D.C. Circuit Orders FCC to Review Charge of Distortion in Network News Report

## Wider Ranging Probe Required

In an opinion devoid of any First Amendment sensitivities and certain to unsettle FCC licensees, a panel of the Court of Appeals for the District of Columbia has upset the standard by which the FCC decides petitions to deny a license or a renewal which assert claims of broadcast news distortion. *Serafyn v. Federal Communications Commission*, No. 95-1385 (D.C. Cir. August 11, 1998).

### *Widens Range of Evidence*

In reviewing complaints of intentional news distortion, the FCC in the past has required hard evidence extrinsic to the broadcast itself that demonstrates an intent to distort by the ownership or most senior management of the licensee (e.g., written instructions from management on the subject, evidence of bribery, or outtakes unambiguously showing an intent to distort.) In an opinion written by Judge Douglas Ginsburg, the D.C. Court of Appeals panel, however, suggests that the Commission must look not merely at such objective and direct evidence of intentional news distortion, but at evidence that is certainly less direct and not as clearly extrinsic, ranging from assertions of mistakes in the broadcast to failure to interview a specific expert to statements by the talent and producers about their views generally on truth. Indeed, the evidence that the Court instructed the Commission to review as possibly probative of an intent to distort looks remarkably like the circumstantial evidence that plaintiffs seek to introduce to prove actual malice or negligence in a libel suit.

The court also suggests that the involvement in deliberate distortion of the "licensee, including its principals, top management, or news management," which is the universe of individuals whose actions the Commission has said can put the license grant or renewal at risk, might include talent and executive producers. That conclusion would dramatically broaden the critical group.

Concerned as well that the Commission was reviewing each piece of the evidence in isolation rather than as a whole, that the FCC in asking petitioners to "demonstrate" an intent to distort was requiring the complainant to meet a higher burden than should be required (which was to raise a substantial and material question of fact about the licensee's intent), and that the FCC had failed to provide sufficient or reasoned explanation for its decision to deny the petition, the court vacated the FCC order and remanded to the Commission for further proceedings.

### *A Petition to Deny Against CBS*

The issue arose as a result of a petition by Alexander Serafyn to the FCC to deny or set for hearing the application of CBS for a new station license. Serafyn argued that CBS was unfit to receive a license because of intentional distortion in a *60 Minutes* report concerning anti-Semitism in the newly independent Ukraine.

Serafyn also petitioned to revoke CBS's other station licenses arguing that CBS made false statements to the Commission about CBS's handling of viewer letters about the news report. He was joined in that petition by the Ukrainian Congress Committee of America, among others, and the cases were consolidated on appeal. The dismissal of that petition by the Commission was upheld by the court as reasonable.

### *The Standard*

The issue on license renewal or grant is ultimately one of whether the licensee or proposed licensee is going to operate the station in the public interest. The Commission requires that any issue raised at licensing must raise both a substantial and material question about the criteria.

The court notes that the Commission "regards an allegation as material only if the licensee itself is said to have participated in, directed, or at least acquiesced in *a pattern* of news distortion," (emphasis added). The panel further quotes Commission policy to the effect that it does not intend to defer action on licensing unless the extrinsic evidence of distortion involves "the licensee, including its principals, top management, or news management."

The allegation of distortion becomes "substantial" only when it meets two conditions. First, it must be a deliberately intended slanting or misleading. It is not enough, the court quotes the FCC, that the complainant disagrees with the

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broadcasters interpretation of the facts in the news report. Second, the distortion must involve a significant aspect of the broadcast that affects its basic accuracy.

The Commission has made it quite clear, as the court acknowledges, that the standard it imposes is intended to make its investigation of an allegation of news distortion "'extremely limited [in] scope.'"

### *The Evidence*

The CBS *60 Minutes* segment at issue was entitled "The Ugly Face of Freedom." About the Ukraine in post-Soviet times, it suggested, according to the complaint, that all Ukrainians were anti-Semites. Petitioners to the FCC alleged that CBS distorted an interview with a rabbi in the Ukraine, providing outtakes of the interview to prove his views were misrepresented; mistranslated the word "Jew" from Ukrainian into "kike"; stated that the Ukrainian Galicia Division had helped in the roundup and execution of Jews in 1941 when the Division did not exist until 1943; and rebuffed an unsolicited offer of assistance from a professor of Ukrainian history. Serafyn also submitted copies of angry letters CBS received from viewers regarding the report, including one from the head of the Ukrainian Greek Catholic Church, who had also been interviewed for the report, and who had asserted publicly that he had been misled by CBS about the thrust of the report.

The court states that Serafyn submitted evidence that *60 Minutes* had no policy against news distortion and that "management" considered some distortion acceptable -- citing quotations (which clearly must have been taken out of context) from Mike Wallace and Don Hewitt about how lying may sometimes be appropriate or necessary. The court suggests that it is "likely" that Wallace and Hewitt are members of "management" and thus could be considered as the licensee in the Commission's analysis of this alleged distortion and their comments considered to be the CBS policy on the issue.

The court reviewed the evidence presented by the complainant, instructing the Commission that it must evaluate the evidence and provide reasons (obviously more than were contained in the initial FCC opinion) as to whether the evidence is sufficient or not. While the court upholds the Commission's conclusion that the broadcast did not distort the rabbi's interview, it sends back for further FCC review (1) the CBS decision not to use the proferred professor (or why did CBS pick one expert and not another); (2) the viewer letters, to be evaluated when they offer evidence of CBS's intent and when they reflect on issues of inaccuracy in the broadcast; and (3) evidence of inaccuracies in the broadcast. As to the last, while acknowledging that the Commission has rejected the role of arbiter of truth, the court contends that the inaccuracy of a broadcast may be indicative of the broadcaster's intent, at least with respect to "egregious and obvious error."

### *The Next Step*

In light of the opinion, the parties have a number of options. The FCC and CBS (which entered as intervenor) can seek rehearing and/or rehearing *en banc*. More likely, the FCC can accept the remand and either review the material itself and rewrite its opinion to accommodate the concerns expressed by the court or first call for comments by the parties. Previously, CBS, taking the position that any official investigation into its news broadcasting "offends the protections of free press," (as quoted by the court in the opinion), did not discuss the substance of petitioners' allegations in responding to the petitions to deny. CBS may undertake to file comments more broadly addressing petitioners' claims at this juncture.

* * * * *

The FCC's standard for analyzing petitions such as Mr. Serafyn's was designed to keep the Commission as much as possible away from intrusive ventures into news and editorial decision-making, while at the same time remaining cognizant of the obligation that licensees must operate in the public interest. Thus, the FCC only considered, in evaluating news distortion complaints, the deliberate acts of principals and top management and only extrinsic evidence demonstrating deliberate, intentional distortion at the heart of the news broadcast. Moreover, the FCC looked for a pattern of wrongdoing, not isolated acts.

All of this is acknowledged by the Court of Appeals panel. That it ordered the Commission to review viewer letters, choices of experts by the producers, and "egregious and obvious errors" in the alleged inaccuracies in the broadcast -- holding in effect that circumstantial rather than only direct evidence may be considered as indicative of intentional distortion -- threatens to change the FCC's review into a highly intrusive government incursion into the editorial process.